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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

January 7, 2025

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Withdrawal and Release of Certain OLC Opinions

Dear Attorney General Garland:

I urge you to withdraw certain legal opinions by the Department of Justice's Office of Legal Counsel (OLC) relating to the allocation of war powers and foreign relations powers between Congress and the President. I additionally urge you to publicly release certain records relating to the President's authority to deploy U.S. Armed Forces within the United States, and the activities in which those military personnel may or may not engage.

As you are aware, the Constitution divides war powers between Congress and the President and assigns Congress, not the President, the authority to declare war. The Constitution also bifurcates the treaty-making power, which the President may exercise only with the advice and consent of the Senate. As memorialized in OLC's own guidance on best practices, OLC helps the President fulfill his or her obligation "to take Care that the Law be faithfully executed."¹ Unfortunately, a number of OLC opinions dating to prior presidential administrations which remain on the books contain conclusions that are inconsistent with Congress's constitutional prerogatives with respect to war, Congress's role in treaty-making, and/or the President's duty under the Take Care Clause. As you are no doubt aware, the Department of Justice has previously withdrawn flawed or outdated OLC legal opinions.² I ask that you direct OLC to rescind the below opinions as well.

The first is a 1989 opinion regarding the Federal Bureau of Investigation's (FBI) authority to apprehend suspects overseas.³ The opinion concluded, *inter alia*, that the President could unilaterally "override" the U.N. Charter's prohibition on the use of force.⁴ As that prohibition is the key international law constraint on presidential war-making, the conclusion that the President can, in effect, disregard it is potentially of great consequence.

¹ David J. Barron, *Re: Best Practices for OLC Legal Advice and Written Opinions*, July 16, 2010.

² David J. Barron, *Withdrawal of Office of Legal Counsel CIA Interrogation Opinions*, April 15, 2009.

³ Authority of the Federal Bureau of Investigations to Override International Law in Extraterritorial Law Enforcement Activities 13 Op O.L.C. 163 (1989).

⁴ *Id.*

This legal conclusion is inconsistent with the President's obligation "to take Care that the Law be faithfully executed" as treaties such as the U.N. Charter are "laws" for the purposes of the Take Care Clause.⁵ The Senate has repeatedly reaffirmed its view on this point, including with respect to non-self-executing treaties.⁶

The second OLC opinion meriting withdrawal also bears on the separation of powers between Congress and the President regarding U.S. treaty obligations. In 2020, OLC concluded that a statutory provision requiring the President to give Congress advance notice of his intention to withdraw from a treaty was unconstitutional. OLC assessed, "Congress's authority does not extend to regulating the President's decision to exercise a right of the United States to withdraw from a treaty."⁷ This conclusion is inconsistent with a statute providing that the "President shall not suspend, terminate, denounce, or withdraw the United States from the North Atlantic Treaty . . . except by and with the advice and consent of the Senate, provided that two-thirds of the Senators present concur, or pursuant to an Act of Congress."⁸ Notably, President Biden did not object to this prohibition when signing it into law.

The third is a 2001 opinion contending, "Congress's power to declare war does not constrain the President's independent and plenary constitutional authority over the use of military force" and concludes the President could effectively wage the entire "War on Terror" without congressional authorization.⁹ The fourth is a 2002 memorandum finding that "were it the President's judgment that a change of regime in Iraq would remove a threat to our national interests, he could direct the use of force to achieve that goal" and indicated the President could wage the Iraq War even without congressional authorization.¹⁰

The 2001 and 2002 opinions not only arrogate to the President Congress's authority under the Declare War Clause, they are also inconsistent with OLC's own war powers doctrine, which recognizes that "war in the constitutional sense" requires congressional authorization.¹¹

A fifth opinion that should be considered for rescission is a 2020 memorandum articulating one of the government's justifications for killing Iranian General Qassem Soleimani.¹² Although still heavily redacted, this legal opinion concludes that the President had authority under both the 2002 Authorization for the Use of Military Force against Iraq (2002 Iraq

⁵ See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008); Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter*, 105 CORNELL L. REV. 1809 (2020).

