IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE, Defendant.	No. 1:19-cv-0778-CJN

PLAINTIFF CAUSE OF ACTION INSTITUTE'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56 and Local Civil Rule 7, Plaintiff Cause of Action Institute replies in support of its cross-motion for summary judgment. ECF No. 24.

Ryan P. Mulvey (D.C. Bar No. 1024362)
R. James Valvo, III (D.C. Bar No. 1017390)
Lee A. Steven (DC Bar. No. 468543)

CAUSE OF ACTION INSTITUTE
1875 Eye Street, N.W., Suite 800
Washington, D.C. 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
ryan.mulvey@causeofaction.org
james.valvo@causeofaction.org
lee.steven@causeofaction.org

Counsel for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This case is about timing. The Department of Commerce ("Commerce") now concedes that Section 232 of the Trade Expansion Act of 1962 ("Section 232") imposes a statutory obligation to publish the 232 Auto Tariffs Report. Commerce further concedes, perhaps begrudgingly, that it will comply with that obligation at some unidentified point in the future. But whatever discretion Commerce may enjoy in delaying publication of the report in the *Federal Register*, its duty to disclose the report in response to Plaintiff Cause of Action Institute's ("CoA Institute") Freedom of Information Act ("FOIA") request attaches now.

Commerce has identified no viable grounds under the FOIA to justify withholding the report. The agency has failed to offer a compelling defense of its use of "temporary" privileges, which do not exist, and has failed to resolve the inconsistency of its concurrent invocation of the deliberative-process and presidential-communications privileges—neither of which apply here. This leaves Commerce in an untenable position. Either it must admit that these privileges continue to shield the report from disclosure *even after* the President decides whether to impose tariffs, creating a conflict with Section 232's publication requirement, or it must acknowledge that the privileges do not apply at all, requiring the agency to release the report to CoA Institute.

Unsurprisingly, Commerce refuses to face this simple truth. It attempts instead to hype up the case with hyperbolic allusions to "arsenals," "major weapons," "adversarial confrontation," and "nation-state rivalry." Realizing the inadequacy of its legal position, Commerce hides behind the emotional vocabulary of

economic warfare. The Court should not heed this overwrought argumentation. There are equally important stakes in the proper interpretation of the FOIA and transparent and open government. The Court's decision here will not only impact the parties; it will set a precedent for the treatment of future Section 232 reports.

ARGUMENT

I. Commerce has waived any argument that the 232 Auto Tariffs Report is not an "agency record" subject to the FOIA.

In its cross-motion, CoA Institute explained that unless Commerce disputes that the 232 Auto Tariffs Report is an "agency record" subject to the FOIA, this Court should treat it as such. *See* Pl. Cause of Action Inst.'s Opp'n to Def. Dep't of Commerce's Mot. for Summ. J. & Cross-Mot. for Summ J. at 7, ECF No. 24 [hereinafter Pl.'s Cross-Mot.]. Commerce did not respond to that argument and has therefore conceded the point. *See* Def.'s Reply in Support of its Mot. for Summ. J. & Opp'n to Pl.'s Cross-Mot. for Summ. J., ECF No. 25 [hereinafter Def.'s Opp'n]; *see also Judge Rotenberg Educ. Ctr., Inc. v. Food & Drug Admin.*, 376 F. Supp. 3d 47, 62 n.4 (D.D.C. 2019). The 232 Auto Tariffs Report is an agency record.

II. Commerce cannot rely on Exemption 5 to withhold the report.

A. The Court should adopt the plain meaning of Exemption 5's threshold "inter-agency or intra-agency record" requirement.

CoA Institute has argued that Commerce may not rely on Exemption 5 to withhold the 232 Auto Tariffs Report because, to begin with, the report does not meet the threshold requirement as an "inter-agency or intra-agency" record. *See* Pl.'s Cross-Mot. at 8–13. Although CoA Institute recognized the expansive interpretation of this phrase in the Circuit, it also explained why the Court should

adopt the ordinary meanings of "inter-" and "intra-," read in tandem with the statutory definition of "agency," to limit the scope of Exemption 5. *Id.* Commerce does little to rebut that argument. It instead focuses on reciting prevailing precedent and advocating a novel approach to statutory interpretation.

