

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

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4
5 CENTER FOR INTERNATIONAL
6 ENVIRONMENT LAW,

7 Appellee,

No. 12-5136

8 v.

9 OFFICE OF THE UNITED STATES
10 TRADE REPRESENTATIVE AND RON
11 KIRK, IN HIS OFFICIAL CAPACITY
12 AS THE UNITED STATES TRADE
13 REPRESENTATIVE,

Appellants.

Thursday, February 21, 2013

Washington, D.C.

15 The above-entitled matter came on for oral
16 argument pursuant to notice.

17 BEFORE:

18 CIRCUIT JUDGES BROWN AND KAVANAUGH, AND
19 SENIOR CIRCUIT JUDGE RANDOLPH

20 APPEARANCES:

21 ON BEHALF OF THE APPELLANTS:

22 H. THOMAS BYRON, III, ESQ.

23 ON BEHALF OF THE APPELLEE:

24 MARTIN WAGNER, ESQ.
25

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

H. Thomas Byron, III, Esq.
On Behalf of the Appellants

3; 29

Martin Wagner, Esq.
On Behalf of the Appellee

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P R O C E E D I N G S

THE CLERK: Case number 12-5136, Center for International Environment Law v. Office of the United States Trade Representative and Ron Kirk, in his official capacity as the United States Trade Representative, Appellants. Mr. Byron for the Appellants; Mr. Wagner for the Appellee.

ORAL ARGUMENT OF H. THOMAS BYRON, III, ESQ.

ON BEHALF OF THE APPELLANTS

MR. BYRON: Good morning. May it please the Court, I'm Thomas Byron from the Department of Justice here on behalf of the Government Defendants.

The District Court in this case ordered release of a classified document based on the Court's own assessment of the harm to foreign relations that could be expected to result from disclosure. The Court -- I'm sorry, if I may, I'd like to reserve five minutes for rebuttal, thank you. The District Court in making that assessment expressly disagreed in multiple ways with the Executive Branch's expert declarations that made clear the kinds of harm to foreign relations that reasonably could be expected to result from disclosure of the white paper at issue in this case.

Now, the document at issue in this case is a one-page white paper entitled Commentary in Like Circumstances. It's an interpretive document that the United States Trade Representative negotiators submitted to the Free Trade

1 Agreement of the Americas negotiating partners, the foreign
2 countries with which we were engaged in negotiating with.

3 JUDGE RANDOLPH: It's not part of the record even
4 sealed, is it?

5 MR. BYRON: That's correct, Judge Randolph.

6 JUDGE RANDOLPH: It was never reviewed *in camera* by
7 the District Court?

8 MR. BYRON: That's right, Judge Randolph.

9 JUDGE RANDOLPH: Did you ever request that the
10 District Court do that?

11 MR. BYRON: We didn't request it, and it's, of
12 course, under the FOIA, always available for the Court to
13 request it. The Court here did not request it.

14 We would point out to the Court that the District
15 Court's substitution of its judgment about likely harm to
16 foreign relations fails to give the deference that's due to
17 the Executive in this sensitive area of foreign relations and
18 national security, and is entirely inconsistent with this
19 Court's consistent case law over many decades that emphasizes
20 the need for such deference, and requires District Courts in
21 reviewing FOIA Exemption 1 cases to accord substantial weight
22 to the expert predictive judgments of the Executive Branch in
23 these areas of foreign affairs and national security.

24 JUDGE KAVANAUGH: When do you think a Court could
25 ever disagree with the Executive's determination in this kind

1 of case?

2 MR. BYRON: Well, Judge Kavanaugh, the case law is
3 very clear, it says that if the declarations are logical or
4 plausible, and if they're reasonably specific and detailed
5 enough --

6 JUDGE KAVANAUGH: Isn't that going to cover 100
7 percent of the cases?

8 MR. BYRON: I certainly think, Judge Kavanaugh, that
9 the Executive would not submit a declaration that was not
10 logical --

11 JUDGE KAVANAUGH: Right.

12 MR. BYRON: -- or plausible, that's a standard we
13 strive to meet.

14 JUDGE KAVANAUGH: So, yes, this is a 100 percent of
15 the cases presumably as long as the Executive puts together an
16 affidavit of some kind, a declaration.

17 MR. BYRON: Well, not just of some kind. I mean, we
18 do strive to meet a serious standard here, and we think that
19 logical and plausible are requirements that are satisfied,
20 certainly in this case, certainly in the many, many cases we
21 cited that this Court has reviewed.

22 JUDGE KAVANAUGH: But you wouldn't want a Court to
23 say that's not logical to us, we disagree with the Executive
24 Branch's logic.

