[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

No. 16-5054

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT JUDICIAL WATCH, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

(A) Parties and Amici

The following parties, interveners, and amici curiae appeared, or sought to appear, below:

Plaintiff: Judicial Watch, Inc.

Defendant: U.S. Department of Defense

The following parties, interveners, and amici curiae are before this Court on appeal:

Plaintiff-Appellant: Judicial Watch, Inc.

Defendant-Appellee: U.S. Department of Defense

(B) Ruling under Review

The ruling under review is the Opinion and Order of the United States District Court for the District of Columbia (Jackson, J.) issued on February 2, 2016. The ruling can be found at Joint Appendix pages 71-77 and is published as *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 2016 U.S. Dist. LEXIS 11872 (D.D.C. Feb. 2, 2016).

(C) Related Cases

Judicial Watch, Inc. does not believe that there are any related cases within the meaning of Local R. 28(a)(1)(C).

/s/ Paul J. Orfanedes

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* Authorities upon which Plaintiff-Appellant chiefly relies are marked with asterisks.

GLOSSARY OF ABBREVIATIONS

DOD	U.S. Department of Defense
FOIA	Freedom of Information Act
JA	Joint Appendix
FY 2014 NDAA	National Defense Authorization Act for Fiscal Year 2014

JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Columbia ("District Court") had jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, namely the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This appeal is timely under Fed. R. App. 4(a)(1)(B) because the District Court entered its final judgment on February 2, 2016, and a timely notice of appeal was filed on February 29, 2016. Joint Appendix ("JA") at 71 and 78.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the "Lumpkin Memorandum," prepared by Assistant Secretary of Defense Michael D. Lumpkin for U.S. Secretary of Defense Chuck Hagel's use in deciding whether to authorize the transfer of five (5) Guantanamo Bay detainees to the nation of Qatar in exchange for the release of U.S. Army Sgt. Bowe Bergdahl, lost any deliberative character it may have once had and should be produced to Judicial Watch in its entirety.

STATUTES

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

(b) This section does not apply to matters that are –

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process

privilege shall not apply to records created 25 years or more before the date on which the records were requested.

STATEMENT OF THE CASE

At issue in this appeal is whether the U.S. Department of Defense ("DOD" or "the Department") is improperly withholding a memorandum concerning the transfer of five Guantanamo Bay detainees to the nation of Qatar in exchange for the release of U.S. Army Sgt. Bowe Bergdahl. The District Court correctly determined that the memorandum, referred to as the "Lumpkin Memorandum" because it was prepared by Assistant Secretary of Defense Michael D. Lumpkin, was responsive to Judicial Watch's FOIA request, but found that the memorandum was deliberative and therefore exempt from production under FOIA's Exemption 5. DOD's own submissions conclusively show that the Lumpkin Memorandum lost any deliberative character it may have once had when it was adopted by U.S. Secretary of Defense Chuck Hagel. As a result, the memorandum is neither pre-decisional nor deliberative, but instead reflects a final agency decision. It should be produced to Judicial Watch in its entirety.

STATEMENT OF FACTS

I. Sgt. Bowe Bergdahl and the Release of Detainees from Guantanamo Bay.

In the aftermath of the September 11, 2001 attacks, the United States and its allied forces captured individuals fighting on behalf of al-Qaida and the Taliban. The United States detains some of these individuals at the U.S. Naval Station at Guantanamo Bay, Cuba.

Section 1035 of the National Defense Authorization Act for Fiscal Year 2014 ("FY 2014 NDAA") authorizes the Secretary of Defense to transfer or release individuals held at Guantanamo Bay, provided the Secretary makes a specific determination and provides notification to certain congressional committees. Pub. L. No. 113-66, § 1035, 127 Stat. 672, 851 (2013). The requisite determination may be made under section 1035(a) or section 1035(b). Under section 1035(a), the Secretary must determine that "the individual is no longer a threat to the national security of the United States." *Id.* at § 1035(a). Under section 1035(b), the Secretary must determine that "actions that have been or are planned to be taken will substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests" and that "the transfer is in the national security interests of the United States." *Id.* at § 1035(b). In addition, the Secretary must "notify the appropriate committees of Congress of a determination … not later than 30 days

before the transfer or release of the individual." *Id.* at § 1035(d). The notification must include certain information, such as a "detailed statement of the basis for the transfer or release" and "[a]n explanation of why the transfer or release is in the national security interest of the United States." *Id.*

On May 31, 2014, Secretary Hagel transferred five detainees from Guantanamo Bay to the nation of Qatar in exchange for the Taliban's release of U.S. Army Sgt. Bowe Bergdahl. JA at 13-14.

