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 REPLY MEMORANDUM
IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The government's opposition confirms that it is possible to segregate the small amount of classified information from the legal analysis plaintiff seeks. But instead of voluntarily releasing its legal memorandum justifying the use of military force (as it has done so many times in the past without imperiling the President's ability to get candid advice[1]), the government has taken a different tack: submitting an ever-rising mountain of paper to keep the Court and the public from reading a partially redacted seven-page memo and a handful of talking points. As a result, the government has been able to give the missile strikes a veneer of legality through the widespread release of numerous statements and talking points proclaiming the missile strikes' legality, while at the same time showing contempt for a long-running democratic tradition followed by both Republican and Democratic presidents alike.

FOIA allows this Court to right that wrong. Nowhere in the government's briefing and declarations—which remain conclusory and insufficient to carry the government's burden of establishing privilege on many of the documents at issue (and, indeed, do not even refute that it disclosed many of the talking points to the press)—does the government ever deny that the President, his White House staff, three Cabinet Secretaries, and the National Security Council spokesperson have all openly acknowledged most, if not all, of the legal justifications for the cruise missile strikes against Syria in April 2017. And having publicly stood at podiums to insist on the President's legal authorities for using military force, the government cannot now shield itself with claims of privilege to block the release of the officially acknowledged information in the legal memorandum, press talking points, and post-strike notes. *See, e.g.*, *Canning v. U.S.*

[1] *See* Pl. Mem. of Law in Supp. of Pl. Cross-Mot. for Summ. J. ("Pl. Cross-Mem.") 14 n.13, ECF No. 26-2 (prior executive branch memos on the use of force).

Dep't of Justice, 263 F. Supp. 3d 303, 311 (D.D.C. 2017). The suppression of information that the government itself publicized "would frustrate the pressing policies of the Act without even arguably advancing countervailing considerations." *Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 832 (D.C. Cir. 1979).

This Court has, in the past, recognized that *in camera* review is the most efficient, cost-effective, and timely way to resolve such a dispute. *See, e.g.*, *Envtl. Integrity Project v. Small Bus. Admin.*, 151 F. Supp. 3d 49, 54-55 (D.D.C. 2015) (Cooper, J.). It should do so again here for the small handful of documents at issue: the legal principles at issue are simple and largely undisputed, the government's declarations remain conclusory and potentially contradictory, and the public has a significant interest in "obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of a high-profile government action." *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 299 (D.D.C. 2017) (internal quotation marks and citation omitted).

ARGUMENT

At issue are three small categories of documents the government seeks to withhold: (1) a series of talking points prepared for the press (the "press talking points"), *Vaughn* Index Nos. 5-13, ECF No. 24-7, (the "*Vaughn* Index"), (2) a final version of a legal memorandum, *id.* Nos. 1-2, and (3) post-strike briefing notes for a meeting between an Acting Assistant Attorney General and the Attorney General (the "post-strike notes"), *id.* No. 4. The government's efforts to apply Exemption 5 to these documents fail.

First, the government may not shield the press talking points under the deliberative process privilege when it refuses to provide either a declaration or a *Vaughn* index establishing that the press talking points have not been provided to the press. And that refusal is all the more

egregious when all indications are that the White House itself circulated the talking points to the media in a document titled "Basis for Using Force."

Second, the legal memorandum may not be withheld when it has been adopted as working law by the Department of Justice, and the government's own supplemental declaration indicates that the legal justification for the Syria missile strikes will be used by the Attorney General when determining "how to advise the President on *future* military action" Second Decl. of Paul P. Colborn ("Suppl. Colborn Decl.") ¶ 3, ECF No. 28-2. The other privileges that the government claims are equally unavailing: the claim of presidential communications privilege rests on little more than declarations formulaically reciting quotations from case law that describe the kind of material normally shielded from discovery, the claim of attorney-client privilege is not even supported by any evidence that the White House maintained the memorandum's confidentiality, and the attorney-client privilege was waived, in any case, by the government's extensive post-strike PR campaign.

Third, the case for withholding the post-strike notes suffers from similar deficiencies. Not only does the government fail to show that at least portions of the post-strike notes are simply a recounting of the government's legal basis for the military strikes—and therefore not shielded by the deliberative process privilege—but also any claims of attorney-client privilege were (again) waived by the post-strike PR campaign.

Finally, even if the government could establish that the entirety of any of the documents was privileged—and it can't—the government's extensive post-strike official acknowledgment of the legal basis for the military strikes waives the ability for the government to withhold the officially acknowledged information now.

