IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF STATE, *et al.*, *Defendants.*	Case No. 19-cv-01773-TNM

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's Minute Entry dated December 11, 2019, and for the reasons stated in the Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment (April 10, 2020), ECF No. 18-1, and accompanying filings, Plaintiffs American Oversight and Democracy Forward Foundation hereby move for summary judgment.

Dated: April 10, 2020

Respectfully submitted,

/s/ *Nitin Shah*

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	)	
Defendants.	)	
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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In July 2017, President Trump seized the notes of a State Department employee who was providing interpreting services during the President's meeting with Russian Federation President Vladimir Putin on the sidelines of the G-20 Summit in Hamburg, Germany. This seizure was part of President Trump's pattern of concealing his foreign policy actions from others in his own Administration and from the historical record. In so doing, he violated the Federal Records Act ("FRA" or the "Act"), which establishes that records that provide evidence of the activities of the United States Government must be preserved. And, when an agency head or the Archivist of the United States has reason to be aware of an unlawful removal of records, the FRA requires them to take remedial steps, including initiating an action to recover the unlawfully removed records through the Attorney General. Because Defendants Secretary of State Michael Pompeo (the "Secretary") and Archivist of the United States David Ferriero (the "Archivist") failed to take action here, Plaintiffs brought this suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to compel them to do so.

On summary judgment, Defendants do not deny that President Trump seized the interpreter's notes, and they have abandoned the contention, pressed in their motion to dismiss, that he was within his rights to do so because the records are covered by the Presidential Records Act, rather than the FRA. Instead, they primarily advance one argument: that the notes of an interpreter, as a categorical matter, cannot contain enough evidence of government activities to qualify as a record under the FRA. To support this assertion, Defendants rely entirely on declarations from agency officials describing general practices of interpretive note-taking and record-keeping, but that contain no firsthand information regarding the contents of these notes,

and that fail to address the unique sensitivity and required treatment of interpreter notes created in the context of a meeting between heads of state.

Defendants' statements do not suffice to meet their burden and are, in any event, controverted by other evidence. In a sworn declaration, the former head of the State Department's Office of Language Services avers that, in the context of such head-of state meetings, interpreter notes are critical to ensuring that these important and sensitive discussions are fully documented for use by administration officials and, eventually, examiners of the historical record. They are therefore "records" under the FRA and, accordingly, Defendants were under a mandatory duty to recover them. Because they failed to do so, and because Defendants' other arguments are equally unavailing, summary judgment should be denied as to Defendants and granted for Plaintiffs.

BACKGROUND

A. Statutory and Regulatory Background

The FRA governs the creation, management, and disposal by agencies of "records." *See generally* 44 U.S.C. chapters 21, 29, 31 & 33. The Act defines "records" as

> all recorded information, regardless of form or characteristics, [1] made or received by a Federal agency under Federal law or in connection with the transaction of public business and [2] preserved or appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

Id. § 3301(a)(1)(A).

The State Department and the National Archives and Records Administration ("NARA") have issued regulations adopting and elaborating on this definition. The State Department's regulation simply restates the statutory definition. *See* U.S. Dep't of State, 5 Foreign Affairs Handbook-4 H-113, https://fam.state.gov/FAM/05FAH04/05FAH040110.html#H113. NARA's

regulation explains, as relevant here, that the statutory term "appropriate for preservation" means materials "which, in the judgment of the agency, should be filed, stored, or otherwise systematically maintained by an agency because of the evidence of agency activities or information they contain, even if the materials are not covered by its current filing or maintenance procedures." 36 C.F.R. § 1222.10(b)(6).

NARA's General Records Schedules, the controlling government-wide disposition authority for records covered by the FRA, are also relevant here. Particularly pertinent is the schedule for records NARA characterizes as "intermediary records." Those are defined as records that "are created or used in the process of creating a subsequent record." *See* NARA, General Records Schedule 5.2: Transitory and Intermediary Records 84 (July 2017), available at https://archives.gov/files/records-mgmt/grs/grs05-2.pdf. NARA requires that these "intermediary records" be maintained until "successful creation of the final document or file" has been verified, or until they are "no longer needed for a business use, whichever is later." *Id.* In other words, intermediary records must be maintained at least until the document they are used to create has been finalized.

The FRA imposes mandatory duties on agency heads and the Archivist to ensure that records evidencing government decision-making are created and preserved. Among these obligations is to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures . . . of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." 44 U.S.C. § 3101. Agency heads are further required to establish records management programs that provide "effective controls over the creation and over the maintenance and use of records," *id.* § 3102(1), and to "establish

safeguards against the removal or loss of records the head of [the] agency determines to be necessary and required by regulations of the Archivist," *id.* § 3105.

This lawsuit arises from Secretary Pompeo's and the Archivist's mandatory and judicially enforceable duty, found in 44 U.S.C. § 3106 ("Section 3106"), to initiate an action to recover records that were unlawfully alienated from the State Department. Section 3106 requires the relevant agency head to "notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction[.]" *Id.* § 3106(a). The Act commands that the agency head and the Archivist "shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency." *Id.*

Section 3106 also imposes a separate, freestanding obligation on the Archivist to initiate the recovery action through the Attorney General where the agency head does not do so. Specifically, where the agency head fails to "initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action," or otherwise is "participating in, or believed to be participating in such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made." *Id.* § 3106(b).

Where the agency head and the Archivist have "failed to initiate remedial action in a timely [manner], 'private litigants may sue under the APA to require them to do so.'" *CREW v. U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 101, 110 (D.D.C. 2007) (quoting *Armstrong v. Bush* ("*Armstrong I*"), 924 F.2d 282, 296 n.12 (D.C. Cir. 1991)). The availability of "judicial

review of the agency head's and Archivist's failure to take enforcement action reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended." *Armstrong I*, 924 F.2d at 295.

B. Factual Background and Procedural History

President Trump met with Russian Federation President Vladimir Putin and then-Secretary of State Rex Tillerson on the sidelines of the G-20 Summit in Hamburg, Germany on July 7, 2017. During the course of the meeting, the State Department's interpreter, whom Defendants have identified as Yuri Shkeyrov, *see* Declaration of Dr. Yun-Hyang Lee ("Lee Decl."), State AR 0008, ECF No. 15-2, ¶ 20, took notes. *See also* Declaration of Hannah Bloom, attached to Pl. Mot. for Summ. J., Ex. A (Greg Miller, *Trump Has Concealed Details of His Face-to-Face Encounters With Putin From Senior Officials in Administration*, Wash. Post, Jan. 13, 2019) ("Miller Article"). These notes serve two purposes: (1) they aid the interpreter in ensuring a complete and accurate translation, and (2) for meetings between high-level officials and heads of state, they aid in the preparation of a "Memorandum of Conversation," or "MemCon," that is lodged in the official files of the State Department and serves as the official agency record of the conversation. *See* Declaration of Harry Obst ("Obst Decl."), attached to Pl. Mot. for Summ. J., Ex. B, ¶¶ 9-14.

At the conclusion of that meeting, President Trump seized the notes taken by the State Department interpreter. *See* Miller Article. This seizure of an interpreter's written work product by a principal is completely without precedent, according to Harry Obst, the distinguished former head of the State Department's Office of Language Services ("OLS"). Obst Decl. ¶ 17. It is, however, of a piece with the unusual measures President Trump has undertaken to conceal the details of his meetings with foreign leaders, especially President Putin, not only from the public

at large, but also from key members of his Administration, including officials at the State Department. *See* Miller Article. These practices have resulted in the total absence of a "detailed record, even in classified files, of Trump's face-to-face interactions with the Russian leader at five locations over the past two years." *Id.* The absence of any documentation of these meetings undermines the purpose of the FRA by rendering the historical record incomplete and making it more difficult for government officials, including those at the State Department, to carry out their official duties to conduct diplomacy on behalf of the United States. *See id.*; Obst Decl. ¶ 9.

The President's seizure of the interpreter's notes in Hamburg became publicly known in January 2019. *See* Miller Article. Shortly thereafter, Plaintiffs American Oversight and Democracy Forward Foundation—nonprofit organizations committed to promoting transparency and accountability in government—sent separate letters to Secretary Pompeo and the Archivist on January 24, 2019, and February 7, 2019, respectively, requesting that the two officials take action to remedy the President's apparent FRA violation, including by initiating an action through the Attorney General to recover the seized notes. *See* Compl. Exs. A & B, ECF Nos. 1-1, 1-2.

After receiving no response to their letters, Plaintiffs commenced this action on June 18, 2019 to "challenge[] the failure of Defendants to carry out their nondiscretionary duties under the FRA to recover State Department records created to document in-person meetings between President Donald J. Trump and Russian Federation President Vladimir Putin, which were unlawfully removed from the Department." *See* Compl., ECF No. 1, ¶¶ 2, 5. Proceeding under the APA, Plaintiffs assert two claims: the first, under 5 U.S.C. § 706(1) ("Section 706(1)"), seeking an order compelling Defendants to initiate a recovery action for the notes taken by the State Department's interpreter at the Hamburg meeting ("Hamburg Meeting Notes") through the

Attorney General; and the second, under 5 U.S.C. § 706(2) ("Section 706(2)") to set aside Defendants' arbitrary and capricious, and otherwise unlawful, decision not to initiate a recovery action through the Attorney General.

After briefing and oral argument, the Court denied Defendants' motion to dismiss in a bench ruling on December 11, 2019. *See* Minute Order (Dec. 11, 2019). On March 13, 2020, Defendants filed a Motion for Summary Judgment, ECF No. 16, and supporting memorandum, ECF No. 16-1 (hereinafter "Br."). Concurrently with their motion, Defendants filed an "administrative record" that consists of a series of declarations from NARA and State officials. ECF Nos. 15-1 – 15-3. In those declarations, the officials make only passing, secondhand reference to the actual events (and the subject document) underlying this lawsuit. As noted above, they identify the State Department employee who served as interpreter at the meeting as Mr. Shkeyrov. *See* Lee Decl. ¶ 20. They acknowledge that OLS interpreters, such as Mr. Shkeyrov, "provide[] services for the U.S. Government," *id.* ¶ 8, and that Mr. Shkeyrov did indeed take written notes, *see* Declaration of Laurence Brewer ("Brewer Decl."), NARA AR 0003, ECF No. 15-3, ¶¶ 10-11, although they do not describe the content of Mr. Shkeyrov's notes on this specific occasion.

Defendants do not deny that Mr. Trump seized Mr. Shkeyrov's notes. Instead, Defendants largely describe general note-taking and recordkeeping practices, and explain that, based on their apparent understanding of these general practices, Defendants determined that the Hamburg Meeting Notes were not a "record" under the FRA, and thus they were not required by Section 3106 to initiate an action to recover the Hamburg Meeting Notes. *See, e.g.*, Declaration of Timothy Kootz ("Kootz Decl."), State AR 0003, ECF 15-2, ¶ 10; Brewer Decl. ¶ 10.

Defendants' description of the practices of OLS is incomplete, as demonstrated by the Declaration of Mr. Obst, who served in OLS, including as its Director and a member of the Senior Executive Service, from 1964 until 1997, and who periodically served as an interpreter on a contract basis after his retirement from full-time service. Obst Decl. ¶¶ 2–3, 5.[1] Based on his more than three decades of experience, Mr. Obst explains that a description of general practices is not complete if it fails to distinguish between routine interpreting missions and those involving heads of state or other high-level officials. *Id.* ¶ 16 ("[S]tarkly different rules apply to meetings involving high level officials, and especially meetings between the President and a foreign head of state."). Although Defendants' declarations accurately describe the treatment of interpreter notes for those routine missions, which comprise an estimated "90 percent" of OLS's workload, *id.* ¶ 15, they do not speak to the very different treatment of notes for meetings involving particularly sensitive material or high-level officials, *id.* ¶ 16, such as the one at issue here. For these high-level meetings, the practice of OLS interpreters is to retain and safeguard these notes because they are relied on for preparation of a Memorandum of Conversation, which

[1] Consideration of extra-record evidence is appropriate in cases alleging agency inaction because "'if an agency fails to act, there is no administrative record for a federal court to review.'" *Nat'l Law Ctr. on Homelessness & Poverty v. VA*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012) (quotation marks omitted); *see also Kusuma Nio v. DHS*, 314 F. Supp. 3d 238, 242 (D.D.C. 2018) (considering extra-record information submitted as an exhibit to the plaintiffs' motion for summary judgment in Section 706(1) agency inaction case); *see also Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511–12 (9th Cir. 1997) (holding that the district court was not prohibited from considering extra-record evidence in a Section 706(1) action "especially where the court permitted both sides to submit supplemental evidence"). Same here: in the absence of an actual contemporaneous record, Defendants have submitted nothing besides declarations created for purposes of this litigation, with the sole exception of a standard hiring agreement for contract interpreters that is of little relevance. Plaintiffs' declarations are also relevant to their Section 706(2) claim as necessary "background information [that] is needed to 'determine whether the agency considered all of the relevant factors.'" *Grace v. Whitaker*, 344 F. Supp. 3d 96, 112–13 (D.D.C. 2018) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

memorializes the contents of the discussion. *Id.* ¶¶ 11–14, 16. Once the final version of the Memorandum of Conversation is created, it is submitted to the Secretary of State's Executive Secretary to be lodged in the files of the State Department. *Id.* ¶ 14. Defendants' declarations are entirely silent as to whether a Memorandum of Conversation was prepared or submitted for the Hamburg meeting.

