No. 08-125

In the Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,
PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that communications from a small group of former government officials and academics, who were individually and directly solicited by an agency for their expert advice and who were neither self-advocates nor advocates for others, constituted "inter-agency or intra-agency" communications exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 512 F.3d 677. The opinion of the district court (Pet. App. 41a-87a) is reported at 404 F. Supp. 2d 325.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2008. A petition for rehearing was denied on April 30, 2008 (Pet. App. 88a). The petition for a writ of certiorari was filed on July 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 13, 2001, shortly after the September 11 terrorist attacks, President Bush ordered the

Department of Defense (Department or DoD) to establish military commissions to try terrorists—defined as non-citizens who the President determines are members of al Qaeda, have engaged in acts of international terrorism, or have knowingly harbored such persons. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002). In the course of promulgating regulations to carry out the Presidential directive, the Department of Defense "solicited and received comments from a number of non-governmental lawyers, who were former high ranking governmental officials or academics or both," Pet. App. 3a, and whose "previous experience in the government and/or their expertise made them uniquely qualified to provide advice" to the Department with respect to procedures for the envisioned military commissions, *id.* at 4a (citation omitted).[1] Those individuals were not paid for their services, but there was an understanding that they would be consulted on a continuing basis and that the contents of their advice "would not be released publicly." *Ibid.* (citation omitted).

Petitioner filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, with the Department seeking "all written or electronic communications" between the Department and any person who was not an officer or employee of the United States concerning the President's order, including but "not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any

[1] Those whose views the Department solicited included, *inter alios*, individuals who had served as Legal Counsel to the President, Director of the CIA and FBI, Secretary of the Army, Department of Defense General Counsel, and Assistant Trial Counsel at the Nuremberg war crimes tribunal. Pet. App. 14a & n.8.

similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted." Pet. App. 4a-5a. The Department released thousands of pages of responsive documents, including documents containing views submitted by "individuals who were 'not consulted with on a continuing basis or with the understanding and expectation that their comments would be kept in confidence.'" *Id.* at 4a n.3 (citation omitted); see *id.* at 13a (noting that the Department did not claim exemption for comments from "members of the public or organizations *with an interest in these matters*"). The Department withheld from disclosure, pursuant to FOIA Exemption 5, nineteen documents relating to the views of individuals the Department had specifically solicited with an understanding that they would be consulted on an ongoing basis and that their advice would remain confidential. *Id.* at 5a, 44a. Exemption 5 exempts from FOIA's disclosure requirement "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).

2. Petitioner filed this suit under FOIA in the United States District Court for the District of Columbia in February 2004, seeking disclosure of the documents the Department had withheld. The court held that, pursuant to this Court's decision in *Department of the Interior* v. *Klamath Water Users Protective Ass'n.*, 532 U.S. 1 (2001) (*Klamath*), the Department had acted appropriately in withholding the disputed documents under Exemption 5. Pet. App. 73a.[2] The court observed that

[2] Petitioner also raised other issues before the district court. Pet. App. 47a-54a (adequacy of the Department's search); *id.* at 54a-69a (FOIA Exemption 3). Those issues are not presented in the petition for a writ of certiorari.

the consultants' "comments were clearly made to advance the 'truth and [the consultant's] sense of what good judgment calls for, and in those respects [the consultant] functions just as an employee would be expected to do.'" *Id.* at 74a (brackets in original) (quoting *Klamath*, 532 U.S. at 11). The court rejected petitioner's argument that the consultants had merely advanced their personal interests, observing that the attorneys' views "were requested by the DoD" and that "[t]here is simply no evidence that any non-agency attorneys were representing their personal interests or the interests of any clients in making their comments." *Ibid.*

The district court further reasoned that withholding the documents is consistent with the purpose of Exemption 5 "to enhance the 'the quality of agency decisions.'" Pet. App. 75a (quoting *Klamath*, 532 U.S. at 9). The court concluded that the attorneys' views were solicited on a matter "of vital importance to this nation" and "would enhance the quality of the agency's decision making process." *Ibid.* The court therefore ruled that the 19 documents were exempt from disclosure under the deliberative process privilege encompassed within Exemption 5 because the recommendations "reflect the personal view of the author" and their disclosure "might very well stifle the frank and honest views of others who may in the future be asked to provide advice and guidance to the DoD." *Id.* at 79a-80a.

