

**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

**MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFF'S  
MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

On January 2, 2020, President Trump ordered the targeted killing of Iran’s top military commander, reportedly the second most powerful man in Iran, Major General Qassim Soleimani—without approval from Congress or the U.N. Security Council. Breaking precedent with recent administrations, the White House sent Congress the notice required by the War Powers Act by way of an entirely classified document. Thus, the American people know nothing and can know nothing of its contents, and Congress cannot engage in public debate on the soundness of the White House rationale for the attack.

The next day, The Protect Democracy Project, Inc. (“Protect Democracy”) submitted substantially identical FOIA requests to the Department of Defense (“DOD”), the Department of State (“State”), and three offices of the Department of Justice (“DOJ”): the Office of Legal Counsel (“OLC”), the Office of Information Policy (“OIP”), and the National Security Division (“NSD”). The requests seek records relating to the military strike, the President’s legal justification—if any—for the strike, and any related communications with Congress or consideration of whether or not to inform Congress of the strike.

Recognizing the grave implications of killing the top general of a regional military power without congressional or United Nations approval, the risk of rapid escalation in hostilities, and the volatility of war, Protect Democracy requested expedited treatment. Although DOJ’s components OLC and OIP appropriately granted expedition, DOJ’s NSD, as well as DOD and State, erroneously denied it.

Meanwhile, the administration has not provided any written legal or policy justification for the killing, and the oral rationales it has offered have been vague and inconsistent. Generally, administration officials have claimed that Soleimani was plotting some imminent attack on the

United States, which would justify the killing as self-defense under domestic and international law. But after it was revealed that President Trump had approved the strike seven months in advance, he pivoted and asserted that “it doesn’t really matter” whether the targeted killing was in response to an imminent threat to the United States, effectively disavowing the need for any justification under U.S. or international law to unilaterally engage in acts of war.

Looming over this discourse is the very real risk of escalation. Following Soleimani’s killing, the Iranian government has launched missile strikes on two Iraqi military bases housing U.S. troops, shot down a Ukrainian commercial airliner—claiming error—killing all 176 aboard, and repudiated previously agreed-to restrictions on uranium enrichment. In response, both houses of Congress have engaged in discussions about curtailing President Trump’s authority to wage war on Iran. Without access to the President’s legal and policy justification for the attack, the public lacks the information necessary to express its views on this congressional deliberation of the highest consequence and urgency.

Protect Democracy seeks to compel all Defendants to expedite its FOIA requests, and thus to produce all requested records (or acknowledge if no such records exist) without further delay. In *Protect Democracy Project, Inc. v. U.S. Department of Defense*, another Judge of this Court granted a preliminary injunction in a case on all fours with this one. 263 F. Supp. 3d 293, 299 (D.D.C. 2017). There, Protect Democracy sought expedited processing of its requests for records related to the April 2017 missile strikes in Syria, a previous unilateral military action President Trump ordered without prior congressional or international consultation, for which the administration refused to provide its legal justification, and which entailed a serious risk of escalation. The court explained that such circumstances present a potential for irreparable harm “because ongoing public and congressional debates about issues of vital national importance

cannot be restarted or wound back,” and “[m]ilitary strikes cannot be undone.” *Protect Democracy Project*, 263 F. Supp. 3d at 301. Here, as in *Protect Democracy Project*, expedition is crucial to avoid irreparable harm in the event that the armed conflict escalates further and the United States gets dragged into another war while the American people and their elected representatives are denied the information they need to participate in democratic debate.

## BACKGROUND

### I. The Military Strike on Iran and the Administration’s Shifting Justifications

On January 2, 2020, President Trump approved the targeted killing of Iran’s top general at Baghdad International Airport in Iraq.<sup>1</sup> Acting on the President’s orders, an American MQ-9 Reaper drone fired missiles into a convoy leaving the airport, killing Major General Qassim Soleimani, who was the leader of the elite Quds Force of the Islamic Revolutionary Guard Corps of Iran and Iran’s most important military commander.<sup>2</sup> Soleimani was behind almost every significant Iranian intelligence and military operation over the past twenty years,<sup>3</sup> and is responsible for hundreds of American deaths in Iraq, and numerous militia attacks on Israel.<sup>4</sup>

“Soleimani was an enemy of the United States. That’s not a question,” Senator Christopher S. Murphy wrote on Twitter.<sup>5</sup> Nevertheless, he added, “[t]he question is this—as

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<sup>1</sup> Michael Crowley, *et al.*, *U.S. Strike in Iraq Kills Qassim Soleimani, Commander of Iranian Forces*, N.Y. Times (last updated Jan. 7, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Tim Arango, *et al.*, *Qassim Soleimani, Master of Iran’s Intrigue, Built a Shiite Axis of Power in the Mideast*, N.Y. Times (last updated Jan. 13, 2020), <https://www.nytimes.com/2020/01/03/obituaries/qassem-soleimani-dead.html>.

