UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Plaintiffs, v. DEPARTMENT OF DEFENSE, CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF JUSTICE, and DEPARTMENT OF STATE, Defendants.	17 Civ. 3391 (PAE)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS THE DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, AND CENTRAL INTELLIGENCE AGENCY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page:

Statutes

Rules

Defendants the Department of Defense ("DOD"), Department of State ("DOS"), and Central Intelligence Agency ("CIA") respectfully submit this memorandum of law in support of their motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

PRELIMINARY STATEMENT

Plaintiffs brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking to compel disclosure of records pertaining to an operation carried out by the United States military, described in Plaintiffs' FOIA request as "the United States' January 29, 2017 raid in al Ghayil, Yemen" (the "al Ghayil Raid" or "Raid"). Plaintiffs seek the disclosure of documents pertaining to, *inter alia*, "[t]he legal and policy bases," decision-making processes, "[b]efore-the-fact" and "after-action" assessments, and casualties associated with the Raid. In response to Plaintiffs' FOIA request, DOD, DOS, and CIA conducted reasonable searches for responsive records and processed several hundred responsive pages. Defendants also conducted numerous follow-up searches and re-reviews in an effort to provide more information to Plaintiffs and resolve the parties' disputes, and made several supplemental releases of information. With respect to the records remaining at issue in this case, Defendants have withheld from disclosure records and information that remain currently and properly classified and/or statutorily protected, including detailed information regarding United States military operations, capabilities, and assessments, intelligence reporting and analyses, and foreign government information, the disclosure of which could reasonably be expected to harm national security. Defendants have also withheld certain privileged predecisional and deliberative records, and information protected by the presidential communications privilege.

The declarations provided by DOD, DOS, and CIA logically and plausibly establish that the records remaining at issue in this case are protected from disclosure, in whole or in part,

because they are currently and properly classified, statutorily protected, and/or privileged, and thus exempt under FOIA Exemptions 1, 3, and/or 5. *See* 5 U.S.C. §§ 552(b)(1), (3), (5).[1] The DOD declaration also establishes that the one agency search challenged by Plaintiffs was reasonable, adequate, and conducted in good faith. Accordingly, the Court should grant summary judgment to DOD, DOS, and CIA.

BACKGROUND

I. The FOIA Request

This matter arises from FOIA requests submitted by Plaintiffs on March 15, 2017, to CIA, the Joint Staff at the Pentagon, the United States Central Command ("CENTCOM"), the DOD Office of Inspector General, the Department of Justice ("DOJ") FOIA Unit, the DOJ Office of Legal Counsel, and the Department of State. *See* Dkt. No. 37, Ex. 1 (the "Requests"). The Requests seek disclosure of several categories of records relating to the al Ghayil Raid, including records pertaining to the legal and policy bases for the Raid, the process by which the government approved the Raid, before-the-fact assessments and "after-action" investigations of the Raid, and casualty information. *Id.* at 2, 5.

II. Initial FOIA Responses Provided by DOD and DOS, and First Round of Summary Judgment Motions

Three components within DOD searched for, located, and processed responsive records: the Joint Staff, the DOD Office of the General Counsel ("DOD OGC"), and CENTCOM.[2] *See* Declaration of Major General Jim Hecker dated April 5, 2019 ("DOD Dec."), ¶ 4. The Joint

[1] DOD and DOS also withheld certain personally identifying information from the challenged records pursuant to Exemption 6 and, as to DOD, Exemption 3 (via the exempting statute 10 U.S.C. § 130b, which authorizes the withholding of, among other things, information regarding any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit). Those exemptions are not addressed herein because Plaintiffs previously indicated that they do not challenge these categories of withholdings.

[2] DOD's Office of Inspector General conducted a search but located no responsive records.

Staff processed 442 pages of records, DOD OGC processed 38 pages, and CENTCOM processed 343 pages; in addition, DOS referred a set of responsive records to DOD for processing and release. *Id*. DOD made several releases of documents between November 2017 and July 2018. *Id*. DOS processed 489 pages of responsive records and made three releases to Plaintiffs between November 2017 and July 2018. *See* Declaration of Eric F. Stein dated March 29, 2019 ("DOS Dec."), ¶¶ 10-12, 17.

Following the agencies' initial FOIA responses, the parties conferred about the agencies' withholdings to identify and potentially narrow any disputes. *E.g.*, DOD Dec. ¶ 4. After receiving more information about the records and Defendants' withholdings, Plaintiffs indicated that they intended to challenge withholdings in 45 DOD records and 9 DOS records, as well as CENTCOM's searches for 2 records. *Id.*; *see also* Dkt. No. 78 ¶ 6. In July 2018, Defendants DOD, DOS, and DOJ[3] moved for summary judgment. Dkt. Nos. 74-79. Plaintiffs opposed and cross-moved for summary judgment against DOS and partial summary judgment against DOD. Dkt. Nos. 83-85. Plaintiffs also narrowed their challenges to four DOS documents, 26 DOD documents, and one CENTCOM search. *See* Dkt. No. 84 at 5.

Following Plaintiffs' filing, DOD and DOS voluntarily re-reviewed the remaining challenged documents and determined that they could release additional information from certain records. In September and October 2018, DOD made three supplemental releases of information from 12 of the challenged DOD records. DOD Dec. ¶ 5. Following these supplemental releases, Plaintiffs notified DOD that they no longer challenged five of those DOD records. *Id.* In

[3] Two components within the Department of Justice—the Office of Information Policy and the Office of Legal Counsel—searched for responsive records. The Office of Information Policy did not locate any responsive records, while the Office of Legal Counsel located and processed five responsive records. Plaintiffs initially challenged OLC's withholdings in one of these records, *see* Dkt. No. 79 ¶ 13, but ultimately withdrew that challenge, Dkt. No. 84 at 5.

September 2018, DOS made a supplemental release of information that had been previously withheld from one challenged DOS record, DOS Dec. ¶ 13, but Plaintiffs have not further narrowed their challenges to the four remaining contested DOS documents. In December 2018, the Court agreed to terminate the parties' pending motions and to allow the parties to file new summary judgment motions, in light of developments described below involving CIA and DOD. Dkt. No. 103.

