UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE PROTECT DEMOCRACY PROJECT, INC., *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, et al., *Defendants*.	Civil Action No. 20-172 (RC)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Protect Democracy Project, Inc. ("Protect Democracy") submitted a request under the Freedom of Information Act for documents relating to a January 2, 2020 military strike against Iranian General Qassem Soleimani. The parties' cross-motions for summary judgment concern a single document: a memorandum issued by the Justice Department's Office of Legal Counsel (the "OLC Memo") about one month after the strike on Soleimani. The evidence shows that the OLC Memo states the law of the Executive Branch with respect to targeted killings of Iranian military figures in Iraq. That law, which governs hundreds of thousands of civilians and service members throughout government and the armed forces, may not be kept secret. The evidence also shows that the Administration has publicized its legal justification for the military action, thereby waiving any privilege that might have otherwise attached to the OLC Memo.

The President and his Administration needed a legal justification after the strike on Soleimani. In the immediate aftermath of the attack, the President and his team vigorously contended that the strike was justified as a response to an "imminent" threat posed by Soleimani and the Iranian military: purportedly, Soleimani was planning attacks on four U.S. embassies across the Middle East. But by mid-January, the Administration had offered no evidence to support the "imminent" threat theory and abandoned it. At a press conference, Attorney General William Barr denounced the "imminent threat" theory that the Administration had touted only days earlier as a "red herring."

In place of the "imminent threat" theory, high-ranking Administration officials began to argue that a 2002 statute, the Authorization for Use of Military Force against Iraq, authorized the strike on Soleimani. Around the same time, OLC prepared and then signed the OLC Memo at issue in this case. The OLC Memo was signed on or after January 31, 2020. The Administration's contemporaneous and subsequent formal statements of legal justification for

the Soleimani strike uniformly argue that the 2002 statute authorized the strike and do *not* argue that an "imminent" threat justified the attack. These formal statements both confirm that the OLC Memo is the law of the Executive Branch and waive any assertion that the OLC Memo is privileged. For these reasons and others stated below, this Court should grant Protect Democracy's motion and order the government to produce the OLC Memo.

Alternatively, if the Court does not grant Protect Democracy's motion, then it should deny OLC's motion and direct OLC to produce the Memo to the Court for *in camera* review. OLC claims in its motion that the OLC Memo memorializes advice given to the President. But the record strongly suggests the OLC Memo was drafted primarily to provide a legal justification for the military strike after the fact, when the President's "imminent threat" theory floundered. Because there is a disputed issue of fact as to whether the OLC Memo memorializes advice connected to presidential decision making about the Soleimani strike, OLC's motion for summary judgment, which is predicated on that fact, should not be granted.

STATEMENT OF THE CASE

I. Statutory Background

Congress enacted the War Powers Resolution of 1973 (50 U.S.C. § 1541 *et seq.*) to reassert and underscore the Constitution's division of war-making power between the political branches. That law mandates that "[t]he President … 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." 50 U.S.C. § 1542. The Executive Branch typically partners with the "Gang of Eight" in Congress—a group consisting of both parties' leadership and the leaders of both chambers' intelligence committees—to implement the Resolution's requirement.

After Al-Qaeda's terrorist attacks against the United States on September 11, 2001, Congress authorized the use of military force against nations, organizations, or persons that planned, authorized, or committed those attacks. Public Law 107–40 § 2(a), 115 Stat. 224 (Sept. 18, 2001), 50 U.S.C. § 1541 note. The next year, Congress passed a joint resolution entitled Authorization for Use of Military Force Against Iraq Resolution of 2002. Public Law 107–243 § 1, 116 Stat. 1498, 1500 (Oct. 16, 2002), 50 U.S.C. § 1541 note (hereafter, the "2002 AUMF" or "2002 statute"). The 2002 AUMF authorizes the President to use the United States military to defend the United States "against the continuing threat posed by Iraq." 2002 AUMF § 3(a)(1). If the President determines that such use of force is necessary, he must notify the Speaker of the House and President pro tempore of the Senate prior to or within 48 hours after such use of force. 2002 AUMF § 3(b).

