ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5307

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

On Appeal from an Order of the
U.S. District Court for the District of Columbia
Case No. 17-cv-410-TNM

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rules 28(a)(1) and 26.1 and Fed. R. App. P. 26.1, the Electronic Privacy Information Center ("EPIC") submits the following Certificate as to Parties, Rulings, and Related Cases and Corporate Disclosure Statement:

I. PARTIES AND *AMICI* APPEARING BELOW

The parties to this case are Appellant EPIC, which was the Plaintiff in the district court, and Appellee United States Department of Justice, which was the Defendant in the district court.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues; to protect privacy, the First Amendment, and other constitutional values; and to promote open government.

The United States Department of Justice is a federal agency subject to the Freedom of Information Act, 5 U.S.C. § 552.

There were no amici or intervenors appearing before the district court, and no amici or intervenors have appeared before this Court.

II. RULINGS UNDER REVIEW

The ruling under review in this appeal is the August 15, 2018 Order and Memorandum Opinion by the U.S. District Court for District of Columbia (Hon.

Trevor N. McFadden) granting the Department of Justice's motion for summary judgment and denying EPIC's cross-motion for summary judgment.

III. RELATED CASES

This case has not been before this Court or any other court, with the exception of the district court below. EPIC is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

IV. CORPORATE DISCLOSURE STATEMENT

EPIC is a 501(c)(3) non-profit corporation. EPIC has no parent, subsidiary, or affiliate. EPIC has never issued shares or debt securities to the public, and no publicly-held company has any ownership interest in EPIC.

Respectfully Submitted,

Dated: July 19, 2019

/s/ John L. Davisson
JOHN L. DAVISSON
EPIC Counsel

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* Authorities principally relied upon are designated by an asterisk (*).

Statutes

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GLOSSARY

ADD	Citation to the Addendum
DOJ	Department of Justice
EPIC	Electronic Privacy Information Center
JA ___	Citation to the Joint Appendix
NARA	National Archives and Records Administration
OAG	Office of the Attorney General
OIP	Office of Information Policy
OLP	Office of Legal Policy

INTRODUCTION

The records sought in this Freedom of Information Act ("FOIA") case concern the use of predictive analytic techniques in the U.S. criminal justice system, a topic of vital public interest. But the questions presented on appeal have even broader significance for open government. If any report that is merely received by an adviser to the President is itself subject to the presidential communications privilege, federal agencies will obtain "a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *In re Sealed Case*, 121 F.3d 729, 749 (D.C. Cir. 1997). It is well established that only the President, or an immediate White House adviser authorized by the President, may assert the presidential communications privilege. Because neither the President nor an authorized adviser has invoked the privilege in this case, and because the Predictive Analytics Report could not be properly subject to the privilege, the lower court's decision should be reversed.

Moreover, the Department of Justice ("DOJ") has provided nothing more than conclusory statements to support its exemption claims under the presidential communications privilege and deliberative process privilege. That is not sufficient. Agencies bear the burden under the FOIA to offer "specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Morley v.*

CIA, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977)). The lower court inverted this burden when it accepted the DOJ's "sweeping, generalized claims of exemption[.]" *NACDL v. EOUSA*, 844 F.3d 246, 257 (D.C. Cir. 2016) (quoting *Mead Data Cent., Inc.*, 566 F.2d at 251). For this reason as well, the decision of the lower court should be reversed.

JURISDICTIONAL STATEMENT

The lower court had jurisdiction to review the DOJ's refusal to disclose records in its possession responsive to EPIC's FOIA Request pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331.

EPIC filed a timely notice of appeal on October 12, 2018. Fed. R. App. P. 4(a)(1)(B); Fed. R. App. P. 26(a)(1)(C). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

PERTINENT STATUTORY PROVISIONS

The text of pertinent federal statutory provisions and a pertinent executive order is reproduced in the addendum to this brief.

STATEMENT OF ISSUES FOR REVIEW

1. Does the presidential communications privilege extend to agency records sent to a White House employee where there is no evidence that the employee personally exercised "broad and significant responsibility for

investigating and formulating the advice to be given the President," *In re Sealed Case*, 121 F.3d 729, 757 (D.C. Cir. 1997)?

2. May an agency withhold records requested under the Freedom of Information Act based on its mere assertion that the records are subject to the presidential communications privilege, even though that privilege can only be invoked by "the President or his immediate White House advisers," *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1114 (D.C. Cir. 2004)?
3. May an agency withhold records requested under the Freedom of Information Act pursuant to the presidential communications privilege where there is no evidence that the privilege was actually invoked?
4. Whether the agency in this case carried its burden of establishing that certain communications with outside consultants are "intra-agency" communications?
5. May an agency rely on the deliberative process privilege to withhold purely factual material requested under the Freedom of Information Act?

STATEMENT OF THE CASE

I. EPIC's FOIA Request

On June 15, 2016, EPIC submitted a FOIA Request to the DOJ's Office of Information Policy ("OIP"). Brinkmann Declaration ¶ 3, JA 32. EPIC's FOIA Request sought records pertaining to the use of "risk assessment" and "evidence-

based" tools in law enforcement, including any policies, guidelines, source codes, or validation studies. JA 32. "Evidence-based assessment tools," or "risk assessments," are techniques that "try to predict recidivism—repeat offending or breaking the rules of probation or parole—using statistical probabilities based on factors such as age, employment history and prior criminal record." Anna Maria Barry-Jester et al., *The New Science of Sentencing,* Marshall Project (Aug. 4, 2015).[2] Specifically, EPIC sought:

1. All validation studies for risk assessment tools considered for use in sentencing, including but not limited to, COMPAS, LSI-R, and PCRA.
2. All documents pertaining to inquiries for the need of validation studies or general follow up regarding the predictive success of risk assessment tools.
3. All documents, including but not limited to, policies, guidelines, and memos pertaining to the use of evidence-based sentencing.
4. Purchase/sales contracts between risk-assessment tool companies, included but not limited to, LSI-R and the federal government.
5. Source codes for risk assessment tools used by the federal government in pre-trial, parole, and sentencing, from PCRA, COMPAS, LSI-R, and any other tools used.

