

P R O C E E D I N G S

1
2 THE DEPUTY: Your Honor, this is Civil Action
3 19-778, Cause of Action Institute versus United States
4 Department of Commerce.

5 Will the parties please come forward to this
6 lectern and identify yourselves for the record.

7 MR. MULVEY: Good morning, Your Honor.

8 May it please the Court. Ryan Mulvey for
9 plaintiff, Cause of Action Institute; and I am joined by my
10 colleagues James Valvo and Lee Steven. Thank you.

11 THE COURT: Good morning, Mr. Mulvey.

12 MR. MOUSTAKAS: Good morning, Your Honor.

13 My name is John Moustakas. I'm appearing on
14 behalf of the United States Attorney's Office. I am really
15 appearing on behalf of the Department of Commerce. I am an
16 Assistant United States Attorney here in D.C.

17 THE COURT: Mr. Moustakas, good morning.

18 So we're obviously here on cross motions for
19 summary judgment. I have reviewed all of the papers. And I
20 think I would like to treat this as -- I will call it a
21 traditional "oral argument." I know there are cross
22 motions.

23 Mr. Mulvey, why don't we start with you.

24 I have questions for both sides. But feel free to
25 launch into why you think I should order these records to be

1 produced -- this record.

2 MR. MULVEY: Thank you, Your Honor.

3 Section 232 of the Trade Expansion Act of 1962
4 lays out the framework by which Congress has delegated to
5 the president the authority to adjust tariffs on imported
6 articles to safeguard national security. Yet the exercise
7 of this delegated authority is conditioned on the
8 preparation and provision of a report by the Secretary of
9 Commerce which contains his findings and recommendations.

10 Section 232 straightforwardly requires that any
11 such report be published in the *Federal Register* subject to
12 redaction only for information that may be classified or
13 proprietary in nature.

14 The defendant's implementing for regulations for
15 Section 232 leave very little room for discretion as to
16 delay of publication. As Cause of Action has demonstrated
17 in its briefing, the record -- the historical record
18 demonstrates that Section 232 secretarial reports are, on
19 the whole, promptly made available to the public.

20 THE COURT: Do you concede that were it not for
21 Section 232, that this would be a report subject to the
22 presidential communications privilege?

23 MR. MULVEY: Outside of the 232 context, such
24 report at issue here could be protected by the presidential
25 communication privilege, yes. But the fact that we're

1 dealing with Section 232 makes this --

2 THE COURT: Right.

3 But I'm trying to understand whether there is any
4 dispute between the parties about the nature of the
5 document, the report, whether if, hypothetically, the
6 president asked the Secretary of Commerce for similar advice
7 outside the context of Section 232 -- so you don't have to
8 worry about the statutory framework and implications of
9 it -- whether the kind of report we're talking about here
10 would be, at least presumptively, subject to the
11 presidential communications privilege?

12 MR. MULVEY: I think that that's probably the
13 case, Your Honor.

14 But we also need to take into account other
15 interests that Courts, when kind of looking at the --
16 whether or not the privilege actually applies -- the need
17 for confidentiality. So, here, it's a little bit unique
18 because the president has disclosed in executive summary
19 and, also, through quotation aspects of the report.

20 THE COURT: Right.

21 So that's certainly how I read the papers. And my
22 instinct is that there isn't really a dispute that in
23 another context a report like this could be subject or would
24 be subject to the presidential communications privilege. So
25 your argument has to be that the privilege isn't applicable

1 here because of Section 232.

2 But before we get there, I just want to back up
3 for a second and ask you the following question which is --
4 I understand your textural argument about intra- and
5 inter-agency.

6 MR. MULVEY: Yes.

7 THE COURT: Do you have a case? Or what's the
8 best case standing for the proposition that a communication
9 between the head of the agency and the president can't
10 qualify under Exemption 5 because it is neither intra- nor
11 inter-agency?

12 MR. MULVEY: As we acknowledge in this Circuit,
13 the case law recognizes that such communication is that
14 would qualify and would meet the threshold requirement.
15 But, as you acknowledge, we believe that there is a strong
16 textural argument for why that -- why the circuit case law
17 is mistaken.

18 And, furthermore, in light of developments in the
19 Ninth and the Sixth Circuits on the consulting corollary,
20 which is the document that sort of undergirds the circuit
21 case law here in the D.C. Circuit on communications between
22 an agency and the Executive Office of the President -- that
23 that sort of foundational doctrine is now suspect. And even
24 more so in light of the Supreme Court's plain meaning
25 approach to the FOIA, most recently this summer, in the

1 Exemption 4 case, *FMI v Argus Leader* and, then, several
2 years ago in *Milner versus Department of the Navy*. So there
3 is no D.C. Circuit case that is directly on point; that much
4 is true, as we put in the papers.

5 THE COURT: Well, that's an understatement.

6 I mean, the District which, of course, binds me,
7 has held in other contexts that one need not have a,
8 quote-unquote, agency on either side of a communication for
9 the document to qualify as inter-agency for purposes of
10 Exemption 5; and whether or not that's right, that is the
11 law that I have to apply here.

12 MR. MULVEY: Well, we would submit -- unless the
13 law is wrong, and we think that there are strong textual --

14 THE COURT: You are not asking me to ignore the
15 D.C. Circuit, are you?

16 MR. MULVEY: As we put in our papers, we would
17 submit that the case law that stands for the proposition
18 that the threshold requirement for Exemption 5 is met when
19 an executive branch agency communicates with a non-FOIA
20 subject entity within the Executive Office of the President,
21 that that case law is ill-grounded.

22 THE COURT: Okay. So let's turn to 232.

23 MR. MULVEY: Sure.

24 THE COURT: And let me just make sure I understand
25 the various components of your argument. I think I do, but

1 let me just make sure.

2 232 obviously requires the publication of the
3 report at issue here at some point in the future; I know the
4 Government's position is there is no deadline. But your
5 position is -- I think it has that fact that legal
6 requirement has a couple of implications. And let me just
7 make sure I understand them.

