UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE, *et al.*, Defendants.	Civil Action No. 25-10189 (PAE)

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

To justify and govern an ongoing military campaign that has killed nearly two hundred civilians,[1] the Executive Branch, including the Department of Defense ("DOD"), has repeatedly relied on a single memorandum drafted by the Department of Justice's Office of Legal Counsel ("OLC"), expressly adopting it as "working law." Seeking to avoid the straightforward conclusion that this memo must be publicly disclosed under the Freedom of Information Act ("FOIA"), Defendants twist public statements evidencing both adoption and waiver of privileges beyond recognition—and even urge the Court to ignore many of them altogether. They also ask this Court to contravene binding Circuit precedent. Beyond all of that, they double down on vague declarations that fail to establish the applicability of their claimed exemptions in the first place. The Court should reject Defendants' effort to conceal from the American people the law that governs an unprecedented military campaign currently being waged in their name.

ARGUMENT

I. The Executive Branch, including DOD, has expressly adopted the OLC memo as working law.

As Plaintiffs have previously explained, the Executive Branch, including DOD, has expressly adopted the OLC memo as the working law governing its ongoing boat strikes campaign, meaning the memo's legal analysis must be disclosed. Pls.' Opp'n Br. 5–14, ECF No. 57. In response, Defendants make two contrary arguments: first, that the factual record does not evince express adoption of the OLC memo; and second, that they need not disclose working law if it was once protected by the presidential communications privilege. Both are wrong.

[1] The most recent strike occurred on May 27, 2026, bringing the reported death toll to 196. *See* Lazaro Gamio et al., *Tracking U.S. Military Killings in Boat Attacks*, N.Y. Times (May 27, 2026), https://www.nytimes.com/interactive/2025/10/29/us/us-caribbean-pacific-boat-strikes.html.

A. The factual record demonstrates that DOD has expressly adopted the OLC memo as working law.

Defendants cannot avoid the mountain of facts evincing their express adoption of the OLC memo. And because the record demonstrates that adoption has occurred, Defendants cannot satisfy their burden to show that their Exemption 5 withholdings are logical or plausible.

First, Defendants argue that former DOD Principal Deputy General Counsel Charles Young III did not confirm that the OLC memo sets forth "the[] legal basis" for the boat strikes. Defs.' Opp'n Br. 12, ECF No. 59. But the full text of Mr. Young's Senate testimony makes clear that is exactly what he did. While the government is correct that he *also* claimed to have no authority to release the OLC memo, *id.*, in doing so, he referred to a prior administration's refusal to disclose "*their* legal basis" for certain lethal strikes. Stein Decl. Ex. A, at 76, ECF No. 50 (emphasis added). That point makes no sense if he was not affirmatively acknowledging that the OLC memo contains Defendants' "legal basis" for the boat strikes campaign.[2]

Struggling to sidestep Mr. Young's obvious point, Defendants claim that Mr. Young, a top lawyer at DOD, "could not have opined on . . . the legal basis" for military strikes being carried out by his own agency "because the decision on whether to proceed with contemplated military action was the President's, not DOD's." Defs.' Opp'n Br. 12. That is a startling argument, amounting to the claim that a high-ranking DOD lawyer who at least is familiar with (and likely helped formulate, *see* Defs.' Opp'n Br. 4 n.3) advice presented in a now-binding memo is

[2] Defendants urge the Court to ignore Mr. Young's testimony altogether because he did not "affirmatively rais[e]" the OLC memo himself and instead discussed it "in response to questions from Congress." Defs.' Opp'n Br. 14. That supposed "distinction," *id.*, is nonsensical and is also entirely irrelevant under this Circuit's express adoption case law, *see, e.g.*, Tr. of Hr'g: FY 2006 Approp. for Foreign HIV/AIDS Programs at 29–30, *Brennan Ctr. for Just. v. DOJ*, No. 09 Civ. 8756 (S.D.N.Y. Jan. 28, 2011), ECF No. 21-4 (reproducing testimony the Second Circuit later held evidenced adoption, *see Brennan Ctr. for Just. v. DOJ*, 697 F.3d 184, 204–05 (2d Cir. 2012), in which an agency official discussed an OLC memo in response to a congressmember's question).

nonetheless in no position to discuss that very same advice. That is not only illogical and implausible, *cf. Florez v. CIA*, 829 F.3d 178, 185 (2d Cir. 2016), but it fails the laugh test.