<sup>5</sup> Christopher S. Murphy (@ChrisMurphyCT), Twitter (Jan. 2, 2020, 5:49 PM), <https://twitter.com/ChrisMurphyCT/status/1212913952436445185>.

reports suggest, did America just assassinate, without any congressional authorization, the second most powerful person in Iran, knowingly setting off a potential massive regional war?”<sup>6</sup>

Two days later, in response to Iranian government pledges to reciprocate, President Trump warned that a strike on Americans or American assets would mean that “52 Iranian sites (representing the 52 American hostages taken by Iran many years ago), some at a very high level & important to Iran & the Iranian culture, and those targets, and Iran itself, WILL BE HIT VERY FAST AND VERY HARD.”<sup>7</sup>

There is no readily apparent international or domestic authorization for the use of force against Iran. As to requirements imposed by international law, the United Nations Charter, a treaty ratified by the United States, permits the use of force against another country only with permission of the United Nations Security Council or as a matter of self-defense.<sup>8</sup> There is no such resolution providing legal authority for military action against the Iranian government.

And as Senator Murphy noted, the U.S. Congress has not authorized the use of force against the Iranian government. 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.” 50 U.S.C. § 1542. Longstanding U.S. government protocol has implemented this requirement via Executive Branch consultation with the “Gang of Eight” in Congress, consisting of leadership of both parties and of the intelligence committees in both chambers. The White House did not inform congressional leaders of plans for the

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<sup>6</sup> *Id.*

<sup>7</sup> Donald J. Trump (@realDonaldTrump), Twitter (Jan. 4, 2020, 2:52 PM), <https://twitter.com/realDonaldTrump/status/1213593965838163968>.

<sup>8</sup> U.N. Charter art. 2, para. 4; art. 51.

Soleimani strike—or the intelligence that the White House claimed justified it—before the attack. The only member of Congress who appears to have been briefed on plans for the strike is Senator Lindsey Graham who stated he learned of those plans while golfing with President Trump at Trump’s resort in Florida.<sup>9</sup>

On January 4, 2020, 48 hours after the strike on General Soleimani, the White House sent Congress a notification regarding the strike as required by the War Powers Act. The White House included only classified information in the notification, so the American people know nothing and can know nothing of its contents, and Congress cannot engage in public debate on the soundness of the White House rationale for the attack.<sup>10</sup> House Speaker Nancy Pelosi has criticized the secret contents of the notification as “prompt[ing] serious and urgent questions about the timing, manner and justification of the Administration’s decision to engage in hostilities against Iran.”<sup>11</sup>

The next day, President Trump posted as follows on Twitter:

These Media Posts will serve as notification to the United States Congress that should Iran strike any U.S. person or target, the United States will quickly & fully strike back, & perhaps in a disproportionate manner. Such legal notice is not required, but is given nevertheless!<sup>12</sup>

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<sup>9</sup> Libbey Cathey, *Pelosi demands briefing on US-Iran strike, Graham says he was informed beforehand*, ABC News (Jan. 3, 2020), <https://abcnews.go.com/Politics/pelosi-demands-briefing-us-iran-strike-graham-trump/story?id=68049245>.

<sup>10</sup> Maggie Haberman and Catie Edmondson, *White House Notifies Congress of Suleimani Strike Under War Powers Act*, N.Y. Times (Jan. 4, 2020), <https://www.nytimes.com/2020/01/04/us/politics/white-house-war-powers-resolution.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Donald J. Trump, Twitter (Jan. 5, 2020, 3:25 PM), <https://twitter.com/realDonaldTrump/status/1213919480574812160>; Amber Phillips, *What is the War Powers Act and what can Congress do to enforce it with Trump on Iran?*, Wash. Post (Jan. 8, 2020), <https://www.washingtonpost.com/politics/2020/01/07/war-powers-act-explained/>.

On January 8, 2020, administration officials briefed members of Congress regarding the White House's justification for the targeted killing. The officials asserted generally that intelligence showed that Soleimani posed an imminent threat but refused to describe it in detail.<sup>13</sup> "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."<sup>14</sup> 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."<sup>15</sup>

In the following days, the administration has provided conflicting rationales for the strike. On Friday, January 10, 2020, President Trump told Fox News's Laura Ingraham in an interview broadcast that the purported imminent threat had been to four U.S. embassies across the Middle East.<sup>16</sup> The following Sunday, Defense Secretary Mark T. Esper said on CBS's "Face the Nation" that he had never been shown evidence that Iran was planning an attack on four embassies.<sup>17</sup> In that same program, Representative Adam B. Schiff, Chairman of the House Permanent Select Committee on Intelligence and thus a member of the Gang of Eight, said the briefing for the Gang of Eight after the attack never mentioned that four embassies were

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<sup>13</sup> 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>.

<sup>14</sup> *Id.*

<sup>15</sup> 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>.

<sup>16</sup> 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>.

