No. 09-17235

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff-Appellee,

v.

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE and DEPARTMENT OF JUSTICE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

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ARGUMENT

I. Exemption 3 and Exemption 6 Authorize Withholding of the Identities of the Telecommunications Company Representatives

A. Exemption 3

1. Section 102A(i)(1) of the National Security Act of 1947, 50 U.S.C. § 403-1(i)(1), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." The need to protect intelligence sources and methods lies at the heart of the government's invocation of Exemption

3 in this case. See Brief for Appellants at 17-19. As explained by the Director of National Intelligence, it is imperative for private parties that assist the government in collecting foreign intelligence to have confidence that their participation will not be revealed. See ER 478-79 (declaration of Director of National Intelligence). The importance of protecting such information in this case is reflected in the lengths to which Congress went in structuring FISA's immunity provision, 50 U.S.C. § 1885a, to allow the dismissal of suits against telecommunications carriers without requiring the government to confirm or deny that the carriers provided assistance. See *id.* § 1885a(a)(1)-(5); Brief for Appellants at 20-21.

EFF does not dispute that the National Security Act protects the identities of companies and individuals that assist the government's foreign intelligence activities. Nor does it dispute that disclosure of such information can have a grave impact on the willingness of private parties to assist the government. Instead, EFF argues that the identities of the companies that assisted the government here are already publicly known, and hence there is no longer any basis for withholding information that could identify those companies.

The short answer to this argument is that it confuses public speculation with official confirmation. It is one thing for the public and the press to speculate about which companies provided assistance to the government; it would be another thing

altogether for the government itself to release information (if any) that could confirm that speculation. Government assurances of confidentiality to sources who assist in intelligence gathering would be of little value if those assurances must give way whenever the public and press come to speculate about the source's involvement. And for foreign adversaries looking for information about our intelligence sources, methods, and capabilities (see ER 478-79), confirmation by the government itself is far more valuable than uncertain inferences drawn from other, less authoritative sources.

For this reason, EFF's reliance on newspaper and magazine articles purporting to "confirm" the identities of companies assisting the government is misplaced. Articles that purport to disclose secret information on the basis of anonymous sources (see, *e.g.*, ER 254, 291) can raise suspicions, but nothing more. As the Fourth Circuit explained in *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (1975):

> It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so. The reading public is accustomed to treating reports from uncertain sources as being of uncertain reliability, but it would not be inclined to discredit reports of sensitive information revealed by an official of the United States in a position to know of what he spoke.

Accordingly, courts have consistently recognized that "even if a fact has been the subject of media speculation, its official acknowledgment could damage national security." *Public Citizen* v. *Department of State*, 11 F.3d 198, 201 (D.C. Cir. 1993); *Fitzgibbon* v. *CIA*, 911 F.2d 755, 765 (D.C. Cir.1990) ("in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures"); *Salisbury* v. *United States*, 690 F.2d 966, 971 (D.C. Cir.1982); *Afshar* v. *Department of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1981). So too here.

EFF also asserts (at 7) that the role of one company, AT&T, has been "prov[en]" and "confirmed" by a declaration by one of that company's technicians. However, the declaration on which EFF purports to rely is not in the record in this case. Instead, the declaration was submitted in the pending suits challenging the foreign intelligence activities that are the subject of the FISA immunity provision. See *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974, 990 (N.D. Cal. 2006) (declining to rely on declaration at summary judgment stage), *remanded*, 539 F.3d 1157 (9th Cir. 2008). Here, the record contains only EFF's summary of the declaration, not the declaration itself. See ER 247-52. Moreover, even taken on its own terms, EFF's summary shows that the declaration rests on hearsay and the technician's opinions and inferences. See, *e.g.*, ER 248 (reciting what technician claimed to have been told by another employee); *id.* at 248-49 (drawing inferences about activities in location

to which "he did not have access"); see also *Hepting*, 439 F. Supp. 2d at 990 (noting that inferences drawn by technician are disputed). Thus, neither the declaration itself nor EFF's summary of the declaration's hearsay statements and opinions proves the existence or nature of AT&T's alleged involvement in the intelligence program at issue in *Hepting*.