The most important point, though, is not that "Mr. Young was . . . *purporting* to speak *for the President*," Defs.' Opp'n Br. 13 (emphasis added), but that he was *in fact* speaking *for DOD*. His remarks evidence *DOD's* express adoption of the OLC memo. Likewise, he was not "bind[ing] *the President*," *id.* (emphasis added), he was binding *DOD*.[3] So was Joint Chiefs of Staff Chairman General Dan Caine, when he testified that military commanders are "rigorously following" the OLC memo, Smith Decl. Ex. A, at 78–80, ECF No. 58, as was SOUTHCOM Commander General Francis Donovan, when he described DOD's "information release authority" over the memo, Stein Decl. Ex. L, at 42. DOD officials *themselves* have thus repeatedly evidenced their agency's express adoption of the memo.

Defendants also try to dismiss White House Press Secretary Karoline Leavitt's reference to the OLC memo from the White House podium. But they never address Plaintiffs' central claim about the Press Secretary's remarks: that she invoked the OLC memo as part of a public relations campaign to convince the public that the ongoing boat strikes are lawful, *see* Pls.' Opp'n Br. 9, 11. Defendants characterize the Press Secretary's statement as merely "acknowledg[ing]" that the memo was shared with Congress. Defs.' Opp'n Br. 16. But in fact, on a day when the boat strikes' legality was the subject of intense national media scrutiny, *see* Pls.' Br. 7, ECF No. 49, the Press Secretary, unprompted, singled out "the classified DOJ Office of Legal Counsel opinion" as a cornerstone of the Executive Branch's efforts to win over members of Congress "who may have expressed some concerns" about the legality of "the Venezuelan strikes." Stein Decl. Ex. I, at 26.

[3] On *that* point, Mr. Young's testimony confirmed his own capacity in clear terms. *See* Stein Suppl. Decl. Ex. A, at 5 ("I've been responsible for legal determinations and legal policy across the Department of War [sic] and its components").

After making this sort of "public relations calculation," Defendants must disclose the "reference[d]" document. *Brennan Ctr.*, 697 F.3d at 205.

Finally, Defendants are incorrect that statements by members of Congress about the memo's binding and authoritative character "cannot show" that it has been expressly adopted. Defs.' Opp'n Br. 16. Notably, Defendants do not claim (and therefore forfeit the argument) that it would be improper to treat these statements as admissible evidence of congressmembers' own understandings of the contents and significance of the memo—and for good reason, as courts routinely and properly take judicial notice of statements reproduced in the Congressional Record, printed on official government websites, and made by elected officials at press conferences and in interviews. *See* Fed. R. Evid. 201(b)(2); *United States v. Suquilanda*, 116 F.4th 129, 141 n.11 (2d Cir. 2024) (Congressional Record); *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 520–24 nn.4–6, 7 (N.D. Cal. 2017) (press conferences, interviews, and government websites).[4] Instead, they insist that this Court's express adoption inquiry must "be limited to the Executive Branch's own statements," claiming that the waiver-based "official acknowledgment" doctrine somehow informs the adoption analysis here. *See* Defs.' Opp'n Br. 17–19.