I. The Press Talking Points, the Final Legal Memorandum, and the AG Briefing Notes May Not Be Withheld Under Exemption 5

A. The Talking Points Are Not Protected by the Deliberative Process Privilege

The government's evidence falls short of the standard to withhold the press talking points on the basis of the deliberative process privilege.[2] Contemporaneous mainstream news reports indicate that the government distributed these talking points to the media to explain the legal basis for the missile strikes. The government refuses to either acknowledge or deny that account. Defs.' Reply in Supp. of Mot. for Summ. J. ("Defs.' Reply") 23 n.13, ECF No. 28. Therefore, the government has not laid a sufficient evidentiary foundation for withholding. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 511 F. Supp. 2d 56, 71 (D.D.C. 2007) ("[T]he court . . . lacks the information necessary to determine whether these materials have been relied upon or adopted as official positions after their preparation. Indeed, the likelihood of such adoption is particularly high in the case of 'talking points,' and the distinction between such records and 'briefing materials' is, at best, slim."); *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 25 (D.D.C. 2002) ("[C]ommunications between agencies and outside parties are not protected under Exemption 5.").

1. *The Government Adopted the Press Talking Points*

The government made divergent evidentiary showings concerning the two sets of talking points. While the government has submitted sworn declarations that the "*information*" contained in the congressional talking points "was not deployed by the Department officials," Suppl. Decl. of Eric F. Stein ("Suppl. Stein Decl.") ¶ 11, ECF No. 28-1 (emphasis added), the same is not true with respect to the press talking points. The government has maintained its silence on

[2] The government also seeks to shield certain employee names under Exemptions 6 and 7. Plaintiff has no objection to the government redacting those names.

whether it deployed information in those talking points. Neither the declarations nor the *Vaughn* Index provide the Court with any foundation on which to determine that the press talking points have not been distributed to the press. And the government has not denied, Defs.' Reply 23 n.13, the authenticity of the "Basis for Using Force" document that all accounts show is administration-released press talking points, *see* Pl. Cross-Mem. Ex. I, ECF No. 26-11—a release that has been confirmed to be the government's talking points by a *New York Times* reporter, Pl. Cross-Mem. Ex. J, ECF No. 26-12.

The government's failure to support its position is all the more problematic in light of the *Washington Post*'s contemporaneous report that the press talking points were, in fact, *cleared for public release* as the views of a United States official. As the *Post* explains:

> In lengthy internal notes that were distributed to U.S. government agencies late Thursday evening, which I obtained in full, the administration lays out its justifications for the strikes and the challenge the United States is now laying at Russia's feet.
>
> The notes were meant to be used as responses to various questions from journalists and were *cleared through the interagency process for use on background* as a "U.S. official." . . . .
>
> In its initial talking points, the administration did not explain what legal justification Trump is relying on for the use of force under U.S. law but referred to Syria's repeated violations of international law. But late Thursday night, the White House legal office issued supplementary talking points to assert a more specific legal justification.

Josh Rogin, Opinion, *Trump Administration on Syria Strikes: 'Russia Faces a Choice*,*'* Wash. Post, (Apr. 6, 2017), https://www.washingtonpost.com/news/josh-rogin/wp/2017/04/06/trump-administration-on-syria-strikes-russia-faces-a-choice/?utm_term=.6de53af8f52b (attached hereto as Exhibit A) (emphasis added).

That is fatal: even if press talking points are sometimes protected by the deliberative process privilege, the government's showing with respect to *these* talking points is defective. *See Elec. Privacy Info. Ctr. v. Dep't of Justice*, 584 F. Supp. 2d. 65, 71 (D.D.C. 2008); *Judicial*

Watch v. U.S. Postal Serv., 297 F. Supp. 2d 252, 265-66 (D.D.C. 2004). Talking points that have been adopted by the government as the views of a "U.S. official" cannot qualify for the deliberative process privilege regardless of the circumstances in which they were prepared. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The government's repeated statements that documents are "drafts" does not establish an entitlement to withhold material that is eventually adopted or used in dealings with the public. *See Elec. Frontier Found. v. U.S. Dep't of Justice*, 826 F. Supp. 2d 157, 170-71 (D.D.C. 2011).

2. *The Government's Segregability Analysis Does Not Establish That the Entirety of the Press Talking Points May Be Withheld*

The government cannot base its segregability analysis on the claim that the *release* itself of any part of the talking points documents would harm the deliberative process, *see, e.g.*, Decl. of Daniel R. Castellano ("Castellano Decl.") ¶ 41, ECF No. 24-2, while at the same time "neither confirm[ing] nor den[ying] the authenticity of th[e] document," Defs.' Reply 23 n.13.

If, as the government asserts, the *release* of "*any part*" of the document would harm the deliberative process, *see* Castellano Decl. ¶ 43 (emphasis added), and portions of the document have already been voluntarily released, then the harm to the deliberative process has already occurred *at the hands of the government*. Alternatively, if the government wishes to claim that the document is authentic but that the release of heretofore unreleased portions would harm the deliberative process, then the government should revise its position on segregation insofar as at least some of the talking points can (and have) been released without harming the deliberative process. Or, finally, if the government wishes to claim that the document is not authentic and was not cleared for release, then it should provide the Court with a declaration to that effect. But the government cannot prophesy that doom will occur if something is *released* while not denying the release has occurred. Given plaintiff's showing that the government, in fact, has

released the press talking points as the views of the United States, it is the plaintiff—and not the government—that is entitled to summary judgment on this point. *See Goodrich Corp. v. EPA*, 593 F. Supp. 2d 184, 190-91 (D.D.C. 2009).