8 As to the privilege -- as to the question of
9 whether this report could be privileged, your view is that
10 because the report must be published in the future it could
11 not be considered privileged.

12 MR. MULVEY: That's right.

13 THE COURT: That's one argument.

14 MR. MULVEY: That's one of our arguments, yes.

15 THE COURT: So do you have any case standing for
16 the proposition that a document that would be subject to the
17 presidential communications privilege, which is a -- it's
18 either a constitutional privilege or a federal common-law
19 privilege that extends to the head of the Article II branch;
20 that that -- a document that would otherwise be privileged
21 can't be because Congress has ordered its production at some
22 point in the future?

23 MR. MULVEY: So the presidential communications
24 privilege is not a common-law privilege but -- as opposed to
25 the deliberative-process privilege. And it's been

1 recognized by the courts as arising from the Constitution
2 and the theory of the separation of powers.

3 And there are various cases -- I don't know if I
4 have one right off the top of my head -- that do recognize
5 that the privilege extends beyond any -- as opposed to the
6 deliberative-process privilege, any final sort of decision.
7 It persists even past a single administration. So there is
8 plenty of circuit case law on that.

9 And our position would be if the presidential
10 communications privilege were actually to apply and could be
11 used by the president outside of the FOIA context, Congress
12 couldn't then come in and order the publication of the
13 report in the *Federal Register*. Yet that is the statutory
14 scheme, and it's been the scheme for decades; and the
15 reports have been published.

16 And as far as we're aware, and the Government has
17 made no argument to the contrary, there is no waiver by the
18 White House prior to the publication of the 232 secretarial
19 reports. Yet, if the presidential communications privilege
20 did apply, that would need to be the case because commerce
21 would not be in a position to waive the president's
22 privilege; only the president can do that.

23 THE COURT: It's not clear to me that the
24 Government has to take a position on whether the prior
25 publications constitute a waiver or not.

1 It seems to me that the Government's position
2 might be: 232 has constitutional implications to the extent
3 that it requires the publication of a presidential
4 communication. We are, nevertheless, not going to fight it
5 because we're fine with the materials being produced so long
6 as it occurs at a point where the information is not
7 particularly confidential and doesn't affect the executive
8 branch's undertaking of the various steps that the report
9 leads to. And the fact that we decide later to publish a
10 document is neither acquiescence in the constitutional
11 sense, nor necessarily a waiver -- or at least it's not
12 clear to me that they have to admit that, when they have
13 produced the reports in the past, that there were waivers.

14 MR. MULVEY: Well, it's certainly true that they
15 don't have to admit that. They may not be able to; some of
16 these reports are rather old. But, nevertheless, I don't
17 think it follows from that that they, then, have free reign
18 to disclose a report whenever they wish.

19 The statute in the implementing regulations don't
20 leave that sort of room for discretion --

21 THE COURT: So -- but go back to the question I
22 asked, which is: Do you have a case that stands for the
23 proposition that Congress's requirement that a document be
24 produced at some point in the future makes a document that
25 would otherwise be a presidential communications privilege

1 not privileged?

2 MR. MULVEY: I don't think such a case exists,
3 Your Honor. In that sense this is, as we explained in our
4 brief, a sort of case of first impression.

5 THE COURT: So, in your view, when must this
6 report be published?

7 MR. MULVEY: Well, our view is that it should be
8 published upon submission to the president.

9 THE COURT: And where do you get that requirement?

10 MR. MULVEY: We get that requirement -- well, we
11 can look at the implementing regulations. So this is 15 CFR
12 705.10. (A) says that an investigation, once it's complete,
13 a report is promptly prepared. Subsection (b), the report
14 is provided to the president. And, in (c), we see -- so the
15 statute requires publication. The implementing
16 regulations -- what they have done is -- what actually goes
17 into the *Federal Register* is an executive summary. And,
18 then, in the FOIA reading room, a full copy of the report is
19 made available. And, in (c) -- I mean, it follows that it's
20 put -- it's made available to the public. There is nothing
21 in that --

22 THE COURT: Well, does it say when?

23 MR. MULVEY: No. It does not set a hard deadline
24 by days.

25 THE COURT: Isn't the case that neither the

1 statute nor the regs include a specific period, deadline,
2 date, or otherwise, for the "when" question?

3 MR. MULVEY: No. Basically, it does not.

4 But there is also nothing to support the
5 Government's contention that it can just wait until whenever
6 it wants.

7 THE COURT: But couldn't -- well, let's assume,
8 hypothetically, that the Government sat on the report well
9 after every action was taken by the president, secretary,
10 and others, pursuant to it. Four years from now the
11 Government still hasn't produced the report, hypothetically;
12 wouldn't you have an APA claim against the Government at
13 that point --

14 MR. MULVEY: Well, that's --

15 THE COURT: -- for failing to comply with the
16 statutory directive to produce the report? It wouldn't be a
17 FOIA claim, it would be an APA claim.

18 MR. MULVEY: That's a possibility -- a theoretical
19 possibility. This is not an APA suit.

20 We're actually trying to seek a copy of the report
21 through FOIA because the agency has failed to comply. I
22 suppose it's theoretically possible that you could be
23 bringing an APA suit at some point, yes.

24 THE COURT: Let me -- can I circle back to the
25 Section 232 argument.

1 I understand the argument that the requirement of
2 publication is inconsistent with the nature of a privilege
3 and it undermines the notion that this could be a
4 presidential communications privilege.

5 Is that the same argument as the following or is
6 it a little bit different, which is: Section 232 makes
7 clear, in your view, that Congress didn't intend that an
8 otherwise privileged document would be exempt under
9 Exemption 5?

10 MR. MULVEY: Could you rephrase that? I am not
11 quite sure I understand the question, Your Honor.

12 THE COURT: Sure. So it seems to me that to --
13 for a document to be withheld under Exemption 5, three
14 things have to be true at least.