But express adoption is not like official acknowledgment. The official acknowledgment doctrine, for its part, asks whether the custodian of specific classified information waived classification "through an official and documented [public] disclosure." *ACLU v. DOD* (*Yemen FOIA*), 435 F. Supp. 3d 539, 555 (S.D.N.Y. 2020) (quotation marks omitted). And the ability to waive a privilege generally belongs to the one who holds it. Express adoption, on the other hand,

[4] Defendants are thus wrong to suggest that the congressmembers' statements constitute "incurable hearsay." Defs.' Opp'n Br. 18. But they are right that hearsay ordinarily cannot support or defeat a motion for summary judgment, *id.*, a standard that undoubtedly applies, at least in part, to the sole declaration they submitted to meet the government's burden to justify their Exemption 5 withholdings, *see* Pls.' Opp'n Br. 14–15.

is *not* a waiver doctrine; rather, it looks to *external* evidence of what is, at bottom, an *internal* state of being: whether an agency now treats previously privileged "advice as binding authority." *ACLU v. NSA*, 925 F.3d 576, 597 (2d Cir. 2019). Because this transformation of advice into binding authority is likely to be "hidden from public view," *id*. at 595, courts liberally "examine *all* the relevant facts and circumstances" in express adoption cases, *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 357 n.5 (2d Cir. 2005), including statements from those who "lack[] the authority to adopt [the relevant document] as binding authority" but have probative insights about the document and its use by the Executive Branch, *ACLU v. NSA*, 925 F.3d at 596 n.106.

The congressmembers' statements presented in Plaintiffs' submissions fall squarely within this category of "express evidence" of adoption. *Id*. (italics omitted). Their remarks outlining the contents of the memo and characterizing it as "*the* legal authorization document" for the boat strikes campaign, as well as setting forth binding "parameters" that "govern" the campaign, were made based on personal reviews of the memo and attendance at Executive Branch briefings concerning, among other things, the memo's significance to the campaign. Pls.' Opp'n Br. 10 (canvassing congressmembers' statements). As individuals with personal knowledge of the memo's contents who directly oversee the military and have received repeated assurances from the Executive Branch about the strikes' purported legality, *cf. La Raza*, 411 F.3d at 359, congressmembers' characterizations of the memo and its role within the Executive Branch "have appreciable probative value in determining, under the record as a whole, whether [Defendants'] justifications" for withholding the memo "are logical and plausible," *Florez*, 829 F.3d at 184–85. This Court should not "deliberately bury its head in the sand to [this] relevant and contradictory record evidence solely because" it comes from outside an "agency seeking . . . to avoid the strictures of FOIA." *Id*. at 187.

Thus, considering the above Executive Branch and congressional statements "[t]ogether," as this Court must, *ACLU v. NSA*, 925 F.3d at 596, inexorably leads to one conclusion: The Executive Branch, including DOD, has expressly adopted the OLC memo as working law. As such, Defendants' justifications for their Exemption 5 withholdings are not logical or plausible.

B. Working law vitiates the presidential communications privilege.

Defendants also urge this Court to erroneously hold the working law doctrine "inapplicable to the presidential communications privilege." Defs.' Opp'n Br. 4–5. Leaving to one side Defendants' failure to establish this privilege has not been waived, *see infra* § II, Defendants' argument is foreclosed by *Brennan Center for Justice v. DOJ*, which held, in no uncertain terms, "that 'Exemption 5 can never apply' to 'working law.'" 697 F.3d at 208 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54 (1975)). A contrary rule would be anathema to one of FOIA's core purposes: "to prevent the creation of 'secret law.'" *Afshar v. Dep't of State*, 702 F.2d 1125, 1142 n.21 (D.C. Cir. 1983); *see also* Pls.' Opp'n Br. 13–14. For this reason, the Supreme Court's logic in *Sears*—and, by extension, that of this Circuit's working law cases—admits no carve out for *any* privilege incorporated into Exemption 5. *Sears*, 421 U.S. at 154; *ACLU v. NSA*, 925 F.3d at 591; *Brennan Ctr.,* 697 F.3d at 208.