<sup>17</sup> 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>.

targeted.<sup>18</sup> The next day, on January 13, 2020, at 4:49 a.m., 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.<sup>19</sup> And at 8:09 a.m., President Trump tweeted that "it doesn't really matter" whether the targeted killing was in response to an imminent threat to the United States, effectively disavowing the need for a justification under U.S. or international law unilaterally to engage in acts of war.<sup>20</sup>

While its policy justifications for the strike have been inconsistent, the Trump administration's legal justification for the targeted killing of a top Iranian government official has been withheld entirely from the American people. The War Powers Resolution notification provided to Congress might have included a legal rationale, but if so, as explained above, the public cannot know because that notification was entirely classified. This secrecy stands in contrast to the Department of Justice's actions in 2011 when the United States initiated the use of force against Libya. Then, the Department of Justice's Office of Legal Counsel published a 14-page "Memorandum Opinion for the Attorney General," dated April 1, 2011, entitled "Authority To Use Military Force in Libya."<sup>21</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> 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>.

<sup>20</sup> 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](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).

<sup>21</sup> Available at <https://fas.org/irp/agency/doj/olc/libya.pdf>.

## II. Risk of Escalation and Congressional Action

In the meantime, the risk remains that the conflict will escalate. On January 7, 2020, the Iranian government launched missile strikes against two Iraqi military bases housing U.S. troops in Iraq. While the White House initially reported no casualties from the strikes, U.S. military sources later identified at least 11 injured troops.<sup>22</sup> President Trump has repeatedly threatened disproportionate retaliation in the event of a strike by Iran on U.S. interests. Just months ago, he pledged that an “attack by Iran on anything American will be met with great and overwhelming force. In some areas, overwhelming will mean obliteration.”<sup>23</sup> During tensions between the U.S. and Iran the year before, President Trump tweeted: “NEVER, EVER THREATEN THE UNITED STATES AGAIN OR YOU WILL SUFFER CONSEQUENCES THE LIKES OF WHICH FEW THROUGHOUT HISTORY HAVE EVER SUFFERED BEFORE. WE ARE NO LONGER A COUNTRY THAT WILL STAND FOR YOUR DEMENTED WORDS OF VIOLENCE & DEATH. BE CAUTIOUS!”<sup>24</sup>

Several hours after the attack on U.S. troops in Iraq, Iranian missile defenses shot down a Ukrainian commercial airliner that had just taken off from Tehran, killing all 176 aboard. The Iranian government eventually admitted it was a “mistake,” after initially denying responsibility.<sup>25</sup>

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<sup>22</sup> Jake Tapper, Ryan Browne, and Barbara Starr, *US troops were injured in Iran missile attack despite Pentagon saying initially there were no casualties*, CNN (Jan. 17, 2020), <https://www.cnn.com/2020/01/16/politics/service-members-injured-iran-strike/index.html>.

<sup>23</sup> Donald J. Trump, Twitter (Jun. 25, 2019, 10:42 AM), <https://twitter.com/realDonaldTrump/status/1143529907403788288>.

<sup>24</sup> Donald J. Trump, Twitter (Jul. 22, 2018, 11:24 PM), <https://twitter.com/realDonaldTrump/status/1021234525626609666>.

<sup>25</sup> Tapper, Browne, and Starr, *supra* n. 22.



And on January 14, 2020, the governments of Great Britain, France, and Germany formally accused Iran of violating the 2015 agreement that limited its nuclear program. The Iranian government linked its decision no longer to abide by those restrictions on its uranium enrichment to the U.S. strike on Soleimani.<sup>26</sup> In response to recent similar threats from Iran to resume uranium enrichment, President Trump threatened that such action would “come back to bite [Iran] like no one has been bitten before!”<sup>27</sup>

The strike on Soleimani, Iran’s response, and the President’s consistent threats of escalation create the very real potential for future military action involving Iran. Thus, the administration’s foreign policy, military, and legal agencies have an obligation to provide to the American people straightforward and consistent legal and policy justifications for the targeted killing of Iran’s top general, which military and foreign policy experts have described as “tantamount to an act of war.”<sup>28</sup>

Our Constitution divides war-making powers between Congress and the President. This is both to avoid a situation in which it is too easy for one person to initiate a war, and to ensure that the United States goes to war only when the people support doing so. Congress has taken steps to exercise its war powers to check the President. On January 9, 2020, the House of Representatives passed a resolution that would require President Trump to seek congressional

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<sup>26</sup> Steven Erlanger, *France, Germany and U.K. Serve Notice on Iran Under Nuclear Deal*, N.Y. Times (Jan. 14, 2020), <https://www.nytimes.com/2020/01/14/world/europe/iran-nuclear-deal.html>.

<sup>27</sup> Donald J. Trump, Twitter (Jul. 3, 2019, 4:33 PM), <https://twitter.com/realDonaldTrump/status/1146517318509481984>.