⁶ S. EXEC. REP. NO. 110-12, at 10 (2008) ("[A]ll treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed.").

⁷ Congressional Mandated Notice Period for Withdrawing from the Open Skies Treaty, (2020).

⁸ Section 1250A of the National Defense Authorization Act for Fiscal Year 2024.

⁹ The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 188, 193 (2001).

¹⁰ Authority of the President Under Domestic and International Law to Use Military Force Against Iraq 26 Op. O.L.C. 143 (2002).

¹¹ See e.g. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. (slip op.) 1, 8 (2018) (recognizing that the President is "oblig[ed] . . . to seek congressional approval prior to contemplating military action that would bring the Nation into a war").

¹² Memorandum from Steven A. Engel, Assistant Attorney General, for John A. Eisenberg, Legal Advisor to the National Security Council, Re: January 2020 Airstrike in Iraq Against Qassem Soleimani (Mar. 10, 2020).

AUMF) and Article II of the Constitution to order the attack on a senior Iranian official.¹³ OLC's statutory interpretation—reading the 2002 *Iraq* AUMF to apply to *Iran*—has been rejected by bipartisan majorities in both houses of Congress.¹⁴ Further, given the predictably significant risk of escalation entailed by the attack on Soleimani, as illustrated by the retaliatory Iranian missile barrage against U.S. forces at al Asad air base in Iraq, it is difficult to square the opinion's interpretation of the President's authority under Article II with OLC's own prior doctrine regarding the need for congressional authorization for “war in the constitutional sense.”¹⁵

Congress and the executive branch may have differing views in some respects as to the separation of powers between them. However, these opinions are concerning outliers even by the standards of the executive branch's own legal doctrine. Indeed, it does not appear that OLC has relied upon these opinions in other publicly available legal memoranda. For these reasons, I urge the Department of Justice to withdraw them.

In addition to the aforementioned opinions that should be rescinded, I request that the Department of Justice publicly release opinions and manuals pertaining to the domestic use of the U.S. military. For decades, OLC has issued guidance on the circumstances in which the President may deploy the military within the United States, as well as what servicemembers may do when so deployed.¹⁶ Some of OLC's final opinions in this area are publicly available, but the documents requested below are not.

The American people have a right to know how the Executive Branch interprets the President's constitutional and statutory authority to use the military domestically. The need for transparency regarding these legal interpretations is particularly urgent today given the risk of domestic military deployment to suppress protests or carry out mass deportations.¹⁷

¹³ *Id.*

¹⁴ S.J.Res. 68 (2020) (“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.”).

¹⁵ See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. (slip op.) 1, 21 (2018) (“[I]n evaluating the expected scope of hostilities, we also considered the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia and Iran.”).

¹⁶ E.g., OLC Mem. of July 1, 1964, Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi; OLC Mem. of Oct. 4, 1967, Use of Federal Troops to Protect Government Property and Functions at the Pentagon Against Anti-War Demonstrators; OLC Mem. of April 26, 1968, Legal Authority for Using Federalized National guard and Reserve Components of Armed Forces in Suppressing Civil Disorders at the Request of a State; OLC Op. of Apr. 29, 1971, Authority to Use Troops to Prevent Interference with Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions; OLC Op. of Feb. 19, 1991, Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies; OLC Op. of May 1998, Permissibility Under Posse Comitatus Act of Detail of Defense Department Civilian Employee to the National Infrastructure Protection Center; OLC Mem. of June 8, 2002, Determination of Enemy Belligerency and Military Detention; OLC Op. of Jan. 19, 2021, Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act.

