IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PROTECT DEMOCRACY PROJECT, INC. *Plaintiff*, v. U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF JUSTICE, and U.S. DEPARTMENT OF STATE, *Defendants.*	)	Civil No. 1:17-cv-00842-CRC

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns whether the Executive Branch may keep secret from the American public its purported legal authority to launch military action against a foreign country. On April 6, 2017, the United States initiated military strikes against the Syrian regime, following that regime's horrific use of chemical weapons against its own people. The following day, Plaintiff Protect Democracy submitted Freedom of Information Act (FOIA) requests to Defendants seeking information about the legal justification for this military action. While the use of chemical weapons is outrageous and raises grave humanitarian concerns, neither the U.S. Congress nor the United Nations had authorized the use of military force against Syria.

As a result of Plaintiff's requests and this litigation, Defendants have now acknowledged that the Executive Branch produced a legal opinion setting out its views of the President's authority to use military force. As described below, Defendants have also now acknowledged that the relevant portions of this opinion – describing the legal justification – are not classified. Nonetheless, the Administration insists that it must keep this legal authority secret from the American public. It may not do so.

Congress enacted the Freedom of Information Act, 5 U.S.C. § 552, to prevent the government from keeping the public in the dark on important issues facing our country. The "basic purpose" of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). And no decisions are more important to a democracy than those about taking the country to war. For the reasons set forth below, none of the government's arguments to keep its legal authority a secret are availing. Accordingly, Plaintiff respectfully requests that the Court deny Defendants' Motion

for Summary Judgment and grant Plaintiff's Cross-Motion for Summary Judgment, and order the government to produce the relevant materials describing its legal justification.

BACKGROUND

I. The Military Strikes Against the Syrian Government and Plaintiff's FOIA Requests

On April 6, 2017, the U.S. military conducted strikes against Syrian government forces, following an order from President Trump. This was the first time that the United States had initiated hostilities against the Syrian government. The prior Administration had sought authorization from Congress to use force against Syria.[1] Around that time, Donald Trump had tweeted: "What will we get for bombing Syria besides more debt and a possible long term conflict? Obama needs Congressional approval."[2] Congress has not approved any such action. Nor has the United Nations.

To Plaintiff's knowledge, the Syria strikes were the first time that the Trump Administration had commenced military action against a new adversary. Because Congress had not authorized this action, Protect Democracy believed it was important for the public to understand what, if any, legal authority the President was acting upon. As such, the day following the U.S. military action against Syria, Protect Democracy submitted nearly identical FOIA requests to components of the U.S. Department of Justice ("DOJ"), the U.S. Department of Defense ("DOD"), and the U.S. Department of State ("State"). *See* Pl.'s Compl. (May 8, 2017) ECF No. 1, Exs. A, C., E, G, & I. Protect Democracy's requests sought records concerning

[1] *See* Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. Times, Aug. 31, 2013, http://www.nytimes.com/2013/09/01/world/middleeast/syria.html.

[2] Donald J. Trump (@realDonaldTrump), Twitter, (Aug. 29, 2013, 11:14 AM), https://twitter.com/realdonaldtrump/status/373146637184401408 (attached hereto as Exhibit A).

whether the President had received a legal opinion authorizing the strike and, if so, what the legal justification was.

II. The Administration Speaks Extensively About the Strikes, but Fails to Provide the Public with the Legal Justification

Until this FOIA action, the Administration refused to acknowledge whether it had received a legal opinion discussing the legal authority for the strikes and, if so, what that legal authority was. Nonetheless, in the few days following the strikes on April 6, the President and Administration leaders spoke repeatedly about the rationale and legal justification for the military action. For example:

- The President's April 8, 2017 letter to Congress pursuant the War Powers Act states that the President "acted in the vital national security and foreign policy interests of the United States, pursuant to [his] constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive."[3]
- On April 10, 2017, White House spokesman Sean Spicer cited humanitarian reasons and ISIS, and claimed that the Constitution gives the President "the full authority to act" whenever military force is "in the national interest."[4]
- Secretary of State Rex Tillerson advocated that "some action be taken" to "make clear that these chemical weapons continue to be a violation of international norms,"[5] a

[3] President Donald J. Trump, A Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, Apr. 8, 2017, https://www.whitehouse.gov/the-press-office/2017/04/08/letter-president-speaker-house-representatives-and-president-pro-tempore (attached hereto as Exhibit B).

[4] Daily Press Briefing by Press Secretary Sean Spicer -- #35, Apr. 10, 2017, https://www.whitehouse.gov/the-press-office/2017/04/10/daily-press-briefing-press-secretary-sean-spicer-35 (attached hereto as Exhibit C).

[5] Press Briefing by Secretary of State Rex Tillerson and National Security Advisor, General H.R. McMaster, The White House, Apr. 6, 2017, https://www.whitehouse.gov/the-press-

similar theme to another public statement about "holding to account any and all who commit crimes against the innocents anywhere in the world."[6]

- Defense Secretary James Mattis focused on "the defeat of ISIS." He also described the decision to use a military response in Syria as the best way to "deter the regime" from using chemical weapons in violation of international prohibitions.[7]
- The U.S. Ambassador to the U.N., Nikki Haley, pointed to Syria's "violation of the [C]hemical [W]eapons [C]onvention" and "violation of the U.N. Security Council resolutions."[8]
- A National Security Council (NSC) spokesperson gave its statement on the President's authority a couple months later, following President Trump's tweets about Syria, stating: "As commander in chief, the president has the power under Article II of the Constitution to use military force overseas to defend important U.S. national interests."[9]

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office/2017/04/06/press-briefing-secretary-state-rex-tillerson-and-national-security (Sec. Tillerson citing "agreements that had been entered into pursuant to U.N. Security Council Resolution 2118, as well as Annex A agreements that the Syrian government themselves accepted back in 2013.") (attached hereto as Exhibit D).

[6] Gardiner Harris, *Tillerson Says U.S. Will Punish 'Crimes Against the Innocents' Anywhere,* N.Y. Times, Apr. 10, 2017, https://www.nytimes.com/2017/04/10/world/europe/rex-tillerson-russia-syria.html (attached hereto as Exhibit E).

[7] Terri Moon Cronk & Lisa Ferdinando, *Mattis: 'No Doubt' Syrian Regime Responsible for Chemical Attacks on Citizens*, DoD News, Apr. 11, 2017, https://www.defense.gov/News/Article/Article/1148560/mattis-no-doubt-syrian-regime-responsible-for-chemical-attacks-on-citizens/ (attached hereto as Exhibit F).

