IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FAIRHOLME FUNDS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. 13-465C
v.	)	(Judge Sweeney)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

MOTION FOR LEAVE TO FILE AMICUS BRIEF OF PROFESSOR JOHN YOO

Professor John Yoo respectfully moves for leave to file the accompanying amicus brief in support of the *Perry Capital* plaintiffs' Motion to Remove the Protected Information Designations from Documents Cited in the D.C. Circuit Merits Briefing (March 31, 2016), Doc. 304. Professor Yoo is the Emanuel S. Heller Professor of Law at the University of California, Berkley, School of Law and served as the Deputy Assistant U.S. Attorney General in the Office of Legal Counsel (OLC) from 2001 to 2003. At OLC, Professor Yoo worked on issues involving foreign affairs, national security, and separation of powers. Professor Yoo has written extensively on the separation of powers, the scope of the President's constitutional authority, and executive privilege, and he is one of the Nation's leading authorities on those topics. Professor Yoo's experience and expertise make him uniquely qualified to address arguments over the propriety of the Government's efforts to avoid public criticism by using a variety of evidentiary privileges—many of which may only be invoked by the federal government—to prevent disclosure of information relating to its decision to nationalize Fannie Mae and Freddie Mac. As a leading scholar and practitioner in this area, Professor Yoo has a strong interest in seeking to ensure that the Government does not overstep the bounds of its constitutional authority to withhold important information from the public.

Although no statute or rule defines the scope of the Court's authority to grant or deny leave to file an amicus brief, *see United States ex rel. Gudur v. Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927–28 (S.D. Tex. 2007), federal courts generally take a liberal approach to allowing the filing of amicus briefs, *see Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). The Court should grant Professor Yoo leave to file his brief because he is a leading authority on separation of powers and executive privilege issues, and his perspective will be useful to the court. *See Wolfchild v. United States*, 62 Fed. Cl. 521, 537 (2004).

April 7, 2016

Respectfully submitted,

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AMICUS CURIAE BRIEF OF PROFESSOR JOHN YOO IN SUPPORT OF *PERRY CAPITAL* PLAINTIFFS' MOTION TO REMOVE THE PROTECTED INFORMATION DESIGNATIONS FROM DOCUMENTS CITED IN THE D.C. CIRCUIT MERITS BRIEFING

The plaintiffs in *Perry Capital v. Lew*, No. 14-5243 (D.C. Cir.), recently filed a motion requesting that this Court remove the "protected information" designation from certain materials produced in discovery in this case that they anticipate using at their April 15, 2016 oral argument before the D.C. Circuit. *See* Doc. 304. Professor John Yoo submits this amicus brief in support of the *Perry Capital* Plaintiffs' motion.

INTEREST OF AMICUS CURIAE

John Yoo is the Emanuel S. Heller Professor of Law at the University of California, Berkley, School of Law and served as the Deputy Assistant U.S. Attorney General in the Office of Legal Counsel (OLC) from 2001 to 2003. At OLC, Professor Yoo worked on issues involving foreign affairs, national security, and separation of powers. Professor Yoo has written extensively on the separation of powers, the scope of the President's constitutional authority, and executive privilege, and he is one of the Nation's leading authorities on those topics. Professor Yoo's experience and expertise make him uniquely qualified to address arguments over the propriety of the Government's efforts to avoid public criticism by using a variety of evidentiary

privileges—many of which may only be invoked by the federal government—to prevent disclosure of information relating to its decision to nationalize Fannie Mae and Freddie Mac. As a leading scholar and practitioner in this area, Professor Yoo has a strong interest in seeking to ensure that the Government does not overstep the bounds of its constitutional authority to withhold important information from the public.

SUMMARY OF ARGUMENT

In an apparent effort to withhold information from the public and the courts that would undermine its defense of the nationalization of Fannie Mae and Freddie Mac, the Government has adopted an extraordinarily broad understanding of deliberative process and other forms of executive privilege in this case. Yet not even the Government claims privilege over the materials the *Perry Capital* plaintiffs propose to use in open court in the D.C. Circuit. Under these circumstances, the Court should view the Government's efforts to hide these materials from the public with particular skepticism. Because the materials at issue are more than three years old, their disclosure poses no risk to the financial markets. The public has a strong interest in being fully apprised of the important proceedings before the D.C. Circuit, and that interest—not the Government's preference for secrecy—should guide the Court's analysis of the *Perry Capital* plaintiffs' motion.