<sup>28</sup> E.g., Robin Wright, *The Killing of Qassem Suleimani is Tantamount to an Act of War*, The New Yorker (Jan. 3, 2020), <https://www.newyorker.com/news/our-columnists/the-us-assassinated-suleimani-the-chief-exporter-of-irans-revolution-but-at-what-price>.

authorization before taking further military action against Iran.<sup>29</sup> And on January 14, 2020, Senator Tim Kaine announced that a corresponding measure has enough Republican support to pass the Senate.<sup>30</sup> Representative Elissa Slotkin, sponsor of the House resolution, has pledged that the House will take up a Senate-passed measure restraining President Trump's military action against Iran.<sup>31</sup> Last year, an amendment to the National Defense Authorization Act that would curb U.S. military actions towards Iran passed the House of Representatives on a bipartisan basis. While a similar amendment failed in the Senate, four Republicans joined Democrats in supporting it.<sup>32</sup>

In order for Congress to exercise its role as a representative of the people, the people must be able to provide their representatives with their views. The public cannot do this in an informed way without access to Defendant agencies' asserted legal authority and policy justification for the administration's military actions.

Further, considering the demonstrated possibility of a sudden escalation of hostilities with Iran, it is imperative that the public be informed of the administration's assessments of its authority and its policy rationale for the Soleimani strike in order for the public to share their

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<sup>29</sup> 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>.

<sup>30</sup> Catie Edmondson, *Senate Has Votes to Pass Limits on Trump's Iran War Power, Likely Drawing a Veto*, N.Y. Times (Jan. 14, 2020), <https://www.nytimes.com/2020/01/14/us/politics/iran-war.html>.

<sup>31</sup> Rebecca Kheel, *House war powers sponsor expects to take up Senate version of resolution*, The Hill (Jan. 15, 2020), <https://thehill.com/policy/defense/478442-house-war-powers-sponsor-expects-to-take-up-senate-version>.

<sup>32</sup> Bryan Bender and Connor O'Brien, *Why a pro-Trump Republican is fighting to limit the President's war powers*, Politico (last updated Sept. 20, 2019), <https://www.politico.com/story/2019/09/19/trump-war-iran-1748552>.

views with Congress immediately. The public need for this information could not be more urgent.

### **III. Plaintiff's FOIA Requests**

On January 3, 2020, Plaintiff sent FOIA requests to Defendant DOJ's components OLC, OIP, and NSD, as well as to DOD and State. Plaintiff's requests, which were identical but for the name of the receiving agency, sought the following records:

1. Any and all records, including but not limited to emails and memoranda, reflecting, discussing, or otherwise relating to the January 2, 2020 military strike in Iraq and/or the President's legal authority to launch such a strike.
2. Any and all records, including but not limited to emails and memoranda, reflecting or related to communications with Congress, congressional committees, or individual members of Congress regarding the January 2, 2020 military strike in Iraq, including but not limited to records that reflect consideration of whether or not to inform Congress, congressional committees, or individual members of Congress of the strike, and/or the existence or absence of any obligation to inform Congress, congressional committees, or individual members of Congress of the strike.

The timeframe for this request was "December 1, 2019 through the present." Ex. A (DOJ OLC FOIA Request); Ex. B (OIP FOIA Request); Ex. C (NSD FOIA Request); Ex. D (DOD FOIA Request); Ex. E (State FOIA Request). For each of these FOIA requests, Plaintiff also sought expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and the agency-specific regulations.

#### **A. Plaintiff's FOIA Responses from DOJ's Components OLC, OIP, and NSD**

Protect Democracy sought expedited processing from DOJ's OLC, OIP, and NSD under the applicable statute as well as DOJ's regulations because the request concerns "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence," 28 C.F.R. § 16.5(e)(1)(iv), and because there is "urgency to inform the public about an actual or alleged Federal Government activity." 28 C.F.R. § 16.5(e)(1)(ii). Both the OLC and OIP granted Plaintiff's request for expedited

processing. *See* Ex. F (Response from OLC, dated Jan. 10, 2020); Ex. G (Response from OIP, dated Jan. 14, 2020). NSD, however, denied the request, claiming that Plaintiff did not demonstrate “a particular urgency to inform the public.” *See* Ex. H (Response from NSD, dated Jan. 13, 2020).

### **B. Plaintiff’s FOIA Response from DOD**

Protect Democracy sought expedited processing from DOD under 5 U.S.C. § 552(a)(6)(E) and DOD’s regulations, which entitle the requester to expedited processing when “[t]he information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged governmental activity.” 32 C.F.R. § 286.8(e)(1)(i)(B). DOD denied Plaintiff’s request, stating that Plaintiff “[did] not clearly demonstrate[] how the information will lose its value if not processed on an expedited basis.” *See* Ex. I at 1 (Response from DOD, dated Jan. 9, 2020). Instead, DOD placed Plaintiff’s request in its “complex processing queue,” noting that its “workload is approximately 3,126 open requests.” *Id.* at 2.

### **C. Plaintiff’s FOIA Response from State**

Like its other FOIA requests, Plaintiff sought expedited processing from State under 5 U.S.C. § 552(a)(6)(E) and State’s regulations because “[t]he information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal government activity.” 22 C.F.R. § 171.11(f). In response, State restated its expedited processing regulations and issued a vague denial of Plaintiff’s request, without any particularized description of which element was at issue or how Plaintiff’s request fell short. *See* Ex. J (Response from State, dated Jan. 6, 2020).