[8] Olivia Beavers, *Haley: Attack on Syria "One of the President's Finest Hours,"* The Hill, Apr. 9, 2017, http://thehill.com/homenews/administration/327997-haley-attack-on-syria-one-of-the-presidents-finest-hours (attached hereto as Exhibit G).

[9] Jeryl Bier, *White House: Trump Does Not Need Congressional Approval to Strike Syria*, The Weekly Standard, June 30, 2017, http://www.weeklystandard.com/white-house-trump-does-not-

- In addition to giving press conferences, on April 8, 2017, Administration press guidance entitled Basis for Using Force was published online.[10] This document (hereinafter referred to as the "Basis for Using Force" guidance) was reportedly developed within the Administration and provided to Administration spokespeople.[11] It provides a set of reasons under domestic and international law that seek to justify the President's April 6 strikes against Syria. They include the rationales offered by the President – "As Commander in Chief, the President has the power under Article II of the Constitution to use this sort of military force overseas to defend important U.S. national interests." *See* Ex. B. The Basis for Using Force guidance also includes other reasons cited by other Administration leaders, including "deter[ring] and prevent[ing] Syria's illegal and unacceptable use of chemical weapons," and "widespread violations of international law by the Syrian government" including

need-congressional-approval-to-strike-syria/article/2008682 (NSC spokesperson stating that "[t]he United States has a strong national interest in preserving regional stability, averting a worsening of the humanitarian catastrophe in Syria, and deterring the use and proliferation of chemical weapons, especially in a region rife with international terrorist groups with an interest in obtaining these weapons and using them to attack the United States and its allies and partners." Also, article reporting that "An NSC spokesperson clarified that the Trump administration will continue to reply upon the 2001 Authorization for Use of Military Force for actions against ISIS, but responding to the Syrian regime's use of chemical weapons was part of the president's Article II powers and did not need Congressional approval.") (attached hereto as Exhibit H).

[10] Marty Lederman, *(Apparent) Administration Justifications for Legality of Strikes Against Syria, Just Security*, Apr. 8, 2017, https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria/ (attached hereto as Exhibit I).

[11] Charlie Savage (@charlie_savage), Twitter (April 8, 2017, 2:32 PM), https://twitter.com/charlie_savage/status/850823762278842372 (Savage, a reporter for the New York Times, reported that the published Basis for Using Force guidance was the same as the guidance held by Administration spokespersons when he tweeted "'Basis for Using Force' @marty_lederman got = press guidance (talking pts) for admin spox") (attached hereto as Exhibit J).

"violation . . . [of] the Chemical Weapons Convention . . . as well as UN Security Council Resolution (UNSCR) 2118." Ex. I.

Despite the extensive public relations campaign about the legal basis for the strikes, the Executive Branch refused to share with the public or Congress any legal opinion justifying the military action.

III. This Court's Opinion Granting in Part a Preliminary Injunction and the Government's Failure to Provide the Requested Records

In light of inadequate responses to its FOIA requests, Protect Democracy filed this suit on May 8, 2017. After the Administration took additional military action against the Syrian regime on May 18, 2017, Protect Democracy filed a motion for preliminary injunction, *see* Mot. for Prelim. Inj., ECF No. 3, which this Court partially granted to expedite the processing of Plaintiff's FOIA requests. *See Protect Democracy Project, Inc v. U.S. Dep't of Def.*, No. 17–cv–00842, 2017 WL 2992076 (D.D.C. July 13, 2017). The Court recognized that "a significant delay in processing Protect Democracy's requests would 'compromise a significant recognized interest,'" and that undue delay in production would harm both Protect Democracy and the public at large. *Id.* at 4.

In order to facilitate prompt production of records and avoid triggering FOIA exemptions, Plaintiff narrowed its request to documents regarding the legal justification for the military action as well as final versions of responsive records. Tr. of Mot. Hr'g 3-4, ECF No. 16. Plaintiff also agreed to exclude prior non-final versions of requested documents, so as to seek only the last edited version of requested documents. *Id.* Plaintiff further agreed to exclude correspondence discussing or transmitting these prior versions. Defs.' Mem. of Law in Supp. of Mot. for Summ. J. ("Defs.' Mem.") 2 fn. 2., ECF No. 24-1. Plaintiff does not seek Defendants' interim

deliberations – only the final memorandum it produced setting forth its purported legal justification.

Defendants have identified three sets of responsive records. One is various iterations of a legal opinion prepared by certain agency lawyers, referred to herein as the "legal memorandum." *See Vaughn* Index Nos. 1-3, ECF No. 24-7, referred to herein as "*Vaughn* Index." The second is an outline prepared by the DOJ Office of Legal Counsel (OLC) that the government presumes is dated April 7, 2017, the day after the military strikes, referred to herein as "OLC outline." *See Vaughn* Index No. 4. The third comprises various talking points and questions and answers prepared as guidance for the press and for responding to questions from Congress, referred to herein as the "talking points." *See Vaughn* Index Nos. 5-15.

STANDARD OF REVIEW

Summary judgment is appropriate when the record demonstrates that there is no genuine issue as to the material facts, and the moving party demonstrates it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. It may only be granted to the Defendant if "the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Greenberg v. U.S. Dep't of Treasury*, 10 F. Supp. 2d. 3, 11 (D.D.C. 1998).

Federal courts review *de novo* agencies' withholding of materials that it claims are exempt under FOIA. 5 U.S.C. § 552(a)(4)(B). FOIA exemptions must be narrowly construed. *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982)). "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The agency "bears the burden of establishing the applicability of the claimed

exemption." *Assassination Archives & Res. Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003). This burden does not shift even when the requester files a cross-motion for summary judgment because "the Government 'ultimately [has] the onus of proving that the [documents] are exempt from disclosure.'" *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999).

ARGUMENT

I. The Government Concedes That the Requested Information Concerning Its Legal Authority for Military Attacks Is Not Classified

Protect Democracy has sought disclosure of the Administration's *legal* justification for the strikes against Syria. Defendants concede that this information in the legal memorandum, *Vaughn* Index Nos. 1-3, is not classified, and that it can be segregated from the small amount of classified factual information that exists in one document. Plaintiff does not seek the classified factual information. As such, Exemptions 1 and 3 are no basis to withhold the requested information about the Executive Branch's legal analysis.

