CASE NO. 09-17235
SCHEDULED FOR ORAL ARGUMENT JANUARY 12, 2010

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.

Appeal from the United States District Court for the Northern District of California, the Honorable Jeffrey S. White, District Judge
Civil Case Nos. 3:08-cv-01023-JSW and 3:08-cv-08-2997-JSW

ANSWERING BRIEF OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Electronic Frontier Foundation ("EFF") is a nonprofit corporation with no parent corporation. No publicly held company owns 10% or more of the stock of EFF.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether the government can block the public's use of the Freedom of Information Act ("FOIA") to learn details about a lobbying campaign to seek retroactive legal immunity for telecommunications carriers for their participation in illegal government surveillance. The District Court correctly rejected various government claims of exemption from the FOIA to withhold this information, and its decision should be affirmed.

Since 2005, the nation has been aware that the country's major telecommunications companies—AT&T, Verizon and Sprint—participate in a government domestic surveillance program that spies on Americans without judicial warrants. After news of the surveillance broke and President Bush publicly admitted certain portions of it, the carriers' customers filed a series of lawsuits alleging that the participating companies violated multiple privacy laws, as well as rights guaranteed by the Constitution. The Electronic Frontier Foundation ("EFF") is counsel for the plaintiffs in the lead lawsuit, *Hepting v. AT&T*.

The lawsuits, buttressed by multiple admissions about the surveillance by members of Congress and administration officials, led the carriers and the Executive branch to launch an extensive lobbying campaign to secure congressional approval of a process for the Executive branch to retroactively

immunize the carriers, thereby blocking the Judiciary from considering whether those companies violated the law and their customers' privacy.

As the congressional debate raged, EFF sent two sets of FOIA requests to the Department of Justice ("DOJ") and Office of the Director of National Intelligence ("ODNI") (collectively "defendants") aimed at uncovering the lobbying efforts of the carriers and the Executive branch. The goal was to ensure that the public could see how these powerful companies worked hand in glove with the defendants to cover up the carriers' illegal activities.

In July 2008, after months of intense lobbying and debate, Congress passed the FISA Amendments Act ("FAA"), which led to the dismissal of the lawsuits against the carriers. Nonetheless the public controversy continues. Congress is now considering three separate bills that would repeal the carriers' immunity and reinstate the lawsuits.

The defendants refuse to disclose certain material responsive to EFF's FOIA requests for three main reasons, none of which is sound.

First, the defendants claim that intelligence sources and methods will be endangered if the public learns the identities of the carrier representatives who worked with the agencies to draft and promote the immunity provisions. This claim is unsupportable and a misuse of the government's legal authority to protect actual national security secrets. The companies themselves have admitted to seeking

immunity in various lobbying disclosure statements, even naming some of the specific individuals involved. The people whose identities the government seeks to protect are not secret agents, intelligence sources operating in hostile foreign countries, or even the technical architects of the surveillance systems at issue. They are lobbyists, lawyers and consultants to the nation's telecommunications carriers who worked with America's public servants to do a disservice to the public. The effort to hide their identities is not about protecting national security—it's about preventing the public from seeing the influence that corporations wield in the corridors of power in Washington, D.C.

In truth, the public has long been aware of the carriers' involvement in the government's warrantless surveillance program. This fact has been admitted by Executive officials and members of Congress, and has been discussed on the front pages of the nation's newspapers, in books, in dramatic congressional testimony and through documents and declarations presented in court. The disclosure of specific individuals' names may embarrass the Executive branch, the lobbyists, the carriers and ultimately the Congress that was manipulated by them, but it will not endanger the nation's security.

Second, the government claims that carrier representatives pushing for passage of a law have a privacy interest in their names that outweighs the public interest in disclosure. This claim is as overreaching as it is ironic, particularly when

those representatives were seeking immunity to protect the carriers from massive violations of their customers' privacy. Balanced against the significant public interest in knowing who sought immunity, the individuals' minimal privacy interest in their names cannot justify nondisclosure.

Finally, the government argues that immediate presidential advisors are "agencies" for purposes of the FOIA, and their communications are "inter-agency" or "intra-agency" records that may qualify for privilege. This is an overreaching claim. The FOIA's legislative history is clear and unequivocal: the President's immediate advisors are not "agencies" for purposes of the "privilege" exemption to the FOIA. Moreover, the government has failed to show that it is otherwise entitled to withhold material under the various privileges it has claimed.

The government's positions here—using false claims of "secrecy" and "privacy" to hide the lobbying efforts of corporate partners and seeking to stretch the FOIA far beyond its statutory moorings to prevent the public from seeing its own advocacy efforts on behalf of those powerful companies—are the opposite of the new "presumption of disclosure" that this Administration has so loudly trumpeted. The District Court's rejection of those positions was correct and should be affirmed.

STATEMENT OF ISSUES

1.) Whether the government has met its burden under FOIA Exemption 3 to show that disclosure of identities of representatives of telecommunications companies who sought statutory immunity would reveal "intelligence sources and methods."

2.) Whether the government has met its burden under FOIA Exemption 6 to show that disclosure of these identities would constitute a "clearly unwarranted invasion of personal privacy" of the carrier representatives.

3.) Whether immediate presidential advisors and their staffs fall within the FOIA's statutory definition of "agency," and are therefore eligible to claim privilege for inter- or intra-agency records under FOIA Exemption 5.

4.) Whether the government has met its burden to show that the presidential communications, deliberative process, attorney work product, or inter-branch joint deliberative process privileges apply to documents concerning a campaign to secure legal immunity for unlawful surveillance activities.

STATEMENT OF FACTS

The government's arguments against disclosure of the information sought by EFF—especially the defendants' claim that secrecy supposedly requires that the names of corporate representatives who worked to shield the carriers from liability be withheld—ignore the public nature of the underlying dispute.

A. The government conducted a warrantless surveillance program to spy upon the domestic communications of millions of Americans.

Since the fall of 2001, the National Security Agency ("NSA") has conducted a warrantless communications surveillance program with the cooperation of American telecommunications carriers including AT&T, Verizon (which now owns MCI) and Sprint. The unlawful and unconstitutional[1] program, which surveilled millions of ordinary Americans, is described in detail in ER 212-277.[2]

While the program was initially secret, news reached the public four years ago, when it was exposed on the front page of the *New York Times*. ER 279-282. The public learned that the NSA "monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants[.]" *Id.* The day after this report, President Bush admitted aspects of the program in a radio address. ER 284-286. Executive branch officials confirmed that the NSA was tracing and analyzing "large volumes of

[1] The government has admitted that the program violated FISA. Excerpts of Record ("ER") 224-25. As a senator, President Barack Obama declared that "[w]arrantless surveillance of American citizens, in defiance of FISA, is unlawful and unconstitutional." Charlie Savage, *Barak Obama's Q&A*, BOSTON GLOBE, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/.

[2] This Federal Rule of Evidence Section 1006 Summary of Voluminous Evidence, which was originally filed in *In re National Security Agency Telecommunications Records Litigation* ("*In re NSA* MDL") (N.D. Cal. Case No. 06-1791-VRW), was also submitted to the District Court in this litigation. *See also generally* Inspectors General Report on the President's Surveillance Program (unclassified), July 2009, *available at* http://www.justice.gov/oig/special/s0907.pdf.

telephone and Internet communications flowing into and out of the United States." ER 288-289.

The public also learned that the NSA had approached carriers for cooperation in data mining communications, and arranged for back-door access to streams of domestic and international email and phone calls. ER 239-240. The identities of the carriers involved were quickly confirmed by whistleblowers, the telecoms themselves, members of Congress and the Executive branch. For example, former AT&T technician Mark Klein came forward with detailed evidence proving that AT&T has been collaborating with the NSA, providing "over 100 pages of highly technical details . . . including 57 detailed schematics and 24 tables of data." ER 247-252. Numerous members of congressional intelligence committees verified that MCI (since acquired by Verizon) provided call records to the government as part of the program, and confirmed that AT&T participated in the "NSA domestic calls program." ER 254. Telecom executives also identified AT&T, MCI and Sprint as participants. ER 291-292.