JA 32. In a letter dated August 9, 2016, OIP acknowledged receipt of EPIC's FOIA request on behalf of the DOJ's Office of the Attorney General ("OAG") and Office of Legal Policy ("OLP"). JA 33.

[2] https://www.themarshallproject.org/2015/08/04/the-new-science-of-sentencing.

II. EPIC's FOIA Lawsuit

On March 7, 2017—265 days after the DOJ received EPIC's FOIA Request—EPIC filed the instant suit due to the agency's failure to make a determination within the time period required by 5 U.S.C. § 552(a)(6)(B). Complaint, JA 24–30; JA 33. EPIC stated two claims for relief: failure to comply with statutory deadlines (Count I) and unlawful withholding of agency records (Count II). JA 29. After the DOJ filed an Answer, Dkt. No. 11, the lower court ordered the DOJ to produce all non-exempt records responsive to EPIC's FOIA Request in two phases. Minute Order (July 11, 2017).

In a letter dated August 16, 2017, the DOJ informed EPIC that interim searches had been conducted of the OAG and OLP in connection with categories 4 and 5 of EPIC's FOIA Request. JA 33. The agency stated that no responsive records were located as a result. *Id.*

In a letter dated October 31, 2017, the DOJ informed EPIC that it had completed final processing of EPIC's FOIA Request. JA 33. The agency provided EPIC with 359 pages of documents, many of which were partially redacted. *Id.* The agency also stated that it was withholding 2,367 pages in full under Exemption 5 of the FOIA. *Id.*

As relevant to this appeal, the DOJ withheld four categories of responsive records. First, the DOJ withheld in full a 26-page "Predictive Analytics Report"

and cover letter composed by the DOJ in 2014. JA 34–35. The agency asserted that the Predictive Analytics Report was covered by the presidential communications privilege and deliberative process privilege, and thus exempt from disclosure under 5 U.S.C. § 552(b)(5) (Exemption 5). JA 35–36, 40–50; Vaughn Index 7–8, JA 74–75. The agency did not allege that President Trump, former President Obama, or any "immediate White House adviser" of either President had actually invoked the presidential communications privilege with respect to the Predictive Analytics Report. *In re Sealed Case*, 121 F.3d at 752.

Second, the DOJ withheld 14 pages of intra-agency "Predictive Analytics Report Research," asserting that the records were exempt from disclosure under the deliberative process privilege and Exemption 5. JA 35–36, 41–43, 70.

Third, the DOJ withheld 282 pages of "Predictive Analytics Report Research" that were "sent between outside expert consultants and the Department," asserting that the records were exempt from disclosure under the deliberative process privilege and Exemption 5. JA 35–36, 41–43, 70–71. The DOJ claimed that these records were "effectively[] 'inter-/intra-agency' records," and therefore met the threshold requirement of Exemption 5. JA 38.

Finally, the DOJ withheld in full 49 pages of intra-agency "Briefing Material," asserting that the records were exempt from disclosure under the deliberative process privilege and Exemption 5. JA 35–36, 41–45, 72–73.

Following the DOJ's production of records, the parties cross-moved for summary judgment. Dkt No. 23; Dkt. No. 24; Dkt. No. 25; Dkt. No. 30; Dkt. No. 31; Dkt. No. 33.

III. The Lower Court Decision

On August 15, 2018, the lower court granted the DOJ's motion for summary judgment and denied EPIC's cross-motion for summary judgment. Order, JA 23; Mem. Op., JA 8–22.

First, the lower court held that the Predictive Analytics Report was exempt from disclosure under the presidential communications privilege and Exemption 5. JA 11–15. The court reasoned that the Report was privileged because it was "solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President[.]" JA 12 (quoting *In re Sealed Case*, 121 F.3d at 750). However, the court did not address whether the White House employee who received the Report had the "broad and significant responsibility" necessary for the privilege to attach. *In re Sealed Case*, 121 F.3d at 757. Instead, the court deemed it sufficient that the employee was "a member of the staff of the White House Counsel, who is certainly himself an immediate White House adviser." JA 12.

The lower court also held that the DOJ had "adequately invoked the [presidential communications] privilege" as to the Predictive Analytics Report, even "without any action by the President or his staff." JA 14. But the court emphasized that there is no "Circuit authority to decide the question" of whether an agency may "invoke the presidential communications privilege unilaterally" in a FOIA context. JA 12–13. Because the court concluded that the Report was protected by the presidential communications privilege, the court did not reach the issue of whether the deliberative process privilege might also apply to the Report. JA 12.

Second, the lower court held that all of the research and briefing materials withheld by the DOJ were exempt from disclosure under the deliberative process privilege and Exemption 5. JA 15–21. The court concluded that the materials were privileged because, on the agency's telling, they "assemble relevant facts and disregard irrelevant facts, reflecting the judgment of Department employees and consultants who prepared the materials[.]" JA 18. The court accepted the agency's assertion that no factual content could be reasonably segregated and disclosed from the 345 pages of withheld research and briefing materials. *Id*. The court also held that the research materials exchanged between the DOJ and outside consultants constituted "intra-agency records subject to Exemption 5,"

reasoning that the consultants' interests were aligned with those of the DOJ when they supplied the information in question. JA 20–21.