A. The legal analysis that Protect Democracy seeks is not classified

Nowhere in its brief or accompanying declarations does the government claim that the information Protect Democracy seeks is classified. The Government has subjected the requested records to careful classification review by the Office of the Director of National Intelligence ("ODNI"). ODNI's assessment make clear that the information Plaintiff seeks – the legal justification behind the military strikes – is not classified.

ODNI's classification review concluded that only "a limited number of discrete words and phrases" that are "within or referring to the factual background section on page one of the legal memorandum" are classified. Decl. of Patricia Gaviria ("Gaviria Decl.") ¶13, ECF No. 24-8. The Gaviria Declaration and the government's brief describe at length the classified portion of

the legal memorandum, and it is only the factual background – not the legal rationale – that is classified. The Gaviria Declaration explains that the classified "words and phrases" are those that concern the following categories of information: Signals Intelligence targets, *id.* ¶ 14; Signals Intelligence collection and technical capabilities of the NSA, *id.* ¶ 15; the IC's analytic tradecraft, *id.* ¶ 16; *see also id.* ¶ 20 (summarizing this material); Defs. Mem. at 28.

ODNI's Declaration nowhere indicates that this classified information is spread throughout the legal memorandum. Rather, it repeatedly states that is contained in a separate factual background section. *Id.* ¶ 10 ("The IC information formed a part of the factual background."); *id.* ¶ 16 ("The factual background section of the legal memorandum contains an assessment of the IC's confidence assessment of the information available to it regarding the events of April 4, 2017.").

In addition, the government only seeks to invoke other statutes (FOIA Exemption 3) as to the same limited amount of classified factual material about the intelligence related to the chemical weapons attack. *See* Defs.' Mem. at 31-32; Gaviria Decl. ¶¶ 21-23. As such, the government does not claim that the two cited sections of the National Security Act of 1947 or 18 U.S.C. § 798 prohibit the release of the requested *legal* analysis justifying the Syria strikes.

In short, neither ODNI's declaration nor the government's memorandum claims that the legal analysis in the memorandum is classified. And that is all this litigation is about. Plaintiff is not interested in the Intelligence Community's basis for concluding that a chemical weapons attack had occurred in Syria in early April. The government has repeatedly said that such a chemical weapons attack occurred and that the U.S. strikes against Syria were a response to that attack. What Protect Democracy wants to know is the Administration's purported legal

justification for using force under domestic and international law. Neither the government's brief nor any of the supporting declarations assert that such information is classified.

B. The classified information – which, again, Protect Democracy does not seek – can be segregated from the rest of the withheld documents

As explained above, the government claims that some "discrete words and phrases on one page of the memorandum" at issue are classified. Defs.' Mem. at 28. This classified information "relates to the U.S. Government's assessment that Syrian government forces carried out a chemical weapons attack." *Id.* The government nowhere asserts that this small and discrete portion of classified information (which appears on one page of the requested legal memorandum) results in the full memorandum being classified or protects the full memorandum from disclosure. In other words, the rest of the memorandum – the portions containing the legal analysis in which Plaintiff is interested – can be reasonably segregated from the discrete words and phrases that are classified.

FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). The government's briefs and declarations assert that non-*deliberative* portions of the requested information cannot be segregated from the deliberative portions to which it seeks to apply Exemption 5. *See*, e.g., Decl. of Daniel R. Castellano ("Castellano Decl.") ¶ 43, ECF No. 24-2. Exemption 5 is discussed. *Infra* Part II. But nowhere in the government's brief or its declarations does it assert that the discrete classified words and phrases cannot be segregated from the rest of the legal memorandum. *See* Defs.' Mem. at 32-33; Decl. of Paul P. Colborn ("Colborn Decl.") ¶ 29, ECF No. 24-3; Decl. of Mark H. Herrington ("Herrington Decl.") ¶ 19, ECF No. 24-5; Decl. of Eric F. Stein ("Stein Decl.") ¶ 27, ECF No. 24-6.

"It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Cent. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.D.C. 1977). It is not surprising that the government fails to argue that legal analysis in the legal memorandum is inextricably intertwined with and not readily segregable from any classified information. Recall that the only classified information at issue in the legal memorandum concerns the intelligence sources and methods relied on in the government's determination that a chemical weapons attack had occurred.

And the government makes no argument that the legal analysis in the legal memorandum is so tied to the factual predicate of the chemical attack that it cannot be segregated. Such an argument would be illogical, because the predicate fact (the chemical attack) has been made public and has been explained in public as the reason for the strikes. Presumably the legal analysis includes the Administration's theory for why it can engage in military action notwithstanding the lack of authorization from Congress or the United Nations. There is no reason why that legal analysis cannot be shared while some "discrete words and phrases" in the factual background section of the memorandum are redacted. *See N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 120 (2d Cir. 2014), *opinion amended on denial of reh'g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014) ("With the redactions and public disclosures discussed above, it is no longer either 'logical' or 'plausible' to maintain that disclosure of the legal analysis in the OLC–DOD Memorandum risks disclosing any aspect of 'military plans, intelligence activities, sources and methods, and foreign relations.'").

In addition, the government makes no assertion that the nature, timing, or scope of the military strikes themselves is classified – nor could it, as that information has all been shared with the public. And Plaintiff is not seeking these types of operational details, but only the legal

justification. *See* Tr. of Mot. Hr'g 3-4. (Pl. attorney: "We have been able to . . . cut out . . . a large portion of documents that would bring in FOIA exemptions such as those for national security, such as those going to the operational details of the strikes.").

C. Exemptions 1 and 3 do not apply to the information that Protect Democracy seeks

This case concerns Plaintiff's request for the legal justification that the Administration relied upon in taking military action against the Syrian regime. As set forth above, the government does not claim that this information is classified. *See supra* I.A. Nor does it claim that the legal analysis is intertwined with and cannot be reasonably segregated from a few discrete words and phrases that it asserts are classified. *See supra* I.B. Plaintiff is not interested in the small portion of the legal memorandum that includes the information the government contends is classified: namely the discussion of intelligence community sources and methods behind the conclusion that there had been a chemical weapons attack. But those discrete words and phrases on a single page can be redacted. And when they are, the rest of the legal memorandum containing the requested information – the purported legal justification – can be released. As such, FOIA Exemptions 1 and 3 do not preclude disclosure of the requested information.[12]

[12] Because Plaintiff seeks only the Administration's purported legal justification for the strikes, Plaintiff has decided not to challenge the adequacy of the searches conducted by the agencies. Whether or not Defendants' searches were adequate – and, based on the declarations, there is some question on that score –the documents described in the Vaughn Index appear to contain the information that Plaintiff seeks, and thus Plaintiff limits its arguments to why those documents cannot properly be withheld.