B. The Legal Memorandum Is Not Covered by Exemption 5

The government seeks to withhold the final version of the interagency legal memorandum on three contested grounds: presidential communications privilege, deliberative process privilege, and attorney-client privilege.[3] None succeed.

1. *The Legal Memo is Not Protected by the Presidential Communications Privilege*

The government is wrong to argue that the seniority of the soliciting staff member is "immaterial" when determining the applicability of the presidential communications privilege. Defs.' Reply 5. That privilege is "bottomed on a recognition of the unique role of the President." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1121 (D.C. Cir. 2004) (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)). The underlying justification for the application of the privilege becomes weaker when a court is dealing with "twice- and thrice-removed communications." *Id.* at 1123. Unsurprisingly then, *Sealed Case* separately analyzed claims of privilege relating to "top presidential advisers," 121 F.3d at 757, such as the "White House Counsel, Deputy White House Counsel, Chief of Staff and Press Secretary," *id.* at 758, and lower advisors such as the official here, *id.*

Here, the government has clarified that the memorandum was neither written nor solicited by any of the President's closest advisors. Rather, it was solicited by a deputy to a deputy to the National Security Advisor (*i.e.*, the staff's staff) and was written primarily by agency staff. This is not to say that materials solicited by such staff can never qualify for

[3] Plaintiff has no objection to the government withholding the classified words and phrases contained in the Factual Background section of the legal memorandum.

application of the privilege—*Sealed Case* demonstrates that in some cases they can—but the staff's seniority is relevant when analyzing a claim of privilege. That places the focus on the role the materials played in the process. And there is no indication here that any of the specific advice on legality was relayed to the President in any way—beyond evidently ending up in the NSC Legal Advisor's inbox. Suppl. Stein Decl. ¶ 6.

Indeed, the government's declarations are largely silent as to the role that both the government lawyer and the supposed legal advice played *in this particular process*. The government makes no showing as to whether legality was a significant concern to anyone more senior than a deputy legal advisor thrice-removed from the President (which is far from certain when the Attorney General had to be briefed about the strike's legal basis *after* the strike had occurred, *see Vaughn* Index No. 4; Suppl. Colborn Decl. ¶ 3). This attenuated chain is legally insufficient to justify the *presidential* communications privilege. *Cf. Muttitt v. Dep't of State*, 926 F. Supp. 2d 284, 306 (D.D.C. 2013) (government must do more to establish privilege under Exemption 5 than provide "conclusory quotations from case law that describes the kind of material normally exempt from disclosure."). Were the government's present evidentiary showing—solicitation of an agency document by staff to the staff—accepted, nearly any document solicited by the White House would qualify for presidential communications privilege.

2. *The Working Law Exception Bars Application of the Deliberative Process Privilege*

The government argues that the inter-agency memorandum cannot be working law because the plaintiff has no evidence that its reasoning has been adopted. Defs.' Reply 16-17. But the government's own declarations are all the proof plaintiff needs. The Supplemental Colborn Declaration specifically claims that the AAG's briefing notes are protected by the deliberative process privilege because they reveal the administration's legal basis for the attack

which would then be used by the Attorney General when determining "how to advise the President on *future* military actions." Suppl. Colborn Decl., ¶ 3; *see also id.* (noting document identified "considerations that could be relevant to potential future actions."). That means that the memorandum is the working law regardless of whether it is "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)). Because the memorandum represents the working law of the Justice Department, it cannot be shielded from public view by the deliberative process privilege. *See Coastal States*, 617 F.2d at 866-69.

Moreover, the record indicates that the remainder of the government has adopted the memorandum's reasoning as well. For example, the administration's lawyer-vetted legal talking points—the "Basis for Using Force" document—speak to the strike's "domestic law basis." Pl. Cross-Mem. Ex. I, at 3; *see also infra* Subsection II.A.2 (discussing a plethora of authorities indicating the presidential basis for using military force in Syria). And the government's *Vaughn* Index—unless the President relied on another legal analysis from either DOJ, DOD, or State which the government has failed to provide—makes absolutely clear that the only "domestic law basis" that the talking points could be referring to is the reasoning in the inter-agency memo because no other constitutional analysis had been done.[4]

[4] In light of the evidence that the executive branch adopted the memorandum's reasoning, the government's observation that the "President [was] free to reject the analysis and recommendations set forth in the legal memorandum," Defs.' Reply 15, is irrelevant. Nonetheless, if the government is suggesting that the President is free to adopt whatever view of his authority to order strikes on a foreign country he desires and then order his subordinates to follow it, the government is wrong. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("[O]urs is a government of laws, not of men, and . . . we submit ourselves to rulers only if under rules.").