The National Defense Authorization Act requires the President to submit a report to Congress "on the legal and policy frameworks for the United States' use of military force and related national security operations." 50 U.S.C. § 1549(a)(1). If the President changes the legal and policy framework described in subsection (a)(1) of the statute, he must notify Congress within 30 days. *Id.* § 1549(b). The unclassified portions of these reports "shall be made available to the public at the same time [they are] submitted" to Congress. 50 U.S.C. § 1549(c).

II. Statement of Undisputed Facts

A. President Trump Authorizes the Targeted Killing of Iranian General Qassem Soleimani

Shortly after the United States designated Iran's Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, in June 2019, Iran fired surface-to-air missiles at a surveillance drone operated by the U.S. military in the Middle East, destroying the $130 million aircraft. *See* Plaintiff's Statement of Undisputed Facts ("SUF") ¶ 1. President Trump authorized, then called

off, a retaliatory strike on military targets in Iran. SUF ¶ 2. Around the same time, he authorized the targeted killing of Qassem Soleimani, the Iranian General who led the Quds Force, which is part of Iran's Revolutionary Guard Corps. SUF ¶ 3. Soleimani was Iran's most important military commander. SUF ¶ 4. He had orchestrated almost all significant Iranian intelligence and military operations for the preceding twenty years, and was responsible for hundreds of American deaths in Iraq, as well as numerous militia attacks in Israel. SUF ¶ 5.

On January 2, 2020, the U.S. military carried out the killing of General Soleimani. SUF ¶ 6. That night, an American MQ-9 Reaper drone fired missiles into Soleimani's convoy as it left the Baghdad International Airport in Iraq, killing him and others. SUF ¶ 7.

"Soleimani was an enemy of the United States. That's not a question," Senator Chris Murphy wrote after learning of the killing. SUF ¶ 8. "The question is … did America just assassinate, without any congressional authorization, the second most powerful person in Iran, knowingly setting off a potential massive regional war?" SUF ¶¶ 8–9.

Senator Murphy was not the only one with questions about the strike. Despite the seven-month gap between the President's authorization of the strike and its completion, Congress had not been warned—let alone consulted—about the decision to kill Soleimani. The Administration did not consult or notify the Gang of Eight in advance of the military strike. SUF ¶ 10. Senator Lindsey Graham, who was not a member of the Gang of Eight, learned of the strike's approval in advance, while golfing with President Trump in Florida. SUF ¶ 11.

In the days after Soleimani's killing, tensions between the U.S. and Iran escalated. President Trump tweeted that if Iran responded to the Soleimani strike, "52 Iranian sites … WILL BE HIT VERY FAST AND VERY HARD." SUF ¶ 12. The Iranian military nevertheless launched missiles against two Iraqi military bases housing U.S. troops on January 7, 2020. SUF

¶ 13. That strike left at least 109 American troops with traumatic brain injuries. SUF ¶ 13. President Trump stated the soldiers' injuries were "headaches" that were "not very serious …." SUF ¶ 14.

B. After Killing Soleimani, the Administration Claims That the Strike Was Justified to Prevent an Imminent Attack

When asked about the legal justification for the military strike on Soleimani, the Administration initially argued that Soleimani had posed an imminent threat to American troops. The day after the attack, on January 3, 2020, President Trump told reporters in Florida that "Suleimani was plotting imminent and sinister attacks on American diplomats and military personnel, but we caught him in the act and terminated him." SUF ¶ 15.

On January 4, 2020, the Administration notified Congress about the military action [SUF ¶ 16] as required by law. *See* 50 U.S.C. § 1543(a)(3). But the Administration chose to classify the entire notification—blocking members of the public from reading its contents and precluding Members of Congress from holding debate on its rationales. SUF ¶ 17. Responding to the notification later the same day, House Speaker Nancy Pelosi lamented that "Congress and the American people are being left in the dark about our national security." SUF ¶ 17. Pelosi warned that the notification's contents raised "serious and urgent questions about the timing, manner and justification of the administration's decision to engage in hostilities against Iran." SUF ¶ 18. Three American officials told the *New York Times* that the notification "only recounts the attacks that Iran and its proxies have carried out in recent months and weeks rather than outlining new threats." SUF ¶ 19.