II. The Executive Branch Cannot Keep Secret from the American People Its Non-Classified Legal Justification for Launching Military Attacks Against a Foreign Sovereign

A. FOIA protects the public's right to know the government's legal rationale for using the military against a foreign country

FOIA plays a vital role in our democracy. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Robbins Tire & Rubber Co.*, 437 U.S. at 242. FOIA is "a means for citizens to know what their Government is up to. This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) (internal quotation marks and footnote omitted).

In light of the statute's important role, FOIA calls for "broad disclosure of Government records." *CIA v. Sims*, 471 U.S. 159, 166 (1985). While Congress has enumerated certain exemptions, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Rose*, 425 U.S. at 361). Thus, the D.C. Circuit and Supreme Court have insisted that "[a]t all times[,] courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure.'" *Id.* (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 547 (1991)). And so, the various exemptions are to be "narrowly construed." *Rose*, 425 U.S. at 361. Indeed, in light of "the Act's goal of broad disclosure," the Supreme Court has repeatedly "insisted that the exemptions must be given a narrow compass." *Milner*, 562 U.S. at 571 (internal quotation marks omitted).

It is hard to imagine a matter of greater importance to our democracy than the Executive Branch's decision to initiate military conflict with a foreign government. Thus, it is no surprise

that the government has traditionally made available the Executive Branch's legal analysis when the government initiates military action in the absence of congressional authorization.[13] Indeed, such analyses have repeatedly been made public over the past few decades. *Id.* Moreover, on other issues, the Administration has readily disclosed its written legal theories when doing so suits its interests.[14] As this Court has previously explained in this case, there is a "compelling need" for Plaintiff and the public to be provided with the requested information, and "both [Plaintiff] and the public at large" would be harmed if the release of the requested information is unduly delayed. *Protect Democracy*, 2017 WL 2992076 at *4.

The government should have followed its past practice here and voluntarily shared with the American people its legal basis for initiating military action against the Syrian regime. Because the relevant materials are not classified, and not appropriately withheld under any privilege, FOIA requires it to do so.

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[13] *See, e.g., Authority to Use Military Force in Libya*, O.L.C. (2011) https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf; *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, O.L.C. (2002) https://assets.documentcloud.org/documents/4254479/AUTHORITY-of-the-PRESIDENT-UNDER-DOMESTIC-and.pdf; *Authority for Use of Military Force To Combat Terrorist Activities Within the United States*, O.L.C. (2001) https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memomilitaryforcecombatus10232001.pdf; *Authorization for Continuing Hostilities in Kosovo*, O.L.C. (2000) https://www.justice.gov/sites/default/files/olc/opinions/2000/12/31/op-olc-v024-p0327.pdf; *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327 (1995) https://www.justice.gov/file/20146/download; *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173 (1994) https://assets.documentcloud.org/documents/4254477/Deployment-of-United-States-Armed-Forces-Into.pdf.

[14] *See, e.g., Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office*, 41 Op. O.L.C. 1 (2017) https://www.justice.gov/opinion/file/930116/download; Memorandum for Donald F. McGahn II, Counsel to the President, *Designating an Acting Director of the Bureau of the Consumer Financial Protection* (2017), https://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb_acting_director_olc_op_0.pdf.

B. Exemption 5 does not justify the withholding of the identified documents

The government's effort to invoke Exemption 5 on various grounds fails. As explained above, the government's invocation of exemptions must be considered in light of the purposes of FOIA and the Supreme Court's admonition that exemptions should be construed narrowly. Here, Defendants cannot sustain their claims to withhold documents under the presidential communications privilege, attorney-client privilege, or deliberative process privilege.[15] As set forth below, each of these privileges is inapplicable and, in any event, is waived.

1. The attorney-client privilege does not apply and, in any event, is waived

For two reasons, Defendants fail to satisfy their burden to establish that the legal memorandum (*Vaughn* Index Nos. 1-3), the OLC outline (*Vaughn* Index No. 4), and certain of the talking points (*Vaughn* Index Nos. 14-15) are protected by the attorney-client privilege. First, they have provided no more than conclusory assertions that these documents have been kept confidential, which is a prerequisite to the invocation of privilege. Second, any claim to attorney-client privilege has been waived as a result of repeated disclosures of information intended to justify the legality of the April 6 military strikes, including published press guidance on the Basis for Using Force.

"Like all privileges . . . the attorney-client privilege is narrowly construed and is limited to those situations in which its purpose will be served." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). In order to invoke the privilege, "an agency must demonstrate that the document it seeks to withhold (1) involves 'confidential communications

[15] Not all claims were applied to all documents. The *Vaughn* Index sets out all three claims for Docs. 1-3; deliberative and attorney-client privileges for Doc. 4, deliberative privilege for Docs. 5-13 (Plaintiff is not challenging the (b)(6) and (b)(7) claims for Docs. 11-13); and deliberative and attorney-client privileges for Docs. 14-15.

between an attorney and his client' and (2) relates to 'a legal matter for which the client has sought professional advice.'" *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F. Supp. 2d 252, 267 (D.D.C. 2004) (quoting *Mead*, 566 F.2d at 252). Plaintiff does not dispute that Defendants have satisfied the second prong of this test – it is the first prong where they fall short. It is a "fundamental prerequisite" of the attorney-client privilege that the material over which the privilege is asserted was kept confidential "both at the time of the communication" and that such confidentiality has been "maintained since." *Judicial Watch v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 154 (D.D.C. 2012) (internal quotation marks and citation omitted). Defendants have failed to show – as they must – "that the information provided to its lawyers was intended to be confidential and was not disclosed to a third party." *Cuban v. S.E.C.*, 744 F. Supp. 2d 60, 78 (D.D.C. 2010).