Contrary to the government's suggestion, Defs.' Reply 13-17, this case is not *Electronic Frontier Foundation*-redux. There, the plaintiff could not "point to any evidence supporting its claim that the FBI expressly adopted the OLC Opinion as its reasoning." 739 F.3d at 11. Here, by contrast, the talking points (especially when read in conjunction with the Supplemental Colborn Declaration) do just that. Therefore, the government may not invoke deliberative process privilege until it can show that the legal memorandum's reasoning was "not so adopted." *Afshar v. Dep't of State*, 702 F.2d 1125, 1143 (D.C. Cir. 1983).

Finally, the evidentiary record of adoption in this case should be examined in light of the broader history of executive branch legal memos on war powers. For over half a century, from the State Department Legal Advisor's memorandum on Korea, *see* Adrian Fisher, *Authority of the President to Repel the Attack in Korea*, 23 Dep't of St. Bull. 173, 173-78 (1950), to the Office of Legal Counsel's Libya memo, *see Authority to Use Military Force in Libya*, O.L.C., 7-13 (2011), presidents have relied on prior presidential assertions of legal authority to justify their uses of military force. The government's suggestion that the legal memorandum here is anything other than an addition to the long-running body of executive branch law on the President's war powers authority is nothing more than selective amnesia that will be discarded the next time the President wants to use military force.

3. *The Legal Memorandum is Not Protected by Attorney-Client Privilege*

It is a "fundamental prerequisite" of the attorney-client privilege that the material must be kept confidential "both at the time of the communication" and "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). In an attempt to cure the deficiencies with its first declaration, the government has submitted a supplemental declaration from Mr. Colborn. But in his new declaration, Mr.

Colborn indicates that he simply talked to another OLC attorney to determine whether confidentiality had been maintained. Suppl. Colborn Decl. ¶ 2. Left unexplained is whether the White House maintained confidentiality over the document. And the *Vaughn* Index—which lacks any indication of the recipients or general circulation of the withheld legal memorandum, *see* Pl. Cross-Mem. at 30-32 (listing deficiencies)—does not fill in any of the gaps in Mr. Colborn's declaration because it gives the Court no idea of how widely the government shared the legal memorandum.

Those omissions are material where, as is here, it was the White House that appeared to be handling communications with the media regarding the legal basis of the strikes. *See* Ex. A (noting communications issued by "White House legal office"). And those omissions are all the more material when the White House appears to have been freely sharing accounts of the whole endeavor. *See* Michael Wolff, *Fire and Fury: Inside the Trump White House* 192-94 (2018).

Further, any such privilege has been waived. Much of the government's position on the confidentiality of the memorandum depends on its ability to show that it has not "officially disclosed or authenticated the 'Basis for Using Force' document." Defs.' Reply 25. But—as explained above—the record indicates *that* document was in fact authorized for release and adopted as the view of the United States. *See supra* Section I.A.

And once the "Basis for Using Force" document is seen as an authorized disclosure, it should also be seen as a waiver of the attorney-client privilege. *See Coastal States*, 617 F.2d at 862 ("Like all privileges, . . . the attorney-client privilege is narrowly construed and is limited to those situations in which its purpose will be served."). The document reveals the strike's "domestic law basis"—which was "very similar to the authority for the use force in Libya in 2011, as set forth in an April 2011 opinion by the Department of Justice's Office of Legal

Counsel." Pl. Cross-Mem. Ex. I, at 3. The document then gives an even lengthier discussion of why, under international law, the strikes were a "justified and legitimate . . . measure." *Id.* at 3. That discussion is more than simply "conclusions"—rather it is a legally-vetted recounting of the legal basis for the strikes acknowledging past Office of Legal Counsel opinions and referencing their application to the present case that waives the attorney-client privilege. *See N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 116 (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).[5]

II. The Government May Not Withhold Officially Acknowledged Information

A. The Government Waived All Potentially Applicable Privileges When It Officially Acknowledged Information Regarding the Legal Basis for the Strikes

"[A] showing of public availability renders the FOIA exemptions inapplicable," *Davis v. U.S. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992), because "an exemption can serve no purpose once information . . . becomes public," *Cottone v. Reno*, 193 F.3d 550, 555 (D.C. Cir. 1999). The D.C. Circuit applies a three-part test for determining when information has been openly acknowledged by the government: (1) "the information requested must be as specific as the information previously released;" (2) "the information requested must match the information previously disclosed;" (3) "the information requested must already have been made public through an official and documented disclosure." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). Because the information plaintiff seeks here has been openly acknowledged by the government, it may no longer be shielded from the public.

[5] For the same reasons described above, the government also cannot withhold the post-strike notes for briefing the Attorney General under Exemption 5.