Since the NSA's warrantless surveillance program was first revealed, more than 40 lawsuits have been filed throughout the United States by telecom customers seeking to hold their government and cooperating carriers responsible for violating the law. In addition, the United States filed several suits against state public utility commissioners, attorneys general, and various carriers seeking to

block the states' attempts to seek information from the carriers about their involvement in warrantless surveillance activities. ER 527. All of these lawsuits were consolidated in the Northern District of California as the *In re NSA* MDL.[3]

Even within the Bush Administration, concerns over the program's legality led to "very serious disagreement" in March 2004 (ER 255), with Jack Goldsmith, then head of the DOJ's Office of Legal Counsel, testifying that there were aspects of the surveillance that he "could not find legal support for." ER 256.[4] Former Attorney General John Ashcroft said at the time that if he had known the full facts, he never would have signed off on the program. ER 258. As a result of this controversy, about two dozen Bush appointees, including Acting Attorney General James Comey and FBI Director Robert Mueller, were prepared to resign. ER 259. The valid concerns about legality coupled with the lawsuits consolidated in *In Re NSA* MDL led the carriers to become concerned about liability for their role in the warrantless surveillance.

B. The telecommunications carriers lobbied for a law to shield them from liability for their role in the unlawful surveillance activity.

The push for telecom immunity began in the spring of 2007. ER 663-664. Initially, the Executive branch sought to include telecom immunity in the

[3] Plaintiff EFF is Co-Lead Coordinating Counsel in the *In Re NSA* MDL litigation.

[4] Goldsmith referred to the Terrorist Surveillance Program, "a label attached after the original stories appeared about the program." ER 266. It refers to a subset of the larger warrantless surveillance program. *See generally* ER 264-267.

legislation that became the Protect America Act ("PAA"), Pub. L. No. 110-55, 121 Stat. 552 (2007), which amended the Foreign Intelligence Surveillance Act ("FISA"). While the PAA, as enacted, did not provide for immunity, the *New York Times* reported that "pressure from the telecommunications companies on the Bush administration has apparently played a major hidden role in the political battle over the surveillance issue" and that the White House had promised to seek immunity in any future bill. ER 295.

In an August 22, 2007 interview discussing the government's warrantless surveillance activities with the *El Paso Times*, then-Director of National Intelligence J. Michael McConnell confirmed that the named lawsuit defendants had indeed collaborated with the government: "under the president's program, the terrorist surveillance program, the *private sector had assisted us*. Because if you're going to get access you've got to have a partner and *they were being sued*." ER 302 (emphasis added). In light of McConnell's public admission, there is no fair claim that the carriers' identities are secret.

The carriers took steps to defend their interests. As reported by *Newsweek*, "[t]he nation's biggest telecommunications companies, working closely with the White House, have mounted a secretive lobbying campaign to get Congress to quickly approve a measure wiping out all private lawsuits against them for assisting the U.S. intelligence community's warrantless surveillance programs."

ER 308.[5] The lobbying campaign intensified in the fall of 2007 after this Court heard oral argument in the lead case against AT&T, due to "fears that [this Court was] poised to rule that the lawsuit should be allowed to proceed." *Id.*[6]

Congress allowed the Protect America Act to expire on February 16, 2008 without reaching an agreement to extend the controversial law. *See Elec. Frontier Found. v. ODNI*, 542 F. Supp. 2d 1181, 1186 (N.D. Cal. 2008). During February 2008, DOJ and ODNI made repeated public references to communications with carrier representatives, asserting that the companies might refuse to cooperate with even lawful government surveillance requests unless they received immunity in additional pending legislation to amend the FISA. For example, in a February 15, 2008 interview on Fox News, McConnell said, "The companies are telling us if you can't protect us, the cooperation you need is not going to be there." ER 312. Likewise, according to a February 23, 2008 press release jointly issued by DOJ and ODNI, "although our private partners are cooperating for the time being, they have expressed understandable misgivings about doing so in light of the on-going uncertainty and have indicated that they may well discontinue cooperation if the

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[5] *See also generally* ER 126-127, ER 308-310; ER 443-444, 451-452 (evidence of the telecoms' multi-million dollar lobbying campaign to promote retroactive immunity).

[6] This Court ultimately remanded that case without a decision on the merits of the then pending appeal. *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008).

uncertainty persists." ER 316. Similarly, on February 26, 2008, a senior Administration official said that ODNI and DOJ "have been working very closely with general counsel's offices in the various providers, because they've been asking about this looming potential expiration [of the Protect America Act]." ER 325. He explained that the carriers were "concerned about it and they might—they may well withdraw that cooperation if the situation doesn't get cleared up with permanent legislation." *Id*.[7] The next day, McConnell admitted that all of the telecoms were still cooperating (ER 238), but the purported threats to stop cooperating continued to be a key talking point for supporters of further FISA amendments, including DOJ and ODNI. *See, e.g.,* ER 333-334. Some congressional officials came to believe that the telecoms' threats were part of their lobbying strategy to obtain immunity. ER 127.

While the PAA did not authorize domestic wiretapping, the warrantless surveillance program nonetheless continued. ER 263. As of March 2008, the *Wall Street Journal* reported that the NSA still "monitors huge volumes of records of domestic emails and Internet searches . . . . The NSA receives this so-called 'transactional' data from other agencies or private companies[.]" ER 264. At the same time, the government was getting more nervous because, as DOJ put it, the

[7] AT&T refused to cooperate with surveillance requests for six days, while Verizon expressed concerns, but did not refuse. ER 127.

"bottom line is that some of these cases have gotten some traction," ER 323, and that "a merits adjudication of the plaintiff's constitutional claims . . . would significantly negate a major purpose of the retroactive liability" provisions. ER 338 (Attorney General Mukasey and McConnell).

The lobbying campaign was ultimately successful. The FISA Amendments Act, codified at 50 U.S.C. § 1885 *et seq.*, became law in July 2008. Pub. L. No. 110-261, 122 Stat. 2436 (2008). The FAA established a process to extend retroactive legal immunity to the telecoms that facilitated the government's warrantless surveillance program, and resulted in the dismissal of the cases against the telecoms by the District Court. The cases are currently on appeal in this Court.[8]

The carriers' legal immunity continues to be controversial and is the subject of ongoing legislative debate. On September 17, 2009, Senator Russ Feingold and seven other senators introduced the JUSTICE Act, S. 1686, which would eliminate the provision of the FAA that established retroactive legal immunity for carriers that participated in the warrantless wiretapping program. On September 29, 2009, Senator Christopher Dodd and three other senators introduced S. 1725, or the Retroactive Immunity Repeal Act, which would similarly repeal the grant of carrier immunity. On October 20, 2009, Representative John Conyers introduced

[8] The lead case is *Hepting v. AT&T*, Ninth Circuit Case No. 09-16676.

H.R. 3846, the FISA Amendments Act of 2009, which would also repeal telecom immunity.

C. EFF's FOIA requests for records about the telecom lobbying campaign.

On December 21, 2007, EFF faxed two letters to ODNI and the DOJ Offices of the Attorney General ("OAG"), Legal Counsel ("OLC"), National Security Division ("NSD"), Legislative Affairs and Legal Policy, requesting under the FOIA all records from September 1, 2007 to December 21, 2007 concerning "briefing, discussions, or other exchanges" that agency officials

> have had with 1) members of the Senate or House of Representatives and 2) representatives or agents of telecommunications companies concerning amendment to FISA, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities.

Elec. Frontier Foundation, 542 F. Supp. 2d at 1184; ER 731-745.

In letters sent by facsimile on April 24, 2008, to the same set of agencies, EFF requested, under the FOIA, all records:

A. from December 21, 2007 to the present concerning briefings, discussions, or other exchanges any [agency] official has had with representatives or agents of telecommunications companies[9] concerning amendments to FISA,

[9] The phrase "representatives or agents of telecommunications companies" was defined to "include lobbyists and lawyers acting on behalf of such companies. According to *Newsweek*, these individuals include, but are not limited to, 'powerhouse Republican lobbyists Charlie Black and Wayne Berman (who represent AT&T and Verizon, respectively), former GOP senator and U.S. ambassador to Germany Dan Coats (a lawyer at King & Spaulding who is representing Sprint), former Democratic Party strategist and one-time assistant secretary of State Tom Donilon (who represents Verizon), former deputy attorney

(Footnote continued)

including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities;

B. from December 21, 2007 to the present concerning briefings, discussions, or other communications from any [agency] official to any member of the Senate or House of Representatives or their staffs[10];

C. from December 21, 2007 to the present concerning *any* communications, discussions, or other exchanges regardless of subject that any [agency] official has had with Charlie Black, Wayne Berman, Dan Coats, Tom Donilon, Jamie Gorelick or Brad Berenson; and

D. from January 1, 2007 to the present that are responsive to the categories above, and have not yet been produced in response to previous EFF FOIA requests.

See, e.g., ER 770-775 (letter to OAG).

