

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**RYAN GOODMAN, as Co-Editor-in-Chief
of Just Security,**

Plaintiff,

v.

**UNITED STATES DEPARTMENT OF
DEFENSE,**

Defendant.

Case No.: 1:20-cv-8349

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Ryan Goodman, co-editor-in-chief of *Just Security*, by his undersigned attorneys, alleges:

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, for declaratory, injunctive, and other appropriate relief. Plaintiff Ryan Goodman is a former Special Counsel to the General Counsel of the Department of Defense (“DoD”) and the founding co-editor-in-chief of *Just Security*, an online publication dedicated to national security law and policy. Through this action he seeks the immediate processing and timely release of agency records from Defendant Department of Defense that show the number of American troops serving in Afghanistan, Iraq, and Syria on a quarterly basis—figures that were publicly available until late 2017. Plaintiff also seeks the release of records that show why these figures were suddenly hidden from the American public.

2. For over a decade, under both Republican and Democratic administrations, DoD made publicly available the number of U.S. civilian and military personnel serving in

Afghanistan, Iraq, and eventually Syria, in quarterly manpower reports released on a few-months delay. This data served as a critical source of specific and consistent official information about the U.S. military's presence in key combat zones. Transparency on troop levels has been essential for public oversight and accountability concerning the progress of military operations in the Middle East and South Asia.

3. However, the Trump administration began concealing these official war zone troop counts from the American public, the press, servicemembers, and their families less than a year into its first term. Starting with its December 2017 report, DoD abruptly stripped the number of troops serving in Afghanistan, Iraq, and Syria from the manpower reports, leaving the American people in the dark on critical matters of U.S. national security policy.

4. In his capacity as a candidate for President and as President of the United States, Donald J. Trump has repeatedly promised to bring troops home from the Middle East and Afghanistan. Most recently, just weeks ahead of the November presidential election, President Trump made yet another promise to reduce the number of American troops serving in Iraq.¹ If voters are to know whether the President is keeping his promises, they must know the number of servicemembers in Afghanistan, Iraq, and Syria. But the Trump administration is preventing this democratic accountability.

5. To secure the previously public information, Plaintiff submitted two FOIA requests (the "Requests") to the Defendant agency on April 21, 2020. The first request ("Troop Numbers Request") seeks the troop numbers as the Defense Manpower Data Center ("DMDC") reported them before the administration began concealing the official numbers. The second request ("Documents Request") seeks records sufficient to explain the decision to redact these

¹ See Eric Schmitt, *U.S. to Reduce Troop Levels in Iraq to 3,000*, N.Y. Times (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/us/politics/iraq-troops-trump.html>.

numbers in late 2017 and the current criteria for counting the number of military personnel by country. More than five months later, Defendant still has not provided any responsive records nor issued a final determination on Plaintiff's FOIA requests.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action and personal jurisdiction over the Defendant pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(E)(iii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

7. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

8. Plaintiff Ryan Goodman is founding co-editor-in-chief of *Just Security*, an online forum dedicated to the rigorous analysis of U.S. national security law and policy. *Just Security* publishes both commentary and original reporting, and is based at the Reiss Center on Law and Security at New York University School of Law, a 501(c)(3) charitable organization headquartered at 139 MacDougal Street, New York, New York 10012.

9. Because *Just Security* is an unincorporated nonprofit, Mr. Goodman is bringing this complaint on its behalf, pursuant to Federal Rule of Civil Procedure 17(b)(3) and New York General Associations Law § 12.

10. Defendant Department of Defense is a department of the executive branch of the U.S. government and is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). Defense Manpower Data Center is a component of DoD. DoD has possession and control over the requested records.

STATEMENT OF FACTS

The History of Troop Count Disclosures

11. As far back as 1950, DoD published U.S. troop numbers through the quarterly report *Worldwide Manpower Distribution by Geographical Area* and later through DMDC. Decades of historical reports are available on the DMDC website.² As part of its quarterly manpower reports, DMDC has released data on the number of active-duty military and civilian personnel by geographic location. The DMDC reports are typically released a few months after the end of the quarter and presently bear the number DRS #103763. Decades of reports from 1950 through the most recent quarter are available to the public on the DMDC website.³ See Exhibit A (excerpting report from the quarter ending September 30, 2017).

