

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

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

DECLARATION OF MAJOR GENERAL TERRY FERRELL

Pursuant to 28 U.S.C. § 1746, I, Major General Terry Ferrell, hereby state and declare as follows:

1. I am the Chief of Staff of United States Central Command (“CENTCOM”).

CENTCOM is one of nine combatant commands of the United States armed forces; it directs and enables military operations and activities with allies and partners to increase regional security and stability in support of enduring United States interests within its Area of Responsibility (“AOR”). At present, CENTCOM’s AOR includes 20 nations in the Middle East, Central and South Asia, and the strategic waterways that surround them. Prior to 2008, CENTCOM’s AOR also included seven African nations. Like all combatant commands, CENTCOM constitutes a headquarters element without any military units permanently assigned to it; CENTCOM operates with component commands within its AOR—one for each of the U.S. armed services, along with a joint special operations component and a number of subordinate joint task forces.

2. I was commissioned in the U.S. Army as an Armor Officer upon graduating from Marshall University in 1984. Generally, Armor Officers are responsible for tank, cavalry, and forward reconnaissance operations on the battlefield. The role of an Armor Officer is to be a leader in operations specific to the armor branch. My assignments included multiple joint and operational tours, staff assignments at numerous levels, and several commands. Highlights include commanding the 3d Squadron, 7th Cavalry Regiment, 3d Infantry Division (Mechanized), based in Fort Stewart, Georgia and deployed in support of Operation JOINT FORGE (Bosnia) and Operation IRAQI FREEDOM. I then commanded the 2d Brigade, 3d Infantry Division (Mechanized), deployed in support of Operation IRAQI FREEDOM. Following Brigade Command, I assumed duties as Chief of Staff of the 3d Infantry Division (Mechanized) in Fort Stewart, Georgia. After my tour as Division Chief of Staff, I assumed duties as Assistant Division Commander (Support), and later Assistant Division Commander (Maneuver), of the 2d Infantry Division in the Republic of Korea. Following my return to the United States, I served as Commanding General of the National Training Center in Fort Irwin, and subsequently commanded the Combined Joint Task Force Horn of Africa, in Djibouti, in support of Operation ENDURING FREEDOM. Most recently, I served as the Commanding General of the 7th Infantry Division in Joint Base Lewis-McChord. I began my tour as Chief of Staff of CENTCOM in June 2015.

3. As the Chief of Staff for CENTCOM I am responsible for, among other things, protecting extremely sensitive military planning, operations, and intelligence information against unauthorized disclosures. I have been designated as a TOP SECRET Original Classification Authority ("OCA") by the Secretary of Defense (Exhibit A), with

authorization to classify and declassify national security information. As Chief of Staff I serve as both the OCA and Initial Denial Authority (“IDA”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. My statements herein are based upon my personal experiences, my personal knowledge of CENTCOM operations and information, my review of the records in this case, information available to me in my capacity as the Chief of Staff of CENTCOM, and information furnished to me in the course of my official duties.

The FOIA Requests and CENTCOM’s Searches and Responses

4. I am familiar with the efforts of CENTCOM personnel to process the FOIA requests at issue. I am also familiar with the FOIA request, dated March 15, 2017, submitted by Plaintiffs seeking the following records:

- (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 evaluated and 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 B.

5. In response to the request, CENTCOM conducted diligent searches for records responsive to the request and identified and processed 343 pages of records for release in coordination with the U.S. Department of Defense (“DOD”) Office of the General Counsel, approving releases on November 17, 2017, January 3, 2018 (which contained a corrected version of CENTCOM’s first release), April 19, 2018, and June 15, 2018. The first CENTCOM release consisted of records Bates stamped CENTCOM/001 through CENTCOM/296. Subsequent searches for attachments and responses to emails resulted in CENTCOM’s April 19, 2018 release of records Bates numbered CENTCOM/297 through CENTCOM/339. Finally, additional searches for attachments led to CENTCOM’s June 15, 2018 release of records Bates numbered CENTCOM/340 through CENTCOM/343.