In each of its letters, EFF formally requested expedited processing because the letters sought information about which there was "[a]n urgency to inform the public about an actual or alleged [f]ederal [g]overnment activity," and were "made by a person primarily engaged in disseminating information," as provided in 5 U.S.C. § 552(a)(6)(E)(v)(II), 32 C.F.R. § 1700.12(c)(2), and 28 C.F.R. § 16.5(d)(1)(ii). *See, e.g.,* ER 771-772. Although the defendants granted EFF's

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general Jamie Gorelick (whose law firm also represents Verizon) and Brad Berenson, a former assistant White House counsel under President George W. Bush who now represents AT&T.'" *See, e.g.,* ER 771 (letter to OAG). Brad Berenson is also counsel to AT&T in the *In Re NSA* MDL. ER 398.

[10] EFF did not seek communications *from* members of Congress *to* DOJ officials.

expedited processing requests, they nonetheless failed to respond in a timely manner.

D. The litigation.

EFF filed suit on February 20, 2008 and June 17, 2008, respectively, seeking the immediate processing and release of all improperly withheld records under the FOIA, 5 U.S.C. § 552. ER 964-91. Recognizing the extraordinary public interest in the documents requested, the District Court issued a preliminary injunction requiring the defendants to expedite the processing of EFF's December 2007 requests. *Elec. Frontier Found.,* 542 F. Supp. 2d 1181.[11]

The agencies processed each of EFF's requests as described in detail in the defendants' affidavits and indices filed pursuant to *Vaughn v. Rosen*, 484 F.2d 820, 842 (D.C. Cir. 1973), withholding a significant amount of material in whole or part.[12] *See* ER 128-948. The government moved for summary judgment on December 10, 2008. ER 994 Dkt. 29. Upon reviewing the defendants' explanations for their withholdings, EFF filed a cross motion for summary judgment on January 13, 2009. ER 996 Dkt. 43. EFF challenged only withholdings related to

[11] The parties negotiated a processing schedule for the April 2008 requests, enforcing expedited processing without a motion. *See* ER 1005 Dkt. 62.

[12] Under *Vaughn v. Rosen*, an agency typically submits an affidavit describing the basis for its withholdings and providing justifications for redactions, accompanied by an index listing responsive records and indicating the precise redactions made to the records. We refer to the government's affidavits and indices collectively as its "*Vaughn* submission."

unclassified communications between and among executive agencies, Congress, the White House, and carriers concerning amendments to FISA, and the identities of individual agents or representatives of the carriers within those communications.[13]

Shortly thereafter, on his first full day in office, President Barack Obama issued a Memorandum for Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009). The memorandum provides that "[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." *Id*. On May 12, 2009, after applying the newly issued FOIA guidelines, the defendants released to EFF a small number of additional records identified for "discretionary release." ER 128-202. On September 24, 2009, the District Court denied the government's motion for summary judgment and granted EFF's cross motion, ordering the government to produce all improperly withheld documents by October 9, 2009. ER 4-13. The defendants sought leave to file a motion for reconsideration, which the District Court denied. ER 1-3.

[13] EFF decided not to challenge the adequacy of the agencies' searches, or the withholding of any material under Exemptions 1, 2, 3, or 7(E). EFF also elected not to challenge the withholding of identifying information about government or private sector individuals, except names associated with carriers.

In response to the District Court's September 24 order, the government represents that it has released to EFF all communications exchanged among the Executive branch, carriers and Congress, which the defendants had initially argued were privileged inter- or intra-agency materials exempt from disclosure under FOIA Exemption 5. Gov't Br. 12. The defendants appeal only the parts of the order requiring them to release 1) the identities of representatives of telecommunications companies, and 2) records exchanged within the Executive branch that the government contends are privileged. *Id*.

ARGUMENT

I. The government failed to meet its burden of showing that the identities of telecommunications carrier representatives were properly withheld pursuant to Exemptions 3 or 6.

A. The government has not shown that the identities of representatives of telecommunications carriers fall within Exemption 3.

The government's Exemption 3 withholding of the identities of carrier representatives is unjustified. Exemption 3 applies only to information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). To justify its withholdings, the government primarily relied upon the National Security Act, 50 U.S.C. § 403-1(I)(1), which authorizes the Director of National Intelligence to "protect intelligence sources and methods from unauthorized

disclosure."[14] That authority does not apply here, because disclosing the identities of carrier lobbying representatives would not reveal intelligence sources and methods.

1. The District Court's conclusion that the disclosing the identities of telecommunications carrier representatives would not reveal sources and methods was correct, not clear error.

The District Court correctly concluded that the government failed to meet its burden of proving that disclosing the names of the representatives of the carriers would indirectly reveal intelligence sources or methods. The District Court's factual determinations regarding the "danger of indirect identification" can be overturned on appeal only if they were clearly erroneous. *Willamette Indus., Inc. v. United States*, 689 F.2d 865, 867 (9th Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish." *Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation omitted). The District Court's decision here does not.

In *Assembly of California v. Department of Commerce*, 968 F.2d 916 (9th Cir. 1992), a FOIA case hinged on whether disclosure of the requested information would reveal anything about the agency's decisional process. The Court held that

[14] In addition, the government relies on Section 6 of the National Security Agency Act, 50 U.S.C. § 402 note, to withhold five documents still at issue. *See* Section I.A.3, *infra*.

this was "a fact-based inquiry where deference to the district court's findings is appropriate." *Id.* at 919. As in *Assembly of California*, the determination of whether disclosure of the identities of the carrier representatives would reveal intelligence sources and methods is a fact-based inquiry and the District Court's factual determination is reviewed for clear error.

The District Court's ruling more than meets that standard. The record shows that the identities of numerous carrier representatives have already been publicly disclosed by the companies themselves. Indeed, the Lobbying and Disclosure Act of 1995 ("LDA") requires disclosure of lobbying contacts with the defendants. *See* 2 U.S.C. § 1602(3) (defining "covered executive branch official"). In 2008 alone, AT&T and its lobbyists filed more than eighty reports in the publicly available Lobbying Disclosure Act Database listing individuals who lobbied on the carrier's behalf with regard to FISA. ER 443-444 (listing AT&T's 2008 reports for FISA lobbying). For example, AT&T filed an LDA form admitting it lobbied Congress, the White House, the DOJ and ODNI "[c]oncerning legal liability issues associated with lawsuits and allegations that certain telecom carriers assisted the federal government with certain alleged intelligence programs." ER 451.[15] In one

[15] Therefore, the government speculation that the LDA forms "would not necessarily disclose whether the lobbyist (or his client) had engaged in lobbying regarding the statutory immunity," Gov't Br. 29, is unsupported by the evidence.

document alone, AT&T named nine specific individuals who lobbied on this issue.[16] *Id.*

Revelation of names here would show what particular representatives said—which would be new information not currently known to the public—and the documents may contain additional names that have not been disclosed in the Lobbying Disclosure Act Database. However, the release of the names would create no *new* inferences stemming from the very public lobbying campaign. Moreover, the government has not claimed that the carrier representatives revealed sources and methods in the content of the communications. Gov't Br. 30. In fact, the government claims it has released that content. *See infra* I.B.2.

Further, the identities of the major corporate participants in the warrantless surveillance program are well known. As noted above, the evidence includes admissions by the Executive branch and Congress. *See* ER 235-255. For example, the Bush Administration repeatedly confirmed that the companies who assisted the government were defendants in the *In re NSA* MDL in the course of its advocacy of immunity. *See, e.g.,* ER 237-238. Sourced newspaper reports have been even more blunt. For example, *USA Today* reported: "The National Security Agency has secured the cooperation of large telecommunications companies, including AT&T,

[16] The document identifies Amy Andryszak, Katreice Banks, Wendy Donoho, Lyndon Boozer, Bruce Byrd, Gerald Hogan, Barry Hutchison, Peter Jacoby, and Theodore Kingsley.

MCI and Sprint, in its efforts to eavesdrop without warrants on international calls by suspected terrorists, according to seven telecommunications executives." *See, e.g.,* ER 291.

Nor is it a secret which of the telecoms threatened to withhold cooperation from the government as a negotiating tool in the lobbying push for immunity. *Newsweek* reported that AT&T threatened to stop helping the government conduct surveillance unless its demands for liability immunity were met, and that Verizon made similar avowals. ER 126-127.

The government argues that the District Court did not explicitly find that the disclosure of carrier representatives' identities would not reveal intelligence sources and methods. However, that finding is implicit in the District Court's order to disclose this information, which was in response to EFF's arguments that the carrier identities simply do not reveal sources and methods.[17] Implicit findings of fact are also reviewed for clear error. *See United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991); *Comm. for Idaho's High Desert Inc. v. Yost Comm. for Idaho's High Desert Inc*., 92 F.3d 814, 821 (9th Cir. 1996). The District Court did

[17] The District Court's denial of the government Motion for Reconsideration further confirms this implicit determination, since the government had directly claimed that the court failed to address this issue in its original ruling. ER 1008 Dkt. 93-1.

not commit clear error in ordering that the information be released despite the government's Exemption 3 arguments.

