

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

NICHOLAS HARRISON, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 1:18-cv-641-LMB-IDD
PATRICK M. SHANAHAN, in his official	)	
capacity as Acting Secretary of Defense;, <i>et</i>	)	
<i>al.</i> ,	)	
	)	
Defendants.	)	

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**JOINT STATUS REPORT PURSUANT TO THE COURT’S FEBRUARY 1, 2019 ORDER**

The parties submit this joint status report as directed in the Court’s February 1, 2019 Order. Dkt. 114. As directed by the Court, the parties held a conference call on Monday, February 4, 2019, to discuss ways to narrow the issues raised in Plaintiffs motion to compel (Dkt. 107). The parties were not able to resolve the parties’ dispute over all of Defendants’ deliberative process privilege claims.

I. Plaintiffs’ Suggestion to Narrow the Parties’ Remaining Disputes

Plaintiffs’ understood the Court’s February 1 Order as requiring the Parties to provide a way for the Court to resolve all outstanding issues when the Court reconvenes on February 8, 2019. Plaintiffs disagree with Defendants suggestion because it does not resolve the dispute in a timely manner. If Defendants were allowed to wait until February 13, 2019 to provide the sample for *in camera* review and then were further allowed time to consider and object to any order of the Court before producing the documents at issue, Plaintiffs will likely not receive these documents until after the close of fact discovery on March 15, 2019.

A. *Meet and Confer*

Prior to the meet and confer, Plaintiffs emailed Defendants and agreed to have the call on Monday “if that provides you sufficient time to meet with your clients and apply the guidance

provided by Judge Davis this afternoon. We want to be able to have a meaningful meet and confer.” Ex. A. Prior to the call, Defendants’ provided proposed categories to be used in an *in camera* review, but noted that they were continuing to categorize documents and “hope[d] to complete this work by the end of the week.” *Id.*

During the call, Defendants noted that they had identified 610 documents that the Department of Defense (DoD) was reconsidering, but that a decision on withdrawal could not occur until Thursday, February 7, 2019. When questioned, Defendants’ counsel admitted that he did not have the authority to withdraw any privilege claims. As a result of the meet and confer, Plaintiffs withdrew their challenge to the documents identified in Defendants’ “Coordinated Media Responses” category.<sup>1</sup>

At Plaintiffs request, the Parties reviewed several redacted documents (US00003421, US00001905, and US00003263). Plaintiffs explained why they believed each document was not privileged, but Defendants maintained that the documents were privileged and that the documents “had deliberative information redacted from them and accurate descriptions of the redacted information in the privilege log.” Ex. B.

After it became clear that there was still significant disagreement between the Parties, the meet and confer transitioned to the appropriate way to provide an *in camera* sample for the Court to review.

#### B. *Plaintiffs’ Proposal*

Plaintiffs believe that this can and should be resolved at the February 8 hearing<sup>2</sup> or as soon thereafter as possible. If the Court believes that an *in camera* review is necessary, Plaintiffs will

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<sup>1</sup> The “Coordinated Media Responses” documents are US00003421, US00006864, US00006865, US00006910, US00006911, US00011100, US00011101, US00020757, US00020788.

<sup>2</sup> Plaintiffs maintain that the deliberative process privilege is inapplicable here because

select a sample of documents using Defendants' 15 categories by 5:00 p.m. February 8, 2019.

Defendants will submit the records for *in camera* review by 5:00 p.m. February 11, 2019.

Plaintiffs request that the Court order production 4 days after its order in light of Plaintiffs need to take depositions using these documents and the imminent close of fact discovery.

## II. Defendants' Suggestion to Narrow the Parties' Remaining Disputes

To narrow the issues, Defendants identified 406 documents that contain deliberative information that are similar to documents for which the Department of Defense (DoD) has previously agreed to withdraw its claims of deliberative process privilege.<sup>3</sup> DoD is currently reviewing those documents, and will decide whether to withdraw its privilege claims by Thursday, February 7, 2019. Setting aside those documents, the parties' continue to dispute deliberative process privilege claims for 1,237 documents that were withheld or redacted by Defendants.<sup>4</sup>

### A. Defendants' Proposal

If the Court determines an *in camera* review is necessary, Defendants propose that the Court address the remaining disputes by examining a representative sample of several documents from each of 15 separate categories.<sup>5</sup> Although Defendants continue to maintain that the Court

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Defendants' decision making process, and intent, is at the heart of the case.

<sup>3</sup> Defendants have withdrawn or are considering withdrawing their claims of deliberative process over a total of 610 documents.

<sup>4</sup> Exhibit 3 to Plaintiffs motion contains duplicate entries for several privilege claims. The total number of challenged privilege claims is 1,847.

<sup>5</sup> The first category of documents relate to the policy discussions pertaining to DoDI 6485.01, the military personnel instruction regarding HIV. The second category relates to policy discussions pertaining to DoDI 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services. The third category contains documents pertaining to the policy development work of the accessions medical standard working group, including minutes and recordings of the working group's meetings. The fourth category pertains to documents specific to the operations of U.S. Military Entrance Processing Command. The fifth category encompasses the deliberations of the military personnel policy working group and DoDI 1332.45 relating to DoD retention policy for

should address whether the privilege applies on a document-by-document basis, Defendants would agree to a review of narrowly tailored categories to facilitate the Court's review of the documents that remain in dispute. Defendants believe that a categorical approach is necessary here because the disputed records are from several different DoD agencies, and because the applicable test requires the Court to consider whether the plaintiffs' need for the documents outweighs the government's interest in maintaining the privilege. The application of this test requires consideration of the context of the deliberative information, which is different for each category of documents. For example, the documents and information that the Army has withheld on the basis of privilege relate to an ongoing review and adjudication of recommendations of a draft regulation. As the attached declaration notes, in the Army's view, "any piercing of the privilege [of these documents] before the Army has completed its update to the policy would prove disastrous to the integrity of the military's considered professional judgment . . . ." Ausprung Decl. ¶ 7.