## ARGUMENT

### PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION

Protect Democracy is entitled to a preliminary injunction granting its requests for expedited processing of the requests addressed to NSD, DOD, and State. In considering a request for a preliminary injunction, a court must weigh four factors:

(1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury absent injunctive relief; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest.

*Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001). Here, all four factors weigh in favor of granting Protect Democracy's motion.

#### A. Plaintiff Is Likely to Succeed on the Merits

Protect Democracy submitted FOIA requests to DOJ components OLC, OIP, and NSD, as well as State and DOD, in which it requested expedited processing. OLC and OIP appropriately granted the request for expedition. NSD, State, and DOD, on the other hand, erroneously denied Protect Democracy's request for expedition, despite the fact that OLC and OIP—applying the same statutory provisions and nearly identical regulations to the same set of facts—reached the opposite conclusion. *Cf. ACLU v. U.S. Dep't of Justice*, 321 F. Supp. 2d 24, 32 (D.D.C. 2004) (finding agency's denial of expedited processing unreasonable where agency had granted a similar request for expedition a year earlier).

As explained below, OLC and OIP were correct to conclude that expedition is appropriate in this case. NSD, State, and DOD should be required to expedite Protect Democracy's request.

### 1. Protect Democracy is entitled to expedited processing

FOIA provides that “[e]ach agency shall promulgate regulations . . . providing for expedited processing of requests for records” in cases of “compelling need” or “in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E). The statute defines “compelling need” as a circumstance where, *inter alia*, “with respect to a request made by a person primarily engaged in disseminating information,” there is “urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* § 552(a)(6)(E)(v)(II).

Each of the defendant agencies has adopted regulations regarding expedited processing. The applicable DOJ regulations provide for expedition for requests that involve “[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information,” 28 C.F.R. § 16.5(e)(1)(ii), or “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence,” *id.* § 16.5(e)(1)(iv). Similarly, the relevant State and DOD regulations provide for expedited processing where “[t]he information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity.” 32 U.S.C. § 286.8(e)(1)(i)(B) (DOD regulations); 22 C.F.R. § 171.11(f)(2) (State regulations). Protect Democracy’s requests are entitled to expedited processing under either of the standards articulated above.

- a. *There is an “urgency to inform” the public regarding the government activities that are the subject of Protect Democracy’s FOIA request, and Protect Democracy is “primarily engaged in disseminating information”*

Protect Democracy’s FOIA request is entitled to expedition because it was “made by a person primarily engaged in disseminating information,” and involves an “urgency to inform the

public concerning actual or alleged Federal Government activity.” 5 U.S.C.

§ 552(a)(6)(E)(v)(II); *see also* 28 C.F.R. § 16.5(e)(1)(ii); 32 U.S.C. § 286.8(e)(1)(i)(B); 22 C.F.R. § 171.11(f)(2).

As the D.C. Circuit has explained, the question whether there is an “urgency to inform the public” turns on “at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” *Al-Fayed v. C.I.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001). There can be no question that Protect Democracy’s request “concerns federal government activity.”

The first two factors are also satisfied. *First*, the subject of the request—the President’s decision to launch a military strike against Iran and, more specifically, his legal authority and policy justification for doing so—are of the utmost public importance and have been the focus of significant media attention. *See, e.g.*, Tim Lister & Eve Bower, *Growing doubts on legality of US strike that killed Iranian general*, CNN (last updated Jan. 6, 2020), <https://www.cnn.com/2020/01/06/middleeast/soleimani-strike-legality-doubts-us-iran-intl/index.html>; *see also* 28 U.S.C. § 16.5(e)(3) (“The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ‘urgency to inform’ the public on the topic.”); *Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 299 (“[A]s evidence that [Protect Democracy’s assertions of urgency with regard to FOIA requests concerning the April 2017 missile strikes against Syria] were justified, one need look no further than the widespread media attention—including by some of the nation’s most prominent news outlets—paid both to the April 6 strike and its legality, as early as the date of Protect

Democracy’s requests.”).<sup>33</sup> Members of Congress have publicly criticized the administration for its lack of transparency on this crucial issue.<sup>34</sup> And the President’s reasons for using military force—and whether he is legally permitted to do so in the first place—is a concern fundamental to our democracy.