When asserting attorney-client privilege, it is the agency's burden "to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure." *Coastal States*, 617 F.2d at 863. Where an agency seeks to invoke the privilege, "it must affirmatively show confidentiality." *Judicial Watch*, 841 F. Supp. 2d at 154; *see also id.* ("In the final analysis, FOIA places the burden on the agency to prove the applicability of a claimed privilege, and this Court is not free to assume that communications meet the confidentiality requirement."). Mere conclusory assertions that this element has been satisfied are insufficient to meet the agency's burden. *See id.*; *Cuban*, 744 F. Supp. 2d at 79; *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 245 F. Supp. 3d 19, 32 (D.D.C. 2017).

Here, Defendants offer nothing more than conclusory assertions – and in one case fail to offer even that much. With respect to the legal memorandum (*Vaughn* Index, Nos. 1-2), and the

Q&A for Congress (*Vaughn* Index, Nos. 14-15), the State Department's assertion of confidentiality is limited to a single sentence stating that "[t]hese documents and communications were intended to be kept confidential and that confidentiality has been maintained." Stein Decl. ¶ 24. Similarly, with respect to the draft of the legal memorandum located by DoD (*Vaughn* Index, No. 3), the agency states only that "[t]he communication was intended to be confidential and there is no indication that the confidentiality was violated." Herrington Decl. ¶ 16. The shortcomings in the declaration provided by OLC are even more revealing. As to the OLC outline (*Vaughn* Index, No. 4), OLC states – again, in entirely conclusory fashion – that it "was intended to be confidential and to my knowledge has maintained its confidentiality." Colborn Decl. ¶ 25. Strikingly, OLC does not even provide a conclusory statement to this effect with respect to the legal memorandum, *see id.* ¶ 22; an omission that strongly suggests that the confidentiality of this document was *not* maintained.

Again, these conclusory statements are not sufficient to satisfy the agencies' burden. *See Cuban*, 744 F. Supp. 2d at 79 ("The attorney-client privilege is not applicable just because the defendant states that it applies, and a review of the defendant's declaration reveals that the defendant offers nothing more than conclusory assertions and blanket affirmations."). Defendants have not explained what steps were taken to ensure that the allegedly privileged information remained confidential, who had access to the documents and/or the information contained therein, whether such access was limited to individuals who needed it, or any other "information from which the Court can assess whether the attorney-client privilege was properly asserted." *Id.* And with respect to the legal memorandum, the absence of any statement by OLC about the maintenance of confidentiality is dispositive. *See Judicial Watch*, 841 F. Supp. 2d at

154 (rejecting the assertion of attorney-client privilege where the agency did "not speak of confidentiality in connection with the information withheld . . . even in conclusory terms").

Moreover, even if the agencies had carried their burden to establish that the confidentiality of the documents had been maintained, attorney-client privilege still would have been waived as a result of the disclosure of information contained therein. Although it is not binding on this Court, the Second Circuit's decision in *N.Y. Times*, 756 F.3d, is instructive on this point. That case involved a FOIA request for, *inter alia*, an OLC-DOD memorandum explaining the legal justification for a targeted killing of American citizens, including Anwar al-Awlaki. The court concluded that the government's claim of privilege – both attorney-client and deliberative process – had been waived as to the legal analysis contained in the memorandum. *See id.* at 114. This waiver was the result of "numerous statements of senior Government officials discussing the lawfulness of targeted killing of suspected terrorists," *id.*, as well the release of a white paper that "parallel[ed] the OLC-DOD Memorandum in its analysis of the lawfulness of targeted killings," *id.* at 116; *see also id.* ("[T]he substantial overlap in the legal analyses in the two documents fully establishes that the Government may no longer validly claim that the legal analysis in the Memorandum is a secret.").

Here, for substantially similar reasons, any claim of attorney-client privilege has been waived. First, several administration officials have made statements defending the legality of the strikes (albeit with shifting rationales). *Supra* Background, II, at 6-8. And the Basis for Using Force guidance appears to provide a roadmap of the Administration's legal rationale, *see* Ex. I – a roadmap that very likely tracks the legal analysis contained in the withheld legal memorandum and OLC outline. At the very least, the Court should review these documents *in camera* to determine whether there is substantial overlap between them and the Basis for Using Force

guidance, as the Second Circuit did in *N.Y. Times*. The government should not be permitted to rely on the legal advice contained in the withheld documents, while at the same time denying the public the opportunity to assess that advice. *Cf. N.Y. Times*, 756 F.3d at 116.[16]

Finally, as to the two State Department Q&A documents (*Vaughn* Index, Nos. 14-15), Defendants have not satisfied their burden to show that information contained therein was not shared with others outside of the agency, thereby waiving attorney-client privilege. *See Am. Civil Liberties Union v. U.S. Dep't of Homeland Sec.*, 738 F. Supp. 2d 93, 114-15 (D.D.C. 2010). Defendants describe the documents as containing "proposed guidance for responding to questions from Congress regarding the legal basis for the April 6 strikes, *including hypothetical questions and proposed responses in bullet-point form*." Defs' Mem. at 19 (emphasis added). In other words, these documents contained information that was specifically designed to be shared with third parties. Therefore, it is reasonable to believe that at least some of that information – such as that contained in the proposed responses – was in fact conveyed to Congress, and Defendants have not established otherwise, as is their burden. *See Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 171 (D.D.C. 2011).[17]

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[16] The *N.Y. Times* court did note that the white paper had been officially released by the Department of Justice in response to another FOIA request, after it had been leaked to the press. *See* 756 F.3d at 110 n. 9; *id.* at 116. However, it is not clear that the Second Circuit viewed official disclosure as a necessary component of waiver. Nor is there any logical reason to require an official disclosure before attorney-client privilege is waived, as an intentional leak destroys confidentiality in the same manner. A rule requiring official disclosure in order for the privilege to be waived would allow the government to leak confidential information when doing so serves the government's interests, but withhold it from the public when it does not. *Cf. Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F.3d 184, 207-08 (2d Cir. 2012).