25 MR. BYRON: Well, I think logical is a requirement

1 that there be a link between the steps in the explanation that
2 the declarations offer. So, if I can point to the
3 declarations here that explained, for example, that there's a
4 confidentiality agreement among the FTAA negotiating parties,
5 and that disclosure here as ordered by the District Court
6 would breach that confidentiality agreement. The District
7 Court, by the way, didn't dispute that, he just, the Judges
8 concluded that that breach wouldn't cause the kind of harm
9 that he thought was sufficient to foreign relations.

10 Now, in the declarations USTR officials explained
11 that that breach of the disclosure agreement would cause a
12 breach of trust among our negotiating partners, that breach of
13 trust in turn would lead them to adopt rigid negotiating
14 positions in ongoing and future negotiations. Those are
15 logical steps, they lead logically, I think, to the next steps
16 which say that those rigid negotiating positions would limit
17 the opportunity for compromise, and could prevent or delay the
18 agreements that would be in the interests of the United States
19 economic and diplomatic goals. So, I think the logical
20 requirement is easily satisfied here, but it's not as though
21 the Government can make just a conclusory statement, and
22 that's also clear from the case law.

23 Now, you know, so I don't think these are mere
24 rubber stamp opportunities for the Court, and this Court has
25 never suggested that, but it has always suggested that the

1 courts are ill-suited to second guess the judgment of the
2 Executive when it comes to making the kinds of predictive
3 judgments about harm to foreign relations, or damage to
4 national security that are at stake in classification
5 decisions. And so, just as in *Egan* where the Supreme Court
6 emphasized that a predictive judgment about the likely harm to
7 national security is an essential component of a grant of a
8 security clearance, and that that was an area that courts are
9 ill-suited to second guess the Executive on, here, too, and
10 this Court has cited *Egan* and *Simms* in this area, here, too,
11 the courts are just not well positioned, they don't have the
12 background, they don't have the expertise.

13 JUDGE KAVANAUGH: What do you do with Amicus' point
14 that that really is inconsistent with the history of how this
15 exemption developed, and it was passed over President Ford's
16 veto because President Ford articulated the same, almost
17 verbatim the same language you just articulated as to why this
18 should not be passed?

19 MR. BYRON: Your Honor, the 1974 amendments to the
20 FOIA were passed after the Supreme Court's decision in *Mink*.
21 And the previous version of Exemption 1, the language of the
22 statute as it existed before, covered all exempt, all
23 classification decisions, all documents that were classified
24 irrespective of whether they were properly classified. So,
25 the change was to properly classify, it was also to *de novo*

1 review, and to *in camera* review, as Judge Randolph pointed out
2 earlier.

3 So, the question is whether those changes altered
4 the constitutionally required deference to the Executive in
5 this area under the Separation of Powers Doctrine.

6 JUDGE KAVANAUGH: Do you think it's constitutionally
7 required?

8 MR. BYRON: That's I think what President Ford's
9 veto statement made clear, and that's what the United States
10 Solicitor General --

11 JUDGE KAVANAUGH: That's interesting. You don't
12 think Congress could put the courts in the position of second
13 guessing?

14 MR. BYRON: Well, when it comes to predictive
15 judgments about harm to national security and foreign
16 relations I think that's a very difficult question.

17 JUDGE KAVANAUGH: Yes.

18 MR. BYRON: Now, this Court --

19 JUDGE KAVANAUGH: I agree.

20 MR. BYRON: -- has made clear, and binding circuit
21 precedent leaves no doubt that that deference is appropriate
22 and required. Now, I would also point out that --

23 JUDGE RANDOLPH: I just want to back up a little
24 bit. This particular document was classified confidential in
25 response to the FOIA request.

1 MR. BYRON: That's right, Judge Randolph, but that's
2 only because that was the first opportunity or reason for the
3 original classification authority to consider.

4 JUDGE RANDOLPH: And who did the classification?

5 MR. BYRON: The original classification authority I
6 believe if I remember the record correctly was the General
7 Counsel at the time, I think that was Mr. Davidson.

8 JUDGE RANDOLPH: Okay.

9 MR. BYRON: That's in the record, and I can get that
10 for you.

11 JUDGE RANDOLPH: If it had not been classified
12 confidential would you have another FOIA exemption to invoke?

13 MR. BYRON: We did not invoke any other FOIA
14 exemptions, Judge Randolph. I think there were earlier cases
15 in which there was some discussion, and there were claims that
16 Exemption 5, for intra-agency, or interagency exchange of
17 information might cover it, that was not pursued in this case.

18 JUDGE RANDOLPH: What is the President invoked
19 executive privilege?

20 MR. BYRON: Well, Judge Randolph, we've not pressed
21 that argument here, and we've not examined whether the
22 requirements for executive privilege would be satisfied in
23 this circumstance.