To argue that working law does not apply to the presidential communications privilege, Defendants point to the district court opinion in *ACLU v. NSA*, No. 17 Civ. 9198, 2017 WL 1155910 (S.D.N.Y. Mar. 27, 2017). But the *NSA* district court arrived at that conclusion without analysis and with only a "see generally" cite to the government's reply brief and an out-of-circuit case, *see id.* at *12 (citing *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997)), and the Second Circuit had no occasion to review it, *see* Brief for Plaintiffs-Appellants at *10, *ACLU v. NSA*, No. 17-3399, 2018 WL 705476 (2d Cir. Feb. 2, 2018) (indicating the relevant document was not a subject

of the appeal). And while *In re Sealed Case* (though not a FOIA case) may be persuasive authority for the general proposition that the presidential communications privilege can apply to post-decisional material, 121 F.3d at 745, that is not determinative of the question presented here: whether the government's transformation of such a document into working law precludes its ability to rely on the privilege via FOIA's Exemption 5.

It does. Defendants' proposed rule—that any document once covered by the privilege retains that protection forevermore (absent voluntary disclosure or personal waiver by the President, *see* Defs.' Opp'n Br. 13)—contravenes FOIA's structure entirely. Remember: the default under FOIA is *disclosure*, *see Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976), and Exemption 5 is *Congress's* allowance of withholding authority to the Executive Branch. Thus, any privilege incorporated into that Exemption is still subject to Congress's limitations on the same. In crafting Exemption 5, Congress gave the government a statutory pathway to assert various privileges—but in enacting FOIA's affirmative disclosure provisions (from which the working law doctrine emanates), Congress also put limits on the use of those privileges. *See Sears*, 421 U.S. at 153–54 (characterizing the working law doctrine as "powerfully supported by" FOIA's "strong congressional aversion to secret . . . law" and its "affirmative congressional purpose to require disclosure of documents which have the force and effect of law") (cleaned up). Whatever the constitutional roots of the presidential communications privilege may be, it is not inviolable; in fact, it is "qualified" and "can be overcome by an adequate showing of need." *In re Sealed Case*, 121 F.3d at 745; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 452 (1977) (rejecting claim that disclosures required by statute would violate the privilege). With FOIA's affirmative disclosure provisions, Congress made clear that once a document becomes working law, the public's need to scrutinize it overcomes the government's assertion of privilege.

Indeed, this case demonstrates the reasonableness of Congress's approach. According to the government declarant's second-hand account, the memo at issue here was first "solicited and received" by presidential advisors for use in a presidential decision. *See* Watzel Decl. ¶¶ 21–22, ECF No. 52; *see also id.* ¶ 18 (explaining declarant has no personal knowledge of these events). But now that DOD officials have made clear that the memo's advice has become that agency's working law, *see, e.g.*, Smith Decl. Ex. A, at 78–80 (General Caine's testimony explaining operational orders are being issued based on the OLC memo), the memo is no longer just advice, but something very different. Converting the memo into working law was Defendants' choice. It was likewise their choice to publicly disclose that conversion in an effort to defend themselves against widespread public and congressional outcry—the kind of "public relations calculation" that opens a previously privileged document up to disclosure through the express adoption principle. *Brennan Ctr.*, 697 F.3d at 205. In these circumstances, there is no "intrusion" into presidential confidentiality or advisors' "candid communication of views," *Nixon*, 433 U.S. at 451–52, because the Executive Branch will always have a choice about whether to take those steps to further its own interests or to instead preserve its secrecy.

In FOIA, Congress already determined that, to the extent compelled disclosure of working law causes any "intrusion" into presidential confidentiality at all, it is more than "adequate[ly] justifi[ed]." *Id.* at 452. Indeed, the public's interest in knowing "what an agency's law *is*," *ACLU v. NSA*, 925 F.3d at 594—especially the law governing an unprecedented military campaign—is core to our democratic system of government, *Sears*, 421 U.S. at 156. Accordingly, the presidential communications privilege cannot shield expressly adopted working law from public view.[5]

[5] Defendants also intimate, albeit through indirect remarks, that the working law doctrine applies *only* to records once protected by the deliberative process privilege (and not any other privileges incorporated into Exemption 5). *See* Defs.' Opp'n Br. 7, 8, 20. These arguments are also foreclosed

II. Defendants have not demonstrated that Exemption 5 privileges ever applied or have not been waived.

Because the memo is working law, the Court need not reach the question of whether Defendants' claimed Exemption 5 privileges ever applied. *See* Pls.' Opp'n Br. 5. However, if the Court does reach that question, Defendants' opposition brief reinforces what was already clear: They have not demonstrated these privileges' application or continued attachment.

