THE WHITE HOUSE
WASHINGTON

February 23, 2018

Mr. BenjaminOakmont
333 Constitutional Avenue N.W.
Washington, D.C. 20001
Room 1225

Dear Mr. Oakmont:

I am writing to you in regard to the matter before your court being currently resolved, *see Institute for Justice v. Dept. of Defense* (2018). The plaintiff in that case has requested information pertaining to the decision to shut down the Defense Intelligence Agency.

The information he requests, however, comprises private phone-call conversations between me and my circle of senior advisors. It is my sincere belief that a "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Such a privilege, the *Nixon* Court explained, is "fundamental" to the running of government and "inextricably rooted" in our constitutional republic's separation-of-powers architecture. *Ibid.* This type of privilege has become known as the "presidential communications privilege." Furthermore, materials related to national security or broader defense traditionally enjoy "the utmost deference" by courts of law. *Id.* at 710.

But there is an exception to the President's privilege ability; the *Nixon* Court, rightfully so, found that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest of confidentiality," the commitment to due process and administration of criminal justice reigns superior. *Id.* at 713. To allow the President to withhold documents under executive privilege that are general, not specific, and "demonstrably" relevant to a judicial proceeding would hurt that commitment. *Id.* at 712.

There are, it follows, three types of privileges a court of law can be confronted by: presidential communications, national-security information, and generalized executive documents. The FOIA request made here, *see* Compl. ¶ 23, asks for information that falls under the first type: the presidential communication. Plaintiff also contends that *Nixon* lends no support to this position; he goes so far to say that it does the opposite. But, when one reads *Nixon* in full, one will realize that it only supports the conclusion that for what plaintiff is asking is protected.

As noted above, *Nixon* provides three distinctions, but the plaintiff in this case asserts that only *one* exception to executive privilege exists: the privilege of withholding information that would injure national security. Brief in Opposition to Motion to Dismiss ¶ 9. That reading, however, does not comport with the actual decision. In fact, it could be reasonably argued that *Nixon* provides a special treatment not for withholding information pertaining to national-security matters, but instead to information pertaining to private conversations occurring directly with the president or his immediate advisors.

The contents of the conversations the plaintiff requests be released were ones discussed during late-night calls between me and my immediate advisors. Whatever the plaintiff believes they include, they must remain privileged. Were I to be forced to divulge them—no matter their sensitivity in relation to a national-security concern or otherwise—I would very likely be unable to do my job effectively moving forward. Most, if not all—as my staff would testify—of my conversations regarding decision making occur on the telephone. These conversations are private in nature and fall under the presidential communications privilege. Without hesitation, I, therefore, am formally invoking executive privilege in this matter.

Sincerely,