3. The court of appeals affirmed. Pet. App. 1a-22a. The court noted that the documents at issue were "plainly" both predecisional and part of the Department's deliberative process and therefore would qualify for withholding under the "deliberative process privilege" if, as the district court held, they were inter- or intra-agency communications. *Id.* at 6a n.4. The court held that, con-

sistent with this Court's analysis in *Klamath* and the court of appeals' prior decisions in *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), *Formaldehyde Institute* v. *Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989), and *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the disputed documents were subject to withholding under Exemption 5. Pet. App. 5a-22a.

The court of appeals observed that *Klamath* had expressly noted, while reserving decision on the question, the line of circuit court precedent holding that Exemption 5 encompasses "records submitted by outside consultants [that] played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." Pet. App. 11a (quoting *Klamath*, 532 U.S. at 10). The Court had stressed in *Klamath* that the Indian Tribes whose communications with the Bureau of Indian Affairs were at issue in that case had communicated with the Bureau "with their own * * * interests in mind" and were "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone." *Ibid.* (quoting *Klamath*, 532 U.S. at 12). The Court had distinguished such communications—which fell outside of Exemption 5—from those in the typical cases applying Exemption 5, in which the consultant's "only obligations are to truth and its sense of what good judgment calls for, * * * just as an employee would be expected to do." *Ibid.* (quoting *Klamath*, 532 U.S. at 11).

Adhering to established appellate precedent, which *Klamath* had not disturbed, the court of appeals held that the documents at issue in this case qualified as

intra-agency documents under Exemption 5.[3] The court of appeals explained that the terms "inter-agency" or "intra-agency" must be given a "common sense interpretation" so that the agency may "rely on the opinions and recommendations of temporary consultants, as well as its own employees." Pet. App. 16a (quoting *Ryan*, 617 F.2d at 789). The court observed that confidentiality "is crucial to eliciting candid and honest advice from outside consultants," *id.* at 18a, and noted that the Department had good reason to enlist expert advice in this case, as "[i]t was plainly preferable * * * for DoD to consult as widely as possible in order to fairly but effectively try terrorists in the aftermath of September 11, 2001," *id.* at 12a-13a.

The court stressed that its decisions construing the "intra-agency" requirement insist upon "indicia of a consultant relationship between the outsider and the agency," such as evidence that the "agency [sought] out the individual consultants and affirmatively solicit[ed] their advice in aid of agency business." Pet. App. 19a. Here, the Department "sought these individuals out and solicited their counsel based on their undisputed experience and qualifications." *Id.* at 13a-14a. The court emphasized that petitioner "itself concedes" that, unlike the Indian Tribes in *Klamath*, the consultants in this case "had no individual interests to promote in their submissions." *Id.* at 13a. In fact, the court noted, the Department disclosed in response to petitioner's FOIA request

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[3] The court of appeals recognized that *Klamath* expressed reservations "with regard to the potential self-interests of the 'consultants' involved" in two of the District of Columbia Circuit's prior cases, Pet. App. 17a, but observed that, in this case, "there is no dispute that the individuals DoD consulted were not pursuing interests of their own so as to run afoul of *Klamath*'s concern," *ibid.*

comments regarding the tribunals that were submitted by "members of the public or organizations *with an interest in these matters*." *Ibid.* The court rejected petitioner's contention that the absence of a consulting contract, stipend, or a nominal committee membership should be determinative. *Id.* at 13a, 20a-21a. Rather, "[i]t was DoD's formal solicitation of their advice (with or without nominal pay or title) that created a consultant relationship and made them analogous to agency employees and [made] documents containing their advice 'intra-agency.'" *Id.* 20a.

Judge Tatel dissented. Pet. App. 23a-40a. He would have limited the inter- or intra-agency requirement of Exemption 5 to communications from individuals who were formally hired as paid consultants or formally appointed to advisory committees. *Id.* at 25a, 32a. The dissent acknowledged that "[a]gencies will obtain better advice if they can promise confidentiality to outside volunteers whose views they solicit" and that "the benefits of such advice will outweigh the cost in lost transparency," but would have concluded that such communications nonetheless fall outside the scope of Exemption 5. *Id.* at 39a.

