

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 DEPARTMENT OF JUSTICE**

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TABLE OF AUTHORITIES

Cases

ACLU v. CIA,
109 F. Supp. 3d 220 (D.D.C. 2015) 17

ACLU v. DOJ,
681 F.3d 61 (2d Cir. 2012)..... 6, 7, 29

ACLU v. DOJ,
No. 15 Civ. 1954 (CM), 2016 WL 889739 (S.D.N.Y. Mar. 4, 2016)..... 22

ACLU v. DOJ,
210 F. Supp. 3d 467 (S.D.N.Y. 2016).....11

Adamowicz v. IRS,
552 F. Supp. 2d 355 (S.D.N.Y. 2008)..... 6, 7

Amnesty Int’l USA v. CIA,
728 F. Supp. 2d 479 (S.D.N.Y. 2010)..... 8, 19

Baldrige v. Shapiro,
455 U.S. 345 (1982) 6

Brinton v. Dep’t of State,
636 F.2d 600 (D.C. Cir. 1980) 14

Carney v. DOJ,
19 F.3d 807 (2d Cir. 1994)..... 6, 8, 9, 10

Conti v. DHS, No. 12 Civ. 5827 (AT),
2014 WL 1274517 (S.D.N.Y. Mar. 24, 2014) 9

CREW v. DHS, 06-0173,
2008 WL 2872183 (D.D.C. July 22, 2008)..... 19

Dep’t of the Interior v. Klamath Water Users Protective Ass’n,
532 U.S. 1 (2001) 6

Ferguson v. FBI,
 No. 89-5071, 1995 WL 329307 (S.D.N.Y. June 1, 1995)..... 6

Fitzgibbon v. CIA,
 911 F.2d 755 (D.C. Cir. 1990) 7

Frugone v. CIA,
 169 F.3d 772 (D.C. Cir. 1999) 7

Garcia v. DOJ,
 181 F. Supp. 2d 356 (S.D.N.Y. 2002)..... 8

Grand Cent. P’ship v. Cuomo,
 166 F.3d 473 (2d Cir. 1999)..... 6, 8, 13, 14

Halperin v. CIA,
 629 F.2d 144 (D.C. Cir. 1980) 7

Hopkins v. HUD,
 929 F.2d 81 (2d Cir. 1991)..... 10, 13, 17

In re Cnty. of Erie,
 473 F.3d 413 (2d Cir. 2007)..... 10, 11, 12

In re Sealed Case,
 121 F.3d 729 (D.C. Cir. 1997) 19

John Doe Agency v. John Doe Corp.,
 493 U.S. 146 (1989)..... 6

Judicial Watch, Inc. v. DOJ,
 365 F.3d 1108 (D.C. Cir. 2004) 18, 19

Larson v. Dep’t of State,
 565 F.3d 857 (D.C. Cir. 2009) 7

Long v. Office of Personnel Mgmt.,
 692 F.3d 185 (2d Cir. 2012)..... 8

Loving v. DOD,
496 F. Supp. 2d 101 (D.D.C. 2007) 20

MacNamara v. City of New York,
249 F.R.D. 70 (S.D.N.Y. 2008)..... 14

Maynard v. CIA,
986 F.2d 547 (1st Cir. 1993) 8

Meeropol v. Meese,
790 F.2d 942 (D.C. Cir. 1986) 8

Nat’l Council of La Raza v. DOJ,
339 F. Supp. 2d 572 (S.D.N.Y. 2004)..... 14

Nat’l Council of La Raza v. DOJ,
411 F.3d 350 (2d Cir. 2005)..... 14, 16, 17

Nat’l Sec. Archive Fund, Inc. v. CIA,
402 F. Supp. 2d 211 (D.D.C. 2005) 32

New York Times Co. v. DOJ,
756 F.3d 100 (2d Cir. 2014)..... 6

New York Times Co. v. DOJ,
872 F. Supp. 2d 309 (S.D.N.Y. 2012)..... 6

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) 18

NLRB v. Sears,
421 U.S. 132 (1975) 13, 18

Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.,
421 U.S. 168 (1975) 13

Tigue v. DOJ,
312 F.3d 70 (2d Cir. 2002)..... 10, 13

<i>Triestman v. DOJ</i> , 878 F. Supp. 667 (S.D.N.Y. 1995).....	8
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).....	18, 19
<i>Unrow Human Rights Impact Litigation Clinic v. Dep’t of State</i> , No. 13-1573 (KBJ), 2015 WL 5730606 (D.D.C. Sept. 29, 2015)	31
<i>Vaughn v. Rosen</i> , 484 F.2d 820 (D.C. Cir. 1973)	3, 5
<i>Wadelton v. Dep’t of State</i> , 208 F. Supp. 3d 20 (D.D.C. 2016)	9
<i>Wilner v. NSA</i> , 592 F.3d 60 (2d Cir. 2009).....	6, 7, 30
<i>Wolf v. CIA</i> , 473 F.3d 370 (D.C. Cir. 2007)	7
 Statutes	
5 U.S.C. § 552.....	1
5 U.S.C. § 552(b)	32
5 U.S.C. § 552(b)(5)	10
5 U.S.C. §§ 552(b)(1)	1
10 U.S.C. § 130b.....	7
U.S.C. § 552(b)(1)	23
 Rules	
Fed. R. Civ. P. 56(a)	6