This amicus brief also addresses any claim by the Government that the executive privilege entitles it to shield from public disclosure the materials identified in the *Perry Capital* plaintiffs' motion. Professor Yoo believes that executive privilege, as defined by Supreme Court precedent, does not extend to these materials, which the Government has produced. Even if it did, the balancing test set out by *United States v. Nixon*, 418 U.S.

683 (1974), would require any claim to confidentiality to give way before a federal courts' constitutional duty to adjudicate the plaintiffs' claims.

ARGUMENT

I. The Court should authorize disclosure of key discovery materials that not even the Government claims are privileged.

In weighing whether the documents identified in the *Perry Capital* plaintiffs' motion should be made public, the Court should be mindful of the extraordinarily expansive approach the Government has taken to assertions of evidentiary privilege in this case. Indeed, the Government has withheld approximately 12,000 documents as privileged—a substantial fraction of the roughly 60,000 total responsive documents government attorneys reviewed. The briefing on Fairholme's motion to compel demonstrates that the Government withheld many of these documents on the basis of highly questionable legal theories, including the notion that documents created *after* an agency decision is announced may nevertheless be "predecisional" and the assumption that purely factual financial projections are "deliberative." *See* Plaintiffs' Public Redacted Motion to Compel Production of Certain Documents Withheld For Privilege, 18–21 (Dec. 7, 2015), Doc. 272. More troubling still, it appears that the Government has used its assertions of privilege in an effort to gain strategic advantage by publicly disclosing documents that it believes help its case while refusing to produce materials of a similar nature that would undermine its position. *Id.* at 25. In short, the Government has not been shy about refusing to produce documents that would undermine its interests, even when doing so requires it to take extremely aggressive legal positions.

The materials that are the subject of the *Perry Capital* plaintiffs' motion, however, are materials that the Government produced. Thus, *not even the Government*

claims that these materials are subject to a claim of executive or other evidentiary privilege. Accordingly, it is common ground among the parties that the documents identified in the *Perry* plaintiffs' motion do not reveal predecisional agency deliberations, sensitive national security information, attorney-client communications, or any other information that the Government could withhold as privileged. Given the expansive view of evidentiary privileges that the Government has taken in this case, the fact that it chose to produce the materials at issue here provides strong support for the conclusion that public disclosure of these materials would not cause any cognizable harm.

This conclusion is further supported by the fact that the documents at issue concern events that occurred no more recently than September 30, 2012—the cutoff date for the document discovery this Court authorized. Order at 4 (July 16, 2014), Doc. 72. Three and a half year old information has no potential to affect financial markets, which focus on present and future conditions rather than events of the distant past. In nevertheless seeking to withhold these materials from the public, the Government's true concern appears to be that the public might "second guess[ ]" its decision to nationalize Fannie Mae and Freddie Mac. Declaration of Melvin L. Watt ¶ 13 (May 29, 2014), Corrected Appendix to Def. Mot. for Protective Order, at A5–A6, Doc. 50-1). The Government's desire to avoid public criticism is understandable, but in a free society this desire cannot provide the basis for withholding information from the public that is otherwise subject to disclosure.

Far from a justification for maintaining these materials under seal, the Government's preference to shield itself from criticism in a case in which it is the defendant strongly suggests that these materials ought to be publicly disclosed.

Documents that could "influence or underpin [a] judicial decision" are "presumptively open to public inspection," *Bon v. Utreras*, 585 F.3d 1061, 1975 (7th Cir. 2009) (internal quotation marks omitted), and "[t]he interest of the public and press in access to civil proceedings is at its apex when the government is a party to the litigation," *Doe v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014). The norm in favor of open judicial proceedings furthers the values enshrined in the First Amendment, the "core purpose" of which is to "assur[e] freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). The public has a strong interest in fully accessing the D.C. Circuit oral argument in the *Perry Capital* case, and that interest—not the Government's preference to avoid public scrutiny—should guide the Court's analysis.

II. The executive privilege does not provide a proper basis for shielding non-privileged materials from public disclosure.

To the extent the Government contends that it should nevertheless be permitted to conceal the materials identified in the *Perry Capital* plaintiffs' motion on the basis of the executive privilege, this argument fails. To the contrary—as the Government has conceded by producing these materials to the plaintiffs rather than withholding them as privileged—these materials do not qualify for executive privilege.

