UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....x

THE NEW YORK TIMES COMPANY and CHARLIE SAVAGE,

Plaintiffs,

- against -

12 Civ. 3215 (JSR)
ECF Case

UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

.....x

DECLARATION OF PAUL P. COLBORN

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel ("OLC") of the United States Department of Justice (the "Department") and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC's responses to requests it receives under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I submit this declaration in support of the Government's Motion for Summary Judgment in this case. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by others with knowledge of the documents at issue in this case.

OLC'S RESPONSIBILITIES

2. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch. OLC does not purport, and in fact lacks authority, to make policy decisions. OLC's legal advice and analysis may inform the

decisionmaking of Executive Branch officials on matters of policy, but OLC's legal advice does not dictate the policy choice to be made.

3. Some of the legal advice OLC provides to the President and Executive Branch agencies is presented in the form of a formal legal opinion. As part of its regular practice, OLC reviews its formal legal opinions after they are issued to determine whether they may be appropriate for publication. In making that determination, it is OLC's practice to follow the procedures and guidelines set forth in Part III of its Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Attorney General, *Re: Best Practices for OLC Legal Advice and Written Opinions* at 5-6 (July 16, 2010) ("*Best Practices*"), *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf. All confidential legal advice provided by OLC to the President and Executive Branch agencies is covered, as an initial matter, by the deliberative process, attorney-client, and/or presidential communications privileges. The decision to publish an OLC opinion is entirely discretionary and, as discussed below, is based on a number of considerations. Although publication of an OLC opinion represents a waiver of the privileges that apply to that particular opinion, the discretionary decision to publish otherwise has no effect on the legal rights of third parties, on the status of the published advice within the Executive Branch, or on the privileges that protect other confidential legal advice provided by OLC.

4. In deciding whether an opinion is appropriate for publication, the Office considers a number of factors, including the potential importance of the opinion to other agencies or officials in the Executive Branch; the likelihood that similar questions may arise in the future; the historical importance of the opinion or the context in which it arose; and the potential significance of the opinion to the Office's overall jurisprudence. In applying these factors, the Office operates from

a presumption in favor of making its significant opinions fully and promptly available to the public where possible. *Id.* at 5.

5. At the same time, however, countervailing considerations may lead the Office to conclude that it would be inappropriate to publish an opinion that otherwise would merit publication. For example, OLC will decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security. Similarly, OLC will decline to publish an opinion if doing so would interfere with federal law enforcement efforts or would be prohibited by law. Most pertinently for present purposes, "OLC will decline to publish an opinion when doing so is necessary to preserve internal Executive Branch deliberative processes, or to protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices." *Best Practices* at 5-6.

6. The President and other Executive Branch officials (like other public- and private-sector clients) often depend upon the confidentiality of legal advice in order to fulfill their duties effectively. One important reason OLC legal advice may need to remain confidential is that it often constitutes part of a larger deliberative process—a process that itself requires confidentiality to be effective. The Supreme Court long ago recognized that "efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'" *Envtl. Protection Agency v. Mink*, 410 U.S. 73, 87 (1973) (quoting S. Rep. No. 89-813, at 9 (1965)). In my experience, these concerns apply with particular force at OLC where attorneys are often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Frequently, such issues arise in connection with highly complex and sensitive operations of the Executive Branch, on matters that can be quite controversial. To ensure the candor of Executive Branch

deliberations and to encourage Executive Branch officials to continue to request and rely on legal advice from OLC on sensitive matters, it is essential that OLC legal advice provided in the context of internal deliberations not be inhibited by concerns about public disclosure.

7. In addition to these deliberative interests, the need to protect the relationship of trust between OLC and client agencies or offices that seek its legal advice provides a second reason that OLC legal advice may need to remain confidential. As the Supreme Court has observed: "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The law generally protects the special relationship of trust between a client and an attorney when the one seeks and the other provides independent legal advice. If the request for advice is made in confidence, both the request and advice are protected from compelled disclosure. *Id.* at 390 ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."). Based on my experience over 25 years at OLC, I believe that the prospect of compelled disclosure of OLC's legal advice, and of confidential information that client agencies communicate to OLC, would chill the full and frank communications necessary between attorneys and their clients and inhibit both the willingness of clients to seek legal advice and disclose confidences to OLC and also the open and robust nature of the legal advice that OLC could provide.