2. The government's factual showing was insufficient to meet its burden of showing that disclosing telecommunications carrier representatives' identities would reveal intelligence sources or methods.

Even if this Court were to review the District Court's decision *de novo*, the government's factual showing is insufficient to meet its burden of showing that Exemption 3 applies. The government has offered nothing more than vague and general assertions. See ER 465-479 (McConnell Decl.). The government cannot simply "rely 'on general assertions that disclosure of certain categories of facts may result in disclosure of the source and disclosure of the source may lead to a variety of consequences detrimental to national security.'" *Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 807 (9th Cir. 1995) (quoting *Wiener v. FBI,* 943 F.2d 972 (9th Cir. 1991)); *see also Navasky v. CIA*, 499 F. Supp. 269, 278 (S.D.N.Y. 1980) (information must "*reasonably* be expected to lead to disclosure" (emphasis added)).

The government asserts that the Director of National Intelligence ("DNI") may prevent disclosure where he declares that it "would create an 'unacceptable risk' that sources or methods will be revealed." Gov't Br. 23 (citing *Berman v. CIA,* 501 F.3d 1136, 1143 (9th Cir. 2007)). In *Berman v. CIA*, this Court found that the President's Daily Brief (PDB) was protected by Exemption 3 after the

government "stated explicitly" that the requested material would disclose sources and methods, and because "his declarations adequately support that assertion." *Id*. at 1144. The government's declaration in *Berman* showed that the PDB "*would* disclose specific intelligence methods, including technical collection methods," that disclosure "*would* tend to reveal the identities of intelligence sources," and that "[e]ach of the Requested PDBs contains information specifically stating sensitive sources or methods of collection." *Id.* at 1142-43 (emphasis original).

In this case, by contrast, the government does not claim that disclosure of the requested information *would* create an "unacceptable risk." The DNI stated:

> I *believe that* disclosure of this type of material would allow the public and our adversaries to draw inferences about which companies are assisting us and which are not. Although it is true that companies that are not assisting the government may have contacted us to discuss liability protection due to the fact that they had been sued for alleged activities, *I believe that* taken as a whole, the type of information being withheld from plaintiffs *could be viewed* as confirming which private parties are or are not assisting the government . . . .

ER 479 (McConnell Decl. at ¶ 26) (emphasis added).

Notably, McConnell uses the waffling language "I believe that" and "could be viewed" to qualify his assertions, and never claims that disclosure actually *would* jeopardize sources and methods. He could not do so, since McConnell knew that the public was already well aware of the carriers' efforts to avoid liability for their participation in the government's unlawful surveillance scheme. Affidavits with nothing more than conclusory and generalized allegations are not sufficient to meet the government's burden of demonstrating that the carrier representatives'

identities fall under Exemption 3. *Kamman v. IRS*, 56 F.3d 46, 49 (9th Cir. 1995) (citing *Church of Scientology of Cal. v. Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979)).[18]

Nevertheless, the government argues, the DNI's speculation should be accorded "great deference," citing *CIA v. Sims,* 471 U.S. 159, 178-79 (1985). Gov't Br. 23. Yet McConnell's assertions must be taken with a grain of salt in light of his history of representing that information about warrantless wiretapping must be kept secret, and then shortly thereafter revealing the very same information to the public when politically expedient.[19] For example, in May 2007, McConnell declared that he could not disclose "any information that would tend to confirm or

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[18] The government's presentation of McConnell's assertions in its brief is deceptive. It leaves out the more tepid language used by McConnell, creating the impression that stronger assertions were made. The government also references a purported "Director's determination that release of the requested information, including the identities of the companies' representatives, would create an 'unacceptable risk' (*Berman*, 501 F.3d at 1143) of revealing which companies have assisted the government's intelligence activities." Gov't Br. 23-24. The key phrase "unacceptable risk" is merely a quote from *Berman*, however, and does not appear anywhere in the government's *Vaughn* submission in this case.

[19] Recently, in *Horn v. Huddle*, 636 F. Supp. 2d 10, 17 (D.D.C. 2009), the court refused to give "a high degree of deference" to the government's secrecy assertion because of government's "prior misrepresentations regarding the state secrets privilege in this case." Likewise, this Court can refuse to defer to McConnell because he previously misrepresented that disclosing whether or not the government has had the cooperation of private entities would cause "exceptionally grave harm" to national security.

deny" whether the NSA program had "the secret help of a private entity." ER 270. Yet just a few months later, as part of the lobbying push for the passage of the FAA, McConnell, in an interview with the *El Paso Times*, confirmed that "the private sector had assisted us," and admitted it again in congressional testimony shortly thereafter. ER 237, 270, 301-306. Indeed, citing McConnell, the White House later issued a press release stating that the "cooperation of private entities in our intelligence operations is not ancillary—it is integral to our operations." ER 235.

3. The government's reliance on Section 6 of the National Security Agency Act is a red herring.

The government's appeal to Section 6 of the National Security Agency Act of 1959, 50 U.S.C. § 402 note, as a second statutory basis for withholding the identities of the carrier representatives also fails. Gov't Br. 24. Section 6 prevents the "disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." 50 U.S.C. § 402 note. It shields information from disclosure like the organizational chart of the NSA, the identity of NSA officials, and direct information about the functions and activities of the NSA, not the lobbying efforts of corporations.

By and large, the government followed this paradigm. *See, e.g.,* ER 856 (claiming Section 6 only with respect to name of NSA employees, and claiming

sources and methods for the names of carrier representatives). Indeed, the government's *Vaughn* indices show that the DOJ entities universally withheld carrier identities on the sole basis of "sources and methods," and used Section 6 for NSA identities.[20] Nonetheless, the ODNI appears to have asserted Section 6 for "one piece of information" (ER 568) in five documents, presumably the five listed in the ODNI *Vaughn* index as Group 6. ER 200-202.

This "one piece of information" for which the government claimed Section 6 apparently "alludes to the potential existence or nonexistence of US Government relationships with private companies." ER 568. As noted above, these relationships are already well known. Moreover, while the government relies upon the "activities" prong of Section 6, Gov't Br. 24, the joint efforts of private corporations and ODNI to lobby Congress to ensure the corporations avoid accountability for violations of federal law are not activities of the NSA. "[A] term so elastic as 'activities' should be construed with sensitivity to the 'hazard(s) that Congress foresaw.'" *Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 828 (D.C. Cir. 1979). Thus, even for these five documents, the government has not shown that the District Court erred by ordering that the identities of telecommunications representatives must be disclosed.

[20] See, e.g., ER 164 (Office of Information Policy ("OIP") Vaughn Index); ER 179-180, 184-186, 188 (OLC Vaughn Index); ER 494 (FBI Declaration Index); Supplemental Excerpts of Record ("SER") 6, 9-15 & 17-19 (NSD Vaughn Index).

4. The government's failure to segregate exempt material from non-exempt information is an additional reason to affirm denial of the government's summary judgment motion.

The District Court's denial of the government's summary judgment motion must be upheld even if the decision granting EFF's motion for summary judgment is not. This is because the government has failed to meet its obligation to segregate legitimately exempt material from information that must be disclosed. The FOIA explicitly requires that "[a]ny reasonably segregable potion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]" 5 U.S.C. § 552(b).

"The focus of the FOIA is information, not documents, and the agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Willamette Indus.*, 689 F.2d at 867 (addressing the identities of taxpayers withheld pursuant to Exemption 3). In *Willamette Industries,* the district court found that requested documents could be edited and disclosed without danger of identifying the taxpayers to which the documents apply. *Id.* at 868. Even though an expert "testified that in certain circumstances a knowledgeable person in the industry might be able to identify the individual taxpayer by the location of certain tracts, no specific evidence was given as to how often this danger of indirect identification might exist." *Id.* Thus, the Court

affirmed, holding that the district court's findings were not clearly erroneous because the IRS's argument was "too speculative and not supported by facts." *Id.*

Here, the government continues to withhold at least some records in their entirety. ER 200-202 (listing communications with telecoms as "denied in full"). But it has presented no evidence that anyone could identify the carrier representatives from the rest of the withheld material. Indeed, the only evidence provided to the court to support this nondisclosure was a conclusory statement that "we determined that [the documents] did not contain any reasonably segregable, non-exempt information."[21] ER 204.

5. The government has at best demonstrated a dispute of fact about the identity of telecommunications carrier representatives.