15 First, it has to be inter- or intra-agency?

16 MR. MULVEY: Correct.

17 THE COURT: We have already talked about that.

18 Second, it has to be privileged.

19 And third -- and maybe this is not really a
20 "third," and maybe this is my question.

21 Third, it has to be a privilege that Congress is
22 obviously willing to recognize through Exemption 5.
23 Those -- 2 and 3 may collapse.

24 One of your arguments is that Section 232 makes
25 this a nonprivileged document. This is not a presidential

1 communication, subject to the presidential communications
2 privilege.

3 Are you also arguing -- or is it even a different
4 argument, that even if it is a privileged document that
5 Congress -- we have to read 232 and Exemption 5 together.
6 And the only way to harmonize those is to say: Well,
7 Congress was not prepared to recognize the withholding of an
8 exemption -- I'm sorry -- of a presidential communication
9 under Exemption 5 in this specific circumstance.

10 It may be the same argument. But I can imagine it
11 being different because there is nothing in Exemption 5 that
12 necessarily says every single privileged document gets
13 withheld.

14 MR. MULVEY: Yes. So the standard, under
15 Exemption 5 -- so once you're dealing with an agency record
16 that meets the threshold requirement for inter- or
17 intra-agency, it has to be protected by a privilege that
18 would be used in civil discovery. It doesn't have to be
19 actually privileged --

20 THE COURT: Right.

21 MR. MULVEY: -- in a sense, at least with
22 presidential communications, that the president actually
23 asserted; that issue has been resolved in this Circuit.

24 But rather than say that Congress has intended for
25 this certain report to be an exception to the rule as to the

1 presidential communications privilege, I think -- as we have
2 explained in our brief, the better way to look at it is that
3 the shape of the presidential communications privilege, its
4 contours, is informed by the sort of presidential
5 decision-making that's going on.

6 You know, many of the cases in this Circuit,
7 *Judicial Watch v Department of Defense, Center For Effective*
8 *Government v Department of State, Judicial Watch v*
9 *Department of Justice* -- they all deal with the president's
10 decision-making with respect to his Article II authority.

11 And here we're not dealing with an inherent
12 Article II power. We're dealing with Congress's delegation
13 of tariff authority to the president on certain conditions.
14 And, in that respect, I don't think Congress probably
15 intended for this sort of record to even be considered as
16 available for the presidential communications privilege.

17 Not to go off on a slightly different topic, but
18 since we're talking about Congress --

19 THE COURT: Do you think that Congress intended
20 that this report be produced to the public while discussions
21 and negotiations and actions that are attempting to deal
22 with the problems that the report presumably addresses are
23 occurring?

24 MR. MULVEY: Yes. I actually do think that is the
25 case.

1 And I have a -- I have copies of something that
2 we're happy to enter into the docket. It's a factual
3 development, not legal authority; but I have copies for you
4 and for opposing counsel.

5 THE COURT: Well, I was going to ask the
6 Government, but if this gets to that or a related issue --
7 obviously, there was supposed to have been something on -- I
8 guess this is not that.

9 MR. MULVEY: No. But I can talk about that as
10 well.

11 THE COURT: All right. Why don't -- tell me about
12 this.

13 MR. MULVEY: Sure.

14 THE COURT: And tell me about what was supposed to
15 happen on November 12th.

16 MR. MULVEY: Sure. So, on October 31st, the
17 Senate passed its version of the minibus 2 appropriations
18 bill, and that included this amendment that you have in your
19 hand, which requires publication of the 232 report at issue
20 here within a day of enactment of the appropriations bill.

21 So the appropriations bill, as amended, has been
22 passed by the Senate. It was sent for reconciliation to the
23 House. And the Rules Committee has proposed that it be
24 adopted. I don't believe there has been a House floor vote
25 yet on whether to accept the Senate amended version without

1 any further changes.

2 But we think -- you know, this was a bipartisan
3 amendment in the Senate. And it really begins to
4 demonstrate that the Senate understands how 232 is supposed
5 to operate, and that commerce -- they are frustrated.

6 Commerce is supposed to have made its final report
7 available to the public. So, in that respect, Congress may
8 be losing patience with defendant's continued refusal to
9 meet its statutory obligations.

10 As to the other issue, yes, last week -- I believe
11 it was the 13th --

12 THE COURT: Let me just -- can I just understand
13 the state of play?

14 MR. MULVEY: Yes.

15 THE COURT: This is -- this is Senate only; hasn't
16 been enacted into law. The House hasn't passed this. And
17 we're talking about, obviously, a post-Section 232,
18 post-FOIA enactment about the specific issue?

19 MR. MULVEY: Yes. So it's not law, as we readily
20 admit.

21 THE COURT: Right.

22 MR. MULVEY: However, you know, we're talking
23 about Congressional intent. Clearly, Congress is aware that
24 the president -- as to the president's argument that
25 negotiations are ongoing -- and, yet, they still recognize

1 that this report should be made public.

2 THE COURT: So I have -- I must admit, I have been
3 blissfully ignorant of the status of the various
4 appropriations bills.

5 In a realistic world, assuming that the House
6 wants to adopt this, when would it become law?

7 MR. MULVEY: Well, I am not too familiar with the
8 appropriations process, so I don't know how long it would
9 take. Assuming the House -- I think there was going to be a
10 vote soon because the Rules Committee -- there is a
11 Government shutdown looming.

12 THE COURT: Yes. I know that.

13 MR. MULVEY: I don't know when the continuing
14 resolution needs to be renewed. So I couldn't say the time
15 frame for when it would get to the president.

16 But I am sure Congress, if I could surmise, would
17 want to get it to him sooner rather than later. And then it
18 would be up to the president to sign it into law or to --
19 it's a rather large appropriations bill, I think, so...