THE FOIA REQUEST

8. On February 14, 2012, OLC received a FOIA request from Charlie Savage, a New York Times reporter, for two OLC memoranda: (1) Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* (Feb. 20, 2004); and (2) Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions"* (Jan. 9, 2009). *See* Exhibit A, attached hereto.

9. In a letter dated February 22, 2012, I responded to Mr. Savage on behalf of OLC, informing him that our Office was withholding the two requested memoranda pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), because the documents were protected by the deliberative process, attorney-client, and/or presidential communications privileges, and that the documents were not appropriate for discretionary release at this time. *See* Exhibit B, attached hereto. I informed Mr. Savage in my letter that he had the right to appeal OLC's withholding decision to the Office of Information Policy ("OIP") of the Department of Justice. *Id.*

10. On February 24, 2012, Mr. Savage filed an administrative appeal of OLC's decision with OIP. *See* Exhibit C, attached hereto.

11. On April 24, 2012, before OIP had ruled on the appeal, plaintiffs the New York Times Co. and Charlie Savage filed this lawsuit.

DOCUMENTS AT ISSUE

12. The two memoranda that are the subject of the FOIA request were cited in a formal OLC legal opinion: Memorandum Opinion for the Counsel to the President, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Recess*

Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (Jan. 6, 2012) ("Recess Appointments Opinion"). That opinion was published by OLC on its website on January 12, 2012, *see* http://www.justice.gov/olc/memoranda-opinions.html, and http://www.justice.gov/olc, and is available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

13. The Recess Appointments Opinion recounts that the Counsel to the President sought OLC's opinion regarding whether the President had authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, to make recess appointments during the period between January 3 and January 23, 2012, notwithstanding the convening of periodic pro forma sessions in the Senate. As the opinion states, OLC had previously advised the Counsel to the President that the President had the authority to make recess appointments during that time period. *Recess Appointments Opinion* at 1. That prior advice was provided orally.

14. On January 4, 2012, after receiving that oral advice, the President made four recess appointments. Two days later, on January 6, 2012, Virginia A. Seitz, Assistant Attorney General for the Office of Legal Counsel, provided the Counsel to the President with the Recess Appointments Opinion, a formal legal opinion that "memorialize[d] and elaborate[d]" on OLC's earlier oral advice. *Id.* That oral advice was both pre-decisional and part of a presidential deliberative process that culminated in the President's decision to make recess appointments in early January. In addition, that legal advice and the memoralization of it in the Recess Appointments Opinion are also pre-decisional to future decisions by this and future Presidents regarding potential recess appointments.

15. In consultation with the Counsel to the President, OLC determined that publication of the Recess Appointments Opinion would be appropriate. Accordingly, on January 12, 2012, OLC published the Opinion on its website.

16. In the course of its analysis, the published opinion cites other memoranda written by OLC. Two of these cited memoranda are the subject of this FOIA litigation.

17. The first of these memoranda is a February 20, 2004 Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General for the Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* ("Goldsmith Memorandum"). This Memorandum was prepared by OLC in response to a request from the Counsel to the President seeking OLC's opinion regarding whether the President had the authority to make recess appointments during the ongoing intrasession recess of the Senate of eleven days. *See* Recess Appointments Opinion at 6. The President's Counsel requested OLC's legal advice to assist the President in his deliberations regarding whether to make a recess appointment during that recess. The Goldsmith Memorandum advised the President's Counsel that OLC had concluded that the President had the authority to make a recess appointment during an intrasession recess of that length. In providing that advice, OLC provided a candid legal analysis of the issues. (On February 20, 2004, President Bush appointed William H. Pryor Jr. to serve as a judge on the U.S. Court of Appeals for the Eleventh Circuit.) Thus, the Goldsmith Memorandum involved a different deliberative process than that in which the Recess Appointments Opinion played a part.

