

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE PROTECT DEMOCRACY PROJECT,
INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE, U.S.
DEPARTMENT OF DEFENSE, U.S.
DEPARTMENT OF STATE,

Defendants.

Civil Action No. 20-172 (RC)

**REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

Anne H. Tindall
The Protect Democracy Project, Inc.
2020 Pennsylvania Ave., NW #163
Washington, DC 20006
T: (202) 579-4582 | F: (929) 777-8428
anne.tindall@protectdemocracy.org

Benjamin L. Berwick
The Protect Democracy Project, Inc.
15 Main St., Suite 312
Watertown, MA 02472
T: (202) 579-4582 | F: (929) 777-8428
ben.berwick@protectdemocracy.org

John Paredes (*pro hac vice*)
The Protect Democracy Project, Inc.
115 Broadway, 5th Floor
New York, NY 10006
T: (202) 579-4582 | F: (929) 777-8428
john.paredes@protectdemocracy.org

Counsel for Plaintiff

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Cases (cont.)

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Wadelton v. Dep’t of State,
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Catie Edmondson & Charlie Savage, *House Votes to Restrain Iran War Powers*, N.Y. Times (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html>..... 4

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Catie Edmondson, *Mike Lee, a G.O.P. Senator, Calls Administration’s Iran Briefing ‘Insulting’*, N.Y. Times (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/us/politics/senator-mike-lee-iran-briefing.html> 4

Charlie Savage, *Trump Had Power to Attack Syria Without Congress, Justice Dept. Memo Says*, N.Y. Times (Jun. 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/trump-war-powers-syria-congress.html>..... 15

	Page(s)
Other Authorities (cont.)	
Craig Whitlock, <i>At War with the Truth</i> , Wash. Post (Dec. 9, 2019), https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-confidential-documents/	17
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Eliot L. Engel, Statement on the White House’s Latest Justification for Soleimani Killing (Feb. 14, 2020), https://foreignaffairs.house.gov/press-releases?ID=CB9812EA-2FE2-4643-9DEF-178FDFAD9A95	12
Joe Gould, <i>Democrats press Pompeo over Trump’s ‘failure’ of an Iran policy</i> , DefenseNews (Feb. 28, 2020), https://www.defensenews.com/congress/2020/02/28/dems-tell-pompeo-trumps-iran-policy-is-failing-in-contentious-hearing/	1
Karen DeYoung, <i>Trump says ‘it doesn’t really matter’ if Iranian general posed an imminent threat</i> , Wash. Post (Jan. 13, 2020), https://www.washingtonpost.com/national-security/trump-says-it-doesnt-really-matter-if-iranian-general-posed-an-imminent-threat/2020/01/13/c9f7ea1c-362e-11ea-9541-9107303481a4_story.html	12
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Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (Feb. 14, 2020), https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf	12
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Peter Baker, <i>et al.</i> , <i>Seven Days in January: How Trump Pushed U.S. and Iran to the Brink of War</i> , N.Y. Times (last updated Jan. 13, 2020), https://www.nytimes.com/2020/01/11/us/politics/iran-trump.html	4

Other Authorities (cont.)

Press Release, House Committee on Rules, “Chairman McGovern,
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<https://rules.house.gov/press-releases/chairman-mcgovern-ranking-member-cole-announce-rules-committee-hearing-examining-ways>..... 4, 10

Steven A. Engel, Ass’t Att’y Gen., OLC, April 2018 Airstrikes
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INTRODUCTION

Last Friday, Secretary of State Mike Pompeo appeared before the House Foreign Affairs Committee, where he endured sharp questioning from Members of Congress about the fact that, despite his own previous assertions that imminent threats to U.S. embassies justified the Trump administration's January 2, 2020 targeted killing of Iran's top general, Qassim Soleimani, neither the classified briefing the administration provided to Congress nor the legal justification the administration supplied as required by the War Powers Resolution provided any specific information about such imminent threats.¹ Noting that the statements of imminence occurred in response to press inquiries and that more circumspect explanations appeared in mandatory reporting to Congress, former CIA officer and current Representative Abigail Spanberger observed that "[w]hen the administration was constrained by the law to tell the truth . . . [it] abandon[ed] the talking points."² Protect Democracy's FOIA requests seek the actual rationale and legal justification for the administration's decision to kill Iran's top general without consulting Congress, as opposed to the exceedingly vague contents of its January 31 and February 14 legally required reports to Congress or the talking points its representatives uttered on Sunday morning news programming. The House of Representatives began hearings *today* on reasserting its powers over war-making decisions like the strike against Soleimani, and a House vote on a Senate-passed measure to curtail future military against Iran is imminent. The window for informed public comment on this congressional deliberation could close at any time. Protect Democracy's interest in this information—as well as the public's and the Congress's—is acute