12. For over a decade, under both Republican and Democratic administrations, DoD has consistently released to the public the number of temporary and permanent personnel serving in Afghanistan, Iraq, and Syria in the DMDC reports.

13. These reports have served as a vital and consistent source of official government information, so journalists and the American public may know the official number of U.S. servicemembers in war zones.

14. In addition to its public-facing DMDC reports, DoD has consistently used another troop-count figure: Force Management Level (FML). Whereas the DMDC reports have consistently conveyed to the American people the number of temporary and permanent U.S. servicemembers stationed abroad, FML has historically functioned as a “troop cap.” That is, the number includes only full-time troops committed to a defined enduring mission like Operation

² See *DoD Personnel, Workforce Reports & Publications*, Def. Manpower Data Ctr., https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last accessed Oct. 6, 2020).

³ *Id.*

Inherent Resolve or Operation Resolute Support, and it is set by the White House to delimit the “bounds on the number of military personnel that may be deployed in a country or region.”⁴ This figure is not consistently provided to the public.

Redaction of Troop Counts

15. Leading up to the 2016 presidential election, then-candidate Trump pledged to end “endless wars.”⁵ This message has been a fixture of the Trump presidency.

16. In April 2017, the White House transferred authority for setting FML in Iraq and Syria to DoD, and in June 2017, DoD received the authority to set FML in Afghanistan.⁶ In August 2017, DoD announced that then-Secretary James Mattis expanded DoD’s FML accounting and reporting practices for Afghanistan to include not only full-time troops, but any “troops required for short-duration missions,” “troops in a temporary duty status, troops assigned to combat support agencies, and forces assigned to the material recovery element and the Resolute Support sustainment brigade in reported totals.”⁷ When asked why Secretary Mattis made this change, a DoD spokesperson replied that the Secretary “really want[ed] to bring more transparency to this accounting discussion.”⁸ The spokesperson added that Secretary Mattis “has determined we must simplify our accounting methodology and improve public—the public’s understanding of America’s military commitment in Afghanistan.”⁹

⁴ Heidi M. Peters & Sofia Plagakis, Cong. Research Serv., R44116, Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2018, at 2 (2019), <https://fas.org/sgp/crs/natsec/R44116.pdf>.

⁵ *Transcript of Donald Trump’s Speech on National Security in Philadelphia*, Hill (Sept. 9, 2016), <https://thehill.com/blogs/pundits-blog/campaign/294817-transcript-of-donald-trumps-speech-on-national-security-in-philadelphia>.

⁶ See Thomas Gibbons-Neff, *Trump Gives Pentagon Authority to Set Troop Levels in Afghanistan*, Wash. Post (June 13, 2017, 11:27 PM EDT), <https://www.washingtonpost.com/news/checkpoint/wp/2017/06/13/trump-gives-pentagon-authority-to-set-troop-levels-in-afghanistan/>.

⁷ *Department of Defense Afghanistan Force Management Level Accounting and Reporting Practice Briefing by Pentagon Chief Spokesperson White and Joint Staff Director Lieutenant General McKenzie in the Pentagon Briefing Room*, U.S. Dep’t Def. (Aug. 30, 2017), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1295700/department-of-defense-afghanistan-force-management-level-accounting-and-reporti>.

⁸ *Id.*

⁹ *Id.*

17. However, in contrast to Secretary Mattis’s commitments to transparency, President Trump asserted in August 2017 a desire to withhold information on U.S. military personnel, stating: “We will not talk about numbers of troops or our plans for further military activities.”¹⁰

18. When the December 2017 DMDC quarterly report was published in the spring of 2018, DoD abruptly redacted the numbers of U.S. military and civilian personnel serving in Afghanistan, Iraq, and Syria. *See* Exhibit A (comparing an excerpt of the unredacted report for the quarter ending on September 30, 2017, and an excerpt of the redacted report for the quarter ending on December 31, 2017). No explanation for this decision was offered when the decision was made or the report was released.