In addition to its misplaced reliance on these speculative sources, EFF also suggests (at 9, 20) that the Executive Branch itself disclosed which companies provided intelligence-gathering assistance to the government. That is incorrect. We describe the statements cited by EFF in the margin below. Even if those statements were to be read in the light most favorable to EFF, the most they might be read to suggest is that the defendants in then-pending civil suits *included* companies that had provided assistance to the government. See ER 237-38.[1] Nothing in the statements suggests that *all* of the defendants had done so. A number of companies were sued

[1] For example, the Director of National Intelligence stated that "the private sector had assisted us" and that "they were being sued." ER 237. In a similar vein, President Bush stated that "our government told them that their participation was necessary * * * and now they're getting sued * * * ," and the White House press secretary stated that companies "that were alleged to have helped their country after 9/11 * * * certainly helped us * * * ." *Id.* None of these statements suggests that all of the companies that had been sued had provided assistance. And none provides any other basis for inferring that any particular company did so. See *id.* (statement of Director of National Intelligence) (statement quoted above neither confirmed nor was intended to confirm "any specific relationship between the Government and any specific party").

for alleged involvement in intelligence-gathering activities, and as a result, even a direct acknowledgment that companies that had provided assistance had been sued would not support an inference that any one defendant in particular had assisted the government.

2. As explained in our opening brief, the Director of National Intelligence determined that disclosing the identities of telecommunications companies that communicated with the agencies regarding FISA immunity legislation "would allow the public and our adversaries to draw inferences about which companies are assisting us and which are not." ER 479. As a result, that information may be withheld under the National Security Act and Exemption 3. And disclosing the identities of the companies' representatives would be tantamount to disclosing the identities of the companies that they were representing. See Brief for Appellants at 22-23.

EFF states (at 23) that the Director's assessment speaks in terms of risks and probabilities rather than certainties. As a descriptive matter, that characterization of the Director's assessment is correct. But as a legal matter, EFF's suggestion (at 23) that information may be protected under Section 102A(i)(1) only when there is certainty that it will reveal intelligence sources and methods is completely wrong.

In *Berman* v. *CIA*, 511 F.3d 1136, 1143 (9th Cir. 2007), this Court held squarely that the Director "*need not demonstrate to a certainty* that disclosure will result in intelligence sources or methods being revealed" (emphasis added). Instead, information may be withheld if the Director concludes that disclosure would create an "unacceptable risk that sources or methods would be revealed." *Id.* And because the Director "is better situated to gauge the national security implications of disclosure," the courts "must therefore defer" to his risk assessment. *Id.*; see *CIA* v. *Sims*, 471 U.S. 159, 178-78 (1985) (Director's judgments regarding protection of intelligence sources and methods "are worthy of great deference").

Here, the Director's assessment represents precisely the kind of judgment about unacceptable risks that is entitled to deference under *Berman*. The Director's declaration expressly recognizes that companies sued for allegedly assisting the government could have contacted the government regarding statutory immunity even if they had not in fact provided assistance. ER 479. The Director therefore did not suggest that knowing which companies did or did not contact the government would prove axiomatically which companies did or did not provide assistance. Instead, the Director reasoned that the information sought by EFF "could be viewed" by the public, and more important, by our adversaries, "as confirming which private parties are or are not assisting the government." *Id.*

Given the critical importance of intelligence gathering capabilities to national security, the mandate of the National Security Act to "protect intelligence sources and methods" necessarily entitles the Director to shield information whose disclosure would put the secrecy of sources and methods in jeopardy, even if the information does not disclose sources and methods directly, and even if the connection is a matter of inferences and probabilities rather than certainties. See *Berman*, 501 F.3d at 1143; see also *Sims*, 471 U.S. at 178 (National Security Act authorizes withholding of "superficially innocuous information on the ground that it *might* enable an observer to discover the identity of an intelligence source") (emphasis added). As cases like *Berman* and *Sims* demonstrate, it is not for the courts, much less for EFF, to second-guess the good-faith judgment of the Director of National Intelligence about what level of risk to the secrecy of intelligence sources and methods is acceptable.