18. After providing the Goldsmith Memorandum to the Counsel for the President, OLC, consistent with Office practice, considered whether to publish the Memorandum, and determined that it was not appropriate for publication. Accordingly, the Goldsmith

Memorandum has not been made public, and its existence was disclosed publicly only earlier this year, when it was cited in OLC's Recess Appointments Opinion.

19. The second memorandum that the plaintiffs seek is a Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions"* (Jan. 9, 2009) ("Elwood File Memorandum"). That File Memorandum contains a draft legal analysis, prepared for the Counsel to the President, that considers whether it would be lawful for the President to make recess appointments during an adjournment of the Senate, notwithstanding the Senate's meeting in periodic pro forma sessions approximately every three days. The draft legal analysis was prepared as possible legal advice to the Counsel to the President for use in connection with a potential presidential decisionmaking process. It was never finalized or issued as an opinion of the Office, but it was preserved in OLC's files as a record of OLC's work on the issue.

20. Because the Elwood File Memorandum consists of draft legal analysis that was never finalized as a formal OLC opinion, OLC of course did not consider publishing it. The Memorandum has not been made public. As with the Goldsmith Memorandum, the existence of the File Memorandum was disclosed publicly only when it was referred to in the Recess Appointments Opinion.

WITHHOLDING UNDER EXEMPTION FIVE

21. FOIA's Exemption Five exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption Five incorporates the traditional privileges that the government may assert in civil litigation against a private litigant and

exempts from FOIA's reach documents covered by such privileges. Exemption Five applies to the Goldsmith Memorandum because it is protected by the deliberative process, attorney-client, and presidential communications privileges, and to the Elwood File Memorandum because it is protected by the deliberative process privilege.

22. The Goldsmith Memorandum is protected by the deliberative process privilege because the Memorandum is pre-decisional and provided legal advice as part of a presidential deliberative process. The Memorandum is pre-decisional because it was prepared for the consideration of the President's Counsel to aid the President in deciding whether to make a recess appointment during the intrasession recess of the Senate then underway. The Memorandum is deliberative because it constitutes legal advice from OLC to the President's Counsel for use in the deliberations over whether to make a recess appointment during the Senate recess at issue and because it reflects the give-and-take and candor of an Executive Branch deliberative process. Compelled disclosure of the Memorandum would undermine the deliberative processes of the Executive Branch—in this case, of the President. Attorneys at OLC are often asked to provide advice and analysis with respect to very difficult and unsettled questions of law, and on matters that can be quite controversial. It is essential to the President in carrying out his mission and to the proper functioning of the Executive Branch overall that OLC's legal advice not be inhibited by concerns about the risk of public disclosure. Protecting the confidentiality of OLC's memoranda conveying legal advice provided in the context of presidential (or other Executive Branch) deliberations is essential both to ensure that creative and sometimes controversial legal arguments and theories may be examined candidly, effectively, and in writing, and to ensure that the President, his advisers, and other Executive Branch officials continue to request and rely on frank legal advice from OLC on sensitive matters.

23. The attorney-client privilege also applies to the Goldsmith Memorandum. The opinion was requested by the Counsel to the President, and the opinion was communicated in confidence by the Assistant Attorney General for OLC to the President's Counsel. Having been asked to provide legal advice, OLC attorneys stood in a special relationship of trust with the President and his Counsel. Just as disclosure of client confidences in the course of seeking legal advice would seriously disrupt the relationship of trust so critical when attorneys formulate legal advice to their clients, so too would disclosure of the legal advice itself undermine that trust.

