No. 08-1476

In the Supreme Court of the United States

DWIGHT J. LOVING, PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether documents of the Department of Defense and Department of the Army relating to the President's review of a military death sentence were properly withheld under Exemption 5 of the Freedom of Information Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 550 F.3d 32. The opinion of the district court (Pet. App. 18a-36a) is reported at 496 F. Supp. 2d 101.

JURISDICTION

The judgement of the court of appeals (Pet. App. 17a) was entered on December 23, 2008. A petition for rehearing was denied on March 3, 2009 (Pet. App. 37a-40a). The petition for a writ of certiorari was filed on May 28, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure of records held by federal agencies upon public request. Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. In particular, FOIA Exemption 5 authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).

Exemption 5 protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context," *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *FTC* v. *Grolier Inc.*, 462 U.S. 19, 26 (1983). Documents that are "normally privileged" from discovery in a civil suit are exempt from disclosure irrespective of any demonstration of need made by a given requestor. See *Sears, Roebuck & Co.*, 421 U.S. at 149 n.16; *Grolier*, 462 U.S. at 28.

2. Petitioner was an Army private who was sentenced to death in 1989 by a general court-martial, a sentence that this Court affirmed on direct review. See *Loving* v. *United States*, 517 U.S. 748, 750 (1996).

Under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, if a court-martial issues a death sentence, "that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. 871(a); see *Manual for Courts-Martial, United States*-2005, Rule for Courts-Marital 1207 (R.C.M.) ("No part of a court-martial sentence extend-

ing to death may be executed until approved by the President."). The President may also commute or remit the sentence. 10 U.S.C. 871(a).

Petitioner submitted FOIA and Privacy Act requests to the Department of Defense (DoD) and the Department of the Army seeking, among other documents, various memoranda prepared by senior officials and transmitted to the President in connection with the President's statutory review of petitioner's death sentence. Pet. App. 2a. The DoD released 133 pages in response to these requests but withheld an additional 104 pages on a variety of grounds, including FOIA Exemption 5. *Id.* at 3a.

3. Petitioner subsequently commenced this lawsuit against respondents under multiple statutes, including FOIA, and respondents released hundreds of additional documents and withheld many others. Pet. App. 3a. Petitioner ultimately narrowed his suit to a FOIA claim seeking disclosure of the following four documents at issue here (identified by *Vaughn* index number):[1]

> #408 A 31-page memorandum from the Judge Advocate General of the Army to the Secretary of the Army (forwarded to the President pursuant to R.C.M. 1204(c)(2)) reflecting the Judge Advocate General's analysis of plaintiff's case and recommendation as to whether the Secretary should recommend that the President approve plaintiff's death sentence, dated January 13, 2004;

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[1] See *Vaughn* v. *Rosen*, 484 F.2d 820, 826-828 (D.C. Cir. 1973) (requiring an "an itemized explanation by the Government" of documents withheld under a claimed FOIA exemption), cert. denied, 415 U.S. 977 (1974).

> #499 A one-page memorandum addressed from the [Acting] Secretary of the Army to the President "containing the [Acting Secretary's] recommendation regarding whether or not PVT Loving's death sentence should be approved," dated November 8, 2004;
>
> #86 A one-page memorandum from the Secretary of Defense to the President forwarding plaintiff's military court-martial capital case to the President for action, dated January 8, 2006;
>
> #87 An undated one-page memorandum from the DoD Office of the General Counsel to the Counsel to the President concerning "The President's Action in Two Military Capital Cases."

Id. at 21a-22a.

The government argued that the presidential communications and deliberative process privileges applied to the documents and therefore withheld them under Exemption 5. Pet. App. 5a.

The district court entered summary judgment in favor of respondents. See Pet. App. 18a-19a, 35a. The court held that three of the withheld documents, Documents 408, 499, and 86, were covered by the presidential communications privilege, see *id.* at 26a-27a, and that the fourth, Document 87, was covered by the deliberative process privilege, see *id.* at 29a.