Rather than give the Director's intelligence judgments the deference to which they are due, EFF argues (at 18) that this Court should defer to the district court's "factual determinations" regarding the risk to intelligence sources and methods unless they are clearly erroneous. But contrary to EFF's suggestion, the district court made no "factual determinations" regarding Exemption 3. Not only does the court's decision not discuss the factual background of the Exemption 3 issue, but it fails to provide *any* discussion of the applicability of Exemption 3 to the identities of the

telecommunications company representatives. Indeed, the only reference to Exemption 3 in the entire opinion is the district court's acknowledgement that the defendants had invoked the exemption and the court's observation that "documents over which Defendants claimed Exemption 2 or 3, but not Exemption 5,[,] *are no longer at issue here as EFF's challenge has been abandoned*." ER 9 n.1 (emphasis added). The district court's ensuing decision to order the disclosure of the representatives' identities is entirely unexplained, and therefore unworthy of deference of any sort. And to the extent that the court's decision may be deemed to reflect an implicit rejection of the judgment of the Director of National Intelligence, the court's failure to defer to that judgment is a legal error rather than a factual one, and therefore would not be insulated by a clear-error standard of review in any event.[2]

3. EFF also argues (at 19-20) that the government has no basis under Exemption 3 for withholding information relating to which companies communicated with the agencies because lobbying disclosure reports for one telecommunications

[2] Because the Director's judgments under Section 102A(i)(1) the National Security Act are entitled to judicial deference, whether the Director's judgment in this case is sufficient to support withholding under Exemption 3 is a question of law, not a question of fact. For that reason, there is no need to remand for the district court to make factual findings. However, if this Court were to conclude that the record was insufficient to evaluate the Director's judgment under the appropriate legal standard, it would not be inappropriate to remand to allow further explanation by the current Director regarding the basis for withholding under Section 102A(i)(1).

company, AT&T, refer to lobbying by that company relating to FISA immunity. EFF does not claim that the reports disclose lobbying on FISA immunity by any telecommunications company or companies other than AT&T. Thus, even if the existence of AT&T's lobbying reports were relevant to the withholding of information (if any) relating to AT&T itself, the reports would provide no basis for disclosure with respect to the identities of representatives of other companies (if any) that may have communicated with the agencies.

As for AT&T itself, EFF argues (at 20) that in light of the lobbying reports, disclosure of withheld information (if any) identifying AT&T representatives (if any) would not support any "*new* inferences" regarding AT&T's alleged assistance in foreign intelligence activities. That is incorrect. If that information (assuming it exists) were combined with other information that has already been made public, including the contents of telecommunications company communications that have already been released, the outside world would be presented with a far more comprehensive picture than the one presented by the bare bones of AT&T's lobbying reports. Our adversaries would be able to assess the magnitude and scope of the (hypothetical) communications; which companies may have communicated with particular agencies and officials and which did not; which agencies and officials a company communicated with; and the specific issues the company raised and specific

concerns the company expressed. Assuming, again *arguendo*, that AT&T did communicate with the government, knowing the scope and details of those assumed communications would put the world in general, and our adversaries in particular, in a better position to draw inferences about the existence *vel non* and nature of AT&T's participation (if any) in the contested intelligence activities.

4. As explained in our opening brief, the Exemption 3 withholding in this case rests not only on the National Security Act, but also on Section 6 of the National Security Agency Act, 50 U.S.C. § 402 note, which provides that "[n]othing in this Act or any other law * * * shall be construed to require the disclosure of the organization or any function of the National Security Agency, [or] of any information with respect to the activities thereof * * * ." EFF objects to the government's reliance on Section 6 only with respect to five items withheld by ODNI, and even as to those items, EFF objects only insofar as ODNI relied on Section 6 to withhold the identities of telecommunications company representatives. As EFF acknowledges (at 16 n.13), apart from seeking the representatives' identities, it has not challenged "the withholding of any material" under Exemption 3.