1. *The Government's Public Statements Constitute Official Disclosures*

The government largely concedes—as it must—that the statements by the President, three Cabinet Secretaries, the Press Secretary, and the NSC spokesperson constitute official and documented disclosures of information by the government. The public statement by the President to Congress, Pl. Cross-Mem. Ex. B, ECF No. 26-4, constitutes an official disclosure by all executive branch agencies. *See ACLU v. CIA*, 710 F.3d 422, 429 & n.7 (D.C. Cir. 2013). Likewise, the disclosures by the President's Press Secretary, the President's NSC spokesperson, U.N. Ambassador, the Secretary of Defense, and the Secretary of State should have the same effect. *See Shapiro v. CIA*, 170 F. Supp. 3d 147, 159 n.5 (D.D.C. 2016). And, finally, the government's disclosures in this FOIA action—which also include any documents that the government cannot demonstrate are protected by privilege in Part I—also constitute official disclosures. *See Mobley v. CIA*, 806 F.3d 568, 584 (D.C. Cir. 2015) (explaining that the government's "FOIA response [can] satisfy that prong").

The "Basis for Using Force" document is the only disclosure that the government quibbles with as constituting an official and documented disclosure. Defs.' Reply 23-24. But, as detailed above, the government has no basis to withhold the press talking points documents under Exemption 5: the contemporaneous reports of an acknowledged, cleared, and intentional release in the *Washington Post*, Ex. A, and by a *New York Times* reporter, Pl. Cross-Mem. Ex. J, should be credited over the government's mere statement that this may or may not have been an official leak, *see Goodrich Corp.*, 593 F. Supp. 2d at 191. Therefore, the burden is on the government to show that the officially disclosed information in the press talking points has been "destroyed, placed under seal, or otherwise removed from the public domain." *Cottone,* 193 F.3d at 556.

In addition, the government officially acknowledged at least parts of the "Basis for Using Force" document. So whether the "Basis for Using Force" document constitutes an official disclosure is largely immaterial: even if government had submitted credible evidence that the disclosure was unauthorized, the on-the-record statements by government officials officially acknowledging portions of the "Basis for Using Force" document put the plaintiff in nearly the same position it would be if the "Basis for Using Force" document did not constitute an official disclosure.

For example, portions of the "Basis for Using Force" document were repeated nearly verbatim by the NSC spokesperson *on-the-record* to the *Weekly Standard*. The "Basis for Using Force" document begins:

> 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. The 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 long-standing interests in obtaining these weapons and using them to attack the United States and its allies and partners.

Pl. Cross-Mem. Ex. I, at 3. The NSC spokesperson made the same statement—save for the capitalization of Commander in Chief and President, the deletion of "this sort of," and the alteration of "with long-standing interests" to "an interest" —to the *Weekly Standard*:

> 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. The 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.

Pl. Cross-Mem. Ex. H, at 3, ECF No. 26-10.

That is a textbook case of official acknowledgment. The close overlap between the "Basis for Using Force" document and the government's official statement to the *Weekly*

Standard, substantiated by a "hard copy simulacrum of the sought-after material," *Cottone*, 193 F.3d at 555, can satisfy even the most demanding standard for judging whether the information in the withheld press talking points is "as specific as the information previously released" and "match[es] the information previously disclosed." *Fitzgibbon*, 911 F.2d at 765.[6]

Therefore, the government can no longer rely on *any* FOIA exemption to justify withholding the officially acknowledged material in a FOIA action. *See Canning,* 263 F. Supp. 3d at 311. Thus, regardless of the route taken—either because the government has not demonstrated an ability to withhold the document under Exemption 5 or because plaintiff has shown an official acknowledgment of the document's contents—the plaintiff may rely on the "Basis for Using Force" talking points as an official disclosure.

2. *The Government's Official Disclosures Officially Acknowledge Contents of the Legal Memorandum*

Under the official acknowledgment test, plaintiff has the initial burden of "producing at least some evidence that" any applicable FOIA "privilege has been waived." *Elec. Frontier*

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[6] If the government objects to the *Weekly Standard* quote not including the "this sort of" language, Secretary Tillerson recently sent a Senate Committee a written, on record answer containing that exact phrase:

> KAINE: We had a hearing . . . and we had Secretary Tillerson before us . . . I asked him the question of legal justification for the military strike in April in Syria, and he took it for the record, and submitted a record answer, that . . . I'd like [to] introduce . . . .
>
> FLAKE: Without objection.
>
> KAINE: . . . We ask about the military justification. Quote, ". . . The president authorized that strike pursuant to his power under Article II of the Constitution, as Commander in Chief and Chief Executive, to use *this sort of* military force missile strikes overseas to defend important U.S. national interests."

Senate Foreign Relations Committee Holds Hearing on Use of Military Force, (Dec. 13, 2017) (attached hereto as Exhibit B) at 13 (emphasis added).