[17] The two cases on which Defendants rely – *Kelly v. CIA*, No. 00-cv-2498 (TFH), 2002 WL 34463900, at *17 (D.D.C. Aug. 8, 2002); and *Judicial Watch v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 34 (D.D.C. 2011), *see* Defs.' Mem. at 19 – are inapposite, as they do not appear to

2. The presidential communications privilege does not apply

In order to warrant withholding of a record under the presidential communications privilege, the government must show that the President saw the document, or that the document was either (1) "authored" or (2) "solicited and received" by "those members of an *immediate* White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter." *In re Sealed Case*, 121 F.3d 729, 757 (D.C. Cir. 1997) (emphasis added). Here, the government neither claims that the President saw the document, nor does it identify the individuals who "authored" or "solicited and received" the document with enough specificity for the Court to determine that they had the requisite level of responsibility to justify the invocation of the presidential communications privilege. *See* Defs.' Mem. at 14-15 ("The legal memorandum, which was drafted by an inter-agency group of attorneys, was solicited and received by the *staff* of the most senior legal counsel of the National Security Council . . . .") (emphasis added); Herrington Decl. ¶¶ 15, 17; Stein Decl. ¶ 26.

The legal memorandum cannot qualify for the privilege by its authorship. The legal memorandum was "authored by an interagency group of lawyers." Colborn Decl. ¶ 22. But even the Attorney General himself cannot "be equated with the close presidential advisors discussed in *In re Sealed Case*," *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1120-21 (D.C. Cir. 2004). It necessarily follows that attorney advisor(s) in OLC (who are lower in the Justice Department hierarchy than the Attorney General) or their counterparts at other agencies do not qualify as close presidential advisors either. *See id.; In re Sealed Case*, 121 F.3d at 752 ("In

involve the kind of talking points or proposed answers to questions that are specifically designed to be shared with third parties.

particular, the privilege should not extend to staff outside the White House in executive branch agencies."). After all, any other interpretation of the presidential communications privilege would "pose a significant risk" of improperly "expanding to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the [p]resident." *Id.*

Because the memo at issue was not "authored" by a close presidential advisor, the government must demonstrate that it was "solicited and received" by an appropriately high-level White House employee. *See Loving v. Dep't of Def.*, 550 F.3d 32, 40 (D.C. Cir. 2008) (noting limited exception for communications "directly involving" the President). It is important to note that "solicited and received" does not simply mean read. *See U.S. Dep't of Treasury v. Pension Benefit Guarantee Corp.*, 249 F. Supp. 3d 206, 211 (D.D.C. 2017). In order to prevent the presidential communications privilege from "expanding too far," *Judicial Watch*, 365 F.3d at 190, and impinging on the public's "enduring and cherished . . . right to know how its government is conducting its business," *id.* at 197, the D.C. Circuit requires that an inter-agency memo is actually *solicited* by "immediate White House advisers who have broad and significant responsibility for investigating and formulating the advice to be given the President" before the privilege attaches. *Id.* at 189 (citation and internal quotation marks omitted).

The government does not carry its burden of demonstrating that the legal memorandum was solicited by a sufficiently high-level White House official for the privilege to attach. Instead, the government claims that the memorandum was "solicited and received by the *staff* of the most senior legal counsel of the National Security Counsel." Defs.' Mem. 14 (emphasis added). At most, the government states that the legal memorandum was "communicated" to (not solicited by) the NSC Legal Advisor – not that it was requested by or even at the direction of this person. *See* Colborn Decl. ¶ 23.

The government's failure to identify the person or role of the "staff," who requested the memorandum, including the level of seniority of that staff or even if that "staff" is a lawyer, dooms its invocation of the privilege. The identity (or at the very least the role) of the soliciting individual is critical when evaluating whether the privilege actually applies. *See, e.g., Judicial Watch*, 365 F.3d at 189 ("[T]he demands of the privilege become more attenuated the further away the advisers are from the President."); *id.* at 198 ("The less one can learn from these twice- and thrice-removed communications . . . the less need is there to protect them under the presidential communications privilege."); *In re Sealed Case*, 121 F.3d at 758 (concluding that documents authored by the Deputy White House Counsel "are clearly covered by the privilege," but only concluding that documents authored by associate White House Counsel are protected after determining that those individuals "exercised broad and significant responsibility for gathering information . . . and authoring initial drafts of the White House Counsel's report"). There is no indication in the government's papers that the "staff" that solicited the memorandum has any contact at all with the President, let alone is one of those "immediate White House advisers who have 'broad and significant responsibility for investigating and formulating the advice to be given the President'" – as the law requires. *See Judicial Watch*, 365 F.3d at 189 (quoting *In re Sealed Case,* 121 F.3d at 752). Because the government has not provided the Court with the critical information it needs to determine the applicability of the privilege, it should deny the government's motion for summary judgment on the presidential communication privilege for all three versions of the legal memorandum.

This Court should also deny the request to apply presidential communication privilege to the DOD's version of the legal memorandum (*Vaughn* Index, No. 3) on an additional ground. The DOD's declarant asserts that the DOD's version of the memo was an "earlier draft of the

document located by other defendant agencies," Herrington Decl. ¶ 15. But nowhere does the DOD's declarant establish that its version was actually "solicited and received" by anyone in the White House, let alone somebody of the seniority that the privilege requires. *See Judicial Watch*, 365 F.3d at 1121 ("[I]nternal documents that are not 'solicited and received' by the President or the Office of the President should be evaluated under the deliberative process privilege.").

3. The deliberative process privilege does not apply

The government has also failed to carry its burden to establish that the deliberative process privilege applies – for two reasons. First, the identified documents fall under the "working law" exception to the deliberative process privilege. Second, at least some of the documents are postdecisional.

a. The withheld documents fall within the "working law" exception

Under the working law doctrine, the government cannot shield from the American public a body of "secret law" about the executive branch's ability to take the country to war unilaterally. The "working law" exception from the deliberative process privilege removes protection for records that have been adopted as agency policy. *Coastal States*, 617 F.2d at 866. Under FOIA, this exception exists because the "public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the 'working law' of the agency." *NLRB v. Sears*, 421 U.S. 132, 152-53 (1975). Thus, "Exemption 5, properly construed, calls for disclosure of all opinions and interpretations which embody the agency's effective law and policy." *Id.* at 153 (internal quotations omitted). The working law doctrine reflects the "strong congressional aversion to 'secret (agency) law'" and "an affirmative congressional purpose to require disclosure of documents which have 'the force

and effect of law.'" *Taxation with Representation Fund v. I.R.S.*, 646 F.2d 666, 678 (D.C. Cir. 1981).

As the D.C. Circuit has explained, under the working law doctrine, "an agency is not permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Elec. Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983) (internal quotations omitted).