Even if this Court does not affirm the grant of summary judgment to EFF on the issue of carrier representative identities, the denial of the government's summary judgment must be upheld. At best, the government has shown a dispute of fact about whether the disclosure of these identities would lead to the disclosure of intelligence sources and methods, precluding summary judgment. Accordingly, the proper course of action (absent affirmance) is to remand to the District Court to

[21] The government does not cite to this declaration. Instead, the government's brief incorrectly asserts that it has released the substance of all the communications. Gov't Br. 30-31.

resolve this disputed fact. *See Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1149-50 (9th Cir. 2008).

B. The government has failed to show that identities of representatives of telecommunications carriers are properly withheld under Exemption 6.

The government also tries to justify withholding the identities of telecom representatives by invoking FOIA Exemption 6. 5 U.S.C. § 552(b)(6). But that exemption only protects individuals' personal privacy, and may not be invoked to conceal professional dealings. *See Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982). "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships." *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980). Each of the individuals whose identity is being withheld communicated with the government on behalf of a carrier, not as a private citizen. Gov't Br. 25.[22]

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Courts have developed a two-step test to determine

[22] The government is not helped by the recent decision in the Third Circuit that a corporation has a privacy interest for the purposes of Exemption 7(C), 5 U.S.C. § 552(b)(7)(C). *AT&T v. FCC*, 582 F.3d 490, 498 (3d Cir. 2009). The exemption at issue in that case is aimed at encouraging cooperation with law enforcement. The court took care to note that its holding had no application to Exemption 6, noting, "Exemption 6 would apply only to individuals even if 'personal privacy,' taken on its own, encompasses corporations." *Id.* at 497.

whether a record may be withheld under Exemption 6. First, the record withheld must be of the type of personnel, medical or "similar files" protected by the statute. Second, if a record meets that threshold will courts examine whether its disclosure "would constitute a clearly unwarranted invasion of personal privacy." *Wash. Post,* 456 U.S. at 601, 602. Neither step is met here.

1. Disclosing telecommunications carrier representatives' identities would not constitute a clearly unwarranted invasion of personal privacy.

The irony of the government's Exemption 6 argument is apparent. The government argues that the names of the carrier representatives who sought legal immunity for their principals' participation in a massive and illegal invasion of privacy must be withheld—in the name of privacy. Exemption 6 permits the government to withhold records only where disclosure would result in a "clearly unwarranted invasion of personal privacy." Determining whether there is a risk of such invasion requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (quoting *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation

of the public's right to governmental information." *Rose*, 425 U.S. at 372 (quoting S. Rep. No. 89-813, at 8 (1965)).

Given the FOIA's "strong presumption of disclosure" and the statutory language exempting only "clearly unwarranted" invasions of privacy, the balance does not begin level, but with a finger on the requestor's side of the scale. In other words, "the court [should] tilt the balance in favor of disclosure." *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971). In fact, "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Wash. Post Co. v. Dep't of Health and Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1983); *accord Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009).

Only in certain circumstances do individuals have a privacy interest in their identities. *See, e.g., Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (finding that individuals have a privacy interest in keeping their names, coupled with their home addresses, private). The government agues here that the "sensitive and controversial" nature of the retroactive immunity legislation enacted led to an expectation that the carrier representatives' identities remain private. Gov't Br. 28. However, in *Alliance for Wild Rockies v. Department of the Interior*, the court rejected a similar claim, holding that Exemption 6 did not protect the names of individuals who submitted comments to an Executive branch agency as part of a proposed rulemaking. 53 F. Supp. 2d 32, 36 (D.D.C. 1999). Even "when certain

'special circumstances' exist[ed], namely when the comments pertain to sensitive or controversial issues," the court found the commenters' privacy interest to be minimal, "if any" existed at all. *Id*.

It is the government's burden to sustain its withholdings by means of declarations or other testimony. *Rose*, 425 U.S. at 358; 5 U.S.C. § 552(a)(4)(B). This requires the government to specifically "articulate the privacy interest in the records, [and] demonstrate that such privacy interests meet the standard for an agency's withholding under Exemption 6." *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C. Cir. 2007).

The government points to the declaration of John F. Hackett (Director of Information Management at ODNI) to support its claim that disclosure of the names of carrier representatives "would constitute a clearly unwarranted invasion of personal privacy" and is therefore forbidden by Exemption 6. Gov't Br. 27-28 (citing ER 938-939). But the Hackett declaration fails to identify any cognizable privacy interests, much less a "clearly unwarranted" invasion of those interests, and therefore cannot sustain the Exemption 6 withholdings. Hackett simply asserts that "[i]ndividuals who communicate with the ODNI to discuss matters that are viewed as controversial by some members of the public have an expectation that their names and other identifying information will not be publicly disclosed." ER 938.

The government errs in asserting that such individuals have a cognizable privacy interest in keeping their names secret. Gov't Br. 28. A rule barring release of the identities of those who attempt to influence public policy on "controversial" issues would gut the FOIA's strong presumption in favor of disclosure. The government's assertion that disclosing identities "will tend to impair the lines of communication between the Executive Branch and private individuals" is irrelevant. Gov't Br. 28. Even if this was true, disclosure would not be clearly unwarranted because the effect of disclosure on *the agency* is irrelevant to an Exemption 6 analysis. "Exemption 6 on its face is concerned with protecting personal privacy, and no more." *Wash. Post Co.*, 690 F.2d at 260 n.23.

Finally, the government has failed to show that the individual carrier representatives will be harmed if their names become public. Such a showing is required to justify an Exemption 6 withholding. "The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Rose*, 425 U.S. at 381 n.19. A typical example of the harm that Exemption 6 is intended to prevent can be found in *Judicial Watch, Inc. v. Food & Drug Administration*, 449 F.3d 141, 153 (D.C. Cir. 2006). In that case, the D.C. Circuit held that where the government had produced supporting affidavits detailing "the danger of abortion-related violence to those who developed [an abortion pill], worked on its FDA approval, and continue to manufacture the drug,"

it had satisfied its burden under Exemption 6. *Id*. No such possibility of harassment has been suggested in this case; indeed, the names of carrier representatives lobbying on this issue have been publicly available for years, with no evidence of harassment.

In the absence of such a possibility, the privacy interests "are not particularly compelling" and the agency "has not met its burden" to sustain an Exemption 6 withholding. *Int'l Broth. of Elec. Workers Local Union No. 5 v. Dep't of Hous. and Urban Dev.*, 852 F.2d 87, 92 (3d Cir. 1988). Because the government has failed to show that the individual carrier representatives would be harmed by disclosure of their identities in any way whatsoever, it has failed to carry its Exemption 6 burden.

2. The public interest tips the balance strongly in favor of disclosure of the identities of telecommunications carrier representatives.

The Court must balance privacy interests against "the preservation of the basic purpose of the FOIA 'to open agency action to the light of public scrutiny.'" *Rose*, 425 U.S. at 372 (quoting *Rose*, 495 F.2d at 263). The "relevant 'public interest in disclosure' to be weighed in this balance is the extent to which disclosure would . . . 'contribut[e] significantly to public understanding of the operations or activities of the government.'" *Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989)) (emphasis omitted). Agency efforts to influence

the drafting and passing laws is undoubtedly an operation or activity of the government. To the extent that carrier representatives have any privacy interest in their work-related communications—a dubious proposition, at best—it is outweighed by the strong public interest in determining the impact and nature of the agency and carriers' lobbying efforts. ER 308-310.

As discussed in I.A.1 *supra*, Congress has required the disclosure of lobbying contacts through the Lobbying and Disclosure Act. The LDA recognized the public's right to know about specific attempts to influence the government and has required the disclosure of the identities of registered lobbyists. 2 U.S.C. § 1601; *see also* the Honest Leadership and Open Government Act of 2007 (Pub. L. 110-81, 121 Stat. 735) (amending the LDA to increase public disclosure requirements). Additionally, other statutes reveal an overarching federal policy of disclosing information about attempts to influence government, even when it could possibly reveal personal details. *See Wash. Post Co.*, 690 F.2d at 263, 265 (Ethics in Government Act argues for disclosure); *Common Cause v. Nat'l Archives & Records Serv.*, 628 F.2d 179, 184-85 (D.C. Cir. 1980) (Federal Corrupt Practices Act policy favors disclosure).

As acknowledged by Congress in the LDA, "responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and Executive Branches

of the Federal Government [and] effective public disclosure of the *identity* and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government." 2 U.S.C. § 1601 (emphasis added). The government's assertion that there is no public interest in knowing the identities of the carrier representatives is clearly mistaken. ER 30.[23]

The government claims that because it has disclosed the content of the carriers' communications with the defendants, the public can have no interest "whatsoever" in knowing the identities of the industry representatives involved. Gov't Br. 30. This argument is factually wrong; the government continues to withhold the content of many of the carriers' communications. *See* ER 197-202 (ODNI *Vaughn* Index Group 6). Equally important, the public has a strong interest in the disclosure of the roles and identities of individuals who participated in the drafting of legislation that was designed to avoid accountability for violations of law, especially as Congress considers new legislation to repeal that law.