Commerce's reliance on Circuit caselaw reveals the weakness of those cases in the face of a textual reading of the FOIA. Consider, for example, Commerce's citation to *Judicial Watch, Inc. v. Department of Justice*, which in turn quotes from *Ryan v. Department of Justice*, to support the claim that a record need not be "'created by an agency or remain in [its] possession . . . in order to qualify as 'intra-agency.'" Def.'s Opp'n at 5 (citation omitted). The *Judicial Watch* and *Ryan* holdings both depend on some form of the so-called "consultant corollary." Historically, courts have used the consultant corollary to extend Exemption 5 to cover records "solicited by [an] agency" and "submitted by outside consultants as part of the deliberative process." *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980). But no version of the "consultant corollary" applies here.

First, according to the agency itself, Commerce never "solicited" the 232 Auto Tariffs Report.[1] *See* Def.'s Opp'n at 3 ("[The report] was created for and received by the President at his request[.]"); Decl. of Brian D. Liberman ¶ 23 (President Trump "instructed" Secretary Ross to prepare the report), ECF No. 20-3. *Second*, the report was not "submitted" by "outside consultants." It was created by internal

[1] It is not clear *who* "solicited" the report. Commerce argues that it was the President. But under Section 232, only the Secretary can begin an investigation that results in a report. *See infra* at pp. 12–13.

agency experts. *Cf.* Def.'s Opp'n at 21. *Third*, the report was not part of an intra-agency deliberative process.[2] *See id.* at 14 ("The Automotive Report was created for, and reviewed by, the President, and his advisers, who is the ultimate decision-maker under Section 232."); *cf.* Pl.'s Cross-Mot. at 10 n.5 ("Commerce failed to argue for the privileging *of its own* decision-making processes.").

The Supreme Court has explained that the consultant corollary grew out of the practice of agencies hiring outside experts, who "play[] essentially the same part in an agency's process of deliberation" as its own employees. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10 (2001). The "consultant," or its analogous equivalent, is expected to "function[] just as an employee[.]" *Id.* at 11. But the President neither serves Commerce's institutional interests nor does he step into the shoes of agency personnel by participating in Commerce's deliberative processes. As the agency itself argues, the President is the furthest thing from a "consultant." *See* Def.'s Opp'n at 5 ("[The] primary function" of the "executive agencies" is to "serve" the President.).

Some Circuit caselaw effectively provides a free pass for agencies interacting with the President and his advisors. Yet that doctrine is a house built on sand.

[2] The supposed "deliberative" nature of the 232 Auto Tariffs Report is Commerce's sole basis for rejecting CoA Institute's analogy to the treatment of records exchanged between agencies and Congress. *See* Def.'s Opp'n at 6–7; *see also* Pl.'s Cross-Mot. at 12–13. But Commerce confuses the issue at hand. It does not matter whether the tariff report is pre-decisional *for the President*. The key consideration is whether it reflects the final policy position of the Secretary after completing a Section 232 investigation. *See infra* at pp. 13–15.

Courts cannot stretch the consultant corollary so far, and they should not disregard the plain meaning of the text of Exemption 5.

As an alternative to relying on some contortion of the consultant corollary, Commerce argues that the term "agency" can mean different things even within the same statute. *See id.* at 5–6 ("Whether the President . . . [is] an 'agency' for purposes of imposition of 'FOIA disclosure requirements' is quite different from whether the President . . . [is] part of or [his] own 'agency' for purpose of application of privileges[.]"). This bizarre position offers no discernable principle to identify when, or for what purposes, the President is outside the scope of the FOIA or, conversely, when he is either "part" of an agency or "his own" agency.