Federal Rule of Civil Procedure 56 1, 6

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 2

 I. The FOIA Request.....2

 II. FOIA Responses Provided by DOD, DOS, and OLC.....2

 III. Plaintiffs’ Challenges.....3

ARGUMENT 4

 I. Legal Standards for Summary Judgment in FOIA Actions.....4

 II. CENTCOM’s Searches Relating to CENTCOM/019 and CENTCOM/272 Were Reasonable and More Than Adequate.....6

 III. DOD, DOS, and OLC Properly Withheld Privileged Information Pursuant to Exemption 5.....8

 A. Attorney Client Privilege.....8

 B. Deliberative Process Privilege.....11

 C. Presidential Communications Privilege.....16

 IV. DOD, DOS, and OLC Properly Withheld Classified Documents and Information Pursuant to Exemption 121

 V. DOD, DOS, and OLC Produced Any Reasonably Segregable Portions of the Challenged Records.....30

CONCLUSION.....30

Defendants the Department of Defense (“DOD”), Department of State (“DOS”), and Department of Justice (“DOJ”) 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 information pertaining to “the United States’ January 29, 2017 raid in al Ghayil, Yemen” (the “al Ghayil Raid” or “Raid”). Specifically, Plaintiffs seek the disclosure of documents pertaining to “[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 DOJ’s Office of Legal Counsel (“OLC”) conducted diligent searches for responsive records and processed several hundred responsive pages. These agencies have withheld from disclosure information that remains currently and properly classified (principally, detailed information regarding United States military operations, capabilities, assessments, and similar material). The defendant agencies have also withheld certain privileged attorney-client communications, predecisional and deliberative documents, and materials protected by the presidential communications privilege.

The declarations provided by DOD, DOS, and OLC logically and plausibly establish that the 55 records remaining at issue in this case are protected from disclosure, in whole or in part, because they are currently and properly classified and/or privileged, and thus exempt under FOIA Exemptions 1 and/or 5, 5 U.S.C. §§ 552(b)(1) and/or (5).¹ The declaration provided by

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 have indicated that they do not challenge these withholdings.

the United States Central Command (“CENTCOM”) establishes that the two searches challenged by Plaintiffs were reasonable, adequate, and conducted in good faith. Accordingly, the Court should grant summary judgment to DOD, DOS, and DOJ.

BACKGROUND

I. The FOIA Request

This matter arises from FOIA requests submitted by Plaintiffs on March 15, 2017. *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. FOIA Responses Provided by DOD, DOS, and OLC

Three different components within DOD located and processed responsive records: the Joint Staff at the Pentagon, the DOD Office of the General Counsel (“DOD OGC”), and CENTCOM, which is the combatant command within the United States armed forces that directs and enables military operations and activities in the Middle East and Central and South Asia.² *See* Declaration of Rear Admiral James J. Malloy dated July 13, 2018 (“DOD Dec.”), ¶ 4; Declaration of Major General Terry Ferrell dated July 20, 2018 (“CENTCOM Dec.”), ¶¶ 1, 5. The Joint Staff processed 442 pages of records, DOD OGC processed 38 pages, and CENTCOM processed 343 pages. DOD Dec. ¶ 4; CENTCOM Dec. ¶ 5. In addition, DOS referred a set of responsive records to DOD for processing and release. DOD Dec. ¶ 4. The majority of the records processed by the Joint Staff, DOD OGC, and CENTCOM were released in part; the *Vaughn*³ indices (which are identical) attached to the DOD and CENTCOM Declarations

² DOD’s Office of Inspector General located no responsive records.

³ These indices derive their name from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

indicate which challenged documents were released in part (“RIP”) and which were withheld, or “denied,” in full (“DIF”). DOS processed 489 pages of responsive records, releasing 23 in full and 162 in part, and withholding 304 pages in full. *See* Declaration of Eric F. Stein dated July 20, 2018 (“State Dec.”), ¶ 16. OLC located and processed five responsive records, all of which were withheld in full. *See* Declaration of Paul P. Colborn dated July 20, 2018 (“OLC Dec.”), ¶¶ 11-12.⁴

III. Plaintiffs’ Challenges

After the agencies completed their initial FOIA responses, the parties engaged in further discussions, during which the agencies provided additional information to Plaintiffs in response to their inquiries (and, in some cases, made supplemental releases), and Plaintiffs narrowed the universe of withholdings that they would challenge. *See* Dkt. Nos. 57, 59, 61 (reporting on the parties’ ongoing discussions).⁵ Plaintiffs ultimately represented that they intended to challenge CENTCOM’s searches for two documents, as discussed further below, as well as the defendant agencies’ withholdings in 45 DOD records, nine DOS records, and one OLC record. *See* Dkt. No. 64 (enumerating Plaintiffs’ challenges). DOD, DOS, and DOJ now move for summary judgment with regard to their application of FOIA exemptions to certain information in the challenged documents and, with respect to CENTCOM’s searches relating to two documents: CENTCOM/019 and CENTCOM/272.

⁴ DOJ’s Office of Information Policy did not locate any responsive records.

⁵ Pursuant to the Court’s instructions during the June 8, 2018 pre-motion conference in this case, Plaintiffs provided the Government with a preliminary package of materials that Plaintiffs characterized as official government acknowledgments potentially relevant to Plaintiffs’ challenges. After reviewing these materials, DOS and DOD concluded that they could provide some additional information that had previously been withheld from their FOIA releases in this case, and re-released certain records to Plaintiffs with some redactions removed. *See* State Dec. ¶ 12; DOD Dec. ¶ 28.