II. Judicial Watch's FOIA Request.

On June 3, 2014, Judicial Watch submitted a FOIA request to DOD seeking access to "any and all records concerning, regarding, or relating to the determinations of the Secretary of the U.S. Department of Defense" to transfer the detainees to Qatar. JA at 7 and 28. At DOD's request, Judicial Watch clarified on July 22, 2014 that it was seeking access to

> any and all Secretary of Defense memos signed on or before May 31, 2014, that approve the release of the five Guantanamo Bay detainees exchanged for Sgt. Bowe Ber[g]dahl, who included:
>
> Khair Ulla Said Wali Khairkhwa
> Mullah Mohammad Fazi
> Mullah Norullah Noori
> Abdula Haq Wasiq
> Mohammad Nabi Omari.

Judicial Watch also clarified that it sought any "determinations" made by the Secretary of Defense, if such determinations were separate and apart from any

"memos" the Secretary of Defense may have signed approving the release of the detainees. JA at 7-8 and 39-40.

Judicial Watch filed suit on November 18, 2014, when DOD failed to respond substantively to the request. JA at 6.

III. The Proceedings Below.

On April 27, 2015, DOD produced only one record to Judicial Watch – a five-page, heavily-redacted letter from Secretary Hagel to the Hon. Carl Levin, Chair of the U.S. Senate Committee on Armed Services.[1] JA at 13-18. The cover letter accompanying the Department's production stated, "The only documents responsive to your request are eight identical letters addressed to members of Congress." *Id.* at 13. The letter continued, "Specifically, the letters, signed by the Secretary of Defense on May 31, 2014, are addressed to Senators Dianne Feinstein, Barbara Mikulski, Robert Menendez, and Carl Levin, and Congressmen Mike Rogers, Howard P. "Buck" McKeon, Ed Royce, and Harold Rogers." *Id*. The single, heavily-redacted letter produced by DOD appears to be one of the "notifications" required by section 1035 of the FY 2014 NDAA, albeit without the requisite 30-day advanced notice. DOD appears to have ignored the law's 30-day advanced notification requirement.

[1] Large portions of the letter were redacted by DOD pursuant to FOIA Exemption 1. JA at 13-18. Judicial Watch did not challenge these redactions of the letter.

On August 26, 2015, DOD moved for summary judgment, asserting that the single letter it produced to Judicial Watch was the only record responsive to the request. JA at 3. Judicial Watch opposed the motion, arguing that DOD's moving papers made reference to an additional record – an unproduced, six-page memorandum – that also was plainly responsive to the request. JA at 3-4 and 73.

Specifically, in a declaration signed by DOD Associate Deputy General Counsel Mark H. Harrington, the department asserted that the "only potentially responsive records" were "a cover memorandum with attachments to the Secretary of Defense from Assistant Secretary of Defense Michael D. Lumpkin … for consideration of approving the transfer of the five detained individuals, and eight identical notification letters addressed to the chairs of relevant committees regarding the transfer." JA at 23. Associate Deputy General Counsel Harrington declared that "then-Secretary of Defense Hagel signed the eight identical classified notification letters, but did not sign or endorse the cover memorandum from Assistant Secretary Lumpkin." JA at 23. He continued, "I am informed that it is common for the Secretary of Defense not to endorse a cover memorandum, if he proceeds to sign the correspondence submitted beneath the cover memorandum." *Id.* "Had the Secretary of Defense signed a separate decision memo, it would have been returned to and stored by the DOD component office that had prepared the action, in this instance the Office of the Under Secretary of Defense for Policy."

Id. at 24. According to Associate Deputy Counsel Harrington, "[t]he memorandum and attachments from Assistant Secretary Lumpkin were not responsive to Plaintiff's FOIA request because they did not constitute a signed memo or other determination by the Secretary of Defense relating to the detainees. Rather, these documents included information provided to assist the Secretary in his deliberations regarding whether to approve the transfer." *Id.* Harrington also asserted that "the determination to transfer the five individuals … was not based upon Section 1035(a)(1) of the FY 2014 NDAA, but rather, as described in the congressional notification letter provided to plaintiff, the transfer was based upon Section 1035(b) of the FY 2014 NDAA." *Id.* at 25. "[A]s Secretary Hagel testified before the House Armed Services Committee on June 11, 2014, he determined that the risks associated with the transfer had been substantially mitigated by the security measures put in place by Qatar." *Id.*

The District Court ordered DOD to submit the cover memorandum and attachments to the Court for *in camera* review. JA at 73. After its review and further briefing, the District Court held that the "Lumpkin Memorandum" was responsive to Judicial Watch's request, but was subject to the deliberative process privilege and nothing beyond the "TO:, FROM:, and SUBJECT: lines" should be released to Judicial Watch. *Id.* at 4, 60, and 73. An almost completely-redacted copy of the memorandum was subsequently produced to Judicial Watch, and

summary judgment was entered in DOD's favor on February 2, 2016. *Id.* at 5, 62-67, and 68.