IV. EPIC's Appeal and the Court's Denial of Summary Affirmance

On October 12, 2018, EPIC filed a notice of appeal from the lower court's summary judgment order. On December 3, 2018, the DOJ moved this Court for summary affirmance of the lower court's decision. Appellee's Mot. for Summ. Affirm. (Dec. 3, 2018). EPIC filed an opposition the DOJ's motion on December 13, 2018. Appellant's Opp'n (Dec. 13, 2018). EPIC explained that "[b]oth the DOJ and the lower court recognize that the question of which government officials may invoke the Presidential Communications Privilege in a FOIA case is an issue of first impression in this Court." *Id.* at 3.

On March 28, 2019, the Court denied the DOJ's motion, concluding that "[t]he merits of the parties' positions are not so clear as to warrant summary action." Order (Mar. 28, 2019) (quoting *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam)).

SUMMARY OF THE ARGUMENT

The court below erred when it concluded that the DOJ could withhold the Predictive Analytics Report prepared by the agency and related research and briefing documents. The Report is not subject to the presidential communications privilege, and the research and briefing materials consist of factual content that

must be released. First, the lower court failed to apply the test for the presidential communications privilege set out in *In re Sealed Case*, 121 F.3d 729. The law requires a detailed and fact-specific analysis to conclude that a record is subject to the privilege. Second, the lower court erred in finding that an agency employee may invoke the presidential communications privilege unilaterally—without approval from the President or any "immediate White House adviser" authorized by the President. *Id*. at 752. Congress, the Courts, and the Executive agree that the presidential communications privilege must be invoked directly by the President or his designee. This rule is consistent, too, with the original understanding of the privilege. Third, the lower court erred when it determined that communications with academics outside the DOJ were "intra-agency" communications based solely on conclusory statements from the agency. Finally, the DOJ did not carry its burden of proving by specific evidence that the factual material withheld by agency would reveal its deliberative process. Thus, the agency unlawfully failed to segregate even a single fact from 345 pages of research and briefing materials.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Judicial Watch, Inc. v. DOD (Judicial Watch II)*, 913 F.3d 1106, 1110 (D.C. Cir. 2019) (citing *Morley*, 508 F.3d at 1114).

ARGUMENT

I. THE LOWER COURT DID NOT APPLY, AND THE AGENCY HAS NOT MET, THIS CIRCUIT'S TEST FOR THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE.

In evaluating the DOJ's assertion of the presidential communications privilege over the Predictive Analytics Report, the lower court failed to apply the test set out by this Court in *In re Sealed Case*. Because the DOJ has not shown that the Report meets the standard for the privilege, the lower court's grant of summary judgment as to the Report should be reversed.

As this Court explained in *In re Sealed Case*, the presidential communications privilege only applies to (1) documents sent to the President and (2) documents "solicited and received" by the President's "immediate advisers" and their "staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 749, 752; *accord Loving v. DOD*, 550 F.3d 32, 37 (D.C. Cir. 2008); *Judicial Watch, Inc. v. DOJ (Judicial Watch I)*, 365 F.3d 1108, 1114 (D.C. Cir. 2004). The Court was emphatic that any extension of the privilege beyond the President,

> unless carefully circumscribed to accomplish the purposes of the privilege, could pose a significant risk of expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President. In order to limit this risk, the presidential communications privilege should be construed as narrowly as is

> consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected.

In re Sealed Case, 121 F.3d at 752 (footnote omitted).

The Court also made clear that the privilege "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *Id*. Thus, the Court in *In re Sealed Case* also evaluated whether "the documents in question were generated in the course of advising the President in the exercise" of a "quintessential and nondelegable Presidential power." *Id*. Notably, the Court did not hold that the privilege would extend to communications concerning "presidential powers and responsibilities" that "can be exercised without the President's direct involvement." *Id*. at 752–53.

The lower court failed to apply the *In re Sealed Case* test when it determined that the presidential communications privilege applied to the Predictive Analytics Report. Instead, the court simply quoted one part of the test out of context and sidestepped the full analysis. JA 15. It is true, as the lower court noted, that the presidential communications privilege can "apply to communications involving 'members of an immediate White House adviser's staff.'" *Id.* (quoting *In re Sealed Case*, 121 F.3d at 752). But the court misunderstood the rule for determining *which* senior staff members and records qualify for the privilege.

Contra the lower court, the presidential communications privilege does not attach to the Predictive Analytics Report merely because it was sent to an employee of the White House Counsel's office (then-Associate White House Counsel Kate Heinzelman). *Id.* That is not the test. The privilege extends only to communications solicited and received by "*certain* members"—not *all* members—"of [immediate White House advisers'] staffs." *Judicial Watch II*, 913 F.3d at 1111 (emphasis added). The lower court's analysis was incomplete because it failed to address whether the *particular* White House employee who received the Predictive Analytics Report had "broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 752. The court did not discuss—and the DOJ did not explain—what responsibilities the receiving staff member had, or what role (if any) that individual played in formulating advice for the President.