24 JUDGE RANDOLPH: You know what the first time a
25 President invoked executive privilege?

1 MR. BYRON: I am not familiar with the history of
2 the privilege in that level of detail.

3 JUDGE RANDOLPH: It was 1796, it was George
4 Washington when the House of Representatives asked him to
5 provide --

6 MR. BYRON: The negotiating --

7 JUDGE RANDOLPH: -- material dealing with the
8 negotiation of the Jay Treaty --

9 MR. BYRON: Right. I do --

10 JUDGE RANDOLPH: -- which sounds pretty close to
11 this.

12 MR. BYRON: Well, Your Honor, in cases like *Simms*,
13 for example, and *Egan* had made clear that there's a long
14 history within the Executive Branch of protecting national
15 security information by classification. Now, at the time of
16 the Jay Treaty there wasn't, for example, an executive order
17 establishing different levels of classification and
18 protection. So, it may not be necessary in these
19 circumstances to do so any more, especially since FOIA, in
20 FOIA Congress recognized that classified national security
21 information should be protected from disclosure.

22 We would like to point out, I see I'm about to run
23 into my rebuttal time, and I just want to make a couple of
24 points, if I may. First of all, the harms that were
25 identified here are plainly logical, plausible, and extremely

1 detailed over the course of multiple iterations, and in fact,
2 we believe the District Court should have granted summary
3 judgment promptly when we first moved for summary judgment.
4 The District Court's disagreements, although the opinions used
5 the phrase implausible or illogical, in fact, they don't
6 reflect those kinds of characterizations of the declarations,
7 in fact, they represent substantive disagreements about
8 predictive judgments. And I pointed out one, I can point out
9 some others if the Court's interested, but I think it's clear
10 from our brief.

11 Finally, the Plaintiff here has argued that review
12 in this Court should be under clear error standard, as fact
13 finding that's plainly inappropriate under this Court's case
14 law, and we think that's a well settled point, if the Court
15 has any questions we'd be happy to address it, of course. If
16 there are no further questions at this point I'd like to
17 reserve --

18 JUDGE RANDOLPH: I just have one.

19 MR. BYRON: Yes, Your Honor.

20 JUDGE RANDOLPH: The classification expires at the
21 end of this year --

22 MR. BYRON: That's right, Judge Randolph.

23 JUDGE RANDOLPH: -- and there's a footnote in your
24 brief saying but nevertheless we're going to extend it, what
25 does that mean?

1 MR. BYRON: So, the reason it expires at the end of
2 this year is because the, under the terms of the Secretariat's
3 closure, the FTAA Secretariat's closure, there was an
4 agreement among the negotiating governments that made clear
5 that all the restricted documents would remain restricted
6 under December 31st, 2013, at which time they would be
7 unrestricted, or de-restricted I think is the term they used,
8 unless the submitting government objected, and if a submitting
9 government objects the document remains restricted at that
10 time unless and until unanimous consent is obtained. So,
11 that --

12 JUDGE RANDOLPH: But the classification as --

13 MR. BYRON: Right, Judge Randolph.

14 JUDGE RANDOLPH: -- confidential expires December
15 31st, are you making a representation that it's going to be
16 classified confidential beyond?

17 MR. BYRON: Yes, Judge Randolph, it will be
18 reclassified at that time, just as in this case originally it
19 was classified for a 10-year period because the expectation
20 was that the negotiations would be complete and the original
21 reasons for classification may no longer pertain. It was
22 reclassified in I believe 2008 in order to take account of
23 that extension to 2013, and it will be re-evaluated at that
24 time, I believe that in light of the USTR's determination that
25 it would object to disclosure or de-restriction at that time

1 that classification would be, that it would re-classified on
2 that basis.

3 JUDGE BROWN: Is the footnote sufficient? I'm
4 asking because what we have in the record, of course, is a
5 representation that as of the end of this year --

6 MR. BYRON: Yes.

7 JUDGE BROWN: -- there is no reason to worry about
8 disclosure, but then we have a footnote saying but we're going
9 to wish to keep it confidential beyond that. So, is that all
10 we need? Does that overcome what's in the record?

11 MR. BYRON: Well, Judge Brown, I think, first of
12 all, I disagree with the characterization there's no reason to
13 worry about disclosure, I think that's not what the FTAA as a
14 Secretariat closing mechanism means. It just means that
15 because there's no longer going to be a formal mechanism for
16 protecting and seeking consent to disclosure that there will
17 then be an end date with a provision for protection as
18 appropriate. So, that provision for protection as appropriate
19 is what we highlighted that the Government here will pursue.
20 Certainly now there's no question this document is classified,
21 it's subject to the confidentiality agreement, and we have
22 represented to this Court in a brief signed by the USTR's
23 General Counsel that that will be, that protection will
24 continue after the end of this year. I thank Your Honors, and
25 I look forward to rebuttal. Thank you.