Defendants propose that the parties randomly select a limited number of documents from each category, with the court ultimately reviewing about 40 to 75 documents total. The parties would select the representative documents from each category on Friday, February 8, 2019.

Defendants would then submit the records to the Court for *in camera* review on or before 5 p.m. on

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non-deployable service members. The sixth category consists of spreadsheets, printout, and slides that provide information and analysis concerning the military's population of non-deployable service members. The seventh category pertains to guidance for and strategy discussions concerning media inquiries.

The eighth category contains documents related to the Army's ongoing review of AR 600-110, and the ninth category is comprised of documents concerning the Army's prior policy reviews. The tenth category includes documents related to DoD's 2014 and 2018 reports to Congress, as well as any other Congressional inquiry. The eleventh category consists of documents related to DoD's policy discussion concerning pre-exposure prophylaxis treatment, which is treatment used by individuals who are not infected with HIV, but who are at risk of contracting HIV, to prevent HIV infection. The twelfth category pertains to policy discussions about DoDI 6490.07. The thirteenth and fourteenth categories contain Air Force- and Navy-specific policy discussions. The last category is meant to capture any document that does not fit in another category.

Wednesday, February 13, 2019. Defendants further request that the Court set a deadline for compliance with the Court's order that allows Defendants sufficient time to consider and, if necessary, file an objection.

B. Defendants' Response to Plaintiffs' Characterization of the Meet-and-Confer

Defendants disagree with the Plaintiffs characterization of the parties' third meet and confer to the extent that it accuses Defendants of needlessly delaying disclosure of documents or suggests that Defendants' counsel lacks the authority to present recommendations to its clients regarding their assertion of the deliberative process privilege. However, we believe our disagreements on the subject are unnecessary for the Court to make its determination on the Plaintiffs' Motion to Compel.

At the February 4, 2019 meet and confer, Defendants informed Plaintiffs that Defendants had re-reviewed, individually, 713 documents that they had asserted privilege over and that by Thursday, February 7, Defendants would be able to notify Plaintiffs if they would withdraw the privilege on 610 of these documents (33% of the total disputed documents). Defendants also told Plaintiffs that the remaining documents could be divided into fifteen categories, and that these categories comply with the Court's order to narrow the issue before it. Using these categories, the Court can perform an *in camera* review of a subset of the documents in each category to determine whether the balancing test requires piercing the deliberative process privilege on a category-by-category basis. The Plaintiffs, as they concede in their Proposal, agree that the Court can resolve this dispute at Friday's hearing, and state "If the Court believes that an *in camera* review is necessary, Plaintiffs will select a sample of documents using Defendants' 15 categories by 5:00 p.m. February 8, 2019. Defendants will submit the records for *in camera* review by 5:00 p.m. February 11, 2019." Defendants agree that this plan is the best way forward for the Court to

address the remaining 1,237 documents as proposed above, although as a practical matter Defendant will need until Wednesday, February 13, 2019 to prepare the selected documents for submission to the Court.

Date: February 5, 2019

/s/ Andrew R. Sommer

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DATE: February 5, 2019

Respectfully submitted,

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*Counsel for the Government*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

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*Counsel for the Government*

**From:** [Norway, Robert M. \(CIV\)](#)  
**To:** [Sommer, Andrew R.](#); [Harding, John](#); [Berman, Keri L. \(CIV\)](#); [McCotter, Trent \(USAVAE\)](#); ["Scott Schoettes"](#); [Hemmings, Allie](#)  
**Cc:** [Berman, Keri L. \(CIV\)](#); [Cutri-Kohart, Rebecca \(CIV\)](#)  
**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis  
**Date:** Tuesday, February 05, 2019 2:33:27 PM  
**Attachments:** [image002.png](#)

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Drew,

I in no way meant to imply that John is unable to handle the issues addressed in this or any other meet and confer. John stated or suggested a number of times throughout the conference that he was uncertain the government could meaningfully meet and confer because no one present on the call had final authority to withdraw assertions of privilege over particular documents. However, when I asked John if Plaintiffs would agree to withdraw their challenges to certain documents, he indicated that the attorneys present on the call for Plaintiffs were similarly without final authority to make those withdrawals. My request that you or Scott appear on future calls was simply intended to ensure that someone with the necessary authority to make final decisions be present to expedite future negotiations.

Best,  
Rob

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**From:** Sommer, Andrew R. <ASommer@winston.com>  
**Sent:** Tuesday, February 05, 2019 11:54 AM  
**To:** Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Harding, John <JWHarding@winston.com>; Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; McCotter, Trent (USAVAE) <TMcCotter@usa.doj.gov>; 'Scott Schoettes' <sschoettes@lambdalegal.org>; Hemmings, Allie <AHemmings@winston.com>  
**Cc:** Berman, Keri L. (CIV) <kberman@CIV.USDOJ.GOV>; Cutri-Kohart, Rebecca (CIV) <rctrik@CIV.USDOJ.GOV>  
**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

Rob,

Upon further review of your email, I wanted to respond to something appears implicit in your request that Scott or I personally attend these meet and confers. To the extent that you are implying that John is incapable of handling these meet and confers or is otherwise unable to do so, I wholeheartedly disagree with any such implication. John is an Officer of the Court of the Eastern District of Virginia and has always conducted himself in a manner demanded by that office. He is more than capable of addressing the legal and factual issues that were to be addressed in this meet and confer and has taken the lead on this particular motion for Plaintiffs. I assume that I am misunderstanding what is being implied here. And I trust you would agree that, were my interpretation of the undertones in your email correct, they would have no place in this proceeding.