¹ Joe Gould, *Democrats press Pompeo over Trump's 'failure' of an Iran policy*, DefenseNews (Feb. 28, 2020), <https://www.defensenews.com/congress/2020/02/28/dems-tell-pompeo-trumps-iran-policy-is-failing-in-contentious-hearing/>.

² *Id.*

and justifies emergency relief in the form of a preliminary injunction. Nothing in Defendants' opposition suggests otherwise.

ARGUMENT

I. **Protect Democracy's Motion Properly Seeks Relief This Court Is Empowered to Grant.**

The Protect Democracy Project, Inc. ("Protect Democracy") properly brings this preliminary injunction motion before the court. Defendants' argument that a preliminary injunction motion is "*not* intended to provide a litigant with the means to bypass the litigation process and achieve rapid victory," Opp'n at 6, ignores the proper role of the court as a backstop to noncompliant agency responses to FOIA requests. *See Daily Caller v. U.S. Dep't of State*, 152 F. Supp. 3d 1, 10 (D.D.C. 2015) ("[W]here a requester seeks judicial review . . . the agency may continue to process the request, and the court . . . will supervise the agency's ongoing progress, ensuring that the agency continues to exercise due diligence in processing the request.") (citation omitted). As the D.C. Circuit has explained, "The FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). "On numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate, have granted such motions." *EPIC v. Dep't of Justice*, 416 F. Supp. 2d 30, 35 (D.D.C. 2006) ("*EPIC*") (citing cases). This is especially true where, as here, Congress is actively considering "the same subject matter" and "the requested documents are sought in order to inform the public on a matter of extreme national concern." *Ctr. for Public Integrity v. U.S. Dep't of Defense*, 411 F.3d 5, 10 (D.D.C. 2019). Protect Democracy respects that a preliminary injunction is not a routine remedy. At the same time, requests for records directly relevant to current congressional debate on the President's power to take actions that could lead to war with Iran are not routine FOIA requests.

Defendants argue that preliminary injunction motions are “unfair to other FOIA requesters” because they enable the movant to “jump[] ahead of other requests.” Opp’n at 6-7. But in the very case Defendants cite in support of this argument, the court *granted* a preliminary injunction, acknowledging that in “the extraordinary case[,] . . . the public interest favors placing [a movant’s] requests ahead of other requests in the . . . FOIA queue.” *Am. Oversight v. U.S. Dep’t of State*, 414 F. Supp. 3d 182, 187 (D.D.C. 2019); *see also* *Ctr. for Pub. Integrity*, 411 F. Supp. 3d at 14 (concluding that although “[t]he grant of a preliminary injunction in [that] case [would] likely place Plaintiff’s request ahead of others in Defendants’ FOIA queues[,] extraordinary circumstances . . . warrant[ed] such line-cutting”).

The same line-jumping is warranted here. In *Center for Public Integrity*, FOIA requesters sought records including communications between DOD and the Office of Management and Budget regarding the release of congressionally appropriated funds for military aid to Ukraine. *Id.* at 8. The Court recognized that the documents at issue were directly relevant to congressional impeachment proceedings stemming from President Trump’s direction that military aid to Ukraine be withheld. *Id.* at 10. Under those circumstances, because “[o]nly an informed electorate can develop its opinions and persuasively petition its elected officials to act in ways which further the aims of those opinions [W]here the records are sought to inform an imminent public debate, courts in this Circuit have granted preliminary injunctions.” *Id.* This case is analogous to *Center for Public Integrity*. Protect Democracy seeks records related to President Trump’s ordering the targeted killing of Iran’s top general and second-most powerful government official—an act engendering obvious risk of military escalation—without consulting Congress. When the executive branch briefed Congress after the fact, that briefing left the

legislative branch deeply dissatisfied and concerned.³ On January 9, 2020, the House of Representatives passed a resolution pursuant to the War Powers Resolution that would require President Trump to seek congressional authorization before taking further military action against Iran.⁴ The Senate passed a similar resolution on February 13, in a bipartisan 55-45 vote.⁵ House Speaker Nancy Pelosi then announced that the House would take up the Senate-passed legislation “in the coming weeks.”⁶ The House Rules Committee held a related hearing *today*,⁷ and a House floor vote on the Senate-passed resolution is imminent. Preliminary relief is justified here so that “an informed electorate can develop its opinions and persuasively petition its elected officials to act in ways which further the aims of those opinions.” *Ctr. for Public Integrity*, 414 F. Supp. 3d at 10.