By contrast, this Court reached a fact-specific conclusion in *In re Sealed Case*—after "a review of the documents"—that two *particular* Associate White House Counsel "exercised broad and significant responsibility" in advising the President on the use of his non-delegable appointment and removal powers. *Id.* at 758. Thus, the documents received by those two Associate White House Counsel in their specific advisory roles fell within the narrow compass of the presidential

communications privilege. *Id*. The Court certainly did not hold that the privilege extends to records received by any person with the job title of "Associate White House Counsel."[3]

Moreover, neither the lower court nor the agency in this case explained how the Report could have been "generated in the course of advising the President in the exercise" of a "*quintessential and nondelegable Presidential power*"—a key requirement for the privilege to apply. *In re Sealed Case*, 121 F.3d at 752 (emphasis added). The Report summarizes research on "the use of predictive analytics in law enforcement," JA 34, which is a vast field of policy that extends well beyond any of the President's "quintessential and nondelegable" powers. *In re Sealed Case*, 121 F.3d at 752. In contrast to this case, the D.C. Circuit cases cited by the lower court pertained to documents used to advise the President on the exercise of his nondelegable powers: appointment and removal (*In re Sealed Case*) and pardons (*Judicial Watch I* and *Loving*). So too with *Judicial Watch II*, which concerned the question of "whether to order a military strike on Osama bin Laden's compound in Pakistan." *Judicial Watch II*, 913 F.3d at 1108.

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[3] In its summary affirmance reply, the DOJ dismissed the individualized privilege analysis required by *In re Sealed Case* test as "overly technical." Appellee's Reply in Supp. of Mot. for Summ. Affirm. 6. To the contrary: it is the law of the Circuit.

Because the lower court failed to apply the test required by *In re Sealed Case*—and because the DOJ has not otherwise demonstrated that the presidential communications privilege applies to the Predictive Analytics Report—the decision of the lower court should be reversed.

II. EVEN IF THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE COULD APPLY IN THEORY TO THE REPORT, THE PRIVILEGE CANNOT BE UNILATERALLY INVOKED BY THE AGENCY.

As explained, the DOJ has not shown that the Predictive Analytics Report falls within the scope of the presidential communications privilege. But even if the Report could qualify for the privilege in theory, the *presidential* communications privilege can only be asserted by a President or authorized White House adviser—the privilege cannot be unilaterally asserted by a DOJ attorney. Because the privilege has not been properly invoked here, the lower court erred in holding that the Report is protected from disclosure under Exemption 5.

A. Only a President or an authorized White House adviser may invoke the presidential communications privilege.

In the case below, the DOJ asserted—and the lower court held—that the Predictive Analytics Report is protected by the presidential communications privilege. Yet as the lower court and DOJ both acknowledge, neither President Trump, nor former President Obama, nor any "immediate White House adviser" of either President has actually invoked the privilege. *In re Sealed Case*, 121 F.3d at 752. Because the presidential communications privilege is uniquely the province of

Presidents and immediate White House advisers, the DOJ's attempt to unilaterally assert the privilege fails.

As this Court has emphasized, "'the presidential communications privilege should be construed as narrowly as is consistent with ensuring that the confidentiality of the President's decision-making process is adequately protected.'" *Judicial Watch I*, 365 F.3d at 1108 (quoting *In re Sealed Case*, 121 F.3d at 752). Accordingly, in cases where the presidential communications privilege has been successfully asserted, such an assertion has typically come from an immediate White House adviser authorized by the President. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 745 n.16 ("[I]n his affidavit former White House Counsel Abner J. Mikva stated 'the President . . . has specifically directed me to invoke formally the applicable privileges over those documents.'"); *Citizens for Responsibility & Ethics in Washington v. DHS*, 514 F. Supp. 2d 36, 48 (D.D.C. 2007) (accepting an invocation of the privilege where it was asserted by the Deputy Assistant to the President for Homeland Security).

In *Judicial Watch I*, the D.C. Circuit expressed concern that even a "White House Counsel's declaration" might be insufficient to invoke the privilege because—unlike the declaration in *In re Sealed Case*—it did not specifically state that the White House Counsel was "authorized by the President to invoke the presidential communications privilege." *Judicial Watch I*, 365 F.3d at 1114; *see*

also In re Sealed Case, 121 F.3d at 745 (noting that *United States v. Reynolds*, 345 U.S. 1 (1953), "might suggest that the President must assert the presidential communications privilege personally"); *Ctr. on Corp. Responsibility, Inc. v. Shultz*, 368 F. Supp. 863, 872–73 (D.D.C. 1973) (holding that the White House Counsel's sworn statement that he was "authorized to say that the White House was claiming 'executive privilege'" was insufficient because "[t]he President . . . must make the formal claim").

Moreover, as this Court recently explained, "the presidential communications privilege is properly invoked with respect to 'documents or other materials that reflect presidential decisionmaking and deliberations and that *the President*"—not an agency employee—"believes should remain confidential.'" *Judicial Watch II*, 913 F.3d at 1111 (2019) (emphasis added) (quoting *In re Sealed Case*, 121 F.3d at 744). Unlike the deliberative process privilege, the presidential communications privilege "is rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case*, 121 F.3d at 745. Expanding the privilege beyond this ambit "could have the effect of inviting use of the presidential privilege to shield communications on which the President has no intention of relying in exercising his pardon duties, for the sole purpose of raising the burden for those who seek their disclosure." *Judicial Watch I*, 365 F.3d at 1118.

Despite these sharp limits on the invocation of the presidential communications privilege, the lower court concluded—erroneously—that DOJ could assert the privilege "without any action by the President or his staff." JA 14. The court based its privilege analysis solely on the *type* of document at issue, relying on the dictum from *EPA v. Mink*, 410 U.S. 73 (1973), that the rules of discovery underpinning Exemption 5 "can only be applied . . . by way of rough analogies." *Id.* at 86. But the Court in *Mink* also took care to explain that the exemption must be applied in the same manner as the discovery process: "Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *Id*. at 91. And as both this Court and the lower court have recognized, invocation of the presidential communications privilege in a discovery context requires presidential authorization. *Judicial Watch*, 365 F.3d at 1114; JA 13.