Found. v. U.S. Dep't of Justice, 890 F. Supp. 2d 35, 46 (D.D.C. 2012). To do so, plaintiff must "point[] to specific information in the public domain that appears to duplicate that being withheld." *Davis,* 968 F.2d at 1279 (internal quotation marks omitted). Then, the plaintiff must show that the public information "duplicates the contents" of the withheld information, *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60-61 (D.C. Cir. 2003). But it need not invariably make that showing with direct evidence. *See Cottone*, 193 F.3d at 555 (rejecting an "inflexible rule requiring every public-domain claim to be substantiated with a hard copy simulacrum of the sought-after material."); *see also Judicial Watch v. U.S. Dep't of Def.*, 963 F. Supp. 2d 6, 13 (D.D.C. 2013) ("There may not be much flexibility in the public domain doctrine—*but there is some* . . . ." (emphasis added)).

Plaintiffs can meet this standard through sufficient circumstantial evidence—such as, for example, official government letters that reveal information that *must* be in the withheld materials. *See, e.g.*, *Canning,* 263 F. Supp. 3d at 311; *id.* at 314. They can also do so on the basis of documents that are not simply hard copy simulacra of the documents they seek when they provide "any specific explanation of the overlap between the information in the" officially documented disclosures and the documents sought. *Lieff, Cabraser, Heimann & Bernstein, LLP v. U.S. Dep't of Justice*, 697 F. Supp. 2d 79, 85-86 (D.D.C. 2010).

We know from the government's disclosures in this FOIA action that the withheld memorandum is seven pages long and analyzes the legal basis for President Trump's missile strikes against Syria. *See* Decl. of Paul P. Colborn Ex. C, at 1, ECF 24-3; *Vaughn* Index Nos. 1-2. Thus, the next step for plaintiff is to show that the contents of the government's official disclosures match portions of the withheld memorandum.

We know that the publicly released "Basis for Using Force" document specifically discloses information in the withheld legal memorandum for at least three reasons. First, the government cannot have it both ways—if the government is going to try to shield the press talking points under the deliberative process privilege, *see* Pl. Cross-Mem. Ex. H, at 2-5; Castellano Decl. ¶¶ 34-42, then it cannot then disavow the idea that the legally-vetted talking points were specifically prepared to disclose particular information in the legal memorandum. Second, as the administration has officially denied to both the public and Congress that it relied in any way on Congress's Article I authority to authorize hostilities,[7] the press talking points *cannot* be wrong as no other constitutional provision could authorize the use of military force in Syria. (It is not as though the strikes could have been authorized under Articles III, IV, V, VI, or VII.) Third, the short period between the finalization of the legal memorandum and the release of the "Basis for Using Force" talking points further weighs in favor of a determination that the "Basis for Using Force" talking points discloses the specific, matching information the memorandum. *See N.Y. Times Co. v. U.S. Dep't of Justice*, 806 F.3d 682, 686 (2d Cir. 2015) (length of time government statement comes after legal opinion should be considered when determining waiver).

That the content of the "Basis for Using Force" matches specific information in the withheld legal memorandum is further confirmed by the post-strike letter that President Trump sent to Congress. That letter acknowledged the exact same legal basis for the missile strikes: the President's authority under Article II of the Constitution to conduct foreign relations and as

[7] Pl. Cross-Mem. Ex. H, at 4 ("An NSC spokesperson clarified that [the strike] . . . was part of the president's Article II powers . . . ."); *see also* Ex. B, at 12 (Secretary of State Tillerson report to Congress that "The April 6 US military strike on Shayrat Airfield in Syria was not based on . . . statutory authorizations . . . .").

Commander-in-Chief to engage in military strikes to further important national interests. *See* Pl. Cross-Mem. Ex. B, at 3.

And the President is hardly the only government official to go on-the-record on that particular point. Over the past year, government officials have repeatedly issued near-identical statements to the "Basis for Using Force" document on nearly every point:

"Basis for Using Force"	**Matching Public Statements by Government Officials**
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.	1. NSC Spokesperson: "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."[8] 2. Secretary Tillerson: "The president authorized that strike pursuant to his power under Article II of the Constitution, as Commander in Chief and Chief Executive, to use this sort of military force missile strikes overseas to defend important U.S. national interests."[9] 3. Press Secretary Spicer: "Article 2 of the Constitution is pretty clear that when it's in the national interest of the country, the president has the full authority to act."[10]
The 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 long-standing interests in obtaining these weapons and using them to attack the United States and its allies and partners.	1. NSC Spokesperson: "The 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."[11] 2. *Washington Post* article on U.S. talking points: "In this case, the U.S. national interest is described as 'promoting regional stability, which the use of chemical weapons threatens.'"[12]

[8] Pl. Cross-Mem. Ex. H, at 3.
[9] Ex. B.
[10] Pl. Cross-Mem. Ex. H, at 3.
[11] Pl. Cross-Mem. Ex. H, at 3.
[12] Ex. A.