Regards,

Drew

**Andrew R. Sommer**

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**From:** Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>  
**Sent:** Tuesday, February 05, 2019 10:02 AM  
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**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

John,

I feel that I need to correct and clarify your summary of the parties' call.

We indicated on the call that Defendants were working to narrow the volume of documents in dispute, and that we had identified 610 documents in Plaintiffs' fourth category that contained deliberative information similar to deliberative information that DoD had previously decided to withdraw its claim of privilege. We informed Plaintiffs that DoD has agreed to consider whether to withdraw its privilege claims over those documents. We told you that DoD will make these decisions by Thursday, and that we will inform you of DoD's decision on Thursday.

We also offered a method of narrowing the dispute similar to the method that we had offered two weeks ago: creating narrower categories of documents that would allow the court to test the privilege claims on a category-by-category basis. Before the call, we proposed a list of 14 categories, and on the call we agreed to add an additional category. We had also sent plaintiffs a spreadsheet

that placed all the documents in Plaintiffs' fourth category in three subgroups. We told you that Defendants can categories all the documents challenged by Plaintiffs by Thursday.

On the call, Plaintiffs did not offer any suggestions as to how the parties could narrow the dispute. Rather, Plaintiffs opened the call with a request whether Defendants would withdrawal all of their deliberative process claims. We declined.

We did not anticipate that you would want our clients at the meet-and-confer, and you did not ask us to ensure that they would join the call. Further, we note that, although we agreed to a call at the time proposed by Plaintiffs, neither of Plaintiffs' lead counsel, Drew Sommers or Scott Schoettes, joined the call.

As we explained on the call, the ultimate decision whether to maintain a claim of privilege rests with our clients. We can make recommendations, but the agencies must determine whether they wish to maintain privilege over a particular document. Had you mentioned this issue before the call, we may have been able to make arrangements for a representative from DoD to attend the call. In any event, you indicated that you lacked the authorization to agree to withdraw Plaintiffs' challenges to Defendants claims of privilege and that you could not agree to our proposal to narrow the dispute without conferring with the other members of your team about our offer.

We also tried to discuss the subgroups of documents Defendant had identified in Plaintiffs' fourth category. One group was a collection of 9 documents concerning press guidance. The parties discussed two redacted documents in the press guidance subgroup. As you indicated in your email, you said that plaintiffs "didn't need" these documents and could probably withdraw their challenges, but that you did not have the authority to do so on the call. We also asked you to ask if Plaintiffs would withdrawal their challenge to the 7 other documents in the press guidance subgroup.

We then suggested that the parties discuss the documents in a second subgroup related to the military personnel policy working group. You, however, asked that we discuss a series of three redacted emails. The emails identified by Plaintiffs had deliberative information redacted from them and accurate descriptions of the redacted information in the privilege log. For these reasons, we informed you that Defendants would maintain their privilege claims over those documents.

We then noted how the review process could be streamlined if Plaintiffs considered grouping documents by category, as we suggested. We used the last two redacted emails as an example. Both emails were from the Army. We informed you on the call that the Army is currently considering a revision of AR 600-110, and that nearly all of the 89 documents redacted or withheld by the Army concerned this decision. We also pointed out that the Army has not yet made a decision to revise AR 600-110, and the documents that were withheld are not about the policy that was applied to Sgt. Harrison. We told you that the Army had decided to maintain its privilege claims to date.

At this point in the conversation, we discussed Defendants' suggested method for presenting the documents that remain in dispute to the Court for *in camera* review. In this process, you indicated that plaintiffs wanted to include a direction for defendants to turn over all documents within four

days of the magistrate judge's decision. We said that Defendants could not agree to that timeline because it would require compliance before Defendants have had an opportunity to consider filing an objection to the magistrate judge's decision. We did not say that the Army intended to file an appeal; we meant only to preserve our client's opportunity to do so if they so choose.

We have offered a meaningful method of narrowing the issue for the Court's resolution. We have created 15 categories to narrow the documents and told you that Defendants will have all of the disputed documents assigned to one of these categories by Thursday evening.

We then proposed that the parties select a representative sample of documents from each category. The parties discussed the total number of documents this method would require the Court to review. We indicated that we thought the parties could agree to a selection method that would require the *in camera* review of about 40 to 75 documents. We did not agree to limit this number to approximately 50, as noted in your summary, but we will consider that point, if Plaintiffs now take that position.

We will not agree to attach documents to the status report. Plaintiffs did not inform us on the call that you intended to place selected documents before the Court as part of the status report. Had you done so, Defendants would have asked for the same courtesy. We will circulate a draft status report as soon as possible.

Lastly, we ask that one of Plaintiffs' lead counsel, either Drew or Scott, attend future meet-and-confer calls.

Best,  
Rob Norway

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**From:** Harding, John <[JWHarding@winston.com](mailto:JWHarding@winston.com)>

**Sent:** Monday, February 04, 2019 8:57 PM

**To:** Norway, Robert M. (CIV) <[rnorway@CIV.USDOJ.GOV](mailto:rnorway@CIV.USDOJ.GOV)>; Berman, Keri L. (CIV) <[kberman@CIV.USDOJ.GOV](mailto:kberman@CIV.USDOJ.GOV)>; McCotter, Trent (USAVAE) <[TMcCotter@usa.doj.gov](mailto:TMcCotter@usa.doj.gov)>; Sommer, Andrew R. <[ASommer@winston.com](mailto:ASommer@winston.com)>; 'Scott Schoettes' <[sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org)>; Hemmings, Allie <[AHemmings@winston.com](mailto:AHemmings@winston.com)>

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**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

Dear Rob:

I'm following up to confirm where we left our meet and confer per the Court's order on Defendants' deliberative process privilege claims.