¹⁷ See, e.g., Veronica Stracqualursi, *Trump suggests using military against ‘enemy from within’ on Election Day*, CNN (Oct. 14, 2024); Stephen Groves, *Trump tested the limits on using the military at home. If elected again, he plans to go further*, Associated Press (Oct. 13, 2024); Stephen Groves, *Trump aims to expand domestic military use if reelected*, Military Times (Oct. 14, 2024); Charlie Savage et al., *Deploying on U.S. Soil: How Trump Would Use Soldiers Against Riots, Crime and Migrants*, N.Y. Times (Aug. 17, 2024); Leo Shane III, *Lawmakers push Pentagon*

Given the right of the American people to these legal interpretations, I urge you to release the following:

1. OLC Opinion of July 17, 1953, Re: Power of the President to Use Troops in Aid of Immigration Authorities.
2. OLC Opinion of July 28, 1967, Re: Use of Armed Forces to Suppress Civil Disorders in the Washington Metropolitan Area.
3. OLC Opinion of August 5, 1967, Re: Legal Requirements for the Use of Federal Troops in Case of Severe Domestic Violence Within Your State.
4. OLC Opinion of August 10, 1967, Re: Operational Control of Metropolitan Police Department in the Event of Use of Federal Troops to Suppress Civil Disorder.
5. OLC Opinion of April 18, 1968, Re: Whether the Posse Comitatus Act (18 U.S.C. 1385) Prohibits Issuance of Special Police Commissions to Military Personnel for the Purpose of Enabling Them to be Employed in Off-Duty Hours as Deputy Sheriffs, Special Policemen, Security Guards, Bouncers or Merchant Patrolmen.
6. OLC Opinion of May 11, 1970, Re: Authority to use troops to protect federal functions, including the safeguarding of foreign embassies in the United States.
7. OLC Opinion of September 30, 1970, Re: Legality of Deputizing Military Personnel Assigned to the Department of Transportation.
8. OLC Opinion of April 28, 1971, Re: Authority of Police, with Aid of Troops, to Cordon off Pedestrian Access to Various Key Traffic Areas.
9. OLC Opinion of March 13, 1972, Re: *Use of Federal Forces to Perform the Functions of the Pacific Coast Longshoremen.*
10. OLC Opinion of March 17, 1972, Re: *Legal Justification for the Use of Federal Troops to Act as Longshoremen in the Event of a Renewed Longshoremen's Strike.*
11. OLC Opinion of November 17, 1972, Re: *Use of Federal Troops to Protect Embassies.*
12. OLC Opinion of March 24, 1978, Re: *Restrictions which the Posse Comitatus Act, 18 U.S.C. § 1385, Places on the Use of Military Personnel to Assist the Department of Justice in the Investigation and Prosecution of Frauds Committed by Contractors in the Course of Procurement by the Department of Defense.*
13. OLC Opinion of January 10, 1980, Re: *Use of Federal Military Force in Domestic Terrorism Incidents.*

14. OLC Opinion of February 5, 1980, Re: *Possible Use of the Armed Forces in the Event of Terrorist Activity at the Lake Placid Olympics*.
15. Memorandum for Jo Ann Harris, Assistant Attorney General, Criminal Division, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, April 5, 1994, *Use of Military Personnel for Monitoring Electronic Surveillance*.
16. OLC Opinion of May 10, 1994, Re: *Use of Military to Enforce Immigration Laws*.
17. Memorandum for the Attorney General from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, Nov. 5, 2002, *Department of Defense Assistance in an FBI Domestic Terrorism Investigation*.
18. Letter of Mar. 27, 1978, for Deanne Siemer, Gen. Counsel, Dep't of Defense, from Mary Lawton, Deputy Assistant Attorney General, OLC.
19. Department of Justice Manual, *The Use of Military Force Under Federal Law to Deal with Civil Disorders and Domestic Violence* (July 1980).
20. OLC, *Federal Legal Authorities for Emergency Response Briefing Book*—known alternately as the “Attorney General Emergency Manual.”

Thank you for your prompt attention to this matter.

Sincerely,



Richard J. Durbin
Chair