Meanwhile, the risk of escalation, though hard to quantify, is very real—making this issue a matter of significant exigency. *See supra* pp. 8-9. As Protect Democracy explained when initially seeking expedited processing, “this request is made all the more urgent by the

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<sup>33</sup> For additional media coverage on questions concerning the legality of the targeted killing, see, for example, Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani*, Lawfare (Jan. 3, 2020), <https://www.lawfareblog.com/did-president-have-domestic-legal-authority-kill-qassem-soleimani>; Ken Dilanian, *Was it legal for Donald Trump to order the killing of a top Iranian general?*, NBC News (Jan. 3, 2020), <https://www.nbcnews.com/news/world/was-it-legal-donald-trump-order-killing-top-iranian-general-n1109961>; Sean Illing, *An expert on why the Soleimani assassination was almost certainly illegal*, Vox (Jan. 3, 2020), <https://www.vox.com/2020/1/3/21048012/iran-general-killed-qasem-soleimani-legality>; Merrit Kennedy & Jackie Northam, *Was it Legal For the U.S. To Kill a Top Iranian Military Leader*, NPR (Jan. 4, 2020), <https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader>; Ed Kilgore, *What Legal Authority Did Trump Have to Assassinate Qasem Soleimani?*, N.Y. Mag. (Jan. 3, 2020), <http://nymag.com/intelligencer/2020/01/what-is-trumps-legal-authority-for-soleimani-assassination.html>; Lisa Mascaro & Deb Riechmann, *Trump tests Congress’ war powers with strike against Iran*, AP (Jan. 7, 2020), <https://apnews.com/9a76c82948930cdcd2e6531b3030670d>; William Roberts, *Was Trump’s order to assassinate Iran’s Qassem Soleimani legal?*, Al Jazeera U.S. (Jan. 3, 2020), <https://www.aljazeera.com/news/2020/01/trump-order-assassinate-iran-qassem-soleimani-legal-200103212119366.html>.

<sup>34</sup> For example, House Speaker Nancy Pelosi criticized the classified notification as “prompt[ing] serious and urgent questions about the timing, manner and justification of the Administration’s decision to engage in hostilities against Iran.” Seung Min Kim, *The White House has formally notified Congress of the Soleimani strike*, Wash. Post (Jan. 4, 2020), [https://www.washingtonpost.com/politics/the-white-house-has-formally-notified-congress-of-the-soleimani-strike/2020/01/04/1cc60090-2f3f-11ea-be79-83e793dbcaef\\_story.html](https://www.washingtonpost.com/politics/the-white-house-has-formally-notified-congress-of-the-soleimani-strike/2020/01/04/1cc60090-2f3f-11ea-be79-83e793dbcaef_story.html). Senator Mike Lee called the in-person briefing “insulting,” describing it 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.” 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>.



possibility of escalation of hostilities with Iran and the fact that the President may decide to engage in further military action at any time.” Ex. A, at 3; Ex. B, at 3; Ex. C, at 3; Ex. D, at 2-3; Ex. E, at 3. Moreover, Congress is currently considering legislation or oversight actions related to the use of military force against Iran. *See supra* pp. 9-11. The public’s ability to share their informed views with their elected representatives hinges upon timely disclosure of the relevant information.

Furthermore, in the absence of public written records, the conflicting claims about the executive’s legal authority contained in public statements of administration officials, create confusion as to policy and legal rationale for the targeted killing. *See supra* pp. 5-7. President Trump himself has suggested an astoundingly broad interpretation of his own authority to wage war. After news broke that he had approved Soleimani’s killing seven months in advance, he tweeted that “it doesn’t really matter” whether the targeted killing was due to an imminent threat of attack, and that Soleimani’s “horrible past” alone justified the use of military force against him.<sup>35</sup> The President’s assertion that he can launch a military assault on any foreign enemy with a “horrible past,” without further authority or justification, is tantamount to a disavowal of any domestic and international legal constraints on his war powers and would eviscerate Congress’s constitutional role in such matters.

In short, “the subject matter of the request [is] central to a pressing issue of the day” and, in that respect, resembles other requests for which courts have found that expedited processing is appropriate. *Wadelton v. Dep’t of State*, 941 F. Supp. 2d 120, 123 (D.D.C. 2013) (citing cases); *see also, e.g., ACLU*, 321 F. Supp. 2d at 29-31; *Leadership Conf. on Civil Rights v. Gonzales*,

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<sup>35</sup> *See supra* p.7.

404 F. Supp. 2d 246, 260 (D.D.C. 2005). The public has an immediate right to understand the administration's position with respect to the legality of Soleimani's killing, and to assess whether that position is justified.

*Second*, further delay of a response here harms Protect Democracy's strong interest in providing urgent information to the public about the legal authority and decisionmaking of the Executive Branch in order to promote democratic debate and accountability. As emphasized by *American Civil Liberties Union of Northern California v. U.S. Department of Defense*, "another recognized interest would be harmed by delay: the media's interest in quickly disseminating breaking, general-interest news. . . . [P]laintiffs' request showed not only the public's need to know but also the urgency of the news." No. C 06-01698 WHA, 2006 WL 1469418, at \*8 (N.D. Cal. May 25, 2006). And as the *Protect Democracy Project* court reasoned, "there is another potential harm, too: The possibility for the strikes to recur without legal justification." 263 F. Supp. 3d at 300. Likewise, Protect Democracy's interest in quickly sharing information in the context of congressional legislative debate and the possibility of escalation has an urgency that has been, and will continue to be, harmed by the delay in accessing the requested records.