The withheld documents are precisely the sort of secret law that FOIA does not allow to be kept hidden from the American people. Over many years, Executive Branch lawyers have developed intricate theories about the President's authority to initiate military conflicts. Through memoranda from OLC and inter-agency lawyers, the Executive Branch establishes a working legal policy of when the President may direct military action unilaterally, without congressional authorization. The Executive Branch has frequently shared this body of working law with the American people because it is so important to the public's understanding of a critical issue in our democracy. *See supra* n.13. If the government gets its way here and the Executive Branch's legal theories are maintained as a secret body of law, then there is no ability for the Congress or the public to provide the democratic check that the Founders envisioned.

In this way, secret legal memos on the President's war powers are nothing like the OLC memorandum to FBI on national security letters at issue in *Elec. Frontier Found.*, 739 F.3d at 1. There, the court concluded that OLC was simply providing one-off legal advice for consideration by the FBI as FBI developed its own policy. Here, in contrast, the interagency legal memorandum is another entry in a well-developed body of Executive Branch law that shapes the

President's actions in using military force without congressional approval. And critically, in the *Electronic Frontier Foundation* case, the FBI "had declined, for the time being, to rely on the authority discussed in the OLC opinion." *Id.* at 10 (internal quotation omitted). Here, in contrast, the Executive Branch presumably has relied on the agency lawyers' conclusions about the Executive Branch's legal authority in carrying out the strikes.

The body of law developed by OLC and interagency Executive Branch lawyers does "state or determine" the Executive Branch's legal policy on when the President may use military force. *See id.* And these memoranda constitute "authoritative statements" concerning the Executive Branch's legal policy on war-making issues. *Id.* Legal opinions of this type are not mere advice; they set forth the Executive Branch's policy about when it can go to war without Congress.[18] The working law doctrine does not allow the government to keep this law secret from the American people. The interpretations set forth in these memoranda and talking points "are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public." *Coastal States*, 617 F.2d at 868 (quoting *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971)).

b. The OLC outline and various talking points are postdecisional and not deliberative

Several of the withheld documents – in particular the documents created *after* the strikes – are postdecisional and so not covered by the privilege. "The most basic requirement of the privilege is that a document be *antecedent* to the adoption of an agency policy. . . . A post-decisional document, draft or no, by definition cannot be 'predecisional.'" *Judicial Watch, Inc. v.*

[18] The same is true for the outline and talking points that are presumably based on the legal memorandum (*Vaughn* Index, Nos. 4-15).

U.S. Postal Serv., 297 F. Supp. 2d 252, 260 (D.D.C.2004); *see N.Y. Times Co. v. U.S. Dep't of Def.*, 499 F. Supp. 2d 501, 514 (S.D.N.Y. 2007).

As the government acknowledges, "The purpose of the deliberative process privilege is to encourage full and frank discussion of legal and policy issues within the government, and to protect against public confusion resulting from disclosure of reasons and rationales that were not ultimately the bases for the agency's action." Defs.' Mem. at 20. These concerns are simply not implicated by documents created after the government acts that are used to explain the basis for the government action that has already been taken. As the Supreme Court has instructed: "it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed." *Sears*, 421 U.S. at 151.

The strikes against Syria took place on April 6, 2017. The *Vaughn* Index identifies several withheld documents that were prepared *after* April 6. In particular, the OLC outline (*Vaughn* Index, No. 4) is described as an outline that is "presumed" to be dated April 7. And most of the talking point and question and answer documents on the *Vaughn* Index are likewise dated April 7, *see Vaughn* Index, Nos. 5-7, 11-13, dated April 2017, *see id.* Nos. 9-10, or are undated, *see id.* Nos. 14-15. These materials appear to be developed after the operative decision to explain or justify the decision – not as part of the relevant decisionmaking process.

In particular, the government fails to explain how the OLC outline regarding "the legal bases for the April 6 strikes," Defs.' Mem. at 22, is predecisional. The government asserts that the outline was (i) "predecisional to what the Acting AAG of OLC would ultimately advise the

Attorney General" and (ii) "predecisional to any ultimate decision the Attorney General would then make in advising the President." *See* Colborn Decl. ¶ 24; Defs.' Mem. at 21-22. This makes little sense. Once that military action had been taken, the only rationale for a briefing would be to explain the legal policy upon which the Executive Branch had already acted.

Moreover, the government does not argue that the OLC outline recounts the predecisional deliberative process that government lawyers used to establish the Executive Branch's legal policy. While the outline may summarize the legal policy views upon which the government acted, that is distinct from the decisionmaking or deliberative process. *Cf. CREW v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 234 (D.D.C. 2009) ("DOJ acknowledges that an after-the-fact explanation of a decision will generally not be protected by the deliberative process privilege. The agency, however, contends that what is at issue here is not an after-the-fact explanation, but a recounting of the predecisional deliberative process itself." (internal citations and quotation marks omitted)). At a minimum, the government fails to identify what decision the Acting Attorney General was advising the Attorney General about on or after April 7. And without that, it is impossible for the Court to "be able to pinpoint an agency decision or policy to which the[] document[] contributed." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C. Cir. 1983)).

So too for the various talking points prepared for the press and Congress. Plaintiff acknowledges that some cases in this District have extended the deliberative process privilege to "*drafts and discussions* relating to how to respond to press inquiries." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012) (emphasis added). Here, the withheld press materials are not described as "drafts" or "discussions" that are part of a process to formulate a press strategy. Instead, at least some of the withheld documents reflect the

ultimate "press guidance" that had been decided upon. *See Vaughn* Index, Nos. 5-6 ("This document is substantially similar but not identical to the press guidance contained in Doc #9…"). In that sense, these are similar to the "talking points and the formulation of responses to possible questions" at issue in *N.Y. Times*. *See* 499 F. Supp. 2d at 514-15. Here, as there, "Defendants do not adequately describe how these documents are 'contemplative, deliberative, analytical documents, weighing the pros and cons of a given course of action.'" *Id.* (quoting *Associated Press v. U.S. Dep't of Def.*, No. 05-cv-5468, 2006 WL 2707395, at *8 (S.D.N.Y. Sept. 20, 2006)). As in that case, "[t]hese documents were created after the implementation" of the relevant government action, *id.*, and so are outside the scope of the privilege. As the D.C. Circuit put it: "Characterizing these documents as 'predecisional' . . . would be a serious warping of the meaning of the word. No 'decision' is being made or 'policy' being considered; rather the documents discuss established policies and decisions . . . ." *Coastal States*, 617 F.2d at 868.