As the Supreme Court explained in the foundational *Nixon* case, executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). It derives from the President's exercises of his enumerated authorities. Just as the judiciary enjoys confidentiality in its deliberations, the President must expect "confidentiality of his conversations and correspondence." *Id.* Without this privilege,

the President will not enjoy the candor necessary to make the best decisions possible. "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." *Id*.

Executive branch communications relating to the FHFA and the takeover of Fannie Mae and Freddie Mac do not fall within the privilege as set out by *Nixon*. First, Fannie Mae and Freddie Mac themselves are not parts of the executive branch of government; they are publicly-traded corporations that operate under government charters. Second, the FHFA is not an agency that reports directly to the President. Congress established it as "an independent agency of the Federal Government." 12 U.S.C. § 4511. While the director of the agency is appointed by the President with the advice and consent of the Senate, the President can only remove him or her "for cause." *Id.* at § 4511. Executive privilege encompasses discussions between the President and his closest aides. No court has ever held that it would include an independent agency head. Independent agency heads do not take direction from the President and could not be considered to fall within *Nixon*'s description of "those who assist him."

Even if executive privilege were held to possibly include independent agencies, there is no showing that the communications at issue here involve the President. *Nixon* discusses the need for candor between a President and "those who assist him." It does not identify nor create a generalized right to confidentiality throughout the entire executive branch. If it extended that far, then presumably every employee in the executive branch, every government owned corporation (including Amtrak and the Post Office), and every communication between these individuals would receive the same

constitutional status as conversations between the President and the White House chief of staff. The executive privilege that extends to the President and his top aides, such as cabinet secretaries and White House aides, cannot create a diffuse right to secrecy throughout the entire executive branch and the multifarious regulatory bodies, entities, and corporations created by Congress.

Even if executive privilege were held to include these entities, these communications would fail to receive protection under the balancing test set out in *Nixon*. *Nixon* recognized that military or diplomatic secrets might be entitled to the highest level of protection, one that might verge on absolute. *Nixon*, 418 U.S. at 710. The communications involved in this litigation, of course, do not fall within the category of national security, military, or foreign affairs. In *Nixon*, the Court found that communications outside these areas would have to seek privilege based on "the President's generalized interest in confidentiality." *Id*. at 711. In such cases, the interest in confidentiality must be balanced against the competing need of other branches for disclosure of the information.

In *Nixon* itself, the Court balanced President Nixon's claim to confidentiality in his discussions with his aides to the right of criminal defendants to produce the information for their defense at trial. "In this case, we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id*. at 711-12. *Nixon* concluded that the federal court's constitutional duty to conduct a fair criminal trial, which required the production of relevant evidence to the defense, outweighed the diffused claim of confidentiality.

This case should reach the same outcome as *Nixon*. While the case here is civil, rather than criminal, the origin of the right is the same: the Bill of Rights. In *Nixon*, the Court found that any presidential claim to confidentiality had to give way before the Fifth Amendment right to due process and the Sixth Amendment right to compulsory process. Here, the plaintiffs sue directly under the Fifth Amendment Takings Clause. The federal courts have a specific constitutional duty to vindicate those rights, which should take precedence in any balancing test over the President's generalized claim to confidentiality.

Finally, we bring to the Court's attention one sometimes overlooked passage in *Nixon* that bears on this case. *Nixon* states at points that executive privilege is necessary for the performance of the President's constitutional responsibilities or enumerated powers. It compares the need for candor to judges' need for secrecy in their deliberations or, presumably, confidential discussions between legislators. Executive privilege will be highest at the core of the President's Article II responsibilities: serving as Commander-in-Chief and Chief Executive in defense of the nation. Here, however, there is no similarly central constitutional responsibility at stake. The President's authority—to oversee Fannie Mae and Freddie Mac—is not enumerated in the Constitution. It is delegated by Congress, and not even delegated directly to the President, but instead to the head of an independent regulatory agency that is not directly under the command of the President. It may be the case that executive privilege would not apply here because, under *Nixon*, it does not apply to regulatory functions delegated by Congress.

CONCLUSION

The Court should grant the *Perry Capital* plaintiffs' motion.

April 7, 2016

Respectfully submitted,

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