As a basis for its narrow objection to ODNI's treatment of these documents, EFF attacks the sufficiency of a declaration by NSA, which does not (in EFF's view) provide adequate justification for ODNI to withhold the identity of

telecommunications carriers. See EFF Brief at 26 (quoting from ER 568) (Paragraph 25 of declaration of Associate Director, Community Integration, Policy and Records for NSA). But the discussion in the NSA declaration quoted by EFF has nothing to do with ODNI at all. Instead, by its terms, it relates to different documents belonging to DOJ. See ER 568 ("Five of the six consultations *from DOJ* involve correspondence between *DOJ*, NSA, and private individuals," and NSA redacted information "in *these* five sets of documents" that alludes to the existence or non-existence of relationships between the government and private parties) (emphasis added). NSA's explanation of why it redacted material from the DOJ records is perfectly adequate, but even if it were not, it is irrelevant to the withholding of information in different and unrelated documents by ODNI.

EFF also argues (at 27-29) that ODNI should have segregated exempt information and disclosed non-exempt material in these five items. However, the duty to segregate arises only when a withheld document contains non-exempt as well as exempt material. Here, the five items referred to by EFF were withheld in their entirety because ODNI determined that all of the material in them was exempt under Exemption 3 and other exemptions. See ER 200-202 (ODNI *Vaughn* index); ER 938-40 (declaration of John F. Hackett, Director of Information Management Office of ODNI). In any event, the district court's disclosure order does not itself require

segregation of these documents, and because EFF has not filed a cross-appeal, it cannot seek revision of the district court's order in this respect. See, *e.g.*, *Spurlock* v. *FBI*, 69 F.3d 1010, 1018 (9th Cir. 1995) ("An appellee who fails to file a cross-appeal cannot attack a judgment with a view towards enlarging his own rights").

B. Exemption 6

ODNI and DOJ have also withheld the identities of the individuals who communicated with the agencies on the basis of Exemption 6, which protects personal information whose disclosure "would constitute a clearly unwarranted invasion of personal privacy." EFF argues that there is a substantial public interest in knowing the identities of individuals who communicated with the Executive Branch regarding FISA immunity, and that those individuals do not have any interest in being able to carry out such communications on a confidential basis that protects their identities. Both arguments are incorrect.

1. EFF has asserted that the public has an interest in knowing whether and how the Executive Branch's position regarding statutory immunity was influenced by lobbying by telecommunications companies. But as explained in our opening brief EFF has never explained how that interest would be furthered by knowing the identities of the individuals who communicated with the Executive Branch on the

companies' behalf. Moreover, the agencies' disclosure of the contents of the communications between the telecommunications companies and the government fully illuminates the impact on "an agency's performance of its public duties" (*U.S. Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)), and no additional light would be cast on the Executive Branch's activities by disclosing the identities of the individuals involved in the communications. See, e.g.,*Forest Service Employees for Environmental Ethics* v. *U.S. Forest Service*, 524 F.3d 1021, 1028 (9th Cir. 2008) ("As a result of the substantial information already in the public domain, * * * the release of the identities of the employees who participated in the [agency action] would not appreciably further the public's important interest in monitoring the agency's performance").

EFF argues (at 35-36) that the disclosure requirements of the Lobbying Disclosure Act (LDA) demonstrate a public interest in knowing which individuals communicated with the Executive Branch regarding FISA immunity proposals. But to the extent that the LDA requires lobbyists to disclose whom they represent and on what matters they have lobbied, that information is already publicly available by virtue of the LDA itself. Assuming *arguendo* that any of the same information is contained in the withheld materials in this case, its release under FOIA would be purely duplicative of information already in the public domain, and therefore would

contribute nothing further to the public interest embodied in the LDA. And to the extent that the identities of persons who communicated with the Executive Branch are *not* required to be disclosed by the LDA (see Brief for Appellants at 29 & n.8), the LDA offers no support for EFF's public interest argument as to those individuals.