19. DoD also retroactively redacted the numbers of U.S. personnel serving in Afghanistan, Iraq, and Syria from its previously released reports, including its September 2017 report.¹¹ These historical figures were later restored.¹²

20. At the time of redaction, DoD was unable to cite any change in circumstances or a new security imperative to justify the sudden redaction of numbers that had been provided just a few months prior and going back more than a decade.

21. Moreover, DMDC revised its accounting policy for the countries it did report to include only “personnel who are permanently assigned for duty at these locations.”¹³ DMDC noted on its website that the report “no longer includes personnel on temporary duty, or deployed

¹⁰ *Remarks by President Trump on the Strategy in Afghanistan and South Asia*, White House (Aug. 21, 2017, 9:02 PM EDT), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-strategy-afghanistan-south-asia>.

¹¹ Tara Copp, *Pentagon Strips Iraq, Afghanistan, Syria Troop Numbers From Web*, Military Times (Apr. 9, 2018), <https://www.militarytimes.com/news/your-military/2018/04/09/dod-strips-iraq-afghanistan-syria-troop-numbers-from-web>.

¹² Tara Copp (@TaraCopp), Twitter (Apr. 10, 2018, 1:13 PM), <https://twitter.com/TaraCopp/status/983754982326521856>.

¹³ *DoD Personnel, Workforce Reports & Publications*, *supra* note 2.

in support of contingency operations.”¹⁴ The new accounting practice has artificially decreased the number of servicemembers stationed abroad in the DMDC reports compared to figures provided in prior reports. For example, prior to the change, DMDC reported 510 active duty personnel in Niger in the September 2017 report; after the accounting change, DMDC reported only 7 active duty personnel in Niger in the December 2017 report, and 194 active duty personnel in the March 2018 report.¹⁵

22. Changing DMDC and FML accounting practices, in combination with the redaction of the DMDC figures for Afghanistan, Iraq, and Syria, have caused public confusion about the state of the troop count figures. Other sources of information about the number of U.S. personnel abroad, such as media estimates or the occasional response from a Pentagon spokesperson, are entirely irregular, inadequate and incomplete. Numerous journalists have noted DoD’s sudden redaction of these numbers with deep concern.¹⁶

23. Since DoD stopped releasing these troop numbers to the public, President Trump has repeated his promise to bring troops home from the Middle East and Afghanistan. On April 3, 2018, President Trump said, “I want to get out [of Syria]. I want to bring our troops back home,”¹⁷ and he tweeted later that year, “[I]t’s time to bring our great young people home!”¹⁸ During the 2019 State of the Union Address, President Trump said, “Great nations do not fight

¹⁴ *Id.*

¹⁵ By contrast, the *New York Times* reported in February 2018 that there were about 800 U.S. troops in Niger. Rukmini Callimachi et al., ‘*An Endless War*’: *Why 4 U.S. Soldiers Died in a Remote African Desert*, N.Y. Times (Feb. 20, 2018), <https://www.nytimes.com/interactive/2018/02/17/world/africa/niger-ambush-american-soldiers.html>.

¹⁶ See Copp, *supra* note 11; Jason Paladino, *The Pentagon’s War on Transparency*, Project on Gov’t Oversight (Dec. 5, 2019), <https://www.pogo.org/analysis/2019/12/the-pentagon-war-on-transparency>; David Welna, *Pentagon Questioned Over Blackout on War Zone Troop Numbers*, NPR (July 3, 2018, 5:02 AM ET), <https://www.npr.org/2018/07/03/625544265/pentagon-questioned-over-war-zone-numbers-blackout>.

¹⁷ Cristiano Lima, *Trump: ‘I Want To Get Out’ of Syria*, Politico (Apr. 3, 2018, 2:39 PM ET), <https://www.politico.com/story/2018/04/03/trump-syria-troops-withdraw-498531>.