III. CIA's FOIA Response and Referrals to DOD

After receiving the Requests, CIA initially asserted a Glomar response, declining to confirm or deny whether any responsive records existed. *E.g.*, Dkt. No. 44 ("CIA Glomar Dec.") ¶ 8. Plaintiffs moved for partial summary judgment against CIA, and CIA cross-moved for summary judgment. Dkt. Nos. 35-37, 42-44. In June 2018, the Court issued an Opinion and Order denying CIA's motion in full, and granting Plaintiffs' motion only as to Request 2 of the FOIA request, which seeks records pertaining to the process by which the Government approved the al Ghayil Raid. Dkt. No. 67 at 23. The Court's ruling was based in large part on certain official public acknowledgments by then-White House Press Secretary Sean Spicer regarding two January 2017 Deputies Committee meetings and one White House dinner meeting at which the al Ghayil Raid was discussed. *Id.* at 16-17. CIA informed Plaintiffs that it would search for records responsive to Request 2 consistent with the Court's Opinion and Order, including records relating to the two January 2017 Deputies Committee meetings and one White House dinner meeting, but otherwise maintained its Glomar response to Requests 1, 3, 4, and 5. *See* Declaration of Antoinette B. Shiner dated April 5, 2019 ("CIA Dec.") ¶ 6. Plaintiffs notified CIA that they did not intend to challenge CIA's renewed Glomar response to Requests 1, 3, 4, and 5. *Id.*

On December 7, 2018, CIA provided its final FOIA response to Plaintiffs, stating that the agency had located three categories of documents responsive to Request 2 and/or related to the two January 2017 Deputies Committee meetings and the White House dinner meeting at which the Raid was discussed:

> (1) Documents duplicative of some records that had been or were being processed by other agencies in the litigation;
>
> (2) Records that CIA referred in whole or in part to DOD for processing; and
>
> (3) Additional material for which CIA could not provide further detail without revealing information that is itself exempt from disclosure under Exemptions 1 [classified information] and/or 3 [information protected from disclosure by statute].

Id. ¶ 8. As to the category 1 records, CIA provided Plaintiffs with the bates numbers of the duplicative documents that had previously been, or were being, processed by other agencies in this matter. *Id.* ¶ 11. With respect to the category 2 documents, DOD assumed responsibility for processing those records after they were referred to it by CIA. *Id.* ¶ 8. CIA withheld in full the category 3 documents, and has described them in conjunction with this motion as records that contain intelligence reporting compiled in connection with the meetings referenced by then-Press Secretary Spicer at which the Raid was discussed. *Id.* ¶ 12.

In late 2018, DOD and CIA consulted about the records that CIA located in its searches, and DOD learned that CIA had located, among other things, some records that DOD had in its possession but had not already processed. DOD Dec. ¶ 6. Specifically, although DOD had already located and processed documents relating to the second of the two relevant Deputies Committee meetings (the "January 26 DC Meeting"), following the consultation with CIA, DOD identified additional responsive records relating to the first Deputies Committee meeting (the "January 6 DC Meeting"). *Id.* DOD processed the January 6 DC Meeting records. *Id.* ¶ 8.

DOD also processed additional documents referred by CIA that DOD had not previously located or processed, but that implicated DOD equities. *Id.* ¶ 7. In November and December 2018, DOD provided two further FOIA responses to Plaintiffs relating to the records associated with the January 6 DC Meeting and the records that CIA referred to DOD (collectively, the "Referred Documents"). *Id.* ¶ 8. DOD released some of the Referred Documents in part, and provided Plaintiffs with a preliminary *Vaughn* index[4] of all Referred Documents that were withheld in part or in full. *Id.*

Plaintiffs ultimately indicated that they intended to challenge all of the "category 3" documents withheld by CIA that contain intelligence reporting and six records listed on DOD's preliminary *Vaughn* index of Referred Documents. *Id.* ¶ 9. Together with the documents remaining at issue from the original summary judgment motions, Defendants understand that Plaintiffs currently contest withholdings in: (1) 21 DOD documents, (2) four DOS documents, (3) all withheld CIA records that contain intelligence reporting, as described in category 3 of the CIA's final FOIA response, and (4) six Referred Documents. Plaintiffs also continue to contest CENTCOM's search for one record.

ARGUMENT

I. Legal Standards for Summary Judgment in FOIA Actions

FOIA represents a balance struck by Congress "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (citation and quotation marks omitted). Thus, while FOIA generally requires disclosure of agency records, the statute recognizes "that public disclosure is not always in the public interest," *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982); *accord ACLU*

[4] These indices derive their name from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

v. DOJ, 681 F.3d 61, 69 (2d Cir. 2012), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001).

A motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which FOIA cases are typically decided. *See, e.g.*, *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney*, 19 F.3d at 812 (footnote omitted).[5] The agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id*. (citation and quotation marks omitted).

In the national security context, moreover, courts must accord "substantial weight" to agencies' declarations. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *accord N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014); *ACLU v. DOJ*, 681 F.3d at 69; *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In reviewing agency declarations regarding national security matters, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also ACLU v.*

[5] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, No. 89-5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *see also, e.g.*, *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

DOJ, 681 F.3d at 70-71 ("Recognizing the relative competencies of the executive and the judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by government's intelligence agencies regarding whether disclosure of the [withheld information] would pose a threat to national security." (citation and quotation marks omitted)); *accord Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990). Rather, "the agency's justification is sufficient if it appears logical and plausible." *ACLU v. DOD*, 901 F.3d 125, 133 (2d Cir. 2018); *accord Wilner*, 592 F.3d at 73 (citation and quotation marks omitted); *ACLU v. DOJ*, 681 F.3d at 69.

Under this deferential standard, Defendants' declarations submitted herewith (and, in the case of CIA, an additional classified declaration submitted for the Court's *in camera* and *ex parte* review) logically and plausibly establish that the withheld documents and information are exempt from disclosure under FOIA Exemptions 1, 3, and 5. In addition, DOD's declaration shows that CENTCOM's search efforts related to one document, CENTCOM/019, were reasonable and more than adequate. DOD, DOS, and CIA are therefore entitled to summary judgment.