On January 7, 2020, the President again justified the military strike as defensive, telling reporters in the Oval Office that Soleimani "was planning a very big attack and a very bad attack for us and other people." SUF ¶ 20. On January 8, 2020, the Administration sent a team that

included the Secretary of State, the Secretary of Defense, and the CIA Director to brief Members of Congress in a secure facility. SUF ¶ 21. But the Administration refused to specify the nature of the supposed imminent threats. SUF ¶ 22. "We never got to the details," said Senator Mike Lee, who called the briefing "probably the worst briefing I've seen, at least on a military issue, in the nine years I've served in the United States Senate." SUF ¶¶ 22–23.

Although the Administration provided no details to Congress, on January 10, 2020, President Trump told Fox News's Laura Ingraham in an interview that the purported imminent threat probably would have been to four U.S. embassies, including the embassy in Baghdad. SUF ¶ 24. The President stated, "[w]e will tell you that probably it was going to be the embassy in Baghdad." SUF ¶ 25. He also stated, "I can reveal that I believe it probably would've been four embassies." SUF ¶ 25. Secretary of State Mike Pompeo likewise told reporters that "[w]e had specific information on an imminent threat, and those threats from him included attacks on U.S. embassies. Period. Full stop." SUF ¶ 26.

That weekend, Defense Secretary Mark T. Esper said on CBS's "Face the Nation" that he had seen no evidence that Iran was planning any such attack. SUF ¶ 27. In the same program, Representative Adam B. Schiff, Chairman of the House Permanent Select Committee on Intelligence and member of the Gang of Eight, said the Administration's post-strike briefing of the Gang of Eight included no evidence or suggestion that four embassies were targeted. SUF ¶ 28.

On January 13, 2020, NBC reported that President Trump had authorized the targeted killing of Soleimani in June 2019, seven months before the military strike. SUF ¶ 29. The President tweeted later that morning that an attack by Soleimani was "imminent," then added, "but it doesn't really matter because of his horrible past!" SUF ¶ 30. At a press conference that

day, Secretary Pompeo and Attorney General William Barr explained that the attack "reestablished deterrence" and "responded to attacks that had been already committed." SUF ¶ 31. Attorney General Barr stated, "I believe there was intelligence of imminent attack, but I do believe that concept of imminence is something of a red herring." SUF ¶ 32.

C. OLC Issues Its Memorandum and the Administration States That the 2002 AUMF Authorized the Strike on Soleimani

1. The OLC Memorandum

On or about January 31, 2020, the Office of Legal Counsel within the Department of Justice issued what it calls a "legal advice memorandum." Declaration of Paul P. Colborn ¶ 15 (Dkt. 31-1). Mr. Colborn states the OLC Memo was "solicited by and addressed to John A. Eisenberg, a Deputy Counsel to the President and the Legal Adviser to the National Security Council (NSC) and signed by OLC Assistant Attorney General Steven A. Engel—memorializing advice given for use in advising the President and other senior Executive Branch officials regarding the legal basis for potential military action." Colborn Decl. ¶ 15; *see id.* ¶¶ 17-19. The OLC Memo identified in Mr. Colborn's declaration is responsive to Protect Democracy's FOIA request for documents relating "to the January 2, 2020 military strike in Iraq and/or the President's legal authority to launch such a strike." Colborn Decl. ¶¶ 9-11.

2. The Administration's Notification to Congress

Also on or about January 31, 2020, the President sent a notification to Congress, described as "pursuant to section 1264 of the National Defense Authorization Act for Fiscal Year 2018," that included discussion of a change made to the "Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations" (hereafter, the "January 31 Notice" or the "Notice"). SUF ¶ 33. The House Foreign Affairs Committee made the Notice available to the public on February 14, 2020. SUF ¶ 34. The January 31 Notice

acknowledged that "the threat posed by Saddam Hussein's regime was the initial focus of the [2002 AUMF]," but argued that "the United States has long relied upon the 2002 statute to authorize use of force for the purpose of establishing a stable democratic Iraq." SUF ¶ 35. The Notice asserted that "uses of force need not address threats from the Iraq Government," but also "may address threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq." SUF ¶ 36.