EFF also notes (at 36) that ODNI has withheld several communications by telecommunications companies to ODNI. See ER 200-202. As noted above, the contents of these few items have been withheld under Exemption 3, and EFF did not challenge that withholding below. See pp. 12-13 *supra*. EFF offers no explanation of how the public understanding of the FISA lobbying process would be advanced by knowing the identities of the representatives involved in these few communications without knowing the contents of the communications themselves.

Finally, EFF suggests that knowing which individuals communicated with the government regarding FISA immunity would help the public to determine whether political appointees are complying with the "revolving door" restrictions in Executive Order 13490, 74 Fed. Reg. 4673 (Jan. 26, 2009). More specifically, EFF points to the Executive Order's two-year bar on "participating in any particular matter involving specific parties that is directly and substantially related to [the appointee's] former employer or former clients." *Id.* (§ 1, ¶ 2). A matter is "directly and substantially

related to [a] former employer or former clients" if the former employer or client is a party or represents a party. *Id.* at 4673 (§ 2(k)).

EFF speculates (at 37) that individuals who lobbied the last Administration regarding FISA immunity could have been appointed to political positions by the current Administration, and suggests that, if so, knowing which individuals communicated with ODNI and DOJ would assist in determining compliance with this revolving-door rule. EFF's suggestion that the persons whose identities are being withheld in this case may now be political appointees is not only speculation, but speculation of a particularly improbable sort. Another provision of the Executive Order prohibits lobbyists from seeking or accepting employment with any executive agency that the lobbyist lobbied within the two years prior to his or her appointment. *Id.* § 1, ¶ 3(c). Given that the current FISA immunity provision was not enacted into law until July 2008, few if any lobbyists who took part in the efforts to enact the immunity provision would even be eligible for appointment to ODNI or DOJ at this time. Moreover, even if a particular individual were eligible for appointment, and even if he or she had actually been appointed, EFF does not suggest that there is any particular likelihood that any one appointee in particular will violate the rule against participating in specific matters involving his or her former employer or clients. In short, the prospect that disclosing the identities of the individuals who communicated

with the agencies regarding FISA immunity would ultimately expose violations of the Executive Order is negligible at best.[3]

2. On the other side of the scale, the district court itself acknowledged that the individuals have "some" privacy interest in maintaining the confidentiality of their identities and their participation in the discussions with ODNI and DOJ. ER 13. The court did not regard that interest as a substantial one. See *id.* But as other courts have recognized, "something, even a modest privacy interest, outweighs nothing every time." *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *Manna* v. *U.S. Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir. 1995); *Maynard* v. *CIA*, 986 F.2d 547, 566 (1st Cir. 1993). Here, for the reasons just given, there is no public interest in the compelled disclosure of the representatives' identities. As a result, even a modest privacy interest would suffice to sustain the withholding of that information under Exemption 6.

As explained in our opening brief, individuals have a significant privacy interest in being able to communicate confidentially with the government on sensitive

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[3] Moreover, the critical question under that prohibition is simply who the political appointee formerly worked for or represented, not the particular matters involved in that employment or representation. As a result, there would be no need to know that an appointee represented company X in lobbying concerning the FISA immunity provision; it would be enough to know that the appointee formerly worked for or represented X.

and controversial issues, where their involvement could expose them to opprobrium or harassment. Here, EFF does not deny that granting retroactive immunity to telecommunications carriers was a highly controversial issue. Indeed, EFF itself asserts (at 12) that "[t]he carriers' legal immunity continues to be controversial." And as EFF's own discussion of the issue illustrates (*id.* at 8-13), the issue is one that has stirred deep emotions on both sides.

