

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 over thirty years at various levels of command and staff. In recent years, I have served as deputy director of operations, U.S. Central Command (J3), and commander, Carrier Strike Group 10. 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 March 15, 2017 FOIA request, 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 processed 442 pages of records, and the DoD Office of the General Counsel processed 38 pages of records. Documents located and produced by Central Command (“CENTCOM”) are addressed in a separate declaration. This declaration addresses the withholding of information from nineteen records located and produced by the Joint Staff, one document located by the DoD Office of the General Counsel, a set of documents referred to DoD from the State Department, and the classification of a document located by the DOJ Office of Legal Counsel (“OLC”), which Plaintiffs have indicated they are contesting. I understand that Plaintiffs do not challenge the sufficiency of the searches for the records addressed herein, and therefore this declaration does not address those searches.

Application of FOIA Exemptions

A. FOIA Exemption (b)(1)

5. 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).

6. 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.”

7. 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.

8. 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)

9. 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.”

10. 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.

11. 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.

12. Virtually all of the DoD records listed on the attached *Vaughn* index (Exhibit B) contain personally identifying information of low-level DoD and other government employees, or of members of the armed forces assigned to an overseas, sensitive, or routinely deployable unit. This personally identifying information includes names, email addresses, telephone numbers, and other descriptive information relating to these individuals that could be used by those who know or have knowledge of these individuals to locate or identify them. DoD has withheld this

personally identifying information pursuant to FOIA Exemptions 3 and 6, in order to protect the relevant individuals from possible harm (particularly those individuals who are members of the armed forces assigned to an overseas unit or a routinely deployable unit), harassment, retaliation, other types of reprisals, or undue attention from the public. There is no cognizable public interest in the disclosure of the names and other identifying information regarding these employees. The disclosure of this personally identifying information withheld under Exemptions 3 and 6 would not inform Plaintiffs or the general public about the DoD's performance of its mission and/or how DoD actually conducts its operations or activities. Release of this information would constitute a clearly unwarranted invasion of personal privacy, and in some cases the information is also protected by 10 U.S.C. § 130b; the information is therefore exempt from release under FOIA Exemptions 3 and 6.

C. FOIA Exemption (b)(5)

13. 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 exempt information that is normally privileged in the civil discovery context. As applicable here, these privileges include the deliberative process privilege, the attorney-client privilege, and the presidential communications privilege.

14. The attorney client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. The purpose of the privilege is to encourage attorneys and their clients to communicate fully and frankly. The privilege operates in the government context to protect most confidential communications between government counsel and their clients that are made for the purpose of obtaining or

providing legal assistance. The disclosure of confidential attorney-client privileged communications would inhibit open communication between government personnel and their attorneys, thereby depriving the government of full and frank legal counsel and disrupting the relationship of trust that is critical when attorneys formulate legal advice for their clients.

15. 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.

16. The presidential communications privilege applies to the decision making of the President, and applies to the communications not only of the President but 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

Proposals for Military Operations

17. Ten 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. Because the proposal and planning of the operation spanned two different Presidential administrations, the documents are

either drafts that are undated or reflect dates between November 2016 and January 2017. The operational proposal documents include detailed intelligence community assessments of AQAP and ISIL, analysis of UAE capabilities, and specific proposals for DoD military support to UAE's operations, among other operational specifics. Documents fitting into this category are the following:

- JS/001-006, JS/048-53, JS/261-266 (detailed DoD operational proposals by the Secretary of Defense)
- JS/009-011 (memorandum to National Security Advisor from Secretary of Defense, requesting approval of detailed operational proposal)
- JS/37-40 (email containing detailed plan of the Yemen raid)
- JS/059-062 (detailed briefing narrative regarding the planning of military operation)
- JS/273-278, JS/330-336, JS/339-345, State/39-44 (detailed DoD operational proposals including information indicating the geographic scope and timeframe of an operation, intelligence community assessments, and other operational specifics)

18. 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 attached *Vaughn* index, depending on the level of detail of the proposed operations, and thus exempt under (b)(1). 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 (b)(5).

19. JS/009-011 is exempt from release pursuant to (b)(5) for the additional reason that it is protected by the presidential communications privilege. JS/009-011 is a communication from

the Secretary of Defense to the National Security Advisor to the President, setting forth detailed recommendations for review and approval. This memorandum was closely held in that it was sent only to the National Security Advisor, and was provided to aid in the President's decision-making.

Requests for Authorization

20. The proposals discussed above were communicated to the President via a memorandum to the Assistant to the President for National Security Affairs (the National Security Advisor), which detailed the recommended support to UAE and proposed the recommended military operations. The memorandum also attached the proposals discussed above. This memorandum appears either in draft form, as documents JS/009-011 and JS/267-269, or final form, dated January 24, 2017, as documents JS/054-056, JS/280-282, and State/36-38.

21. Again, 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 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 (b)(1). Furthermore, as these documents are pre-decisional proposals provided to a senior advisor to the President, ultimately to be considered by the then-President as part of his decision-making process regarding military operations, and were closely held, they are also both deliberative process and presidential communication privileged and exempt from release pursuant to (b)(5).

Authorization

22. The President approved the proposed operations on January 25, 2017, by signing a memorandum for the President that had been prepared and provided by the National Security

Advisor. (Document OGC/030-031). 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).

23. These two memoranda both contain details regarding the number of personnel, the assets to be utilized, the parameters of the mission, and the time span of the approval. OGC/030-031 reflects the National Security Advisor's presentation of information, options, and recommendations to the President, and JS/022-023 details the specific operational scope of the President's approval. These two records 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 (b)(1). As these documents are also closely held communications among the President and his senior advisors (the National Security Advisor and the Secretary of Defense), they are also presidential communication privileged and exempt from release pursuant to (b)(5).