II. CENTCOM's Searches Relating to CENTCOM/019 Were Reasonable and More Than Adequate

The Government does not bear a heavy burden in defending the searches it performed in response to a FOIA request; the Government need only show "that its search was adequate." *Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012). "Adequacy" requires the agency to demonstrate that its search was "reasonably calculated to discover the requested documents," not that the search "actually uncovered every document extant"; the search "need not be perfect, but rather need only be reasonable." *Grand Cent. P'ship*, 166 F.3d at 489; *see*

also Adamowicz v. IRS, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008) (an agency must make "a good faith effort to search for the requested documents," but "[t]his standard does not demand perfection, and thus failure to return all responsive documents is not necessarily inconsistent with reasonableness"). Where the agency's declarations demonstrate that it has conducted a reasonable search, "the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993); *see also Carney*, 19 F.3d at 812. "[P]urely speculative claims about the existence and discoverability of other documents" are insufficient to impugn the good faith presumption accorded to an agency declaration. *Carney*, 19 F.3d at 813. Furthermore, "FOIA does not impose a document retention requirement on agencies." *Wadelton v. Dep't of State*, 208 F. Supp. 3d 20, 28 (D.D.C. 2016); *Conti v. DHS*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *14 (S.D.N.Y. Mar. 24, 2014). Applying these standards, CENTCOM's searches relating to CENTCOM/019 were reasonable and more than adequate under FOIA, and there is no evidence of agency bad faith.

CENTCOM/019 is a partial email thread dated February 28, 2017, located during CENTCOM's initial searches for responsive records in the agency's Enterprise Vault system, which was the agency's email archiving system at the relevant time.[6] DOD Dec. ¶ 10. DOD released CENTCOM/019 as part of its first FOIA production in November 2017, and again as part of a corrected release in January 2018. *See id.* ¶ 4. During the parties' ensuing discussions and at Plaintiffs' request, CENTCOM further investigated the issues relating to the retrieval of CENTCOM/019, and was able to locate the attachment to the partial email thread (which

[6] Under CENTCOM policy, a user's email account archived an email in the Enterprise Vault system after seven days, where it would remain for three years unless a user specifically retrieved it. DOD Dec. ¶ 10. However, users could no longer retrieve vaulted emails after December 2017, when the Enterprise Vault system was migrated to a different system. *Id.*

CENTCOM then processed and released in part). *Id.* ¶ 10. CENTCOM also made multiple efforts, both during its original searches and again in response to Plaintiffs' requests, to locate the complete email in the accounts of the individuals who either sent or received CENTCOM/019, but was still unable to locate the complete email. *Id.*

Although CENTCOM was ultimately unable to retrieve the entire email thread represented in part by CENTCOM/019, *id.*, DOD's declaration establishes that the agency made reasonable efforts to do so, and that is all FOIA requires. *E.g.*, *Adamowicz*, 552 F. Supp. 2d at 361. That the complete email thread was not located does not render the search inadequate. *See, e.g.*, *Schoenman v. FBI*, 763 F. Supp. 2d 173, 204 (D.D.C. 2011) ("Because the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search . . . the mere fact that a particular document was not found does not demonstrate the inadequacy of a search." (citations and quotation marks omitted)).

III. DOD and DOS Properly Withheld Privileged Information Pursuant to Exemption 5

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (citation omitted). As explained in Defendants' declarations, many of the documents at issue are

protected in whole or in part by Exemption 5, because the deliberative process privilege and/or the presidential communications privilege apply.

A. Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege." *Hopkins*, 929 F.2d at 84. An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship*, 166 F.3d at 482; *accord Tigue*, 312 F.3d at 76–77; *Hopkins*, 929 F.2d at 84. A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision," *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975), and when it "precedes, in temporal sequence, the 'decision' to which it relates," *Grand Cent. P'ship*, 166 F.3d at 482. However, the government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears*, 421 U.S. 132, 151 n.18 (1975); *accord Tigue*, 312 F.3d at 80. So long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Tigue*, 312 F.3d at 80.

In determining whether a document is deliberative, courts inquire as to whether it "formed an important, if not essential, link in [the agency's] consultative process." *Grand Cent. P'ship*, 166 F.3d at 483. Deliberative documents include those "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Hopkins*, 929 F.2d at 84–85 (citation and quotation marks omitted). Draft documents and comments on drafts are "quintessentially predecisional and deliberative." *Nat'l Council of La Raza v. DOJ*, 339 F. Supp. 2d 572, 583 (S.D.N.Y. 2004); *see also, e.g.*, *Grand Cent. P'ship*, 166 F.3d at 482 ("The privilege protects recommendations,

draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency."); *ACLU v. DOJ*, 844 F.3d 126, 132-33 (2d Cir. 2016); *ACLU v. DOJ*, 210 F. Supp. 3d 467, 476-77 (S.D.N.Y. 2016). Legal advice, no less than other types of advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980); *accord Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 356–57 (2d Cir. 2005) (final OLC advice memorandum protected by deliberative process privilege absent express adoption).

Here, DOD properly withheld information pursuant to Exemption 5 and the deliberative process privilege. Indeed, a number of Plaintiffs' FOIA requests by their nature seek deliberative records, for example requests for documents reflecting the Government's evaluation of and decision-making process regarding the proposed Raid. *E.g.*, DOD Dec. ¶ 3. DOD withheld information pursuant to the privilege from, *inter alia*, records reflecting predecisional, planning-stage proposals and briefing narratives for anticipated military operations including but not limited to the Raid, which set forth options, recommendations, and requests for higher-level approval (JS/330-336, JS/339-345, JS/059-062, CENTCOM/048-053, JS/048-053, JS/261-266, JS/273-273, and State/039-044), DOD Dec. ¶¶ 22-23; briefing slides illustrating DOD's detailed concept of operations for proposed military actions (RD/5, RD/6, RD/7, and CENTCOM/246-248), *id.* ¶¶ 25-27; preparatory materials, including an executive summary and two documents containing intelligence reporting and analysis, that were created and/or compiled in connection with the January 6 DC Meeting in order to aid in the meeting participants' discussion of and decision-making regarding the proposed Raid (RD/13, RD/3, and RD/4), *id.* ¶¶ 28-30; and a predecisional request for presidential approval of the Raid, which was sent by the Secretary of Defense to the National Security Advisor via a January 24, 2017 memorandum, for consideration

by the President as part of his deliberative process regarding military operations (CENTCOM/045-047, JS/054-056, JS/280-282, State/036-038, and JS/009-011), *id.* ¶¶ 31, 33. Of this last category of documents, reflecting the Secretary of Defense's January 24, 2017 memorandum to the National Security Advisor, one record (JS/009-011) is deliberative process privileged for the additional reason that it is an unsigned, undated draft of the memorandum (the signed, final version of which DOD also processed and released as CENTCOM/045-047, JS/054-056, JS/280-282, and State/036-038). *Id.*[7]