Protect Democracy "easily" satisfies the requirement of 28 C.F.R. § 16.5(e)(2) that it be "primarily engaged in disseminating information." *Protect Democracy Project*, 263 F. Supp. 3d at 298. Protect Democracy regularly disseminates information and intends to disseminate the information obtained in response to these requests. *See* Declaration of Ian Bassin, Ex. K. Protect Democracy Project operates in the tradition of 501(c)(3) good government organizations that qualify under FOIA as "news media organizations." Like those organizations, the purpose of Protect Democracy is to "gather[] information of potential interest to a segment of the public, use[] its editorial skills to turn the raw materials into distinct work, and distribute[] that work to

an audience.” *Nat’l Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Indeed, Protect Democracy has routinely demonstrated the ability to disseminate information about its FOIA requests to a wide audience.<sup>36</sup> Protect Democracy will disseminate information and analysis about these requests—and any information obtained in response—through its website ([protectdemocracy.org](http://protectdemocracy.org)); its Twitter feed (<https://twitter.com/protctdemocracy>), which has more than 29,000 followers; its email list of approximately 20,000 people; and sharing information with other members of the press. *See Leadership Conf.*, 404 F. Supp. 2d at 260 (finding that plaintiff organization was “primarily engaged in the dissemination of information” where it “disseminate[d] information regarding civil rights and voting rights to educate the public, promote effective civil rights laws, and ensure their enforcement by the Department of Justice”).

b. *The administration’s use of force constitutes a matter of “widespread and exceptional media interest” raising “possible questions about the government’s integrity which affect public confidence”*

As relevant to the NSD FOIA request, DOJ regulations also provide for expedited processing for requests involving “[a] matter of widespread and exceptional media interest in

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<sup>36</sup> *See, e.g.*, Lisa Rein, *Watchdog group, citing “integrity of civil service,” sues Trump to find out if feds are being bullied*, Wash. Post (Apr. 27, 2017), [https://www.washingtonpost.com/news/powerpost/wp/2017/04/27/watchdog-group-citing-integrity-of-civil-service-sues-trump-to-find-out-if-feds-are-being-bullied/?utm\\_term=.8647ab128f3e](https://www.washingtonpost.com/news/powerpost/wp/2017/04/27/watchdog-group-citing-integrity-of-civil-service-sues-trump-to-find-out-if-feds-are-being-bullied/?utm_term=.8647ab128f3e); Ben Berwick, *Going to Court for Civil Servants*, Take Care (Apr. 28, 2017), <https://takecareblog.com/blog/going-to-court-for-civil-servants>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times (May 8, 2017), <https://nyti.ms/2pX82OV>; Justin Florence, *What’s the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare (May 8, 2017), <https://www.lawfareblog.com/whats-legal-basis-syria-strikes-administration-must-acknowledge-limits-its-power-start-war>; *Protect Democracy Files Lawsuit Against State Department Over Treatment of Civil Service* (March 2018), available at <https://protectdemocracy.org/update/lawsuit-state-department-civil-service/>.

which there exist possible questions about the government’s integrity that affect public confidence.” 28 C.F.R. § 16.5(e)(1)(iv). In *ACLU*, the court granted the plaintiff’s request for expedited processing of a FOIA request concerning the number of times FBI field offices had requested permission to compel disclosure of records sought for authorized investigation of terrorist activity under the Patriot Act. 321 F. Supp. 2d at 27. The court granted expedition under this standard, relying on news reports and congressional commentary about possible government abuses under the relevant provision of the statute. *Id.* at 32-33. Likewise, here, the administration’s targeted killing of Soleimani has been criticized in the press and by members of Congress as reckless and possibly illegal or unconstitutional.<sup>37</sup>

#### **B. Plaintiff Will Be Irreparably Harmed Absent the Requested Relief**

As the Supreme Court has observed, public awareness of the government’s actions is “a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Public awareness must be *timely* because “stale information is of little value.” *Payne Enters. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). “When ‘time is necessarily of the essence,’ the harm in agency delay is more likely to be irreparable.” *Am. Oversight v. U.S. Dep’t of State*, No. 19 Civ. 2934 (CRC), 2019 WL 5665930, at \*3 (D.D.C. Oct. 25, 2019) (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

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<sup>37</sup> See, e.g., Rebeca Ingber, *If there was no ‘imminent’ attack from Iran, killing Soleimani was illegal*, Wash. Post. (Jan. 15, 2020), <https://www.washingtonpost.com/outlook/2020/01/15/if-there-was-no-imminent-attack-iran-killing-soleimani-was-illegal/>; Tim Lister & Eve Bower, *Growing doubts on legality of US strike that killed Iranian general*, CNN (last updated Jan. 6, 2020), <https://www.cnn.com/2020/01/06/middleeast/soleimani-strike-legality-doubts-us-iran-intl/index.html>; Reality Check team, *Soleimani attack: What does international law say?*, BBC News (Jan. 7, 2020), <https://www.bbc.com/news/world-51007961>.

Department officials and the White House regarding recall of former ambassador to Ukraine, Marie Yovanovitch, in light of related impeachment inquiry) (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Justice*, 416 F. Supp. 2d 30, 40-41 (D.D.C. 2006) (“EPIC”)).

