

036IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION, <i>et al.</i> ,)	
)	
Plaintiffs,)	Civil Action No.
)	17-cv-3391 (PAE)
v.)	
)	
DEPARTMENT OF DEFENSE, <i>et al.</i> ,)	
)	
Defendants.)	

DECLARATION OF MAJOR GENERAL JIM HECKER

Pursuant to 28 U.S.C. § 1746, I, Jim Hecker, Major General, United States Air Force, hereby declare under penalty of perjury that the following is true and correct:

1. I am the Vice Director of Operations for the Joint Staff at the Pentagon and have served in this capacity since July 2018. In my capacity as the Vice Director of Operations, I assist in the execution of all Department of Defense (“DoD”) operational matters outside of the continental United States. As such, I coordinate and communicate frequently with the staffs of the Unified Combatant Commands, which include U.S. Africa Command, U.S. Central Command, U.S. European Command, U.S. Pacific Command, U.S. Southern Command, U.S. Strategic Command, U.S. Transportation Command, U.S. Cyber Command, and U.S. Special Operations Command, as well as with the Intelligence Community, to ensure on behalf of the Chairman of the Joint Chiefs of Staff that the President of the United States’ and Secretary of Defense’s direction and guidance are conveyed and executed, and that combatant command concerns are addressed by the Joint Staff. I evaluate and synthesize such concerns and advise and make

recommendations to the Chairman of the Joint Chiefs of Staff regarding our worldwide military operations.

2. I make the following statements based upon my years of service and experience in the United States military, personal knowledge, and information made available to me in my official capacity. I have served in the United States Armed Forces for nearly thirty years at various levels of command and staff. In recent years, I have served as Commander, 9th Air and Space Expeditionary Task Force-Afghanistan; Commander, NATO Air Command-Afghanistan; Director, AFCENT's Air Component Coordination Element for U.S. Forces-Afghanistan and NATO's Operation Resolute Support; and Deputy Commander-Air for U.S. Forces-Afghanistan. As the Vice Director of Operations, I receive and review daily operational plans and briefings, reports, and intelligence analyses from the Combatant Commands, the Joint Staff, and the Intelligence Community. I assist with the supervision of the National Military Command Center, which is responsible for monitoring worldwide events affecting national security and U.S. interests twenty-four hours a day, seven days a week. I have traveled in an official capacity to a number of countries where U.S. forces are conducting ongoing operations against al Qa'ida and associated terrorist groups, engaging with senior military and government officials. As a result of my experiences, I have extensive knowledge of our military forces and their capabilities, current operations, and the conventional and unconventional forces and capabilities of the enemies arrayed against us.

3. I am familiar with the FOIA request, dated March 15, 2017, submitted by Plaintiffs seeking:

(1) The legal and policy bases in domestic, foreign, and international law upon which the

government evaluated or justified the al Ghayil Raid, including but not limited to records related to the designation of parts of Yemen as “areas of active hostilities,” and the legal and factual basis that the government uses in designating such areas;

(2) The process by which the government approved the al Ghayil Raid, including which individuals possessed decision-making authority and the evidentiary standard by which the factual evidence was evaluated to support the determination;

(3) The process by which the decision was made to designate three parts of Yemen as “areas of active hostilities”;

(4) Before-the-fact assessments of civilian or bystander casualties of the raid and the “after-action” investigation into the raid; and

(5) The number and identities of individuals killed or injured in the al Ghayil Raid, including but not limited to the legal status of those killed or injured, with these separated out by individuals intentionally targeted and collateral casualties or injuries.

A true and correct copy of the March 15, 2017, letter is attached as Exhibit A.

4. In response to the FOIA request, Joint Staff initially processed 442 pages of records, the DoD Office of the General Counsel (“DoD OGC”) processed 38 pages of records, and U.S. Central Command (“CENTCOM”) processed 343 pages of records. DoD made several releases of documents processed by these components between November 2017 and July 2018. DoD also provided draft *Vaughn* indices (and supplemental descriptions of withheld records) to Plaintiffs, in an effort to identify and narrow the disputes in this case. At that time, Plaintiffs indicated that they contested DoD’s withholding of information in 45 DoD records (24 CENTCOM records, 19 Joint Staff records, one document located by DoD OGC, and a compilation of documents referred to DoD from the United States Department of State (“DoS”)); DoD’s classification of information in one document processed by the United States Department of Justice, Office of Legal Counsel (“OLC”); and CENTCOM’s searches for two CENTCOM documents.