STANDARD OF REVIEW

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Challenges to agency decisions under the APA are properly resolved on motions for summary judgment." *Berry v. Esper*, 322 F. Supp. 3d 88, 90 (D.D.C. 2018). Summary judgment "'serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Davidson v. Dep't of State*, 113 F. Supp. 3d 183, 189 (D.D.C. 2015) (quoting *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 106 (D.D.C. 2011)).

As relevant here, under the APA, a court may "compel agency action unlawfully withheld or unreasonably delayed," and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. For claims seeking to compel "unlawfully withheld or unreasonably delayed" agency action, *id.* § 706(1), the court's duty is to evaluate whether the "agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004).

ARGUMENT

I. Plaintiffs Are Entitled to Judgment as A Matter of Law on Their Section 706(1) Claim

Defendants have abandoned most of the factual and legal contentions they made at the motion to dismiss stage. They do not contest the basic facts underlying this lawsuit—that the President seized the notes of a State Department interpreter at the conclusion of a meeting between him, President Putin, and Secretary Tillerson on the sidelines of the 2017 G-20 summit in Hamburg, Germany. Defendants likewise no longer argue that the document in question is subject to the Presidential Records Act rather than the Federal Records Act. Br. at 15–16 n.9. Nor do Defendants contend that the Hamburg Meeting Notes were not "made or received by a Federal agency under Federal law or in connection with the transaction of public business." 44 U.S.C. § 3301(a)(1)(A).

Accordingly, the dispute in this case now largely boils down to one question: whether the Hamburg Meeting Notes are "appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government." 44 U.S.C. § 3301(a)(1)(A). In support of their view that it is not, Defendants do not cite to a contemporaneous administrative record, but instead proffer a series of declarations that describe general practices for routine interpretation tasks and provide only cursory secondhand accounts of the actual events that occurred here—even though the specifics about this head-of-state meeting are uniquely within the possession of the Government. These declarations fall far short of establishing that the document the President seized is not a record under the FRA, and thus that Defendants' mandatory obligations to recover the document under Section 3106 of the FRA did not attach. The Government's submissions do not speak at all to the need to preserve interpreter notes documenting meetings between heads of state in order to

ensure the existence of a complete and accurate historical record, or to OLS's practice of doing so. Judgment for Plaintiffs is therefore warranted on their Section 706(1) claim.

A. The Hamburg Meeting Notes Are "Records" Within the Meaning of the Federal Records Act

i. The Hamburg Meeting Notes are "appropriate for preservation" because they evidence important government activities.

A document is a "record" subject to the FRA's preservation and recovery duties—including Section 3106—if it is "[1] made or received by a Federal agency under Federal law or in connection with the transaction of public business and [2] preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them." 44 U.S.C. § 3301(a)(1)(A). It is no longer contested that the Hamburg Meeting Notes were "made or received by a Federal agency under Federal law or in connection with the transaction of public business." They were prepared by a State Department employee—whom Defendants have identified as Mr. Shkeyrov—serving in his official agency capacity as an OLS interpreter. *See* Lee Decl. ¶¶ 8, 20.

They are also "appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government." To constitute a record under the FRA, a document need not constitute a verbatim transcript; rather, it must merely have "informational value." 44 U.S.C. § 3301(a)(1)(A). This standard would be satisfied by notes containing only discrete information tending to show such contextual details as the date or time of a meeting, or the names or titles of attendees or broad subjects discussed. *See Armstrong v. Exec. Off. of the President, Off. of Admin.* ("*Armstrong II"*), 1 F.3d 1274, 1284 (D.C. Cir. 1993) (finding documents did not fit within FRA's exception for "copies,"

and so constituted separate "records," where they contained such additional information as "who sent a document, who received it, and when that person received it").

Moreover, notes taken by interpreters during high-level meetings, such as the one in issue here, have a recordkeeping purpose that extends beyond aiding the interpreter in real time. Specifically, where, as here, no designated note taker was present at the meeting, *see* Miller Article, the interpreter will be "personally responsible for preparing the MemCon," a task for which they "would rely principally on their interpreter notes to refresh their memory of the contents of the exchange." Obst Decl. ¶¶ 12–13. Only once the MemCon has been "finalized and submitted . . . to the Executive Secretary in the Office of the Secretary of State . . . would the Executive Secretary direct [the interpreter] to either destroy the notes or hand them over to be destroyed[.]" *Id.* ¶ 16. Accordingly, the Hamburg Meeting Notes were records subject to the FRA's preservation requirements at least until the point at which a MemCon could be finalized. Any removal of the records from agency custody prior to that time would constitute an unlawful alienation, triggering the Secretary's and Archivist's mandatory recovery obligations pursuant to Section 3106.

ii. Defendants' general claims about interpreter notes are insufficient to establish that the Hamburg Meeting Notes are not a "record" for purposes of the FRA.

As stated above, Defendants now contest only whether the Hamburg Meeting Notes are "appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them[.]" 44 U.S.C. § 3301(a)(1)(A). But rather than describing the specific notes at issue here, Defendants contend only that interpreter notes *as a generic matter* could not "have informational value of a kind that would make them appropriate for

preservation." *See* Br. at 13-14. Defendants' declarations focus on this sweeping contention about OLS's general practices regarding "the writings of interpreters from [OLS] generated while providing interpretation services." Kootz Decl. ¶ 4; *see also* Lee Decl. ¶¶ 15-18; *see* Declaration of Marina Gross ("Gross Decl."), State AR 0038, ECF No. 15-2, ¶¶ 4, 6 (providing a "general description of [the] practice" of an OLS employee who provided interpretation services for other meetings between President Trump and President Putin).

To begin with, as discussed further below, the complete absence of any direct evidence in Defendants' declarations addressing what information the Hamburg Meeting Notes actually contain is telling, and especially so where that evidence is uniquely in the possession of the Government. But even taking Defendants' argument on its own terms, their reliance on generalizations and sweeping inferences does not suffice to meet their burden for summary judgment. For instance, Defendants suggest that the Hamburg Meeting Notes could not contain information "appropriate for preservation" because OLS "interpreters do not, and could not, take summary written notes"; "are not rapporteurs for meetings at which they are providing services"; and "would be hindered by any attempt to create 'notes' that meaningfully record the substance of communications." Lee Decl. ¶ 18. These general statements do not deny that the notes here could have "informational value." Additionally, Defendants' attempts to describe interpreter notes as a general matter is qualified by their own recognition that the content of these notes can vary depending on the interpreter and the meeting. *See, e.g.*, Br. at 9 (acknowledging that "different interpreters have developed their own unique styles and approaches to the creation" of meeting notes); *see also* Lee Decl. ¶ 15 ("[I]t is up to each interpreter to craft their own method of recalling principals' statements and interpreting them with fidelity to the original verbal and non-verbal conveyances"); *id.* ¶ 17 (noting that the content of an interpreter's notes might vary

depending on personal "style and needs, the speaking style of the speaker whose words are interpreted, and the nature of the conversation being interpreted"). These concessions underscore that any inference Defendants attempt to draw from their generalized claims about interpreter notes is entirely speculative and cannot resolve questions of material fact.

Moreover, the FRA covers not only information rising to the level of "summary written notes," but also "all recorded information, regardless of form or characteristics" that provides "evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government" or otherwise have "informational value." 44 U.S.C. § 3301(a)(1)(A). Indeed, even discrete information tending to show such contextual details as the date or time of a meeting, or the names or titles of attendees would fall under the FRA's broad definition of "record." *See Armstrong II*, 1 F.3d at 1284. The record proffered by Defendants cannot resolve any dispute of material fact regarding whether such information was in the particular interpreter notes at issue.

iii. Defendants do not address the "starkly different rules" that apply where interpreter notes are created in the context of a high-level meeting involving heads of state.

Defendants concede that interpreters "may utilize a pen and paper to jot down symbols or words" or "phrases" to aid their interpreting, Lee Decl. ¶¶ 13–14, 17, especially "for more complex discussions involving specific numbers, dates, or other granular details," *id.* ¶ 16. But they nevertheless assert that these "notations do not convey the substance of a meeting and would not be meaningful to anyone other than for the temporary and immediate short-term use of the interpreter who makes them," Br. at 9, and so "could not be used by others to reconstruct

such content," Lee Decl. ¶ 18. *See also id.* ¶ 16.[2] But this argument, and the declarations on which it rests, elides an important distinction between routine OLS interpreting missions and missions involving the President or other high-level officials and fails to appreciate the importance of interpreter notes in documenting these high-level meetings. *See* Obst Decl. ¶¶ 9–16. Even if Defendants' generic representations sufficed to address the mine-run of interpreter notes generated by OLS, they fail to address the important differences for notes, such as the notes at issue in this case, that are created in the context of such high-level meetings.

The vast majority of OLS interpreting missions do "not involve high-level officials or [a]re otherwise not highly sensitive" and so "[d]ocumenting these relatively routine meetings in State Department records" is "unnecessary because they [do] not have any particular historical or record-keeping value." Obst Decl. ¶ 15. There is no need to create a post-meeting Memorandum of Conversation documenting such low level meetings, so "OLS interpreters [a]re not required to preserve their notes for any period of time after the interpreting mission [h]as concluded." *Id.* But "starkly different rules apply to meetings involving high-level officials, and especially meetings between the President and a foreign head of state," like the July 2017 Hamburg meeting at issue here. *Id.* ¶ 16. For these meetings, where "it is especially critical to ensure that a record of the meeting is prepared and maintained in the files of the State Department," an interpreter's notes are "treat[ed] . . . with the same level of care and sensitivity as a classified document" and would be maintained until the MemCon is created and lodged in the State

[2] Defendants focus on whether the preserved records would have immediate and obvious utility to an *outside* observer. But, as Plaintiffs illustrate, interpreter notes are useful *to the interpreter* in fulfilling her or his post-meeting duty to help construct or confirm the accuracy of a Memorandum of Conversation—a document of obvious utility both to administration officials seeking to understand what was agreed to, and historians seeking to reconstruct such important events as meetings between heads of state. *See* Obst Decl. ¶¶ 11–13.

Department's files. *Id.*[3] That is, notes like those at issue in this case, which were created in the context of high-level meetings between heads of state, are typically preserved for important recordkeeping purposes and qualify as federal records under the FRA.

Yet Defendants' declarations make no reference to a Memorandum of Conversation, and thus they neither acknowledge nor contest the importance of the interpreter's notes for its preparation. The assertion central to their claim—that interpreter notes, as a general matter, have value only for the duration of the consecutive interpretation—thus does not address the actual circumstances present here. *See id.* ¶¶ 10–13.[4]

iv. NARA's regulation governing "rough notes" and "working files" does not support Defendants where, as here, the Hamburg Meeting Notes are the only evidence of the decisions made in the Hamburg meeting.

Defendants argue that the Hamburg Meeting Notes are not a "record" within the meaning of the FRA because it is a "rough note" under NARA's governing regulation. *See* Br. at 15 (citing 36 C.F.R. § 1222.12(c)). This argument again fails to account for the role interpreter notes play in the creation of a Memorandum of Conversation.

NARA's definition of "rough notes" is supplied as part of its provision mandating that "[w]orking files and similar materials" must be preserved as federal records where:

> (1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and

[3] As discussed in the next section, NARA has made clear that files that are used to create a permanent record are themselves records and must be maintained at least until the permanent record has been created. NARA, General Records Schedule 5.2 at 84.

[4] Even if Defendants' contention that interpreter notes cannot "be used by others to reconstruct" the content of the meetings in which they were recorded is true, Lee Decl. ¶ 18, this claim misses the point. The interpreter notes are useful *to the interpreter* in constructing or providing feedback on the MemCon, which can then be shared with appropriate officials. *See* Obst Decl. ¶¶ 11-13. That notes serve this function is enough to require their preservation at least unless and until a MemCon is created based upon them.