ARGUMENT

Petitioner seeks review (Pet. 12-21) of the court of appeals' determination that advice provided to an agency by a small group of former government officials and academics specifically solicited by the agency for their expertise, and who had no independent interest in the matter, constitute "intra-agency" communications within the meaning of FOIA Exemption 5. The decision of the court of appeals is correct and does not conflict with any

decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. The court of appeals correctly construed FOIA Exemption 5 to encompass communications between an agency and a small group of former government officials and academics who have no interest in the matter but whose advice the agency specifically solicits due to their experience and expertise. Contrary to petitioners' suggestion (Pet. 15-16), there is no reason to limit the protection of Exemption 5 to consulting relationships that comply with certain formalities, such as a paid consulting contract or formal membership on an advisory committee. It is the substance of the relationship, rather than particular formalities, that is determinative. Where, as here, the consultants have been specifically solicited to provide the agency with their disinterested expert advice, with an understanding that the relationship will be ongoing and confidential, that advice constitutes an intra-agency communication within the scope of Exemption 5.

This Court has recognized that the deliberative process privilege encompassed within Exemption 5 extends to "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks and citation omitted). The protection of such documents from disclosure "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," and, thus, in order to enhance "the quality of agency decisions," the Exemption "protect[s] open and frank dis-

cussion among those who make them within the Government." *Klamath*, 532 U.S. at 8-9.

Petitioner does not contest that the Department's solicitation of advice to aid it in formulating procedures for the military tribunals qualifies as a "deliberative process" and therefore satisfies the second prong of Exemption 5. See Pet. App. 6a n.4. Rather, petitioner argues that, no matter how critical they were to the Department's deliberations about how best to implement the President's directive, the experts' views, though sought in confidence, categorically fall outside the scope of Exemption 5's protection because they do not qualify as "intra-agency" communications. Pet. 12-17. Contrary to petitioner's contentions, the court of appeals' holding is consistent with the text and purpose of Exemption 5 and will not lead to the consequences that petitioner hypothesizes.

Although, as this Court has noted, a narrow reading of "intra-agency memorandum" might encompass only "a memorandum that is addressed both to and from employees of a single agency," *Klamath*, 532 U.S. at 9 (quoting *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)), a broader reading is more consistent with the statute's purpose. "It is textually possible and . . . in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as * * * consultant to the agency." *Id.* at 9-10 (quoting

Julian, 486 U.S. at 18 n.1 (Scalia, J., dissenting)).[4] As the Court has recognized, "consultants may be enough like the agency's own personnel to justify calling their communications 'intra-agency.'" *Klamath*, 532 U.S. at 12.

Petitioner does not appear to embrace the narrowest interpretation of "intra-agency"—one limited to communications between an agency's employees—but nonetheless contends (Pet. 15) that an agency's communications with a consultant may qualify under Exemption 5 only if he or she receives compensation for the consultation under a formal contract. As the court of appeals recognized, there is nothing inherent in the nature of a consultant relationship that requires monetary compensation as a prerequisite. Pet. App. 20a. Nor is there anything in the text that mandates adherence to strict formalities, such as payment of a nominal stipend or appointment to an advisory committee. *Id.* at 21a. Rather, the determination whether there exists a consultant relationship that qualifies as "intra-agency" should be based on substance. *Id.* at 19a. The presence or absence of compensation may be a relevant consideration, but there is no basis for giving it sole, controlling weight.

Petitioner's argument ultimately rests on its assertion that without such formalistic limitations, Exemption 5 would become boundless, such that "if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as 'intra-agency.'" Pet. 16 (quoting Pet. App. 33a (Tatel,

[4] Although Justice Scalia made his observation regarding outside consultants falling within the definition of Exemption 5 in the context of a dissenting opinion, the majority did not disagree; rather it found it unnecessary to reach the issue. See *Julian*, 486 U.S. at 11 n.9.