The January 31 Notice's interpretation of the 2002 statute was, by its own terms, a "change in application of the existing legal and policy frameworks." SUF ¶ 37. Only one year earlier, State Department officials had assured lawmakers that "the administration has not, to date, interpreted either the 2001 or 2002 [authorizations for use of military force] as authorizing military force against Iran," except as necessary to protect U.S. or partner force missions already authorized under the statutes. SUF ¶ 38. The January 31 Notice does not rely on the threat of an "imminent" attack as legal basis for the strike. Rather, the Notice concludes that "although the threat of further attack existed, recourse to the inherent right of self-defense was justified sufficiently by the series of attacks that preceded the January 2 strike." SUF ¶ 39.

3. The Defense Department's Publication of Its General Counsel's Speech at BYU Law School

The January 31 Notice reflected the Administration's shift from the "imminent threat" justification to the legal theory that Congress's 2002 statute authorizing the use of military force against Iraq also authorized the 2020 strike on Iran's top military leader. Afterwards, senior officials followed the law that the Administration had developed and formalized in late January. On March 4, 2020, Defense Department General Counsel Paul C. Ney, Jr. gave a speech at Brigham Young University Law School "to explain the international and domestic law underpinnings of the January 2nd [Soleimani] air strike." SUF ¶ 40. Ney stated that "[m]uch of

what I will explain is reflected in publicly available documents that the U.S. Government has already provided to the United Nations Security Council and to Congress" and also stated "the key legal conclusions [about the strike's legality] are already a matter of record," before elaborating on those justifications in detail. SUF ¶ 41.

"With respect to international law," General Counsel Ney stated, the strike was "an exercise of the United States' inherent right to act in self-defense, consistent with Article 51 of the Charter of the United Nations." SUF ¶ 42. "As to U.S. domestic law," he continued, the President had legal authority under "his Article II constitutional power as Commander-in-Chief to protect U.S. personnel and property" in the Middle East, and also "pursuant to statutory authority under the 2002 AUMF." SUF ¶ 43. Ney argued that the 2002 statute granted authority to "establish stability in Iraq" and that Iran "has remained a malign presence there and throughout the Middle East." SUF ¶ 44. General Counsel Ney's speech cited "the relevant Department of Justice OLC opinions." SUF ¶ 45.

4. President Trump's Public Veto Message and Statement Regarding the Veto of a Joint Senate Resolution

On March 11, 2020, the Senate and House of Representative passed a joint resolution directing the President "to terminate the use of United States Armed Forces for hostilities against the Islamic Republic of Iran or any part of its government or military, unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran." S.J. Res. 68 § 2(a) (attached hereto as Addendum A). The joint resolution finds that "Congress has not yet declared war upon, nor enacted a specific statutory authorization for use of military force against, the Islamic Republic of Iran." S.J. Res. 68 § 1(3). In particular, it finds that Congress's 2001 and 2002 authorizations for use of military force against Iraq "do not serve as a specific statutory authorization for the use of force against Iran." *Id.*

President Trump vetoed the joint resolution on May 6, 2020, arguing that the joint resolution "incorrectly implies that the military airstrike against Qassem Soleimani in Iraq was conducted without statutory authority." SUF ¶ 46. The President's veto message specifically rejected Congress's finding that the "Authorization for Use of Military Force Against Iraq Resolution of 2002" does "not serve as a specific statutory authorization for use of force against Iran." SUF ¶ 47. The President argued that the 2002 statute "fully authorized" the "strike against Soleimani." SUF ¶ 48. The veto message noted that the joint resolution itself provides that it should not be construed as preventing the United States from defending itself from "imminent attack," and argued that "this [provision] overlooks the President's need to respond to threats beyond imminent attacks on the United States and its forces." SUF ¶ 49.

In an accompanying public statement, the President reiterated that the 2002 statute authorized the strike on Soleimani. SUF ¶ 50. He also argued that the constitutional authority to authorize the use of military force extended beyond defending the Unites States against imminent attacks. The implication that "the President's constitutional authority to use military force is limited to defense of the United States and its forces against imminent attack," he added, "is incorrect." SUF ¶ 51.

III. Procedural History

On January 3, 2020, Plaintiff sent FOIA requests to Defendant DOJ's subcomponents of the Office of Legal Counsel, Office of Information Policy, and National Security Division, as well as to the Departments of Defense and State. Though it initially requested a range of records relating to the January 2, 2020 strike, Plaintiff has now narrowed its requests to one: the OLC Memo relating to the strike on Soleimani. Dkt. 30. OLC stated that it withheld in full the OLC Memo at issue under FOIA Exemption 5. 5 U.S.C. § 552(b)(5); Dkt. 29. Plaintiff responded that it intended to challenge OLC's exemption determination at summary judgment.