> (2) They contain unique information, such as substantive annotations or comments that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

36 C.F.R. § 1222.12(c). Thus, NARA's treatment of working files is principally concerned with ensuring that non-final documents are preserved as "records" whenever they contain unique information regarding the transaction of government business. *See id.* Defendants contend that neither factor is met here because "[i]nterpreters do not circulate their notes or make them available for any official purpose," and because interpreter notes do not "contain unique information that adds to a proper understanding of the agency's actions." Br. at 14–15.

However, the very concept of a records category of "working files" assumes a final product that itself constitutes a federal record and adequately documents the relevant government activity—*e.g.*, a Memorandum of Conversation, *see* Obst. Decl. ¶¶ 11–16. It has no role to play where the supposed "rough note" is the *only* writing describing a government activity—here, precisely *because* the President seized it before it could be circulated or used to prepare a final Memorandum of Conversation. *See* NARA, Identification of Records, Nonrecord Materials, and Personal Papers, available at https://www.archives.gov/records-mgmt/scheduling/id (noting that "[a]ttention should . . . be given to working files, or working papers, because of the difficulty of determining record status," and that "working files used in preparing reports" are "likely record[s]").[5]

But even if the NARA definition properly applies in this context, Defendants' contentions as to why the Hamburg Meeting Notes cannot meet that standard are refuted by the

[5] The undisputed fact that national security officials within the administration, including then-National Security Adviser H.R. McMaster, sought but were denied an accounting of the meeting demonstrates that the MemCon derived from the notes would have found an eager and receptive audience had the President not seized the predicate notes. *See* Miller Article.

facts Plaintiffs present in the Obst Declaration. That declaration establishes that, in contexts like this one, interpreters rely on their notes to prepare the MemCon, which is then circulated to officials and lodged in the official files of the State Department. *See* Obst Decl. ¶¶ 11–16. For this same reason, it is clear that interpreter notes do, indeed, contain information that adds to a proper understanding of government action. *See id.*

Indeed, NARA's General Records Schedule, which establishes government-wide records management policy, contains a provision governing precisely these circumstances—the status of records that must be maintained at least until they are used for the creation of a final document that appropriately catalogues government activities and decision-making. Such documents are called "intermediary records" and are subject to retention requirements established under the FRA. Intermediary records are defined as "[r]ecords . . . created or used in the process of creating a subsequent record." NARA, General Records Schedule 5.2 at 84. This schedule requires that these records be maintained until "verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later." *Id.* Only upon the creation of the final document may the intermediary record be destroyed, because "the final record to which the intermediary record contributes fills [the] need" for a record that "provide[s] evidence of decision-making." NARA, Transmittal No. 29, Frequently Asked Questions (FAQs) About GRS 5.2, Transitory and Intermediary Records 34 (Dec. 2017), available at https://www.archives.gov/files/records-mgmt/grs/grs05-2-faqs.pdf.

The import of this provision could not be clearer. Where, as here, the intermediary record—*i.e.*, the interpreter's notes—was seized before the final document—*i.e.*, the MemCon—could be created, the FRA, and NARA's implementing policies, have plainly been violated. Yet Defendants' declarations are entirely silent on this issue.

v. The absence of evidence addressing the specific contents of the Hamburg Meeting Notes is fatal to Defendants' motion.

The complete absence of any evidence in Defendants' presentation addressing what information the Hamburg Meeting Notes actually contain is revealing. That information is uniquely within the possession of the Government, and it would confirm (or refute) Defendants' assertions about the contents of the document.

The singular instance in which Defendants even attempt to address the Hamburg Meeting Notes in particular, as opposed to interpreter notes in general, comes through Dr. Lee's description of a conversation she had in preparing her declaration. *See* Br. at 9 (citing Lee Decl. ¶ 20). According to Dr. Lee's characterization of this conversation, Mr. Shkeyrov purportedly "confirmed that his practice on that occasion conformed with the above description" of OLS general practice. Lee Decl. ¶ 20. This secondhand, vague, and indeterminate statement offered instead of a firsthand declaration from Mr. Shkeyrov himself comes nowhere close to establishing an appropriate record justification for Defendants' inaction.[6]

To the extent Defendants suggest that whether a specific document is a "record" is a matter reserved for their discretion, *see* Br. at 13, this argument fails for two reasons. First, the D.C. Circuit has not held that the FRA affords Defendants such unfettered discretion. *Armstrong I*, 924 F.2d at 295; *see also Armstrong II*, 1 F.3d at 1283 ("To the extent any question remains, we reject the . . . argument . . . that agency heads have sweeping discretion to decide which

[6] *Cf. Cause of Action Inst. v. Tillerson*, 285 F. Supp. 3d 201, 208 n.6 (D.D.C. 2018) (McFadden, J.) (finding that consideration of evidence should be guided by a focus on "admissibility" and "reliability," and describing some of the questions left unresolved by a hearsay declaration defendants submitted in support of dismissal); Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.").

documents are 'appropriate for preservation.'"). Rather, the court in *Armstrong I* held that the available *remedy* is limited to "requir[ing] the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action"—exactly what Plaintiffs seek here. *Armstrong I*, 924 F.2d at 295.

Second, even accepting Defendants' view that *Armstrong I* limits judicial review of agency determinations, they would still need to "actually decide whether specific documents," as opposed to entire categories of documents, "constitute 'records'" under the FRA. *Id.* at 293–94. Defendants have plainly not done so here, instead reaching a general conclusion as to interpreter notes *as an entire category*. *See* Kootz Decl. ¶ 4; *see also* Lee Decl. ¶¶ 15–18; *see* Gross Decl. ¶¶ 4, 6. Rather, in reaching a sweeping, categorical determination, Defendants attempt to claim "the inherent discretion to consider [documents] *en masse* as not 'appropriate for preservation,'" though courts in this district have made clear that no such discretion exists where "the agency heads admit that they have never surveyed the contents" of the particular records at issue. *Armstrong II*, 1 F.3d at 1283.

Thus, Defendants have failed entirely to put forth a record that even addresses the specific question of whether the Hamburg Meeting Notes contain information necessitating preservation under the FRA. As a result of this failure, the record cannot possibly sustain Defendants' decision not to initiate a recovery action through the Attorney General.

B. The President's Seizure of the Hamburg Meeting Notes Violates the Strict Procedures for Alienation Set Forth in the FRA

A record subject to the FRA, like the Hamburg Meeting Notes, may not "be 'alienated or destroyed' except pursuant to the disposal provisions of the FRA." *Armstrong I*, 924 F.2d at 285 (quoting 44 U.S.C. § 3314). Specifically, "[u]pon the request of an agency head, the Archivist may authorize the disposal of records that are no longer needed by the agency and that do not

have 'sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government[.]" *Id.* (quoting 44 U.S.C. § 3303a). There is no separate mechanism by which a qualifying "record" can be alienated or destroyed under the FRA.

Defendants do not deny that President Trump seized the Hamburg Meeting Notes, and they make no effort to argue that he did so in a manner consistent with the FRA's specific records disposal provision. *See* Br. at 15. Rather, Defendants only claim the President's seizure of the Hamburg Meeting Notes was permissible because, again, "interpreters' notes do not qualify as federal records," and so "the FRA does not prohibit their removal." *Id.* For all the reasons discussed above, the document in issue here—especially given that it was created in the context of a meeting between heads of state—was an agency record, and the FRA's disposal provisions apply. *See* Obst Decl. ¶¶ 11–16.

Consequently, the President's conduct violated the FRA and triggered Defendants' nondiscretionary duties under that statute to initiate a recovery action for the Hamburg Meeting Notes.

C. The Secretary Had Reason to Believe the President Unlawfully Removed the Hamburg Meeting Notes and His Failure to Initiate A Recovery Action Contravenes His Nondiscretionary Duty Under 44 U.S.C. § 3106

The FRA imposes on agency heads, like the Secretary, a nondiscretionary duty to "initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency[.]" 44 U.S.C. § 3106(a).[7]

[7] It is beyond dispute "that § 3106 encompasses at least a duty to 'ask the Attorney General to initiate legal action.'" *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 953–54 (D.C. Cir. 2016) (quoting *Armstrong I*, 924 F.2d at 295).

Then-Secretary Tillerson was present at the July 2017 Hamburg meeting, *see* Miller Article, and so a reasonable inference may be drawn that he had personal, first-hand knowledge of the events underlying this claim—an inference that Defendants do nothing to refute. *See Competitive Enter. Inst. v. EPA*, 67 F. Supp. 3d 23, 34 (D.D.C. 2014) (finding it reasonable to infer from the available context, including the scope of the violation, that the agency head was aware of unlawful alienation and so mandatory recovery duties were triggered); *see also Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) (holding that "actual knowledge can be proved through 'inference from circumstantial evidence'" on summary judgment).

But Plaintiffs need not rely on reasonable inferences alone to demonstrate that Defendants knew or had reason to believe President Trump unlawfully seized the Hamburg Meeting Notes. Rather, Defendants acknowledge that both the State Department and NARA have had actual knowledge of the events giving rise to Plaintiffs' claim since at least January 2019. Mr. Brewer describes a January 2019 conversation with Mr. Kootz in which he sought "to ascertain State's views on the record status of interpreter notes" after "becoming aware" of allegations "that President Trump seized a State Department interpreter's notes after his July 7, 2017 meeting with Russian Federation President Vladimir Putin." *See* Brewer Decl. ¶ 10; *see also* Kootz Decl. ¶ 9. Thus, both NARA and State were plainly aware of the alienation by no later than January 2019, which readily satisfies this element.

Despite conceding that Defendants have had actual knowledge of the facts giving rise to Plaintiffs' claim for a substantial period of time, they seek to evade their obligation to initiate a recovery action by arguing that no obligation ever accrued because "interpreters' notes do not qualify as federal records," so "the Secretary did not know and had no reason to believe that there had been an unlawful removal of federal records from the Department" and made no

finding to that effect. Br. at 16. For all the reasons discussed above, the Hamburg Meeting Notes are a record under the FRA and thus this element is satisfied.

Defendants renew their argument from their motion to dismiss that the FRA's mandatory recovery provision is not triggered unless and until an agency head makes a specific finding that a violation has occurred. *See* Br. at 16. For this novel proposition, Defendants rely again on dicta from an unpublished district court case, *Price v. U.S. Dep't of Just.*, No. 18-cv-1339, 2019 WL 2526439 (D.D.C. June 19, 2019). *Price* should not guide the Court here. There, the court denied the plaintiff's motion for a temporary restraining order and preliminary injunction because it found the preliminary evidentiary showing lacking. *Id.* at *7–*11. The court then went on to consider, in a discussion it acknowledged was not essential to the decision, "a further reason why Price's theory of relief may not hold up." *Id.* at *11. Analogizing to 44 U.S.C. § 2115, a different FRA provision with different language, the district court posited that the mandatory duty to initiate a recovery action under § 3106 does not attach unless the agency head has actual knowledge that records are being unlawfully removed or destroyed. *Id.* at *13.

Defendants' argument, and their reliance on *Price*, ignores an important textual difference between two provisions of the FRA.[8] While the provision the court cited there required an actual "find[ing]" by the Archivist, section 3106 requires only that there be a "reason to believe" that a violation has occurred. *Compare* 44 U.S.C. § 2115 (duties triggered "[w]hen

[8] Defendants also cite *CREW v. Pruitt* as support for their proposition that "[t]he Court cannot conclude that § 3106(a) imposed any obligation on the Secretary" where "nothing in the administrative record suggests that the Secretary ever determined, or had a basis to determine, that the President unlawfully took possession of the interpreter's notes, nor that the notes were federal records." *See* Br. at 16 (citing *CREW v. Pruitt,* 319 F. Supp. 3d 252, 261 (D.D.C. 2018)). But *Pruitt* deals only with 44 U.S.C. § 2115's enforcement provision, and does not even purport to apply that provision by analogy to § 3106 as *Price* strains to do. *Pruitt*, 319 F. Supp. 3d at 261-262.

the Archivist finds" a violation has occurred) with *id.* § 3106 (referral required for recovery of records agency head "knows or has reason to believe" have been unlawfully removed). The D.C. Circuit has "repeatedly held that where different terms are used in a single piece of legislation, the court must presume that Congress intended the terms to have different meanings." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1240 (D.C. Cir. 2007) (internal quotation marks and punctuation omitted) (collecting cases). That analysis applies directly here, and so the plain language of section 3106—and the plain distinctions between the two provisions—controls.

D. Like Secretary Pompeo, Archivist Ferriero Has Not Carried Out His Nondiscretionary Duty Under the FRA

For substantially the same reasons, Plaintiffs have demonstrated that the Archivist was also required to initiate a recovery action. While the duty to act in the first instance falls to the head of the agency from which a record was unlawfully alienated, the FRA further, and independently, obligates the Archivist to spring into action by "request[ing] the Attorney General… initiate" a recovery action when (i) the agency head is aware that an alienation has occurred and the agency head fails to act within a reasonable period of time to recover the record, or (ii) where the agency head "is participating in, or believed to be participating in any such unlawful action." 44 U.S.C. § 3106(b).