EFF points to *Alliance for the Wild Rockies* v. *Dep't of the Interior*, 53 F. Supp. 2d 32, 34 (D.D.C. 1999), as support for the proposition that individuals do not have an appreciable privacy interest in their identities when they communicate with the government on "sensitive or controversial issue[s]." But even taken on its own terms, *Alliance for the Wild Rockies* involves a fundamentally different scenario from the one here: the submission of public comments in an agency rulemaking proceeding. As the district court emphasized, rulemaking commenters "generally do not expect that their names will remain confidential." *Id.* at 36. Moreover, in the particular rulemaking proceeding at issue there, the agency "made it abundantly clear in its [rulemaking] notice that the individual submitting comments * * * would *not* have their identities concealed." *Id.* at 36, 37 (emphasis added); see also *id.* at 34 (quoting rulemaking notice that "'[t]he complete file for this proposed rule is available for [public] inspection'").

Here, in contrast, the telecommunications companies and their representatives were engaging in deliberately confidential, non-public communications with the agencies, and the record reflects the agencies' recognition that persons who communicate with them confidentially on controversial matters "have an expectation that their names and other identifying information will not be publicly disclosed." ER 938 (ODNI declaration). Nothing in *Alliance* even remotely suggests that individuals lack a legitimate expectation of privacy in these circumstances, and the prevailing case law points in the opposite direction. See, *e.g.*, *Lakin Law Firm, P.C.* v. FTC, 352 F.3d 1122, 1125 (7th Cir. 2003); *Strout* v. *U.S. Parole Board Comm'n*, 40 F.3d 136, 139 (6th Cir. 1994); *Gordon* v. *FBI*, 388 F Supp. 2d 1028, 1041-42, 1045 (N.D. Cal. 2005).

Contrary to EFF's suggestion (at 33), Exemption 6 does not require a direct threat of physical harm, like "the danger of abortion-related violence" involved in *Judicial Watch, Inc.* v. *FDA*, 449 F.3d 141, 153 (D.C. Cir. 2006). Not only have courts permitted the withholding of personally identifying information on the basis of far less dramatic concerns, but they have allowed the identities of persons who communicate with the government to be withheld even where no threat of any kind is alleged. See, *e.g.*, *Lakin Law Firm*, 352 F.3d at 1125.

EFF argues (at 33) that protecting the identities of persons who communicate confidentially with the government on controversial public matters will "gut the FOIA's strong presumption in favor of disclosure." EFF offers no support for that *ipse dixit*, and none exists. As the discussion above illustrates, any public interest in disclosure is fully served by disclosure of the contents of the communications; when the contents themselves have been made public, as they have here, withholding the identities of the individuals involved will hardly "gut" FOIA. And contrary to EFF's suggestion, courts evaluating the withholding of information under Exemption 6 are free to consider the adverse impact of disclosure on an agency's ability to obtain needed information from private parties. For example, the Sixth Circuit sustained the Parole Commission's refusal to disclose the identities of persons commenting on parole decisions because, *inter alia*, "there would appear to be a public policy interest against such disclosure, as the fear of disclosure to a convicted criminal could have a chilling effect on persons, particularly victims, who would otherwise provide the Commission with information relevant to a parole decision." *Stroud*, 40 F.3d at 129.

II. With Respect to Inter-Agency and Intra-Agency Materials, the Disclosure Order Should be Vacated and Remanded for Consideration of the Agencies' Privilege Claims under Exemption 5

1. Exemption 5 protects "inter-agency or intra-agency" documents that would be privileged in civil litigation. As explained in our opening brief, the district court erred in ordering the disclosure of materials withheld under Exemption 5 that were exchanged within and between ODNI and DOJ or between the agencies and the White House. As EFF itself acknowledges (at 39), the materials exchanged within and between the agencies are "inter-agency or intra-agency" materials under Exemption 5, and therefore may not be ordered disclosed until and unless a district court determines that they are not privileged. And under *EPA* v. *Mink*, 410 U.S. 74 (1973), and its progeny, such as *Judicial Watch* v. *Department of Energy*, 412 F.3d 125, 129-31 (D.C. Cir. 2005), deliberative materials exchanged between the agencies and the White House likewise qualify as "inter-agency" materials for purposes of Exemption 5.