ARGUMENT

A court should grant summary judgment when the record demonstrates that there is no genuine issue as to material facts, and the moving party demonstrates it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. It is "well established" that in FOIA cases, "[t]he standard governing a grant of summary judgment in favor of an agency's claim [is] that it has fully discharged its disclosure obligations." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983). The agency bears the burden to show "that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Id.* "This burden does not shift even when the requester files a cross motion for summary judgment because the Government ultimately has the onus of proving that the documents are exempt from disclosure, while the burden upon the requester is merely to establish the absence of material factual issues before a summary disposition of the case could permissibly occur." *Prop. of the People, Inc. v. OMB*, 330 F. Supp. 3d 373, 380 (D.D.C. 2018) (quotation marks omitted). FOIA's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, FOIA exemptions must be narrowly construed against the agency objecting to disclosure. *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011).

OLC claims that its memorandum is exempt from disclosure under FOIA Exemption 5, which provides that FOIA's disclosure provisions do not apply to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). OLC argues that if it were in litigation with Protect Democracy, it would be able to withhold the OLC Memo based on the presidential communications privilege, the deliberative process privilege, and the attorney-client privilege. As explained below, OLC is incorrect.

I. This Court Should Grant Protect Democracy's Motion for Summary Judgment

Whether or not any privilege applies to the OLC Memo, this Court should grant summary judgment to Protect Democracy because the undisputed facts in the record show that the OLC Memo is the working law of the Executive Branch and may not be kept secret. The undisputed facts also show that the Administration waived any applicable privilege by disclosing its legal justification for the military strike on Soleimani in numerous public statements.

A. The OLC Memo Is the Working Law of the Executive Branch

The Executive Branch cannot hide "secret law" from Congress and the public, so documents that "embody the agency's effective law and policy" are not exempted from disclosure under FOIA Exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975); *see Center for Effective Gov't v. United States Dep't of State*, 7 F. Supp. 3d 16, 29 (D.D.C. 2013). The public is vitally concerned with the reasons supplied as "the basis for an agency policy actually adopted." *NLRB*, 421 U.S. at 153. "These reasons, if expressed within the agency, constitute the "working law" of the agency and have been held by the lower courts to be outside the protection of Exemption 5." *Id.* at 153-54. The OLC Memo embodies the Administration's effective law and policy and the reasons for adopting it. Therefore, it is not exempt from disclosure under FOIA Exemption 5.

First, the National Defense Authorization Act requires notice to Congress within 30 days of any change in the Administration's legal and policy frameworks for use of military force. 50 U.S.C. § 1549(b). The chronology of events here reflects that the Administration adopted its position that the 2002 AUMF authorized the strike in January 2020, triggering the statutory requirement to notify Congress of that change in position. *See id.* After the strike, the Administration formalized its position in the OLC Memo, which became the working law. In

other words, the OLC Memo reflected the "reasons which [supplied] the basis for an agency policy actually adopted" and is the Administration's working law. *NLRB*, 421 U.S. at 152.

Second, after the OLC issued its Memo, the Administration's *public* statements shifted to focus on a statutory justification for the strike's legality—the 2002 authorization for use of force against Iraq. Whereas before the OLC issued its Memo, the President and his team issued informal, unsupported, and contradictory statements about a possible imminent attack, after the OLC issued its Memo, the Administration's statements became uniform, written, and formal. The Administration's matching public statements made only after the OLC issued its Memo demonstrate that the Executive Branch likely adopted the OLC Memo as its primary—perhaps singular—expression of working law on the targeted killing of Iranian government officials.