5. The parties commenced summary judgment briefing in July 2018. Plaintiffs filed an opposition and cross-motion on August 21, 2018, wherein they narrowed the number of DoD

withholdings they were contesting to a total of 26 records (10 CENTCOM records, 13 Joint Staff records, and 3 records that were part of the compilation referred to DoD by DoS). Plaintiffs also reduced the number of contested CENTCOM searches to one. Following Plaintiffs' filing, DoD voluntarily reviewed all of the contested DoD withholdings and determined that it could release additional information from certain DoD records. In September and October 2018, DoD made three supplemental releases of information from 12 of the challenged DoD records. Following these supplemental releases, Plaintiffs notified DoD on October 9, 2018, that they were further limiting their challenges by removing four CENTCOM records and one Joint Staff record from the universe of disputed documents.

6. While these re-release efforts were ongoing, DoD conferred with the Central Intelligence Agency ("CIA") regarding certain records that, I understand, CIA identified during its searches related to this matter. DoD learned that CIA located some records that were duplicates of: (1) records already processed by DoD in this matter; or (2) records in DoD's possession, although they had not been previously processed. More particularly with respect to (2), around the time of these consultations with CIA, DoD located records associated specifically with a Deputies Committee meeting held on January 6, 2017, by searching the records of an individual at DoD who had access to preparatory meeting documents circulated by the National Security Council.

7. Additionally, CIA referred certain records to DoD that DoD had not previously processed or located in its searches, but that implicated DoD equities.

8. In November and December 2018, DoD provided two further FOIA responses to Plaintiffs, relating to: (1) the records associated with the January 6, 2017 Deputies Committee meeting that DoD located in its supplemental search, described above; and (2) the records that CIA referred to DoD (collectively, the "Referred Documents"). DoD released some of the

Referred Documents in part, and also provided Plaintiffs with preliminary descriptions of all Referred Documents that were withheld in part or in full. Plaintiffs indicated that they challenge the withholding of certain information from six of the Referred Documents, denominated herein as RD/3, RD/4, RD/5, RD/6, RD/7, and RD/13.

9. In December 2018, the parties withdrew (and the Court terminated) their pending motions, in the interest of efficiently addressing all remaining disputes in one new set of motion and cross-motion papers. The records that will be addressed in this declaration are:

CENTCOM/020-026, CENTCOM/027-030, CENTCOM/036-038, CENTCOM/045-053, CENTCOM/246-268, CENTCOM/330-334, JS/009-011, JS/022-023, JS/048-053, JS/054-056, JS/057-058, JS/059-062, JS/188-191, JS/261-266, JS/273-278, JS/279-282, JS/330-336, JS/339-345, STATE/034-035, STATE/036-038, STATE/039-044, RD/3, RD/4, RD/5, RD/6, RD/7, and RD/13. This declaration also addresses CENTCOM's search for CENTCOM/019, which I understand to be the only search that Plaintiffs challenge.

Search Associated with CENTCOM/019

10. CENTCOM/019 is the first page of a longer email, dated February 28, 2017, which was located during CENTCOM's searches for responsive records, and released to Plaintiffs. It is unknown precisely why the remainder of the partial email message was not retrieved during CENTCOM's initial searches. As described below, CENTCOM was subsequently unable to retrieve the remainder of CENTCOM/019 from its Enterprise Vault system, despite its efforts to do so. CENTCOM utilized the Enterprise Vault storage system until the migration of all DoD email accounts to Defense Enterprise Email (DEE) in 2017. Under CENTCOM policy, a user's Outlook email account would archive ("vault") an email after seven days and it would remain vaulted for three years, unless retrieved by the user. Before DoD's migration to DEE, email

users were afforded an opportunity to retrieve any emails that were still vaulted. Once CENTCOM completed migration to DEE, the Enterprise Vault system was deleted and its servers decommissioned on December 29, 2017, after which CENTCOM could not recover messages that were vaulted at the time of decommissioning. In response to requests from Plaintiffs, CENTCOM did further investigate the issues relating to the retrieval of CENTCOM/019. While CENTCOM was still unable to retrieve the entire email that had been located in the Enterprise Vault System, CENTCOM did successfully retrieve the attachment to CENTCOM/019, which DoD processed and released on June 15, 2018. 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. I understand through counsel that Plaintiffs are not challenging CENTCOM's withholding of any information from CENTCOM/019 itself or the attachment thereto that was located and produced in June 2018.