The FOIA includes a clear definition of "agency" that does not suggest any variable meaning. *See* 5 U.S.C. § 552(f)(1). Courts must abide by legislatively defined terms because they clarify how the law is supposed to operate. As the Supreme Court has held, the judiciary is "bound to give effect to [a statutory] definition . . . for it would be idle for Congress to define the sense in which it used [that term] 'if [courts] were free in despite of it to choose a meaning for [themselves].'" *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960) (citation omitted). Unless a party can show why a word used several times within a statute is supposed to have multiple definitions, the "natural presumption" is that "'identical words used in different parts of the same act . . . have the same meaning.'" *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (citation omitted).

Commerce's scant caselaw does little to rebut these fundamental canons of statutory interpretation. *Environmental Defense Fund, Inc. v. Costle*, for example, involved the interpretation of the term "public hearing," which was neither defined in the statute at issue nor anywhere else in federal law. 631 F.2d 922, 927–28 (D.C. Cir. 1980). The *Costle* court also qualified its approach by explaining that it would only be appropriate "[i]n the absence of an explicit or conclusive contextual definition." *Id.* at 928. Here, by contrast, the FOIA explicitly and conclusively defines "agency." That definition is unambiguous. And Commerce has not pointed to anything beyond its outcome-based preferences to suggest that Congress intended courts to ignore the supplied definition of "agency" when interpreting Exemption 5.

Commerce's reliance on *Property of the People, Inc. v. Office of Management & Budget* is similarly unpersuasive. The court there analyzed how the National Security Council's non-agency status, together with the D.C. Circuit's holding in *Judicial Watch v. Secret Service*, which concerned the delineation between the scope of the FOIA and the Presidential Records Act, could inform its consideration of whether the presidential-communications privilege protected agency calendars. *See* No. 17-1677, 2019 WL 3891166, at *5 (D.D.C. Aug. 19, 2019). That court did not address Exemption 5's threshold requirement, and it is unclear whether it intended to do anything but take for granted that agency records exchanged with certain components of the Executive Office of the President qualify for withholding.

B. The presidential-communications privilege does not apply to the 232 Auto Tariffs Report.

Commerce cannot support its use of the presidential-communications privilege. Section 232 requires publication of the 232 Auto Tariffs Report in the *Federal Register*, subject only to limited redaction for classified and proprietary information. 19 U.S.C. § 1862(b)(3)(B). Congress's decision to mandate that publication while also limiting Commerce's ability to redact the report, either for its own purposes or on behalf of the President, carries over to the FOIA context. "Section 232 is . . . effectively a 'reverse Exemption 3' statute,' . . . [which] *mandate[s] the disclosure* of information and specif[ies] what information [Commerce] may withhold." Pl.'s Cross-Mot. at 17. Commerce counters that the President's authority under Section 232 is an "inherent Article II treaty-making power" and raises the specter of disclosure interfering with foreign relations. On all counts, Commerce's arguments are unpersuasive and highlight the Administration's motivation to keep records secret for no legitimate purpose.

1. The Court should consider whether the 232 Auto Tariffs Report was used for the exercise of Article II authority.

Commerce asserts that it is irrelevant whether the 232 Auto Tariffs Report was created to assist the President in the exercise of an inherent Article II power. *See* Def.'s Opp'n at 7 ("[T]he nature of the power at play does not limit the scope of the privilege."). What matters instead, the agency argues, is "'who *solicits* the communication, and whether that person also ultimately *receives* it.'" *Id.* at 9 (citation omitted). Yet, as CoA Institute explained, the logical conclusion of that position is the impermissible extension of the presidential-communications privilege

to cover almost *anything* about *everything* in an agency's possession. The Circuit has warned that this approach would "sweep within the reach of the . . . privilege much of the functions of the executive branch[.]" *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1122 (D.C. Cir. 2004). That would be an absurd result, and Commerce has identified no limiting principle to avoid it.