In *Protect Democracy Project*, the court concluded that irreparable harm would likely result absent a preliminary injunction, observing that “[t]he recent escalation in hostilities between U.S. and Syria, plus indications from the White House that another chemical weapons attack may be in the offing, make it more likely that irreparable harm will result without expedited processing of Protect Democracy’s requests.” 263 F. Supp. 3d at 301. The court explained that such circumstances present a potential for irreparable harm “because ongoing public and congressional debates about issues of vital national importance cannot be restarted or wound back.” *Id.* (internal citation omitted). The court added that the prospect of irreparable harm is more vivid “where the use of military force [with the prospect of escalation] is implicated.” *Id.* Because unlike, “for example, the promulgation of an administrative rule, or even the passage of legislation . . . [m]ilitary strikes cannot be undone.” *Id.* (internal citations omitted).

As in the litigation involving the Syria airstrikes, here, too, Protect Democracy will be irreparably injured if it is not provided the requested information. As explained above, the issue of the administration’s legal and policy rationale for the Soleimani killing is a matter of national significance, shown by extensive news media and congressional attention. *See supra* pp. 15-16 & n. 33. And, as the killing itself and Iran’s erratic response showed—Iran disavowed its commitment to limitations on uranium enrichment and mistakenly shot down a commercial aircraft, *see supra* pp. 8-9—the conflict could quickly escalate with no advance warning. The public’s ability to participate in a meaningful and informed debate about further military action

against Iran is severely hampered by the administration's failure coherently to explain its actions. Protect Democracy is entitled to injunctive relief to ensure it can participate in the time-sensitive public and congressional debates regarding our country's military posture toward Iran.

### **C. The Requested Relief Will Not Burden Others' Interests**

The preliminary injunction sought here would not burden others' interests. Defendant cannot be "burdened" by a requirement that it merely comply with the law. *See Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (recognizing "an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate"). The immediate relief Plaintiff seeks will require nothing more of the government than what federal law already mandates: the expedited processing of Protect Democracy's FOIA requests. Furthermore, even to the extent that there is a burden to others awaiting processing of FOIA requests, it is one imposed by Congress, which is the proper place for concerns to be addressed. *See Elec. Frontier Found. v. Off. of Director of Nat'l Intelligence*, No. C 07-5278 SI, 2007 WL 4208311, at \*7 (N.D. Cal. Nov. 7, 2007) (citing *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999)) ("any complaints about the burdens of complying with the law are best addressed to Congress, not the courts."). Furthermore, in practical terms, it would be difficult for Defendants to argue that injunctive relief in this case would cause much delay to other requesters given the very specific nature of Plaintiff's FOIA requests and extremely limited time window ("December 1, 2019 through the present"). And even granting that argument, "[t]his is the extraordinary case where the public interest favors placing [Protect Democracy's] requests ahead of other requests in [Defendants'] FOIA queues." *Am. Oversight*, 2019 WL 5665930, at \*4; *see also Ctr. for Pub. Integrity v. United States Dep't of Def.*, No. Civ. 19-3265(CKK), 2019 WL 6270921, at \*7 (D.D.C. Nov. 25, 2019) (granting preliminary injunction in FOIA case requesting documents from DOD and OMB concerning the withholding of military

aid to Ukraine, concluding “that the extraordinary circumstances presented in this case warrant [FOIA queue] line-cutting”). It is truly the exceptional case where that the President launches a unilateral attack, without consultation or apparent authorization, on the top military figure of a hostile regional power, potentially “setting off a . . . massive regional war.”<sup>38</sup>

#### **D. The Public Interest Favors the Requested Relief**

The final factor in the preliminary injunction analysis also weighs in favor of issuance of the order Protect Democracy seeks in this case. Release of FOIA records promotes the public interest by “shed[ding] light on an agency’s performance of its statutory duties.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989). But more fundamentally, courts have long recognized that “an agency’s compliance with a mandatory statutory regime is presumably always in the public interest.” *Protect Democracy Project*, 263 F. Supp. 3d at 301 (citing *Jacksonville Port Auth.*, 556 F.2d at 59). Lastly, the “timely release” of information given media attention and congressional action makes the public interest “particularly well-served.” *EPIC*, 416 F. Supp. 2d at 42.

Protect Democracy’s interest is not only in Defendants’ general adherence to their statutory mandates. In this particular case, disclosure of the requested records will serve the public interest by allowing a meaningful public debate on the President’s decision and legal authority to initiate military conflict. Debate on this very issue is already underway in Congress, with votes coming as early as this week. The public has a vital interest in assessing the requested information in time for that assessment to inform its representatives’ decisionmaking.

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<sup>38</sup> Christopher S. Murphy (@ChrisMurphyCT), Twitter (Jan. 2, 2020, 5:49 PM), <https://twitter.com/ChrisMurphyCT/status/1212913952436445185>.

## CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court immediately enjoin Defendant DOJ's component NSD, as well as Defendants DOD and State, to grant Plaintiff's requests for expedited processing.

Dated: January 22, 2020

Respectfully submitted,

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