Application of FOIA Exemptions

A. FOIA Exemption (b)(1) – Classified Information

11. FOIA exemption (b)(1) provides that FOIA does not require the production of records 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).

12. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order only if all of the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls

within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage. As relevant here, section 1.4(a) permits classification of information pertaining to “military plans, weapons systems, or operations;” 1.4(b) permits classification of “foreign government information;” 1.4(c) permits classification of information pertaining to, reflecting or constituting “intelligence activities (including covert action), intelligence sources or methods, or cryptology;” 1.4(d) permits classification of information pertaining to, “foreign relations or foreign activities of the United States;” and 1.4(g) permits classification of “vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security.”

13. In Section 1.3(a)(2) of E.O. 13526, the President authorized agency heads to designate officials that may classify information originally as TOP SECRET. In turn, and pursuant to Section 1.3(c) of E.O. 13526, the Deputy Secretary of Defense, acting pursuant to a delegation from the Secretary of Defense, has authorized me to exercise TOP SECRET and SECRET original classification authority.

14. My determination that certain information in the requested records is classified has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

B. FOIA Exemptions (b)(3) and (b)(6) – Personal Information

15. Exemption 3, 5 U.S.C. 552(b)(3), permits the Government to withhold information that is “specifically exempted from disclosure by statute.” DoD has invoked 10 U.S.C. § 130b, which authorizes the withholding of “personally identifying information regarding ... any member of the armed forces assigned to an overseas unit ... or a routinely deployable unit.”

16. Exemption 6, 5 U.S.C. § 552(b)(6), permits the Government to withhold information about individuals when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” DoD has a practice to withhold personally identifying information of those members of DoD who are at the military rank of Colonel or below and at the rank of GS-15 or below. An exception to this rule allows the names of those personnel who routinely deal with the press to be released.

17. The rationale for this policy is that disclosing the names of the individuals involved could subject such individuals to annoyance or harassment in their private lives. Thus, this policy protects significant personal privacy interests. Moreover, release of these low-level individuals’ names would not serve the “core purpose” of the FOIA, as it would not show “what the government is up to.” Thus, there is no cognizable public interest outweighing the significant personal privacy interests involved. I understand Plaintiffs do not challenge these withholdings.

C. FOIA Exemption (b)(3) and the National Security Act – Intelligence Information

18. In addition to 10 U.S.C. § 130b, discussed above in paragraph 15, DoD has invoked Section 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). The Director of National Intelligence has delegated authority pursuant to this provision to members of the Intelligence Community, including several components of DoD. Material that would reveal information relating to intelligence sources or methods falls within the scope of the NSA’s protection and is exempted from disclosure pursuant to Exemption 3. Exemption 3 protects against the disclosure not only of intelligence sources and methods themselves, but also of information that would tend to disclose an intelligence source or method. Exemption 3 does not require a showing that any fact is classified, or any showing of harm to national security, to justify a withholding.

D. FOIA Exemption (b)(5) – Privileged Information

19. Exemption 5, 5 U.S.C. § 552(b)(5), permits the withholding of “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Exemption 5 allows an agency to withhold information that is normally privileged in the civil discovery context. As applicable here, these privileges include the deliberative process privilege and the presidential communications privilege.

20. To fall within the deliberative process privilege, an agency record must be pre-decisional and deliberative. Predecisional deliberative documents include documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions are made. Legal advice forming part of the decision-making process may be privileged under the deliberative process privilege. Disclosure of predecisional deliberative documents would undermine the decision-making processes of government, by chilling the candid and frank communications necessary for effective decision-making.

21. The presidential communications privilege applies to the communications of the President, and also of the President’s senior advisors. The presidential communications privilege

is based on the need 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, and also applies to closely held presidential directives and decisional documents.