We were hoping that we could significantly narrow the issues that were before Judge Davis, here's what you told me during the call:

- You had no authority to withdraw any claims of privilege during our conference;

- You had sent 610 documents found in Plaintiffs' "Category 4" to the Department of Defense for further evaluation, but a decision would not be likely until the close of business on Thursday; and
- You had indicated that your team was still categorizing certain documents into the categories that you had defined and expected to be done with that by close of business Thursday.

I suggested we review exemplar documents from the redacted documents the Government produced as a way to find common ground. We were unable to do so. Nevertheless, here is where we left things:

- US00003421. This document related to a media inquiry. I indicated that we might be willing to withdraw our pursuit of this document. I am confirming that we will do so for this document as well as all other "Coordinated Media Responses" documents you identified, not because we believe Defendants are properly applying the deliberative process privilege, but because we don't see it as being particularly relevant to our case at this time;
- US00001905. This document expressly states that a policy review had not begun, and thus the privilege is not being properly applied. You refused to produce the unredacted email because you maintain that the redacted material is pre-decisional regardless of whether the review period had started.
- US00003263. Keri explained that the redacted section was the individual's "musings" on past deliberations, and indicated that the redacted text relates to HIV. Keri stated that the Government's position is that recollections are not fair game. I noted that the purpose of the document was not to support or promote a decision and thus the privilege did not apply. I then stated that it should still be produced as it could show pretext. Your position is that Judge Davis is wrong as to that issue.
- US00002371. This document specifically relates to Sgt. Harrison. I noted that I believed this document was a good example of the sword-and-shield approach about which Judge Davis cautioned. You represented that the redaction related to an ongoing revision of AR600-110 and that the Army was maintaining its privilege as to the 84 documents that it has identified as relating to that revision. You further noted that the Army intends to appeal Judge Davis' ruling if he finds in favor of Plaintiff as to these documents.

We also discussed an approach for the Court to handle an *in camera* review. You suggested narrowing the categories of documents to be discussed by the parties. You suggested that you could provide the categories of documents by Friday and then have a selection of documents after that. I noted my concern about the timing, especially given the forthcoming discovery deadlines, and asked if you could provide categories of documents for which you were willing to withdraw the privilege claim by tomorrow. You informed me you were not able to do that.

You then suggested that you wanted to inform the Court that the Government had identified 610 documents that it was reconsidering and then re-categorize the rest of the documents into smaller

categories. You proposed 14 categories. I noted that your categories were topical this time and in our previous meet and confer, you had categorized them into types of documents. You then said you would provide the types of documents to the Court as part of the sample of categories. I again emphasized that this was not a meaningful change from your position prior to the hearing before Judge Davis and again asked what you had done in light of the Court's recommendation on Friday. You believe that your identification of 610 documents the DoD is re-reviewing is progress.

We then discussed the benefits and issues of various sampling methods (randomization, categorical, proportional, etc.). You wanted to provide the categories by Friday, but I stated that my understanding was that the court intended to rule on Friday. My opinion was that we needed to put something concrete before the judge. We both agreed that a sample should be no more than approximately 50 documents. I indicated that I would get back to you on the approach that we would propose about sampling.

You agreed to draft a joint notice to the Court per the Court's order. We look forward to your draft, but we expect it to set forth the time-lines that Defendants are proposing and that Plaintiff has concerns that the timing is too slow and will hinder the remainder of the case schedule. Moreover, we expect that the submission will provide the three redacted documents identified above as exhibits for the judge's consideration given the issues we discussed today.

Thanks,

John

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**From:** Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>  
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**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

John,

In preparation for our meet-and-confer, we propose subdividing plaintiffs' fourth category into three subgroups, as indicated in the attached spreadsheet. The largest of these is a subgroup that

contains the spreadsheets for which Defendants had previously withdrawn their privilege claims. Also in plaintiffs' fourth category are media briefs, guidance to public affairs officers, and documents discussing public relations strategy. The third subgroup contains documents related to or used by the Military Personnel Policy Working Group both before and after the publication of DoDI 1332.45.

As we did before Plaintiffs filed their motion, Defendants propose that the best way to narrow the dispute is for the parties to agree to narrower categories of documents. We are working toward further categorizing the documents identified in Plaintiffs' first category. We hope to complete this work by the end of the week. As of this afternoon, we have identified fourteen distinct categories of documents, including:

- 1 – DoDI 6485.01 and related discussions
- 2 – DoDI 6130.03 and related discussions
- 3 – AMSWG documents
- 4 – USMEPCOM-related discussions
- 5 – DoDI 1332.45/Military Personnel Policy Working Group (MPP WG) and related discussions
- 6 – Non-Deployability Report Analysis and Discussion
- 7 – Coordinated Media Responses
- 8 – Army's Current AR 600-110 Revision and related discussions
- 9 – Army's Prior AR 600-110 Revision and related discussions
- 10 – DoD Reports to Congress and Other Responses to Congressional Inquiries
- 11 – PreP Policy discussions
- 12 – DoDI 6490.07 and related discussions
- 13 – AF-Specific Policy Discussions
- 14 – Navy-Specific Policy Discussions (such as, SECNAVINST 5300.30E)

We would like to discuss this approach during this afternoon's call.