³ Peter Baker, *et al.*, *Seven Days in January: How Trump Pushed U.S. and Iran to the Brink of War*, N.Y. Times (last updated Jan. 13, 2020), <https://www.nytimes.com/2020/01/11/us/politics/iran-trump.html> (“What really came across was a sense of disdain and contempt for the legislative branch,” said Representative Gerald E. Connolly. “They didn’t even pretend to be engaged in information sharing and consultation.”); Catie Edmondson, *Mike Lee, a G.O.P. Senator, Calls Administration’s Iran Briefing ‘Insulting’*, N.Y. Times (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/us/politics/senator-mike-lee-iran-briefing.html> (Senator Mike Lee described the briefing for Senators as “probably the worst briefing I’ve ever seen, at least on a military issue, in the nine years I’ve served in the United States Senate.”).

⁴ Catie Edmondson & Charlie Savage, *House Votes to Restrain Trump’s Iran War Powers*, N.Y. Times (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/us/politics/trump-iran-war-powers.html>.

⁵ Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. Times (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html>.

⁶ *Id.*

⁷ Press Release, House Committee on Rules, “Chairman McGovern, Ranking Member Cole Announce Rules Committee Hearing Examining Ways to Assert Congress’ Constitutional Authority,” Feb. 25, 2020, <https://rules.house.gov/press-releases/chairman-mcgovern-ranking-member-cole-announce-rules-committee-hearing-examining-ways>.

Defendants cite a string of cases to support their claim that courts in this district “routinely deny requests for preliminary injunctions in FOIA cases,” and should do so here. Opp’n at 7-8. None of them is analogous to the facts in this case. The most similar to this one is *Protect Democracy Project v. Department of Defense*, 263 F. Supp. 3d 293, 303 (D.D.C. 2017) (“*Protect Democracy I*”). There, the court denied in part Protect Democracy’s motion for a preliminary injunction, finding that the public interest weighed against ordering production by a date certain. It reasoned that “while U.S.–Syria tensions have been rising, there is no reason to expect further hostilities within any definite time window—for example, next week or next month.” 263 F. Supp. 3d at 302. The expedited congressional deliberations in this case serve as the ticking time bomb that the court found lacking in *Protect Democracy I*.⁸

⁸ The other cases Defendants cite are even more easily distinguishable from the case at bar. Three of the four cases cited are denials of preliminary injunctions for expedited processing. These are inapposite to this case, where the government’s response to Protect Democracy’s earlier preliminary injunction motion for expedited processing was to grant the relief sought without litigation. See *Allied Progress v. Consumer Fin. Prot. Bureau*, No. CV 17-686 (CKK), 2017 WL 1750263, at *4-6 (D.D.C. May 4, 2017) (declining to order expedited processing because plaintiff had not shown it was a “person primarily engaged in information dissemination,” and had not demonstrated either an “urgency to inform” the public or a “substantial public interest in the records sought”); *Waderton v. Dep’t of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013) (declining to order expedited processing because plaintiff had not shown an “urgency to inform”); *Long v. Dep’t of Homeland Sec.*, 436 F. Supp. 2d 38, 43 (D.D.C. 2006) (same). In the fourth case, *Landmark Legal Foundation v. E.P.A.*, 910 F. Supp. 2d 270 (D.D.C. 2012), the court ruled that a delayed response to a FOIA request would not impair the plaintiff’s ability to file a lawsuit against an EPA rule. *Id.* at 277. On the other hand, in the instant matter, a belated lawsuit cannot provide effective redress for missed opportunity to contribute key information to a congressional deliberation regarding the President’s war powers.

Thus, the cited cases stand only for the proposition that under the facts presented in each case, the plaintiff could not satisfy the requirements for a preliminary injunction. All the cases recognize that under the right circumstances, courts can issue preliminary injunctions to expedite a FOIA request.