Defendants misread Section 3106 in arguing that the "text of § 3106(b) suggests that any obligation of the Archivist to initiate a recovery action can only arise if the Archivist is first notified by the agency head" about an alienation and after a reasonable period of time has passed. Br. at 18. According to Defendants, Plaintiffs' "claim against the Archivist fails for that reason alone." *Id.*

The text of § 3106(b) is clear, however, and it refutes Defendants' argument: the Archivist has an independent duty to act "[i]n any case in which *the head of a Federal agency*

does not initiate an action for such recovery or other redress *within a reasonable period of time after being notified* of any such" alienation. 44 U.S.C. § 3106(b) (emphasis added). The Archivist's duty is triggered when *the agency head* fails to take action despite being aware of the alienation. *Id.* No other reading would make sense, particularly because this provision contemplates the Archivist acting when the agency head is directly involved in the improper alienation. *Id.* Under Defendants' reading of Section 3106(b), the Archivist could be independently aware of an unlawful alienation, and could even be aware that the agency head knows about the alienation and participated in it, yet would have no obligation to seek recovery of the alienated record. *See* Br. at 18–19. Such a reading would eviscerate the backstop protection Congress created in § 3106(b) for scenarios, like this one, where the agency is unable or unwilling to act. That interpretation simply does not comport with the statute. *See Armstrong II*, 1 F.3d at 1278–79 ("Congress did not intend to grant [the agency] … a blank check for records disposal.") (quoting *Am. Friends Serv. Comm., v. Webster*, 720 F.2d 29, 62 (D.C. Cir. 1983)).[9]

Defendants next assert that "the Archivist had no awareness of an unlawful removal," because "NARA's informal consultation with the Department led it to conclude that no further consideration was necessary because the interpreter's notes did not qualify as federal records." Br. at 18. Thus, according to Defendants, their collective awareness that the President alienated

[9] Even if Defendants' strained reading of Section 3106(b) were correct, it has no relevance here, where NARA has been aware of the alienation since at least January 2019 and yet has failed to initiate action for recovery of the Hamburg Meeting Notes within a reasonable period of time. *See* Brewer Decl. ¶ 10. It would be a strange outcome indeed if the agency tasked with overseeing the FRA had no obligation to take action simply because the agency whose record was alienated failed to ask them to do so. Congress was not so trusting of federal agencies as to permit that outcome. *See Am. Friends Serv. Comm.*, 720 F.2d at 41 ("Congress was certainly aware that agencies, left to themselves, have a built-in incentive to dispose of records relating to [their] 'mistakes[.]'").

the Hamburg Meeting Notes outside the process prescribed by the FRA triggered no duty to act. *See id.* at 18–19. But by the terms of their own submission, Defendants' "informal consultation" did not consider the *specific* interpreter notes at issue here—*i.e.*, the Hamburg Meeting Notes—but rather considered only the *category* of interpreter notes in general. *See* Brewer Decl. ¶ 11. Indeed, according to Mr. Brewer, he and Mr. Kootz sought "to ascertain State's views on the record *status of interpreter notes*" and so "[b]ased on this description, [NARA] agreed that *interpreter notes* do not meet the FRA definition of a federal record." *Id.* ¶ 10. (emphasis added).

The distinction is important. Defendants did not consider the actual content of the Hamburg Meeting Notes. All that Defendants have is the contention, critical to each of the arguments they have advanced, that interpreter notes, as a general matter, can never meet the statutory standard to constitute records under the FRA. But that proposition has been rebutted by Plaintiffs, *see supra* at 12-14; Obst Decl. ¶¶ 11–16, and so cannot relieve the Archivist of his duty to act under the FRA.

II. Defendants' Decision Not to Initiate a Recovery Action Through the Attorney General Is Arbitrary and Capricious and Contrary to Law

Because Defendants' failure to act violates their mandatory duty under Section 3106, judgment for Plaintiffs is warranted on Count I. Plaintiffs are additionally entitled to judgment on Count II because, by their own statements, Defendants have conclusively determined that they will not act to recover the Hamburg Meeting Notes, and this determination should be set aside as arbitrary and capricious and contrary to law under APA Section 706(2). The Government has submitted declarations from records officials at the State Department and NARA in which they aver that they conclusively determined that the Hamburg Meeting Notes were not a "record" for purposes of the FRA, which would trigger the mandatory recovery duty under Section 3106. *See* Kootz Decl. ¶ 10; Brewer Decl. ¶ 11. Defendants seek the benefit in this

litigation of these definitive statements about determinations they made regarding the Hamburg Meeting Notes. Yet Defendants nevertheless assert that their decisions do not satisfy the finality requirement for a claim under APA Section 706(2). These arguments are unpersuasive.

Defendants' conclusive—but legally flawed—determinations that the Hamburg Meeting Notes were not a record under the FRA are quintessentially reviewable final agency decisions. And because Defendants' decision not to initiate a recovery action was arbitrary and capricious and contrary to law, judgment for Plaintiffs is warranted on this claim.

A. Defendants' Conclusive Determinations That the President's Seizure of the Hamburg Meeting Notes Did Not Trigger Their Mandatory FRA Duties Are Reviewable Final Agency Actions

To constitute final agency action, two requirements must be satisfied. "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Translantic*, 400 U.S. 62, 71 (1970)). Both requirements are plainly met here.

First, Defendants' declarations clearly establish that their determinations marked the consummation of their decisionmaking process with respect to these records. Mr. Kootz, the State Department's Agency Records Officer, states that he "ha[s] concluded that any written material generated by the [OLS] interpreter in the course of providing oral interpretation during the meeting between President Trump and President of the Russian Federation Putin in Hamburg, Germany, on July 7, 2017 was not a federal record," and that, "[a]ccordingly," no

consideration was given to initiating an enforcement action through the Attorney General. Kootz Decl. ¶ 10. And Mr. Brewer, NARA's Chief Records Officer for the U.S. Government, states that based on information provided by the State Department, his "office agreed that interpreter notes do not meet the FRA definition of a federal record," and thus, "NARA determined that any removal or seizure of the interpreter's notes would not qualify as an unlawful removal or destruction of records contemplated by the FRA." Brewer Decl. ¶¶ 10–11.

There is no ambiguity or tentativeness in these statements. Rather, they are final determinations that foreclosed the possibility that the Hamburg Meeting Notes would be deemed a record subject to Section 3106. The agencies, through their designated records officers, have stated unequivocally their conclusion that this record was not a "record" under the FRA, and therefore they were under no obligation to refer the removal to the Attorney General. This determination is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990). The first element of the *Bennett v. Spear* test is readily met.

Second, Defendants' decisions determined legal rights and obligations because they foreclosed the possibility that Defendants would take action to return the Hamburg Meeting Notes to the custody of the State Department. These decisions, in turn, ensured that the public, including Plaintiffs, would be prevented from exercising their legal right to seek the Hamburg Meeting Notes through the Freedom of Information Act. Such a decision satisfies the second prong of the *Bennett v. Spear* inquiry, as it definitively resolved a legal question that determined the rights and obligations of the Secretary, the Archivist, and Plaintiffs under the FRA and FOIA. *See NRDC v. EPA*, 643 F.3d 311, 320 (D.C. Cir. 2011) (guidance that "altered the legal regime by resolving" a previously open question about interpretation of the Clean Air Act in a manner

that "binds EPA regional directors" satisfied second *Bennett* prong). Under the Supreme Court's "pragmatic approach" to the analysis, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (cleaned up), an agency action qualifies if it has "concrete consequences . . . as a result of the specific statutes and regulations that govern it." *Calif. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019) (discussing *Hawkes*). The direct and unavoidable effect of Defendants' decision not to treat the interpreter notes as federal "records" on Plaintiffs' ability to request them through FOIA surely qualifies.

Defendants focus on the "negative" aspect of their decision—that theirs was a decision *not* to act. Br. at 20–21. But it has long been settled that an agency's conclusive determination that it *would not* act is no less final than a decision that it *would*. "[N]o significance whatsoever inheres in the fact that the administrative determination is couched in terms of a 'no action' decision rather than in the form of a decree binding a party to perform or refrain from some particular act." *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 668 (D.C. Cir. 1970) (citing *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 141–42 (1939)). Indeed, the Supreme Court said as much in *Hawkes*, noting that a negative jurisdictional determination by the Army Corps of Engineers—stating that it had no authority to enforce the laws with respect to a given parcel of land because it did not contain waters within the agency's jurisdiction—would satisfy the "legal consequences" prong to the same extent as an affirmative jurisdictional determination. 136 S. Ct. at 1814–15.

So too here. The determination of the relevant agency officials that they lacked jurisdiction to initiate an enforcement action because, in their view, the notes in question did not constitute a "record" under the FRA, is just as "final" for purposes of the APA as a decision that

they could, and indeed were required to, act. *See also S. Utah Wilderness All.*, 542 U.S. at 63 (a "denial" or "saying no to a request" is agency action).

Unable to mount a persuasive argument based on the two extant elements of the *Bennett v. Spear* test, Defendants invent a third. Although its parameters are not entirely clear, they appear to suggest that a decision that does not arise in connection with a "formal administrative decisionmaking process," Br. at 20, cannot constitute final agency action. The Supreme Court has rejected this argument in terms that could not be clearer. "The bite in the phrase 'final action' . . . is not in the word 'action,' *which is meant to cover comprehensively every manner in which an agency may exercise its power*. It is rather in the word 'final,' which requires that the action under review 'mark the consummation of the agency's decisionmaking process.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (emphasis added) (citations omitted) (quoting *Bennett*, 520 U.S. at 177–78). In other words, if the decision of an agency constitutes final agency action under the *Bennett v. Spear* test—which Defendants' decision surely does—the inquiry is at its end.

The cases to which Defendants refer do not aid their argument. *Fund for Animals v. Bureau of Land Mgmt*, 460 F.3d 13 (D.C. Cir. 2006), for example, involved in pertinent part a challenge to a budget request to Congress that plainly did not affect any legal rights or obligations, as it was, at most, "a useful planning document." *Id.* at 20. *General Motors Corp. v. EPA*, 363 F.3d 442 (D.C. Cir. 2004), involved letters responding to manufacturers' requests to discuss a series of enforcement actions that "were part of the ongoing dialogue initiated by industry," and their content did not satisfy either prong of the *Bennett v. Spear* inquiry. *Id.* at 450. *Wagdy v. Sullivan*, 316 F. Supp. 3d 257 (D.D.C. 2018), *aff'd sub nom Wagdy v. Pompeo*, No. 18-5244, 2019 WL 479845 (D.C. Cir. Jan. 31, 2019), concerned an agency's collection of

information in anticipation of a visa revocation decision, where the unchallenged revocation decision was clearly the consummation of the agency's decisionmaking process, not a series of acts of information collection and storage. The language Defendants quote from in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1172 (D.C. Cir. 2016), merely recites the standard for review under APA Section 706(1), not evaluation of a claim under Section 706(2). And finally, the footnote Defendants cite from *Skalka v. Kelly*, 246 F. Supp. 3d 147, 152 n. 6, (D.D.C. 2017) simply stands for the proposition that the relief available is different under Sections 706(1) (an order compelling the unlawfully withheld action) and 706(2) (an order setting aside the unlawful agency decision). *Skalka* does not suggest that claims under the two provisions are mutually exclusive.[10]

B. Defendants' Decision Not to Initiate a Recovery Action Should be Set Aside

Under the APA, agency action should be "h[e]ld unlawful and set aside" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). For substantially the same reason that judgment for Plaintiffs is warranted on their APA Section 706(1) claim, it is also warranted on their Section 706(2) claim. Just as Defendants' *failure* to initiate a recovery action violates their mandatory duty under Section 3106, their *decision* not to institute an action to recover the Hamburg Meeting Notes through the Attorney General violates Section 3106. Accordingly, that decision should be set aside.

Defendants' decision is also arbitrary and capricious because of their failure to consider that an interpreter's notes for meetings between high-level government officials are different

[10] There is, however, often substantial overlap in the two forms of relief and, in this case, the relief that would be afforded under Section 706(1) would address Plaintiffs' injury. Accordingly, the Court need not address the Section 706(2) claim if it grants the relief sought under the Section 706(1) claim.

than for run-of-the-mill, routine interpreting missions, and that these notes are essential for ensuring that a complete and accurate Memorandum of Conversation memorializing the meeting is prepared. The declarations by the agency officials fail to even acknowledge this fact, much less explain how their decision not to treat these notes as records can be reconciled with the need to preserve them for this important purpose. *See supra* at 14-16; Obst Decl. ¶¶ 11–16. An agency action is arbitrary and capricious if it has "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The agencies' decision here, which cannot be reconciled with knowledge that is uniquely within their own possession and expertise, fits that bill.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment and grant Plaintiffs' Cross-Motion for Summary Judgment.