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 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).⁶ The agency’s declarations in support of its determinations are “accorded a presumption of good faith.” *Id.* (citation and quotation marks omitted).

⁶ 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., New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

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 *New York Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014); *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*, 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, “an agency’s justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.” *Wilner*, 592 F.3d at 73 (citation and quotation marks omitted); accord *ACLU*, 681 F.3d at 69; *Wolf*, 473 F.3d at 374-75.

Under this deferential standard, the defendant agencies’ declarations amply demonstrate that the withheld documents and information are exempt from disclosure under FOIA Exemptions 1 and 5. In addition, CENTCOM’s declaration shows that its searches related to CENTCOM/019 and 272 were reasonable and more than adequate. DOD, DOS, and DOJ are therefore entitled to summary judgment as to the withheld documents and information, and the challenged searches.

II. CENTCOM's Searches Relating to CENTCOM/019 and CENTCOM/272 Were Reasonable and More Than Adequate

The Government does not have 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; *Triestman v. DOJ*, 878 F. Supp. 667, 672 (S.D.N.Y. 1995). “[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 and 272 were reasonable and more than adequate under FOIA, and there is no evidence of 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.⁷ CENTCOM Dec. ¶ 8. CENTCOM initially released CENTCOM/019 as part of its first FOIA production in November 2017, and again as part of a corrected release in January 2018. *Id.* ¶ 5. During the parties' later discussions and at Plaintiffs' request, CENTCOM personnel further investigated the technical issues relating to CENTCOM/019 and were able to locate one of the attachments to the partial email thread, which the agency processed and released in part on June 15, 2018. *Id.* ¶ 8. While CENTCOM was unable to retrieve the entire email thread represented in part by CENTCOM/019, *id.*, CENTCOM'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.

CENTCOM/272 is an email dated March 28, 2017, in which the author asks CENTCOM operational law attorneys to provide clarification on the wording of CENTCOM operational directives. *Id.* ¶ 9. CENTCOM/272 was located in the course of CENTCOM's general searches for responsive documents in Enterprise email accounts, document portals, and shared drives, and it was processed and released in part in CENTCOM's first release to Plaintiffs on [date]. *Id.* In March 2018, Plaintiffs asked CENTCOM to search for "the response" to the request posed in CENTCOM/272. *Id.* The CENTCOM Office of the Staff Judge Advocate was tasked to search for any response, if one existed. *Id.* The Operational Law Division personnel involved in the email communication reflected in CENTCOM/272 searched for any such response, which would have been provided by email, in their Enterprise email accounts, and located no records. *Id.* This search was plainly reasonable; that no response was 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

⁷ 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. CENTCOM Dec. ¶ 8. However, users could no longer retrieve vaulted emails after December 2017, when the Enterprise Vault system was migrated to a different system. *Id.*

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, DOS, and OLC 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 the declarations provided by the defendant agencies, many of the documents at issue are protected, in whole or in part, by Exemption 5 and the attorney client privilege, the deliberative process privilege, and/or the presidential communications privilege.

A. Attorney Client Privilege

“The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance. Its purpose is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote “broader public interests in the observance of law and administration of justice.” *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (citation and quotation marks omitted). The privilege operates in the government context as it does between private attorneys and their clients, “protect[ing] most confidential communications between government counsel and their clients

that are made for the purpose of obtaining or providing legal assistance.” *Id.* Because “public officials are duty-bound to understand and respect constitutional, judicial and statutory limitations on their authority . . . , their access to candid legal advice directly and significantly serves the public interest.” *Id.* at 419. “Upholding the [attorney-client] privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business,” and “[a]brogating the privilege undermines that culture and impairs the public interest.” *Id.* (citation and quotation marks omitted). To invoke the attorney-client privilege, a party must demonstrate that there was: “(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.” *Id.* at 419. The materials withheld by DOD, DOS, and OLC pursuant to Exemption 5 and the attorney-client privilege easily meet this standard.

DOD invoked the attorney-client privilege (in addition to other privileges and Exemption 1, where appropriate) with respect to confidential email communications between DOD employees or contractors and DOD attorneys, or among DOD attorneys regarding information conveyed to them for the purpose of obtaining legal advice. *See* DOD Dec. ¶ 29; CENTCOM Dec. ¶¶ 24-26; *see generally Vaughn* index. These emails conveyed legal advice or analysis from individual DOD attorneys or DOD lawyers’ groups; forwarded information to DOD attorneys for the purpose of seeking legal advice; and/or reflected legal discussion and deliberations among DOD attorneys on legal issues relating to DOD operations. *See* DOD Dec. ¶ 29; CENTCOM Dec. ¶¶ 25-26; *see generally Vaughn* index. These emails related not only to the al Ghayil Raid, but also to other, unrelated military operations or proposals for future operations. *See* DOD Dec. ¶ 29; CENTCOM Dec. ¶¶ 25-26; *see generally Vaughn* index.

DOS withheld information from two challenged records pursuant to Exemption 5 and the attorney-client privilege (among other bases for withholding): Documents C06395321 and C06432633. *See* State Dec. ¶¶ 23, 37, 53. Document C06395321 is an undated draft briefing paper containing an annotated agenda, background information, and recommendations for expected participation by a senior DOS official in an upcoming interagency meeting scheduled for May 5, 2017. *Id.* ¶ 35. The document includes confidential legal analysis and advice regarding domestic and international legal issues, prepared by DOS attorneys for their clients, regarding a proposal to be discussed at that meeting. *Id.* ¶¶ 35, 37. Document C06432633 is an undated draft attachment to another document, which itself is an undated draft annotated agenda for an interagency meeting scheduled for January 5, 2017, to be attended by a senior DOS official. *Id.* ¶ 51. Document C06432633 was prepared confidentially by DOS attorneys for the purpose of illustrating an approach reflecting their legal advice, for use ultimately by their clients. *Id.* ¶ 53.