[23] The carriers are not required to disclose lobbying where it is "not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law." 2 U.S.C. § 1602(8)(B)(xi). While this may cover lobbying reports that would necessarily disclose classified information, it does not mean, as the government asserts, that Exemption 6 protects all communications on "matters that are viewed as controversial by some members of the public." *Alliance for Wild Rockies,* 53 F. Supp. 2d at 36. The government notes that the LDA does not require reports about all contacts. Gov't Br. 29 n.8.

Such knowledge is also necessary for the public to determine whether the government is complying with its promise to reduce the influence of lobbyists in the new administration. Immediately after taking office, President Obama issued an executive order entitled "Ethics Commitments by Executive Branch Personnel," which severely limits the role of former lobbyists in the administration. Exec. Order No. 13,490, 3 C.F.R. § 13490 (Jan. 21, 2009). The policy prohibits Executive branch personnel from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients." But the public cannot assess whether the Administration is honoring that prohibition unless it knows the identities of individuals who lobbied the defendant agencies.[24]

II. The Court should affirm the District Court's order that the defendants disclose communications within the Executive branch.

FOIA Exemption 5 shields from disclosure a narrow category of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency[.]" 5 U.S.C.

[24] This is not an idle concern. For example, Wilmer Cutler Pickering Hale & Dorr is counsel for Verizon in the *In re NSA* MDL, and the Administration has nominated or appointed numerous of the firm's attorneys to Executive branch positions, including within defendant DOJ. *See* WilmerHale, *WilmerHale Attorneys Transition to High-Ranking Government Positions,* http://www.wilmerhale.com/about/news/newsDetail.aspx?news=1643 (June 10, 2009) ("The list of former WilmerHale lawyers working for the government now totals more than 20.").

§ 552(b)(5). The exemption protects a record from release where "its source [is] a government agency," and where the withheld material falls "within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context").

The defendants claim four distinct privileges to continue withholding documents under Exemption 5: the presidential communications privilege, the deliberative process privilege, the attorney work product doctrine, and an inter-branch deliberative process privilege. In each case, the government has failed to show that it has properly withheld all material.

A. Communications between agencies and the White House do not satisfy the Exemption 5 inter- or intra-agency threshold requirement to claim privilege.

By its very terms, Exemption 5 protection is limited to "inter-agency or intra-agency" records. 5 U.S.C. § 552(b)(5). The government asserts that communications between Executive branch agencies and the White House qualify as "inter- or intra-agency" materials. *Id*. The government is wrong.

The FOIA defines an "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other

establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1). The government argues, and EFF agrees, that communications within DOJ and ODNI or between Executive branch agencies satisfy the threshold.[25] Gov't Br. 33. But the legislative history of the FOIA explains that the term "Executive Office of the President" in the definition of "agency" was *not* intended to include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Conference R. No. 93-1380 at 232 (1974); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1109 n.1 (D.C. Cir. 2004).[26]

The government concedes this, but argues that "it is nonetheless well settled that that Exemption 5 protects deliberative communications between agencies and the President and his immediate advisors," Gov't Br. 34, citing *Environmental Protection Agency v. Mink*, 410 U.S. 74, 85 (1973). *Mink* is inapposite: the

[25] This does not mean, of course, that such materials are exempt from disclosure. The government still bears the burden of proving that a privilege applies to documents that satisfy the threshold inquiry, as discussed *infra* in II.B.

[26] Instead, the definition was intended to include "any administrative unit with the substantial independent authority in the exercise of specific functions," consistent with *Soucie v. David,* 44 F.2d 1067, 1073 (D.C. Cir. 1971). S. Rep. No. 93-854 at 185 (1974).

Supreme Court issued the decision the year *before* Congress amended the FOIA to include the current definition of "agency." The other cases cited by the government likewise rely in significant part on this statutorily superceded decision, not recognizing that the 1974 amendments to the FOIA made clear that the statutory definition of "agency" excludes immediate White House advisors. *See Judicial Watch, Inc. v. Dep't of Energy,* 412 F.3d 125, 347 (D.C. Cir. 2005); *Berman v. CIA*, 378 F. Supp. 2d 1209, 1219 (E.D. Cal. 2005); *see also Binion v. Dep't of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983).[27]

B. The government has failed to show that communications that purportedly satisfy the threshold are privileged.

The inter- or intra-agency threshold is only the first requirement an agency must satisfy to withhold material under Exemption 5. Next, the agency must demonstrate that the record is privileged. As the District Court properly noted, there is no need to decide whether a privilege applies when the government has failed to meet the threshold. ER 12. Nonetheless, if this Court finds the

[27] This does not mean that the President is foreclosed from asserting executive privilege over his communications or those reaching his immediate advisors or their staffs. The law recognizes a qualified, constitutionally rooted executive privilege independent of the FOIA that protects the policy-making processes of acting and former presidents. *See, e.g., United States v. Nixon*, 418 U.S. 683, 703-13 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 446-55 (1977); *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). However, the government has not claimed such a privilege here.

government satisfied the threshold, it should affirm the District Court's decision because the government failed to show that it withheld only privileged material, and the Court may affirm the District Court's judgment on any basis supported by the record. *Travelers Prop. Cas. Co. of Am. v. ConocoPhillips Co.,* 546 F.3d 1142, 1145 (9th Cir. 2009) (citing *Atel Fin'l Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (per curiam)).

The government was not entitled to summary judgment on Exemption 5 because it failed to demonstrate that all the documents it withheld were privileged. For this reason, the District Court's denial of the government's motion should be affirmed. To the extent that the Court believes that factual determinations are necessary to make the privilege determinations, the proper resolution is affirming the denial of summary judgment and remand for further proceedings.

1. The presidential communications privilege does not allow the government to withhold materials unless they are authored or solicited and received by immediate presidential advisors.

To shield a significant amount of material still at issue, the government asserts the presidential communications privilege, which protects communications reflecting presidential deliberations that the President determines should remain confidential. *United States v. Nixon*, 418 U.S. at 708. The privilege covers documents authored or solicited and received by the President himself, and also extends "down the chain of command" to the President's "immediate White House

advisors" and their staffs. *Judicial Watch v. DOJ*, 365 F.3d at 1115-16. It is limited to White House advisors who have "broad and significant responsibility for investigating and formulating the advice to be given to the President on the particular matter to which the communications relate." *In re Sealed Case,* 121 F.3d at 752. But the privilege does not extend to more remote White House employees, nor does it apply outside the White House to officials in Executive agencies. *Judicial Watch v. DOJ,* 365 F.3d at 1116-24; *In re Sealed Case*, 121 F.3d at 752.

In considering the government's claims, the Court must "proceed on the basis that '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.'" *Judicial Watch v. DOJ*, 365 F.3d at 1116 (quoting *In re Sealed Case*, 121 F.3d at 752). In cases where the disputed material involves the communications of presidential advisors, the D.C. Circuit has "recognized that the need for the presidential communications privilege becomes more attenuated the further away the advisers are from the President." *Judicial Watch v. DOJ,* 365 F.3d at 1123; *In re Sealed Case*, 121 F.3d at 752.

Here, the defendants' sweeping invocations of the privilege lack any legal support for four reasons. First, the presidential communications privilege does not extend outside the White House. *In re Sealed Case*, 121 F.3d at 752; *Judicial Watch v. DOJ*, 365 F.3d at 1114. Yet the vast majority of material still being

withheld under this privilege has no apparent connection to White House advisors. Specifically, the government claims the privilege to cover communications to, from, and among a wide range of government agencies, including officials from ODNI, CIA, NSA, and the DOJ's Civil Division, Office of the Attorney General, National Security Division, Office of Legislative Affairs, Office of Legal Counsel, Office of Legal Policy, and the FBI.[28]

The D.C. Circuit has rejected the extension of the privilege to shield documents involving "dual hat" advisors who perform duties in addition to advising the President.[29] As that court noted in *Ryan v. Department of Justice,* when considering whether the Attorney General should be considered an immediate presidential advisor in particular situations, "the President has a choice between using his staff to perform a function and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt. To redraw this statutory line in a

[28] *See*, *e.g.*, ER 152-66 (OIP *Vaughn* Index Groups 2-4 & 9); ER 169-94 (OLC *Vaughn* Index Groups 1, 37, 44, 49, 53-55, 57, 75-79, 81-82, 85, 87); ER 197-202 (ODNI *Vaughn* Index Group 6); ER 572-88 (Kovakas Decl. ¶¶ 9-14, 17-20 & 24); SER 6-7 (NSD *Vaughn* Index Part 1, Groups 6-7).

