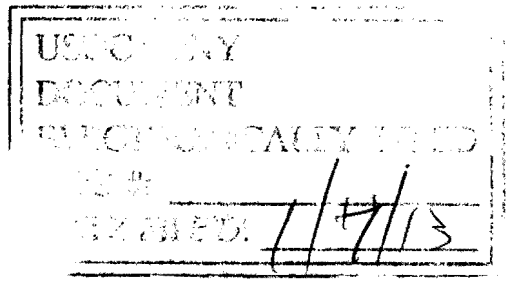

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and CHARLIE SAVAGE,

Plaintiffs,

-v-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

12 Civ. 3215 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs The New York Times Company and Charlie Savage (collectively, "New York Times") bring this action pursuant to the Freedom of Information Act ("FOIA"), seeking disclosure of two memoranda prepared by the Department of Justice's Office of Legal Counsel ("OLC") on the President's constitutional power to make recess appointments during pro forma sessions of the Senate. Defendant United States Department of Justice ("DOJ") claims these memoranda are protected from disclosure under the "deliberative process privilege." See 5 U.S.C. § 552(b)(5); Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005). The New York Times contends that DOJ waived any privilege when, in the wake of President Barack Obama's recess appointments of the first director of the Consumer Financial Protection Bureau and three members of the National Labor Relations Board, OLC published a memorandum on recess appointments that cited the two memoranda that plaintiffs seek. The parties cross-moved for summary judgment in June 2012

and the Court heard oral argument on July 19, 2012. Having now fully considered the parties' written and oral arguments, as well as their supplemental written submissions, the Court concludes that the memoranda are privileged and hereby grants DOJ's motion for summary judgment, denies plaintiffs' cross-motion for summary judgment, and directs entry of final judgment.

"Summary judgment is the preferred procedural vehicle for resolving FOIA disputes." Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 723 (S.D.N.Y. 2012) (quoting Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys., 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009)). Although a party requesting summary judgment must demonstrate that there is "no genuine dispute as to any material fact" and that he is "entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(a), here the essential facts are undisputed:

On January 4, 2012, President Barack Obama appointed Richard Cordray to the Consumer Financial Protection Bureau and three others to the National Labor Relations Board. Plaintiffs' Complaint dated Apr. 24, 2012 ("Compl.") ¶ 17. Although these appointments took place during the Senate's annual 20-day winter break, id. ¶ 18, the appointments generated immediate legal and political controversy, id. ¶ 21. Presidents have traditionally not made appointments during Senate recesses lasting fewer than

10 days, id. ¶ 19, and, during the Senate's winter break, the Senate held "pro forma" sessions every third day. Id.

Pro forma sessions, first employed during recesses in 2007, typically last a few seconds and require the presence of only one Senator. See Declaration of David E. McCraw dated June 27, 2012, Ex. 4 ("Seitz Memorandum") at 2. The Senate does not conduct normal business during these sessions; and the sessions' apparent purpose is to limit Presidential recess appointments. See id. at 2-3. Since 2011, members of the Republican-led House of Representatives have refused to pass any resolution to allow the Senate to recess for more than three days for the remainder of the President's term. Id.; see U.S. CONST. art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days."). Accordingly, President Obama's appointments during the Senate's winter break -- despite the Senate's pro forma sessions -- prompted commentators, academics, and government officials to debate whether there was a legal basis for permitting the President to make appointments when the Senate's recesses formally lasted no more than three days. Compl. ¶ 21.

The Office of Legal Counsel responded to the debate on January 12, 2012 by publishing a memorandum from Virginia Seitz, Assistant Attorney General for the OLC, to Kathryn Ruemmler, the White House Counsel, on January 6, 2012 (the "Seitz Memorandum").

Id. ¶¶ 26-27. The twenty-three page memorandum argues that pro forma sessions cannot prevent the President from exercising his constitutional power to appoint officials during a recess. Id. ¶ 27; see U.S. CONST. art. II, § 2, cl. 3. The Memorandum reasons that when the Senate is not available to perform its advise-and-consent role -- such as during its winter break -- the Senate is in recess for the purposes of the Recess Appointments Clause. See Seitz Memorandum at 23.