Finally, the document withheld by OLC was withheld pursuant to, among other applicable exemptions and privileges, the attorney-client privilege. OLC Dec. ¶ 20. The document was authored by an interagency lawyers' group, coordinated by the National Security Council ("NSC") Legal Advisor, for use by the President's National Security Advisor in advising the President and the NSC. *Id.* The factual material contained in the document was provided to OLC and the other attorneys who received the document by NSC staff for the purpose of obtaining confidential legal advice. *Id.*

These materials are quintessentially privileged attorney-client communications. *See Cnty. of Erie*, 473 F.3d at 419. As noted by the defendant agencies, disclosure of this information, which was confidential, would inhibit open communication between the defendant

agencies' personnel and their attorneys, thereby depriving the defendant agencies of full and frank legal counsel, and disrupting the relationship of trust that is critical when attorneys formulate legal advice for their clients. *See, e.g.*, DOD Dec. ¶ 14; CENTCOM Dec. ¶ 25; State Dec. ¶¶ 23, 37, 53; OLC Dec. ¶¶ 5-6, 16, 20.

B. 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*, 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, DOS, and OLC properly withheld information pursuant to Exemption 5 and the deliberative process privilege. With respect to the challenged documents processed by the Joint Staff and DOD OGC, and the documents referred to DOD by DOS, DOD withheld information pursuant to the deliberative process privilege from records reflecting: (1) predecisional proposals for military operations, which set forth options and recommendations relating to anticipated operations (DOD Dec. ¶¶ 17-18); (2) predecisional requests for presidential approval of proposed operations, which were provided to a presidential advisor for consideration by the President as part of his decisionmaking process regarding military operations (*id.* ¶¶ 20-21); (3) a predecisional request for presidential authorization of the extension of a prior approval of military operations, which was intended to aid in the President’s decisionmaking process about military options (*id.* ¶ 24); (4) predecisional narrative descriptions of national security topics (including but not limited to the Yemen operation) to be discussed at a Deputies Committee meeting relating to DOD proposals, which were furnished as part of a governmental decisionmaking process and for the purpose of discussion and consideration (*id.* ¶

28); and (5) four intra-agency DOD emails containing predecisional legal advice and analysis relating to DOD proposals for military operations and the scope of such operations, in order to help advise senior leaders regarding the scope of authority for military action, as part of a decisionmaking process regarding DOD operations (*id.* ¶ 29). *See generally Vaughn* index.

As to the challenged documents processed by CENTCOM, DOD withheld information from the following documents pursuant to the deliberative process privilege: CENTCOM/003-005 (email including a detailed DOD operational proposal laying out options relating to the al Ghayil Raid); CENTCOM/045-053 (memorandum from the Secretary of Defense to the National Security Advisor, attaching a detailed DOD operational proposal, making recommendations and seeking approval with respect to the al Ghayil Raid); CENTCOM/060-130, 218-244, and 246-268 (highly detailed briefing materials, operational proposals, and with respect to CENTCOM/218-244, a draft information paper with redlines, setting forth recommendations and options relating to upcoming military options); CENTCOM/329 (draft proposal relating to one aspect of the al Ghayil Raid); CENTCOM/280, 286, and 294 (emails including legal discussions with and among DOD attorneys discussing unresolved aspects of future DOD actions); and CENTCOM/15-18 and 187-189 (emails among DOD attorneys containing discussions and deliberations regarding military operations and plans). CENTCOM Dec. ¶ 28; *see generally Vaughn* index. These records “reflect interim stages of governmental decision-making about military operations, and did not constitute a final decision to engage in an operation or to take an action. Rather, these communications and records reflect different considerations, opinions, options and approaches that preceded an ultimate decision.” CENTCOM Dec. ¶ 27. The disclosure of the factual information included in these deliberations and discussions “would

reveal the nature of the preliminary recommendations and opinions preceding the final determinations.” *Id.* ¶ 28.

DOS withheld information pursuant to the deliberative process privilege in seven documents: C06395294, C06395321, C06432231, C06432239, C06432636, C06432854, and C06432633. State Dec. ¶¶ 33, 37, 41, 47, 53. As discussed above, C06395321 and C06432633 are both drafts. State Dec. ¶¶ 37, 53; *see supra* Part III.A. C06395321 is predecisional and deliberative in that it includes recommendations for positions that a senior DOS official should take in an interagency meeting, and the interagency meeting for which the paper was prepared was itself part of an ongoing interagency discussion and decisionmaking process on security issues and concerned a particular proposal to be decided on at a higher level. *Id.* ¶ 37. C06432633 was drafted to inform interagency discussion about the issues it addresses in the meeting for which it was prepared. *Id.* ¶ 53. Document C06395294 is a draft action memorandum dated March 10, 2017, to the Secretary of State regarding foreign policy in Yemen. *Id.* ¶ 31. The memorandum proposes lines of effort for approval or disapproval by the Secretary, and assesses the proposals’ potential risks and benefits. *Id.* ¶ 33. 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 Deputies Committee meetings held on January 26, 2017 (as to C06432231), and January 6, 2017 (as to C06432239, C06432636, and C06432854). *Id.* ¶¶ 39, 45. The emails summarize interagency deliberations about specific proposals, and are therefore covered by the deliberative process privilege. *Id.* ¶¶ 41, 47.