6. This declaration addresses CENTCOM’s withholding of certain information from 24 of the records located and produced by CENTCOM, which Plaintiffs have identified and indicated they are contesting. Each of the CENTCOM withholdings that Plaintiffs have indicated they are contesting is described on the *Vaughn* index attached hereto.

7. I understand that Plaintiffs are also challenging the sufficiency of CENTCOM’S search for two records: (1) the complete email reflected in part in the record Bates numbered CENTCOM/019, and (2) “any response to” the record Bates numbered CENTCOM/272.

8. CENTCOM/019 is a partial email message located during CENTCOM’s searches for responsive records. CENTCOM released the first page of the email message, which is dated February 28, 2017, as CENTCOM/019. However, CENTCOM was unable to retrieve the remainder of CENTCOM/019 from the Enterprise Vault system. Prior to the migration of all DOD email accounts to Defense Enterprise Email (DEE) in 2017, CENTCOM utilized the Enterprise Vault storage system. Under CENTCOM policy, a user’s Outlook email account

would archive (“vault”) an email after seven days and it would remain vaulted for three years, unless retrieved by the user. Prior to migration to DEE, email users were afforded an opportunity to retrieve any vaulted emails. Once CENTCOM completed migration to DEE, the Enterprise Vault system was deleted and its servers decommissioned on December 29, 2017. In response to subsequent requests from Plaintiffs, CENTCOM further investigated the technical issues relating to the retrieval of CENTCOM/019, and while CENTCOM was still unable to retrieve the entire email that was located in the Enterprise Vault System, the agency did successfully retrieve one of the attachments to CENTCOM/019, which it processed and released on June 15, 2018. I understand through counsel that Plaintiffs are not challenging CENTCOM’s withholding of any information from CENTCOM/019 itself or the attachment thereto that was located and produced, or CENTCOM’s search for any other attachments to CENTCOM/019.

9. CENTCOM/272 is an email dated March 28, 2017, asking CENTCOM operational law attorneys to provide clarification on the wording of CENTCOM operational directives. I understand through counsel that Plaintiffs are not challenging CENTCOM’s withholding of any information from CENTCOM/272 itself. 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 CENTCOM’s first release to Plaintiffs. I understand Plaintiffs are not challenging CENTCOM’s general searches. However, in response to a specific follow-up request that Plaintiffs sent on March 20, 2018, asking CENTCOM to identify any response to the email contained in CENTCOM/272, the CENTCOM Office of the Staff Judge Advocate was tasked to search for any response, if one existed. The Operational Law Division personnel involved in the previously produced email exchanges

searched for such a response, which would have been sent through email, on their enterprise email accounts and located no responsive records.

Application of FOIA Exemptions

A. FOIA Exemption 1 – Classified Information

10. Exemption 1, 5 U.S.C. § 552(b)(1), states that the FOIA does not apply to 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....”

11. Based upon my personal review of the documents, personal experience as an armor officer and commander in combat, and information furnished to me in the course of my official duties, I determined that all of the information withheld from the disputed pages under Exemption 1 was, in fact, properly withheld because it continues to meet the classification criteria of Executive Order 13526 (“E.O. 13526”). This information includes information classified at the SECRET level, including records labeled SECRET//NOFORN (which prohibits even foreign coalition partners from viewing the records). Section 1.2 of E.O. 13526 states that “Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe. Section 6.1(1) of E.O. 13526 defines “damage to the national security” as follows: “Damage to the national security” means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

12. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of that 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;” and 1.4(d) permits classification of information pertaining to, “foreign relations or foreign activities of the United States.”

13. 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 Exemption 5 – Privileged Information

14. 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.

C. FOIA Exemption (b)(6) – Personally Identifying Information

15. Exemption 6, 5 U.S.C. § 552(b)(6), permits the withholding of information about individuals when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” CENTCOM follows the DOD practice of withholding 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.

16. 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.

Withheld Information

Military Operational Information

17. All of the CENTCOM records containing withholdings challenged by Plaintiffs contain DOD operational information relating to the al Ghayil Raid and/or other military operations or proposed military operations.