1 ORAL ARGUMENT OF MARTIN WAGNER, ESQ.

2 ON BEHALF OF THE APPELLEE

3 MR. WAGNER: Good morning, Your Honors. My name is
4 Martin Wagner, I'm representing the Center for International
5 Environmental Law.

6 This case goes to the very heart of the purpose of
7 the Freedom of Information Act. The document at issue in this
8 case is being used by the U.S. Trade Representative to make
9 law, to establish international law that binds the U.S.
10 Government, and limits what the U.S. Government can do on
11 behalf of, or to protect U.S. interests to U.S. citizens. The
12 Supreme Court has recognized that the Freedom of Information
13 Act is vital to the functioning of our democracy because it
14 informs citizens about what their government is up to, and it
15 allows the governors to be held accountable to the governed.

16 So, because of that importance the Congress, the
17 Supreme Court, and this Court have recognized three basic
18 principles to be applied in looking at a Freedom of
19 Information case.

20 JUDGE RANDOLPH: It's not just citizens who can
21 invoke the Freedom of Information Act, isn't that right?

22 MR. WAGNER: No, that's correct. That's correct.
23 Anyone can. And because of the importance of the public
24 knowing what the government is up to there are three
25 principles that are essential to applying a Freedom of

1 Information Act case. The first is a strong presumption in
2 favor of disclosure of information; the second is that any
3 exemption to the disclosure of information is to be narrowly
4 construed; and the third is that the burden is on the Agency
5 to justify not disclosing any information. And in this case
6 with respect to Exemption 1 the burden is on the Agency to
7 show an expectation of harm, not just a hypothesis about harm
8 but an expectation of harm that is reasonable, specific, and
9 plausible. And this Court has held that the Agency can't
10 sustain that burden with explanations that are called into
11 question by contradictory evidence in the record, and that's
12 exactly what happened here, the District Court did not
13 substitute its judgment for the Agency's at all, the District
14 Court looked at the evidence in the record, examined sometimes
15 conflicting evidence, attempted very hard in fact to grant
16 deference to the Agency by giving the Agency two additional
17 opportunities, pleading with the Agency to provide it the
18 reasonable and plausible explanation that it should, and
19 ultimately found that the evidence added up to there not being
20 a reasonable and plausible expectation of harm in this case.

21 JUDGE KAVANAUGH: How can you reach that conclusion
22 without looking at the document?

23 MR. WAGNER: Well, that's obviously a challenge in a
24 FOIA case, but what I believe you can do exactly what the
25 District Court did here, which is to look at the claims that

1 the Agency made, and the basis for those claims, and ask
2 whether they are reasonable and plausible even without having
3 information, having the document in front of you. What the
4 Agency --

5 JUDGE RANDOLPH: Let me ask you something, I'm going
6 to read something to you, and you tell me whether this is
7 reasonable and plausible, okay? The nature of foreign
8 negotiations requires caution, and their success must often
9 depend on secrecy, and even when brought to a conclusion a
10 full disclosure of all the measures, demands, or eventual
11 concessions which may have been proposed or contemplated would
12 be extremely impolitic for this might have a pernicious
13 influence on future negotiations, or produce immediate
14 inconveniences, perhaps danger and mischief in relation to
15 other powers. Is that a logical and plausible reason for
16 withholding a document?

17 MR. WAGNER: Yes, Judge Randolph, that is a logical
18 statement, but it doesn't refer at all to this document, or
19 the release of this document.

20 JUDGE RANDOLPH: It refers to all documents that
21 were within the Executive Branch during negotiations, either
22 proposed or contemplated is the language. That's George
23 Washington in 1796, it sounds like a lot of the affidavits
24 that are here, doesn't it?

25 MR. WAGNER: I actually think it does sound very

1 much like the affidavits, and that's precisely the problem
2 because what Congress said in 1974 is that's not enough, that
3 argument is essentially --

4 JUDGE RANDOLPH: But this was George Washington
5 telling Congress that they could not demand it.

6 MR. WAGNER: Well, I would say one thing about your
7 question about, which I think goes to the separation of powers
8 question, which is that in this instance yes, the Executive
9 has the constitutional authority to manage foreign affairs,
10 but Congress has the constitutional authority to manage
11 international commerce, to have international relations. And
12 so, this is a situation in that gray zone where both branches
13 have authority, and so if you're asking about this particular
14 situation I think Congress does have the authority not only to
15 ask for a document, but to set limits on when the Executive
16 can keep a document secret.

17 JUDGE RANDOLPH: Exemption 1 doesn't just apply to
18 international trade.

19 MR. WAGNER: No, it doesn't, but the case before us
20 here is about, and we're not challenging the constitutionality
21 of Exemption 1, we're challenging the question of whether
22 Exemption 1 applies to this document.

23 JUDGE RANDOLPH: So, I wonder the generality that
24 these exemptions should be narrowly construed because Congress
25 said that the citizens have a right to know, I just wonder

1 whether that generality applies when what we're talking about
2 specifically is treaty negotiations.