The two most extensive discussions of the strike's legal justification—the January 31 Notice to Congress and the March 4 speech delivered by General Counsel Ney—share identical sections. The January 31 Notice stated: "Although the threat posed by Saddam Hussein's regime was the initial focus of the statute, the United States has long relied upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq." Sutherland Decl., Ex. V. General Counsel Ney's speech made the same claim, almost word-for-word. *See id.*, Ex. X. The January 31 Notice stated that "the air strike against Soleimani in Iraq is consistent with this longstanding interpretation of the President's authority under the . . . 2002 AUMF." *Id.*, Ex. V. General Counsel Ney's speech included the same line, verbatim. *Id.*, Ex. X. The striking overlap between the Administration's two statements strongly suggests they both relied on the same working law: the OLC Memo.

Third, President Trump cited his Administration's new interpretation of the 2002 statute to justify his May 6 veto of Congress's Joint Resolution, further reflecting reliance on the OLC

Memo and treating it as precedential. President Trump's veto statement demonstrates that his Administration regards the OLC Memo as a precedential interpretation of the 2002 statutory authorization for use of military force against Iraq as applied to Iranian officials such as Soleimani. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (interpretations "intended to guide and direct" in analogous cases are not protected by the deliberative process privilege). Taken separately and especially when taken together, the Administration's formal, public, written statements and the timing of those statements underscore that it embraced the OLC Memo as effective law.

B. The Administration Waived Any Privilege That Might Have Applied to the OLC Memo under FOIA Exemption 5

All the privileges asserted by OLC may be waived or forfeited by statements or conduct inconsistent with the assertion of those privileges. "Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege." *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982). Thus, "voluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context waives the privilege, not only as to the specific communication disclosed but often as to *all other communications relating to the same subject matter*." *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (emphasis added).

In the context of the presidential communications and deliberative process privileges, a voluntary disclosure does not waive the privilege as to "all other communications relating to the same subject matter." *Id.* Rather, the voluntary disclosure of a document "waives these [executive] privileges for the document or information specifically released, and not for related materials." *Id.*; *see also New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014); *Center for Effective Gov't*, 7 F. Supp. 3d at 29.

The government bears the burden to prove that it has *not* waived the privilege because Protect Democracy "is not positioned to prove otherwise." *Judicial Watch, Inc. v. United States Postal Serv.*, 297 F. Supp. 2d 252, 269 (D.D.C. 2004). It cannot do so here because the evidence indicates that the Trump Administration repeatedly and publicly disclosed the subject of the OLC Memo—the legal justification for the strike on Soleimani—in its contemporaneous January 31 Notice to Congress, General Counsel Ney's speech, and President Trump's veto message and accompanying statement. All of these statements were formal, written, public, and widely disseminated by publication on official government and other websites.

Defense Department General Counsel Ney's public speech at BYU Law School about the "air strike in Iraq targeting Qassem Soleimani" stands out as a clear example of waiver because it is a detailed, specific, voluntary disclosure of the legal justification for the strike on Soleimani—the same specific subject as the OLC Memo. His aim was to explain "the international and domestic law underpinnings" of the Soleimani strike. His published speech restates the Trump Administration's interpretation of the 2002 AUMF. He stated that, "although the threat posed by Saddam Hussein's regime was the initial focus of the statute," the 2002 AUMF authorized the targeted killing of an Iranian leader because it "authorize[d] the use of force for the purpose of establishing a stable, democratic Iraq" and Iran "remained a malign presence" in the region. Sutherland Decl., Ex. X. Like Attorney General Barr, Ney argued that the question whether Iran was planning an "imminent" attack was a "red herring." *Id.*

General Counsel Ney also explained that a President should seek congressional approval before bringing the nation into the kind of conflict that would qualify as a "war." To determine whether a conflict is a "war," Ney explained, "[t]he relevant Department of Justice OLC opinions say that we must engage in a 'fact-specific assessment of the anticipated nature, scope,

and duration of the planned military operations.'" Sutherland Decl., Ex. X (quoting OLC opinions). Ney then explained why, under the OLC's relevant opinions, the strike on Soleimani was not an act of "war." As he explained, the President applied the OLC standard to determine "that the nature, scope, and duration of hostilities directly resulting from the strike against Soleimani in Iraq would not rise to the level of war with Iran for constitutional purposes." *Id.* Because Ney explicitly stated that OLC opinions supply the relevant standard for determining whether a President has engaged in "war" and then argued that the President made a reasonable determination under that OLC standard *specifically* with respect to the Soleimani strike, he very likely was restating the conclusions of the OLC Memo in this case.