18. The records Bates stamped 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. 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. 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. CENTCOM/304-307 and CENTCOM/330-334 are post-operation reports that contain specific details about the operation, assessments, intelligence, and other information. 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. 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.

19. All of the other 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, as itemized in the *Vaughn* index.

20. The disclosure of the above-described information reasonably can be expected to cause damage to national security. Revealing military operational details, intelligence sources

and methods, and relationships with a foreign government would provide invaluable information to our enemies, including terrorist organizations such as al-Qaeda in the Arabian Peninsula (AQAP), regarding DOD capabilities, priorities, vulnerabilities, and limitations. Terrorist organizations, violent extremist organizations, or hostile foreign governments could use such information to better plan attacks, thwart U.S. and coalition counterterrorism efforts and military operations, or evade justice.

21. The disclosure of the intelligence products, analyses, and assessments contained in the challenged documents, particularly those that set forth detailed operational proposals, assessments, and recommendations, would reasonably be expected to cause harm to national security. Where a certain intelligence capability, technique, or interest is unknown to our enemies, disclosure of such information could enable those groups to take countermeasures to nullify the effectiveness of U.S. and coalition intelligence activities.

22. Releasing information concerning foreign governments and U.S. foreign relations and overseas activities could similarly reasonably be expected to cause damage to national security. If the scope of U.S. military activity in the CENTCOM AOR were revealed, it could adversely affect counterterrorism operations conducted by the United States in the AOR. Detailing the United States' specific level of involvement in the AOR in places such as Yemen may cause foreign partner nations to reconsider prior decisions or agreements to allow or support 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. Therefore, disclosure of the foreign government information, and information relating to the foreign relations and foreign activities of the United States, contained in the challenged documents could reasonably be expected to harm national security.

23. The DOD operational information withheld from these documents is therefore currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d), as detailed in the DOD *Vaughn* index, and thus exempt from disclosure under FOIA Exemption 1.

Records Protected by the Attorney Client Privilege and Deliberative Process Privilege

24. Certain records responsive to the request were retrieved from email accounts maintained and utilized by DOD attorneys who routinely advise the command on operational law issues, such as the legal requirements associated with executing the al Ghayil Raid and other military operations. This legal advice and analysis is specifically protected from release by exemption (b)(5) and the attorney client privilege.

25. The attorney client privilege protects confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought legal advice. In this case, the attorney client privilege applies to confidential communications between DOD attorneys and DOD employees or contractors seeking legal advice about DOD issues, for example legal issues related to the al Ghayil Raid and other operations discussed in the CENTCOM records. These confidential communications consist of discussions of facts relevant to requests for legal advice, discussions between DOD attorneys that reflect such facts, and legal analysis and advice provided to the DOD. The confidentiality of these communications has been maintained. If these confidential communications were to be disclosed, it would inhibit open

communication between DOD personnel and DOD attorneys regarding legal issues relevant to military operations, thereby depriving the DOD and its officials of full and frank legal counsel.

26. The CENTCOM records containing withholdings challenged by Plaintiffs, to which the attorney client privilege applies, are the following (discussed further in the *Vaughn* index): CENTCOM/003-005 (relaying legal analysis from DOD lawyers relating to aspects of the Raid); CENTCOM/031 and 032 (relaying information to DOD attorneys for purpose of obtaining legal advice relating to a future operation); CENTCOM/020-026 and 304-07 (conveying legal advice from DOD attorney regarding aspects of military operations); CENTCOM/033, 037-038, 155-156, 164-166, 184-186, 286, 294, and 295-296 (emails among DOD attorneys and other DOD employees reflecting discussion and analysis of legal issues relating to military operations).

27. Some of the information withheld from the CENTCOM records is also protected from disclosure by the deliberative process privilege, which protects intra- or inter-agency records that are pre-decisional and deliberative. The purpose of the privilege is to prevent injury to the quality of agency decision-making. Here, the deliberative process privilege applies in conjunction with the attorney client privilege (as well as Exemption 1) to protect certain records, including proposals, briefing materials, drafts, communications between DOD attorneys and other DOD employees, certain communications among DOD employees, and certain communications between DOD employees and other government officials, regarding DOD operational recommendations (including but not limited to recommendations relating to the al Ghayil Raid), legal issues relating thereto, options for action, and requests for approval. These communications and records reflect interim stages of governmental decision-making about military operations, and did not constitute a final decision to engage in an operation or take an

action. Rather, these communications and records reflect different considerations, opinions, options and approaches that preceded an ultimate decision.