Start with the deliberative process privilege. To properly invoke this privilege, Defendants must show that the memo was "originated to facilitate an *identifiable* final agency decision." *Brennan Ctr.*, 697 F.3d at 202 (emphasis added). And yet, Defendants persist in shrouding the relevant "decision" in mystery, indicating only that it involved some unspecified "military action." Defs.' Opp'n Br. 6. Nor do Defendants explain how the OLC memo "actually related" to this unidentified decision, *La Raza*, 411 F.3d at 356 (cleaned up), claiming only that the memo's legal advice was a "component of the decisionmaking process," Defs.' Opp'n Br. 6. These nebulous assertions cannot satisfy Defendants' burden.

Defendants also fail to show that the presidential communications and attorney–client privileges have not been waived through dissemination (assuming they ever applied). They repeat their general claim that access to the memo has been "strictly controlled," Watzel Decl. ¶ 24, but this assertion, without more, does not suffice, Pls.' Opp'n Br. 21–22. And it is contravened by General Caine's testimony, which indicates that numerous DOD officials have reviewed the memo for non-advisory purposes, *see* Smith Decl. Ex. A, at 79. Moreover, when faced with General Donovan's unequivocal testimony that *DOD* maintains "information release authority" over the

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by Supreme Court and Second Circuit case law. *See, e.g.*, *Sears*, 421 U.S. at 154–55 (working law overcomes work-product privilege); *La Raza*, 411 F.3d at 360 (same as to the attorney–client privilege).

OLC memo, Defendants assert that (unstated) "context" somehow morphs General Donovan's statement into a claim about his *personal* "authority to unilaterally release" it. Defs.' Opp'n Br. 4. That beggars belief.[6]

At bottom, Defendants fail to establish that their claimed privileges ever applied or have not been waived. Accordingly, they have not justified withholding the memo under Exemption 5.

III. Defendants have not shown that the memo's legal analysis is not segregable.

Defendants also continue to insist that "no information" in the OLC memo "is segregable," Defs.' Opp'n. Br. 21, not even those portions that articulate a "philosophy of Executive war powers" based on "constitutional-era documents," present a "domestic legal rationale for when the President can unilaterally wage war," Stein Decl. Ex. E, at S7945, or claim strike participants "will be protected from prosecution," Stein Decl. Ex. C, at 25.[7] Even assuming these portions of the memo "cite classified materials," Matthews Decl. ¶ 21, ECF No. 53, those citations can easily be redacted, Pls.' Opp'n Br. 23–24. Moreover, it is implausible to suggest that disclosure of, for instance, legal analysis of constitutional-era documents, could possibly "reveal[] classified associations," Defs.' Opp'n Br. 21. The Court should order Defendants to disclose this segregable legal analysis. *See* 5 U.S.C. § 552(b).

CONCLUSION

The Court should order release of all improperly withheld information in the OLC memo.

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[6] At a minimum, Defendants' attempt to recast General Donovan's testimony has created a dispute about a material fact whose resolution would be aided by limited discovery. *See Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); Pls.' Opp'n Br. 15, 21. And their continued reliance on a facially insufficient, second-hand account to justify their Exemption 5 withholdings warrants *in camera* review. *See* Pls.' Opp'n Br. 25.

[7] Defendants have never acknowledged these descriptions of the memo's contents, let alone suggested they are inaccurate. *Cf*. Defs.' Opp'n Br. 17–18.

Dated: May 29, 2026
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Respectfully submitted,

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