¹⁸ Donald J. Trump (@realDonaldTrump), Twitter (Dec. 19, 2018, 6:10 PM ET), <https://twitter.com/realDonaldTrump/status/1075528854402256896>.

endless wars . . . [i]t is time to give our brave warriors in Syria a warm welcome home,” and that in Afghanistan, “[w]e will be able to reduce our troop presence.”¹⁹ On October 21, 2019, President Trump reiterated his campaign pledge: “We’re bringing our troops back home. I got elected on bringing our soldiers back home.”²⁰ On May 27, 2020, President Trump tweeted, “After 19 years, it is time for [Afghanistan] to police their own [c]ountry. Bring our soldiers back home . . . !”²¹ On August 31, 2020, he touted that he had accomplished “bringing many of the troops home and most of the troops home.”²²

24. To this day, the American public does not know, and has not received public information needed to verify, whether any, much less “many” or “most,” of the troops have been brought home. Observers speculate that the total number of troops might even have slightly increased since President Trump took office, but it is impossible to know the truth when the administration is hiding the numbers from Afghanistan, Iraq, and Syria.²³

The FOIA Requests

25. On April 21, 2020, Plaintiff submitted two FOIA requests to DoD regarding the redacted troop figures. The requests are incorporated by reference and attached as Exhibit B (Troop Numbers Request) and Exhibit C (Documents Request).

¹⁹ Donald J. Trump, *State of the Union Address*, White House (Feb. 5, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address-2>.

²⁰ Donald J. Trump, *Remarks by President Trump in Cabinet Meeting*, White House (Oct. 21, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-15>.

²¹ Donald J. Trump (@realDonaldTrump), Twitter (May 27, 2020, 7:54 AM), <https://twitter.com/realDonaldTrump/status/1265612405784162304>.

²² Interview by Laura Ingraham with Donald J. Trump, in Washington, D.C. (Aug. 31, 2020), <https://www.foxnews.com/transcript/president-trump-joins-laura-ingraham-to-discuss-violence-in-democrat-run-cities-planned-visit-to-kenosha>.

²³ Karen DeYoung & Missy Ryan, *Trump Is Determined to Bring Home U.S. Military Forces from Somewhere*, Wash. Post (July 21, 2020, 11:28 AM EDT), https://www.washingtonpost.com/national-security/trump-is-determined-to-bring-home-us-military-forces-from-somewhere/2020/07/20/c2664fb8-c851-11ea-b037-f9711f89ee46_story.html.

26. In its first request, Plaintiff requested “[r]ecords sufficient to show the number of military and DoD Appropriated Fund (APF) civilian personnel permanently assigned to: Afghanistan, Iraq, and Syria for the period December 2017 to the most recent available quarter, disaggregated by country and broken down quarterly.” Exhibit B at 1-2. Plaintiff also requested “[r]ecords sufficient to show the number of U.S. Armed Forces personnel on temporary duty or deployed in support of contingency operations . . . in reported totals” for each of the three countries over the period December 2017 to the most recent available quarter. *Id.* at 2. Plaintiff additionally requested “[r]ecords sufficient to show the Force Management Level (FML)” for the three countries over the same period. *Id.*

27. In its second request, Plaintiff requested records sufficient “to show the criteria for counting or determining the number of military personnel by country reported in the DMDC quarterly manpower report[s]”; “to explain the decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria in DMDC quarterly reports”; “to show the criteria for counting or determining the number of personnel under the Force Management Level (FML) for Afghanistan, Iraq, and Syria”; and “to show whether FML continues to function as a troop cap in Afghanistan, Iraq, and Syria.” Exhibit C at 2.

28. In both requests, Plaintiff stressed that he was seeking the numbers and documents on a matter of great public interest and emphasized the public’s “urgent right to know the number of U.S. troops being placed in harm’s way.” Exhibit B at 6. Accordingly, Plaintiff requested expedited treatment of both requests, as authorized by FOIA, 5 U.S.C. § 552(a)(6)(E), and DoD regulations, 32 C.F.R. § 286.8(e)(1)(i)(B).