3 MR. WAGNER: Well, I think it applies --

4 JUDGE RANDOLPH: Because the history is the other
5 way with respect to treaty negotiations.

6 MR. WAGNER: Well, with respect to treaty
7 negotiations, and this carries on through today, Congress and
8 the Executive have a I would call it a creative tension about
9 how treaty negotiation, how, I'm sorry, international trade
10 negotiations, because that's what we're talking about here,
11 how those negotiations happen. The Executive is the function
12 that has the conversations with the foreign governments, but
13 Congress is responsible for those agreements ultimately. So,
14 I think that we're in that gray zone where Congress does have
15 the authority to set rules about what --

16 JUDGE RANDOLPH: Well, the Senate is, anyway.

17 MR. WAGNER: No, in fact, the entire Congress has
18 the authority, has the constitutional responsibility.

19 JUDGE RANDOLPH: Not to ratify treaties.

20 MR. WAGNER: For a trade treaty, yes, and that's why
21 the Executive sends a trade treaty before it finalizes it to
22 the entire Congress for a vote of the entire Congress. Yes.

23 JUDGE RANDOLPH: Is that right? I didn't know that.

24 MR. WAGNER: But what the USTR is proposing here is
25 a system that goes directly contrary to what Congress proposed

1 in 1974 --

2 JUDGE KAVANAUGH: But you -- sorry to interrupt.

3 MR. WAGNER: No.

4 JUDGE KAVANAUGH: But you agree there is some
5 deference.

6 MR. WAGNER: Absolutely.

7 JUDGE KAVANAUGH: And substantial --

8 MR. WAGNER: Substantial weight.

9 JUDGE KAVANAUGH: -- weight, right?

10 MR. WAGNER: I think --

11 JUDGE KAVANAUGH: Where does that come from? I
12 mean, it comes from the committee report, but why do you
13 accept that?

14 MR. WAGNER: Well, I think I would accept it for the
15 reasons that Judge Randolph suggested, that the Executive
16 clearly has responsibility here, constitutional
17 responsibility, and that there is a need for the Executive to
18 make decisions about how trade, how international negotiations
19 happen.

20 JUDGE KAVANAUGH: But once you acknowledge that,
21 which I think under our case at least you have to acknowledge
22 at this point, and how are we to second guess the judgment?
23 I'm just struggling with it's not complete deference, but it's
24 not no deference, it gives substantial weight, and once you
25 give substantial weight I'm just struggling with how you could

1 ever get behind the explanation in an Exemption 1 situation.

2 MR. WAGNER: The way I like to think of this whole
3 system is it's a trust but verify system, right? And so,
4 Congress said, and in fact, this is what the Supreme Court in
5 the *Mink* case essentially said trust, all you can do is trust.

6 JUDGE KAVANAUGH: Right.

7 MR. WAGNER: And then Congress said no, we need
8 verification. And what the standard for verification is, is
9 it reasonable and plausible? And so, it's not acceptable, I
10 think, for the --

11 JUDGE KAVANAUGH: But what it talks about, and
12 picking up on Judge Randolph's point, when they talk about
13 potential harm to future negotiations and things, we don't,
14 yes --

15 MR. WAGNER: Okay.

16 JUDGE KAVANAUGH: -- we can guess, we don't know, we
17 don't deal with that every day.

18 MR. WAGNER: No, we don't. And that's a situation,
19 and I think that USTR makes that point very well. Predictions
20 about future harm, the Court should not, neither you nor the
21 District Court should substitute your judgment for the
22 Agency's. However, that doesn't mean simply rubber-stamping
23 the explanation. What Congress said is the Agency has to
24 explain why it thinks there is an expectation, not just an
25 imagination about a harm, and that has to be plausible, it has

1 to be reasonable. And so, here, the District Court looked at
2 the evidence and said on the basis of the evidence before me
3 that expectation is not reasonable, and we can use the example
4 of the confidentiality arrangement. So, the evidence before
5 the Court is that USTR says there's this arrangement and it
6 has these provisions, there's no evidence before the Court of
7 exactly the language of that arrangement, whether that
8 arrangement ever was in any kind of written document, so
9 that's not before the Court, but the Court had the declaration
10 of a former U.S. Government negotiator who participated in
11 this negotiations, as well as other trade negotiations who
12 said I know about these agreements, and these agreements are
13 primarily intended to protect information created by another
14 government from being disclosed. And he said I am aware of
15 many situations in which governments, the U.S. and others --

16 JUDGE KAVANAUGH: Primarily, you threw the word
17 primarily in there --

18 MR. WAGNER: Well, yes.

19 JUDGE KAVANAUGH: -- it's not exclusively.

20 MR. WAGNER: And in fact, then you look at the fact
21 that the Government here with respect to three other
22 documents, with respect to which it made exactly the same
23 arguments about loss of trust, when it asked the other
24 governments they had no concern about releasing this document.
25 So, the District Court looked at that and said I believe that

1 with respect to releasing information created by the U.S.
2 Government it is not plausible or reasonable to believe that
3 there will be the kind of harm that USTR is concerned about
4 here.