J., dissenting)). Notably, the court of appeals took pains to disclaim any such construction of Exemption 5. Pet. App. 19a-20a. The court noted that the Department made no attempt to invoke Exemption 5 for comments received from the public or even from solicited parties who had their own interest in the matter. *Id.* at 13a. Rather, the court's ruling was limited to communications as to which the Department had made a "formal agency solicitation of advice from a discrete group of experts" whose "previous experience in the government and/or their expertise made them uniquely qualified" to provide disinterested advice to the Department with respect to procedures for the envisioned military commissions. *Id.* at 4a, 21a (citation omitted). See *id.* at 14a n.8 (noting posts the solicited individuals had held). Petitioner's speculation that, contrary to the court of appeals' specific admonition, its opinion will lead to "absurd results" provides no basis for this Court's review of the appellate court's limited holding.[5]

2. Contrary to petitioner's argument (Pet. 13-15) the court of appeals' construction of Exemption 5 does not conflict with this Court's decision *Klamath*. As the court of appeals explained, Pet. App. 11a, the Court in *Klamath* held only that the Indian Tribes in that case did not function as impartial consultants participating in

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[5] In his dissenting opinion, Judge Tatel read the majority's opinion, as petitioner does, as holding that Exemption 5 covers "*everyone* an agency asks for advice." Pet. App. 25a. As detailed above, the majority opinion expressly disavowed such a holding. See *id.* at 20a (noting that "nothing in our cases (including today's decision) even remotely supports" the dissent's view that the court would "allow an agency merely to ask the general public for advice at a press conference or in the Federal Register and then to classify the resulting responses as 'intra-agency' documents").

the formulation of the agency's own policy but instead "necessarily communicate[d] with the Bureau with their own, albeit entirely legitimate, interests in mind" and were "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone." *Klamath*, 532 U.S. at 12. Because the Tribes in *Klamath* were "obviously in competition with nontribal claimants" for scarce benefits, *id.* at 13, their advocates could not be regarded as functionally similar to agency employees, whose "only obligations are to truth and [their] sense of what good judgment calls for," *id.* at 11.

There is no suggestion in this case that the experts consulted by the Department were "self-advocates" or were "seeking benefits" for themselves or were "in competition" with others. This is not a case in which there was any "competition" for "benefits"—much less for benefits "inadequate to satisfy everyone." Rather, as the court of appeals recognized and as petitioner has conceded, the expert advice of these former government officials and experts was solicited by the Department precisely because they had "undisputed experience and qualifications" in the area and thus were uniquely qualified to aid "DoD's deliberation in promulgating regulations." Pet. App. 13a-14a. The outside consultants served a function—offering their views, based upon their wealth of experience, as to "what good judgment calls for" regarding a matter of critical public interest—that does not differ in any substantive respect from what "an employee would be expected to do." *Klamath*, 532 U.S. at 11. There is, therefore, no conflict between the decision of the court of appeals and this Court's decision in *Klamath*.

3. Petitioner does not contend that the decision of the court below conflicts with the decision of any other

appellate court. Rather, petitioner urges the Court to grant certiorari to resolve "[t]he dispute between the majority and the dissenting judge below." Pet. 12. It is well established that this Court does not grant a writ of certiorari to address intra-circuit conflicts, see *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), and, in any event, there is no intra-circuit conflict because, as the majority explained, its decision is entirely consistent with other District of Columbia Circuit cases applying Exemption 5. See Pet. App. 18a-20a.

Implicitly acknowledging that the petition does not satisfy this Court's traditional standards for granting a petition for a writ of certiorari, petitioner argues (Pet. 18) that review in this case is justified despite the absence of any conflict because "[e]very FOIA action may be brought in the District of Columbia." Pet. 18; 5 U.S.C. 552(a)(4)(B). While it is true that each FOIA requester has the *option* to bring a suit challenging the withholding of documents in the United States District Court for the District of Columbia, FOIA also provides requesters with the choice to bring suit "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated." *Ibid.* FOIA suits outside the District of Columbia are hardly rare. Most notably, of the nine district court decisions petitioner cites (Pet. 19) as addressing advice from consultants, six arose outside the District of Columbia in districts encompassed within the First, Eighth, Ninth, and Tenth Circuits, including cases in the District of Colorado, the District of Utah, the District of Maine, the Eastern District of Missouri, and the Northern and Central Districts of California. See Pet. 19-20. Indeed, the District of Utah case cited by peti-

tioner is currently before the Tenth Circuit in *Stewart* v. *Department of the Interior*, No. 07-4200 (argument scheduled for Nov. 17, 2008), on the government's appeal of the district court's FOIA ruling. As this body of litigation indicates, there is no reason to regard the District of Columbia Circuit's decision in this case as foreclosing additional consideration in the several courts of appeals of Exemption 5's application to communications with unpaid consultants. There is no reason for the Court to depart from its traditional practice of allowing issues to be fully developed among the courts of appeals before deciding that review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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