II. Protect Democracy Is Likely to Succeed on the Merits.

Under FOIA, Defendants were required to make a “determination” regarding Protect Democracy’s FOIA requests within a specified timeframe. *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 188 (D.D.C. 2013). To comply with FOIA’s determination requirement, an agency must “at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* Under ordinary circumstances, the deadline for making a determination is twenty business days from receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). Agencies can avail of a ten-business-day extension upon showing “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B). As of February 19, when Protect Democracy filed this motion, Defendants had let 31 days pass without issuing the required determination. “Where, as here, the agency has not yet issued a determination and the statutory deadline has passed, it has violated FOIA.” *Am. Oversight*, 414 F. Supp. 3d at 186. Accordingly, Protect Democracy “is certain to succeed on the merits of its claim that State owes it a determination on its requests.” *Id.*

As an initial matter, Defendants distort Protect Democracy’s position by claiming that it “seems to suggest” that “the agencies have failed to process its requests by ‘FOIA’s unambiguous deadlines.’” *Opp’n* at 9. Then they cite a string of cases holding that FOIA does not require production of documents within a specified timetable. *Id.* at 9-10. But, as discussed, Protect Democracy claims that Defendants violated FOIA by failing to make the required *determination* within the required timeline. *P’s Mem.* at 14-15.

Defendants bury their response to Protect Democracy’s actual argument in a footnote, where they claim that generic statements made in declarations attached to their opposition brief

count as determinations under FOIA. *See* Opp'n at 10-11 n.1. With the exception of NSD's declaration, which reported no responsive records, *see* Tiernan Decl. ¶ 7, none of Defendants' declarations satisfy the determination requirement as set forth in *CREW*: they all fail to aver that the relevant agency has finished "gather[ing] and review[ing] documents." *CREW*, 711 F.3d at 188.

Taking each declaration in turn, OLC's avers only that, as of February 26 (six business days after the FOIA deadline), its staff has "begun the process of identifying custodians and determining whether responsive records are likely to exist." Colborn Decl. ¶ 20. OIP's declaration does aver that it has completed a non-email search that yielded no responsive records. Brinkmann Decl. ¶ 12. As to emails, however, OIP avers only that on January 14, it "placed Plaintiff's request in the search queue for expedited requests," and that "OIP's best estimate is that Plaintiff's search results will be returned by August 1, 2020." *Id.* ¶ 9, 11. DOD's declaration avers that "searches are ongoing" and acknowledges that those searches have yet to "yield[] a responsive set of records." Renehan Decl. ¶ 9-10. And finally, State's declaration admits that the agency "has not made a final determination with respect to Plaintiff's request," Stein Decl. ¶ 8, directly contradicting Defendants' assertion. Opp'n at 11 n.1. To eliminate any ambiguity, State's declaration explains that "[a]t this time, the Department is focused on identifying the custodians who are reasonably likely to possess potentially responsive material, distributing search tasks to those custodians, and compiling any material provided by those custodians for ingestion into the Department's document review system." Stein Decl. ¶ 31.

In sum, except as to NSD, none of Defendants' declarations satisfy *CREW*'s first determination requirement of "gather[ing] and review[ing] documents." 711 F.3d at 188. Without having done this, Defendants cannot have satisfied *CREW*'s second requirement of

“determin[ing] and communicat[ing] the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents.” *Id.* As the D.C. Circuit explained, “a ‘determination’ under Section 552(a)(6)(A)(i) must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future.” *Id.*

Protect Democracy understands that FOIA itself does not require production by a date certain. Nonetheless, a court can supervise production “under its customary . . . authority in FOIA matters,” which includes ordering production by a date certain. *Am. Oversight*, 414 F. Supp. 3d at 186. In ordinary cases, FOIA requires production of non-exempt responsive documents “within days or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188. And in expedited cases, production must be completed “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). To ensure that agencies are meeting this burden, courts have equitable power to order accelerated production schedules as well as production by dates certain. *See, e.g., Ctr. for Pub. Integrity*, 411 F. Supp. 3d at 15 (ordering processing of at least 106 pages of responsive records within twelve business days); *Open Society Justice Initiative v. CIA*, 399 F.Supp.3d 161, 168-69 (S.D.N.Y. 2019) (ordering processing of documents relating to the murder of Jamal Kashoggi at a rate of 5,000 pages per month); Paredes Decl. Ex. N (Scheduling Order, *Leopold v. Dep’t of State*, No. 1:15 Civ. 123 (D.D.C. Oct. 25, 2018), ECF No. 85 (ordering processing of Hillary Clinton’s emails at a rate of 2,200 pages per month)).