20 THE COURT: The reason I ask is because --

21 MR. MULVEY: And if I may, Your Honor -- because I
22 think this almost gets into the separate event which you
23 mentioned.

24 So last week the deadline for the U.S. trade
25 representative to carry out attempted renegotiation of

1 existing trade agreements under 232 -- that was at the
2 direction of the president; the time period for that has
3 expired.

4 THE COURT: Yes.

5 MR. MULVEY: Under 232, that's the end of the
6 process. The president may now take an action, but the
7 trade representative is done. Commerce is done.

8 The president needs to take the action and, then,
9 make -- publish notice of what he has decided to do into the
10 *Federal Register*.

11 THE COURT: Right.

12 MR. MULVEY: You know, that has passed; the White
13 House has been silent. News reports suggests the president
14 wants to push this out another six months.

15 We're not here to debate the legitimacy of such an
16 action as that; this is not a Section 232 case. Although, I
17 know there is a lot of interest in the legal world about
18 whether he would be authorized to do that.

19 You know, if -- and I would also add that the
20 Government in this case, in its declaration, argued that, at
21 a minimum, the report should be kept secret until the 13th.
22 Well, that day has passed. So I think they face an uphill
23 battle -- or should -- in arguing why it should remain
24 secret when there is no more room for official attempted
25 renegotiation.

1 But if these deadlines are meaningless, how
2 long -- I think you even mentioned four years. Let's say
3 the president gets reelected and decides perhaps he will
4 never take action on tariffs and just remains mum on the
5 issue; does he have the authority to keep this secret under
6 FOIA, under Section 232?

7 I mean, that is -- I mean, we don't think that
8 that's the case. We think this report needs to be made
9 public. It should have already been made public. Congress
10 is beginning to see that. Otherwise, this is going to be
11 interminable secrecy on the part of the White House, and
12 this report may never get out.

13 THE COURT: So the reason I pause to focus on the
14 language of HR 3055 -- that you handed up -- is I wanted to
15 ensure that I understood it and its potential implications
16 here.

17 As I see it, or as I understand it, the
18 Government's argument, of course, is that there is no
19 temporal obligation on it with respect to when the report
20 needs to be published; and I know you have a contrary view.

21 MR. MULVEY: Yes.

22 THE COURT: But if this were to pass, it would at
23 least purport to obligate the production of the report a day
24 after this becomes law. And there is at least a good chance
25 that that changes the arguments that the Government is

1 prepared to make or has made or, frankly, the Government's
2 position on whether it's going to publish the report or not.

3 I am disinclined to conclude that some bill that
4 the -- or some language that the Senate has passed changes
5 my mind on anything. But if this gets enacted, I think the
6 Government would have to take a position about whether it's
7 going to comply with the clear statutory mandate about
8 timing, independent of FOIA, or whether it takes the
9 position that this is somehow unconstitutional or interprets
10 it a particular way. And it might also have to rethink or
11 take a set of positions about -- now that you have a
12 temporal requirement, how that affects the privilege
13 arguments they're making here. So -- and I will ask the
14 Government those questions.

15 But it seems to me that the -- at least the
16 possibility that this statute or this language can get
17 passed in the relatively near future -- I am not saying that
18 it will -- but the possibility could change the nature of
19 this matter. And I wonder -- this is my musing in some
20 respects -- whether I should wait for some modest period of
21 time to see whether this becomes law.

22 Maybe I will ask the Government that. So why
23 don't we do that.

24 Mr. Moustakas, we don't need to start there. I
25 have a set of questions for you. But I am happy, also, to

1 hear from you about anything you would like to argue based
2 on what you heard from plaintiff or my questions. I'm happy
3 to take it however you'd like.

4 MR. MOUSTAKAS: Well, I'm just kind of a caveman
5 lawyer. I like answering questions better than making
6 speeches.

7 THE COURT: Okay.

8 MR. MOUSTAKAS: So if you want to dive right in,
9 I'm ready to roll.

10 THE COURT: So what happens to your arguments if
11 Congress, in fact, passes this law, this bill, that would
12 require expressly -- or purport to require expressly the
13 publication of the report a day after the bill becomes law?

14 MR. MOUSTAKAS: So as you might expect me to
15 answer -- I have just seen this, I have no idea -- when
16 counsel was saying he was going to pass something up, I was
17 curious what it was. I had no idea that this was what it
18 is.

19 THE COURT: Let me ask you a related question
20 then; and I appreciate that.

21 Assuming, again, that this has actually passed the
22 Senate, there is at least a chance it could become law;
23 there is a chance that it affects the arguments here in a
24 significant way. Shouldn't I just hold off for some modest
25 period of time to decide the case as it presently exists

1 because there is a chance it will change?

2 MR. MOUSTAKAS: That seems to me to be a not
3 unreasonable thing to do. And it's consistent with -- in a
4 way, it's almost -- we often -- courts often defer action to
5 avoid constitutional issues. Ironically, this could create
6 a constitutional issue.

7 But the Court adverted to something I thought
8 about that we didn't put in our brief, which is the question
9 about whether the Congress can condition a delegation of
10 authority on the executive giving up privileges it's
11 constitutionally entitled to have.

12 And I think the Court got it exactly right when
13 the Court said that, as a practical matter, we don't have to
14 decide that issue and we can pass over that because the way
15 that we read the statute -- and, by the way, the way
16 Congress now requires us to read the statute, having passed
17 the FOIA Improvement Act of 2016, is to say that we're
18 always looking at whether the reasons to withhold a document
19 or a record still apply.

20 So this notion that there isn't a temporal aspect
21 is hogwash because -- with all due respect -- because we are
22 required always to be -- first of all, there is a new
23 element which -- after 25 years, there is no more
24 protection.

25 But even beyond that, if a cooperating witness is

1 being protected and we're withholding an FBI Form 302 in
2 order to protect that witness, there is an argument that
3 when that witness and all of his family members have died,
4 heaven forbid, in an explosion -- the purpose for protecting
5 that may no longer exist; of course, it might protect
6 sources and methods.