Unlike the deliberative process and attorney work-product privileges, *see FTC v. Grolier*, 462 U.S. 19, 28 (1983), the presidential communications privilege has never been applied in a "categorical" fashion by this Court or the Supreme Court. And for good reason: the presidential communications privilege does not protect a general category of records, but rather protects certain communications

which the President "believes should remain confidential." *Judicial Watch II*, 913 F.3d at 1111. Unsurprisingly, this Court has never found that agencies may withhold records under the FOIA merely because they are the *type* of records that the President of the United States could, in theory, choose to keep confidential. *See Judicial Watch I*, 365 F.3d at 1114 (noting also that "the issue of whether a President must personally invoke the privilege remains an open question").

The lower court's holding also cannot be squared with the text of 5 U.S.C. § 552(b)(5). Exemption 5 permits the withholding only of "agency memorandums or letters that *would* not be available by law to a party other than an agency in litigation with the agency[.]" *Id.* (emphasis added). But the determination of whether the Predictive Analytics Report "would" be privileged in litigation cannot be made *in vacuo* by an agency employee far removed from the President. Allowing the DOJ to assert the privilege this way—by deeming exempt all records that the President *could* withhold as privileged—impermissibly ignores the FOIA's "text and structure[.]" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019); *see also Milner v. Department of Navy*, 562 U.S. 562 (2011) (overturning *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) because its holding was "disconnected from Exemption 2's text").

Allowing an employee of a federal agency, acting alone, to invoke the presidential communications privilege would also dramatically expand the scope of the privilege and turn the FOIA's presumption of disclosure on its head. When the President asserts the privilege in civil discovery, the privilege is qualified and may be overcome by an "adequate showing of need." *Judicial Watch II*, 913 F.3d at 1112. Yet that presumption cannot be overcome in FOIA litigation. *Id.* (citing *Loving*, 550 F.3d at 40). If an agency employee could unliterally invoke the presidential communications privilege without qualification, the privilege would no longer operate "narrowly as is consistent with ensuring that the confidentiality of the President's decisionmaking process is adequately protected." *In re Sealed Case*, 121 F.3d at 752. Rather, the privilege would become precisely what this Court has warned of: "a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." *Id*.

Because neither the President nor an authorized White House adviser has invoked the presidential communications privilege as to the Predictive Analytics Report, the DOJ cannot withhold the Report under Exemption 5.

B. History shows that the presidential communications privilege cannot be unilaterally invoked by an agency.

The history of the presidential communications privilege further underscores the error of the lower court's decision. The President himself—not an agency

employee—must be the "sole judge" of whether withholding documents as privileged is "in the public interest." *United States v. Burr*, 25 F.Cas. 55, 69 (C.C.D. Va. 1807).

Executive privilege dates back to the early Republic. President George Washington was the first to address whether the President can withhold documents when another branch requests them. In 1792, the House of Representatives asked the administration for documents on the failed St. Clair military expedition. Paul Ford, 1 *The Writings of Thomas Jefferson* 189–90 (1892). Aware that his response would establish an important precedent, Washington convened his cabinet to consider the issue. *Id*. The cabinet concluded that a presidential privilege did exist, but that the President should disclose "such papers as the public good would permit, & ought to refuse those the disclosure of which would injure the public." *Id*. According to then-Secretary of Thomas State Jefferson, the cabinet also determined that requests for executive documents should go to the President personally, and not to heads of departments. *Id*. Thus, from the earliest interpretations of executive privilege in the United States, it has been clear that the President himself—not an agency subordinate—is responsible for determining whether specific records should remain confidential.

Fifteen years later, then-President Jefferson further solidified the precedent that executive privilege belongs to the person of the sitting President. During the

1807 treason trial of Aaron Burr, Chief Justice Marshall subpoenaed from President Jefferson two letters about the Burr Conspiracy by General James Wilkinson. *Burr*, 25 F.Cas. at 63. Jefferson, who was inclined to comply with the subpoena but reserved the right to withhold and redact documents, wrote:

> Reserving the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as president the public interest permits to be communicated, and to whom, I assure you of my readiness under that restriction, voluntarily to furnish on all occasions whatever the purposes of justice may require.

Id. at 65. As Marshall continued to press for the letters, Jefferson asserted the President's unique right to decide which materials may be disclosed in the public interest. *Id*. at 69. Jefferson explained:

> All nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He [the President], of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication.

Id. Burr was ultimately acquitted of treason before the subpoena dispute was resolved. *See In re Sealed Case*, 121 F.3d at 739 (reviewing the history of the presidential communications privilege).

In Burr's subsequent misdemeanor trial, Chief Justice Marshall confirmed that the presidential communications privilege requires the President's personal involvement. Marshall rejected Jefferson's attempt to authorize the prosecuting Attorney, George Hay, to redact portions of the Wilkinson letters on his own,

explaining "the propriety of withholding [the letters] must be decided by himself [the President], not by another for him. Of the weight of the reasons for and against producing it, he is himself the judge." *Burr*, 25 F.Cas. at 192.

Meanwhile, Congress possessed the same understanding of the President's right to withhold documents in 1807. Shortly before Burr's trial, the House passed a resolution requiring the President to send documents concerning the Burr conspiracy "except such as he may deem the public welfare to require not to be disclosed." Resolution of Fri. Jan. 16 1807, 16 Annals of Cong. 336 (1806–07). The request was to be sent to the Office of the President, not the executive agencies. *Id*.

The history of the presidential communications privilege makes clear that—contra the lower court—the DOJ may not unilaterally invoke the privilege.