28. I have examined all of the information withheld pursuant to the deliberative process privilege and have determined that to the extent there is any factual material contained therein it is part and parcel of the deliberations and cannot be reasonably segregated from privileged material. The selection of facts in these documents would reveal the nature of the preliminary recommendations and opinions preceding the final determinations. In the case of draft documents, disclosure of these records would reveal what information was considered significant or was discarded in the course of the drafting process. Disclosure of these documents would significantly hamper the ability of DOD personnel to candidly discuss and assess the viability of certain courses of action. Additionally, revealing this information could mislead or confuse the public by disclosing rationales that were not the basis for the government's final decisions. Furthermore, none of this information has been otherwise publicly disclosed. The CENTCOM records containing withholdings that Plaintiffs are challenging, to which the deliberative process applies, include the following: CENTCOM/003-005 (email including detailed DOD operational proposal laying out options for courses of action 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 regarding unresolved aspects of future DOD actions); and CENTCOM/15-18 and 187-189 (emails among DOD attorneys containing general discussions and deliberations regarding military operations and plans).

29. The records enumerated in the previous five paragraphs also contain, as part of the legal discussions and advice and governmental deliberations reflected therein, detailed intelligence community assessments, analysis of capabilities, and specific DOD operational information and plans. As stated above, this information is currently and properly classified at the Secret level pursuant to sections 1.4(a), (b), (c), and (d), as applicable and listed in the attached *Vaughn*, and thus exempt from disclosure under FOIA Exemption 1.

Record Protected by the Presidential Communications Privilege

30. In addition, the presidential communications privilege applies to CENTCOM/045-053, which is a memorandum from the Secretary of Defense to the National Security Advisor, attaching a DOD operational proposal, making recommendations and seeking approval relating to the proposed al Ghayil Raid. This document is a direct, confidential communication from the Secretary of Defense to the President's senior aide on national security concerning a sensitive topic, and disclosure would inhibit the ability of the President and his immediate advisors to engage in effective communications and decisionmaking. The memorandum made specific recommendations and sought approval with respect to the anticipated al Ghayil Raid, and has been closely held within the Executive Branch. The memorandum is also withheld in full on the basis of Exemption 1.

Personally Identifiable Information

31. In virtually every CENTCOM record listed on the *Vaughn* index, CENTCOM applied FOIA Exemption 6 to protect the names and/or other identifying information of members

of DOD who are at the military rank of Colonel or below and at the rank of GS-15 or below, and also names and/or other identifying information of low-level employees of other government agencies or components. In addition to withholding names, CENTCOM has withheld telephone numbers, email addresses, and other descriptive information relating to these individuals where the information could be used by those who know or have knowledge of these individuals to identify them. Public disclosure of the names and/or other identifying information of these low-level government employees could result in a wide range of potential harms. Individuals whose names are associated with American military efforts could potentially be subject to harassment, retaliation, or other types of reprisals. Moreover, these individuals could be subject to undue attention by the public. There is no cognizable public interest in the disclosure of the names and other identifying information regarding the low-level government employees described herein. The only relevant public interest in the Exemption 6 balancing test is the public's interest in shedding light on the agency's performance of its statutory duties. The disclosure of the personally identifying information withheld under Exemption 6 would not inform Plaintiffs or the general public about CENTCOM's performance of its mission and/or how CENTCOM actually conducts its operations or activities. Release of this information would constitute a clearly unwarranted invasion of personal privacy, and it is therefore exempt from release under FOIA Exemption 6.

Review for Reasonably Segregable Information

32. CENTCOM 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 20th day of July 2018, at MacDill Air Force Base, Tampa, Florida.



Major General Terry Ferrell