Although Commerce believes the presidential-communications privilege is not limited by the nature of the decision-making it aims to protect, the agency nonetheless uses a two-page footnote to argue that CoA Institute has "ignore[d] the nature of the President's duties under Section 232." Def.'s Opp'n at 8. Commerce claims the President's delegated authority to impose tariffs "overlaps with the exercise of his broader, fundamental constitutional responsibilities . . . in conducting foreign affairs and protecting national security[.]" *Id.* at 8 n.2.

Assuming the Court were to find this argument properly raised, *see Hutchins v. Dist. of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (courts "need not consider cursory arguments made only in a footnote"), Commerce again faces the same overbreadth problem that pervades its entire defense. It is possible to tie nearly *anything* the White House (or any part of the Executive Branch) does to the exercise of an inherent Article II power. Greater precision is required. Commerce prepared the 232 Auto Tariffs Report for a statutorily defined purpose: to inform the President's decision to impose tariffs. The President is free to use the report for other purposes he considers useful, but he cannot bypass Congress's disclosure

directives by claiming executive privilege. The President's "treaty-making power" does not affect this case.[3]

2. Commerce incorrectly asserts that the presidential-communications privilege protects "treaty negotiations" and that its position is entitled to *Chevron* deference.

Commerce tries to widen the presidential-communications privilege to include, as a categorical matter, "documents concerning ongoing treaty negotiations with other nations[.]" Def.'s Opp'n at 11. The agency argues that disclosure would "compromise these negotiations and the President's overall ability to execute his statutory responsibilities." *Id.* at 11–12. Commerce would have the Court acknowledge the President's authority to keep the 232 Auto Tariffs Report secret until he determines that its release would no longer "jeopardize the U.S. position." *Id.* at 12. Indeed, the agency goes so far as to suggest its decision to accept this presidential interference must be afforded *Chevron* deference. *Id.* at 12 n.4.

To begin with, the caselaw that Commerce offers about treaty negotiation is inapt. Those cases deal with records falling either within the deliberative-process privilege, *see Fulbright & Jaworski v. Dep't of Treasury*, 545 F. Supp. 615, 619–20 (D.D.C. 1982), or Exemption 1. *See Brayton v. Office of the U.S. Trade Representative*, 657 F. Supp. 2d 138, 142, 145 (D.D.C. 2009). Yet the 232 Auto Tariffs Report is not classified, and Commerce has not raised an Exemption 1

[3] It is thus unsurprising that Commerce offers no citation for its claim that "[n]egotiating trade agreements . . . is one of the major weapons in the presidential arsenal that Congress invoked in Section 232." Def.'s Opp'n at 9 n.2.

argument.[4] Further, the report does not reveal the "give-and-take" of the treaty negotiation process. It is not a White House document and does not provide insight into ongoing discussion of treaty terms. *See Fulbright & Jaworski*, 545 F. Supp. at 620. Rather, the report reflects Commerce's findings and recommendations on the imposition of tariffs. That's all.

Commerce's appeal to *Chevron* deference also is misplaced. Although there may be ambiguity in Section 232's timeline for publication in the *Federal Register*, the President's policy-based preferences for delaying publication, and his concomitant refusal to permit Commerce to release the record under the FOIA, warrants no deference.[5] Commerce has not pointed to *any* authoritative legal interpretation of Section 232 that would give the President such an unprecedented role in the agency's preparation and publication of a tariff report. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

The agency claims that it "and the President reasonably understand Section 232 to confer discretion over the Report's release to a time when the very interests promoted by the asserted privileges and the design of the Act would not be harmed." Def.'s Opp'n at 16. But there is no support in the record for that claim nor is there any evidence that Commerce engaged in any formalized process for developing and articulating the interpretation of Section 232 that it now offers the Court. *See Mead*

[4] Even if it the report were partially classified, Section 232 provides a basis for withholding. *See* 19 U.S.C. § 1862(b)(3)(B).