	3. Ambassador Haley: "It is in our vital national security interest to prevent the spread and use of chemical weapons."[13] 4. General Mattis: "[T]he president directed military action consistent with our vital national interests to deter the use of chemical weapons."[14] 5. Secretary Tillerson: "[I]t is in the national interest because of the threat that unsecured chemical weapons pose given the chaotic conditions on the ground in Syria."[15] 6. NSC Spokesperson Anton: "[T]his is an instance in which he determined it was in the national interest."[16] 7. Press Secretary Spicer: "The proliferation of those weapons pose a grave threat to our national security."[17] 8. Press Secretary Spicer: "I think if you recognize the threat that our country and our people face if there is a growth of use or spread of chemical weapons of mass destruction, those—the proliferation of those, the spread to other groups is a clear danger to our country and to our people."[18] 9. Secretary Tillerson: "[O]ne of the existential threats we see on the ground in Syria is if there are weapons of this nature available in Syria, the ability to secure those weapons and not have them fall into the hands of those who would bring those weapons to our shores to harm American citizens."[19] 10. Secretary Tillerson: "There are elements on the ground in Syria, elements that are plotting to reach our shore, and these type of weapons falling into their hands and

[13] Michelle Nichols et al., *Russia Warns of Serious Consequences from U.S. Strike in Syria,* Reuters, (Apr. 6, 2017), https://ca.reuters.com/article/topNews/idCAKBN1782S0-OCATP (attached hereto as Exhibit C).
[14] Jim Mattis, Secretary of Defense, *Press Conference by Secretary Mattis and Gen. Votel in the Pentagon Briefing Room*, Washington, D.C. (Apr. 11, 2017), https://www.defense.gov/News/Transcripts/Transcript-View/Article/1148604/press-conference-by-secretary-mattis-and-gen-votel-in-the-pentagon-briefing-room/ (attached hereto as Exhibit D).
[15] Rex Tillerson, U.S. Secretary of State, Remarks at a Press Availability*,* Lucca, Italy (Apr. 11, 2017), https://www.state.gov/secretary/remarks/2017/04/269693.htm (attached hereto as Exhibit E).
[16] Susan B. Glasser, *Michael Anton: The Full Transcript*, Politico (Apr. 17, 2017), https://www.politico.com/magazine/story/2017/04/michael-anton-the-full-transcript-215029 (attached hereto as Exhibit F).
[17] Pl. Cross-Mem. Ex. C, at 5, ECF No. 26-5.
[18] *Id.* at 7.
[19] Pl. Cross-Mem. Ex. D, at 3, ECF No. 26-6.

	being brought to our shore is a direct threat on the American people."[20]
This domestic law basis is very similar to the authority for the use force in Libya in 2011, as set forth in an April 2011 opinion by the Department of Justice's Office of Legal Counsel.	1. *Washington Post* article on U.S. talking points: "The Trump administration is claiming this justification is similar to what the Obama administration used in 2011 to use force in Libya."[21]
The targeted U.S. military action against the Syrian military targets directly connected to the April 4 chemical weapons attack in Idlib was justified and legitimate as a measure to deter and prevent Syria's illegal and unacceptable use of chemical weapons.	1. Pentagon Spokesperson Captain Davis: "The strike was intended to deter the regime from using chemical weapons again."[22] 2. Secretary Tillerson: "Assad has continued to use chemical weapons in these attacks with no response—no response from the international community—that he, in effect, is normalizing the use of chemical weapons, which then may be adopted by others. So it's important that some action be taken on behalf of the international community to make clear that these chemical weapons continue to be a violation of international norms."[23]
The U.S. use of force is necessary and proportionate to the aim of deterring and preventing the future use of chemical weapons by the Syrian government	1. Secretary Tillerson: "[T]he strike itself was proportional because it was targeted at the facility that delivered this most recent chemical weapons attack."[24] 2. Pentagon Spokesperson Captain Davis: "The strike was a proportional response to Assad's heinous act. Shayrat Airfield was used to store chemical weapons and Syrian air forces.[25]

Given the contents of the "Basis for Using Force" press talking points, the President's contemporaneous letter to Congress discussing the legal authority for his strikes, NSC's official

[20] *Id.* at 9.
[21] Ex. A.
[22] Press Release, Statement from Pentagon Spokesman Captain Jeff Davis on U.S. Strike in Syria, Release No: NR-126-17, U.S. Department of Defense (Apr. 6, 2017), https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/ (attached hereto as Exhibit G).
[23] Pl. Cross-Mem. Ex. D, at 3.
[24] *Id.*
[25] Ex. G.

statement on the record as well as the plethora of other on-the-record statements from high-level administration officials—including the multiple cabinet secretaries—this case is nothing like *Davis*, *Assassination Archives*, *ACLU* or *Edmonds*. *See* Defs.' Reply 24.

In *Davis*, the plaintiff could not even point to the specific disclosures that had been in the public record. *See* 968 F.2d at 409 ("The government is in no better position than Davis to establish exactly which tapes are transcribed in public documents."). By contrast, here plaintiff can point to specific official acknowledgments by government officials. *See Cottone*, 193 F.3d at 555 ("Unlike the situation we confronted in *Davis*, however, Cottone has demonstrated precisely which recorded conversations were played in open court.").