Although the Seitz Memorandum is dated January 6, 2012 -- two days after the President's appointments -- its stated purpose was to "memorialize[] and elaborate[]" earlier oral advice given to the President. Seitz Memorandum at 1. The memorandum is advisory; language such as "[w]e believe" and "[w]e conclude" is common. See, e.g., id. at 9, 18. Its concluding paragraph is illustrative of its tone: "In our judgment, . . . the convening of periodic pro forma sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause." Id. at 23.

However, the Seitz Memorandum cites, inter alia, the two earlier memoranda that are at issue in this case. The first, "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)" ("Goldsmith Memorandum"), is referenced six times:

> This Office has consistently advised that "a recess during a session of the Senate, at least if it is sufficient length, can be a 'Recess' within the meaning of the Recess Appointments Clause' during which the President may exercise his power to fill vacant offices." [Goldsmith Memorandum at 1].
>
> . . .
>
> "The number of days in a recess period is ordinarily calculated by counting the calendar days running from the day after the recess begins including the day the recess ends." Goldsmith Memorandum at 1.
>
> . . .
>
> The Department of Justice "has long interpreted the term 'recess' to include intrasession recesses if they are of substantial length." . . . see also Goldsmith Memorandum at 1-2
>
> . . .
>
> Attorneys General and this Office have repeatedly affirmed the President's authority to make recess appointments during intrasession recesses of similar or shorter length. See, e.g., Goldsmith Memorandum at 2-3 (recognizing President's authority to make a recess appointment during an intrasession recess of eleven days).
>
> . . .
>
> And both this Office and the Department of Justice in litigation have recognized the argument that 'the three days set by the Constitution as the time during which one House may adjourn without the consent of the other, U.S. CONST. art. I, § 5, cl. 4, is also the length of time amounting to a 'Recess' under the Recess Appointments Clause." Goldsmith Memorandum at 3.
>
> . . .

> [The] recess appointment [of Judge William H. Pryor in 2004] was approved by this Office, see Goldsmith Memorandum, and upheld by the court of appeals en banc, see Evans v. Stephens, 387 F.3d 1220.

Seitz Memorandum at 1 & n.1, 5-6, 9 nn.13, 21.

The second memorandum, "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 Memorandum"), is referenced once in an introductory paragraph:

> The question [about recess appointments despite pro forma sessions] is a novel one, and the substantial arguments on each side create some litigation risk for such appointments. We draw on the analysis developed by this Office when it first considered the issue. See [Elwood Memorandum].

Id. at 4.

The same day that OLC released the Seitz Memorandum, Jay Carney, the President's Press Secretary, fielded questions from reporters about the President's recess appointments and more specifically about the Seitz Memorandum. In response to questions about whether the Administration was prepared for litigation over the legitimacy of the President's recess appointments, Carney answered, "Well, I would just refer you to the OLC memo." Press Briefing by Press Secretary Jay Carney, 1/12/2012, available at http://www.whitehouse.gov/the-press-office/2012/01/12/press-briefing-press-secretary-jay-carney-1122012 [hereinafter "Press Briefing"].

On February 14, 2012, New York Times reporter Charlie Savage submitted a FOIA request to OLC seeking a copy of the Goldsmith and Elwood memoranda. Compl. ¶ 32; see 5 U.S.C. § 552(a)(3). By letter dated February 22, 2012, OLC denied the request. Compl. ¶ 33. OLC responded that the documents are "protected by the deliberative process, attorney-client, and/or presidential communications privileges, and they are not appropriate for discretionary release at this time." Id. ¶ 35; see 5 U.S.C. § 552(b)(5). The New York Times Company and Charlie Savage appealed the denial on February 24, 2012. Compl. ¶ 37. After more than 20 days passed without any response by OLC, the New York Times initiated this action on April 24, 2012. Id. ¶ 1.