Withheld Information

DoD Proposals for Military Operations

22. Eight of the documents with withholdings challenged by Plaintiffs detail DoD operational proposals for supporting the United Arab Emirates' ("UAE") offensive to clear al-Qaida in the Arabian Peninsula ("AQAP") from Shabwah Governorate, Yemen. The proposal and planning of the operation spanned two different Presidential administrations, and the documents are either undated, or reflect dates between November 2016 and January 2017. These operational 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, among other operational specifics.

Challenged documents falling into this category are the following:

- JS/330-336, JS/339-345 (substantially similar, detailed operational proposals regarding support to the Shabwah offensive, including the al Ghayil Raid). JS/330-336 is dated January 3, 2017, and JS/339-445 is dated November 10, 2016. These records request approvals for military actions and include detailed information indicating the geographic scope and timeframe of the operation, intelligence community assessments, and other specifics. These records explicitly refer the operational requests and proposals contained therein for further review and approval, and do not contain any final conclusions.
- JS/059-062 (detailed briefing narrative regarding the planning of the anticipated military operation, and seeking approval of DoD concept of operations regarding the proposed

operation). The document is undated, but its content makes clear that it was drafted well in advance of the al Ghayil Raid, as the document discusses future plans and recommendations for that Raid and related military actions. This document was located as an attachment (among other attachments) to two email threads among DoD attorneys discussing the al Ghayil Raid or later anticipated military actions after the Raid, for their situational awareness and to provide factual context for those discussions.

- CENTCOM/048-053, JS/048-53, JS/261-266, JS/273-278, State/039-044 (identical copies of detailed DoD operational proposal document regarding support to the Shabwah offensive, including the anticipated al Ghayil Raid). The scope of the operational discussion in this DOD proposal document is far broader and more detailed than the discussion reflected in the President's later approval memorandum dated January 26, 2017. CENTCOM/048-053 was attached to CENTCOM/045-047, discussed below, which is the January 24, 2017 memorandum sent by the Secretary of Defense to the National Security Advisor, requesting Presidential approval of the proposed Raid and attaching the operational proposal in order to provide full detail about the proposed military operation. JS/048-53 was located as an attachment to an email thread among DoD personnel discussing the just-approved al Ghayil operation, to provide factual context regarding the details and execution of the operation. JS/273-278 was located in a package of background materials circulated to government officials in preparation for the January 26, 2017 Deputies Committee meeting at which the al Ghayil Raid was discussed. State/039-044 was located as an attachment to a memorandum from the National Security Advisor to a small group of cabinet and similarly high-level government officials conveying the President's authorization of a later military proposal.

23. These documents are currently and properly classified at the Secret or Top Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, as applicable and listed in the *Vaughn* index attached hereto as Exhibit B, depending on the level of detail of the proposed operations, and are thus exempt from disclosure under FOIA exemption (b)(1). These documents discuss specific details about military operations, capabilities, strategies, and tactics, as well as intelligence assessments, U.S. national interests, foreign government information, and enemy activities and capabilities, among other topics. Furthermore, because these documents are predecisional (predating proposed military operations) and deliberative (setting forth options, recommendations, and proposals relating to anticipated military operations), they are also deliberative process privileged and exempt from release pursuant to exemption (b)(5).

24. CENTCOM/048-053, JS/048-053, JS/261-266, JS/273-278, and State/039-044 are exempt from disclosure pursuant to exemption (b)(5) for the additional reason that they are protected by the presidential communications privilege. The DoD operational proposal set forth in these records was included with a January 24, 2017 memorandum transmitted from the Secretary of Defense to the National Security Advisor to the President, a senior advisor to the President, setting forth detailed recommendations for the President's review and approval. The memorandum was provided to aid in the President's decision-making regarding a military operation, and the attached DoD operational proposal was included to provide complete operational detail for the President's consideration. The proposal was closely held in that it was sent initially only to the President's National Security Advisor as an attachment to the January 24, 2017 memorandum, and circulated later only to relevant advisors, including the Deputies Committee considering the operation, and, shortly after the President's approval, to a limited group of personnel within DoD involved with the planning and execution of the Raid. State/039-

044 was attached to a Presidential authorization memorandum sent by the National Security Advisor to a small group of cabinet and similarly high-level government officials conveying Presidential approval of a later military operation. For the same reasons as discussed above, this copy of the DoD operational proposal was also part of the presidential decision-making process regarding military actions and was also closely held among the President's nearest advisors.