7 But the point still remains that there is nothing
8 Byzantine or weird or -- to use the plaintiff's language --
9 bizarre about the idea that you could have Congress saying:
10 Hey, President and Secretary, we want you to tackle this
11 problem that we, as a big institution, can't tackle. You
12 guys are executives. Dig into this. Figure it out. And
13 you, Secretary of Commerce -- you are an expert. Give your
14 best thinking, put your best people on this; and let the
15 president have the benefit of that.

16 I just want to step back for a second and say this
17 is -- I couldn't remember -- I was taking the Metro in
18 today. There is some metaphor about a blind person trying
19 to describe the elephant. In a way, sometimes lawyers get
20 so wrapped up in the niceties of language and trying to
21 interpret language that we kind of don't step back.

22 In this case, we're talking about can the
23 president have advisors give him advice and have that
24 shielded, particularly with respect to something that
25 Congress says is super important and where you could stop

1 anyone on the street and say: Hey, if we're negotiating
2 with the Japanese over auto imports, should we tell them all
3 of our ideas about how we might stop them from flooding our
4 markets? Even my mom can figure out that we probably
5 wouldn't want to do that.

6 So there is something elegant in just saying: The
7 privilege extends -- and there is probably fancy, old law
8 cases that say this as well; but that the law goes to the
9 limits that it needs to go. So the privilege extends, in my
10 view -- and I think it's in the Government's view -- to that
11 moment where these negotiations are over.

12 I am not a jerk. I am not unmindful of the idea
13 that someone could misuse the freedom that comes from not
14 having a deadline; but we are not anywhere near that.

15 Demonstrably -- and I am not an expert in this.
16 And I was nervous about coming here today because I am not
17 an expert in this. But I know, from growing up, that we
18 were worried about Japanese imports of automobiles in
19 the '70s.

20 So this is an intractable problem that has existed
21 for a long time. Congress has given the president certain
22 authority and has said: Even at the end of this 180-day
23 period, the president can take other such actions as he
24 deems necessary. And it's not shocking that it might take a
25 little bit longer than 180 days. So I don't think there is

1 any evidence of something dilatory.

2 I also don't think that the fact that four
3 senators have signed on to seeking an amendment -- and, by
4 the way, there is something -- the irony should not be lost
5 on anyone in this courtroom that the folks who are
6 championing strict constructionism want you now to look at
7 this, which isn't even arising in legislative history yet.

8 I want to say one more thing. In another FOIA
9 case I was working on this week regarding an inmate's
10 ability to get his presentence report, and I have been
11 fighting with the Bureau of Prisons because they say: Oh,
12 you can't do it. Well, the Supreme Court actually thinks
13 you can. So we have been going back and forth, and I was
14 reading *Julian* very carefully.

15 If you had to think of one justice who was most
16 associated in the modern era with strict constructionism, it
17 certainly would be Justice Scalia. And Justice Scalia, in
18 dissent -- on a point that no one in the majority disagrees
19 with, by the way -- said: I get this language about inter-
20 and intra-agency; I get it. But the more natural reading of
21 this is that it has to be that, when the Administrative
22 Office of the Courts -- which is not a FOIA agency --
23 produces a document to another agency of government, that
24 that is subject to the Exemption 5 privileges because it's
25 just natural. So that's what I was starting to say earlier;

1 and I know that I am sort of meandering on this.

2 But if you step back and think about this, this is
3 kind of quintessential privilege stuff, right? But somebody
4 asks somebody else for advice; the person provides advice.
5 And the advice is in a bubble when the advice is the most
6 important to be -- most important for that advice to be
7 protected. And the plaintiffs in this case, who have a
8 point of view, want that to be revealed. That doesn't
9 represent, you know, sort of a general view about how
10 privilege should operate; they have an agenda. They have an
11 interest; and I get it.

12 But, ironically, this is one of the few places
13 where we don't need FOIA because we have the Congress
14 saying: Go ahead, publish this as soon as -- as soon as the
15 imminent -- I think of it as, sort of, we're in a period
16 of --

17 THE COURT: Well, Congress doesn't say that.
18 Congress is silent about the "when."

19 Congress -- there is no -- as I understand it,
20 nothing in Section 232 says: Publish when you are ready or
21 publish when the effective publication wouldn't affect your
22 ability to undertake the actions we've delegated to you.

23 We're just -- we're just -- we're assuming that
24 from silence -- or we're inferring it -- your case would be
25 stronger if Congress said: Publish, but only when --

1 MR. MOUSTAKAS: Absolutely.

2 THE COURT: -- you are done.

3 MR. MOUSTAKAS: Absolutely.

4 I guess my view of that, Judge, is that we have to
5 see 232 against the background -- backdrop of these historic
6 privileges against the backdrop of FOIA.

7 THE COURT: So I agree with all of that. But I do
8 have one --

9 MR. MOUSTAKAS: Sure.

10 THE COURT: So assume that this is a privileged
11 communication and it doesn't lose its privileged nature
12 by -- through the requirement by Congress that it be
13 produced at some point to the public.

14 The president, on May 17th, made certain public
15 statements about the report. But you were, nevertheless,
16 withholding the report in full; and I just don't understand
17 how those two things can be squared.

18 I mean, why, at a minimum, don't you have to
19 produce the sentences in the report that line up with what
20 the president has said are the sentences in the report?

21 MR. MOUSTAKAS: I think there are two reasons for
22 that. Well, the primary reason for that is that -- my
23 reading of the presidential communications privilege is it's
24 not subject to a segregative analysis that we have to
25 protect the entire document; I think that's the law.

1 If the Court ultimately rules that this is only
2 subject to the deliberative-process privilege -- and that's
3 our secondary argument, but I don't think it's -- I think
4 the better argument is that it's covered by both. But,
5 certainly, if that is covered by the presidential
6 communications privilege, then I don't think we have to do
7 that.