5 JUDGE KAVANAUGH: What if there's a slight risk of
6 harm?

7 MR. WAGNER: Well, you know, I think that the
8 concern about a slight risk of harm needs to be put into the
9 bigger context of the importance of FOIA. And in fact, the
10 Supreme Court has said that there is a cost to democracy,
11 democracy comes at a cost, and one of the costs is that there
12 may be inconvenience to agencies. And in fact, when the
13 Department of Interior said we can't comply with our FOIA
14 obligations because it will interfere with our ability to
15 comply with other statutory mandates the Supreme Court said
16 I'm sorry, that is a cost of this fundamental element of
17 democracy. So, you can't just say, you know, we're going to
18 stub our toe here, there has to be a real cost, there has to
19 be a real harm, a reasonable expectation of harm.

20 And the other piece about the confidentiality
21 arrangement here is that the speculation that USTR is engaged
22 in is about the reaction of foreign governments, that they're
23 going to feel a loss of trust, and that goes to not only the
24 loss of trust argument, it goes to the argument about reducing
25 the flexibility of other governments, those arguments are all

1 based on how a foreign government is going to react. Well, as
2 you've suggested, we can't predict that, USTR has expertise,
3 they should be given some deference. However, in this
4 situation the USTR is relying on speculation that it could
5 actually test, and has refused to test that speculation.
6 Given the importance of releasing information, important
7 information about law making to the public it's not reasonable
8 to speculate without using a very easily available test for
9 testing whether that is true or not.

10 JUDGE KAVANAUGH: Testing by asking the foreign
11 governments?

12 MR. WAGNER: Exactly.

13 JUDGE KAVANAUGH: But wouldn't that disclose the
14 information that they're worried that there's a harm in
15 disclosing? It's circular, isn't it?

16 MR. WAGNER: That information has already been shown
17 to the governments.

18 JUDGE KAVANAUGH: Yes.

19 MR. WAGNER: The governments all have this document,
20 so all the USTR does is go and say remember document X that we
21 showed you before --

22 JUDGE KAVANAUGH: Yes. Yes.

23 MR. WAGNER: -- we're thinking of releasing it, do
24 you have any objection? And the governments had no objection
25 the previous three times that they were asked.

1 JUDGE KAVANAUGH: No, but they're talking about I
2 think the risks to future negotiations that the, there are
3 multiple things going on here, but one of the separate
4 arguments is this will just undermine the idea that the United
5 States can maintain confidentiality in negotiations, how can
6 you test that?

7 MR. WAGNER: Well, you can test it by asking, which
8 shows, first of all, if the foreign government says no, then
9 you're not, you know, you're not unreliable, right? You show
10 that you will ask. And also, I think we have to go back to
11 this point about what Congress intended not allowing a rubber
12 stamp, because if we allow the confidentiality arrangement,
13 whatever that may be, to mean that the Government doesn't have
14 to release any information, then we're back to a situation
15 where the Court has no role, that USTR can enter into some
16 kind of confidentiality arrangement at the beginning of a
17 negotiation, and any document, whether it's a shopping list is
18 all of a sudden privileged from being disclosed, and the Court
19 can't look behind it because there is, of course, a risk that
20 they're going to lose trust from other governments.

21 JUDGE BROWN: But that goes only to the concern
22 about the breach of confidentiality, it seems to me there were
23 other arguments made about the impact on the U.S. Government
24 in terms of lack of flexibility being used in, you know,
25 enforcing other international trade agreements and those kinds

1 of things, because of that position being exposed, and that it
2 seems to me doesn't really, isn't really concerned with
3 whether other governments are okay with that information being
4 released, but the concern of the U.S. Government.

5 MR. WAGNER: That's correct. And here again, the
6 Court had both a duty to examine the plausibility and
7 reasonability of that concern, and it had other evidence
8 before it. Some of the -- go ahead.

9 JUDGE BROWN: Well, I just want to ask whether you
10 accept that at least that portion of what they're arguing is
11 both plausible and logical?

12 MR. WAGNER: No, we do --

13 JUDGE BROWN: No.

14 MR. WAGNER: -- not, and nor did the District Court,
15 and partly because as the USTR pointed out that foreign
16 negotiators, U.S. negotiators understand that this is a, by
17 definition a preliminary position of the United States, it is
18 not binding, that positions of governments change over time as
19 administrations change, as policies change, and that everyone
20 engaged in this kind of negotiation understands that positions
21 change and that this is not a binding document. So, while
22 yes, this was at one time 13 years ago the position of the
23 United States there is no reason to think that anyone would be
24 particularly surprised if the U.S. put forward a different
25 position.