4. The court of appeals affirmed. Pet. App. 1a-5a. The court rejected petitioner's claim that due process he contended he possessed as a capital litigant requesting documents in connection with his own death sentence rendered Exemption 5 inapplicable. *Id.* at 8a-10a. Relying on this Court's precedents, the court recognized that the identity of a FOIA requester matters only when "the objection to disclosure is based on a claim of privilege

and the person requesting disclosure is the party protected by the privilege." *Id.* at 9a (quoting *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (*Reporters Committee*)). Because the privileges at issue here belong not to the petitioner, but rather to the President of the United States and the Executive Branch, the court held that petitioner's identity and asserted need had no bearing upon the merits of his FOIA request. *Id.* at 10a. The court thus determined that the sole question was whether the presidential communications privilege and deliberative process privilege did, in fact, apply to the withheld documents. *Ibid.* Concluding that the privileges were applicable, the court held that the documents were properly withheld under Exemption 5. *Id.* at 11a-15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that Documents 408, 499, and 86 "are exempt from disclosure based on the presidential communications privilege." Pet. App. 11a.[2] Each of those documents was prepared for the President's direct review and therefore falls within the heart of the presidential communications privilege. See *id.* at 11a-13a. Petitioner contends that Document 408 is not protected by the presidential communications privilege because it "underwent intermedi-

[2] As the court of appeals explained (Pet. App. 14a), petitioner does not dispute that the deliberative process privilege applies to Document 87.

ate review" before being transmitted to the President (Pet. 32), and similarly suggests that all three documents are unprivileged because they were not solicited by the President (Pet. 32-33). But this Court has never held that "intermediate review" defeats the presidential communications privilege or that the privilege rests on the President's "solicitation" of a document.[3] To the contrary, the Court has made clear that the privilege protects "communications in performance of [a President's] responsibilities" and "made in the process of shaping policies and making decisions." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (internal quotation marks omitted) (quoting *United States* v. *Nixon*, 418 U.S. 683, 708, 711 (1974)).

Petitioner contends (Pet. 36) that even if the privileges cover the disputed documents, the court of appeals should have ordered the disclosure of all segregable factual material, or, at the least, undertaken *in camera* inspection of the documents. But the presidential communications privilege protects even purely factual content in covered presidential communications. See *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (discuss-

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[3] The court of appeals has indicated that "internal agency documents" do not qualify for the presidential communications privilege unless "solicited and received" by the President or his "immediate White House advisers." *Judicial Watch, Inc.* v. *Department of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). As the court explained in this case, however, Documents 499 and 86 were addressed directly to the President and thus are not the kind of "internal agency documents" for which presidential solicitation would be required under that test. Pet. App. 11a. And Document 408 was "solicited and received" by the President by virtue of his promulgation of the *Manual for Courts-Martial*, which expressly requires the Judge Advocate General to "transmit . . . [a recommendation] to the Secretary concerned for the action of the President." *Id.* at 12a (citing R.C.M. 1204(c)(2)).

ing *United States* v. *Nixon*, *supra* ("Indeed, *Nixon* argued that the presidential privilege must be qualified to ensure full access to facts in judicial proceedings, thereby assuming that factual material comes under the privilege."). Accordingly, no factual segregation was required with respect to Documents 408, 499, and 86.

With respect to Document 87, both the court of appeals and the district court concluded that the government's description of the document, combined with its declaration that it had released all reasonably segregable material, sufficed to establish that "Document 87 contained no segregable portions." Pet. App. 15a; see *id.* at 33a-34a. Further review of that fact-bound ruling is not warranted.

2. Although the documents at issue satisfy the elements of privileges encompassed by Exemption 5, petitioner nonetheless contends that they cannot be withheld because the Due Process Clause compels their disclosure to a capital defendant. That contention reflects a fundamental misunderstanding of FOIA. Petitioner may seek judicial review of his constitutional claims through any available post-conviction proceeding ancillary to his criminal case. But FOIA does not furnish petitioner with a cause of action to litigate such claims. FOIA is a general disclosure statute that applies to all members of the public equally, and its language makes clear that its exceptions do not turn on the identity of the requestor. Rather, upon request, non-exempt records must be made "promptly available to *any person*." 5 U.S.C. 552(a)(3)(A) (emphasis added). See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004) ("[D]isclosure [under FOIA] does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.").