C. Both Congress and the Executive Branch understand the presidential communications privilege to require the President's personal authorization.

The contemporary understanding of the presidential communications privilege mirrors its original understanding: both Congress and the Executive Branch have determined that a President's authorization is necessary to block the release of presidential records by the National Archives and Records Administration ("NARA").

In 2009, President Obama issued Executive Order 13,489 granting the Attorney General and the White House Counsel authority to review records for potential privilege claims. Exec. Order No. 13,489, 36 C.F.R. § 1270 (2009). The order reserved to the President personally the authority to invoke executive privilege, *id.* § 3(c), but gave the Archivist of the United States the authority to determine whether a former President's claim of privilege should be honored. *Id*. § 4(a)-(b).

Congress responded to Executive Order 13,489 by passing the Presidential and Federal Records Amendments Act of 2014, Pub. L. 113- 187, 128 Stat. 2003 (2014) (codified at 44 U.S.C. § 2208). The Act largely codified President Obama's Order. 44 U.S.C. § 2208(a)(1) requires the Archivist to give notice to both the former President and incumbent President when the Archivist decides to make records public. As with Executive Order 13,489, "the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President[.]" 44 U.S.C. § 2208(b)(1). But Congress went further than President Obama, giving the sitting President final authority to invoke or deny privilege at the request of a former President. 44 U.S.C. § 2208(c). Under the Act, the incumbent President—and only the incumbent President—has the authority to assert privilege over presidential records.

Congress has thus specifically indicated how presidential communications privilege claims should arise in the context of a federal records disclosure request. The PRA and the FOIA share the purpose of providing public access to records. *See* 44 U.S.C. § 2203(g)(1) (duty of the Archivist to disclose documents as rapidly as possible); 5 U.S.C. § 552(a)(4)(B) (presumption in favor of disclosure). There is no basis to conclude that the privilege operates differently under the FOIA than it does under the amended PRA. And given that Congress's amendments to the PRA have been in effect for five years without negatively impacting the Office of the President, there is no credence to the concerns voiced by the DOJ and echoed by the lower court below that the responsibility of asserting the privilege when necessary would overburden the President or his immediate advisers.

Congress, like the Executive Branch, has established that the presidential communications privilege can only be asserted by the President. The rule in FOIA cases is no different. Accordingly, the decision of the lower court should be reversed as to the Predictive Analytics Report.

III. THE AGENCY IS WRONGLY WITHHOLDING FACTUAL MATERIAL AND EXTERNAL COMMUNICATIONS UNDER THE DELIBERATIVE PROCESS PRIVILEGE.

The lower court erred in holding that the 345 pages of research and briefing materials withheld by the DOJ were fully exempt from disclosure under 5 U.S.C. § 552(b)(5). Many of the withheld records do not even satisfy the threshold test of

Exemption 5 because they consist of non-exempt communications between the DOJ and outside parties. Moreover, the lower court incorrectly held that all of the research and briefing materials were covered by the deliberative process privilege, even though the records consist largely or exclusively of non-deliberative factual material.

A. The agency has not established that communications with outside consultants are "intra-agency" records eligible for Exemption 5.

The lower court erred in holding that communications with outside consultants withheld by the DOJ were "intra-agency" records eligible for Exemption 5. The DOJ has not shown that these records fall within the so-called "consultant corollary."

Under the consultant corollary, communications between an agency and an outside consultant can be considered "intra-agency" records for the purposes of Exemption 5—but only if the agency proves that consultant "does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 336 (D.C. Cir. 2011) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001)).

Here, the DOJ withheld 282 pages of "Predictive Analytics Report Research" that were "sent between outside expert consultants and the Department," arguing that the records constitute "intra-agency" records eligible for Exemption 5.

JA 37–38. Yet this argument rests on the DOJ's conclusory assertion that the outside consultants "were not advocating for a government benefit at the expense of others; rather they were simply responding to and cooperating with OLP's request for assistance." JA 38. The DOJ has not identified the consultants involved, except to allege that they are "outside expert consultants" and "academics." *Id*.

These "bald assertions" put forward by the DOJ are not enough to satisfy the consultant corollary test. *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy (CEI)*, 161 F. Supp. 3d 120, 133 (D.D.C.), *modified,* 185 F. Supp. 3d 26 (D.D.C. 2016). When this Court has considered the application of the consultant corollary, it has done so based on specific record evidence about the consultants and their interactions with the agency. *See McKinley*, 647 F.3d at 336–39 (finding, based on detailed record evidence, that the interests of consultant Federal Reserve Bank of New York were aligned with those of the agency); *Nat'l Inst. of Military Justice v. DOD*, 512 F.3d 677, 680–87 (D.C. Cir. 2008) (finding, based on detailed record evidence, that the interests of consulting non-governmental attorneys were aligned with those of the agency); *cf. Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.–Mexico*, 740 F.3d 195, 200 (D.C. Cir. 2014) (remanding for a factual inquiry into whether the Mexican National Water Commission—an alleged "consultant"—had actually assisted in preparing the agency record in question).

Other courts in the D.C. Circuit have also required agencies to address each consultant relationship in specific detail. In *CEI*, the court explained that a "skeletal record"—much like the one offered by the DOJ here—is insufficient to invoke the consultant corollary:

> Whether a person is self-interested in a particular situation is not a binary question. Rather, self-interest exists on a spectrum, with altruism at one end and greed or avarice on the other. The point at which selflessness passes into self-interest is not demarcated by a bright line. Here, OSTP offers little more than bald assertions to support Dr. Francis' purported lack of self-interest in commenting on the OSTP Letter.