The deliberative process privilege also applies to OLC’s withheld document. The document was attached to an email that identified it as a “proposed final version,” and solicited

comments on the draft legal advice it contains, without any indicia that it was ever finalized. OLC Dec. ¶ 19. The document is predecisional because “it was prepared before a final decision was made by decision makers regarding any of the matters discussed within,” and also because as a draft, it was “predecisional to a decision by the lawyers group on whether to finalize the document.” *Id.* The document is deliberative “both because it is a draft and because it reflects the internal deliberations of the interagency group of attorneys as they developed advice for senior decisionmakers.” *Id.* OLC does not know whether the document was ultimately conveyed to decisionmakers, but even if it was conveyed, it would still be predecisional and deliberative, because: (1) it was prepared for the consideration of the President’s national security advisors in deciding whether to recommend a contemplated military action to the President, and (2) it set forth legal advice used by those advisors in preparing their recommendation, as part of an executive branch deliberative process. *Id.*; *see, e.g., ACLU v. CIA*, 109 F. Supp. 3d 220, 238 (D.D.C. 2015) (agency properly withheld legal memoranda under deliberative process, attorney-client, and presidential communication privileges).

As explained in the defendant agencies’ declarations, compelled disclosure of the predecisional, deliberative materials withheld pursuant to Exemption 5 would undermine the deliberative processes of the government, by chilling the candid and frank communications necessary for effective decisionmaking. *See* DOD Dec. ¶ 15; CENTCOM Dec. ¶ 28; State Dec. ¶¶ 22, 33, 37, 41, 47, 53; OLC Dec. ¶¶ 3-4, 19; *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 8-9 (“officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news”). Moreover, since many of the recommendations, options, analysis, and advice

reflected in this withheld material were not final, revealing the material “could mislead or confuse the public by disclosing rationales that were not the basis for the government’s final decisions.” *E.g.*, CENTCOM Dec. ¶ 28. The DOS Declaration further explains that as to the non-final recommendations and proposals that were withheld pursuant to the deliberative process privilege, “[t]he release of this information could reasonably be expected to shrink the range of options presented in the future to the Secretary of State about major foreign policy challenges, because if Department officials expect the options they present to be released to the public then they may be less likely to consider, develop and present unconventional or controversial options that do not reflect conventional wisdom or follow the path of least resistance.” *See* State Dec. ¶ 33; *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)).

C. 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 and 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*, 728 F. Supp. 2d at 522. 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, DOS, and OLC properly withheld certain information in the challenged records pursuant to Exemption 5 and the presidential communications privilege.⁸ The defendant agencies' declarations show that the information withheld pursuant to this privilege was closely held within the Executive Branch. DOD Dec. ¶¶ 19, 21, 23-25, 28; CENTCOM Dec. ¶ 30; State Dec. ¶¶ 42, 48; OLC Dec. ¶ 21. DOD applied the presidential communications privilege to the following records: (1) memoranda from the Secretary of Defense to the President's National Security Advisor, attaching detailed DOD proposals regarding the al Ghayil Raid and seeking approval from the President on the recommended military action (CENTCOM/045-053, CENTCOM Dec. ¶ 30; JS/009-011, DOD Dec. ¶¶ 17, 19-21; and JS/267-269, JS/054-056, JS/280-282, and State/36-38, DOD Dec. ¶¶ 20-21); (2) a memorandum prepared for the President by the National Security Advisor, conveying the National Security Advisor's detailed recommendations to the President regarding the proposed al Ghayil Raid, and bearing the President's signature in approval thereof (OGC/030-031, DOD Dec. ¶¶ 22-23); (3) a memorandum from the National Security Advisor to the Secretary of Defense, conveying the President's approval of the al Ghayil Raid and the specific operational scope of that approval (JS/022-023, DOD Dec. ¶¶ 22-23); (4) an April 28, 2017 memorandum from the Secretary of Defense to the National Security Advisor, presenting a request for approval of an extension of a prior Presidential approval of military operations (State/34-35, DOD Dec. ¶ 24); (5) a May 16, 2017 memorandum from the National Security Advisor to a limited group of DOD officials, conveying approval of the April 28, 2017 request (State/31-32, DOD Dec. ¶ 24); (6) a memorandum from the Secretary of Defense to the National Security Advisor, seeking approval

⁸ 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).

to share specific intelligence with the United Arab Emirates (JS/271-273, DOD Dec. ¶ 25); and (7) portions of a meeting memorandum and attached agenda for a Deputies Committee meeting relating to national security topics, including but not limited to the anticipated Yemen operation (JS/383-387, DOD Dec. ¶ 28); *see generally Vaughn* index. The documents in categories (1) through (6) represent closely held communications between senior advisors to the President (and, as to OGC/030-031, a communication involving the President himself) setting forth detailed operational recommendations to be considered as an essential part of the President's decisionmaking process regarding military matters, and in the case of JS/022-023, describing the scope of the President's approval of one of the proposed actions. JS/383-387, the Deputies Committee meeting memorandum with attached agenda, reflects the substance of matters to be discussed and deliberated on by senior advisors to the President on national security matters, namely members of the Deputies Committee, for the purpose of deciding what advice to provide to the President. DOD Dec. ¶ 28; *see also* State Dec. ¶ 24, discussed further below. Furthermore, the information withheld from JS/383-387 relating to the non-Yemen matters on the meeting agenda would, if disclosed, reveal other topics on which the President sought advice from the Deputies Committee, as part of his decisionmaking processes. DOD Dec. ¶ 28.