[5] Oddly, Commerce reverses course at one point of its argument and claims that "Section 232's public requirement is *unambiguous*[.]" Def.'s Opp'n at 15 (emphasis added). If so, then the statute speaks for itself and *Chevron* deference is unwarranted.

Corp., 533 U.S. at 230–31 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

If anything, Commerce's implementing regulations for Section 232 resolve any ambiguity in favor of prompt disclosure. Those regulations address the completion and publication of the Secretary's report. *See* 15 C.F.R. § 705.10(b), (c). They do not identify grounds for publication delay while the President considers a report's findings and recommendations. *Cf. id.* § 705.11. Instead, they require that publication in the *Federal Register* occur "[u]pon the disposition" of an investigation. *Id.* § 705.12(a); 19 U.S.C. § 1862(d)(1); *see* Black's Law Dictionary (11th ed. 2019) (Disposition: "a final settlement or determination"). Taken together, Commerce's regulations actually *support* CoA Institute's position.

3. The President has waived any short-term confidentiality interests in the 232 Auto Tariffs Report.

Commerce (again, in a footnote, *see Hutchins*, 188 F.3d at 539 n.3) tries to downplay the President's publication of the 232 Auto Tariffs Report's findings and recommendations to salvage short-term confidentiality interests. *See* Def.'s Opp'n at 10 n.3 ("What has been disclosed informs the governed of the doings of its leaders."). But the White House's publication of excerpts of the report was not merely a "generalized" disclosure about government activities. It was a comprehensive presentation of "the entire contents of the [232 Auto Tariffs Report], albeit in summary form[.]" *Wash. Post Co. v. Dep't of the Air Force*, 617 F. Supp. 602, 605 (D.D.C. 1985) (finding waiver for portions of inspection report when agency

published a summary of findings and recommendations). Most importantly, the President quoted directly from the report. Liberman Decl. ¶ 6; *see* Pl.'s Cross-Mot. at 22. This affirmative act undermines any concerns about confidentiality. Whatever harm may have come from disclosing the report's contents has already come with the White House's proclamation. Commerce cannot change history to keep the report secret.

4. Section 232 does not allow the President to "solicit" an investigation and report.

Finally, Commerce suggests that it has otherwise satisfied the technical requirements for applying the presidential-communications privilege because the 232 Auto Tariffs Report "has been 'solicited and received' by the President." Def.'s Opp'n at 13; *see id.* ("The Automotive Report was indisputably 'solicited and received' by the White House pursuant to Section 232[.]"). That is not so.

Section 232 specifies that a tariff report is to be created after an investigation started "[u]pon request of the head of any department or agency, upon application of an interested party, or upon [the Secretary of Commerce's] own motion[.]" 19 U.S.C. § 1862(b)(1). If Commerce seeks to ground the "solicitation" of the report in Section 232 itself—and it does—it must deal with the fact that the President cannot initiate anything. The President is not an agency or department head; he is not the Secretary of Commerce; and he is not an "interested party," as defined elsewhere in the Trade Expansion Act of 1962. *Id.* § 1677(9). The 232 Auto Tariffs Report could not have been "solicited" in the same sense as that word is used in most cases about the presidential-communications privilege. The report is not the

product of presidential solicitation except in the most attenuated colloquial sense. The privilege therefore does not apply.

C. The deliberative-process privilege does not apply to the 232 Auto Tariffs Report.

The brevity of Commerce's defense of its use of the deliberative-process privilege speaks volumes. As CoA Institute explained, courts do not treat the presidential-communications and deliberative-process privileges as overlapping. *See* Pl.'s Cross-Mot. at 23 (citing *Judicial Watch*, 365 F.3d at 1122). Commerce appears to concede the point, *see* Def.'s Opp'n at 12–13, but still insists on arguing that both privileges apply to the same record. Although the deliberative-process privilege could protect records that reflect Commerce's investigation, or its preparation and finalization of the 232 Auto Tariffs Report, CoA Institute has not requested those records. It is the *final version* of the report that is at issue, and that report is neither pre-decisional nor deliberative *as to Commerce*. *See* Pl.'s Cross-Mot. at 24–25.