CEI, 161 F. Supp. 3d at 133–34; *see also COMPTEL v. FCC*, 910 F. Supp. 2d 100, 119 (D.D.C. 2012) ("The Court doubts, and the FCC has provided no evidence to the contrary, that communications with SBC could meet the requirements for consultant corollary outlined by Klamath and other relevant cases."); *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 26 (D.D.C. 2002) ("The Court cannot accept defendants' characterization of Chile as a non-adversarial consultant to USTR.").

Just like the agency in *CEI*, the DOJ has failed to provide adequate evidence justifying the application of the consultant corollary. In *CEI*, the Office of Science and Technology Policy "stated in conclusory terms" that its consultant "effectively functioned as an agency employee, providing advice to OSTP similar to what [the OSTP director] would have sought and received from an OSTP agency employee."

CEI, 161 F. Supp. 3d at 133. The agency also asserted that the consultant "operated as a technical science expert solely on OSTP's behalf, not advancing her own interests or seeking government benefit." *Id*. Still, the court found this explanation insufficient and "reject[ed] Defendant's attempt to apply the consultant corollary." *Id.* at 135.

The DOJ fares no better here, arguing only that its consultants "were not advocating for a government benefit at the expense of others; rather, they were simply responding to and cooperating with OLP's request for assistance." JA 38. And here, as in *CEI*, the DOJ's academic contacts have a strong "professional and reputational stake" in ensuring that their own personal views are reflected in a major federal report on predictive policing. *CEI*, 161 F. Supp. 3d at 134. Their interests are thus distinct from those of the agency.

Because the DOJ has failed to offer particularized evidence demonstrating that the consultants' interests were aligned with its own, the consultant corollary does not apply, and the 282 withheld pages of external communications are subject to release. The lower court was wrong to conclude otherwise.

B. The agency has not shown that the factual content of research and briefing materials is exempt under the deliberative process privilege.

The lower court erred in holding that the 345 withheld pages of research and briefing materials—records consisting overwhelmingly of factual content—are protected in full by the deliberative process privilege. The agency has not met its

burden of proving that Exemption 5 applies to all of the material at issue. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 509 (D.C. Cir 2011).

Factual content is presumptively "not privileged under the deliberative process privilege," *Martin v. Office of Special Counsel, Merit Sys. Prot. Bd.*, 819 F.2d 1181, 1184 (D.C. Cir. 1987). In order to withhold such material, an agency must demonstrate that the facts are "so inextricably intertwined with the deliberative sections of documents that [their] disclosure would inevitably reveal the government's deliberations." *Elec. Frontier Found. v. DOJ*, 739 F.3d 1, 13 (D.C. Cir. 2014) (quoting *In re Sealed Case*, 121 F.3d at 737); *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (quoting *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C. Cir. 1987)) ("The deliberative character of agency documents can often be determined through 'the simple test that factual material must be disclosed but advice and recommendations may be withheld.'"). As this Court has explained:

> Anyone making a report must of necessity select the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.

Playboy Enters., Inc. v. DOJ, 677 F.2d 931, 935 (D.C. Cir. 1982); *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 238 (D.C. Cir. 2008) (quoting *Bristol–Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970)) ("Purely factual

reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended.").

The lower court failed to apply this test, instead placing the burden on EPIC to provide "contrary record evidence or evidence of agency bad faith" in order to defeat the agency's exemption claims. JA 18. Yet factual content is presumptively *not* privileged, and the burden is on the *agency* to show by "'specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA,'" *Morley*, 508 F.3d at 1127 (quoting *Mead Data Cent., Inc.*, 566 F.2d at 258). The DOJ, for its part, simply failed to explain why every single fact, bullet point, and source list across 345 pages of material must be shielded in full from public scrutiny. The court wrongly discounted the inherent implausibility of this across-the-board exemption claim. *See Judicial Watch, Inc. v. DOD*, 715 F.3d 937, 941 (D.C. Cir. 2013) (quoting *ACLU v. DOD*, 628 F.3d 612, 619 (D.C. Cir. 2011)) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'").

Instead, the lower court held simply that "[b]ecause the materials fall within the scope of [*Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974)] and [*Mapother*, 3 F.3d 1533], the factual content in the materials is intertwined with the Department's deliberative process and properly withheld under Exemption

5." But *Montrose* and *Mapother* do not stand for the proposition that all factual material solicited in the course of the decisionmaking process is privileged. Indeed, this Court in *Montrose* underscored that the "factual versus deliberative distinction is inadequate to resolve the difficult question whether the factual summaries should be exempt from disclosure." *Montrose*, 491 F.2d at 67.

In *Montrose*, "factual" summaries were deemed deliberative only because the EPA had condensed over 10,000 pages of facts into relatively short summaries—an intensive undertaking that would reveal a great deal about the agency's deliberations and thought processes. *Id.* at 68–71. Similarly, in *Mapother*, the Court deemed certain factual material exempt under the deliberative process privilege because it "was assembled through an exercise of judgment in extracting pertinent material from a vast number of documents for the benefit of an official called upon to take discretionary action." *Mapother*, 3 F.3d at 1539. These cases provide a stark contrast to the records withheld by the DOJ here, most of which consist of "details on—and copies of—[consultants'] research" that had yet to be "culled" by the DOJ into the final Predictive Analytics Report. JA 38.