DOS withheld certain information from four emails (the last three of which are identical) pursuant to the presidential communications privilege: C06432231, C06432239, C06432636, and C06432854. State Dec. ¶¶ 24, 42, 48. As discussed above, *see supra* Part III.B, these four documents are intra-agency emails providing readouts of deliberations during Deputies Committee meetings held on January 26, 2017 (as to C06432231), and January 6, 2017 (as to C06432239, C06432636, and C06432854), and the readouts were withheld pursuant to the privilege. State Dec. ¶¶ 39, 42, 45, 48. 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, *available at* <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-4/>, 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.* ¶ 24. Deputies Committee meetings “consist of discussions with close presidential 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 concerns” *Id.* The four emails include descriptions of comments by senior officials of the State Department and other agencies made at the two referenced Deputies Committee meetings, in the course of discussions with senior presidential advisors preparing advice on national security matters for potential presentation to the President. *Id.* ¶¶ 24, 42, 48. The discussions reflected in these four emails have not been publicly disclosed, and have been closely held within the Executive Branch. *Id.* ¶¶ 42, 48; *see also, e.g., ACLU v. DOJ*, No. 15 Civ. 1954 (CM), 2016 WL 889739, at *5 (S.D.N.Y. Mar. 4, 2016).

Finally, the presidential communications privilege also applies to the document withheld by OLC. OLC Dec. ¶ 21. That document sets forth legal advice both prepared by and provided to the National Security Council (“NSC”) Legal Advisor regarding the President’s authority to authorize a particular military action. *Id.* The NSC Legal Advisor is a member of the staff of the President’s National Security Advisor and, as Deputy Counsel to the President, is also a member of the staff of the Counsel to the President. *Id.* Both are immediate advisors to the President, and the NSC Legal Advisor has broad and significant responsibilities in the area of providing

legal advice on national security matters. *Id.* The document is therefore protected by the privilege because it is a confidential communication involving a member of the staffs of senior presidential advisors, in the course of formulating advice or recommendations to be provided to the President or his senior advisors, on a matter relating to possible presidential decisionmaking about a particular military action. *Id.*

As the defendant agencies' declarations discuss, the above-described information has been withheld "to preserve the President's ability to obtain frank and informed opinions from his advisors and to make decisions in confidence." OLC Dec. ¶ 21; *see also* DOD Dec. ¶ 16; CENTCOM Dec. ¶ 30; DOS Dec. ¶¶ 24, 42, 48. The application of the privilege to communications involving the President's close advisors ensures that they fully "investigate issues and provide appropriate advice to the President," DOD Dec. ¶ 16, that they do so "without concerns about compelled disclosure," OLC Dec. ¶ 21, and that they may effectively communicate with each other and with the President. State Dec. ¶¶ 42, 48; OLC Dec. ¶ 7. In order to discharge his duties under the Constitution, "the President must be able to receive confidential advice of all kinds, including legal advice." OLC Dec. ¶ 7. Compelled disclosure of this withheld information "could threaten the quality of presidential decisionmaking by impairing the deliberative process in which those decisions are made." *Id.* ¶ 21.

IV. DOD, DOS, and OLC 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, CENTCOM, and DOS, all executed by individuals who are authorized to exercise original classification authority, amply demonstrate that these standards have been met with regard to the classified information withheld by the defendant agencies under Exemption 1.⁹ *See* DOD Dec. ¶ 7; CENTCOM Dec. ¶ 3; State Dec. ¶ 4. All of the information withheld has been 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,

⁹ Because OLC lacks original classification authority, the application of Exemption 1 to certain information in the single OLC document that Plaintiffs challenge is addressed in the DOD Declaration and the DOD *Vaughn* index. *See* OLC Dec. ¶ 24; DOD Dec. ¶ 29.

or methods, foreign relations or foreign activities of the United States, or vulnerabilities or capabilities of systems or plans relating to the national security, within the meaning of section 1.4 of the Executive Order. *See* DOD Dec. ¶¶ 6-8, 17-29; CENTCOM Dec. ¶¶ 3, 11-13, 17-19, 29-30; State Dec. ¶ 4, 18-20, 29-32, 35-36, 39-40, 45-46, 51-52; *see also* E.O. 13,526 §§ 1.4(a)-(d), (g). In addition, each of these agency declarants 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. ¶ 30-33; CENTCOM Dec. ¶¶ 20-23; State Dec. ¶¶ 29-32, 35-36, 39-40, 45-46, 51-52.

All of the documents withheld under Exemption 5 also contain information that remains currently and properly classified, and was therefore properly withheld by DOD, DOS, and OLC pursuant to Exemption 1. *See* DOD Dec. ¶¶ 17-18, 20-25, 28-29; CENTCOM Dec. ¶¶ 29-30; DOS Dec. ¶¶ 29-32, 35-36, 39-40, 45-46, 51-52; OLC Dec. ¶ 23-24; *see generally Vaughn* index. With respect to the DOD documents, each of the ten records setting forth proposals for military operations that were withheld under the deliberative process privilege (and, as to JS/009/011, also pursuant to the presidential communications privilege) detail DOD operational plans for supporting the United Arab Emirates' ("UAE's") offensive to clear al-Qaida in the Arabian Peninsula ("AQAP") from Shabwah Governorate, Yemen. DOD Dec. ¶ 17. These 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," 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.* ¶ 18; *see Vaughn* entries for JS/001-006, JS/009-011, JS/37-40, JS/048-53, JS/059-62, JS/261-266, JS/273-278, JS/330-336, JS/339-345, and State/39-44.