Best,  
Rob Norway

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**From:** Norway, Robert M. (CIV)  
**Sent:** Monday, February 04, 2019 10:29 AM  
**To:** 'Harding, John' <[JWHarding@winston.com](mailto:JWHarding@winston.com)>; Berman, Keri L. (CIV) <[kberman@CIV.USDOJ.GOV](mailto:kberman@CIV.USDOJ.GOV)>; McCotter, Trent (USAVAE) <[TMcCotter@usa.doj.gov](mailto:TMcCotter@usa.doj.gov)>; Sommer, Andrew R. <[ASommer@winston.com](mailto:ASommer@winston.com)>; 'Scott Schoettes' <[sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org)>; Hemmings, Allie <[AHemmings@winston.com](mailto:AHemmings@winston.com)>  
**Cc:** Berman, Keri L. (CIV) <[kberman@CIV.USDOJ.GOV](mailto:kberman@CIV.USDOJ.GOV)>; Cutri-Kohart, Rebecca (CIV) <[rcutrik@CIV.USDOJ.GOV](mailto:rcutrik@CIV.USDOJ.GOV)>  
**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

John,

Thanks for following up. We are available today at 4. We will be ready to conduct a document-by-document discussion. In addition, we hope to circulate a spreadsheet prior to the meet-and-confer that proposes narrower categories to assist the court's review.

Best,  
Rob Norway

---

**From:** Harding, John <[JWHarding@winston.com](mailto:JWHarding@winston.com)>  
**Sent:** Monday, February 04, 2019 10:20 AM  
**To:** Norway, Robert M. (CIV) <[rnorway@CIV.USDOJ.GOV](mailto:rnorway@CIV.USDOJ.GOV)>; Berman, Keri L. (CIV) <[kberman@CIV.USDOJ.GOV](mailto:kberman@CIV.USDOJ.GOV)>; McCotter, Trent (USAVAE) <[TMcCotter@usa.doj.gov](mailto:TMcCotter@usa.doj.gov)>; Sommer, Andrew R. <[ASommer@winston.com](mailto:ASommer@winston.com)>; 'Scott Schoettes' <[sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org)>; Hemmings, Allie <[AHemmings@winston.com](mailto:AHemmings@winston.com)>  
**Cc:** Berman, Keri L. (CIV) <[kberman@CIV.USDOJ.GOV](mailto:kberman@CIV.USDOJ.GOV)>; Cutri-Kohart, Rebecca (CIV) <[rcutrik@CIV.USDOJ.GOV](mailto:rcutrik@CIV.USDOJ.GOV)>  
**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

Hi Rob,

Just following-up on the below email.

Thanks,  
John

**John Harding**

Winston & Strawn LLP

D: +1 202-282-5774

[winston.com](http://winston.com)

WINSTON  
& STRAWN  
LLP

---

**From:** Harding, John  
**Sent:** Friday, February 01, 2019 3:45 PM  
**To:** 'Norway, Robert M. (CIV)' <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Berman, Keri L. (CIV) <[Keri.L.Berman@usdoj.gov](mailto:Keri.L.Berman@usdoj.gov)>; McCotter, Trent (USAVAE) <[Trent.McCotter@usdoj.gov](mailto:Trent.McCotter@usdoj.gov)>; Sommer, Andrew R. <[ASommer@winston.com](mailto:ASommer@winston.com)>; 'Scott Schoettes' <[sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org)>; Hemmings, Allie <[AHemmings@winston.com](mailto:AHemmings@winston.com)>  
**Cc:** Berman, Keri L. (CIV) <[Keri.L.Berman@usdoj.gov](mailto:Keri.L.Berman@usdoj.gov)>; Cutri-Kohart, Rebecca (CIV) <[Rebecca.Cutri-Kohart@usdoj.gov](mailto:Rebecca.Cutri-Kohart@usdoj.gov)>  
**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

Hi Rob,

We can do Monday afternoon if that provides you sufficient time to meet with your clients and apply the guidance provided by Judge Davis this afternoon. We want to be able to have a meaningful meet

and confer on Monday. Does 4:00 work for you?

**John Harding**

Winston & Strawn LLP

D: +1 202-282-5774

[winston.com](http://winston.com)



---

**From:** Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>  
**Sent:** Friday, February 01, 2019 2:38 PM  
**To:** Harding, John <[JWHarding@winston.com](mailto:JWHarding@winston.com)>; Berman, Keri L. (CIV) <[Keri.L.Berman@usdoj.gov](mailto:Keri.L.Berman@usdoj.gov)>; McCotter, Trent (USAVAE) <[Trent.McCotter@usdoj.gov](mailto:Trent.McCotter@usdoj.gov)>; Sommer, Andrew R. <[ASommer@winston.com](mailto:ASommer@winston.com)>; 'Scott Schoettes' <[sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org)>; Hemmings, Allie <[AHemmings@winston.com](mailto:AHemmings@winston.com)>  
**Cc:** Berman, Keri L. (CIV) <[Keri.L.Berman@usdoj.gov](mailto:Keri.L.Berman@usdoj.gov)>; Cutri-Kohart, Rebecca (CIV) <[Rebecca.Cutri-Kohart@usdoj.gov](mailto:Rebecca.Cutri-Kohart@usdoj.gov)>  
**Subject:** RE: Harrison v. Mattis 2/1 Order from Judge Davis

John,

We also understood Judge Davis to have directed the parties to file a notice on Wednesday. Given the minute order, I suggest that we meet Monday afternoon.

Best,  
Rob Norway

---

**From:** Harding, John <[JWHarding@winston.com](mailto:JWHarding@winston.com)>  
**Sent:** Friday, February 01, 2019 2:07 PM  
**To:** Norway, Robert M. (CIV) <[rnorway@CIV.USDOJ.GOV](mailto:rnorway@CIV.USDOJ.GOV)>; Berman, Keri L. (CIV) <[kberman@CIV.USDOJ.GOV](mailto:kberman@CIV.USDOJ.GOV)>; McCotter, Trent (USAVAE) <[Trent.McCotter@usdoj.gov](mailto:Trent.McCotter@usdoj.gov)>; Sommer, Andrew R. <[ASommer@winston.com](mailto:ASommer@winston.com)>; 'Scott Schoettes' <[sschoettes@lambdalegal.org](mailto:sschoettes@lambdalegal.org)>; Hemmings, Allie <[AHemmings@winston.com](mailto:AHemmings@winston.com)>  
**Subject:** Harrison v. Mattis 2/1 Order from Judge Davis

Rob,

Judge Davis' order only gives us until Tuesday at 5:00 to submit our notice. My notes from the hearing were that we needed to submit the notice on Wednesday. Is that what you have too? If our notes are both consistent, then we should call the court together and explain the typo. If Tuesday is accurate, then we need to have the meet and confer on Monday.