General Counsel Ney's speech was like speeches by other high-ranking officials, including Jeh Johnson, then General Counsel of the Defense Department, that led to a finding of waiver in *New York Times Co. v. U.S. Department of Justice*, 756 F.3d 100 (2d Cir. 2014). In that case, OLC had prepared a memorandum concerning the legal justification for the targeted killing of Anwar al-Awlaki in Yemen. 756 F.3d at 103. Johnson's speech "summarized some of the basic legal principles that form the basis for the U.S. military's counterterrorism efforts against Al Qaeda and its associated forces, and referring explicitly to 'targeted killing,' said, 'In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice.'" *Id.* at 114 (quotation marks, brackets, ellipsis, and citations omitted). Other officials made comparable statements, and the government publicly released a "DOJ White Paper" detailing the legal justification for the al-Awlaki killing. *See id.* at 114-16.

In this case, OLC prepared a memorandum concerning the legal justification for the targeted killing of Qassem Soleimani. Ney's speech summarized some of the basic principles that form the basis for the U.S. military's efforts against terrorist threats emanating from Iraq.

The Defense Department's publication of Ney's 4,587-word speech, which focused almost exclusively on the legal justification for the Soleimani strike, was like Johnson's speech and the release of the DOJ White Paper in the al-Awlaki case. Both were specific releases of detailed legal reasoning explaining why the use of military force was justified under U.S. law. Both were used to justify the use of force and were part of a larger "public relations campaign" (*N.Y. Times Co.*, 756 F.3d at 114)—this time, to replace the "red herring" of imminence with a statutory justification that did not depend on imminence at all. And the voluntary disclosures in both cases constitute a waiver requiring release of the OLC Memo itself.

II. Alternatively, This Court Should Deny OLC's Motion and Order *in Camera* Review

Even if Protect Democracy were not entitled to summary judgment (and it is), this Court should deny OLC's motion and order *in camera* review because its assertions supporting its motion are vague and conflict with other evidence in the record.

The evidence shows that President Trump authorized military strikes on Iranian military targets and General Soleimani in June 2019, after Iran downed an American drone. The U.S. military carried out the strike on Soleimani on January 2, 2020. The President and his Administration thereafter explained that the threat of an imminent attack on American personnel and four American embassies justified the strike. Following public and congressional scrutiny and questions, however, the Administration backpedaled away from the "imminent threat" theory and adopted a new theory to justify the military action: As it turned out, the Administration explained, the President had *statutory* authority to kill General Soleimani all along, under the 2002 authorization for use of military force against Iraq. In fact, the concept of an "imminent threat" was just a "red herring," as the Attorney General and General Counsel Ney both put it.

OLC claims that its Memo memorializes legal advice given to NSC Legal Adviser Eisenberg before the January 2, 2020 strike on Soleimani, but that claim conflicts with the record evidence because the widely-published reaction of the President and his team indicates that they received little or no advice. The evidence of the Administration's public statements in the immediate aftermath of the military action shows that it did *not* receive advice that the 2002 AUMF statute authorized the military action against Soleimani; if the Administration had been so advised, it would have provided *that* explanation instead of grasping for a potential "imminent threat" rationale. It did not. Based on the Administration's post-strike "imminent threat" statements and the timing of the OLC Memo, whether OLC advised and the President received advice concerning the 2002 AUMF is a disputed issue of fact.

Similarly, a reasonable finder of fact could conclude that OLC did not give any concrete advice to the President concerning an "imminent threat" on American personnel or embassies because the President and his Administration were never able to articulate what the "imminent threat" might have been and ultimately walked back and then trampled on their own "imminent threat" rationale, calling it a "red herring." Again, if OLC had given advice concerning a specific imminent threat, the Administration would have been able to respond to questions from Congress and reporters about the nature of the threat. It could not, and Secretary Esper admitted that he had not seen specific evidence of a planned attack on American embassies, contradicting President Trump's statement to that effect.

Thus, if the Court were to conclude that it cannot grant Protect Democracy's motion for summary judgment on the existing record, then it should order *in camera* review of the OLC Memo to evaluate the arguments presented herein. The Court could then determine whether the OLC Memo is exempt from disclosure and, if any part is exempt, whether the Administration

waived reliance on that exemption, and if not, whether the privileged material could be redacted. 5 U.S.C. § 552 (a)(4)(B).