[29] ER 152-66 (OIP *Vaughn* Index 1-3 & 9); ER 169-94 (OLC *Vaughn* Index Groups 1, 10, 12, 15-6, 21, 24, 26, 37, 44, 49, 53-5, 57, 75-79, 81-2, 85 & 87); ER 197-202 (ODNI *Vaughn* Index Group 6); SER 6 (NSD *Vaughn* Index Group 2).

different manner, based on complex functional considerations, would strain the language of the Act[.]" 617 F.2d 781, 789 (D.C. Cir. 1980); *accord Judicial Watch v. DOJ*, 365 F.3d at 1120. If accepted by this Court, the defendants' argument would effectively render the FOIA a nullity, since the government could claim that virtually any agency record is somehow related to presidential decisionmaking, even if no one in the White House sent or received it.

Second, a communication falls within the presidential communications privilege only when it involves "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 on the particular matter to which the communications relate." *In re Sealed Case*, 121 F.3d at 752. For the relatively few communications for which the government identifies some connection to a White House official,[30] the defendants have in most cases failed to identify the advisors, their responsibilities, and whether those responsibilities included investigating and formulating advice to the President on the matters to which the communications relate.

After moving for summary judgment, DOJ chose as a discretionary matter to release the names of a handful of high-level White House officials involved in

[30] *See*, *e.g.*, ER 152-66 (OIP *Vaughn* Index Group 1); ER 169-94 (OLC *Vaughn* Index Groups 10, 12, 15-16, 21, 24 & 26); ER 197-202 (ODNI *Vaughn* Index Group 6); SER 6 (NSD *Vaughn* Index Part 1, Group 2).

several communications at issue.[31] But according to the government's affidavits, only "some" of the documents for which the privilege is claimed involved "the President's White House staff." ER 548 (Meyer Decl. ¶ 22). The government's justification for asserting the privilege for those records is even weaker than in *Center for Biological Diversity v. Office of Management and Budget*, in which an agency failed to justify its invocation of the presidential communications privilege where it provided the names of White House officials for whom the privilege was claimed, but did not explain their capacities, proximity to the President, or roles in authoring or soliciting and receiving the documents. No. 07-4997 MHP, 2008 U.S. Dist. LEXIS 98387, 2008 WL 5129417, at *12 (N.D. Cal. Dec. 4, 2008). Here, the government has selectively provided the names of a few White House officials, but has failed to explain the nature of their positions or their proximity to the President.

Third, the presidential communications privilege may be invoked to protect *only* communications "authored or solicited and received" by the President's immediate advisers or their staff members. *In re Sealed Case*, 121 F.3d at 752. By

[31] ER 164 (OIP *Vaughn* Index 10), SER 9-15 (NSD *Vaughn* Index Part 1, Group 5). But NSD released these names in only five of 32 records in the *Vaughn* group, and continues to withhold the names of all White House officials in the other records. Similarly, OIP has released names of two White House officials in three email messages (totaling five pages), but continues to withhold White House names in all the records described in OIP *Vaughn* Index Group 1. ER 153-55. ODNI also continues to withhold the names of White House officials in ODNI *Vaughn* Index Group 6. ER 197-202.

the government's own admission, only *some* communications were authored or solicited and received by White House officials. The Meyer Declaration notes that these staff members *included* representatives of the White House Counsel's Office and the White House Offices of the Chief of Staff, Legislative Affairs, Communications, and the Office of the Vice President. ER 535 (Meyer Decl. ¶ 3). The government failed to meet its burden because Meyer leaves open the possibility that some individuals may have represented other offices within the White House.

Further, the defendants' characterization of emails as "between," "among" or "to" parties including White House representatives does not provide enough detail to show that the communications were "authored or solicited and received by" White House advisors.[32] Indeed, the Office of Legal Counsel's *Vaughn* index shows that in one case, White House employees were merely copied on one of the

[32] In any event, the presidential communications privilege covers only communications, as the name of the privilege plainly states. *Citizens for Responsibility and Ethics in Wash. v. Dep't of Homeland Security,* 592 F. Supp. 2d 127, 132 (D.D.C. 2009); *Citizens for Responsibility and Ethics in Wash. v. Dep't of Homeland Security,* 592 F. Supp. 2d 111, 118 (D.D.C. 2009). It is inappropriate to apply the privilege to documents that are *not* communications, such as handwritten notes and talking points. ER 152-166 (OIP *Vaughn* Index Group 4); ER 169-94 (OLC *Vaughn* Index Group 1); SER 15-16 (NSD *Vaughn* Index Part 1, Groups 6 & 7).

withheld communications, making it highly unlikely that it was "authored or solicited and received by" the White House parties.[33]

Fourth, *In re Sealed Case* made clear that the presidential communications privilege "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the President." 121 F.3d at 752. Here, the government has failed to explain how the governmental operations to which the allegedly privileged communications relate satisfy this standard. All the documents still at issue relate to *Congress's* development of legislation to amend FISA. The President may have input into the legislative process and may sign or veto legislation that has passed the House and Senate, but Congress retains the constitutional power to pass laws, including the power to override a presidential veto. U.S. Const., art. II, § 7. With respect to certain documents withheld under the presidential communications privilege, the defendants do not establish the required nexus to presidential decisionmaking, and thus have failed to carry their burden of showing that the requested records are exempt from disclosure.[34]

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[33] ER 174 (OLC *Vaughn* Index Group 21).

[34] *See, e.g.*, ER 152-166 (OIP *Vaughn* Index, Groups 1, 2-3 & 9-10); ER 169-94 (OLC *Vaughn* Index Groups 1, 10, 12, 15-16, 21, 24, 26 37, 44, 49, 53-545, 57, 75-79. 81-82, 85 & 87); ER 197-202 (ODNI *Vaughn* Index Group 6); SER 6 & 9-16 (NSD *Vaughn* Index, Part 1, Groups 2 & 5-7).

2. The deliberative process privilege does not justify the government's withholding of material that is not predecisional and deliberative.

If a record meets the "inter-agency or intra-agency" threshold, it may be withheld pursuant to the deliberative-process privilege only if it is "*both* (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n v. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (emphasis original) (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)); *see also Maricopa Audubon Soc'y v. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). Records that "simply state or explain a decision the government has already made" are not within the privilege. *Judicial Watch v. DOJ*, 365 F.3d at 1113 (quoting *In re Sealed Case*, 121 F.3d at 737) (internal quotation marks omitted).[35]

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[35] As the D.C. Circuit has noted, the deliberative process privilege "is a general privilege that that applies to all executive branch officials." *Judicial Watch v. DOJ*, 365 F.3d at 1114. Thus, material not eligible for the presidential communications privilege may still qualify for protection under the deliberative process privilege, if the government can demonstrate that it should apply. *Id*. at 1117.

The distinction between the presidential communications privilege and the deliberative process privilege is important because the former provides the government greater protection against disclosure: it is "specific to the President and applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *Judicial Watch v. DOJ*, 365 F.3d at 1114 (quoting *In re Sealed Case*, 121 F.3d at 745) (internal quotation marks omitted). Furthermore, the presidential communications privilege exempts entire documents from disclosure, while material withheld under the deliberative process

(Footnote continued)

This Court has explained, "Exemption 5 cases contrast agency documents leading to a decision with documents explaining or interpreting a decision after the fact. Because an agency's interpretations of its decisions often become the 'working law' of the agency, documents deemed 'postdecisional' do not enjoy the protection of the deliberative process privilege." *Assembly of Cal.*, 968 F.2d at 920 (citing *NLRB*, 421 U.S. at 153). It is the agency's burden to "establish[] the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *United States v. Rozet*, 183 F.R.D. 662, 666 (N.D. Cal. 1998) (citing *Strang v. Collyer*, 710 F. Supp. 9, 11 (D.D.C. 1989), *aff'd*, 899 F.2d 1268 (D.C. Cir. 1990) (internal quotation marks omitted). Critically, an agency also must "*identify a specific decision* to which the document is predecisional" to withhold information under Exemption 5. *Maricopa Audubon Soc'y,* 108 F.3d at 1094 (emphasis added); *see also Assembly of Cal.*, 968 F.2d at 921.