Thanks,  
John

**John W.H. Harding**

**Associate Attorney**

Winston & Strawn LLP  
1700 K Street, N.W.  
Washington, DC 20006-3817

D: +1 202-282-5774

F: +1 202-282-5100

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& STRAWN**  
LLP

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

NICHOLAS HARRISON, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:18-cv-00641 (LMB/IDD)
	)	
PATRICK M. SHANAHAN, et al.,	)	
	)	
Defendants.	)	
	)	

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DECLARATION OF REBECCA AUSPRUNG

I, Rebecca E. Ausprung, hereby state and declare as follows:

1. I am a civilian senior level executive in the U.S. Army currently assigned as the Director of Civil Law and Litigation for the U.S. Army Judge Advocate General’s Corps. I am the senior advisor to The Judge Advocate General, the Commander of the U.S. Army Legal Services Agency (USALSA), and senior Army leadership on civil law and litigation. I provide technical oversight to four civil litigation divisions with over 100 attorneys and paralegal support staff in military and civilian personnel litigation, commercial litigation, regulatory and intellectual property law, FOIA/Privacy Act litigation, tort litigation, contract litigation and appeals, and environmental law and litigation. As part of my duties, I am responsible for supervising the assertion of privileges in accordance with the Federal Rules of Civil Procedure on behalf of the Army for cases in civil litigation.

2. I am generally aware of the claims and arguments alleged in the pleadings and filings submitted in this litigation, and I submit this declaration in support of Defendants’ opposition to the Plaintiffs’ motion to compel documents and information withheld on the basis of the deliberative process privilege in the above-titled case, and as a supplement to the declaration of LTC Edward Bahdi (Dkt. 111-1). I make this declaration based upon my personal knowledge

and upon information that has been provided to me in the course of my official duties. From my official duties related to my responsibilities outlined above, I have an understanding of the Army's assertions of privilege related to the ongoing review and revision of Army Regulation 600-110, *Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus*, Rapid Action Revision dated April 22, 2014 ("AR 600-110"). In particular, I address below the adverse consequences that will result if the Army is required to disclose these materials before the review is completed.

### **The Army's Reliance on the Deliberative Process Privilege**

3. Plaintiffs are asking the Court to compel the disclosure of, among others, documents and information related to the ongoing review of an unapproved, forthcoming version of AR 600-110. The Army is currently in the process of revising the 2014 version of AR 600-110 in order to ensure that its policies concerning the military service of personnel infected with HIV remain evidence-based, and reflect best military advice and the considered professional judgment of the Army's leadership. The Army has solicited the recommendations from working groups and key medical, public health, and personnel policy specialists, and is currently in the process of reviewing and distilling those recommendations into a draft regulation for senior leaders' review. Throughout this review process, the Army has relied upon the frank and candid discussions of its personnel in order to determine whether any current policies should be updated. This fruitful, give-and-take discourse is the essence of any healthy policy making process. Confidential deliberations explore and assess the strengths and weaknesses underlying any proposed changes, and operate to make sure that the Army's policies balance the opportunity to serve with the military requirements of readiness, lethality, and mission accomplishment.

4. The documents and information sought by Plaintiffs relating to the ongoing revision of AR 600-110 were made under a general expectation that the Army's internal deliberations during the development of personnel policies are kept confidential and protected from disclosure. Rigorous debate concerning personnel policies depends upon confidentiality so that participants may speak their minds without fear of invasive scrutiny. Without the freedom to exchange ideas and opinions freely, sensitivity to public pressure or influence ordinarily chills the Army's open and honest policy deliberations. But the military is especially vulnerable within the context of military personnel matters. The public is often unacquainted with the realities and challenges of military life and mission requirements, which routinely distinguish military and ordinary civilian decision making. These nuances, thus, create a heightened risk that the military's decision making processes will be subject to undue scrutiny or criticism. Indeed, the Army is already having to overcome the chilling effect of anticipated public pressure concerning its military personnel policies based, in part, on the mere prospect that its internal deliberations may no longer have the legal protections of privilege.

**Irreparable Harm to the Army's Policy Development Processes**

5. The Army would be irreparably harmed by an order compelling the disclosure of the materials pertaining to the pending review of AR 600-110. As a threshold matter, Plaintiffs are asking for privileged documents pertaining to an ongoing deliberative process, not a final decision or policy. The revision is still in a critical stage of development and hasn't been reviewed, much less preliminarily approved, by any senior staff principals with decision-making authority. In addition, Plaintiffs are only challenging the constitutionality of the current version of AR 600-110, not the forthcoming revision with an undetermined release date. Thus, to the extent Plaintiffs desire to explore the Army's policy deliberative process for potential animus to

support their claims, the focus should be on the deliberative process that led to the regulation being challenged—here, the 2014 version of AR 600-110— not a policy update that is still under review and therefore cannot be a source of discriminatory animus to anyone. To the extent intent or animus applies to an equal protection challenge applying rational basis review, the only intent that is legally relevant is that of the decision making authority at the time the decision was made. Thus, any exceptions to the privilege do not apply to decisions that are not being challenged, or to piercing an ongoing deliberative process that is occurring after the decision actually being challenged.