DOD also withheld, as deliberative process privileged, information from an April 2017 predecisional request sent by the Secretary of Defense to the National Security Advisor (and subsequently circulated to a small group of cabinet and other high-level government officials) seeking authorization to extend prior authorities to a new, anticipated military operation, and setting forth information and recommendations intended to aid in the President's decision-making process (State/034-035). *Id.* ¶ 37.[8] DOD also asserted the deliberative process privilege to protect a confidential email discussion among DOD attorneys in advance of the Raid regarding legal issues relating to one aspect thereof, and soliciting other attorneys' input and views (CENTCOM/036-038). *Id.* ¶ 39.[9] The discussion reflected in CENTCOM/036-038 shows DOD attorneys working to develop advice for senior Department leaders regarding one issue relating to the Raid, but does not reflect any final advice or judgments. *Id.*

[7] In September 2018, DOD voluntarily re-reviewed CENTCOM/045-047 (which is identical to State/036-038, JS/054-056, and JS/280-282, and substantially similar to JS/009-011) and released additional information contained therein to Plaintiffs. DOD Dec. ¶ 32.
[8] In September 2018, DOD voluntarily re-reviewed State/034-035 and released additional information contained therein to Plaintiffs. DOD Dec. ¶ 38.
[9] In September 2018, DOD voluntarily re-reviewed CENTCOM/036-038 and released additional information contained therein to Plaintiffs. DOD Dec. ¶ 40.

DOS withheld information pursuant to the deliberative process privilege in all four of its challenged documents. DOS Dec. ¶¶ 33, 40. Documents C06432231, C06432239, C06432636, and C06432854 (the last three of which are identical to one another) are intra-agency emails providing readouts of deliberations from the two January 2017 Deputies Committee meetings at which the al Ghayil Raid was discussed: the January 6 DC Meeting (as to C06432239, C06432636, and C06432854), and the January 26 DC Meeting (as to C06432231).[10] *Id.* ¶¶ 30, 37. The email readouts reflect predecisional deliberations not simply about the President's potential approval of the al Ghayil Raid (which had yet to occur), but about a wide range of issues concerning the proposed operation, including contingencies that could occur before or in the course of the operation, potential ways to address such contingencies, possible related steps that could be taken in the future, and whether to take such steps. *Id.* ¶¶ 33, 40. The deliberations reflected in the emails have not been publicly disclosed. *Id.* ¶¶ 34, 41.

All of the deliberative records addressed in this section "reflect[] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are made." DOD Dec. ¶ 20. As explained in DOD's and DOS's declarations, disclosure of these deliberations and discussions "would undermine the decision-making processes of government, by chilling the candid and frank communications necessary for effective decision-making," *id*., and would "severely hamper the ability of responsible Department officials to formulate and carry out executive branch programs if preliminary comments, opinions, and ideas were shared with the public." DOS Dec. ¶ 24; *see also Hopkins*, 929 F.2d at 84 (the privilege "protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions"); *Klamath*, 532 U.S. at 8-

[10] In September, DOS voluntarily re-reviewed C06432231 and released additional information contained therein to Plaintiffs. DOS Dec. ¶ 13.

9 ("officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news"). The DOS Declaration further explains that disclosure of the discussions that were withheld pursuant to the deliberative process privilege would "diminish the quality of the Department's contribution to U.S. Government decision-making," because Department personnel "would be less likely to identify possible contingencies . . . and potential responses . . . if such information were subject to public disclosure." DOS Dec. ¶¶ 33, 40; *see also NLRB*, 421 U.S. at 150-51 ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process" (quotation marks omitted)). DOD and DOS properly withheld certain information in the challenged records as deliberative process privileged.

B. Presidential Communications Privilege

Exemption 5 also exempts from disclosure information protected by the presidential communications privilege. *See Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004). The Supreme Court has recognized a "presumptive privilege for Presidential communications" that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974) ("*Nixon I*"). The presidential communications privilege protects "communications in performance of a President's responsibilities, . . . of his office, . . . and made in the process of shaping policies and making decisions." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (citation and quotation marks omitted) ("*Nixon II*"). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Nixon I*, 418 U.S. at 708.

The presidential communications privilege provides broad protection for communications with the President, as well as communications involving senior presidential advisors. It "applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones." *Judicial Watch*, 365 F.3d at 1114 (citation and quotation marks omitted); *see also In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) ("Even though the presidential privilege is based on the need to preserve the President's access to candid advice, none of the cases suggest that it encompasses only the deliberative or advice portions of documents."). This includes closely-held presidential directives and decisional documents. *In re Sealed Case*, 121 F.3d at 745-46; *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010). Further, in addition to protecting communications directly with the President, the privilege protects communications involving senior presidential advisors, including "both [ ] communications which these advisors solicited and received from others as well as those they authored themselves," in order to ensure that such advisors investigate issues and provide appropriate advice to the President. *In re Sealed Case*, 121 F.3d at 752. The privilege also covers those communications "authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Id.* And the privilege extends to both presidential communications and to records memorializing or reflecting such communications. *See CREW v. DHS*, 06-0173, 2008 WL 2872183, at *3 (D.D.C. July 22, 2008) (documents memorializing communications that were solicited and received by the President or his immediate advisors are subject to presidential communications privilege).

DOD and DOS properly withheld certain information in the challenged records pursuant to Exemption 5 and the presidential communications privilege.[11] As with the deliberative process privilege, it is unsurprising that the presidential communications privilege applies to some of the records responsive to Plaintiffs' FOIA requests, given that they seek documents reflecting the advisory and deliberative process that led to the President's approval of the Raid. Defendants' declarations logically and plausibly show that the information withheld pursuant to this privilege was closely held within the Executive Branch, in most cases among the President and his advisors, and with respect to a small number of documents, among a limited number of DOD or DOS personnel connected to the Raid who had a need to know the information in order to perform their job duties. DOD Dec. ¶¶ 24, 28-30, 33, 37; DOS Dec. ¶¶ 34, 41.

DOD withheld information pursuant to the presidential communications privilege from the following records: the January 24, 2017 memorandum sent by the Secretary of Defense to the National Security Advisor seeking Presidential approval of the anticipated Raid and attaching a detailed DOD operational proposal for consideration (CENTCOM/045-047 and attachment at CENTCOM/048-053, JS/054-056 and JS/048-053, JS/280-282 and JS/273-278, State/036-038 and State 039-044, JS/009-011, and JS/261-266), DOD Dec. ¶¶ 24, 33[12]; the April 2017 memorandum from the Secretary of Defense to the National Security Advisor (subsequently

[11] In the FOIA context, the presidential communications privilege need not be invoked by the President himself, but may be asserted by the agency withholding the records in question. *See, e.g.*, *Loving v. DOD*, 496 F. Supp. 2d 101, 108 (D.D.C. 2007), *aff'd*, 550 F.3d 32 (D.C. Cir. 2008).