1 JUDGE BROWN: Right. But it seems --

2 JUDGE RANDOLPH: The --

3 JUDGE BROWN: I'm sorry.

4 JUDGE RANDOLPH: Okay. Go ahead. Is there a time,
5 you know, is there a time line here? I mean, is there --
6 given the logic of what you're saying then you're entitled to
7 documents during the actual negotiations.

8 MR. WAGNER: Only --

9 JUDGE RANDOLPH: So, the United States puts forth a
10 proposal to another country, and you're entitled to that under
11 FOIA?

12 MR. WAGNER: No. Well, let me back up.

13 JUDGE RANDOLPH: Does it have to be at the end of
14 the negotiation?

15 MR. WAGNER: Our argument is not that we're entitled
16 to every document. The argument is that we're entitled to
17 documents unless the Agency can show a reasonable expectation
18 that it's plausible that there will be harm, and that it's not
19 reasonable or plausible simply to say because of a
20 confidentiality arrangement. But if they can point to other
21 reasonable and plausible harms that are reasonably expected to
22 happen then we would not be entitled to those documents, and
23 that would apply whether --

24 JUDGE RANDOLPH: How do you quantify that? I mean,
25 first of all, I want to get back, I meant to follow up on

1 Judge Kavanaugh's question, there's nothing in the executive
2 order that describes degrees of harm, is there? It just says
3 harm. So, and the District Court said well, this is less
4 compelling, the harm here is less compelling than if we were
5 releasing or asked to release a document from another country,
6 but does that matter if it's not, even if it's not compelling,
7 if there's potential harm then --

8 MR. WAGNER: The District Court was looking at
9 whether it was reasonable or plausible to expect harm. There
10 are different levels of harm, but those are different
11 classification levels --

12 JUDGE RANDOLPH: Yes.

13 MR. WAGNER: -- but under this classification the
14 Government only has to show a reasonable expectation of harm.

15 JUDGE RANDOLPH: Okay. Go back to the question that
16 I had, I started with, which was it's during negotiations, and
17 a proposal is put forth, and the foreign country hasn't even
18 responded to it yet, and the only thing that the Government,
19 the State Department or whomever it is that's negotiating this
20 treaty is that listen, we're in the middle of negotiations,
21 and if we start revealing every proposal that we make it's
22 going to disrupt the negotiations. So, that's the only thing
23 they say, why isn't that enough?

24 MR. WAGNER: I think I would imagine that the Agency
25 would say more than that. I would hope that the Agency would

1 say more. If that's --

2 JUDGE RANDOLPH: But what more would they say?

3 MR. WAGNER: Well, they would need to say that
4 because of the status of these particular negotiations the
5 disclosure of this document, or this set of documents would
6 have a harm, would cause a harm for this reason, and
7 presumably in that situation the Agency would be able to
8 present those kinds of arguments. But if it can't then FOIA
9 and the importance of information to our government process
10 requires that the Agency release the document.

11 JUDGE RANDOLPH: I don't understand why it's not
12 sufficient to say that negotiations of a treaty require
13 secrecy.

14 MR. WAGNER: Well, I think Congress said that that's
15 not enough, because Congress said you can't just say secrecy
16 and leave it out of the hands of the courts to examine the
17 reasonableness of propriety, and that's not the situation we
18 have before us here.

19 JUDGE RANDOLPH: Yes, I understand. But your
20 request came in in the year 2000, right?

21 MR. WAGNER: And the negotiations were ongoing at
22 that time.

23 JUDGE RANDOLPH: Right.

24 MR. WAGNER: Yes. Well, Your Honors, thank you very
25 much.

1 JUDGE BROWN: Thank you. How much time did Mr.
2 Byron have left?

3 THE CLERK: Mr. Byron had one minute remaining.

4 JUDGE BROWN: Okay. Well, we'll give you two.

5 ORAL ARGUMENT OF H. THOMAS BYRON, III, ESQ.

6 ON BEHALF OF THE APPELLANTS

7 MR. BYRON: Thank you, Your Honor. I appreciate the
8 generosity.

9 I realize I didn't finish making my point about the
10 1974 amendments, which were passed over the President's veto,
11 but one of the things the President's veto statement made
12 clear is that substantial weight is due in the area of
13 national security and foreign relations. And the Source Book,
14 which was jointly produced by the Senate and House Committees
15 following that and during the consideration of the passage of
16 the veto made clear that that substantial weight standard does
17 apply in this area, and this Court's case law is consistent
18 with that. And the statute itself in 552(a)(4)(B) makes
19 clear in addition to other matters to which accord accords
20 substantial weight, and that's the linkage in the statutory
21 language.