Dated: April 10, 2020

Respectfully submitted,

/s/ Nitin Shah

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 19-cv-01773-TNM
	)	
U.S. DEPARTMENT OF STATE, *et al.*,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF HANNAH BLOOM

I, Hannah Bloom, hereby declare:

1. The facts contained in this declaration are based on my personal knowledge, and I can testify competently to them if called upon to do so.

2. I am a Legal Assistant at Democracy Forward Foundation, which serves as counsel to Plaintiffs in the above captioned matter. I submit this sworn declaration in support of Plaintiffs' Cross-Motion for Summary Judgment.

3. Attached as Exhibit A-1 is a true and correct copy of Greg Miller, *Trump Has Concealed Details of His Face-to-Face Encounters With Putin From Senior Officials in Administration*, Wash. Post, Jan. 13, 2019, https://www.washingtonpost.com/world/national-security/trump-has-concealed-details-of-his-face-to-face-encounters-with-putin-from-senior-officials-in-administration/2019/01/12/65f6686c-1434-11e9-b6ad-9cfd62dbb0a8_story.html.

4. Attached as Exhibit A-2 is a true and correct copy of Peter Baker, *Trump and Putin Have Met Five Times. What Was Said Is A Mystery.*, N.Y. Times, Jan. 15, 2019, https://www.nytimes.com/2019/01/15/us/politics/trump-putin-meetings.html.

I declare under penalty of perjury that the foregoing is true and correct.

Executed April 10, 2020 in Washington, D.C.

/s/ Hannah Bloom

Hannah Bloom

EXHIBIT A-1

The Washington Post
Democracy Dies in Darkness

Trump has concealed details of his face-to-face encounters with Putin from senior officials in administration

By **Greg Miller**

Jan. 13, 2019 at 8:30 a.m. EST

President Trump has gone to extraordinary lengths to conceal details of his conversations with Russian President Vladimir Putin, including on at least one occasion taking possession of the notes of his own interpreter and instructing the linguist not to discuss what had transpired with other administration officials, current and former U.S. officials said.

Trump did so after a meeting with Putin in 2017 in Hamburg that was also attended by then-Secretary of State Rex Tillerson. U.S. officials learned of Trump's actions when a White House adviser and a senior State Department official sought information from the interpreter beyond a readout shared by Tillerson.

The constraints that Trump imposed are part of a broader pattern by the president of shielding his communications with Putin from public scrutiny and preventing even high-ranking officials in his own administration from fully knowing what he has told one of the United States' main adversaries.

As a result, U.S. officials said there is no detailed record, even in classified files, of Trump's face-to-face interactions with the Russian leader at five locations over the past two years. Such a gap would be unusual in any presidency, let alone one that Russia sought to install through what U.S. intelligence agencies have described as an unprecedented campaign of election interference.

Special counsel Robert S. Mueller III is thought to be in the final stages of an investigation that has focused largely on whether Trump or his associates conspired with Russia during the 2016 presidential campaign. The new details about Trump's continued secrecy underscore the extent to which little is known about his communications with Putin since becoming president.

After this story was published online, Trump said in an interview late Saturday with Fox News host Jeanine Pirro that he did not take particular steps to conceal his private meetings with Putin and attacked The Washington Post and its owner Jeffrey P. Bezos.

He said he talked with Putin about Israel, among other subjects. “Anyone could have listened to that meeting. That meeting is open for grabs,” he said, without offering specifics.

When Pirro asked if he is or has ever been working for Russia, Trump responded, “I think it’s the most insulting thing I’ve ever been asked.”

Former U.S. officials said that Trump’s behavior is at odds with the known practices of previous presidents, who have relied on senior aides to witness meetings and take comprehensive notes then shared with other officials and departments.

Trump’s secrecy surrounding Putin “is not only unusual by historical standards, it is outrageous,” said Strobe Talbott, a former deputy secretary of state now at the Brookings Institution, who participated in more than a dozen meetings between President Bill Clinton and then-Russian President Boris Yeltsin in the 1990s. “It handicaps the U.S. government — the experts and advisers and Cabinet officers who are there to serve [the president] — and it certainly gives Putin much more scope to manipulate Trump.”

A White House spokesman disputed that characterization and said that the Trump administration has sought to "improve the relationship with Russia" after the Obama administration "pursued a flawed 'reset' policy that sought engagement for the sake of engagement."

The Trump administration "has imposed significant new sanctions in response to Russian malign activities," said the spokesman, who spoke on the condition of anonymity and noted that Tillerson in 2017 "gave a fulsome readout of the meeting immediately afterward to other U.S. officials in a private setting, as well as a readout to the press."

Trump allies said the president thinks the presence of subordinates impairs his ability to establish a rapport with Putin and that his desire for secrecy may also be driven by embarrassing leaks that occurred early in his presidency.

The meeting in Hamburg happened several months after The Washington Post and other news organizations revealed details about what Trump had told senior Russian officials during a meeting with Russian officials in the Oval Office. Trump disclosed classified information about a terrorism plot, called former FBI director James B. Comey a "nut job" and said that firing Comey had removed "great pressure" on his relationship with Russia.

The White House launched internal leak hunts after that and other episodes and sharply curtailed the distribution within the National Security Council of memos on the president's interactions with foreign leaders.

"Over time it got harder and harder, I think, because of a sense from Trump himself that the leaks of the call transcripts were harmful to him," said a former administration official.

Senior Democratic lawmakers describe the cloak of secrecy surrounding Trump's meetings with Putin as unprecedented and disturbing.

Rep. Eliot L. Engel (D-N.Y.), the chairman of the House Foreign Affairs Committee, said in an interview that his panel will form an investigative subcommittee whose targets will include seeking State Department records of Trump's encounters with Putin, including a closed-door meeting with the Russian leader in Helsinki last summer.

"It's been several months since Helsinki and we still don't know what went on in that meeting," Engel said. "It's appalling. It just makes you want to scratch your head."

The concerns have been compounded by actions and positions Trump has taken as president that are seen as favorable to the Kremlin. He has dismissed Russia's election interference as a "hoax," suggested that Russia was entitled to annex Crimea, repeatedly attacked NATO allies, resisted efforts to impose sanctions on Moscow, and begun to pull U.S. forces out of Syria — a move that critics see as effectively ceding ground to Russia.

At the same time, Trump's decision to fire Comey and other attempts to contain the ongoing Russia investigation led the bureau in May 2017 to launch a counterintelligence investigation into whether he was seeking to help Russia and if so, why, a step first reported by the New York Times.

It is not clear whether Trump has taken notes from interpreters on other occasions, but several officials said they were never able to get a reliable readout of the president's two-hour meeting in Helsinki. Unlike in Hamburg, Trump allowed no Cabinet officials or any aides to be in the room for that conversation.

Trump also had other private conversations with Putin at meetings of global leaders outside the presence of aides. He spoke at length with Putin at a banquet at the same 2017 global conference in Hamburg, where only Putin's interpreter was present. Trump also had a brief conversation with Putin at a Group of 20 summit in Buenos Aires last month.

Trump generally has allowed aides to listen to his phone conversations with Putin, although Russia has often been first to disclose those calls when they occur and release statements characterizing them in broad terms favorable to the Kremlin.

In an email, Tillerson said that he "was present for the entirety of the two presidents' official bilateral meeting in Hamburg," but he declined to discuss the meeting and did not respond to questions about whether Trump had instructed the interpreter to remain silent or had taken the interpreter's notes.

In a news conference afterward, Tillerson said that the Trump-Putin meeting lasted more than two hours, covered the war in Syria and other subjects, and that Trump had "pressed President Putin on more than one occasion regarding Russian involvement" in election interference. "President Putin denied such involvement, as I think he has in the past," Tillerson said.

Tillerson refused to say during the news conference whether Trump had rejected Putin's claim or indicated that he believed the conclusion of U.S. intelligence agencies that Russia had interfered.

Tillerson's account is at odds with the only detail that other administration officials were able to get from the interpreter, officials said. Though the interpreter refused to discuss the meeting, officials said, he conceded that Putin had denied any Russian involvement in the U.S. election and that Trump responded by saying, "I believe you."

A White House spokesperson, responding to this detail from the Hamburg meeting, said: “The President has affirmed that he supports the conclusions in the 2017 Intel Community Assessment, and the President also issued a new executive order in September 2018 to ensure a whole of government effort to address any foreign attempts to interfere in US elections.”

Senior Trump administration officials said that White House officials including then-National Security Adviser H.R. McMaster were never able to obtain a comprehensive account of the meeting, even from Tillerson.

“We were frustrated because we didn’t get a readout,” a former senior administration official said. “The State Department and [National Security Council] were never comfortable” with Trump’s interactions with Putin, the official said. “God only knows what they were going to talk about or agree to.”

Because of the absence of any reliable record of Trump’s conversations with Putin, officials at times have had to rely on reports by U.S. intelligence agencies tracking the reaction in the Kremlin.

Previous presidents and senior advisers have often studied such reports to assess whether they had accomplished their objectives in meetings as well as to gain insights for future conversations.

U.S. intelligence agencies have been reluctant to call attention to such reports during Trump’s presidency because they have at times included comments by foreign officials disparaging the president or his advisers, including his son-in-law Jared Kushner, a former senior administration official said.

“There was more of a reticence in the intelligence community going after those kinds of communications and reporting them,” said a former administration official who worked in the White House. “The feedback tended not to be positive.”

The interpreter at Hamburg revealed the restrictions that Trump had imposed when he was approached by administration officials at the hotel where the U.S. delegation was staying, officials said.

Among the officials who asked for details from the meeting were Fiona Hill, the senior Russia adviser at the NSC, and John Heffern, who was then serving at State as the acting assistant secretary for European and Eurasian Affairs.

The State Department did not respond to a request for comment from the interpreter. Heffern, who retired from State in 2017, declined to comment.

Through a spokesman, Hill declined a request for an interview.

There are conflicting accounts of the purpose of the conversation with the interpreter, with some officials saying that Hill was among those briefed by Tillerson and that she was merely seeking more nuanced information from the interpreter.

Others said the aim was to get a more meaningful readout than the scant information furnished by Tillerson. “I recall Fiona reporting that to me,” one former official said. A second former official present in Hamburg said that Tillerson “didn’t offer a briefing or call the ambassador or anybody together. He didn’t brief senior staff,” although he “gave a readout to the press.”

A similar issue arose in Helsinki, the setting for the first formal U.S.-Russia summit since Trump became president. Hill, national security adviser John Bolton and other U.S. officials took part in a preliminary meeting that included Trump, Putin and other senior Russian officials.

But Trump and Putin then met for two hours in private, accompanied only by their interpreters. Trump’s interpreter, Marina Gross, could be seen emerging from the meeting with pages of notes.

Alarmed by the secrecy of Trump's meeting with Putin, several lawmakers subsequently sought to compel Gross to testify before Congress about what she witnessed. Others argued that forcing her to do so would violate the impartial role that interpreters play in diplomacy. Gross was not forced to testify. She was identified when members of Congress sought to speak with her. The interpreter in Hamburg has not been identified.

During a joint news conference with Putin afterward, Trump acknowledged discussing Syria policy and other subjects but also lashed out at the media and federal investigators, and he seemed to reject the findings of U.S. intelligence agencies by saying that he was persuaded by Putin's "powerful" denial of election interference.

Previous presidents have required senior aides to attend meetings with adversaries including the Russian president largely to ensure that there are not misunderstandings and that others in the administration are able to follow up on any agreements or plans. Detailed notes that Talbot took of Clinton's meetings with Yeltsin are among hundreds of documents declassified and released last year.

John Hudson, Josh Dawsey and Julie Tate contributed to this report.

Greg Miller
Greg Miller is a national security correspondent for The Washington Post and a two-time winner of the Pulitzer Prize. He is the author of "The Apprentice," a book on Russia's interference in the 2016 U.S. presidential race and the fallout under the Trump administration. Follow

EXHIBIT A-2

The New York Times https://nyti.ms/2RR75G5

Trump and Putin Have Met Five Times. What Was Said Is a Mystery.

By Peter Baker

Jan. 15, 2019

WASHINGTON — The first time they met was in Germany. President Trump took his interpreter's notes afterward and ordered him not to disclose what he heard to anyone. Later that night, at a dinner, Mr. Trump pulled up a seat next to President Vladimir V. Putin to talk without any American witnesses at all.