A district judge retains discretion over the decision to conduct *in camera* review, and the D.C. Circuit has urged that it is "particularly appropriate when … the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims." *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). Affidavits are insufficiently detailed if they make conclusory claims, merely recite statutory standards, or are "too vague or sweeping." *Quinon*, 86 F.3d at 1227 (quotation marks and citations omitted). Here, OLC's declaration is vague and conflicts with other evidence in the record such that, if the Court does not grant Protect Democracy's motion, *in camera* review is warranted. If, after conducting reviewing the document, this Court finds the OLC Memo contains information covered by a privilege that has not been waived, it should still release a redacted version of the Memo's legal justifications. *See N.Y. Times*, 756 F.3d at 119 (releasing the requested OLC Memo's legal justifications with intelligence gathering activities and other privileged information redacted).

CONCLUSION

For the foregoing reasons, Protect Democracy respectfully requests that this Court grant its motion for summary judgment and deny Defendants' motion for summary judgment. Alternatively, the Court should deny Defendants' motion and order Defendants to submit the withheld OLC Memo for *in camera* review and, after redaction, release non-privileged portions.

Dated: July 16, 2020

Respectfully submitted,

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Addendum A

S. J. Res. 68

One Hundred Sixteenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the third day of January, two thousand and twenty

Joint Resolution

To direct the removal of United States Armed Forces from hostilities against the Islamic Republic of Iran that have not been authorized by Congress.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS.

Congress makes the following findings:

(1) Congress has the sole power to declare war under article I, section 8, clause 11 of the United States Constitution.

(2) The President has a constitutional responsibility to take actions to defend the United States, its territories, possessions, citizens, service members, and diplomats from attack.

(3) Congress has not yet declared war upon, nor enacted a specific statutory authorization for use of military force against, the Islamic Republic of Iran. The 2001 Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) against the perpetrators of the 9/11 attack and the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107–243; 50 U.S.C. 1541 note) do not serve as a specific statutory authorization for the use of force against Iran.

(4) The conflict between the United States and the Islamic Republic of Iran constitutes, within the meaning of section 4(a) of the War Powers Resolution (50 U.S.C. 1543(a)), either hostilities or a situation where imminent involvement in hostilities is clearly indicated by the circumstances into which United States Armed Forces have been introduced.

(5) Members of the United States Armed Forces and intelligence community, and all those involved in the planning of the January 2, 2020, strike on Qasem Soleimani, including President Donald J. Trump, should be commended for their efforts in a successful mission.

(6) Section 5(c) of the War Powers Resolution (50 U.S.C. 1544(c)) states that "at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs".

(7) More than 100 members of the United States Armed Forces sustained traumatic brain injuries in the Iranian retaliatory attack on the Ain al-Assad air base in Iraq despite initial reports that no casualties were sustained in the attack.

(8) Section 8(c) of the War Powers Resolution (50 U.S.C. 1547(c)) defines the introduction of the United States Armed

Forces to include "the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged in, hostilities".

(9) The United States Armed Forces have been introduced into hostilities, as defined by the War Powers Resolution, against Iran.

(10) The question of whether United States forces should be engaged in hostilities against Iran should be answered following a full briefing to Congress and the American public of the issues at stake, a public debate in Congress, and a congressional vote as contemplated by the Constitution.

(11) Section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (50 U.S.C. 1546a) provides that any joint resolution or bill to require the removal of United States Armed Forces engaged in hostilities without a declaration of war or specific statutory authorization shall be considered in accordance with the expedited procedures of section 601(b) of the International Security and Arms Export Control Act of 1976.

SEC. 2. TERMINATION OF THE USE OF UNITED STATES FORCES FOR HOSTILITIES AGAINST THE ISLAMIC REPUBLIC OF IRAN.

(a) TERMINATION.—Pursuant to section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (50 U.S.C. 1546a), and in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976, Congress hereby directs the President to terminate the use of United States Armed Forces for hostilities against the Islamic Republic of Iran or any part of its government or military, unless explicitly authorized by a declaration of war or specific authorization for use of military force against Iran.

(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to prevent the United States from defending itself from imminent attack.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.