The requests for authorization of the al Ghayil Raid; the records memorializing the President's approval of the Raid; the request for extension of a prior approval of military operations; and the request to share certain intelligence with the UAE, all discussed above with respect to Exemption 5, similarly contain information withheld pursuant to Exemption 1. *Id.* ¶¶ 20-25; *see Vaughn* entries for JS/009-011, JS/022-023, JS/054-056, JS/267-269, JS/271-273, JS/280-282, OGC/030-031, State/31-32, State/34-35, and State/36-38. These ten records include detailed intelligence community assessments of AQAP and ISIL, analysis of UAE capabilities, specific proposals for DOD military support to the UAE, details regarding personnel, assets to be utilized in a military action, the parameters of the mission, the time span of a particular mission, and intelligence sources and methods associated with particular intelligence assessments. *Id.* This information is currently and properly classified at the Secret level.¹⁰ *Id.* ¶¶ 21, 23-25. The Deputies Committee meeting memorandum and agenda set forth at JS/383-387 contain information currently and properly classified at the Top Secret level, namely references to the non-Yemen meeting agenda items and the narrative information provided as to all of the agenda items, because it includes details relating to proposed, past, and ongoing military operations, intelligence sources and methods, DOD assessments, equipment information, and foreign activities of the United States. DOD Dec. ¶ 28. Each of the five documents setting forth legal analysis of DOD military proposals, and the scope of operations once they are ultimately approved, also contains information currently and properly classified at the Secret or Top Secret

¹⁰ With respect to OGC/030-031 and JS/022-23, which relate to the President's approval of the al Ghayil Raid, only sections 1.4(a) and (d) apply to the information withheld from those documents pursuant to Exemption 1, which details military operations and foreign activities of the United States. DOD Dec. ¶ 23.

level. DOD Dec. ¶ 29; *see Vaughn* entries for JS/188-191, JS/240-242, JS/324-329, JS/400-404, and OLC 1. This information includes details on the parameters of proposed missions, the time span of any applicable approval, intelligence information, information regarding the capabilities and vulnerabilities of military units, and other operational details. *Id.*

Three DOD records challenged by Plaintiffs contain information that was withheld pursuant only to Exemption 1. Two of these records, JS/041-042 and JS/057-58, are military orders from the Joint Staff to CENTCOM to conduct the presidentially-approved operations supporting the Shabwah offensive. *Id.* ¶ 26. JS/057-058 is a corrected version of JS/041-42. *Id.* These military orders contain details regarding the parameters of the mission, the time span of the approval, and other operational specifics that are currently and properly classified at the Secret level, as they pertain to foreign activities of the United States, intelligence methods, and military operations. *Id.*; *see Vaughn* entries for JS/041-042, JS/057-058. The other DOD record containing information withheld pursuant only to Exemption 1 is an email dated January 30, 2017, which details the actions that were taken during the Raid. DOD Dec. ¶ 27. This document, JS/400-404, contains copious detail about the operation, including information regarding the mechanical capabilities and vulnerabilities of the assets used in the raid, and options for further military operations, and is currently and properly classified at the Secret level. *Id.*

All of the CENTCOM records withheld in part pursuant to Exemption 5 also contain information that is currently and properly classified and therefore withheld pursuant to Exemption 1. CENTCOM Dec. ¶¶ 29-30. Each CENTCOM record containing withholdings challenged by Plaintiffs contains DOD operational information relating to the al Ghayil Raid and/or other military operations or proposed operations. *Id.* ¶ 17; *see Vaughn* entries for

CENTCOM/003-005 through CENTCOM/330-334. CENTCOM/045-053, CENTCOM/060-130, and CENTCOM/246-268 are detailed DOD operational proposals or briefing materials regarding the upcoming al Ghayil Raid and discuss the specific plans for the Raid, 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.* ¶ 18. CENTCOM/329 is a draft proposal to be made regarding one aspect of the Raid, and contains significant foreign government information, the release of which would disclose U.S. intelligence activities and hinder U.S. foreign relations and military cooperation with an allied nation. *Id.* CENTCOM/027-030 is an email forwarding a military order containing a detailed approval of the operation, including discussion of numerous operational specifics and plans anticipated to be executed. *Id.* CENTCOM/304-307 and CENTCOM/330-334 are post-operation reports that contain specific details about the operation, assessments, intelligence, and other information. *Id.* CENTCOM/193-201 is an email from a staff judge advocate to military and civilian lawyers in the DOD forwarding a detailed DOD report about multiple military operations, which only partly addresses Yemen issues. *Id.* CENTCOM/218-244 includes a detailed operational memorandum and redlined draft information paper regarding upcoming military action not directly related to the al Ghayil Raid. *Id.* The remaining CENTCOM records containing withholdings challenged by Plaintiffs are emails reflecting communications among or including DOD lawyers, each of which includes DOD operational information that relates to the categories set forth in Section 1.4, including the names of specific DOD operations and reference to particular aspects of the al Ghayil Raid or other operations. *Id.* ¶ 19; *see Vaughn* entries for CENTCOM/003-005, CENTCOM/015-18,

CENTCOM/020-026, CENTCOM/031, CENTCOM/032, CENTCOM/033, CENTCOM/036-038, CENTCOM/155-156, CENTCOM/164-166, CENTCOM/184-186, CENTCOM/187-189, CENTCOM/280, CENTCOM/286, CENTCOM/294, CENTCOM/295-296.