DoD Concept of Operations Briefing Materials

25. RD/5, RD/6, and RD/7 are detailed DoD briefing slides regarding proposed military support for the Shabwah Offensive, including the then-upcoming al Ghayil Raid. These Referred Documents discuss the specific plans for the proposed military support, 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. RD/5, RD/6, and RD/7 are dated in November and December of 2016, prior to the al Ghayil Raid.

26. CENTCOM/246-268 comprises similar briefing slides regarding support to the Shabwah Offensive. These slides were included as part of a series of attachments to a February 9, 2017 email (CENTCOM/215-217, which is not a challenged record). CENTCOM/246-268 is not separately dated (although the slides starting at CENTCOM/253 are dated January 26, 2017), but is part of larger set of briefing slides regarding support to the Shabwah Offensive dated October 20, 2016, which begins on CENTCOM/226. The February 9, 2017 email to which these slides (and other briefing materials) are attached discusses proposals for additional military action, after the al Ghayil Raid, in support of the Shabwah Offensive; CENTCOM/246-268 appears to have been attached to the email as a point of factual reference to be used in the planning of future,

follow-on operations in the same vicinity. As these proposed operations were contemplated to occur after the al Ghayil Raid, CENTCOM/246-268 is arguably not responsive to Plaintiffs' requests, but as CENTCOM/246-268 includes briefing material prepared prior to the al Ghayil Raid regarding support for the Shabwah Offensive, it was processed as responsive.

27. These slides are currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, and thus exempt under exemption (b)(1). They contain specific, detailed plans for military action, 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. Furthermore, because these documents are predecisional (predating proposed military operations) and deliberative (setting forth options, recommendations, and proposals relating to anticipated military operations), they are also deliberative process privileged and exempt from release pursuant to exemption (b)(5).

Preparatory Deputies Committee Meeting Materials

28. RD/13 is an executive summary of issues, points, and proposals to be discussed at a January 6, 2017 Deputies Committee meeting at which the anticipated al Ghayil Raid was discussed, provided to participants in the meeting. I understand that CIA treated this document for its own equities, which are addressed in CIA's declarations, then referred RD/13 to DoD for processing. This document sets forth the goals and objectives of the upcoming Deputies Committee meeting and reviews background discussions, debates, relevant intelligence assessments, and different options relating to the proposed Raid. The summary lays out military plans and proposals in operational detail, including analyses of the benefits and disadvantages of

various scenarios. The discussions contained in RD/13 regarding options for the upcoming military operation are properly withheld under exemption 5, as this executive summary was drafted to aid participants in a governmental decision-making process, was created for the purpose of discussion and consideration, and was closely held among meeting participants. Therefore, RD/13 is deliberative process privileged. RD/13 is also properly withheld pursuant to the presidential communications privilege, because it relates directly to topics to be discussed and deliberated on by members of the Deputies Committee, who are senior advisors to the President on national security matters, for the purpose of deciding what advice to provide to the President. The substance of these deliberations has not been publicly disclosed, and disclosure would reveal the particular topics on which the President sought advice from the Deputies Committee as part of his decisionmaking process and the deliberations of the President's senior advisors concerning those topics. The document's classification is Top Secret, and the document concerns proposed, past, and ongoing military operations, intelligence sources and methods, DoD assessments, and foreign activities of the United States. Thus, the document is also exempt under exemption (b)(1) pursuant to sections 1.4(a), (b), (c), and (d).

29. RD/3 is a Top Secret intelligence memorandum dated December 28, 2016, regarding the actions and capabilities of AQAP in the area of the Shabwah Offensive, which was part of DoD's packet of preparatory materials provided to participants in the January 6, 2017 Deputies Committee meeting. RD/3 contains discussions and analysis of specific intelligence, the source of that intelligence, and foreign government information, and also concerns foreign activities and planned military operations of the United States. This information is currently and properly classified at the Top Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, and thus exempt under exemption (b)(1). Because the disclosure of RD/3 would tend to reveal

intelligence sources and methods, RD/3 is also properly withheld under exemption 3 and the NSA. RD/3 is further properly withheld under exemption 5 as deliberative process and presidential communications privileged, for the reasons discussed above with respect to RD/13. RD/3 was included among other preparatory materials for the January 6, 2017 Deputies Committee meeting, in order to provide information for meeting participants to consider and discuss in determining what recommendation to make to the President regarding the proposed al Ghayil Raid. RD/3 was closely held and kept confidential, and its substance has not been publicly disclosed.