Commerce offers no support for its principal claim that the "President's use of the analysis and recommendations embodied in the Automotive Report," as opposed to Commerce's, qualify as "pre-decisional" and "deliberative." Although the President may be an "ultimate decision-maker under Section 232," at least for the imposition of tariffs, Def.'s Opp'n at 14, CoA Institute has not requested records about the President's use of the 232 Auto Tariffs Report. What matters is how *Commerce* used the report. Other courts have explained as much when considering extending the deliberative-process privilege to communications with the White

House. *See Cause of Action Inst. v. Dep't of Justice*, 330 F. Supp. 3d 336, 352 (D.D.C. 2018) (collecting cases).

Commerce's stray mention of the confidential-commercial-information privilege is out-of-place. Def.'s Opp'n at 14 n.5. That privilege is distinct from the deliberative-process privilege and only applies in limited situations while an agency is soliciting and considering contract bids. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 359–360 (1979). The privilege is not a general basis for withholding anything that could "plac[e] the government in a disadvantageous negotiating position." Def.'s Opp'n at 14 n.5. Section 232 does not implicate any government contracts. Thus, the "qualified privilege for confidential commercial information . . . generated by the Government itself in the process leading up to awarding a contract" does not apply. *Merrill*, 443 U.S. at 360.

Finally, Commerce's discussion of the interests underlying the deliberative-process privilege reveals (yet again) its serious confusion of how the privilege should be applied here. *See* Def.'s Opp'n at 21–22. Commerce claims that "until implementation, the advice and recommendations [contained in the report] are a *series of fluid and presumably changing options*[.]" *Id.* at 21 (emphasis added). That is incorrect. Rather, the report marks the end of Commerce's investigation and presents the agency's final "findings" and "recommendations." 19 U.S.C. § 1862(b)(3)(A); *see* 15 C.F.R. § 705.10(a) ("When an investigation . . . is completed, a report . . . shall be promptly prepared."); *id.* § 705.12(a) (and published "[u]pon the disposition" of the investigation). There is no danger that disclosure would chill the

work of "DOC officials with deep expertise." Def.'s Opp'n at 21. And while the President may not ultimately agree with Commerce's findings, disclosure would not cause "considerable risk of confusion" about Commerce's stance because that stance has already been memorialized in the report. Commerce's blurring of the distinction between its own role in the Section 232 process and the President's role plagues the agency's argument and dooms its case.

D. Commerce's arguments concerning past agency practice and the use of "temporary" privileges is unpersuasive.

Commerce tries to dismiss CoA Institute's evidence of the agency's past practice of promptly publishing Section 232 reports in the *Federal Register*, *see* Pl.'s Cross-Mot. at 31 (citing Decl. of R. James Valvo, III ¶ 8, ECF No. 24-3), as well as CoA Institute's elaboration on the curious use of "temporary" privileges. *See id.* at 26–32. On each issue, Commerce fails to rebut CoA Institute's arguments.

First, Commerce claims that "the Court has no way of knowing whether any of th[e] more quickly published reports implicated the interests at stake here." Def.'s Opp'n at 18. Yet, from the outset, Commerce has premised its categorical use of Exemption 5 on the theory that Section 232 *always* implicates the *same* interests in confidentiality *until* the President has finalized his decision whether to impose tariffs. *See, e.g.*, *id.* at 1–2 ("Section 232 both solicits and ensures the President receives the tools—in the form of DOC's wise counsel—to combat whatever threat to national security is identified."). Although the goods at issue in each Section 232 investigation may differ—from steel and aluminum to automobiles to titanium sponge—the underlying interests remain unchanged. *See id.* at 2 ("The stakes here

must not be forgotten. If Section 232 is in play, it is because another nation-state . . . has imported [an] article of commerce in a manner that threatens to impair the United States' national security.").