29. Plaintiff requested fee waivers for the two requests as a member of the news media within the meaning of 5 U.S.C. § 522(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l), should fees

amount to more than \$100. Plaintiff also explained that disclosure of the records is in the public interest and satisfies all three factors in 32 C.F.R. §§ 286.12(l)(2)(i)-(iii), namely that the disclosure would “shed light on the operations or activities of the government,” “contribute significantly to the public understanding of [government] operations or activities,” and is not “primarily in the commercial interest of the requester.” Disclosure of the requested records would “inform the American public of some of the most fundamental facts about the decision to send U.S. soldiers into harm’s way,” critical to “continuing public oversight of democratically elected officials and the national security and foreign policies they adopt.” Exhibit B at 2.

Defendant DoD’s Responses

30. On April 23, 2020, the DoD Freedom of Information Division sent interim responses to both requests. DoD explained that it would “not be able to respond within FOIA’s 20-day statutory time period as there are unusual circumstances which impact [its] ability to quickly process [the] request.” Exhibit D at 1. DoD also denied expedited processing.

31. Shortly after Plaintiff submitted the request, the online Public Access Link for the Office of the Secretary of Defense and Joint Staff FOIA Requester Service Center provided an “[e]stimate [d]elivery [d]ate” for both requests of September 11, 2020. Mindful of the unusual circumstances imposed by the COVID-19 pandemic, Plaintiff waited until the estimated date of delivery for a response from DoD.

32. No response was forthcoming on September 11, 2020. To date, DoD has not made a determination on the requests and has not disclosed any responsive records.

33. Plaintiff has constructively exhausted his administrative remedies. Because DoD has “fail[ed] to comply with the applicable time limit provisions” of FOIA, Plaintiff is “deemed to have exhausted his administrative remedies.” 5 U.S.C. § 552(a)(6)(C)(i).

CLAIMS

FIRST CLAIM FOR RELIEF

(Violation of FOIA for failure to timely respond to *Just Security*'s requests)

34. Plaintiff repeats, realleges, and incorporates the foregoing paragraphs as though fully set forth herein.

35. DoD's failure to comply with the statutory time limit for rendering a determination on Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and DoD's regulations promulgated thereunder.

SECOND CLAIM FOR RELIEF

(Violation of FOIA for failure to expedite *Just Security*'s requests)

36. Plaintiff repeats, realleges, and incorporates the foregoing paragraphs as though fully set forth herein.

37. DoD's failure to expedite the processing of Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(6)(E), and DoD's regulations promulgated thereunder.

THIRD CLAIM FOR RELIEF

(Violation of FOIA for failure to make records promptly available)

38. Plaintiff repeats, realleges, and incorporates the foregoing paragraphs as though fully set forth herein.

39. DoD's failure to make promptly available records that are responsive to Plaintiff's requests violates FOIA, 5 U.S.C. § 552(a)(3)(A).

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully REQUESTS that this Court:

- a. Expedite consideration of this complaint pursuant to 28 U.S.C. § 1657;

- b. Declare that the records sought are subject to FOIA and must be disclosed by Defendant in the manner proscribed by FOIA;
- c. Declare that Plaintiff is entitled to expedited processing by Defendant;
- d. Declare that Plaintiff is entitled to fee waivers;
- e. Order Defendant immediately to conduct a thorough search for records responsive to Plaintiff's Requests;
- f. Order Defendant immediately and expeditiously in advance of the November election to process any responsive records for disclosure and produce such records to Plaintiff;
- g. Enjoin Defendant from charging Plaintiff search, review, or duplication fees for the processing of the Requests;
- h. Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees; and
- i. Grant such other and further relief as the Court deems just and proper.

Dated: October 7, 2020

Respectfully submitted,

MEDIA FREEDOM & INFORMATION
ACCESS CLINIC and PETER GRUBER
RULE OF LAW CLINIC

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**Pro Hac Vice forthcoming*
*** Student practice forms forthcoming*