Request for Authorization Extension

24. In an April 28, 2017 memorandum from the Secretary of Defense to the Assistant to the President for National Security Affairs (State/34-35), 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 from the National Security Advisor to a limited group of Defense officials (State/31-32). The request included substantial operational detail, including intelligence assessments regarding AQAP, assessments of UAE capabilities, and assessments of the time required to complete a successful operation. These two documents 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*, and thus exempt under (b)(1). As these documents

are communications between the President's senior advisors), they are also presidential communication privileged and exempt from release pursuant to (b)(5). The request memorandum is also predecisional and intended to aid in the President's decision making about military options, and is therefore deliberative process privileged.

Request to Share Intelligence

25. In a memorandum from the Secretary of Defense to the Assistant to the President for National Security Affairs, the Secretary sought approval to share specific intelligence with UAE. (Document JS/271-273). The request included intelligence assessments, the sources and methods of those assessments, and assessment of UAE capabilities. This document is currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d), and thus exempt under (b)(1). As this document is a communication to the President (via the National Security Advisor) from the Secretary of Defense, it is also presidential communication privileged and exempt from release pursuant to (b)(5).

Orders to Conduct Military Operations

26. 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 JS/ 041-042 and JS 057/058, the latter of which is a corrected copy of the earlier order to ensure the correct concept of operations is referenced. The orders contain details regarding the parameters of the mission, the time span of the approval, and other operational details. They are currently and properly classified at the Secret level pursuant to sections 1.4(a), (c), and (d) of E.O. 13526, as they detail foreign activities of the United States, intelligence methods, and military operations, and are thus exempt under (b)(1).

Post-Operation Review and Discussion of Proposed Follow on Operations

27. Document JS/400-404 is an email dated January 30, 2017, which details the actions taken during the raid in Yemen. The email contains specific details of the mechanical capabilities and vulnerabilities of the assets used in the raid, and is currently and properly classified under 1.4(g). Further, the email discusses options for further military operations and thus is currently and properly classified under 1.4(a) of EO 13526.

Agenda for Meeting

28. Document JS/383-387 is a cover memo and agenda, detailing items for a Deputies Committee meeting relating to DoD proposals for the Yemen operation and other unrelated national security matters. Narrative information about the items to be discussed is properly withheld under exemption 5, as it was furnished as part of a governmental decision-making process and for the purpose of discussion and consideration, and is therefore deliberative process privileged. That information, along with certain information in the cover memo relating to the non-Yemen topics, is also properly withheld pursuant to the presidential communications privilege, because it related 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 as to the non-Yemen meeting items, disclosure would reveal the topics on which the President sought advice from the Deputies Committee as part of his decisionmaking process. The document's classification is Top Secret, and the document concerns proposed, past, and ongoing military operations, intelligence sources and methods, DoD assessments, equipment information, and foreign activities of the United States. Thus, the document is also exempt under (b)(1) pursuant to sections 1.4(a), (b), (c), and (d).

Finally, the names and telephone numbers of low-level government employees, as well as a signature, were withheld pursuant to Exemption 6. On July 20, 2018, after determining that additional information could be provided to Plaintiffs from JS/383-387, DoD re-released this document.

Legal Review of Proposal and Scope of Approval

29. Five documents challenged by Plaintiffs contain legal analysis, by DoD and other executive branch attorneys, of DoD proposals for military operations and of the scope and authority of the operations once approved. These documents are JS/188-191 (email reflecting legal advice from the Office of General Counsel), JS/240-242 (email summarizing a lawyers' group discussion), JS/324-329 (email setting forth legal advice on a non-final proposal), JS/400-404 (email in part providing legal advice as to a new operational proposal), and the OLC document addressed in the declaration of Paul P. Colborn (draft classified legal advice document prepared by an interagency group of attorneys). The documents contain details on the parameters of proposed missions, the time span of the approval, intelligence information, capabilities and vulnerabilities of military units, and other operational details. They are all currently and properly classified at the Secret or Top Secret level pursuant to sections 1.4(a), (b), (c), and (d), and (g) of E.O. 13526, as applicable and listed in the attached *Vaughn* index, depending on the level of detail of the proposed operations, and thus exempt under (b)(1). As to the DoD documents, because these records contain legal analysis from attorneys within DoD to help advise senior leaders regarding the scope of authority for military action, and because these legal discussions and analyses are also predecisional and part of a decision-making process regarding military operations, they are also exempt under (b)(5) as both deliberative and attorney/client privileged.

Potential Harm to National Security

30. The release of the information withheld from these DoD records pursuant to FOIA Exemption 1 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 and unsuspected. 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.

31. 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.

32. 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.

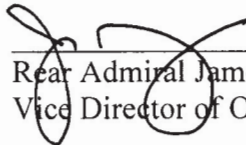
33. Lastly, as discussed above, many of the records challenged by Plaintiffs set forth substantial operational detail regarding DoD military operations. Revealing details of military operations, even after the passage of time, could provide great insight to adversaries regarding DoD's capabilities, priorities, vulnerabilities, and limitations. Terrorist organizations, violent extremist organizations, or hostile foreign governments could use the information to better plan attacks or evade justice. It is for these reasons that the information redacted from the challenged records is currently and properly classified and must not be released.

Review for Reasonably Segregable Information

34. DoD has conducted a page-by-page and line-by-line review of the documents at issue in this declaration. 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 13th day of July 2018, in Arlington, VA.



Rear Admiral James J. Malloy, USN
Vice Director of Operations, J-3, Joint Staff