8 THE COURT: Is the presidential communications --
9 the president's communication privilege is waivable, right?

10 MR. MOUSTAKAS: It is.

11 THE COURT: Has the president not waived those
12 portions of the privilege that relate to the sentences in
13 the May 17th statement that also appear in the report?

14 MR. MOUSTAKAS: So I haven't given -- I would want
15 to give a little bit more thought to that. I have said very
16 quickly it's waivable because, obviously, there are
17 situations where, clearly, it's waivable. The question is
18 how this doctrine operates.

19 You know, in FOIA, unlike in civil litigation,
20 there isn't sort of quite the same breadth of waiver; and
21 there is a reason for that, because we want to encourage the
22 Government to give up as much --

23 THE COURT: Yes. And there is also no weighing of
24 the interest of the requester as there would be in civil
25 litigation; I get that.

1 MR. MOUSTAKAS: Right. So I guess what I think we
2 ought to be focused on here and we want to encourage -- and
3 I don't want to suggest that the Court is a cheerleader.
4 But we certainly -- the doctrine seems to be designed to
5 encourage the Government to disclose as much as it can. And
6 it's forgiving so that decision-makers don't have to worry
7 about subject matter waivers and the like.

8 And so I guess I would say -- and I haven't given
9 a lot of thought to this; I would like to probably give a
10 little bit more thought to it. But I hear where the Court
11 is coming from.

12 And all I can say that is that the president has
13 done what, ideally, if you were designing the law from
14 scratch, you would want. You would want the president --
15 any decision-maker to give up as much as they can without
16 giving up that which is essential to protect in order to
17 promote the interest that the statute was designed to
18 promote.

19 THE COURT: And I am not disagreeing with that at
20 all.

21 The question is having done that, doesn't that
22 have implications for whether certain portions of the report
23 are not privileged anymore?

24 And I take your argument that the presidential
25 communications privilege typically doesn't require

1 segregation of documents; that was your first argument, I
2 think. I did cut you off. I didn't know if there was a
3 second argument.

4 MR. MOUSTAKAS: No. I think I corrected myself.

5 But that was really the main argument I wanted to
6 make. I wanted to make the subsidiary point that, in a way,
7 I think the plaintiff's argument pitches this as a negative
8 where I would tend to view it as a positive.

9 In other words, the fact that the president has
10 gone out there against the backdrop of knowing that subject
11 matter waiver is very frowned on in this area for the policy
12 reasons I have described, that we want to encourage that
13 behavior; and I think the Court has agreed with that. That
14 was --

15 THE COURT: Yes.

16 And I am not even -- I am not talking about
17 subject matter waiver.

18 MR. MOUSTAKAS: Right.

19 THE COURT: I am not suggesting that because the
20 president issued -- again, I am not criticizing the
21 president at all. I think, actually, you are right; that,
22 if the report is not to be produced yet, it's a good thing
23 for the president to have said what he believes can be said
24 at the time without doing damage to the efforts that will
25 follow from the report.

1 And having done that, and talked generally about
2 the report and sort of topics, I am not suggesting that that
3 effected a subject matter waiver such that the report itself
4 is no longer privileged at all.

5 What I am suggesting, however, is that: Once the
6 president says, hypothetically, the report says this -- at
7 some high level of generality, then, what is the -- what is
8 confidential anymore about the report where it says at least
9 that very specific thing, whatever that is.

10 MR. MOUSTAKAS: Right.

11 THE COURT: And shouldn't the Government have to
12 at least go through the report and make sure that it's not
13 withholding the very things that the president has already
14 made public?

15 MR. MOUSTAKAS: Right. So I, frankly, wasn't
16 prepared for this; and I will get myself in trouble for
17 talking too much off the cuff, but you see that I do that
18 pretty freely.

19 What you are saying makes a lot of sense. Right.

20 Making the discrimination about substance is more
21 complicated. But, certainly, the exercise of saying, if
22 he's quoted a swath of this report verbatim, then there is
23 an argument that that swath -- that you could -- it was just
24 one paragraph out of the report, you could produce the
25 report with everything blacked out except for that one

1 paragraph.

2 In a way it seems superfluous, but maybe that's
3 what FOIA requires. I can't think, as I stand here today --
4 and I don't want to manufacture some fanciful reason why
5 having our adversaries see the quote in the report rather
6 than in some executive proclamation makes a substantive
7 difference. So I guess, in all candor, as an officer of the
8 Court, I would have to say that while I'd like to see if I'm
9 wrong about the presidential communications privilege and
10 whether there is another level of protection; as a practical
11 matter, direct quotes, I think the courts have said, are
12 sort of free game.

13 THE COURT: Yes. So can I --

14 MR. MOUSTAKAS: Yes, please.

15 THE COURT: Before I turn to plaintiff's counsel
16 one last time, November 12th was a relevant date as I
17 understood it. And plaintiff's counsel refreshed my
18 recollection on the relevance of the date.

19 But do you have any additional information about
20 the current state of play?

21 MR. MOUSTAKAS: I don't, which is one of the
22 reasons that I really take these guys seriously; that this
23 is being played very close to the vest. It's not surprising
24 to me that it's being played very close to the vest because
25 of the stakes and the impact on international economics are

1 so great and well beyond my "can."

2 But I don't -- what I do know is that we are in a
3 period which is contemplated by the statute that the
4 president does have the authority to direct that other such
5 actions happen after the expiration of the 180 days. But I
6 can't tell you, as I sit here today, that I happen to know
7 what the next step is and when the next deadline is.

8 There are a couple of things I might address if
9 the Court doesn't mind; if it doesn't assist the Court, I
10 will sit down.

11 But I did want to raise something that came up
12 again here in oral argument but also was in the briefs of
13 the plaintiff; that is about the alacrity with which the
14 reports were released. I can't speak to the old reports.