[12] Some copies of the January 24, 2017 memorandum and attached DOD operational proposal were located as attachments to other documents. JS/054-056 and JS/048-053 were attached to an email thread, shortly after the President approved the Raid, among a limited number of DOD personnel discussing the President's recent approval and the execution of the operation. DOD Dec. ¶ 22, 31. JS/280/282 and JS/273-278 were part of a packet of preparatory materials circulated in connection with the January 26 DC Meeting. *Id*. State/036-038 and State/039-044 were circulated by the National Security Advisor to a small group of cabinet and other high-level officials along with a memorandum conveying the President's approval of an extension of prior authorities to a new, anticipated military operation. *Id.*

circulated to a small number of cabinet and other high-level officials), requesting Presidential approval to extend prior authorities to a new, anticipated military action (State/034-035), *id.* ¶ 37; and the executive summary and two intelligence memoranda circulated in preparation for the January 6 DC meeting (RD/13, RD/3, and RD/4), *id.* ¶¶ 28-30. These documents represent closely held communications (or, as to JS/009-011, a draft communication) between senior advisors to the President setting forth detailed operational recommendations, options, and background information to be communicated to the President and/or considered as an essential part of the President's decision-making process regarding proposed military actions.

DOS withheld certain information from each of its challenged records pursuant to the presidential communications privilege. DOS Dec. ¶¶ 34, 41. As discussed above, *see supra* Part III.A, these four documents are intra-agency emails providing readouts of deliberations that took place during the two January 2017 Deputies Committee meetings at which the Raid was discussed; DOS withheld the content of the readouts pursuant to the presidential communications privilege. *Id.* ¶¶ 30, 34, 37, 41. The members of the Deputies Committee constitute senior advisors to the President on national security matters; as set forth in National Security Presidential Memorandum 4, dated April 4, 2017,[13] the Deputies Committee is "the senior sub-Cabinet interagency forum for consideration of, and where appropriate, decision making on, policy issues that affect the national security interests of the United States." *Id.* ¶ 25. The two relevant January 2017 Deputies Committee meetings "involved discussions between close presidential advisors and members of their staffs—who have broad and significant responsibility for gathering information and preparing advice for potential presentation to the President in foreign policy or national security matters—as well as senior officials of the State Department

[13] Available at https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-4/.

and other agencies." *Id.* The four emails include descriptions of comments by senior officials of the State Department and other agencies made at the two Deputies Committee meetings, and reflect, among other things, points raised about a specific issue on which the Deputies Committee is described as taking no position, and an interpretation of the Deputies Committee's position on another specific issue. *Id.* ¶¶ 34, 41. The discussions reflected in these four emails have not been publicly disclosed, and have been closely held within the Executive Branch. *Id*. The readout set forth in C06432231 (regarding the January 26 DC Meeting) was provided by the Counselor of DOS, who attended the meeting, "to a small group of Department personnel who had a need to know the information to perform their respective duties within the Department" and who primarily work in areas of the Department that "had a direct connection to the [Raid]." DOS Dec. ¶ 34.

DOD and DOS properly withheld this information pursuant to the presidential communications privilege, in order "to preserve the President's access to candid advice and to ensure that the President's senior advisors investigate issues and provide appropriate advice to the President." DOD Dec. ¶ 21; *see also* DOS Dec. ¶ 25. The protected presidential communications set forth in these records were closely held among the President and advisory personnel, or in a few cases among DOD and DOS personnel who needed to know the information contained in the communications to perform their job duties. Disclosure of these protected communications "would inhibit the ability of the President, his close advisors, and members of their staffs who have broad and significant responsibility for gathering information in the course of preparing advice for potential presentation to the President in matters that implicate the President's decisions concerning foreign policy or national security, to gather information from senior officials of State and other agencies, identify decisions to be presented

to the President (including in cases where there is disagreement between U.S. Government agencies), and advise the President on those decisions." DOS Dec. ¶ 34. Such a disclosure "would inhibit the ability of the President and his close advisors . . . to engage in effective communications and decision-making." *Id.* ¶ 41.

IV. DOD, DOS, and CIA Properly Withheld Classified Documents and Information Pursuant to Exemption 1

Exemption 1 exempts from public disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). The current standard for classification is set forth in Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) ("E.O. 13,526"). Section 1.1 of the Executive Order lists four requirements for the classification of national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or . . . under the control of the United States Government;" (3) the information must pertain to one or more of eight protected categories of information listed in section 1.4 of the Executive Order; and (4) an original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 13,526 § 1.1(a)(1)-(4). The five protected categories of information listed in section 1.4 of the Executive Order that are relevant here are: "(a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources," and "(g) vulnerabilities or capabilities of systems,

installations, infrastructures, projects, plans, or protection services relating to the national security." E.O. 13,526 § 1.4(a)-(d), (g).

The declarations submitted by DOD, DOS, and CIA logically and plausibly demonstrate that these standards have been met with regard to the classified information withheld under Exemption 1. *See* DOD Dec. ¶ 13; DOS Dec. ¶ 3; CIA Glomar Dec. ¶ 3. All of the information withheld was classified by an original classification authority; is owned by, produced by or for, or under the control of the U.S. Government; and pertains to military plans, weapons systems or operations, foreign government information, intelligence activities, sources, or methods, foreign relations or foreign activities of the United States, and/or vulnerabilities or capabilities of systems or plans relating to the national security, within the meaning of section 1.4(a)-(d) and (g) of the Executive Order. *See* DOD Dec. ¶¶ 13-14, 25, 29-32, 34, 36-38, 40, 42-43; DOS Dec. ¶¶ 3, 20-21, 31-32, 38-39; CIA Dec. ¶¶ 14-15 and nn. 5-6; *see also* Classified Declaration of Antoinette B. Shiner dated April 5, 2019 ("CIA Classified Dec.). Each of the declarants is an original classification authority who has determined that the unauthorized disclosure of each category of withheld information could reasonably be expected to result in damage to national security. *See* DOD Dec. ¶¶ 45-48; DOS Dec. ¶¶ 31, 38; CIA Dec. ¶¶ 15-16 and n.4; CIA Classified Dec.