Their third encounter was in Vietnam when Mr. Trump seemed to take Mr. Putin's word that he had not interfered in American elections. A formal summit meeting followed in Helsinki, Finland, where the two leaders kicked out everyone but the interpreters. Most recently, they chatted in Buenos Aires after Mr. Trump said they would not meet because of Russian aggression.

Mr. Trump has adamantly insisted there was "no collusion" with Russia during his 2016 presidential campaign. But each of the five times he has met with Mr. Putin since taking office, he has fueled suspicions about their relationship. The unusually secretive way he has handled these meetings has left many in his own administration guessing what happened and piqued the interest of investigators.

"What's disconcerting is the desire to hide information from your own team," said Andrew S. Weiss, who was a Russia adviser to President Bill Clinton. "The fact that Trump didn't want the State Department or members of the White House team to know what he was talking with Putin about suggests it was not about advancing our country's national interest but something more problematic."

The mystery surrounding the meetings seems to have drawn attention from the special counsel, Robert S. Mueller III, who is examining ties between the president and Russia. And it has generated a furor in Congress, where Democrats are pushing to subpoena the notes of the president's interpreters or perhaps the interpreters themselves.

Veterans of past administrations could not recall a precedent for a president meeting alone with an adversary and keeping so many of his own advisers from being briefed on what was said. When they meet with foreign leaders, presidents typically want at least one aide in the room — not just an interpreter — to avoid misunderstandings later. Memorandums of conversation, called Memcons, are drafted and details are shared with officials who have reasons to know what was said.

"All five of the presidents whom I worked for, Republicans and Democrats, wanted a word-for-word set of notes, if only to protect the integrity of the American side of the conversation against later manipulation by the Soviets or the Russians," said Victoria J. Nuland, a career diplomat who worked for Dick Cheney and Hillary Clinton, among others.

That would seem an even greater imperative for Mr. Trump, who knew there were questions about his relationship with Mr. Putin given that American intelligence agencies concluded that Moscow tried to help elect him.

"If any president would have wanted witnesses and protection, it ought to have been Donald Trump," said Richard N. Haass, the president of the Council on Foreign Relations and adviser to four presidents, most recently as President George W. Bush's State Department policy planning director. "And yet he chose not to, and that adds fuel to the fire that something here is not right."

Mr. Trump's defenders acknowledge Mr. Trump's approach does not resemble the way his predecessors operated, but note that he has been an unorthodox president in so many ways that it does not prove anything untoward. And, they say, he has reason to feel burned since previous interactions with foreign leaders have leaked, including full transcripts of telephone calls with the leaders of Mexico and Australia published in The Washington Post.

"Of course I was disappointed with Helsinki, but I do not just look at how the president handles specific meetings with Putin," said Luke Coffey, a foreign policy scholar at the Heritage Foundation. "Instead, I'm most interested in what the actual policies are coming out of the administration."

He cited additional sanctions, weapons sent to Ukraine, increased Pentagon spending meant to counter Russian aggression and opposition to a new Russian pipeline to Europe. All that, he said, "is proof that this is one of the toughest administrations on Russia since Reagan."

The question of Mr. Trump's meetings with Mr. Putin was revived by a pair of news stories last weekend. The New York Times reported that after Mr. Trump fired the F.B.I. director James B. Comey in 2017, the bureau opened a counterintelligence investigation to explore whether the president was acting on Russia's behalf. The Post reported that Mr. Trump had gone to unusual lengths to conceal details of his talks with Mr. Putin, including taking his interpreter's notes.

The White House dismissed the stories as unfair smears. “The liberal media has wasted two years trying to manufacture a fake collusion scandal instead of reporting the fact that unlike President Obama, who let Russia and other foreign adversaries push America around, President Trump has actually been tough on Russia,” Sarah Huckabee Sanders, the White House press secretary, said in a statement.

Mr. Trump has been in contact with Mr. Putin since shortly after his election in November 2016. Mr. Putin sent him a congratulatory telegram and the two spoke by telephone on Nov. 14.

They spoke a few more times before meeting in person for the first time as presidents on July 7, 2017, in Hamburg, Germany, during a Group of 20, or G-20, economic summit meeting. Aside from interpreters, the only others in the room were Rex W. Tillerson, then the secretary of state, and Sergey V. Lavrov, the Russian foreign minister.

The inaugural meeting came at a sensitive time. Mr. Trump’s team learned that day that one of the biggest secrets of his presidential bid was about to become public: At the height of the campaign, his son, son-in-law and campaign chairman had met at Trump Tower with Russians on the promise of obtaining dirt on Mrs. Clinton from the Russian government. Mr. Trump’s team was scrambling to respond to a request for comment by The Times.

Mr. Trump’s meeting with Mr. Putin that day lasted more than two hours. Afterward, Mr. Trump took his interpreter’s notes and instructed the interpreter not to brief anyone. Mr. Tillerson told reporters that the leaders discussed everything from Syria to Ukraine, but he also described “a very robust and lengthy exchange” on the election hacking.

A few hours later, Mr. Trump sought out Mr. Putin again during a dinner for all the leaders. Videotape later made public showed Mr. Trump pointing at Mr. Putin, who was seated across and down a long table, then pointing at himself and then making a pumping motion with his fist.

Mr. Trump later told The Times that he went over to see his wife, Melania Trump, who was sitting next to Mr. Putin, and the two leaders then talked, with Mr. Putin’s interpreter translating. No American officials were present, and the White House did not confirm the encounter until more than 10 days later, after it was independently reported.

The day after the two meetings, as Mr. Trump was on Air Force One taking off from Germany heading back to Washington, he telephoned a Times reporter and argued that the Russians were falsely accused of election interference. While he insisted most of the conversation be off the record, he later repeated a few things in public in little-noticed asides.

He said that he raised the election hacking three times and that Mr. Putin denied involvement. But he said Mr. Putin also told him that “if we did, we wouldn’t have gotten caught because we’re professionals.” Mr. Trump said: “I thought that was a good point because they are some of the best in the world” at hacking.

Asked how he weighed Mr. Putin’s denials against the evidence that had been presented to him by Mr. Comey; John O. Brennan, then the C.I.A. director; and James R. Clapper Jr., then director of national intelligence, he said that Mr. Clapper and Mr. Brennan were the “most political” intelligence chiefs he knew and that Mr. Comey was “a leaker.”

Later on the same flight to Washington, Mr. Trump huddled with aides to decide how to respond to the emerging story by other Times reporters about the Trump Tower meeting. He personally dictated a misleading statement, saying the meeting was about Russian adoptions without admitting that it was actually intended to accept Moscow’s aid for his campaign, as emails obtained by The Times later documented.

The confluence of the two conversations with Mr. Putin even as Mr. Trump’s team was grappling with questions about the Trump Tower meeting have fueled further suspicions.

“If you add up all these pieces, it’s a very damning picture at a minimum of how to handle national security,” said Mr. Weiss, who is now at the Carnegie Endowment for International Peace. “If there’s a more nefarious explanation, it’s obviously more disturbing.”

Mr. Trump next encountered Mr. Putin in person on Nov. 11, 2017, at a meeting of the Asia-Pacific Economic Cooperation forum in Da Nang, Vietnam. No formal meeting was scheduled, but the two chatted anyway, and Mr. Trump later indicated that Mr. Putin again denied any election interference. “I really believe that when he tells me that, he means it,” Mr. Trump said.

The two stayed in touch by phone. Mr. Trump called after Mr. Putin was re-elected in a contest heavily managed by the state in his favor. Although wary aides wrote in his briefing papers, “DO NOT CONGRATULATE,” Mr. Trump went ahead and congratulated Mr. Putin.

Their most famous meeting came on July 16, 2018, in Helsinki, where they talked for more than two hours accompanied only by interpreters. At a subsequent news conference, Mr. Trump seemed to again accept Mr. Putin’s denial of election interference over the conclusions of American intelligence agencies.

But what happened behind closed doors remained shrouded. The Kremlin later reported that the leaders reached important agreements, but American government officials were left in the dark. American intelligence agencies were left to glean details about the meeting from surveillance of Russians who talked about it afterward.

Within months, Mr. Trump was angling for another meeting, perhaps at the White House or in Paris. Finally, they scheduled a get-together in Buenos Aires in December on the sidelines of another G-20 meeting.

Days before, Russian forces seized three Ukrainian naval vessels, but Mr. Trump seemed intent on sitting down with Mr. Putin, telling reporters as he left the White House for Buenos Aires that the meeting was still on. Just an hour later, after aides briefed him again on Ukraine standoff, he canceled the meeting on Twitter, catching the Russians off guard.

But when he arrived in Buenos Aires, Mr. Trump ended up having another informal conversation with Mr. Putin at the leaders' dinner. Once again, little information emerged about what they discussed, even to many other American government officials.

"I've never heard of a president conducting one-on-one meetings with his Russian counterpart without note-takers or without afterward offering readouts to his top aides," said David J. Kramer, a former assistant secretary of state under Mr. Bush. "Putin is privy to what the two discussed — why can't senior administration officials be trusted and looped in too?"

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *et al.*, *Plaintiffs*, *v.* U.S. DEPARTMENT OF STATE, *et al.*, *Defendants*.	Case No. 1:19-cv-1773-TNM

DECLARATION OF HARRY OBST

I, Harry Obst, hereby declare under penalty of perjury as prescribed in 28 U.S.C. § 1746 that the following statements are true and correct to the best of my knowledge and belief:

1. I submit this sworn declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment.

2. Between 1965 and 1997, I served as a diplomatic interpreter for the U.S. Department of State within its Office of Language Services ("OLS"), the office whose responsibility is to provide interpretation services for Presidents, Secretaries of State, and other high-rankings government officials. From 1984 to 1997, I served as Director of OLS—the head of the office. During my career, I interpreted for seven U.S. presidents, countless Cabinet officials, and numerous other high-ranking U.S. Government officials, and for foreign leaders upon the request of, or with the permission of, the State Department. I retired with distinction from the State Department in 1997 as a member of the Senior Executive Service, and received merit awards from then-Secretary of State Madeleine Albright and U.S. Information Agency Director Joseph Duffey in recognition of my many years of dedicated service to the United States.

3. During my State Department tenure, I routinely provided interpretation services in meetings that were substantially similar, in terms of importance and attendance by high ranking U.S. and foreign leaders, to the July 2017 Hamburg Meeting at issue in this lawsuit. As Director of OLS, I supervised others who did the same, including Russian-language interpreters performing the same function.

4. After my retirement from the State Department, I have written and taught on the subject of interpretation, including at the Inlingua School of Interpretation, where I served as Director and principal instructor between 1997 and 2004. I am also the author of *White House Interpreter: The Art of Interpretation*, which chronicles noteworthy moments in U.S. diplomatic history from my interpreter's vantage point. Harry Obst, *White House Interpreter: The Art of Interpretation*, Authorhouse (2010).

5. I have also periodically served as an interpreter on a contract basis for the U.S. government since my official retirement. I last did so during the previous Administration.

6. The factual statements contained herein are based on the first-hand knowledge and experiences I gained during my tenure at the State Department, as well as from more recent contract-based service. To the best of my knowledge, the policies and practices of OLS as I describe them remain the policies and practices of that Office in effect to this day.

7. The individuals who provide interpretation services in head of state meetings, like the July 2017 Hamburg Meeting, are performing duties as employees or contractors of the State Department, and specifically OLS. OLS interpreters and OLS contractor interpreters report to the Director of OLS, who reports to the Assistant Secretary for Administration, who reports to the Under Secretary for Management.

8. By far the most common and accurate form of interpretation for a private meeting between world leaders is called "consecutive interpretation." This is where the speaker says a few sentences, the interpreter listens and takes notes, and then interprets those sentences into the other language, without a break. A trained professional consecutive interpreter can store in his or her memory a passage of five to ten sentences, and possibly more with the aid of notes. A professional interpreter is not trying to record every word in these notes, but is rather trying to duplicate the structure of the message, displaying it like a photograph through personalized symbols arranged vertically. These symbols, called ideograms, will assist the interpreter in replicating the structure and sequence of the thoughts expressed by the speaker. But even interpreters who use a lot of ideograms will still, by necessity, record many words in their notes.

9. Following a meeting between high level officials, especially one attended by the President, a Memorandum of Conversation ("MemCon") would be prepared to memorialize the discussion within a few days of its occurrence. The MemCon is a critical document, as it preserves for the historical record the contents of the discussion, and also provides Executive Branch officials with a readout of what was discussed.

10. A standard MemCon would include such details as the date of the meeting; start time and end time; attendance list (including titles); and a disclaimer that the Memorandum was not a verbatim record but was rather a memorialization of the meeting based on the interpreter's memory and interpreter notes. The balance of the MemCon would describe the exchanges between the participants; even if it is not a verbatim transcript, a proper MemCon captures all of the substance discussed by the parties.