SUMMARY OF THE ARGUMENT

The District Court erred by holding that the entire substance of the Lumpkin Memorandum was protected from disclosure by the deliberative process privilege. While the memorandum may have been deliberative when it was originally prepared and submitted to Secretary Hagel, it became final when the Secretary adopted it by signing the congressional notification letters accompanying the memorandum. By DOD's own admission, it was the Secretary's "common practice" not to endorse cover memoranda "if he proceeds to sign the correspondence submitted beneath the cover memorandum." Moreover, Judicial Watch only requested "signed memos" and/or determinations by the secretary, not pre-decisional documents, and if the Lumpkin Memorandum had not been signed or otherwise constituted the "determination(s)" required by the FY 2014 NDAA, it would not have been responsive to Judicial Watch's request. It also appears to be the only record of the Secretary's actual determination(s) regarding the transfers. Consequently, the Lumpkin Memorandum is no longer a deliberative document for purposes of FOIA, and it should have been produced to Plaintiff without redaction.

ARGUMENT

I. Standard of Review.

In FOIA cases, district court decisions are reviewed *de novo*. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007) (*citing Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087 (D.C. Cir. 2006)).

II. The Lumpkin Memorandum Is Not Protected by the Deliberative Process Privilege.

The deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *U.S. Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). Its purpose is to "protect the executive's deliberative processes – not to protect specific materials." *Dudman Communications Corp. v. U.S. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). For an agency to properly withhold records under the deliberative process privilege, the agency must demonstrate that the records are "both 'predecisional' and 'deliberative.'" *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (*quoting Coastal States Gas Corp. v. U.S. Dep't Energy*, 617 F.2d 854, 866, (D.C. Cir. 1980)).

The U.S. Supreme Court has defined pre-decisional documents as those "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1978). A

pre-decisional document "must precede, in temporal sequence, the 'decision' to which it relates." *General Electric Co. v. Johnson*, 2006 U.S. Dist. LEXIS 64907, *13 (D.D.C. Sept. 12, 2006). Whereas pre-decisional documents are privileged, "communications made after the decision and designed to explain it [] are not." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975) ("*Sears*"). The reason for excluding post-decisional documents from FOIA 5 is straightforward: documents created after the decision cannot cause injury to the deliberative process. *Id*. ("It is difficult to see how the quality of a decision will be affected by communications ... occurring after the decision is finally reached.").

To be part of the deliberative process, the document must be part of the decision making process, or, as this Court has described, "[must] reflect[] the give-and-take of the consultative process." *Coastal States*, 617 F.2d 854 at 866. Moreover, this Court has stated, "[T]he agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Id.* at 868.

Even if a record is protected by the deliberative process privilege, it may lose this protection if a final decision maker adopts or incorporates the record by reference. *Afshar v. U.S. Dept. of State*, 702 F.2d 1125, 1142 (D.C. Cir. 1983) ("To the extent the reasoning of the recommendations is expressly adopted, there is no longer any need to protect the consultative process."); *see also Niemeier v.*

Watergate Special Prosecution Force, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of an "underlying memorandum" that was "expressly relied on in a final agency dispositional document."). As the Supreme Court wrote in *Sears*, when a record is adopted as agency policy or incorporated therein by reference:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports [disclosure].

Sears, 421 U.S. at 161 (emphasis added). The action causing the loss of the protection may be informal or implied. *See Coastal States,* 617 F.2d at 866 ("Finally, even if the 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 dealing with the public."); *see also Nat'l Council of La Raza*, *v. U.S. Dept. of Justice*, 411 F.3d 350, 356 (2d Cir. 2005); *Am. Soc'y of Pension Actuaries v. Internal Revenue Serv.*, 746 F. Supp. 188, 191 (D.D.C 1990). "[C]ourts must examine *all* the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred." *Nat'l Council of La Raza*, 411 F.3d at 357, n.5.