Against this factual background, the Court turns to the issues of law. The Freedom of Information Act requires that agencies make available "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." 5 U.S.C. § 552(a)(2)(B). "Upon request, FOIA mandates disclosure of records held by a federal agency, see 5 U.S.C. § 552, unless the documents fall within enumerated exemptions, see § 552(b)." Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). At issue here is whether the Goldsmith and Elwood Memoranda are protected under FOIA's fifth exemption ("Exemption 5") which permits an agency to withhold "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); see La Raza, 411 F.3d at 355-56. By enacting 5 U.S.C. § 552(b)(5), "Congress intended to incorporate into the FOIA all the normal civil discovery privileges," Hopkins v. U.S. Dep't of Hous. & Urban Dev., 929 F.2d 81, 84 (2d Cir. 1991), which "includ[e] the work-product doctrine, and executive, deliberative process and attorney-client privileges." La Raza, 411 F.3d at 356.

"Consistent with FOIA's purposes" of promoting "honest and open government," FOIA's "exemptions are narrowly construed." Id. at 355-56. The government has the burden of proving that the exemption applies. Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice, 697 F.3d 184, 194 (2d Cir. 2012). Federal courts exercise plenary review of an agency's decision to withhold a document. See AT&T Inc. v. FCC, 582 F.3d 490, 496 (3d Cir. 2009), rev'd on other grounds, 131 S. Ct. 1177 (2011).

The first privilege that DOJ cites for withholding the Goldsmith Memorandum, and the only privilege DOJ cites for withholding the Elwood Memorandum, is the deliberative process privilege. The deliberative process privilege "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." Hopkins, 929 F.2d at 84; NLRB v. Sears, Roebuck & Co., 421 U.S.

132, 150. It is a "sub-species of work-product privilege that covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." La Raza, 411 F.3d at 356 (quoting Tigue v. Dep't of Justice, 312 F.3d 70, 76 (2d Cir. 2002)).

An agency document may be withheld pursuant to the deliberative process privilege if it is: "(1) predecisional, i.e., prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, i.e., actually . . . related to the process by which policies are formulated." Brennan Ctr., 697 F.3d at 194 (internal quotation marks omitted) (alteration in original) (quoting La Raza, 411 F.3d at 356). The "predecisional" inquiry does not turn on "the ability of an agency to identify a specific decision in connection with which a memorandum is prepared." Sears, 421 U.S. at 165. Rather, a memorandum may contain "recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." Id. A "deliberative" document is one that, among other factors, "reflect[s] the personal opinions of the writer rather than the policy of the agency." Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999).

There is no serious dispute that the Goldsmith and Elwood Memoranda are predecisional and deliberative. Indeed,

plaintiffs concede that at the time the Memoranda in dispute here were authored they were likely protected by the deliberative process privilege. See Memorandum of Law in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment dated June 28, 2012 ("Pls. Opp. Br.") at 6 ("There is a time-warp quality to DOJ's arguments here . . . . [W]ere we requesting the memoranda at their respective inceptions, DOJ may well have prevailed."); see also Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) (noting that "a document from a subordinate to a superior official is more likely to be predecisional" before holding memorandum sent to Assistant Secretary of the Army from his general counsel regarding legal strategy in light of controversy was a "classic case of the deliberative process at work"). Plaintiffs instead argue, however, that the Obama Administration waived any privilege the Memoranda may have once been entitled to when they "bec[ame] the basis of official government policy, . . . used by the executive branch in its dealings with the public." Pls. Opp. Br. at 6.

The government may be found to have waived the privilege otherwise afforded to a document under the deliberative process privilege and be required to disclose the document in two situations. First, the privilege is waived (or, perhaps, never attaches) "when the document is more properly characterized as an

opinion or interpretation which embodies the agency's effective law and policy, in other words, its 'working law,'" Brennan Ctr., 697 F.3d at 195 (internal quotation marks and alterations omitted) (quoting Sears, 421 U.S. at 153). Second, the privilege is waived if the contents of the document have been expressly "adopted, formally or informally, as the agency position on an issue or [are] used by the [government] in its dealings with the public." Id. at 195 (alteration in original) (quoting La Raza, 411 F.3d at 356-57). The plaintiffs contend that both exceptions require disclosure of the Goldsmith and Elwood Memoranda. The Court evaluates the applicability of each exception in turn, and concludes that neither applies.