In *Assassination Archives*, the plaintiff tried to use disclosures by the CIA under the JFK Act—supported by an associate professor's speculation that "the overwhelming majority of Cuban personalities in whom the CIA has had an interest have been disclosed under the JFK Act," *Assassination Archives*, 334 F.3d at 60-61 (internal citations omitted)—to conclude that the government must have previously disclosed portions of a CIA compendium of "Cuban nationals who could lead the country if Castro was ousted," *id.* at 57 n.2. Thus, the *Assassination Archives* plaintiff's link between the public disclosures and the confidential material was purely speculative and not even necessitated by the very terms of plaintiff's own evidence—and that link was all the more tenuous because the government submitted a declaration that the government had "never released any portion of the [withheld] document in any form at any time, whether as part of the JFK Act or otherwise." *Id.* at 61 (internal quotation marks and brackets omitted).

Here, by contrast, the government has pointedly refused to confirm whether portions of the legally-vetted press talking points had been released to the public or the press, *see* Defs.'

Reply 23 n.13, and plaintiff need not rely on an *Assassination-Archive*-sized leap-of-logic when the government itself—prepared after what it claimed was a deliberative process—revealed the constitutional basis for its use of force and disclaimed the *only other conceivable constitutional basis*. *See Canning*, 263 F. Supp. 3d at 311 (concluding that official acknowledgment doctrine applied because "letter written by Assistant Attorney General Mueller" "unambiguously" reveals specific information that the government was attempting to withhold). Accordingly, given plaintiff's "colorable contention that" the Basis for Using Force press talking points, the President's letter to Congress, the multiple statements by cabinet secretaries, and the NSC spokesperson's statements "revealed significant details about" President Trump's legal justification for the strikes, the government "has waived any right to object to the disclosure of that *information*." *Shapiro v. U.S. Dep't of Justice*, 239 F. Supp. 3d 100, 127 (D.D.C. 2017); *see also In re Sealed Case,* 121 F.3d at 741 ("[R]elease of a document only waives . . . privileges for . . . information specifically released . . . ."); *N.Y. Times*, 756 F.3d at 114.

Finally, the government's reliance on *ACLU* and *Edmonds* suffers from similar deficiencies. In both *ACLU* and *Edmonds*, the court based its conclusion that the public disclosures had not been as specific as the withheld material by relying on classified declarations submitted by the government. *See ACLU v. CIA*, 109 F. Supp. 3d 220, 243 (D.D.C. 2015); *Edmonds v. FBI*, 272 F. Supp. 2d 35, 49 (D.D.C. 2003). By contrast, the government has made no such submission here, so plaintiff's colorable and credible showing goes uncontradicted—that the "Basis for Using Force" press talking points, the President's contemporaneous letter to Congress, the NSC spokesperson's official statement on the record, as well as the plethora of other on-the-record statements from high-level administration officials disclosed specific, matching information in the withheld legal memorandum and talking points. *See Fitzgibbon*,

911 F.2d at 765 ("[I]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.").[26]

B. At a Minimum, In Camera Review of the Small Number of Documents Is Warranted

Given plaintiff's showing that public disclosures by authorized government officials officially acknowledged specific information in the withheld material—and therefore preclude application of any Exemption 5 privilege—"[t]he only way to determine whether the [g]overnment (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." *ACLU v. Dep't of Justice*, No. 15-cv-1954, 2016 WL 889739, at *5-6 (S.D.N.Y. Mar. 3, 2016).

Such an approach is eminently justified given the small number of documents at issue, the government's equivocations with respect to the "Basis for Using Force" document, and the high-level and general discussions in both the *Vaughn* Index and the declarations that give the Court little idea of the contents of the documents and how widely they have been circulated. *See Carter v. U.S. Dep't of Commerce*, 830 F. 2d 388, 392-93 (D.C. Cir. 1987); *see also Kerr v. U.S. District Court for N.D. Cal.*, 426 U.S. 394, 405-06 (1976) ("[T]his Court has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege.").[27] This Court has previously agreed that *in camera* review was appropriate in similar

[26] The very same arguments would prevent the government from withholding officially acknowledged information in the post-strike notes.

[27] The government argues that in camera review is disfavored when documents contain highly classified national security information. *See* Defs.' Reply 26 n.14. As the government has confirmed that only a few words are classified and plaintiff is not asking the Court to order the government to release the classified portions of the legal memorandum, plaintiff would have no objection to the government providing the Court a copy of the memorandum with the classified portion redacted for conducting *in camera* review.

circumstances. *See Envtl. Integrity Project*, 151 F. Supp. 3d at 54-55. It should do so again here, and review the final legal memorandum, the withheld press talking points, and the post-strike notes, and order the government to produce them, or, at the very least, the officially acknowledged information in the documents.

CONCLUSION

The Court should grant plaintiff's motion for summary judgment and deny the government's.

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Respectfully submitted,
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