30. RD/4 is a Top Secret intelligence note dated December 30, 2016, which was part of DoD's packet of preparatory materials provided to participants in the January 6, 2017 Deputies Committee meeting. RD/4 contains discussions and analysis of specific intelligence, the source of that intelligence, and foreign government information, and also concerns foreign activities and planned military operations of the United States. This information is currently and properly classified at the Top Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, and thus exempt under exemption (b)(1). Because the disclosure of RD/4 would tend to reveal intelligence sources and methods, RD/4 is also properly withheld under exemption 3 and the NSA. RD/4 is further properly withheld under exemption 5 as deliberative process and presidential communications privileged, for the reasons discussed above with respect to RD/3 and RD/13. RD/4 was included among other preparatory materials for the January 6, 2017 Deputies Committee meeting, in order to provide information for meeting participants to consider and discuss in determining what recommendation to make to the President regarding the proposed al Ghayil Raid. RD/4 was closely held and kept confidential, and its substance has not been publicly disclosed.

Secretary of Defense Memorandum Requesting Presidential Authorization

31. The operational proposals located at CENTCOM/048-053, JS/048-53, JS/261-266, JS/273-278, State/039-044 and discussed above at Paragraphs 22 and 24 are copies of a detailed proposal document that was communicated to the President along with a January 24, 2017 memorandum from the Secretary of Defense to the Assistant to the President for National Security Affairs (the National Security Advisor). The memorandum itself requested approval of the attached, detailed DoD operational proposal, and also included specifics regarding the operation's anticipated scope and nature. Four signed, final versions of the memorandum were processed and released: CENTCOM/045-047 (which had as an attachment CENTCOM/048-053), JS/054-056, JS/280-282, and State/036-038 (which had as an attachment State/039-044). JS/009-011 is an unsigned, undated draft of this memorandum. JS/054-056 was located as an attachment to the same email thread to which JS/048-053 was attached (discussed above at Paragraph 22), reflecting a discussion among DoD personnel about the just-approved Raid, to provide factual context regarding the details of the operation. JS/280-282, as discussed above relating to JS/273-278, was located in a package of background materials circulated to government officials in preparation for the January 26, 2017 Deputies Committee meeting at which the al Ghayil Raid was discussed. State/036-038, as discussed above with respect to State/039-044, was attached to a Presidential authorization memorandum sent by the National Security Advisor to a small group of cabinet and similarly high-level government officials regarding approval of later military action.

32. Following Plaintiffs' filing of their original opposition and cross-motion in August 2018, DoD voluntarily re-reviewed CENTCOM/045-047 (which is duplicative of State/036-038, JS/054-056, and JS/280-282, and substantially similar to JS/009-011) and determined that it

could release additional information contained therein to Plaintiffs, which it did on September 28, 2018.

33. Again, portions of these records include detailed intelligence community assessments of AQAP and ISIL, analysis of UAE capabilities, and specific proposals for DoD military support to UAE's operations, and those portions are currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, as applicable and listed in the attached *Vaughn* index, and thus exempt from disclosure under exemption (b)(1). Furthermore, as these documents (and their attached DoD operational proposals) are pre-decisional proposals provided to (or drafted to be provided to) a senior advisor to the President, setting out options and recommendations ultimately to be considered by the then-President as part of his decision-making process regarding military operations, and were closely held, portions of these records are also both deliberative process and presidential communications privileged and exempt from release pursuant to exemption (b)(5). JS/009-011 is deliberative process privileged for the additional reason that it is an unsigned, undated draft of the memorandum seeking authorization.

Presidential Authorization

34. The President approved the proposed operation on January 26, 2017, by signing a memorandum for the President that had been prepared and provided by the National Security Advisor. That approval was relayed on behalf of the President in a memorandum from the National Security Advisor to the Secretary of Defense dated January 27, 2017. (Document JS/022-023).