CoA Institute's interpretation of the historical data offers a commonsense conclusion unlike Commerce's hyperbole. Section 232 reports have typically been published near-contemporaneous with their transmission to the President because the statute requires that outcome. Although national security concerns may be more pronounced in certain cases, those concerns cannot excuse Commerce from meeting its statutory obligations. The agency's disingenuous attempt to recast past practice as somehow reflecting "discretionary disclosure," *see* Def.'s Opp'n at 18 n.8, confuses how Section 232 operates.

Second, Commerce concludes that CoA Institute's argument about "temporary" privileges is "internally contradictory" because CoA Institute maintains that Congress can "limit the Executive's privileges." *Id.* at 19–20. But this characterization of CoA Institute's argument is mistaken. The problem of "temporary" privileges only arises *assuming Commerce is correct* about the availability of the presidential-communications and deliberative-process privileges. *See* Pl.'s Cross-Mot. at 26 ("Taken seriously, Commerce's position requires one of two things to be true."). In other words, CoA Institute's discussion of "temporary" privileges highlights the inherent contradictions of Commerce's primary argument that Section 232's publication requirement is reconcilable with the "temporary" withholding of the tariffs report under Exemption 5. *Id.* at 28 ("If Commerce is

correct that either privilege applies, they will apply even after the President decides whether to impose tariffs.").

In this sense, Commerce's analogy to internal deliberative work product later adopted as final policy is irrelevant because, yet again, it depends on a blurred distinction between the agency's decision-making under Section 232, and the President's later use of the Secretary's investigative report for his own purposes. *See id.* at 20. The statute and Commerce's implementing regulations advise that the availability of the 232 Auto Tariffs Report, whether under the FOIA or in the *Federal Register*, should not depend on the President's decision to impose tariffs or carry-out trade negotiations. *See supra* at pp. 9–10. And whatever discretion the agency may enjoy in delaying *Federal Register* publication, that discretion does not translate to the FOIA context, where prompt disclosure is required. *Cf. Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) ("prompt" production means "within days or a few weeks of a 'determination,' not months or years").

E. Commerce must segregate non-exempt information in the report and release it to CoA Institute.

Commerce claims that it has met its burden in showing that no reasonably segregable non-exempt information can be released. The agency also argues that CoA Institute failed to "produce a 'quantum of evidence' to rebut this claim" and "only reiterate[s] . . . variations of its arguments against the application of the presidential communications privilege or deliberative process privilege." Def.'s Opp'n at 22, 24. That is not true.

CoA Institute pointed to language that the President directly quoted from the 232 Auto Tariffs Report, as the agency itself admits. *See* Liberman Decl. ¶ 6; Pl.'s Cross-Mot. at 22; *see also id.* at 34. Additionally, CoA Institute identified the problem with Commerce asserting it could judge the meaningfulness of portions of the 232 Auto Tariffs Report that are purely factual and non-deliberative. *See id.* at 33–34. Commerce has not responded to these arguments. The agency instead offers anodyne recitation of the interests underlying the president-communications and deliberative-process privileges. Non-specific boilerplate promises about Commerce having conducted an adequate segregability review cannot carry the day.

CONCLUSION AND RELIEF SOUGHT

For these reasons, the Court should deny Commerce's motion for summary judgment; grant CoA Institute's motion; order Commerce to produce the 232 Auto Tariffs Report; and grant other relief the Court considers appropriate.

Dated: September 24, 2019

Respectfully submitted,

/s/ Ryan P. Mulvey
Ryan P. Mulvey (D.C. Bar No. 1024362)
R. James Valvo, III (D.C. Bar No. 1017390)
Lee A. Steven (DC Bar. No. 468543)

CAUSE OF ACTION INSTITUTE
1875 Eye Street, N.W., Suite 800
Washington, D.C. 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
ryan.mulvey@causeofaction.org
james.valvo@causeofaction.org
lee.steven@causeofaction.org

Counsel for Plaintiff