22 The Court has asked a couple of times about *in*
23 *camera* review. This Court's case law is also clear that that
24 should generally be rare, it's a last resort, of course, it's
25 always available, and if this Court believes it's necessary we

1 would, of course, make the document available to the panel if
2 requested.

3 The Plaintiff has pointed to the declaration by Mr.
4 Magraw (phonetic sp.), and his experience in other
5 negotiations, of course, doesn't tell us anything, he wasn't
6 privy to the confidentiality arrangement among the 34 FTAA
7 governments here, which was detailed in the declarations by
8 the USTR officials.

9 JUDGE RANDOLPH: The phrase in like circumstances is
10 a common phrase in --

11 MR. BYRON: Yes, Your Honor.

12 JUDGE RANDOLPH: -- treaties?

13 MR. BYRON: Judge Randolph, in investment treaties,
14 it is common in the two provisions that we've emphasized are
15 both very sensitive and very important to U.S. economic
16 interests, and those are the national treatment, and most
17 favored nation treatment provisions for foreign investors.
18 So, those two phrases --

19 JUDGE RANDOLPH: Can you give me a context in which
20 that --

21 MR. BYRON: Sure.

22 JUDGE RANDOLPH: -- phrase is used?

23 MR. BYRON: Yes. So, a foreign investor is entitled
24 to treatment that is equivalent to a domestic company, for
25 example, or domestic investor, national treatment, in like

1 circumstances. And so, the question is many if not all
2 investment treaties include that phrase as part of the
3 national treatment, and likewise the most favored nation
4 treatment, which is a widely understood and accepted
5 investment treaty provision, as well. In both of those
6 circumstances the treaties do not generally define the phrase
7 in like circumstances. And the United States has consistently
8 protected its views about what that phrase means in different
9 circumstances, and we identified here the content specific
10 concerns, Judge Brown, your question went to this, as well,
11 the content specific concerns about releasing the position
12 that we tabled in this negotiation as part of this
13 negotiation, which never did conclude, of course, and those
14 were multiple, but two main points arose, one of them was that
15 by disclosing our position in the FTAA negotiations we would
16 lock in our negotiators in future negotiations when this issue
17 would arise again. And Judge Randolph, you asked if it's
18 common, it is not just common, it is consistent in these
19 treaties.

20 JUDGE RANDOLPH: I can't remember, did you cite
21 these other treaties in your brief?

22 MR. BYRON: We pointed it out in the declarations,
23 pointed out that there were multiple ongoing negotiations and
24 anticipated future negotiations.

25 JUDGE RANDOLPH: No, that used the phrase, did you

1 cite other --

2 MR. BYRON: We didn't cite other treaties. We'd be
3 happy to provide that information if the Court's interested.
4 We can certainly do that.

5 JUDGE RANDOLPH: I would appreciate it. Yes.

6 MR. BYRON: Okay. We'll be happy to do that, Your
7 Honor. The other issue, though, that's related, remember, the
8 District Court said, I just don't think it's true that your
9 negotiators would be locked in, I think they could still use
10 these negotiating techniques in negotiating up or accepting
11 another country's similar offer. How is the Court in a
12 position to judge what a negotiator would be able to do in a
13 setting with other governments? That's precisely the kind of
14 second guessing that's precluded by this Court's binding
15 precedent that says substantial weight must be accorded to the
16 predictive judgments of the Executive.

17 The other area, though, is in the arbitration
18 context in which arbitrators have to interpret this in like
19 circumstance phrase in existing treaties, and in future
20 treaties when they are entered into and disputes arise. And
21 there the arbitrator has, again, there's no definition in the
22 treaty, the arbitrator will look to different sources, and
23 could look to this document if it were released. As I said,
24 the Government has consistently declined to release this. The
25 District Court here said I think arbitrators are smarter than

1 that, I don't think they will do that, but that again is a
2 predictive judgment.

3 JUDGE RANDOLPH: I have one final question. Do you
4 know what the date of this documents is, or more pertinent, I
5 suppose, on what date was it supplied to the other countries?

6 MR. BYRON: The record does not include that
7 information, Judge Randolph. It had been submitted already at
8 the time that the FOIA request was received in 2000, but it's
9 not clear whether it was submitted. There were two sessions
10 identified of the subgroup on investment that were the subject
11 of the FOIA request, and it's not made clear in the record
12 which of those two sessions it was submitted at.

13 JUDGE RANDOLPH: All we know is that it was produced
14 prior to the FOIA request?

15 MR. BYRON: It was distributed to the other 33 FTAA
16 negotiating governments prior to the FOIA request, that's
17 correct, Your Honor. If the Court has no further questions
18 we'd urge you to reverse the judgment below. Thank you.

19 JUDGE BROWN: Thank you.

20 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

March 4, 2013

DEPOSITION SERVICES, INC.