35. JS/022-023 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. Portions of the document are currently and properly

classified at the Secret level pursuant to sections 1.4(a) and (d), as they detail foreign activities of the United States and military operations, and are thus exempt under exemption (b)(1). While the document was originally withheld in full, following Plaintiffs' filing of their original opposition and cross-motion in August 2018, DoD voluntarily re-reviewed JS/022-023 and determined that it could release additional information contained therein to Plaintiffs, which it did in September and October 2018.

Orders to Conduct Military Operations

36. Two of the documents challenged by Plaintiffs are military orders from the Joint Staff to CENTCOM to conduct operations supporting the Shabwah offensive approved by the President. These are documents CENTCOM/027-030 and JS/057-058. The orders contain details regarding the parameters of the mission, the time span of the approval, and other operational information. That information is currently and properly classified at the Secret level pursuant to sections 1.4(a), (c), and (d) of E.O. 13526, as it details foreign activities of the United States, intelligence methods, and military operations, and is thus exempt under exemption (b)(1). While the documents were originally withheld in full, following Plaintiffs' filing of their original opposition and cross-motion in August 2018, DoD voluntarily re-reviewed these records and determined that it could release additional information contained in CENTCOM/027-030 and JS/057-058 to Plaintiffs, which it did in September and October 2018.

Secretary of Defense Request for Authorization Extension

37. In an April 28, 2017 memorandum from the Secretary of Defense to the Assistant to the President for National Security Affairs (State/034-035), the Secretary sought an extension of a prior approval of military operations. The Secretary's request was approved on May 16, 2017, via an approval memorandum addressed from the National Security Advisor to a limited group

of cabinet and similarly high-level officials (State/031-032, which is not a contested record). The request memorandum set forth at State/034-035, which was attached to the approval memorandum set forth at State/031-032, included substantial operational detail, including intelligence assessments regarding AQAP, assessments of UAE capabilities, and assessments of the time required to complete a successful operation. Portions of State/034-035 are currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, as applicable and listed in the attached *Vaughn* index, and thus exempt under exemption (b)(1). As this document is a communication between senior presidential advisors (the National Security Advisor and the Secretary of Defense), which was then circulated (attached to the May 2017 approval) by the National Security Advisor back to a small group of cabinet and similarly high-level officials, it is also presidential communication privileged, and portions of the document are exempt from release pursuant to exemption (b)(5). State/034-035 is also predecisional and intended to aid in the President's decision making about an anticipated military operation, and has been closely held and kept confidential. Therefore, portions of the record are deliberative process privileged.

38. Following Plaintiffs' filing of their original opposition and cross-motion in August 2018, DoD voluntarily re-reviewed State/034-035 and determined that it could release additional information contained therein to Plaintiffs, which it did on September 28, 2018.

DoD Legal Discussion of One Aspect of the Raid

39. CENTCOM/036-038 is an email discussion extracted from a CENTCOM attorney's email account discussing legal issues relating to one aspect of the al Ghayil Raid, in advance of the operation, providing analysis and opinions, and copying other DoD attorneys on the email in order to solicit their views. This email reflects, on page CENTCOM/037, a deliberative

discussion among DoD attorneys of a legal issue relating to the operation for the purpose of aiding DoD operational commanders, and does not reflect final advice or judgments. Portions of the email discussing specific operational plans and details, as well as information about coordination with a foreign government, are currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, and thus exempt under exemption (b)(1). Because this record contains legal discussion among DoD attorneys, intended to help advise senior leaders regarding the scope of authority for military action, and because these legal discussions and analyses are also part of a predecisional decision-making process regarding military operations, those portions are also exempt under exemption (b)(5) as deliberative process privileged.

40. Following Plaintiffs' filing of their original opposition and cross-motion in August 2018, DoD voluntarily re-reviewed CENTCOM/036-038 and determined that it could release additional information contained in that record to Plaintiffs, which it did on September 28, 2018.