4. The government has waived the presidential communications privilege and the deliberative process privilege

The government waives all potentially applicable privileges when it voluntarily reveals material to "third parties outside of the White House." *In re Sealed Case*, 121 F.3d at 742. And once material travels beyond agency walls, it loses the protections of Exemption 5. *See Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Rep.*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002) ("[C]ommunications between agencies and outside parties are not protected under Exemption 5."). Accordingly, regardless of whether the Court wishes to conceptualize the issue as one of waiver, or as one of the government satisfying its burden to show the applicability of Exemption 5, the legal implication of disclosure is clear: material must have remained in the executive branch for the government to withhold it now.

A close reading of the government's declarations implies that the government did not maintain the confidentiality of the legal memorandum. As detailed above, OLC's declarant does not represent to the Court that OLC maintained the confidentiality of the memorandum. *See supra subsection* II.B.1. At the very least, such an omission in an attorney declaration should be given great weight, and when judged against the statements of the other declarants that confidentiality was maintained, create a fact issue precluding summary judgment on Exemption 5 as applied to the memorandum.

Moreover, even if the legal memorandum or the talking points were not physically distributed, the government's public statements in the wake of the strike likely waived privilege as to at least *some* of the material in either the memo and/or the talking points. In particular, though waivers of presidential communications privilege and the deliberative process privilege are not subject matter waivers, the government cannot disclose information in a document and then later try to claim privilege over it in a FOIA suit. *See In re Sealed Case*, 121 F.3d at 741 ("[R]elease of a document only waives . . . privileges for . . . information specifically released, and not for related materials."). Thus, for example, the government can waive confidentiality over material in OLC memos and talking points by disclosing information in the memos to the third-parties in press conferences and speeches. *See, e.g.*, *N.Y. Times*, 756 F.3d at 114 ("[D]eliberative privileges, in the context of Exemption 5, may be lost by disclosure.").

Here, the government issued a war powers notification to Congress discussing the legal basis of the strikes, *see* Ex. B., and conducted an extensive public relations campaign (both on and off-the-record) involving multiple spokespeople to defend the constitutionality of the strikes, *see* Ex. C-H. That publicity campaign included, among other things, distribution of certain administration talking points on the legality of the strikes. *See* Ex. I-J.

Given that wide-ranging public and private campaign to convince the public that the strikes were lawful as well as the fact that there are only so many ways to describe the President's Article II powers, it seems implausible that no material in any of the withheld documents was disclosed to third-parties. And that is particularly true for the press and congressional talking points. *See Vaughn* Index, Nos. 5-15. After all, the entire purpose of talking points is that they prepare the spokesperson to hit on the points when discussing the matter with third parties.

In light of the seemingly long odds that executive branch officials managed to discuss the legality of the Syria strikes without disclosing any material in over a dozen withheld documents, this Court should deny the government's motion for summary judgment or, at the very least, follow the lead of other district courts in analogous situations and require the government to submit the withheld documents for *in camera* review along with indications as to whether the material was disclosed. *See ACLU v. Dep't of Justice*, No. 15-cv-1954, 2016 WL 889739, at *5-6 (S.D.N.Y. Mar. 3, 2016) ("The only way to determine whether the Government (1) has a viable claim of . . . privilege, and (2) to what extent if at all that privilege may have been waived, is to examine the document."). Such a review would be particularly appropriate here in bringing this case to a quick and expeditious resolution given the manageable number of documents at issue, the vague *Vaughn* Index, *see infra* Part III, as well as the conclusory (and inconsistent) nature of the government's assertions regarding confidentiality. *See Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392-93 (D.C. Cir. 1987).

III. The Vaughn Index Is Inadequate to Support the Claimed Exemptions

The purpose of a *Vaughn* index is "to permit adequate adversary testing of the agency's claimed right to an exemption, and enable the District Court to make a rational decision whether

the withheld material must be produced without actually viewing the documents themselves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218-19 (D.C. Cir. 1987) (internal quotation marks and footnotes omitted). To that end, "when an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. Specificity is the defining requirement of the *Vaughn* index. . . ." *Id.* at 219 (internal quotation marks and footnote omitted).

Here, Defendants' *Vaughn* Index is inadequate in at least two respects. First, Defendants appear to agree that a *Vaughn* index should include the "date, author, recipient and subject of each document," *Skull Valley Band of Goshute Indians v. Kempthorne*, No. 04-cv-339, 2007 WL 915211, at *11 (D.D.C. Mar. 26, 2007), as they have included those fields in their *Vaughn* Index. The problem is that Defendants have left much of their Index blank. For all but three documents, there is no information on "to," "from," or any other author or recipient data.

The more fundamental problem is that Defendants have not provided sufficient information by which the Court can judge whether they have appropriately invoked Exemption 5. Indeed, Defendants' *Vaughn* Index is largely "conclusory, merely reciting statutory standards." *King*, 830 F.2d at 219 (internal quotation marks and footnotes omitted). Defendants fail to "provide necessary contextual information about the particular decision-making processes to which the withheld documents contributed, and the role the withheld documents played in those processes." *Elec. Frontier Found.*, 826 F. Supp. 2d at 168. Nor does the *Vaughn* Index contain "sufficient detail as to the identities, positions, and job duties of the authors and recipients of the

withheld documents," which "are factors relevant to the agency's deliberative process privilege claim." *Id.* at 170.

Furthermore, many of the documents fall into the category of talking points, briefing materials, or press guidance – that is, documents whose contents are likely to be shared with the public or "relied upon or adopted as official positions after their preparation." *Id.* at 171 (internal quotation marks omitted); *see also Judicial Watch*, 297 F. Supp. 2d at 265-66 (deeming agency's description of withheld "draft talking points" inadequate where the agency failed to "indicate whether, as a draft, the[] talking points were actually used in a communication with the public."). Neither the *Vaughn* Index nor Defendants' declarations indicate whether the agency officials who received these materials subsequently used them in communicating to the press, the public, or Congress. In short, the government's *Vaughn* Index fails to provide sufficient detail concerning the withheld documents to facilitate the Court's evaluation of the agencies' Exemption 5 claim.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' motion for summary judgment and grant Protect Democracy's cross-motion for summary judgment. Alternatively, the Court should order Defendants to submit the withheld records for *in camera* review.

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