15 With respect to the aluminum and steel reports,
16 they were produced very quickly, almost contemporaneously
17 with them going to the president. That shouldn't surprise
18 anyone because they supported the action the president was
19 going to take. In other words, the president wanted to
20 impose these tariffs, and Exhibit 1, presumably, were these
21 reports for that. But there was nothing to hide because the
22 action was imminent.

23 And in this case it's clear that things are still
24 going on, that negotiations have been happening; that the
25 president is turning to advisors to understand what the best

1 course of action is. From my way of thinking, this is kind
2 of like -- not to beat this metaphor to a bloody pulp; but
3 it's the poster child for the kind of protection this
4 exemption provides.

5 This is a very complicated problem. The statute
6 itself gives the commerce secretary continuing
7 responsibility. After the publication of the report, the
8 president can ask him -- he actually did -- does ask him to
9 confer with senior officials on an ongoing basis and to
10 alert him to any new developments; and so I think that the
11 scheme all makes sense.

12 To the extent I keep not finishing my thought --
13 when you take the sort of big-picture look at this case, it
14 really is about -- it really can't -- I just have to say
15 this because I would be remiss if I didn't say it.

16 The consequence of following Cause of Action
17 Institute's theory about this case would be to say that the
18 head of all executive departments -- the entire executive
19 branch doesn't have the right to -- a consultant can protect
20 his communications but the President of the United States,
21 who these folks are meant to advise, can't rely on his own
22 presidential communication privilege to protect the secrecy
23 and the sanctity of those communications such that people
24 feel free to speak in a way that will be protected, if only
25 temporarily.

1 I get -- I get the implication of people knowing
2 ultimately what they say is going to be seen, but there is
3 this temporal piece of it. And there is nothing weird --
4 particularly now that we know that the FOIA Improvement Act
5 requires us to take a temporal look and to always be looking
6 at: Is the purpose behind the particular privilege still
7 obtaining? And, if it's not, release the stuff. And so
8 that's kind of my view on that. I have an asterisk, and
9 that usually tells me that something is important; so that's
10 the FOIA Improvement Act.

11 The other thing I guess I would say is you were
12 prescient in one of -- in what I thought would be one of my
13 more clever quips about: It does feel a little bit like an
14 attempt to weaponize FOIA. This feels a little bit like an
15 APA case and a case that says -- it's really a fight about
16 the agency not doing what the agency is supposed to do.

17 In that context, when the expiration comes so
18 close to the deadline -- there is no deadline -- but this
19 internal deadline that's not about the report but about
20 action; I would think that an agency would be deferred to
21 under *Chevron* in the absence of a requirement to publish by
22 a certain date, and all of the policy justifications for the
23 privilege support that.

24 And so I don't think -- I think the idea that
25 these guys have to have done something and that we're

1 inferring that they knew that because they did it in these
2 other contexts -- like aluminum and steel, when there was a
3 really good reason to know why they did it in aluminum and
4 steel -- but not here is not reasonable.

5 THE COURT: For the record, in my view, I don't
6 think I can draw a lot from how other reports have been
7 treated because it seems to me those are different; they are
8 different products, different problems, different resulting
9 approaches by the president to the report.

10 And as you said, it may be that in some reports
11 there was no problem and in other reports there is a
12 problem; but the steps to be taken were the very steps that
13 were identified in the report, and so it made sense to
14 publish. And then, in other contexts, in this very -- this
15 is probably one; the report is important and it has
16 information and, presumably, recommendations. And the "what
17 to do about it" is not uncomplicated, and that very well may
18 make this context unique.

19 So, I mean, it's not to say I think it's
20 irrelevant that in the past these reports have been produced
21 pretty quickly, but I don't think it somehow binds Commerce
22 to have to, in all circumstances, report -- produce the
23 report immediately.

24 MR. MOUSTAKAS: Right, or that it somehow is akin
25 to a course of dealing that creates an implication.

1 If the Court doesn't have any other questions at
2 this moment -- I am more here just to answer questions.

3 THE COURT: Thank you.

4 I would like to hear from plaintiff's counsel.

5 MR. MOUSTAKAS: Thank you, sir.

6 THE COURT: Mr. Mulvey, I'm happy to have you
7 rebut any and everything you have just heard.

8 MR. MULVEY: Thank you, Your Honor.

9 So we have a few points.

10 On the question of whether 232's publication
11 requirement is an unconstitutional condition on the
12 delegation of tariff authority, plaintiff raised that in its
13 opening brief; the Government did not provide a substantive
14 response. So I just wanted to highlight that.

15 In terms of the general scheme of 232 and that we
16 shouldn't take words so seriously and we should look at this
17 more as a nonlawyer perspective -- 232 is pretty detailed,
18 and intentionally so; and words and procedures do matter.

19 Earlier this week -- it's not directly relevant,
20 it's not relevant at all to this case -- but the Court of
21 International Trade heard a case concerning the president's
22 actions dealing with steel. And the basic, you know,
23 explanation the Court gave was that the deadlines in 232
24 matter; and we actually have to take the procedure
25 seriously.

1 The president can't just come in and say: Well,
2 national security is important. Trade is important. We
3 want to win; and we're going to -- just trust me to do this.
4 Well, that's sort of the argument that we're hearing today
5 in this case; and I just do not find that convincing. Words
6 matter. The law does matter.

7 THE COURT: Believe me, I agree.

8 But one notable feature of 232 is that it does
9 contain very detailed deadlines and timeline requirements
10 for a whole bunch of stuff but not publication of the
11 report.

12 MR. MULVEY: Yes. I think one possible
13 explanation for that is that the other steps -- let me back
14 up.

15 The publication of the report in the *Federal*
16 *Register* or its availability in the FOIA reading room of the
17 Department of Commerce is not, shall we say, a condition
18 precedent to the imposition of a tariff.

19 So the validity of the president's imposition of
20 tariffs doesn't depend on the availability of the report.
21 So, perhaps, I can only guess Congress was not as concerned
22 about putting a day deadline the way it did with the rest.