Starting with the "working law" exception, the Second Circuit in Brennan Center held that this exception is inapplicable in the context of an advisory OLC memorandum. Id. at 203. The working law exception is "animated by the affirmative provisions of FOIA, and documents must be disclosed if more akin to that which is required by the Act to be disclosed than that which may be withheld under Exemption 5." Id., 697 F.3d at 200 (internal citation omitted) (citing 5 U.S.C. § 552(a)(2)(A)-(C)). To allow otherwise would violate FOIA's "strong congressional aversion to 'secret (agency) law.'" Sears, 421 U.S. at 153 (internal citation omitted). In Brennan Center, the Second Circuit noted that OLC lacks the authority to make policy

decisions, and that OLC memoranda are merely advisory; they "inform[] the decisionmaking of Executive Branch officials." Brennan Ctr., 673 F.3d at 203 (quoting Declaration of Paul P. Colborn at 2, J.A. 318 (Mar. 11, 2011)). Accordingly, the Court of Appeals held that OLC memoranda "do[] not constitute working law or [OLC's] effective law and policy." Id. (internal quotation marks omitted).

Similarly here, the Constitution grants the power to make recess appointments to the President, not OLC. U.S. CONST. art. II, § 2. Neither the Seitz Memorandum nor the Goldsmith and Elwood Memoranda that it cites are the working law of OLC, nor are they "effectively binding" on the President. Brennan Ctr., 673 F.3d at 203; accord Brinton v. Dep't of State, 636 F.2d 600, 605 (D.C. Cir. 1980) (legal memoranda from State Department's Office of Legal Adviser to Secretary of State not working law as Office of Legal Adviser "has no authority to make final decisions" concerning U.S. policy). Indeed, OLC specifically disclaims any such authority here, Declaration of Paul P. Colborn dated June 14, 2012 ("Colburn Decl.") ¶¶ 2, 13-14. Thus, the working law exception is inapplicable.

Turning to the adoption-or-incorporation exception, the Supreme Court has explained that the policy reasons for allowing an agency to withhold a predecisional document no longer apply when "the reasoning becomes that of the [decisionmaker] and

becomes its responsibility to defend." Sears, 421 U.S. at 161. In such a circumstance, the withheld document "loses its predecisional and deliberative character, and accordingly, the deliberative process privilege no longer applies." La Raza, 411 F.3d at 356 (citing Coastal States Gas, 617 F.2d at 866). To determine whether a decisionmaker has expressly adopted or incorporated by reference a memorandum previously covered by Exemption 5, the Second Circuit in La Raza noted that there is no "bright-line test" that calls for "specific, explicit language" of adoption. Id. at 361 n.5. The Court "must examine all the relevant facts and circumstances in determining whether express adoption or incorporation by reference has occurred." Id. Here then, because OLC is not the relevant decisionmaker, see Brennan Ctr., 697 F.3d at 203, the Court must determine whether the President expressly adopted or incorporated by reference the Seitz Memorandum and, in turn, the Elwood and Goldsmith Memoranda on which the Seitz Memorandum relies.

"Mere reliance on a document's conclusions does not necessarily involve reliance on a document's analysis; both will ordinarily be needed before a court may properly find adoption or incorporation by reference." Id. at 358. This is because a decisionmaker may agree with a memorandum's conclusions but for unspecified and different reasons; alternatively, the memorandum may be consistent with a decision the decisionmaker was already

contemplating. In either case the memorandum remains predecisional and subject to the deliberative process privilege. See Afshar v. Dep't of State, 702 F.2d 1125, 1143 n.22 (D.C. Cir. 1983) ("If the agency merely carried out the recommended decision without explaining its decision in writing, we could not be sure that the memoranda accurately reflected the decisionmaker's thinking.").

