



**U.S. Department of Justice  
Civil Division**

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Washington, DC 20530

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September 23, 2019

Patricia S. Connor, Clerk of Court  
United States Court of Appeals  
for the Fourth Circuit  
Lewis F. Powell Jr. Courthouse Annex  
1100 East Main Street, Suite 501  
Richmond, VA 232190

Re: *Roe v. DOD*, No. 19-1410 (4th Cir.)  
(oral argument held Sept. 18, 2019)

Dear Ms. Connor,

In response to Judge Wynn's question at oral argument, this letter provides citations supporting the proposition that the Court may consider two agency declarations prepared after the Air Force decisions plaintiffs challenge.

Generally, a court reviewing agency action under the Administrative Procedure Act must limit its review to the administrative record. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). But agencies may supplement the administrative record to provide "background information or evidence of whether all relevant factors were examined by an agency." *AT&T Info. Sys., Inc. v. GSA*, 810 F.2d 1233, 1236 (D.C. Cir. 1987); *see also, e.g., Lewis v. Babbitt*, 998 F.2d 880, 882 (10th Cir. 1993) (same); *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984) (same); *Arizona Past & Future Found., Inc. v. Lewis*, 772 F.2d 1423, 1426 n.5 (9th Cir. 1983) (same). The supplemental material must "be merely explanatory of the original record and should contain no new rationalizations." *AT&T Info.*, 810 F.2d at 1236.

In this case, the Air Force directed plaintiffs' discharges in light of their inability to deploy to CENTCOM's area of responsibility without a waiver; the comparatively high rate of deployment for plaintiffs' career fields; and plaintiffs' time in service. JA 545, 553. The Soper and Cron declarations explained why those factors were relevant to the Air Force's decisions. For example, the Soper declaration explained that most Air Force deployments are to CENTCOM and that the ability to deploy is critical to the duties of some positions, like those plaintiffs occupied, but not to others. *See, e.g.,* JA 470, 473-74, 476. The Soper and Cron declarations also explained why the Air Force reasonably determined that it was highly unlikely that CENTCOM would grant plaintiffs a waiver.

JA 474, 480-82. Because the declarations are merely explanatory of the record, the Court may properly consider them. We note that plaintiffs did not object to the declarations in either the district court or this Court; indeed, plaintiffs rely on them. *See* Br. 4, 13, 32, 57.

Sincerely,

*s/ Lewis S. Yelin*  
Lewis S. Yelin  
Senior Counsel  
Appellate Staff, Civil Division

## CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are all registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Lewis S. Yelin*  
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