23 THE COURT: Fair enough. Fair enough.

24 MR. MULVEY: Slightly related to that, on the
25 issue of *Chevron* deference, this was raised in the briefing.

1 Commerce is not entitled to any deference under *Chevron* with
2 respect to the FOIA.

3 As for 232, I am not sure that Commerce's
4 implementing regulations do much to resolve any ambiguity in
5 favor of commerce. And the Government has not been able to
6 point to any other sort of formal position or explanation of
7 why the interpretation of the deadline that it is taking in
8 this case is the policy position of the agency. All we have
9 is what the Government has argued in the papers before the
10 Court. So I just want to stress that we do not believe that
11 *Chevron* is very helpful to the Government here.

12 Two more -- rather, three more points.

13 Very quickly, as to the appropriations rider. I
14 just want to note 84 senators voted in favor of that
15 amendment; so there are four cosponsors, I believe. This is
16 something that's passed. Its reconciliation in the House.

17 I also want to clarify that what we're seeking
18 here is the Section 232 secretarial report. But the
19 Government is trying to blow this into a case where we're
20 trying to find records of the continuing negotiations that
21 are going on as if we're trying to get records of the
22 dealings of the White House, within White House walls, or of
23 the U.S. Trade Representative over the past 180 days.

24 Opposing counsel mentioned that the Secretary of
25 Commerce has continuing responsibility. That may be. But

1 that continuing responsibility or any actions or
2 recommendations he may make will not be reflected in the 232
3 report that it's issued here. That report, in a sense, is
4 dead; it's been closed. That's also why it's not protected
5 by the deliberative-process privilege as to the Department
6 of Commerce's decision-making. It's final. It's provided
7 to the president.

8 And then, finally, giving a sort of natural
9 reading -- I think was what opposing counsel used -- to the
10 use of the term "agency," particularly with Exemption 5's
11 threshold -- if we're going -- that we can say -- if we want
12 to take the position that the president can be an agency for
13 purposes of the threshold requirement in Exemption 5, I
14 think there needs to be further argument given as to why he
15 then shouldn't be treated as an agency for other purposes
16 under FOIA.

17 I am not aware of any case law -- and we have
18 distinguished the case law that was provided by the
19 Government -- as to why a defined term -- not just a term,
20 but a defined term can be given multiple meanings within the
21 same statute. "Agency" is used uniformly in FOIA in 552.
22 It's defined in 552. I mean, that's just one of the
23 paradoxes of the prevailing circuit case law as we
24 explained.

25 THE COURT: I am not unsympathetic to some of

1 those arguments. But they seem to me largely irrelevant to
2 a district court judge sitting in this Circuit.

3 MR. MULVEY: I can appreciate that.

4 And, finally, I also want to stress that the
5 president is not -- assuming you were to rule in favor of
6 Cause of Action, the president is not going to be left
7 without protection here as to preserving the secrecy of
8 White House deliberations.

9 There are many -- or at least five -- components
10 of EOP that are recognized that are subject to the FOIA. So
11 the president's communications privilege, in our theory,
12 would still apply there. And the Presidential Records Act
13 is a rather strong mechanism by which the president could
14 intend to retain control over records that reveal
15 deliberative processes within the office of the White House.
16 That was not done here.

17 In fact, Congress abandoned its initial argument,
18 in its determination letter to Cause of Action, that the
19 record at issue was potentially a presidential record.

20 That is all I have in terms of rebuttal.

21 Unless you have any other questions, Your Honor,
22 or you wanted to address the other pending motion.

23 THE COURT: No. I think I had it, and have it.

24 I am concerned -- as my questions earlier
25 indicated -- about deciding now when it's at least

1 hypothetically possible that the relevant law change; and I
2 am just thinking through what that means for how long I
3 might be prepared to wait to see if that happens and the
4 like. Because, as I mentioned before, I am certainly no
5 appropriations maven. And I am not spending every morning
6 reading *Politico* to try to figure out what is going on; so I
7 need to think about that.

8 I will say, just so folks know, my inclination is
9 to not decide the cross motions very quickly on the chance
10 that, in the relatively near future, there would be movement
11 on this provision; and I want to think about this. I want
12 to take this argument back and consider it in chambers --
13 both what was argued on the merits but, also, this question.

14 It may be that I ask for, at least in the near
15 term, some periodic updates about where that language is, in
16 terms of the "approps" bill, where the "approps" bill is;
17 sort of a 101 on where this thing is moving, if at all. Not
18 because I intend to delay the publication of an opinion
19 here, but because I'd rather not have an opinion go out
20 that, you know, essentially gets undermined or at least
21 significantly affected by something that Congress does. So
22 I want to take that under advisement as well. I am not
23 ordering anything today.

24 But I do want to foreshadow that I might enter an
25 order that, basically, requires the parties to meet and

1 confer and to submit what I would consider to be very easy
2 status reports advising me on the status of this language;
3 but I want to consider that. And it may be that I decide
4 that that's not necessary; but it's at least a possibility.
5 So in the event that happens, we may all have to become more
6 expert on appropriations than we might otherwise have wanted
7 to.

8 But in any event, I thank you for your time, for
9 the Government. And I will take the motions under
10 advisement. So thank you.

11 MR. MOUSTAKAS: Thank you, Your Honor.

12 MR. MULVEY: Thank you, Your Honor.

13 THE DEPUTY: All rise.

14 (Whereupon, the proceeding concludes, 10:34 a.m.)

15 **CERTIFICATE**

16
17 I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby
18 certify that the foregoing constitutes a true and accurate
19 transcript of my stenographic notes, and is a full, true,
20 and complete transcript of the proceedings to the best of my
21 ability.

22
23 Dated this 6th day of December, 2019.

24 /s/ Elizabeth Saint-Loth, RPR, FCRR
25 Official Court Reporter