All of the documents discussed above with respect to Exemption 5, *see supra* Parts III.A and III.B, also contain information that remains currently and properly classified, and was therefore properly withheld by DOD and DOS pursuant to Exemption 1. *See* DOD Dec. ¶¶ 22-23, 25-31, 33, 37, 39; DOS Dec. ¶¶ 30-31, 37-38. With respect to the DOD documents, each of the eight records setting forth proposals for military operations that were withheld under Exemption 5 detail DOD operational plans for providing military support to the United Arab

Emirates' ("UAE's") offensive to clear al-Qaida in the Arabian Peninsula ("AQAP") from Shabwah Governorate, Yemen. DOD Dec. ¶ 22. These proposal documents "include detailed intelligence community assessments of AQAP and the Islamic State of Iraq and the Levant ("ISIL"), analysis of UAE capabilities, and specific proposals for DOD military support to UAE's operations," as well as operational specifics such as detailed plans for the al Ghayil Raid and information regarding the particular geographic scope and timeframe of the operation. *Id.* As the DOD Declaration establishes, this information is currently and properly classified at the Secret or Top Secret level. *Id.* ¶ 23. For similar reasons, RD/5, RD/6, RD/7, and CENTCOM/246-268 were withheld pursuant to Exemption 1 (as well as Exemption 5). *Id.* ¶ 27. These documents are detailed briefing slide decks illustrating DOD's proposed plans and recommendations for the al Ghayil Raid. The slides "discuss the specific plans for the proposed military support [to the UAE], including logistical information, photographs, maps, diagrams, weapons and systems information, foreign government information, intelligence assessments, recommendations, proposals for DOD military support to coalition partner operations, discussion of detainee issues, and other operational specifics." *Id.* ¶ 25. This information remains currently and properly classified at the Secret level. *Id.* ¶ 27.

The preparatory documents compiled for the January 6 DC meeting; the January 24, 2017 memorandum from the Secretary of Defense to the National Security Advisor seeking authorization of the proposed Raid; the April 2017 memorandum from the Secretary of Defense to the National Security Advisor seeking approval to extend prior authorities to a new, anticipated military operation; and the email among DOD attorneys deliberating over legal issues relating to one aspect of the Raid, all discussed above with respect to Exemption 5, similarly contain information withheld pursuant to Exemption 1. *Id.* ¶¶ 28-31, 33, 37, 39. The executive

summary of issues, points, and proposals to be discussed at the January 6 DC Meeting, *id.* ¶ 28, sets forth the goals and objectives of the upcoming Deputies Committee meeting, "and reviews background discussions, debates, relevant intelligence assessments and . . . lays out military plans and proposals in operational detail, including analyses of the benefits and disadvantages of various scenarios." *Id.* This information is currently and properly classified at the Top Secret level, and thus is exempt from disclosure under Exemption 1. *Id.* RD/3 and RD/4 are both intelligence memoranda classified at the Top Secret level. *Id.* ¶¶ 29-30. RD/3 addresses "the actions and capabilities of AQAP in the area of the Shabwah Offensive" and "contains discussions and analysis of specific intelligence, the source of that intelligence, and foreign government information." *Id.* ¶ 29. RD/4 contains similar "discussion and analysis of specific intelligence . . . [and] the source of that intelligence . . . and also concerns foreign activities and planned military operations of the United States." *Id.* ¶ 30. The information in both intelligence memoranda is currently and properly classified, and therefore protected from disclosure by Exemption 1. *Id.* ¶¶ 29-30.

Both Secretary of Defense memoranda "include[] specifics regarding the . . . anticipated scope and nature" of the proposed military action for which DOD sought authorization. *Id.* ¶ 31. These specifics addressed, among other things, "intelligence assessments regarding AQAP, assessments of UAE capabilities, and assessments of the time required to complete a successful operation." *Id.* ¶ 37. This information in both request memoranda is currently and properly classified at the Secret level, and therefore protected from disclosure by Exemption 1. *Id.* ¶¶ 33, 37. CENTCOM/036-038, the email setting forth a DOD attorneys' discussion of legal issues relating to one aspect of the Raid, *id.* ¶ 39, also contains specific operational detail about the upcoming military action as well as information about coordination with a foreign government,

information that is currently and properly classified at the Secret level and exempt from disclosure under Exemption 1. *Id.*

The remaining challenged DOD documents were not discussed above with respect to any Exemption 5 assertion, but contain classified information withheld under Exemption 1. JS/022-023 is a memorandum from the National Security Advisor to the Secretary of Defense dated January 27, 2017, communicating the President's approval of the DOD-proposed al Ghayil Raid. *Id.* ¶ 34.[14] The memorandum "details the specific operational scope of the President's approval, including information regarding the number of personnel, the assets to be utilized, the parameters of the mission, and the time span of the approval." *Id.* ¶ 35. Two DOD records reflect military orders from the Joint Staff at the Pentagon to CENTCOM "to conduct operations supporting the Shabwah offensive approved by the President." *Id.* ¶ 36 (discussing CENTCOM/027-030 and JS/057-058).[15] The orders "contain details regarding the parameters of the mission, the time span of the approval, and other operational information." *Id.* CENTCOM/330-334 is a "post-operation report that contains specific details about the al Ghayil Raid, including assessments, intelligence, and other information," including "military operational details and intelligence sources and methods." *Id.* ¶ 41.[16] Lastly, two challenged DOD records, JS/188-191 and CENTCOM/020-026, are emails among DOD personnel discussing military activities following the al Ghayil Raid, including "details regarding the execution and scope of the operations, as well as tactics and strategy for these later operations." *Id.* ¶ 42.[17] The information withheld from

[14] DOD voluntarily re-reviewed JS/022-023, and released additional information contained therein to Plaintiffs in September and October 2018. DOD Dec. ¶ 35.
[15] DOD voluntarily re-reviewed both of these records and released additional information contained therein to Plaintiffs in September and October 2018. DOD Dec. ¶ 36.
[16] DOD voluntarily re-reviewed CENTCOM/330-334 and released additional information contained therein to Plaintiffs in September 2018. DOD Dec. ¶ 41.
[17] DOD voluntarily re-reviewed CENTCOM/020-026 and released additional information contained therein to Plaintiffs in September 2018. DOD Dec. ¶ 43.

these records is currently and properly classified at the Secret level, and therefore exempt from disclosure under Exemption 1. *Id.* ¶¶ 35-36, 41-42.