The information withheld from the challenged CENTCOM records is currently and properly classified at the Secret level, including records labeled SECRET//NOFORN (which prohibits even foreign coalition partners from viewing the records). CENTCOM Dec. ¶ 11. This information pertaining to military plans, weapons systems, or operations, foreign government information, intelligence activities, sources, or methods, and foreign relations or foreign activities of the United States is currently and properly classified and exempt from disclosure under Exemption 1. *Id.* ¶ 12; *see generally Vaughn* index.

Finally, 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* State Dec. ¶¶ 19-20. Document C06395171 is an action memorandum dated February 10, 2017, for the Acting Assistant Secretary for Diplomatic Security that is currently and properly classified at the SECRET level. *Id.* ¶ 29. The document contains information about military plans and operations, including a detailed description of coordinated operational steps that DOD and DOS planned to take to protect U.S. Government personnel from a list of specific threats in connection with a planned future engagement, as well as foreign government information, including reporting on a foreign official's response to recent U.S. activities, information about intelligence gathering activities, and information about U.S. foreign relations and activities, including descriptions of past and planned future engagements with senior foreign officials. *Id.* Document C06395264 is an information memorandum for the Secretary of State regarding foreign policy in the context of upcoming multilateral meetings with Gulf countries and United

Nations counterparts. *Id.* ¶ 30. This document is currently and properly classified at the SECRET level, as it contains an assessment of a foreign military strategy and its implications for U.S. military activities, descriptions of foreign governments' priorities and concerns, an intelligence community judgment, and extensive analysis of the plans and priorities of specified terrorist groups. *Id.*

The remaining seven challenged DOS records also contain information that is currently and properly classified at the SECRET level and therefore withheld pursuant to Exemption 1. *Id.* ¶¶ 29-32, 35-36, 39-40, 45-46, 51-52. C06395294 contains information about specific potential U.S. military activities, discussion of outreach by foreign officials and recommended engagements, information regarding intelligence collection, and an assessment of the diplomatic challenges posed by the situation in Yemen. *Id.* ¶ 32. C06395321 contains an extensive discussion of a potential proposal for U.S. military activities, the views of senior foreign officials, a preview of an expected intelligence community update on the impact of U.S. activities, and assessments of the capabilities and intentions of foreign states and non-state entities. *Id.* ¶ 36. C06432231 discusses 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.* ¶ 40. 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. *Id.* ¶ 46. Finally, C06432633 contains references to contemplated U.S. military activities, references to particular foreign government communications, intelligence

information, and a description of commitments contemplated to be sought from a foreign government. *Id.* ¶ 52.

The defendant agencies' declarations describe with specificity the harms to national security that are reasonably expected to result should the classified information described herein and in the agencies' declarations and *Vaughn* indices be disclosed. For example, DOD explains that the disclosure of intelligence products, sources, and methods, which are valuable only so long as they remain unknown and unsuspected, could jeopardize or even nullify their continued successful use. DOD Dec. ¶ 30. The disclosure of such information could enable adversaries to take countermeasures to mitigate the effectiveness of U.S. and coalition intelligence activities. CENTCOM Dec. ¶ 21. Releasing foreign government information could negatively affect U.S. foreign relations and the United States' counterterrorism operations overseas, by weakening the relationship of trust and confidence between the United States and foreign governments or revealing the United States' specific level of involvement abroad. DOD Dec. ¶ 32; CENTCOM Dec. ¶ 22. 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. DOD Dec. ¶ 33; CENTCOM Dec. ¶ 20.

The DOS Declaration similarly describes the harms that can reasonably be expected to result from the disclosure of the classified records withheld by DOS. State Dec. ¶¶ 29, 30, 32, 36, 40, 46, 52. For example, disclosure of coordinated steps that DOS and DOD planned to take to protect U.S. government personnel from threats would jeopardize the safety of those personnel by making it easier for adversaries to anticipate and counter them. *Id.* ¶ 29. Revealing information about the United States' foreign relations and foreign activities could undermine

U.S. foreign policy and reveal to adversaries specific trends and activities that threaten U.S. national security objectives abroad. *Id.* ¶ 30. Disclosing information regarding specific potential U.S. military activities and recommended conditions for them could enable adversaries to anticipate and counter these activities, and reveal the conditions under which the military activities would be more or less likely to occur. *Id.* ¶ 32.

Because the predictions of national security harm set forth in the agencies' declarations logically and plausibly flow from the nature of the withheld information, they merit substantial deference from this Court. *See, e.g., ACLU*, 681 F.3d at 69, 76; *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007); *Wilner*, 592 F.3d at 76.

V. DOD, DOS, and OLC Produced Any Reasonably Segregable Portions of the Challenged Records

Finally, the defendant agencies' declarations establish that each agency complied 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 OLC reviewed the withheld material and disclosed all non-exempt information that reasonably could be segregated and disclosed. *See* DOD Dec. ¶ 34; CENTCOM Dec. ¶ 32; State Dec. ¶¶ 29, 30, 34, 38, 44, 50, 54; OLC Dec. ¶ 25.

CONCLUSION

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

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Respectfully submitted,

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