By law, Secretary Hagel was required to do at least three things in releasing the detainees from Guantanamo Bay in exchange for Sgt. Bergdahl. First, he was required to make the specific determination(s) required by the FY 2014 NDAA. Pub. L. No. 113-66, §§ 1035(a) and/or (b). Second, he was required to notify particular congressional committees at least 30 days in advance of the detainees' release. *Id.* at § 1035(d). Third, he was required to create and preserve records of his determination(s) to release the detainees, an undeniably significant agency decision. 44 U.S.C. § 3101.

Secretary Hagel satisfied these obligations (albeit not the 30-day advance notice requirement) when he signed the eight congressional notification letters attached to the Lumpkin Memorandum. JA at 23. By DOD's own admission, it was the Secretary's practice not to endorse a cover memorandum if he signed correspondence submitted to him with the cover memorandum. *Id*. As Associate Deputy General Counsel Herrington attested, "[I]t is common for the Secretary of Defense not to endorse a cover memorandum, if he proceeds to sign the correspondence submitted beneath the cover memorandum." *Id.* By signing the notification letters, Secretary Hagel adopted the Lumpkin Memorandum as his own. The memorandum became the determination(s) required of the Secretary by the FY 2014 NDAA before the detainees could be released. Because Secretary

Hagel adopted the Lumpkin Memorandum, the record lost any deliberative character it may have once had. It is no longer a pre-decisional record.

Indeed, Judicial Watch only requested "signed" "Secretary of Defense memos" or "determinations made by the Secretary" about the detainees' release. JA at 7-8. Assistant Secretary Lumpkin did not sign the memorandum, and the determination(s) regarding the detainees' release was not his to make. JA at 62-68. Secretary Hagel made the determination(s) and "signed" the memorandum by signing the accompanying correspondence. *Id.* at 23. If Secretary Hagel had not "signed" the memorandum by following his customary practice of signing the accompanying correspondence, or if the memorandum did not constitute the Secretary's determination(s) regarding the detainees' release, then the memorandum would not be responsive to Judicial Watch's request. The District Court expressly found that the memorandum was responsive, however, and ordered that a redacted copy of the memorandum be produced. JA at 4, 60 ("[T]he record is responsive to plaintiff's FOIA request."), and 73. Not only is that ruling plainly correct, but DOD has not appealed it, and the time for any appeal or cross-appeal has long since expired.

The Lumpkin Memorandum also is the only record of Secretary Hagel's actual determination(s) regarding the release of the detainees. According to DOD, no records other than the memorandum and accompanying congressional

notification letters exist. *Id* at 13. The Secretary must have intended to adopt the Lumpkin Memorandum as his own when he signed the congressional notification letters because he otherwise would not have satisfied his record creation and preservation obligations. *See* 44 U.S.C. § 3101. The congressional notification letters only provided notice of the Secretary's determination(s). JA at 13-18. They are not actual determinations. To find that Secretary Hagel made the requisite determination(s), but did not adopt the Lumpkin Memorandum as his own, would be to conclude that he violated his record creation and preservation obligations.

The District Court nonetheless found "no indication that the Secretary of Defense ever 'expressly adopted' the Lumpkin Memorandum." JA at 75. That finding was in error. Associate Deputy Counsel Harrington's declaration provides ample evidence that Secretary Hagel adopted the memorandum by signing the accompanying congressional notification letters in accordance with his common practice – evidence that the District Court does not appear to have considered in finding that the deliberative process privilege applies. *Id.* at 72-77. The Lumpkin Memorandum is responsive because it was "signed" by Secretary Hagel and constitutes his legally-required determination(s) regarding the release of the detainees. For that same reason, the memorandum lost any deliberative character it may once have had. To find that the memorandum is responsive to Judicial Watch's request, but nonetheless deliberative because it was not "adopted" by

Secretary Hagel is internally inconsistent. Under the circumstances, the memorandum cannot be both responsive and deliberative. To conclude otherwise would be contrary to the undisputed facts of this case.

Similarly, Secretary Hagel did not merely act in accordance with Assistant Secretary Lumpkin's recommendation or accept the Lumpkin Memorandum's reasoning or conclusions. The District Court's concerns in this regard are misplaced. JA at 76. The facts show that Secretary Hagel signed off on the memorandum in accordance with his customary practice, making it his own. *Id.* at 23. The Lumpkin Memorandum became Secretary Hagel's final decision and, as a result, any deliberative character the record it may once have had has been lost.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that the District Court's finding that the Lumpkin Memorandum is protected from disclosure by the deliberative process privilege be reversed and that DOD be ordered to produce the unredacted memorandum to Judicial Watch in its entirety.

Dated: July 25, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 3,337 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I filed via the CM/ECF system the foregoing **BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ Paul J. Orfanedes