Thus, where a decisionmaker, "having reviewed a subordinate's non-binding recommendation, makes a 'yes or no' determination without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate's report." La Raza, 411 F.3d at 359 (citing Afshar, 702 F.2d at 1143 n.22). A "failure" to provide evidence that an agency decisionmaker "adopted the reasoning of [a memorandum] . . . is fatal" to an adoption finding. Wood v. FBI, 432 F.3d 78, 84 (2d Cir. 2005) (Sotomayor, J.) (no adoption of reasoning of DOJ memorandum where high-ranking DOJ official noted on memorandum that he would decline prosecution); accord Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 179 (1975) (no adoption when "it is not possible to know whether the [decisionmaker] agreed with the reasoning of the [report] or just its conclusion").

As applied to this case, the adoption-or-incorporation exception is not sufficient to overcome the deliberative process

privilege. There is no evidence suggesting that the President expressly adopted or incorporated by reference the reasoning of the Goldsmith or Elwood Memoranda. Plaintiffs' argument relies on two pieces of evidence: (1) the chronology of consultations between OLC and the President; and (2) a post-hoc press conference held by Jay Carney, the President's Press Secretary. Neither is sufficient.

Regarding the chronology, the evidence shows that the President met with OLC attorneys prior to naming his recess appointees on January 4, 2012, that the Seitz Memorandum was sent to the White House Counsel on January 6, 2012, memorializing the advice given orally to the President, and that OLC published the Seitz Memorandum on January 12, 2012, after consulting with White House Counsel. Colborn Decl. ¶¶ 14-15. At the most basic level, this timeline suggests that the President did expressly adopt the main conclusion of the Seitz Memorandum, i.e., that it was constitutional for him to make recess appointments during pro forma sessions held by the Senate. But this does not show that he adopted the reasoning that led the OLC to conclude the pro forma sessions did not preclude recess appointments, let alone the specific reasons for which the Goldsmith and Elwood Memoranda were cited. See Wood, 432 F.3d at 84.

Similarly, in Brennan Center, the United States Agency for International Development ("USAID") sought advice from OLC on

whether a statute requiring that NGOs that receive federal funding for HIV/AIDS and anti-trafficking work have a policy explicitly opposing prostitution and sex trafficking would violate the First Amendment if applied to domestic organizations. Brennan Ctr., 697 F.3d at 188-90. The Second Circuit concluded that the agency had expressly adopted one OLC memorandum by making public references to that memorandum in support of its decision not to apply the statute to domestic organization. See id. at 204 (quoting a USAID guidance document citing the memorandum and the congressional testimony of USAID U.S. Global AIDS Coordinator as saying he was "simply following the legislation and [OLC] advice to implement [the statute]"). By contrast, however, the Court of Appeals concluded that USAID had not expressly adopted a second set of OLC memoranda that it had never referred to in public. Id. at 205-07. Importantly, the Court of Appeals reaffirmed its holding in Wood that there was no basis to find express adoption of the reasoning of the memorandum even if the agency had changed its policy in a manner consistent with the conclusions of the memorandum. Id. at 206; Wood, 432 F.3d at 84. Indeed, the Court of Appeals noted that even though the agency stated that it had updated its policy (now requiring domestic organizations to have a policy opposing prostitution and sex trafficking) as "[c]onsistent with guidance from the U.S. Department of Justice," Brennan Ctr., 697 F.3d at 206 (brackets

in original), "[s]uch reference to guidance from the DOJ does not . . . indicate that USAID . . . adopted the reasoning of the July memoranda," id.

In other words, circumstantial evidence of action in conformity with the conclusion of an OLC memorandum is not sufficient to show express adoption of the reasoning of that memorandum, let alone the reasoning and conclusion of the memoranda cited in that memorandum. Id. The President was free to agree with the conclusion of the OLC, but just as free not to rely on the reasoning of that conclusion. See La Raza, 411 F.3d at 359 (requiring evidence that decisionmaker "embraced the OLC's reasoning as [his] own").[1] Additionally, the fact that the White House Counsel consented to OLC publishing the Seitz Memorandum cannot be read as the President expressly adopting its reasoning. See Brennan Ctr., 697 F.3d at 204 nn.15-16 (noting that OLC letters released by OLC, not decisionmaking agency, did not "aid

[1] Even if one could not discern a legal justification for the recess appointments other than the opinion offered by OLC, the Second Circuit has held this is still not enough to show express adoption or incorporation by reference. See Brennan Ctr., 697 F.3d at 197 (quoting Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168 (1975)). Notably, the President's discretionary exercise of his power to make recess appointments places this case in a significantly different posture than that in Brennan Center, where the agency was "required to consider or implement" a specific policy and relied on OLC memoranda to interpret the relevant statute and implement that policy. Id. at 203 n.14.

in establishing either express adoption or incorporation by reference"); Colborn Decl. ¶ 15.