6. More importantly, compelled disclosure at this juncture would irreparably harm an *ongoing* policy development process concerning a sensitive and controversial topic. Not only would the chilling effect impact future decision making, but it would apply exponentially to the final steps in the deliberative process being probed mid-decision. Forcing the Army to prematurely disclose documents related to a regulation that hasn't been approved would, therefore, be highly disruptive to the remaining review process. As Congress's close oversight and this litigation indicate, policies impacting HIV-infected personnel are subject to especially close scrutiny. Without future confidentiality, the healthy give-and-take discourse cultivated since 2015 would effectively cease, at an exceptionally vulnerable time when the regulation will be undergoing close and delicate internal scrutiny by key senior leaders. If the privilege's protections do not apply, the final version of the regulation may not reflect best military advice because key personnel may be more reluctant to provide their candid opinions and feedback in the face of contrary views.

7. The Army's senior leaders need to be able to weigh options and recommendations that have survived the crucible of rigorous, honest debate without outside intervention or pressures,

in order to make informed decisions in the best interest of national security. This is a highly sensitive time when the chilling effect of public pressure is at its zenith, and any piercing of the privilege before the Army has completed its update to the policy would prove disastrous to the integrity of the military's considered professional judgment upon which the nation's security relies.

In accordance with 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of February 2019.



Rebecca E. Ausprung  
Director, Civil Law and Litigation, U.S. Army  
Fort Belvoir, Virginia

**From:** Lute, Lisa M LTC USARMY HQDA DCS G-1 (USA)  
**Sent:** Thursday, November 8, 2018 11:53 AM  
**To:** Biggerstaff, William C (Casey) MAJ USARMY HQDA OTJAG (US)  
**Subject:** FW: HIV Question (UNCLASSIFIED)

-----Original Message-----

From: Brown, Gary W LTC USARMY OSD OUSD P-R (US)  
Sent: Wednesday, September 14, 2016 6:46 PM  
To: Mullen, Lawrence E CIV DHA DIR SUPPORT (US) <lawrence.e.mullen.civ@mail.mil>  
Cc: Anderson, Deidre M COL USARMY OSD OSD (US) <deidre.m.anderson.mil@mail.mil>; Kramer, Christine M COL USARMY HQDA ASA MRA (US) <christine.m.kramer12.mil@mail.mil>; Lute, Lisa M LTC USARMY HQDA DCS G-1 (US) <lisa.m.lute.mil@mail.mil>; Dejesus, Kimberley D LTC USARMY HQDA DCS G-1 (US) <kimberley.d.dejesus.mil@mail.mil>  
Subject: RE: HIV Question (UNCLASSIFIED)

Larry,

From our discussion today at Walter Reed. You believed that there was a representative from HA that worked the last update in 2013, and I'm sending you this reminder email to see if you can locate that POC within your historic emails. Thanks!

Gary

-----Original Message-----

From: Lute, Lisa M LTC USARMY HQDA DCS G-1 (US)  
Sent: Wednesday, September 14, 2016 10:22 AM  
To: Kramer, Christine M COL USARMY HQDA ASA MRA (US); Brown, Gary W LTC USARMY OSD OUSD P-R (US)  
Cc: Anderson, Deidre M COL USARMY OSD OSD (US)  
Subject: RE: HIV Question (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

thank you!

-----Original Message-----

From: Kramer, Christine M COL USARMY HQDA ASA MRA (US)  
Sent: Wednesday, September 14, 2016 7:30 AM  
To: Brown, Gary W LTC USARMY OSD OUSD P-R (US) <gary.w.brown.mil@mail.mil>  
Cc: Lute, Lisa M LTC USARMY HQDA DCS G-1 (US) <lisa.m.lute.mil@mail.mil>; Anderson, Deidre M COL USARMY OSD OSD (US) <deidre.m.anderson.mil@mail.mil>  
Subject: RE: HIV Question (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Thanks, Gary. Appreciate the help.

COL Christine Kramer  
Assistant Deputy for Medical Affairs ASA-M&RA (MP)  
111 Army Pentagon, Room 2E469  
Washington, DC 20310-0111  
☎ Office: 703.695.4791  
☎ DSN: 312.223.4791  
☎ BB: 703.944.8111

-----Original Message-----

From: Brown, Gary W LTC USARMY OSD OUSD P-R (US)  
Sent: Tuesday, September 13, 2016 8:58 PM  
To: Kramer, Christine M COL USARMY HQDA ASA MRA (US)  
<christine.m.kramer12.mil@mail.mil>  
Cc: Lute, Lisa M LTC USARMY HQDA DCS G-1 (US) <lisa.m.lute.mil@mail.mil>;  
Anderson, Deidre M COL USARMY OSD OSD (US) <deidre.m.anderson.mil@mail.mil>  
Subject: RE: HIV Question (UNCLASSIFIED)

Hi Ma'am,

I'm not aware of any current discussions leading towards a change of the DoDI 6485.01. I believe that there might be Service level policy changes in discussion. However, the current DoDI was effective June 7, 2013, and it must be reissued, cancelled, or certified current within 5 years (2018) of its publication in accordance with DoDI 5025.01 (Reference (d)). If not, it will expire effective June 7, 2023 and be removed from the DoD Issuances Website. I would say that a 5 year review ramp up should be approaching us soon. [REDACTED]

I have attached a few updated references that have been published since the 2013 publishing of the current DoDI. In order to check other silos for activity, I have cc'ed a colleague of mine AGR AN COL Deidre Anderson, Chief of Medical Programs for OSD, to see if she's tracking an update to the DoDI from her foxhole. I hope this helps!