Next, Defendants argue that they cannot produce documents as quickly as Protect Democracy requests because identification, review, interagency consultation, and redactions take time. Opp’n at 12-13. Of course, this is generally the case, but it has not stopped courts from ordering accelerated production schedules nonetheless. Apart from pro forma protestations

about their workload and the other expedited requests they have to deal with, Defendants fail to show why Protect Democracy's requested timeline is impracticable. Without specific information from Defendants, Protect Democracy is left make reasonable conjectures as to what is feasible, bearing in mind the singular urgency of its requests. Hence, Protect Democracy specified high-impact documents it deemed likely to exist and to be retrievable without running email searches, and requested production within 24 hours of an order from this Court. *See* P's Mem. at 3. As explained in Protect Democracy's opening brief (at 8-9), the first and most important of these types of documents, OLC memoranda addressing the legality of the Soleimani strike, is something previous administrations released *sua sponte*, promptly after engaging in a military strike. *See, e.g.*, Caroline D. Krass, Principal Dep. Ass't Att'y Gen., OLC, Mem. Op. for the Att'y Gen. re: Authority to Use Military Force in Libya, Apr. 1, 2011.⁹

And if Defendants are indeed able to make a specific showing that Protect Democracy's proposed timeline is infeasible, the Court still may supervise production and determine what timeline is practicable. But the Court should bear in mind that an agency's self-imposed capacity limitations should also be scrutinized for reasonableness. As Judge Engelmayer noted in a FOIA case concerning documents relating to the murder of journalist Jamal Kashoggi, "[an agency's] decision to thus far deny itself the technologic capacity to speed its review cannot dictate the Court's assessment of the review pace that is 'practicable' under FOIA." Instead, "the inquiry must focus on a *reasonable* agency's technological capability . . . even if meeting this demand calls upon [the agency] to augment, temporarily or permanently, its review resources, human

⁹ Available at https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf.

and/or technological.” *Open Soc’y Justice Initiative*, 399 F. Supp. 3d at 168-69 (emphasis added).

III. Plaintiff Will Be Irreparably Harmed Absent the Requested Relief.

An informed public equipped to make its opinions known to its elected representatives is “a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Information about government activity is of significantly diminished value when it comes after the public’s ability to shape action based on it. *See, e.g., Payne Enters.*, 837 F.2d at 494 (“stale information is of little value”). Put differently, “[w]hen ‘time is necessarily of the essence,’ the harm in agency delay is more likely to be irreparable.” *Am. Oversight*, 414 F. Supp. 3d at 186 (granting preliminary injunction in FOIA case involving request for documents reflecting communications between senior State Department officials and President Trump’s personal lawyer, Rudy Giuliani, and documents reflecting communications between State Department officials and the White House regarding recall of former ambassador to Ukraine, Marie Yovanovitch, in light of related impeachment inquiry) (quoting *EPIC*, 416 F. Supp. 2d at 40-41).

Congress is actively considering its response to President Trump’s direction of the targeted killing of Soleimani. The House Rules Committee held a hearing today on how Congress can reassert its war powers authority,¹⁰ and the full House is likely to vote on the Senate-passed resolution limiting further military action against Iran without congressional authorization within weeks, if not days.¹¹ Under these circumstances, Protect Democracy, as

¹⁰ *Supra* n.7.

¹¹ *Supra* n.5.

well as the public and Congress, will suffer irreparable injury if Defendants do not provide the requested records in time to inform these expedited congressional deliberations.

Defendants argue that the Trump administration has provided all the information Protect Democracy and the public need to contribute to ongoing debate on hostilities with Iran—and the President’s initiation of those hostilities without consultation with Congress—citing the two-page notice issued to Congress as required by the 2018 National Defense Authorization Act, and released to the public on February 14, 2020. But that notice created more confusion than clarity about the administration’s rationale and legal justification for the strike.