EFF suggests (at 39-40) that *Mink* is no longer good law on this issue because it was decided before 1974, when Congress amended FOIA to include the current definition of "agency." But when Congress changed FOIA's definition of "agency" in 1974, it *expanded* the definition, not contracted it. If the more narrow pre-1974

definition of "agency" sufficed for the Supreme Court to protect deliberative material exchanged between agencies and the President's immediate advisors, Congress can hardly have overruled *Mink* on this question by adopting a definition that is broader still. Instead, as cases like the D.C. Circuit's 2005 decision in *Judicial Watch* demonstrate, *Mink* is still good law regarding the applicability of Exemption 5 to agency materials used to assist Presidential deliberations. Under EFF's contrary approach, Exemption 5 would protect deliberations between agencies and certain components of the Executive Office of the President, but would provide no protection whatsoever for deliberations between agencies and the President and his immediate advisors, including those in the Office of the President and the National Security Council. EFF makes no attempt to explain why Congress would have wished such an upside-down result.

2. Because the materials exchanged within the Executive Branch satisfy the "inter-agency or intra-agency" requirement of Exemption 5, the district court was obligated to resolve the claims of privilege regarding those documents. That is a task that the district court has yet to undertake. See ER 12. For that reason, the appropriate disposition is for this Court to vacate the disclosure order with respect to the intra-Executive Branch materials withheld under Exemption 5, and remand for the district court to address the merits of the privilege claims.

EFF argues that this Court should not remand for the district court to address the privilege issues, but instead should resolve those issues itself in the first instance, without the benefit of prior consideration by the district court. That suggestion is misconceived, for reasons that are illustrated by EFF's brief itself.

As shown by EFF's lengthy discussion of the privilege issues (at 41-55), determining whether each of the withheld documents is privileged will require a detailed and time-consuming judicial inquiry. The defendants are withholding materials under Exemption 5 on the basis of three distinct privileges: the presidential communications privilege, the deliberative process privilege, and the work product privilege. Different documents are being withheld on the basis of different combinations of those privileges. Each privilege presents its own significant legal issues, and determining the applicability of the privileges will require examination of the *Vaughn* indexes and supporting declarations on an agency-by-agency and document-by-document basis. Performing this kind of detailed review *de novo* is a task for the district court, not this Court in the first instance.

For example, EFF argues that "certain" documents do not have a sufficient nexus to Presidential decisionmaking to support the invocation of the presidential communications privilege; that "many" documents withheld on the basis of the deliberative process privilege are not adequately described in their respective *Vaughn*

indexes; and that "some" of the documents withheld on the basis of deliberative process "appear" to contain purely factual material. EFF Brief at 47, 49-50. These claims require separate examination of the *Vaughn* material for each of the many groups of documents that EFF identifies in the margin of its brief. See *id.* at 47 n. 34, 50 nn. 36-37. Moreover, the lists of documents provided by EFF in the margin are preceded by "*see, e.g.*," presumably meaning that EFF's claims extend, or may extend, to other, as-yet unspecified documents.

The task of sorting through this mass of legal and factual arguments should have been performed by the district court in its original decision. That court's failure to discharge its responsibilities is no reason for this Court to undertake the task itself.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be: (1) reversed insofar as it orders disclosure of information withheld under Exemption 3 and Exemption 6; and (2) vacated and remanded for further proceedings insofar as it orders disclosure of materials withheld under Exemption 5 that were exchanged within the Executive Branch.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, that the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 5444 words.

Date: 12/14/09

/s/ Scott R. McIntosh
Scott R. McIntosh
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2009, I electronically filed the foregoing BRIEF FOR THE APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott R. McIntosh
Scott R. McIntosh