The government's invocations of the deliberative process privilege fail for three reasons. First, the defendants' descriptions of many withheld documents are too vague to demonstrate that the deliberative process privilege has been properly

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privilege must be segregated from non-exempt material. *In re Sealed Case*, 121 F.3d at 745-46. Both are qualified privileges that can be trumped, however, by a "sufficient showing of need." *Judicial Watch v. DOJ*, 365 F.3d at 1114; *see also In re Sealed Case*, 121 F.3d at 745-46 (describing the differences between the two privileges).

applied. The *Vaughn* indices describe some documents in such general terms as "handwritten notes regarding FISA," or "email chain between DOJ and ODNI officials discussing a telephone call received from a telecommunications company."[36] It is impossible to identify any deliberative process or agency decision from such perfunctory descriptions. To the extent the documents relate to ongoing deliberations over amending FISA, the disclosure of such records cannot risk exposing the agencies' deliberative process for the simple reason that the "process" at issue—enactment of legislation—belonged to Congress, not agencies.

Second, the deliberative process privilege may not be invoked to "protect material that is purely factual" rather than deliberative. *Judicial Watch v. DOJ*, 365 F.3d at 1113 (quotation omitted); *see also Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). Some of the withheld documents appear to contain just this type of information. For example, documents that simply report or provide summaries of conversations with congressional staffers, briefings after the fact, or congressional activity convey facts and not agency deliberations.[37]

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[36] ER 197-202 (ODNI *Vaughn* Index Group 6); SER 15-16 (NSD *Vaughn* Index Part 1, Group 6).

[37] *See*, *e.g.*, ER 152-66 (OIP *Vaughn* Index Group 3); ER 169-94 (OLC *Vaughn* Index Groups 26, 37, 76 & 85); ER 197-202 (ODNI *Vaughn* Index Group 5); SER 4-8 (NSD *Vaughn* Index Part 1, Groups 1-4).

Third, the defendants have improperly withheld post-decisional material. The records at issue in this case are related to Congress's efforts to amend FISA, a process that lasted for many months. The defendants' internal deliberations consisted of developing their positions on the evolving legislation—positions that were periodically finalized and conveyed to congressional staffers, carriers, the White House, and the public.[38] In such situations, "even if a document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Rozet*, 183 F.R.D. at 666 (citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir 1980)); *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356-67 (2d Cir. 2005); *see also NLRB*, 421 U.S. at 161 (Exemption 5 does not apply to any intra-agency record that an agency has chosen to expressly adopt or incorporate by reference into a final opinion). For example, the defendants' affidavits make clear that they used talking points to

[38] *See, e.g.,* ER 378-88 (Executive Office of the President, Office of Management and Budget, Statement of Administrative Policy on S. 2248—To Amend the Foreign Intelligence Surveillance Act of 1978 (Dec. 17, 2007); Executive Office of the President, Office of Management and Budget, Statement of Administrative Policy on H.R. 5104—To Extend the Protect America Act of 2007 for 30 Days (Jan. 28, 2008); Executive Office of the President, Office of Management and Budget, Statement of Administrative Policy on H.R. 5349—To Extend the Protect America Act of 2007 for 21 Days (Feb. 13, 2008)).

communicate final agency policies to Congress, the public and the media.[39] There is no indication that these withheld documents were drafts or otherwise reflected agency deliberations.

The Court should also consider the government's past misuse of this privilege in reviewing the defendants' representations here. In May 2009, after President Obama issued his FOIA memorandum, ODNI made a "discretionary" release of several records previously withheld in full under the deliberative process privilege. These materials are unquestionably final documents used in the agency's dealings with the public.[40] For example, some of the documents released by ODNI that are publicly available include:

- a "fact sheet,"[41]
- a joint statement by DOJ and ODNI regarding a House FISA proposal,[42]
- copies of *New York Times* and *Washington Post* op-eds by McConnell,[43]

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[39] ER 608-09, 725-26 (Steele Decl. ¶ 30 (talking points "used to brief officials and prepare them to answer inquiries . . . in anticipation of questions from members of the public, as well as Congressional inquiries"); Pustay Decl. ¶ 61 (talking points "used to brief officials and prepare them to answer inquiries from Congress, members of the public, or the media")).

[40] Each of these records was also apparently withheld under the presidential communications privilege. ER 197-202 (ODNI *Vaughn* Index Group 2).

[41] Compare "FISA Legislation Necessary to Keep Our Nation Safe" ER 52-54, as released in full by ODNI, with ER 98-101.

[42] Compare ER 55-57, as released by ODNI, and ER 103-04.

[43] Compare ER 60-72, as released by ODNI, and ER 106-110.

- a statement of administration policy on a House bill,[44] and
- a transcript of an interview with McConnell on CNN's "Late Edition."[45]

Despite the clear and obvious post-decisional character of these records, the government's *Vaughn* submission asserted unequivocally that these documents were properly exempt from disclosure under Exemption 5.[46] Such withholdings raise reasonable concerns that other records are improperly withheld under the privilege and should prevent the government from receiving the benefit of the doubt.

3. The attorney work product privilege does not justify the withholding of material reflecting lobbying efforts.

The government continues to withhold a small number of documents under the attorney work product doctrine.[47] This privilege is designed to protect documents prepared by an attorney that reveal the attorney's theory of the case or litigation strategy. *Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19 (1983). It does not protect lobbying efforts with respect to prospective *legislation*. *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 164 (E.D.N.Y. 1994); *In re*

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[44] Compare ER 74-76, as released by ODNI, and ER 112-14.

[45] Compare ER 88-96, as released by ODNI, and ER 116-24.

[46] *See* ER 933 (Hackett Decl. ¶ 31); ER 948-53 (Turner Decl.); ER 465-479 (McConnell Decl.).

[47] *See*, *e.g.*, ER 169-94 (OLC *Vaughn* Index Groups 49, 75, 79 & 81); ER 197-202 (ODNI *Vaughn* Index Group 6); ER 572-88 (Kovakas Decl. ¶¶ 9-14; 17-20 & 23); SER 17 (NSD *Vaughn* Index Part 1, Group 8).

Grand Jury Subpoenas dated March 9, 2001, 179 F. Supp. 2d 270, 285 n.6 (S.D.N.Y. 2001) (citing *U.S. Postal Serv.,* 852 F. Supp. 156, *Harper-Wyman Co. v. Conn. Gen. Life Ins. Co*., No. 86 C 9595, 1991 U.S. Dist. LEXIS 5007, 1991 WL 62510 (N.D. Ill. Apr. 17, 1991)); *N.C. Elec. Membership Corp. v. Carolina Power & Light Co.,* 110 F.R.D. 511 (M.D.N.C. 1986).

The District Court ruled that communications between the defendants and carriers did not satisfy the inter- or intra-agency threshold for Exemption 5 protection, and therefore could not be withheld under the common interest privilege, attorney work product doctrine, or other privilege. ER 11-12. The government does not challenge that aspect of the Court's order. The only communications still withheld under the attorney work product doctrine, therefore, are materials exchanged within the Executive branch.

The government has failed to show that the disclosure of certain records would in fact reveal an attorney's theory of the case or litigation strategy. For example, an intra-agency email forwarding an unprivileged communication from a carrier with a redlined version of draft FISA legislation does not reveal the government's *litigation* strategy.[48] Likewise, the government has failed to show how intra-agency emails "relaying" congressional deliberations about draft legislation and the substance of communications with carrier representatives would

[48] SER 17 (NSD *Vaughn* Index, Group 8).

reveal the government's "theory of the case or litigation strategy," as the privilege requires.[49] Similarly, emails between agency attorneys and carrier representatives scheduling a meeting to discuss pending FISA legislation do not fall within the privilege. ER 572-88 (Kovakas Decl. ¶ 14).

4. There is no inter-branch joint deliberative process privilege, so no material is properly withheld on that basis.

Finally, the government has withheld a small amount of material under the purported "inter-Branch joint deliberative process privilege," which has never been recognized by any court and in fact has been rejected by the D.C. Circuit.[50] *Dow Jones & Co. v. Dep't of Justice,* 917 F.2d 571, 575 n.2 (D.C. Cir. 1990). The Court should not permit the government to shield any material on this basis, because the unprecedented recognition of such a privilege would severely undermine the central purpose of the FOIA, which is to ensure the existence of "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

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[49] ER 169-94 (OLC *Vaughn* Index 49, 75, 79 & 81); ER 200-202 (ODNI *Vaughn* Index, Group 6).

[50] *See*, *e.g.*, ER 152-66 (OIP *Vaughn* Index Groups 1-3 (9); ER 169-94 (OLC *Vaughn* Index Group 53); ER 572-88 (Kovakas Decl. ¶¶ 9-14, 17-20 & 25).

CONCLUSION

For the reasons stated above, the Plaintiff-Appellee respectfully requests that this Court affirm the District Court's judgment.

Respectfully submitted,

DATED: December 7, 2009

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I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,302 words.

Dated: December 7, 2009

s/ Marcia Hofmann
Counsel for Appellee

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