24. Finally, because the Goldsmith Memorandum was communicated to the Counsel for the President, it is also subject to the presidential communications privilege. That privilege protects confidential communications that relate to possible presidential decisionmaking and that involve the President or his senior advisers. This privilege preserves the President's ability to obtain frank and informed opinions from his advisers and to make decisions in confidence. It is not limited to exchanges directly involving the President, but also protects communications between presidential advisers made in the course of formulating advice or recommendations for the President. The privilege protects such communications in order to ensure that the President's advisers may fully explore options and provide appropriate advice to the President without concerns about compelled disclosure. The Goldsmith Memorandum provided legal advice to one of the President's senior advisers, the Counsel to the President, regarding the President's authority to make a recess appointment during an ongoing intrasession recess of the Senate of eleven days. Accordingly, it is protected by the presidential communications privilege. Based on my long experience at OLC, I strongly believe that compelled disclosure of communications between OLC and the Office of the Counsel to the President could threaten the quality of presidential decisionmaking by impairing the deliberative process in which those decisions are made.

25. The Goldsmith Memorandum has never been publicly adopted or incorporated by reference by any policymaker as a basis for a policy decision. The only public disclosure regarding the Goldsmith Memorandum of which I am aware came in OLC's published January 2012 Recess Appointments Opinion, which made brief references to the Goldsmith Memorandum in the course of its legal analysis.

26. Notwithstanding the foregoing, OLC recognizes that several statements made in the Goldsmith Memorandum were quoted or paraphrased in the January 6, 2012 published opinion. Because they have now been made public, OLC has determined that it is appropriate to release these particular statements in the Goldsmith Memorandum in response to the NYT's FOIA request. On June 14, 2012, OLC, through counsel, provided to plaintiffs' counsel a redacted version of the Goldsmith Memorandum that releases these particular statements, while continuing to withhold the remainder of the Memorandum. A copy of the released portions of the Goldsmith Memorandum is attached hereto as Exhibit D.

27. The Elwood File Memorandum is protected from mandatory disclosure by the deliberative process privilege. The draft legal analysis contained in the File Memorandum was pre-decisional because it was prepared for the Counsel to the President for his office to use in connection with any future presidential decisionmaking processes regarding whether to make a recess appointment during an adjournment of the Senate notwithstanding periodic pro forma sessions. Moreover, because the analysis was never finalized, the Memorandum is pre-decisional to OLC's decision on what final legal position to take on the question presented. And the File Memorandum is quintessentially deliberative, reflecting the tentative thought processes and reasoning of the Office in a document reflecting draft legal analysis that was never finalized, regarding possible advice in connection with future potential deliberations. Draft OLC legal

analysis does not reflect the final views of OLC or the Department of Justice—particularly when, as here, no opinion was ever issued.

28. Compelled disclosure of draft OLC legal analysis would compromise important Executive Branch confidentiality interests. By their very nature, drafts are pre-decisional and deliberative—part of the exchange of ideas and proposals that accompanies careful legal decisionmaking. Drafts are particularly sensitive in the deliberative process that occurs within OLC, where OLC attorneys make extensive use of drafts to focus, articulate, and refine their legal advice and analysis. OLC attorneys circulate draft legal analysis for review, seeking out comments, edits, suggestions, and criticism. Inevitably, initial drafts of documents differ substantially from the final version, as attorneys adjust their analysis in response to input from their colleagues. It is not uncommon at OLC for legal conclusions themselves to change over the course of the deliberations. In the ordinary case, comparing the final copy of an OLC legal opinion against prior drafts would invariably reveal changes and revisions made by OLC during the deliberative process. Forced disclosure of such preliminary analysis would seriously inhibit the frankness and effectiveness of the attorneys engaged in this highly deliberative process, and the quality and integrity of any final result would inevitably suffer.

29. The Elwood File Memorandum has never been publicly adopted or incorporated by reference by any policymaker as a basis for a policy decision. The only public disclosure regarding the Elwood File Memorandum of which I am aware came earlier this year when there was a single reference to it in OLC's published Recess Appointments Opinion. *See Recess Appointments Opinion* at 4 ("We draw on the analysis developed by this Office when it first considered the issue. *See* Memorandum to File, from John P. Elwood, Deputy Assistant Attorney

General, Office of Legal Counsel, *Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic 'Pro Forma Sessions'* (Jan. 9, 2009).").