Each of the challenged DOS documents also contains information that was withheld under Exemption 1, because it is currently and properly classified at the SECRET level. *See* DOS Dec. ¶¶ 31, 38. C06432231 discusses, among other things, planned and contingency U.S. military activities, the views of a senior foreign official about U.S. activities, a proposal for intelligence activity, and contingency actions to be taken in the event of particular foreign political developments. *Id.* ¶ 31. C06432239, C06432636, and C06432854, which are identical, include a detailed discussion of the modalities of potential U.S. military activities, the views of foreign officials about military activities, possible intelligence assessments, and details of potential U.S. engagements with regional partners and possible reactions by regional adversaries. *Id.* ¶ 46.

CIA also withheld classified information and records pursuant to Exemption 1. *See* CIA Dec. ¶¶ 11 & n.3, 13-15; *see generally* CIA Classified Dec. For example, CIA withheld certain information from RD/13—the executive summary prepared for the January 6 DC Meeting and discussed above with respect to DOD's withholdings, *see* DOD Dec. ¶ 28—as currently and properly classified and therefore protected from disclosure pursuant to Exemption 1.[18] *See* CIA Dec. ¶ 11 & n.3; CIA Classified Dec. CIA also withheld other records pursuant to Exemption 1, namely the "category 3" records containing "intelligence reporting compiled in connection with the meetings referenced by [then-Press Secretary Sean] Spicer during the 2 February 2017 press briefing." CIA Dec. ¶ 12; *see also* CIA Classified Dec. CIA cannot provide further detail about

[18] As explained in the DOD Declaration, CIA treated RD/13 for CIA's own equities (in other words, CIA identified information in RD/13 that is exempt from disclosure under Exemptions 1 and 3, *see* CIA Dec. ¶ 11 & n.3), and then referred RD/13 to DOD for its own review and processing. DOD Dec. ¶ 28.

these intelligence reporting records on the public record, because to do so would reveal information that is itself classified and exempt from disclosure under Exemption 1—"namely, the Agency's intelligence priorities and capabilities and sensitive details about CIA's intelligence methods and activities, or lack thereof, in this area of the world (*i.e.*, Yemen and the surrounding region)." CIA Dec. ¶ 12; *see also* CIA Classified Dec.

The classified information that CIA withheld pursuant to Exemption 1 "describes particular intelligence, including CIA activities, assessments, capabilities, and interests." CIA Dec. ¶ 15; *see also* CIA Classified Dec. CIA respectfully refers the Court to the accompanying classified declaration being provided for the Court's *in camera* and *ex parte* review for a more complete description of the withheld information and records and of the bases for their withholding pursuant to Exemption 1. *See* CIA Classified Dec. CIA's classified declaration also furnishes additional detail regarding why CIA cannot further discuss or describe its withheld documents and information on the public record without revealing information that is itself exempt from disclosure. *Id.*

Defendants' declarations describe with specificity the harms to national security that are reasonably expected to result should the withheld classified information be disclosed. DOD explains that the disclosure of intelligence products, sources, and methods, which include not only human sources but also foreign liaison relationships and which are valuable only so long as they remain unknown, could jeopardize or even nullify their continued successful use. DOD Dec. ¶ 44. As DOD explains, "[w]e know that terrorist organizations and other hostile groups have the capacity and ability to gather information from myriad sources, analyze it, and deduce means and methods from disparate details to defeat the U.S. Government's [intelligence] collection efforts." *Id.* ¶ 45. Disclosure of "even seemingly innocuous, indirect references to an

intelligence source or method could have significant adverse effects when juxtaposed with other public-available data." *Id.*

Releasing foreign government information and information concerning U.S. foreign relations and foreign activities "could weaken, or even sever, the relationship between the United States and its foreign partners, thus degrading the Government's ability to combat hostile threats abroad." *Id.* ¶ 46. Revealing the scope of U.S. military activity abroad "could affect counterterrorism operations conducted by the United States. . . . Detailing the United States' specific level of involvement may cause countries to rethink their acquiescence to U.S. counterterrorism missions within their borders, thus damaging the national interests of the United States." *Id.* Moreover, the disclosure of the details of military plans and operations "could provide great insight to adversaries regarding DOD's capabilities, priorities, vulnerabilities, and limitations," which adversaries could use "to better plan attacks or evade justice." *Id.* ¶ 47.

The DOS Declaration similarly describes the harms that can reasonably be expected to result from the disclosure of the classified records withheld by DOS. DOS Dec. ¶¶ 31, 38. Disclosing information about military plans and operations, including contingent activities, could "jeopardize[e] U.S. military operations by revealing information that could be used to anticipate and counter them, including by revealing a contingency that could cause the cessation of certain military activities." DOS Dec. ¶ 31. In particular, revealing information about "the modalities of potential U.S. military activities" could "allow[] adversaries to plan and carry out engagements with detailed knowledge of U.S. capabilities, force levels and intentions." *Id.* ¶ 38. Release of foreign government information, including about the views of foreign officials, could "reduc[e] the likelihood that foreign officials will be willing to convey sensitive information to the U.S. Government." *Id.* ¶¶ 31, 38. As DOS explains further, the compelled disclosure of

information about intelligence activities could "endanger[] the efficacy of" those activities. *Id.* Revealing information about foreign relations and foreign activities of the United States could "undermin[e] U.S. foreign policy by revealing diplomatic strategies and tactics that depend on discretion," *id.* ¶ 31, potentially including "conditions under which to conduct certain activities and factors considered in deciding whether to encourage or support particular foreign governments' initiatives." *Id.* ¶ 38.

The CIA Declaration explains that release of the classified information that it withheld would "not only reveal the intelligence itself, but also could reasonably be expected to reveal CIA's sources and methods used in acquiring this intelligence as well as the apportionment of Agency resources, relationships with foreign entities, strengths and weaknesses in collection capacity, and/or resources available to the Agency that allowed it to obtain the intelligence." CIA Dec. ¶ 15. Such a disclosure could "permit foreign intelligence services and other groups to disrupt CIA activities and/or exploit perceived weaknesses, thereby compromising intelligence operations." *Id.* Furthermore, disclosure of the withheld records containing intelligence reporting would "show the strategic direction of the Agency's intelligence practice." *Id.* ¶ 16. "Even the particular topics that are of interest to the CIA and U.S. Government consumers of the CIA's intelligence (which would be revealed by the withheld records) would be revealing of CIA's and the U.S. Government's intelligence objectives." *Id.* Also, "information about CIA's interest in a particular area or event may benefit a foreign intelligence service or terrorist organization by enabling it to redirect its resources to identify particular CIA sources, circumvent the CIA's monitoring efforts, and generally enhance its intelligence or deception activities at the expense of the United States' national security." *Id.* Disclosure of the withheld intelligence reporting would also "reveal the targets of the CIA's collection efforts as well as the demands

placed upon it by government consumers of the Agency's intelligence products. As a result, the CIA's efforts may be thwarted or made more difficult." *Id.*

The justifications provided in these declarations are entirely logical and plausible; indeed, it would be surprising if intelligence and operational records reflecting the details of a contemplated military operation in a foreign country were not classified. Particularly in light of the substantial deference owed to the agencies' judgments regarding the classified status of these records, *ACLU v. DOJ*, 681 F.3d at 69, the Exemption 1 withholdings are proper.