11. Where a designated note taker from either the State Department or White House was present, they would have primary responsibility for preparing the MemCon. It was common,

in my experience, for the note taker to ask the interpreter to preserve their notes until the MemCon was finalized. The note taker would typically share a draft of the MemCon with the interpreter prior to finalizing so the interpreter, consulting his or her notes, could confirm the accuracy and completeness of the draft MemCon.

12. If no note taker was present at the meeting, then the interpreter would have been personally responsible for preparing the MemCon. How to prepare a MemCon was part of the standard onboarding training for OLS employees.

13. In preparing the MemCon, the interpreter would rely principally on their interpreter notes to refresh their memory of the contents of the exchange.

14. Once the MemCon was prepared, the interpreter would deliver it to the Executive Secretary in the Office of the Secretary of State, who would lodge it in the official files of the State Department. The Executive Secretary would at that point either take possession of the interpreter notes to destroy them or direct the interpreter to destroy them, their purpose of facilitating the preparation of the MemCon having been served.

15. During my decades of service, approximately 90 percent of interpreting missions performed by OLS did not involve high-level officials or were otherwise not highly sensitive. Documenting these relatively routine meetings in State Department records was considered unnecessary because they did not have any particular historical or record-keeping value; accordingly, no MemCon was required to be prepared for these meetings, and for the same reason, OLS interpreters were not required to preserve their notes for any period of time after the interpreting mission was concluded.

16. However, starkly different rules apply to meetings involving high level officials, and especially meetings between the President and a foreign head of state. Those meetings are

considered highly sensitive and extremely important, and it is especially critical to ensure that a record of the meeting is prepared and maintained in the files of the State Department. Accordingly, in my experience during seven different presidential administrations, interpreters are required to maintain their notes of these meetings under the strictest conditions until the MemCon can be prepared. Indeed, we were instructed to treat our notes of those meetings with the same level of care and sensitivity as a classified document. We would guard them zealously until we had finalized and submitted the MemCon to the Executive Secretary in the Office of the Secretary of State, and only then would the Executive Secretary direct us either to destroy the notes or hand them over to be destroyed, as the MemCon would serve as the agency record documenting the meeting.

17. I do not recall a participant in a meeting ever asking me to surrender my interpreter notes. I believe that I would remember such an occurrence, as it would have been a highly unusual experience. Moreover, during the thirteen years that I oversaw OLS, I do not recall any of the interpreters who reported to me saying that their notes had been taken by a principal for whom they had interpreted; such an unusual experience would almost certainly have been brought to my attention right away.

18. If someone did ask for my interpreter notes, including the President, I would have felt compelled to politely decline to hand them over, as I considered my work product to be a record of the State Department. Such a request would constitute a substantial breach of protocol and would disrupt OLS's standard process of retaining interpreter notes until the MemCon is finalized. If the President pressed me further to surrender my notes, I might have, at that point, felt obligated to accede to the demand but my acquiescence would not have indicated agreement or that such a request was appropriate.

19. Although no meeting principal has ever asked me for my notes, I can recall one other analogous situation from my decades as an interpreter for the United States Government. During the Nixon Admnistration, I was called to the White House very late in the evening to interpret for a meeting between Henry Kissinger, then the National Security Adviser; a representative of the German chancellor; and Helmuth Sonnenfeldt, an NSC staffer with expertise on German-Soviet affairs. When the meeting concluded, Mr. Sonnenfeldt ordered me to bring the memorandum memorializing the conversation back to the White House, and not to make a copy for anyone else.

20. As an employee of the State Department, I felt uncomfortable doing anything that would keep the original memorandum from the Secretary of State. After all, my standing State Department instructions were to leave the original version of such memoranda with the Secretary of State's Executive Secretary and provide only copies of the record to participants in the meeting. So that is exactly what I did on this occasion. After completing the memorandum, I delivered the original to the office of then-Secretary of State William Rogers and returned to the White House to deliver a copy to Mr. Sonnenfeldt. Mr. Sonnenfeldt was not pleased that I disobeyed his order, but my obligation as a State Department employee to preserve the memorandum memorializing the conversation in the files of the State Department was clear.

Dated: March 26, 2020

Alexandria, Virginia

Harry Obst

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 19-cv-1773-TNM
U.S. DEPARTMENT OF STATE *et al*.,	)	
Defendants,	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Federal Rules of Civil Procedure 56 and 65, and Local Rule 7(h)(1), Plaintiffs respectfully submit the following response to Defendants' Statement of Undisputed Material Facts, ECF No. 16-2, and Counter-Statement of Undisputed Material Facts in support of Plaintiffs' Cross-Motion for Summary Judgment, ECF No. 18.

Defendants' Statement	Plaintiffs' Response and/or Counter-Statement
1. The general records management policies of the U.S. Department of State (the "Department" or "State Department") are set forth at 5 Foreign Affairs Manual ("FAM") 400 and in the Department's Records Management Handbook, 5 Foreign Affairs Handbook ("FAH")-4, available at https://fam.state.gov. In addition to these policies, the Department has established Records Disposition Schedules that document the major records series related to the activities of each office within the Department, available at https://foia.state.gov/Learn/RecordsDisposition.aspx.	1. Admitted. Compl., ECF No. 1, ¶ 26.

2. The Department's Office of Language Services ("LS"), employing both full-time staff and independent contractors, provides written translation and oral interpretation services in over 60 languages to Department officials as well as to other entities and officials throughout the Federal Government, including the President and his staff, Members of Congress and their staff, the U.S. Departments of Defense and Treasury, and the Superior Court of the District of Columbia. Declaration of Dr. Yun-Hyang Lee ("Lee Decl.")1 ¶¶ 2, 4, 9-10 (STATE AR 0008-09, 0011-12). While most interpretation services provided by LS interpreters support the conduct of diplomacy and foreign affairs by the Department, the White House, and other federal civilian and military agencies, LS also provides interpretation services in certain legal proceedings, including grand jury proceedings, and events such as the National Prayer Breakfast. *Id*. ¶¶ 9-10 (STATE AR 0011-12).	2. Admitted. Compl. ¶ 27.
3. LS interpreters, whether employed as full-time staff or as contractors, are required to demonstrate proficiency in oral interpretation and to adhere to the standards of conduct generally applicable to the profession, including the Code of Professional Ethics ("Ethics Code") adopted by the International Association of Conference Interpreters ("AIIC"), available at https://aiic.net/page/6724. Lee Decl. ¶¶ 5-6 (STATE AR 0010). Among other things, the AIIC Ethics Code imposes strict confidentiality obligations on interpreters. *Id.* ¶ 6. Interpreters are "bound by the strictest secrecy, which must be observed towards all persons and with regard to all information disclosed in the course of the practice of the profession at any gathering not open to the public." AIIC Ethics Code art. 2(a). LS contract interpreters are also contractually bound to maintain confidentiality. Lee Decl.	3. Plaintiffs lack sufficient information to admit or deny.

¶ 7 (STATE AR 0010-11); Terms and Conditions, Blanket Purchase Agreement 7.b (STATE AR 0025).	
4. When a LS interpreter provides interpretation services for a Government official or entity outside the Department, the interpreter does not represent Department leadership or Department policy positions. Lee Decl. ¶ 11 (STATE AR 0012-13). Rather, the interpreter provides interpretation services at the request and direction of the outside entity or official. *See id.* When engaged by an outside entity or official to provide interpretation services at a nonpublic event, the interpreter does not provide a report on the substance of the event to anyone in the Department. *Id.* Indeed, doing so could violate the interpreter's confidentiality obligations. *Id.*	4. Plaintiffs admit in part, deny in part, and lack sufficient information to admit or deny in part. Plaintiffs lack sufficient knowledge to admit or deny whether OLS interpreters "represent Department leadership or Department policy positions" when they "provide[] interpretation services for a Government official or entity outside the Department." Plaintiffs deny that interpreters do not "provide a report on the substance of the event to anyone in the Department" and further deny that "doing so could violate the interpreter's confidentiality obligations." For certain meetings involving high level U.S. government officials, and especially those attended by the President, OLS interpreters use their notes to assist a designated note taker in preparing a memorandum of conversation ("MemCon") documenting the substance of the meeting. Declaration of Harry Obst ("Obst Decl."), attached to Pl. Mot. for Summ. J., Ex. B, ¶ 11. If a meeting of this kind does not have a designated note taker in attendance, then the interpreter becomes primarily responsible for preparing the MemCon and "the interpreter would rely principally on their interpreter notes to refresh their memory of the contents" of the meeting for this purpose. *Id.* ¶¶ 12–13. Once completed, the MemCon would be delivered "to the Executive Secretary in the Office of the Secretary of State" for retention in the Department's files, and the notes would either be turned over to the Executive Secretary for destruction or destroyed by the interpreter, "their purpose of facilitating the preparation of the MemCon having been served." *Id.* ¶ 14.

5. At the July 7, 2017 meeting between the President and President of the Russian Federation Vladimir Putin, a former LS staff interpreter, Yuri Shkeyrov, provided interpretation services to the President. Lee Decl. ¶ 20 (STATE AR 0016). At a number of later meetings between the President and Mr. Putin, a current LS staff interpreter, Marina Gross, has provided interpretation services to the President. *Id*.; Declaration of Marina Gross ("Gross Decl.") 2 ¶ 3 (STATE AR 0039). On each of these occasions, the LS interpreters provided their services at the request and under the direction of the President and his staff. Lee Decl. ¶¶ 9, 11 (STATE AR 0011-13).	5. Plaintiffs admit in part, deny in part, and lack sufficient information to admit or deny in part. Plaintiffs admit that President Trump met with Russian Federation President Vladimir Putin on July 7, 2017 and that an OLS interpreter provided interpretation services during the meeting, Compl. ¶¶ 21, 28, and that Ms. Gross provided interpretation services for other meetings between Presidents Trump and Putin which are not at issue in this case. *See* Declaration of Hannah Bloom, attached to Pl. Mot. for Summ. J., ECF No. 18-1, Ex. A-1 (Greg Miller, *Trump Has Concealed Details of His Face-to-Face Encounters With Putin From Senior Officials in Administration*, Wash. Post, Jan. 13, 2019) ("Miller Article"). Plaintiffs admit that interpretation services are provided at the request of meeting participants and with the permission of the State Department. *See* Obst Decl. ¶ 2. Plaintiffs lack sufficient knowledge to admit or deny whether Yuri Shkeyrov provided interpretation services at the July 7, 2017 meeting. Plaintiffs admit that OLS "interpreters provide[] their services . . . under the direction of the President and his staff" to the extent Defendants mean with respect to directions regarding simple logistical and diplomatic protocol measures such as where to sit or stand during the course of the meeting. Plaintiffs deny, however, that this "direction" has any effect on the status of OLS interpreters as State Department employees or on the record retention rules applicable to their work product. OLS interpreters are, at all times, "performing duties as employees or contractors of the State Department, and specifically OLS," and, accordingly, they "report to the Director of OLS, who reports to

	the Assistant Secretary for Administration, who reports to the Under Secretary for Management." Obst Decl. ¶ 7. OLS interpreters remain bound to follow the directives of the State Department and applicable record retention policies, such as the Federal Records Act. *Id.* ¶ 18. Plaintiffs further deny that this "direction" of OLS interpreters would allow a meeting principal to permissibly alienate the notes of the interpreter. *Id.*
6. The task of providing real-time interpretation is a demanding one, requiring a high degree of concentration. Lee Decl. ¶ 18 (STATE AR 0014-15). It would not be reasonably possible for an interpreter to provide interpretation services during a meeting and at the same time document the substance of the meeting. *See id.*	6. Plaintiffs admit in part, deny in part, and lack sufficient information to admit or deny in part. Plaintiffs admit that consecutive interpretation is a demanding task, which requires a high degree of skill and concentration. Plaintiffs deny, however, that "[i]t would not be reasonably possible for an interpreter to provide interpretation services during a meeting and at the same time document the substance of the meeting." Although an interpreter could not prepare a verbatim transcript, interpreters' notes can contain important details and substantive content from the meeting. *See* Obst Decl. ¶ 8 ("[E]ven interpreters who use a lot of ideograms will still, by necessity, record many words in their notes."); *see also id.* ¶ 11–14 (describing the role interpreter notes play in preparing a substantive MemCon). At least for high level meetings involving the President, like the Hamburg meeting, interpreters rely on their notes to confirm the accuracy of information that will appear in a MemCon, or if no note taker is present, to refresh their recollection for purposes of creating a MemCon. *Id.*
7. LS does not require its interpreters to take notes when they provide interpretation services, nor does it instruct interpreters to follow any specific protocol when it comes	7. Plaintiffs admit in part, deny in part, and lack sufficient information to admit or deny in part.