As Protect Democracy explained in its opening brief, on January 10, 2020, President Trump told Fox News that the targeted killing was responsive to an imminent threat to four U.S. embassies across the Middle East.¹² P’s Mem. at 6. Two days later, Defense Secretary Mark T. Esper said he had never been shown evidence that Iran was planning an attack on four embassies, and Representative Adam B. Schiff, Chairman of the House Permanent Select Committee on Intelligence and thus a member of the Gang of Eight, said the administration’s briefing for the Gang of Eight after the attack never mentioned that four embassies were targeted.¹³ Just one day later, NBC reported that President Trump had authorized Soleimani’s killing back in June 2019, seven months in advance, provided that the President had final sign-off on any specific military operation.¹⁴ President Trump tweeted later that morning that “it

¹² Katie Rogers, *Trump Says 4 Embassies Had Been Targeted by Iranians*, N.Y. Times (Jan. 10, 2020), <https://www.nytimes.com/2020/01/10/world/middleeast/trump-iran-embassy-attacks.html>.

¹³ Peter Baker & Thomas Gibbons-Neff, *Esper Says He Saw No Evidence Iran Targeted 4 Embassies, as Story Shifts Again*, N.Y. Times (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/us/politics/esper-iran-trump-embassies.html>.

¹⁴ Carol E. Lee & Courtney Kube, *Trump authorized Soleimani’s killing 7 months ago, with conditions*, NBC News (Jan. 13, 2020), <https://www.nbcnews.com/politics/national-security/trump-authorized-soleimani-s-killing-7-months-ago-conditions-n1113271>.

doesn't really matter" whether the targeted killing was in response to an imminent threat to the United States.¹⁵

The February 14 notice that Defendants argue clears up the matter for Protect Democracy and the public, *see* Opp'n at 15, did anything but. Rather than relying on an imminent threat to embassies—or any specific person or place—and without reference to any authorization from the President in June 2019, the administration suggested *for the first time* in the February 14 notice that the strike was covered by the 2002 Authorization for Use of Military Force (“AUMF”) against Iraq.¹⁶ The United States, the administration asserted, has “long relied” on the 2002 AUMF to support a “stable, democratic Iraq,” but it cited only two sources of recent vintage for this proposition, and offered two sentences utterly lacking the detail necessary to assess their persuasiveness as to how the killing of Soleimani fosters “a stable, democratic Iraq.” *Id.* Representative Eliot L. Engel, Chairman of the House Committee on Foreign Affairs, responded in a statement: “This legal theory is absurd. The 2002 authorization was passed to deal with Saddam Hussein. This law had nothing to do with Iran or Iranian government officials in Iraq.”¹⁷

¹⁵ Donald J. Trump, Twitter (Jan. 13, 2020, 11:09 AM), <https://twitter.com/realDonaldTrump/status/1216754098382524422>; Karen DeYoung, *Trump says ‘it doesn’t really matter’ if Iranian general posed an imminent threat*, Wash. Post (Jan. 13, 2020), https://www.washingtonpost.com/national-security/trump-says-it-doesnt-really-matter-if-iranian-general-posed-an-imminent-threat/2020/01/13/c9f7ea1c-362e-11ea-9541-9107303481a4_story.html.

¹⁶ Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (Feb. 14, 2020), https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf.

¹⁷ Eliot L. Engel, Statement on the White House’s Latest Justification for Soleimani Killing (Feb. 14, 2020), <https://foreignaffairs.house.gov/press-releases?ID=CB9812EA-2FE2-4643-9DEF-178FDFAD9A95>.

Taking the nation into war is unquestionably a serious matter, and if the President believes he can do so based on this paper-thin justification, Protect Democracy, the public, and Congress have the right to know. Plaintiff's FOIA requests seek more substantial justifications, including specific documents outlined in this motion, such as any OLC memoranda on the legal justification for the Soleimani strike and/or obligation to consult Congress regarding the strike, any correspondence or memoranda addressing the legality of the strike drafted by officials serving any one of the Defendants and shared with the National Security Council, and any "record of discussions" or "summary of conclusions" related to a meeting or meeting(s) involving lawyers for any of the Defendants and pertaining to the Soleimani strike. If these records exist, they are likely to shed more light on the administration's legal and policy justification for striking Soleimani without consulting Congress than the perfunctory paragraphs in the February 14 notice. If they do not exist, Defendants should so disclose.¹⁸

Defendants brush away these inconsistent explanations for Soleimani's killing and the failure to consult with Congress as "dissatisfaction" that is "entirely irrelevant" to public debate on the same topic. Opp'n at 14-15. But the "justifications" Defendants cite for the strike are vague to the point of meaninglessness, except where they're contradictory. They are more consistent with a government obfuscating the reasons for its actions than with informing public debate on a matter of utmost concern. The American people are entitled to actual explanations for actions unilaterally undertaken by the President that could place the country on the path to war, not shifting post hoc rationalizations. It is these actual explanations that are the subject of

¹⁸ Notably, in its declaration in support of Defendants' opposition, OLC makes a point of the fact that specific records such as these are easier for Defendants to locate and produce, Colborn Decl. ¶ 11, but then makes no representations as to whether OLC has in fact searched for these records, and if so, why they have not been reviewed and produced.