30. It is important to reflect on the adverse consequences that compelled disclosure of either the Goldsmith Memorandum or the Elwood File Memorandum—simply as a result of the references to them in the published Recess Appointments Opinion—would inflict on Executive Branch deliberative processes. As discussed above, such forced disclosure would seriously undermine substantial confidentiality interests of the Executive Branch (and in this case, of the President) in receiving full and frank advice from legal advisers. If the confidentiality of such advice is readily breached, the President and other Executive Branch officials will be reluctant to continue to request and rely on legal advice from OLC on sensitive matters—a result that would undermine the public's interest in an Executive Branch that strives to abide by the rule of law.

31. Moreover, OLC's own deliberative processes would be seriously impaired by the release of its confidential legal advice and of a draft OLC legal analysis that has never been finalized, in turn damaging Executive Branch deliberations and ultimately undercutting the interest in governmental transparency. To begin with, OLC would have a strong incentive to avoid publishing its significant legal opinions, such as the Recess Appointments Opinion, to avoid the risk that citations in such opinions to the Office's confidential prior work product would waive privileges attached to that prior work product. To the extent that concerns about compelled disclosure of cited materials would discourage OLC from publishing noteworthy opinions, the public would be deprived of the benefit of OLC's legal analysis on matters of significant public interest, such as the analysis set forth in the Recess Appointments Opinion.

32. Just as important, compelled disclosure of OLC's confidential legal advice and a draft legal analysis based on citation to those documents in a published OLC opinion could affect

how OLC presents its advice to its Executive Branch clients, because it would give OLC an incentive to refrain from providing a complete discussion in its advice regarding the grounds for its legal conclusions. Much like the manner in which a court, in writing a judicial opinion, strives to follow principles of *stare decisis* in reconciling legal conclusions in that opinion with the court's prior decisions, OLC endeavors to be consistent in its legal analysis, taking into account past legal advice provided by the Office and considering whether that prior advice is consistent with, could be reconciled with, or could be distinguished from the legal conclusions the Office is contemplating reaching in the opinion at hand. *See Best Practices* at 2 ("OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office."). Thus, as part of the rigorous analysis that goes into the development of OLC's formal legal opinions, and in an effort to fully explain its analysis to the recipients of its legal advice, OLC often cites the Office's prior legal advice to support or distinguish the advice provided in the current opinion. However, if the citation of OLC's previous legal advice and analysis waived applicable privileges against disclosure or otherwise rendered those privileges inapplicable if we were subsequently to publish the opinion, the Office would have a powerful incentive to change how it presents its advice to avoid the risk of such a waiver by eliminating any citation, discussion, or analysis of its relevant but unpublished prior legal advice and analysis. In addition, given the important role the drafting process plays in developing, focusing, articulating, and refining OLC's legal views, any adjustment to avoid citing prior, unpublished OLC legal advice risks undermining the rigor and candor with which those prior analyses are considered and addressed as OLC arrives at its final view on the question before it. As a result, OLC's Executive Branch clients would be deprived of a full and frank legal analysis that addresses all potentially applicable OLC precedent, and Executive Branch officials would also be deprived of the benefits

of past Executive Branch precedents, analyses, and wisdom as these officials contemplate new (or recurring) policy choices.

33. In sum, I respectfully submit that the Goldsmith Memorandum is covered by the deliberative process, attorney-client, and presidential communications privileges and that the Elwood File Memorandum is covered by the deliberative process privilege. Thus, both memoranda fall squarely within FOIA Exemption Five. The compelled disclosure of either document would seriously harm the deliberative processes of the government. Such disclosure also would disrupt the attorney-client relationship between OLC and the Office of the Counsel to the President and undermine the confidentiality of the President's decisionmaking process.

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

Executed: June 14, 2012

Paul P. Colborn

PAUL P. COLBORN