to making notes while interpreting. Lee Decl. ¶ 15 (STATE AR 0014). Generally, interpreters do have with them a notebook or notepad, which they may use to jot down words or symbols as an aide to their short-term memory, for immediate use while interpreting. *Id.* ¶ 16 (STATE AR 0014-15); Gross Decl. ¶ 4 (STATE AR 0039). These words or symbols are scribbled down in no particular order on the page and would not convey meaningful information about the substance of a meeting where an interpreter was providing interpretation services. Lee Decl. ¶¶ 16-17 (STATE AR 0014-15); Gross Decl. ¶¶ 4-5 (STATE AR 0039-40). Among other things, interpreters may use their own unique abbreviations or symbols when they make notes for the purpose of aiding their short-term memories, and they may identify specific numbers or terms with no discernible context. Lee Decl. ¶ 17 (STATE AR 0015); Gross Decl. ¶ 4 (STATE AR 0039).	Plaintiffs lack sufficient information to admit or deny whether OLS requires interpreters to take notes when they provide interpretation services or to admit or deny whether OLS instructs interpreters to follow a specific protocol when it comes to making notes while interpreting. Plaintiffs admit that interpreters write down words, phrases, and unique abbreviations and symbols while they are providing consecutive interpreting services. *See* Obst Decl. ¶ 8. Plaintiffs deny that these interpreter notes have "no discernible context." Interpreter notes have discernible context and are useful, at a minimum, to the interpreters who create them in confirming the accuracy of information that will appear in a MemCon prepared by a designated note taker, or if no note taker was present, to refresh their recollection for purposes of creating a MemCon. *Id.* ¶¶ 11–13.
8. Ms. Gross and Mr. Shkeyrov have both confirmed that any notes they made while providing interpretation services to the President did not document the President's meeting and would not convey meaningful information about the meeting to anyone viewing such notes after the meeting was over. Lee Decl. ¶ 20 (STATE AR 0016); Gross Decl. ¶ 6 (STATE AR 0040).	8. Plaintiffs deny in part, and lack sufficient information to admit or deny in part. Plaintiffs lack sufficient information to confirm or deny whether notes created by Ms. Gross while providing interpretation services to the President on other occasions not in issue in this case, *see* Gross Decl. ¶ 3 (noting that the meetings between Presidents Trump and Putin for which she provided interpreting services occurred more than a year after the July 7, 2017 Hamburg meeting), documented the meeting or would convey meaningful information about the meeting to anyone viewing such notes after the meeting was over. Plaintiffs deny, however, that Ms. Gross' representations on this score have any bearing on the content of the Hamburg Meeting Notes insofar as she has no first-hand knowledge of the contents of those notes. *Id.* ¶ 6 (noting that "other interpreters follow similar practices [to hers], but ***may use their***

	own unique notation system or symbols") (emphasis added). Plaintiffs lack sufficient information to admit or deny whether Mr. Shkeyrov provided interpretation services to President Trump. To the extent Mr. Shkeyrov provided interpretation services to President Trump at the July 7, 2017 Hamburg meeting, Plaintiffs deny that the record evidence reflects that the Hamburg Meeting Notes do not "document the President's meeting" or "would not convey meaningful information about the meeting to anyone viewing such notes after the meeting was over." Rather, the Lee Declaration contains only secondhand reference to Mr. Shkeyrov's note taking practices at the July 7, 2017 Hamburg meeting. *See* Lee Decl. ¶ 20 ("I have communicated with [Mr. Shkeyrov] and he confirmed that his practice on that occasion conformed with the above description."). Defendants provide no first-hand account of the Hamburg Meeting Notes. Interpreter notes convey meaningful information, at a minimum, to the interpreters who create them and are used in confirming the accuracy of information that will appear in a MemCon prepared by a designated note taker, or if no note taker was present, to refresh their recollection for purposes of creating a MemCon. Obst Decl. ¶¶ 11–13.
9. LS does not review the notes of its interpreters. Lee Decl. ¶ 19 (STATE AR 0016). Interpreters' notes are not circulated or made available for any purpose within the Department. *Id.* Interpreters' notes are not identified as federal records in the Department's disposition schedules. Declaration of Timothy Kootz ("Kootz Decl.") ¶ 8 (STATE AR 0005-06).	9. Plaintiffs deny in part, and lack sufficient information to admit or deny in part. Plaintiffs lack sufficient information to confirm or deny whether OLS reviews the notes of its interpreters. Plaintiffs deny that interpreter notes are not circulated or made available for any purpose within the Department, at least where the notes were created during an interpreting

	mission attended by high level officials, such as the President. For meetings involving the President, a MemCon will be created and interpreter notes are used by the interpreter to confirm the accuracy of information that will appear in a MemCon prepared by a designated note taker, or, if no note taker was present, to refresh their recollection for purposes of creating a MemCon. Obst Decl. ¶¶ 11–13. Once the MemCon is prepared, the interpreter delivers it to the Executive Secretary in the Office of the Secretary of State, who lodges it in the official files of the State Department. *Id.* ¶ 14. The Executive Secretary then "either take[s] possession of the interpreter['s] notes to destroy them or direct[s] the interpreter to destroy them, their purpose of facilitating the preparation of the MemCon having been served." *Id.* Thus, the content of the notes is circulated and transmitted through their incorporation into a MemCon to other officials within the Department who are granted access to the MemCon, including the Secretary of State.
10. In January 2019, records officers in both the Department and the National Archives and Records Administration ("NARA") became aware of news reports suggesting that the President had taken possession of notes that an interpreter had made while providing interpretation services to the President at the President's July 7, 2017 meeting with President of the Russian Federation Vladimir Putin. Kootz Decl. ¶ 9 (STATE AR 0006; Declaration of Laurence Brewer ("Brewer Decl.") 4 ¶ 10 (NARA AR 0007). The Department's records staff consulted with LS regarding the nature of interpreters' notes. Kootz Decl. ¶ 9 (STATE AR 0006). The Department's Records Officer then spoke to NARA staff. *Id*.; Brewer Decl. ¶ 10 (NARA AR 0007). The Department's Records Officer and NARA agreed that interpreters' notes do not qualify as federal records within the meaning of the	10. Plaintiffs admit in part, deny in part, and lack sufficient information to admit or deny in part. Plaintiffs admit that officials within the Department and NARA were aware of news reports suggesting that the President had taken possession of notes that an interpreter had made while providing interpretation services at the July 7, 2017 meeting between President Trump and Russian Federation President Vladimir Putin. Plaintiffs lack sufficient information to admit or deny whether the Department's records staff consulted with OLS regarding the nature of interpreters' notes, or whether the Department's records staff spoke with NARA and agreed that interpreters' notes do not qualify as federal records within the meaning of the FRA.

FRA. Kootz Decl. ¶ 9 (STATE AR 0006); Brewer Decl. ¶ 10 (NARA AR 0007). In light of that understanding, neither agency engaged in any consideration of whether to take action against the President pursuant to 44 U.S.C. § 3106, nor did either agency issue any formal determination regarding whether to take action. Kootz Decl. ¶ 10 (STATE AR 0006); Brewer Decl. ¶ 11 (NARA AR 0007).	Plaintiffs admit that Defendants have not taken action to recover the Hamburg Meeting Notes pursuant to 44 U.S.C. § 3106. Compl. ¶ 36. Plaintiffs deny that Defendants' inaction followed a lack of consideration of whether Defendants should take action and thus did not amount to a final decision. Defendants' own statements confirm that they considered whether interpreter notes could, as a categorical matter, meet the FRA's definition of "record," Kootz Decl. ¶ 9; Brewer Decl. ¶ 10 (noting that "[b]ased on this description [of interpreter practices], my office agreed that interpreter notes do not meet the FRA definition of a federal record"), and, accordingly, made a final determination not to pursue the matter further, *see* Kootz Decl. ¶ 10; Brewer Decl. ¶ 11 ("Because the interpreter notes were not federal records, NARA determined that any removal or seizure of the interpreter's notes would not qualify as an unlawful removal" and "[a]ccordingly, NARA did not initiate any formal inquiry into the matter").
11. Neither the Department nor NARA is aware or has reason to believe that an unlawful removal of federal records has occurred with respect to the notes of Russian interpreters assigned to provide interpretation services to the President. *See* Kootz Decl. ¶ 10 (STATE AR 0006); Brewer Decl. ¶ 11 (NARA AR 0007).	11. Plaintiffs deny that neither the Department nor NARA is aware or has reason to believe that an unlawful removal of federal records has occurred with respect to the notes of Russian interpreters assigned to provide interpretation services to President Trump. *See* Compl. ¶ 30. Defendants acknowledge that they reviewed news accounts of the President's seizure of the Hamburg Meeting Notes in January 2019. Kootz Decl. ¶ 9; Brewer Decl. ¶ 10. Defendants separately received letters from Plaintiffs alerting them to the President's seizure of the Hamburg Meeting Notes and the associated FRA violations. *Id.*; Compl. ¶¶ 31–34.
	12. The OLS interpreter who provided interpretation services at the July 7, 2017 Hamburg meeting created a set of written

	notes during the meeting (the "Hamburg Meeting Notes"). Compl. ¶ 28; Miller Article. No other record was created to document the July 7, 2017 meeting. Compl. ¶ 29; Miller Article.
	13. Following the July 7, 2017, President Trump seized the Hamburg Meeting Notes from the OLS interpreter who created the notes and instructed the interpreter not to discuss the contents of the meeting with other members of the Administration. Compl. ¶ 25; Miller Article.
	14. Most of the interpreting missions performed by OLS interpreters do not involve high-level officials and are not otherwise highly sensitive. Obst Decl. ¶ 15. For these meetings, OLS interpreters are not required to preserve their notes for any period of time because the meeting would not have had any particular historical or record-keeping value. *Id.* Notes created during meetings involving sensitive information or high level government officials, and especially those involving the President, are treated "starkly different." *Id.* ¶ 16. It is critical to ensure that a record of these meetings is prepared and maintained and OLS interpreters are instructed to treat their notes with the same level of care and sensitivity as a classified document and to maintain the notes until a MemCon can be prepared. *Id.*
	15. Following a meeting between high level officials, especially one attended by the President, a MemCon will be prepared to memorialize the discussion within a few days of its occurrence. Obst Decl. ¶ 9. The MemCon preserves for the historical record the contents of the discussion, and also provides Executive Branch officials authorized to receive it with a readout of what was discussed. *Id.*

	16. Where a designated note taker from either the State Department or White House is assigned to attend a high level meeting, like the July 7, 2017 Hamburg meeting, they will have primary responsibility for preparing a MemCon once the meeting concludes. Obst Decl. ¶ 11. In the course of preparing a MemCon, it is common for the note taker to ask the interpreter to preserve their notes until the MemCon is finalized. *Id.* The note taker will typically share a draft of the MemCon with the interpreter prior to finalizing the document so that the interpreter can consult their notes and can confirm the accuracy and completeness of the MemCon. *Id.*
	17. If a note taker is not assigned to the meeting, the interpreter will be personally responsible for preparing the MemCon. Obst Decl. ¶ 12.
	18. A designated note taker was not present at the July 7, 2017 Hamburg meeting. *See* Miller Article.
	19. A standard MemCon includes details like the date of the meeting, the start and end time, a list of attendees and their titles, and a notation that it is a memorialization of the meeting based on the interpreter's memory and notes. Obst Decl. ¶ 10. While it is not meant to provide a verbatim transcript, a proper MemCon will capture the substance of the parties' discussion. *Id.*
	20. Once the MemCon is finalized, it will be submitted to the Executive Secretary within the Office of the Secretary of State. Obst Decl. ¶ 16. Only at that point would the Executive Secretary instruct the interpreter to hand the notes over for destruction or to otherwise destroy the notes. *Id.*
	21. A meeting principal requesting or demanding the notes of an interpreter is an

	extremely unusual and odd occurrence for an OLS interpreter. Obst Decl. ¶ 17.

Dated: April 10, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *et al*.,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE, *et al.*,

Defendants.

Case No. 19-cv-01773-TNM

[PROPOSED] ORDER

Upon consideration of Defendants' Motion for Summary Judgment (Mar. 13, 2020), ECF No. 16, Plaintiffs' Cross-Motion for Summary Judgment (Apr. 10, 2020), ECF No. 18, and the entire record herein, it is hereby

ORDERED that Plaintiffs' Cross-Motion for Summary Judgment is GRANTED and Defendants' Motion for Summary Judgment is DENIED; and it is further

ORDERED that judgment is hereby entered in favor of PLAINTIFFS as to Counts I and II of the Complaint, ECF No. 1.

SO ORDERED.

_____
Dated

_____
United States District Judge
Trevor N. McFadden