As for the press conference held by Jay Carney, Carney's statements are also insufficient to show express adoption or incorporation by reference of the reasoning of the Goldsmith and Elwood Memoranda by the President.[2] The statements made by Carney do not on their face show adoption and incorporation of the Seitz Memorandum's reasoning as relevant to the President's decisionmaking process. Carney referenced the Seitz Memorandum in response to questions from a reporter. When the reporter noted that the Seitz Memorandum was written after the President made his decision and asked whether "the decision was made without the approval of the Department of Justice," Carney noted that OLC had provided the President a verbal opinion prior to the decision. He then noted that the Seitz Memorandum was "lengthy" and that it is "standard . . . for [OLC written opinions] to be developed over a period of time. And . . . the timeframe for this is very similar to, in my understanding, to previous occasion[s]." Press Briefing. This suggests that the verbal opinion given to the President may not have reflected everything contained in the Seitz Memorandum, and makes it next to impossible for the Court to conclude that the President

[2] The Court notes that Carney, as the President's Press Secretary, is not the relevant decisionmaker. His statements are only relevant as circumstantial evidence of the President's

expressly adopted the reasoning of an as-yet written memorandum that may or may not have been fully communicated to him. Moreover, even assuming arguendo that the Seitz Memorandum was provided to the President in full, the press conference does not show express adoption of the reasoning of the Elwood or Goldsmith Memoranda. When asked by a reporter whether the White House was prepared for litigation over the appointments, Carney stated "I would just refer you to the OLC memo." Carney then dismissed assertions by Congress that they had remained in session.

In Brennan Center, the agency had publicly referenced a September 2004 OLC letter but had not referenced the prior July 2004 OLC draft memoranda plaintiffs sought. The Second Circuit concluded that "[t]he lack of any specific reference to the July 2004 memoranda by either USAID or HHS are further indications that the July memoranda were in fact parts of the predecisional and deliberative process that yielded the September 2004 letter," and therefore privileged. Brennan Ctr., 697 F.3d at 206. Similarly here, even assuming Carney's statements might be sufficient to show adoption of the publicly disclosed Seitz Memorandum, they are not specific enough to show adoption of the reasoning of the predecisional Goldsmith and Elwood Memoranda that the New York Times seeks. See also Seitz Memorandum at 4

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decision.

(noting OLC "dr[e]w on the analysis developed . . . when [it] first considered the issue" in the Elwood Memorandum).

Moving back an administration, the New York Times argues in the alternative that President George W. Bush expressly adopted or incorporated by reference the Goldsmith Memorandum's conclusion and reasoning when President Bush appointed Judge William H. Pryor to the Eleventh Circuit in 2004 as a recess appointment. But where a decisionmaker, "having reviewed a subordinate's non-binding recommendation, makes a 'yes or no' determination without providing any reasoning at all, a court may not infer that the [decisionmaker] is relying on the reasoning contained in the subordinate's report." La Raza, 411 F.3d at 359. Without any evidence that President Bush "embraced the OLC's reasoning as [his] own," id. at 358-59, the Court may not treat the Goldsmith Memorandum as a description of the White House's policy toward recess appointments.

Because the Court concludes that the Memoranda are protected by the deliberative process privilege, the Court does not address DOJ's alternative arguments that the Goldsmith Memorandum is also protected by executive privilege and attorney-client privilege. Accordingly, because the Goldsmith and Elwood Memoranda are protected by the deliberative process privilege, and because the government has not waived that privilege, DOJ's motion for summary judgment is hereby granted, and the New York

Times' cross-motion for summary judgment is hereby denied. The Clerk of the Court is directed to enter judgment for defendant and to close the case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
January 4, 2013