Plaintiff's FOIA request and are at issue in this litigation. And it is the absence of these actual explanations amid ongoing public and congressional debate that causes irreparable harm.

In a “heads we win, tails you lose” closing to its argument against irreparable harm, Defendants argue that because many of the documents Protect Democracy requests *may be* exempt from disclosure, no harm can flow from Defendant's failure to search for and review those records. Opp'n at 16-17. That is not the law, and Defendants' cases do not make it so. They rely on dicta in *Landmark Legal Foundation v. E.P.A.*, 910 F. Supp. 2d 270, 278 (D.D.C. 2012), and *EPIC v. D.O.J.*, 15 F. Supp. 3d 32, 45-46 (D.D.C. 2014) (“*EPIC II*”), in which the courts discuss exemptions the defendants in those cases might invoke *after* having found that no irreparable harm would flow from the failure to produce records, especially where, in both cases, production had begun and would soon be complete as to significant portions of the relevant FOIA requests. And they cite *The Nation Magazine v. Department of State*, 805 F. Supp. 68 (D.D.C. 1992), which involved a motion for a temporary restraining order mandating expedited processing, *id.* at 69-70, and thus does not apply here. Defendants then misread *American Oversight v. Department of State*, 414 F. Supp. 3d 182 (D.D.C. 2019), as suggesting that Protect Democracy must prove that some category of the yet-to-be-searched-for—let alone identified—records Defendants possess will not be exempt in order to show irreparable harm. It is true that the court in *American Oversight* pointed to categories of documents in the plaintiff's requests that likely would not be subject to FOIA exemptions, *id.* at 187, but it certainly did not hold that a plaintiff's proof of such is a prerequisite to preliminary relief.

Of course, even if Protect Democracy were required to identify records responsive to its requests likely not covered by FOIA's exemptions, it could do so. For instance, the OLC memoranda specifically named in this motion should be subject to public review, just like one

regarding the legal justification for the use of force in Libya, proactively released by the Obama administration, and one regarding the legal justification for the Trump administration's 2018 strikes against Syria.¹⁹ And, in arguing that the potential presence of exempt responsive material defeats Protect Democracy's motion for preliminary relief, Defendants read an entire category of documents out of the FOIA requests at issue. Defendants state that "Plaintiff's FOIA request seeks only internal Executive Branch communications," Opp'n at 17, *but that is not true*. Protect Democracy's request to each Defendant expressly seeks "emails and memoranda, reflecting . . . communications with Congress, congressional committees, or individual members of Congress regarding the January 2, 2020 military strike in Iraq." *See* Tindall Decl. Exs. A-E, Dkts. 14-3 to 14-7.

The harm stemming from continued obfuscation about the actual rationale and justification for the military strike is acute. Congress's ongoing debate regarding its own authority to restrain potentially war-making actions like the Soleimani strike, and to restrain further action against Iran, only exacerbates the harm. Plaintiff has shown irreparable harm sufficient to satisfy the standard for granting a preliminary injunction.

¹⁹ *See* Caroline D. Krass, Principal Dep. Ass't Att'y Gen., OLC, Mem. Op. for the Att'y Gen. re: Authority to Use Military Force in Libya, Apr. 1, 2011, https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf; Steven A. Engel, Ass't Att'y Gen., OLC, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities (May 31, 2018), <http://www.justice.gov/olc/opinion/file/1067551/download>; Charlie Savage, *Trump Had Power to Attack Syria Without Congress, Justice Dept. Memo Says*, N.Y. Times (Jun. 1, 2018), <https://www.nytimes.com/2018/06/01/us/politics/trump-war-powers-syria-congress.html> ("Mr. Engel signed his memo on Thursday, but it said he had earlier orally given the same advice to Donald F. McGahn II, Mr. Trump's White House counsel," before the strikes.).