Consistent with FOIA's function as a disclosure statute serving the general public, this Court has held that Exemption 5 operates without regard to a litigant's stated "need [for the documents] in the context of the facts of his particular case." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975). Courts do not engage in a balancing or weighing of interests to determine whether particular documents are covered by a litigation privilege and therefore not subject to public disclosure under Exemption 5. As this Court has explained, that Exemption must be construed to encompass "those documents * * * *normally* privileged in the civil discovery context." *Id.* at 149 (emphasis added). The validity of an invocation of Exemption 5 thus turns on whether the requisite elements of a litigation privilege have been satisfied, not on any consideration of a plaintiff's countervailing need. See *FTC* v. *Grolier Inc.*, 462 U.S. 19, 27-28 (1983) ("Respondent urges that * * * the requested documents must be disclosed because the same documents were ordered disclosed during discovery in previous litigation. It does not follow, however, from an ordered disclosure based on a showing of need that such documents are *routinely available* to litigants.") (emphasis added). When, as here, the documents in question are "normally" privileged in the civil discovery context, that is the end of the inquiry. *Sears, Roebuck & Co.* 421 U.S. at 149 & n.16; *Grolier Inc.*, 462 U.S. at 28.

Petitioner's reliance on *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), is misplaced. *Julian* held that the subjects of privileged presentence investigative reports may obtain those documents under FOIA. Contrary to petitioner's suggestion, however, *Julian* did not create a general right for first-party requesters seeking "documents generated by the govern-

ment for the 'sentencing' phase of a proceeding." Pet. 27-28. Rather, as this Court explained in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), *Julian* turned on the fact that privilege at issue in that case could be "waive[d]" by the FOIA requester. *Id.* at 771. Thus, in explaining *Julian*'s reach, *Reporters Committee* concluded that "[e]xcept for cases in which the objection to disclosure is based on a claim of privilege *and the person requesting disclosure is the party protected by the privilege*, the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Ibid.* (emphasis added).

As the court of appeals explained (Pet. App. 9a-10a), that exception has no application here. Exemption 5 applies by virtue of established litigation privileges that protect the decision-making processes of the Executive Branch, including the President himself. Those privileges belong to the President and the Executive Branch, not petitioner, and petitioner has no right to "waive" the Executive Branch privileges at issue. See *Reporters Committee*, 489 U.S. at 771. Because the disputed documents in this case are covered by privilege, they would not be "routinely" available in civil discovery, *Sears, Roebuck & Co.*, 421 U.S. at 149 n.16, and are therefore protected by Exemption 5.

3. Having correctly concluded that a FOIA suit is not a proper vehicle through which to litigate petitioner's due process claim, the court of appeals did not address the merits of that constitutional claim, and there is no reason to depart from the Court's ordinary practice of declining to address such issues for the first time. See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168-169 (2004).

In any event, petitioner's claim of a due process right to the requested documents lacks merit. Petitioner's judicial sentencing has already occurred, and he does not dispute that he was afforded full access to relevant documents concerning the judicial phase of his sentencing. The President's additional role in reviewing respondent's sentence—and the President's solicitation and receipt of advice from Executive Branch officials to facilitate that role—is wholly distinct from the adversarial adjudication at issue in *Gardner* v. *Florida*, 430 U.S. 349 (1977), and the related cases that petitioner invokes. Petitioner cites nineteenth century authorities for the proposition that the President's role in the court-martial process is, in some sense, "judicial." See Pet. 25-26. But the process of Presidential review is not akin to a judicial sentencing proceeding; rather, the President possesses wholly discretionary authority as to his decision-making process. Such Presidential review is "conducted after all legal reviews are completed," and is "conducted as a matter of clemency." *Loving* v. *United States*, 62 M.J. 235, 247 (C.A.A.F. 2005) (quoting S. Rep. No. 53, 98th Cong., 1st Sess. 24 (1983)). Accordingly, the President's exercise of authority under 10 U.S.C. 871(a) "is akin to a state governor's action, and as such, is not part of the direct judicial review of the case." *Loving*, 62 M.J. at 247; see *Loving* v. *United States*, 64 M.J. 132, 137 (C.A.A.F. 2006). Petitioner cites no authority to suggest that the President is constitutionally required to disclose any documents that inform his exercise of such discretion, let alone that the proper avenue for litigating such a constitutional challenge is an action under FOIA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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