Finally, the lower court incorrectly determined that the DOJ complied with its obligation to disclose reasonably segregable factual material, JA 21—a burden that cannot be met "by sweeping, generalized claims of exemption[.]" *NACDL*, 844 F.3d at 257 (quoting *Mead Data Central, Inc.*, 566 F.2d at 260). It is simply

implausible that the DOJ cannot segregate a single fact from the hundreds of pages of documents because every fact would purportedly "reveal the Department's pre-decisional decision-making process[.]" JA 51. The agency has categorically shielded factual material without showing that it constitutes a deliberative link in a decisional chain. And where an agency fails to "provide 'specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA,'" the agency has not satisfied its statutory duty to disclose reasonably segregable material. *Morley*, 508 F.3d at 1127 (quoting *Mead Data Cent., Inc.*, 566 F.2d at 258).

Because the DOJ has not met its burden of showing that all 345 pages of withheld research and briefing materials are exempt under the deliberative process privilege, the decision of the lower court should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court and remand the case for further proceedings.

Respectfully Submitted,

Dated: July 19, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). The brief is composed in a 14-point proportional typeface, Times New Roman, and complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e), because it contains 7,537 words, excluding parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. The following participants in the case will be served by email and the CM/ECF system:

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ADDENDUM

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U.S.C. TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

5 U.S.C. § 552(a)(3)(A)

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

5 U.S.C. § 552(a)(4)(B)

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or 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. 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).

5 U.S.C. § 552(a)(6)(A)

Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination—

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations

under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) such determination and the reasons therefor; that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

5 U.S.C. § 552(a)(6)(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA

Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this

subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

5 U.S.C. § 552(a)(6)(C)(i)

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

5 U.S.C. § 552(a)(8)

An agency shall—

(i) withhold information under this section only if—

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)

(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information;

***

5 U.S.C. § 552(b)

This section does not apply to matters that are—

***

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

***

U.S.C. TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

U.S.C. TITLE 44 – PUBLIC PRINTING AND DOCUMENTS

44 U.S.C. § 2203. Management and custody of Presidential records

44 U.S.C. § 2203(g)(1)

Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

44 U.S.C. § 2208. Claims of constitutionally based privilege against disclosure

(a)

(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

(A) promptly provide notice of such determination to—

(i) the former President during whose term of office the record was created; and

(ii) the incumbent President; and

(B) make the notice available to the public.

(2) The notice under paragraph (1)—

(A) shall be in writing; and

(B) shall include such information as may be prescribed in regulations issued by the Archivist.

(3)

(A) Upon the expiration of the 60-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the public the Presidential record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 30 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

(C) Notwithstanding subparagraphs (A) and (B), if the 60-day period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire during the 6-month period after the incumbent President first takes office, then that 60-day period or extension, respectively, shall expire at the end of that 6-month period.

(b)

(1) For purposes of this section, the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential

record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President, as applicable.

(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under such paragraph.

(c)

(1) If a claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) is asserted under subsection (b) by a former President, the Archivist shall consult with the incumbent President, as soon as practicable during the period specified in paragraph (2)(A), to determine whether the incumbent President will uphold the claim asserted by the former President.

(2)

(A) Not later than the end of the 30-day period beginning on the date on which the Archivist receives notification from a former President of the assertion of a claim of constitutionally based privilege against disclosure, the Archivist shall provide notice to the former President and the public of the decision of the incumbent President under paragraph (1) regarding the claim.

(B) If the incumbent President upholds the claim of privilege asserted by the former President, the Archivist shall not make

the Presidential record (or reasonably segregable part of a record) subject to the claim publicly available unless—

(i) the incumbent President withdraws the decision upholding the claim of privilege asserted by the former President; or

(ii) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(C) If the incumbent President determines not to uphold the claim of privilege asserted by the former President, or fails to make the determination under paragraph (1) before the end of the period specified in subparagraph (A), the Archivist shall release the Presidential record subject to the claim at the end of the 90-day period beginning on the date on which the Archivist received notification of the claim, unless otherwise directed by a court order in an action initiated by the former President under section 2204(e) of this title or by a court order in another action in any Federal court.

(d) The Archivist shall not make publicly available a Presidential record (or reasonably segregable part of a record) that is subject to a privilege claim asserted by the incumbent President unless—

(1) the incumbent President withdraws the privilege claim; or

(2) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

Federal Register
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Presidential Documents

Title 3—

The President

Executive Order 13489 of January 21, 2009

Presidential Records

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures governing the assertion of executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration (NARA) pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) ''Archivist'' refers to the Archivist of the United States or his designee.

(b) ''NARA'' refers to the National Archives and Records Administration.

(c) ''Presidential Records Act'' refers to the Presidential Records Act, 44 U.S.C. 2201–2207.

(d) ''NARA regulations'' refers to the NARA regulations implementing the Presidential Records Act, 36 C.F.R. Part 1270.

(e) ''Presidential records'' refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act, including Vice Presidential records.

(f) ''Former President'' refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A ''substantial question of executive privilege'' exists if NARA's disclosure of Presidential records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch.

(h) A ''final court order'' is a court order from which no appeal may be taken.

Sec. 2. *Notice of Intent to Disclose Presidential Records.* (a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, using any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of executive privilege. However, nothing in this order is intended to affect the right of the incumbent or former Presidents to invoke executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period for a time certain and with reason for the extension of time provided in the notice. If a shorter period of time is required under the circumstances

set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. *Claim of Executive Privilege by Incumbent President.* (a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other executive agencies as they deem appropriate concerning whether invocation of executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of executive privilege is not justified. The Archivist shall be notified promptly of any such determination.

(c) If either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.* (a) Upon receipt of a claim of executive privilege by a living former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this order that executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 6. *Revocation.* Executive Order 13233 of November 1, 2001, is revoked.

THE WHITE HOUSE,
January 21, 2009.

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