IV. The Balance of Equities and Public Interest Point Directly to Preliminary Relief.

The public has a vital interest in the release of information concerning the Trump administration's rationale for unilateral military action that risks a hot war with Iran. Moreover, the public's assessment of that rationale is vital to Congress's ongoing debate about its response to the Soleimani strike. Defendants argue that countervailing interests weigh more heavily against a preliminary injunction. Their arguments fall flat.

First, Defendants argue that granting Protect Democracy's requested relief risks the inadvertent disclosure of exempt or classified materials. As discussed, this is a general consideration about practicability that, without specifics, the government can use as an excuse not to abide by any expedited schedule. This Court's remit is to subject this general protestation to close scrutiny and determine for itself how quickly Defendants can produce documents—especially those Protect Democracy has identified as top priority. If there exist segregable, highly informative documents, such as OLC memos, that can quickly be processed and released, the public value of receiving that information in time to contribute to the congressional debate is more than worth the strain on the agencies in producing them as quickly as truly practicable under court supervision.

Second, Defendants protest the unfairness of line jumping over other expedited requests, “which those requesters consider just as urgent.” Opp'n at 19. But urgency is a matter for the Court to determine, and not all expedited requests are equally urgent. As discussed, Protect Democracy submits that “[t]his is the extraordinary case where the public interest favors placing [its] requests ahead of other requests in the . . . FOIA queue.” *American Oversight*, 414 F. Supp. 3d at 187.

To date, the Defendants’ approach to providing information about a military action that risked drawing the nation into war has been to say what is expedient—even if contradictory—on television and to say as little as possible to Congress. This is dangerous.²⁰ Congress’s purpose in enacting FOIA was to shine sunlight where the executive would prefer fog. In a fog, Defendants benefit from traditional deference to the executive’s national security prerogatives. But Congress and the public have the right to know, rather than just infer, whether the President overstepped his authority in directing Soleimani’s killing without congressional approval. The public interest in that knowledge outweighs any incremental burden on Defendants in locating and reviewing a few specified documents, and in releasing them (or admitting they don’t exist) as quickly as truly practicable.²¹

²⁰ Cf. Craig Whitlock, *At War with the Truth*, Wash. Post (Dec. 9, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-confidential-documents/>.

²¹ Defendants claim in a footnote, without substantial argument, that Protect Democracy has failed to argue why it urgently needs records responsive to the second part of its FOIA request, *i.e.*, records related to communications with Congress, or consideration of whether or not to inform Congress of the military strike. Thus, Defendants urge, Protect Democracy “has waived any emergency relief as to that part of its request.” Opp’n at 21 n.5. This argument is meritless.

On the contrary, the Trump administration’s apparent failure to consult with Congress, potentially in violation of the War Powers Resolution, 50 U.S.C. § 1542, is a central theme of Protect Democracy’s briefing and a key stated reason its requests are so urgent. In fact, the opening sentence of Plaintiff’s opening brief reads: “On January 2, 2020, President Trump ordered the targeted killing of . . . Major General Qassim Soleimani—without approval from Congress” Later on page 1, the brief states: “Recognizing the grave implications of killing the top general of a regional military power without congressional . . . approval, . . . Protect Democracy requested expedited treatment.” And on page 5, the brief explains: “Section 3 of the War Powers Resolution requires that ‘[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.’” Thus, Protect Democracy included in its list of documents for immediate production “any OLC memoranda addressing . . . any obligation to consult with Congress regarding the strike.” P’s Mem. at 3.

CONCLUSION

For the reasons stated above, Plaintiff's motion for a preliminary injunction should be granted.

Dated: March 3, 2020

Respectfully submitted,

THE PROTECT DEMOCRACY PROJECT, INC.

By: /s/ Anne H. Tindall

Anne H. Tindall
The Protect Democracy Project, Inc.
2020 Pennsylvania Ave., NW, #163
Washington, DC 20006
T: (202) 579-4582 | F: (929) 777-8428
anne.tindall@protectdemocracy.org

Benjamin L. Berwick
The Protect Democracy Project, Inc.
15 Main Street, Suite 312
Watertown, MA 02472
T: (202) 579-4582 | F: (929) 777-8428
ben.berwick@protectdemocracy.org

John Paredes (*pro hac vice*)
The Protect Democracy Project, Inc.
115 Broadway, 5th Floor
New York, NY 10006
T: (202) 579-4582 | F: (929) 777-8428
john.paredes@protectdemocracy.org

Counsel for Plaintiff