V. DOD and CIA Properly Withheld Statutorily Protected Information Relating to Intelligence Sources and Methods Under Exemption 3

Exemption 3 permits the withholding of information that is specifically exempted from disclosure by statute. *See* 5 U.S.C. § 552(b)(3). One statute that exempts certain information from disclosure is § 102A(i)(1) of the National Security Act of 1947 ("NSA"), as amended, which states: "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1); *see ACLU*, 681 F.3d at 72-73. The Director of National Intelligence has delegated his authority under the NSA to other heads of components of the intelligence community. *See DeBacco v. U.S. Army*, 795 F.3d 178, 197-98 (D.C. Cir. 2015).

It is well established that the NSA is an exempting statute within the meaning of Exemption 3. *See, e.g.*, *ACLU v. DOJ*, 681 F.3d at 73; *CIA v. Sims*, 471 U.S. 159, 167-68 (1985) (addressing materially identical precursor to § 3024(i)(1)). Exemption 3 and the NSA exempt from disclosure not only intelligence sources and methods themselves, but also information that would tend to disclose an intelligence source or method, *see Halperin*, 629 F.2d at 147-50, and information that "relates to" an intelligence source or method, *ACLU*, 681 F.3d at 73.

In contrast to Exemption 1, to withhold information relating to intelligence sources and methods under Exemption 3 and the NSA, the agency need not show that the information is classified. *Cf. Gardels v. CIA*, 689 F.2d 1100, 1107 (D.C. Cir. 1982) (executive order governing classification of documents "was not designed to incorporate into its coverage the CIA's full statutory power to protect all of its 'intelligence sources and methods'"). Nor does the agency need to make any showing that disclosure of the information would cause harm to national security. *Cf. Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012); *Fitzgibbon*, 911 F.2d at 761-62. Instead, the agency need only show that the information falls within the ambit of the NSA. *Wilner*, 592 F.3d at 72 ("the sole issue for decision" under Exemption 3 "is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage"); *Larson*, 565 F.3d at 868.

Moreover, an agency's discretion in determining what would constitute an unauthorized disclosure of intelligence sources and methods is very broad. *See Sims*, 471 U.S. at 168-73; *see also Hunt v. CIA*, 981 F.2d 1116, 1120 (9th Cir. 1992) (describing CIA's discretion to withhold information under Exemption 3 as "a near-blanket FOIA exemption"). Indeed, the Supreme Court in *Sims* rejected "any limiting definition that goes beyond the requirement that the information fall within the Agency's mandate to conduct foreign intelligence." 471 U.S. at 169.

Pursuant to Exemption 3, DOD and CIA properly withheld information the release of which could reasonably be expected to result in the unauthorized disclosure of intelligence sources and methods protected under § 102A(i)(1) of the NSA. *See* DOD Dec. ¶¶ 18, 29-30; CIA Dec. ¶¶ 11 & n.3, 13, 17-19; *see generally* CIA Classified Dec. DOD withheld RD/3 and RD/4, which are both intelligence memoranda included in DOD's preparatory materials for the

January 6 DC Meeting, under Exemption 3 (among other exemptions) and the NSA, because their disclosure would tend to reveal intelligence sources and methods. DOD Dec. ¶¶ 29-30.

With respect to CIA, the agency determined that "Exemption 3 in conjunction with the National Security Act applies to the same information withheld by CIA pursuant to Exemption 1 because its disclosure could identify CIA intelligence sources and methods." CIA Dec. ¶ 18; *see generally* CIA Classified Dec. Therefore, the information that CIA identified in RD/13 (the executive summary document) for withholding under Exemption 1 was also withheld pursuant to Exemption 3. CIA Dec. ¶ 11 and n.3. (As discussed above, CIA respectfully respects the Court to its classified declaration for details regarding the information that CIA withheld from RD/13, *id.* n.3). CIA also withheld the "category 3" intelligence reporting documents pursuant to Exemption 3 in addition to Exemption 1, because their disclosure would reveal intelligence activities and intelligence sources and methods. *Id.* ¶¶ 12-13, 20; CIA Classified Dec.

The agencies' justifications for withholding these records and information pursuant to the Exemption 3 and the NSA are logical and plausible, especially given the substantial deference owed to the agencies' assessment of what would constitute an unauthorized disclosure of intelligence sources and methods. *See Sims*, 471 U.S. at 179; *Fitzgibbon*, 911 F.2d at 762. DOD and CIA therefore properly withheld statutorily protected information and records under Exemption 3, separate and independent from the propriety of their withholding of the same material under Exemption 1.

VI. Defendants Produced Any Reasonably Segregable Portions of the Challenged Records

Finally, Defendants' declarations establish their compliance with FOIA's requirement that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C.

§ 552(b). DOD, DOS, and CIA reviewed the withheld material closely to identify any information that is exempt from disclosure. *See* DOD Dec. ¶ 49; DOS Dec. ¶ 43; CIA Dec. ¶ 11. DOD and DOS disclosed all non-exempt information that reasonably could be segregated and disclosed.[19] *See* DOD Dec. ¶ 49; DOS Dec. ¶ 43. CIA withheld in full the documents that contain intelligence reporting compiled in connection with the meetings referenced by then-Press Secretary Spicer at which the Raid was discussed, CIA Dec. ¶ 11; as to RD/13, CIA identified exempt information pursuant to exemptions 1 and 3, then referred RD/13 to DOD for further processing. *Id.* and n.3. In sum, Defendants more than met their obligations under FOIA with respect to the challenged documents.

CONCLUSION

For these reasons, the Court should grant summary judgment to DOD, DOS, and CIA.

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April 5, 2019

Respectfully submitted,

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[19] Indeed, following Plaintiffs' filing of their first summary judgment opposition and cross-motion in August 2018, DOD and DOS voluntarily re-reviewed all of the contested DOD and DOS records and made several supplemental releases of additional information that they determined could be disclosed. *E.g.*, DOD Dec. ¶¶ 5, 50; DOS Dec. ¶ 13.