Assessment of Potential Civilian Casualties

41. CENTCOM/330-334 is a post-operation report that contains specific details about the al Ghayil operation, including assessments, intelligence, and other information. Following Plaintiffs' filing of their original opposition and cross-motion in August 2018, CENTCOM voluntarily re-reviewed CENTCOM/330-334 and determined that it could release additional information contained therein to Plaintiffs, which it did on September 28, 2018. The remaining information that is still withheld includes military operational details and intelligence sources and methods that have not been publicly disclosed and are currently and properly classified at the Secret level pursuant to 1.4(a) and (c) of E.O. 13526, and thus exempt under exemption (b)(1).

Emails Discussing Operational Details of Later Military Activities

42. Two documents challenged by Plaintiffs, JS/188-191 and CENTCOM/020-026, are email chains among Department of Defense personnel discussing military activities following the al Ghayil Raid. These emails discuss details regarding the execution and scope of the operations, as well as tactics and strategy for these later operations, and those portions of the emails are currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d) of E.O. 13526, and thus exempt from disclosure under exemption (b)(1). Both of these documents contain the same paragraph setting forth legal analysis regarding an aspect of planned military operations after the al Ghayil Raid; this paragraph is withheld pursuant to exemption 1 because it sets forth operational detail and strategy that is not meaningfully segregable.

43. Following Plaintiffs' filing of their original opposition and cross-motion in August 2018, DoD voluntarily re-reviewed CENTCOM/020-026 and determined that it could release additional information contained in that record to Plaintiffs, which it did on September 28, 2018.

Potential Harm to National Security

44. The release of the information withheld from these DoD records pursuant to FOIA Exemptions 1 and/or 3 could reasonably be expected to cause damage to national security. First, the withheld information includes intelligence information, including discussion of intelligence products, assessments, and sources and methods. The disclosure of these intelligence sources and methods reasonably can be expected to cause damage to national security. Intelligence sources and methods include not only human assets, but also foreign liaison relationships. Intelligence sources and methods must be protected from disclosure in every situation where a certain intelligence capability, technique, or interest is unknown to those groups that could take

countermeasures to nullify its effectiveness. Intelligence sources are valuable only so long as they remain unknown. Once an intelligence source or method (or the fact of its use in a certain situation) is discovered, its continued successful use is seriously jeopardized.

45. The U.S. Government must do more than prevent disclosure of explicit references to an intelligence source or method; it must also prevent disclosure of indirect references to such a source or method. One vehicle for gathering information about the U.S. Government's capabilities is by reviewing officially-released information. We 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 collection efforts. Thus, even seemingly innocuous, indirect references to an intelligence source or method could have significant adverse effects when juxtaposed with other publicly-available data.

46. The information withheld from the challenged records also includes foreign government information and information concerning U.S. foreign relations and foreign activities. Releasing this information could similarly reasonably be expected to cause damage to national security. To reveal the scope of U.S. military activity overseas could affect counterterrorism operations conducted by the United States. Detailing operations reasonably could be expected to cause damage to the national security by negatively impacting U.S. foreign relations. 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. When foreign governments cooperate with the U.S. Government, many do so with the understanding that the fact of their cooperation will be kept in the strictest confidence. Any violation of this confidence 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.

47. Lastly, as discussed above, many of the records challenged by Plaintiffs set forth substantial operational detail regarding DoD military operations. Revealing details of military operations, even after the passage of time, could provide great insight to adversaries regarding DoD's capabilities, priorities, vulnerabilities, and limitations. Terrorist organizations, violent extremist organizations, or hostile foreign governments could use the information to better plan attacks or evade justice.

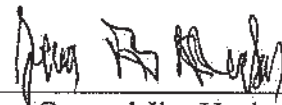
48. For the reasons set forth in this section, the information redacted from the challenged records is currently and properly classified and exempt from disclosure under exemption (b)(1) (and, in the case of RD/3 and RD/4, also protected by the NSA and exempt from disclosure under exemption (b)(3)).

Review for Reasonably Segregable Information

49. DoD has conducted a page-by-page and line-by-line review of the documents at issue in this declaration. Indeed, as discussed above, in September and October 2018, DoD re-reviewed each DoD document then being challenged and made three re-releases of records from which DoD determined it could release additional information. I can confirm that there is no further reasonably segregable information, factual or otherwise, contained in any of the records.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5 day of April, 2019, in Arlington, VA.



Major General Jim Hecker, USAF
Vice Director of Operations, J-3, Joint Staff