Very Respectfully,

Gary W. Brown  
Lieutenant Colonel, USA  
Assistant Director, Reserve and Medical Manpower

Office of The Under Secretary of Defense for Personnel and Readiness  
Military Personnel Policy-Accession Policy Office  
1500 Defense Pentagon, Room 3D1066  
Washington, DC 20301-1500  
(703) 697-9273  
gary.w.brown.mil@mail.mil

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recipient, please contact the sender by reply email and destroy all copies of the original message.

-----Original Message-----

From: Kramer, Christine M COL USARMY HQDA ASA MRA (US)  
Sent: Tuesday, September 13, 2016 3:03 PM  
To: Brown, Gary W LTC USARMY OSD OUSD P-R (US)  
Cc: Lute, Lisa M LTC USARMY HQDA DCS G-1 (US)  
Subject: HIV Question (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Good afternoon Gary,

We have a Soldier who sent a complaint to the SECARMY about DoDI 6485.01 being antiquated. Can you tell me if there are any plans to update the DoDI ? If so, when is that proposed to happen? Do you expect there to be any changes made?

Thanks,

COL Kramer

COL Christine Kramer  
Assistant Deputy for Medical Affairs ASA-M&RA (MP)  
111 Army Pentagon, Room 2E469  
Washington, DC 20310-0111  
☎ Office: 703.695.4791  
☎ DSN: 312.223.4791  
☎ BB: 703.944.8111

CLASSIFICATION: UNCLASSIFIED  
CLASSIFICATION: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED

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**From:** Marsh, K Elizabeth LTC USARMY OSD OUSD P-R (US)  
<kathleen.e.genest.mil@mail.mil>  
**Sent:** Wednesday, July 15, 2015 10:12 AM  
**To:** Arendt, Christopher P CIV OSD OUSD P-R (US); MILLER, Stephanie P SES OSD OUSD P-R (US)  
**Cc:** Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US)  
**Subject:** FW: Drug Testing Panel for Military Service Applicants  
**Attachments:** Proposed Policy Change -- Expanded MEPS Testing Panel Policy v4.docx; DRUG TESTING PANELS.docx

FYSA  
v/r

LTC K. Elizabeth (Marsh) Genest  
Assistant Director, Reserve and Medical Manpower  
OUSD/P&R/MPP/Accession Policy Directorate  
4000 Defense Pentagon, Room 3D1066  
Washington, DC 20301-4000  
(703) 697-9273, FAX (703) 614-9272

kathleen.e.marsh.mil@mail.mil

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-----Original Message-----

**From:** Mullen, Lawrence E CIV USAF AF-SG (US)  
**Sent:** Wednesday, July 15, 2015 10:04 AM  
**To:** Delaune, Jules M CIV (US); Arendt, Christopher P CIV OSD OUSD P-R (US); Marsh, K Elizabeth LTC USARMY OSD OUSD P-R (US)  
**Subject:** Fw: Drug Testing Panel for Military Service Applicants

I spoke with Larry moments ago. At the direction of OSD, DoDMERB doesn't perform drug testing. Will review documents tonight, but 'should not effect" DoDMERB if proper coordination from HA is executed.

---

\*\*\*NEW ADDRESS =  
Lawrence.E.Mullen.civ@mail.mil

Email available 24/7/365

Larry Mullen  
Deputy Director, DoDMERB  
8034 Edgerton Drive, Suite 132  
USAFA, CO 80840-2200

Usual office hours Mon- Fri  
4:30 AM - 2:30 PM Mountain  
Time

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Sipos, Larry CIV OSD HA (US) <larry.sipos.civ@mail.mil>

Sent: Wednesday, July 15, 2015 6:47 AM

To: Delaune, Jules M CIV (US); Mullen, Lawrence E CIV USAF AF-SG (US)

Cc: Smith, Jack W CIV OSD HA (US); Puchino, Beth A CTR OSD OUSD P-R (US); Matthews, Meghan E CTR (US); Fells, Quintin F CTR DHA CONTRACTING (US)

Subject: Drug Testing Panel for Military Service Applicants

Jules, Larry M,

We've been asked to comment on a proposed policy change that will affect accessions. Please take a look at this and let me know if you have any comments.

Jules, for the full package, see CATMS UPR003109-15, but I wouldn't recommend printing it because it's huge.

Larry M, I don't know if you'll be asked directly from P&R or through the AF because of your EA status, but thought I'd include you in case there are actions that DoD MERB or your contractors would have to change.

Larry S

---

**From:** Blanks, Julie A SES OSD OUSD P-R (US) <julie.a.blanks.civ@mail.mil>  
**Sent:** Friday, July 20, 2018 10:07 AM  
**To:** Gleason, Carla M Maj USAF OSD PA (US); Maxwell, Jessica R CIV OSD PA (US); Mulcahy, Patricia SES OSD OUSD P-R (US); Hebert, Lernes J SES OSD OUSD P-R (US)  
**Cc:** Arendt, Christopher P CIV OSD OUSD P-R (US); MILLER, Stephanie P SES OSD OUSD P-R (US); Clark, Robert E CIV OSD OUSD P-R (US); OSD Pentagon PA List DPO PR; Penrod, Virginia S SES OSD OUSD P-R (US); Smithson, Steven R CIV OSD OUSD P-R (US)  
**Subject:** RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

Ok, concur with this approach. And here is the FINAL approved statement for Bloomberg: "While I can't speak directly to an individual's case, I can say that the reasons an individual may be non-deployable vary. Predominantly, the reasons are of a medical, legal or administrative nature. Some of our Service members are non-deployable due to illness or injury. When a Service member is medically non-deployable for 12 consecutive months (except for pregnancy and post-partum), the Services will refer them to the disability evaluation process."

Julie Blanks  
(703) 571-2367

-----Original Message-----

**From:** Gleason, Carla M Maj USAF OSD PA (US)  
**Sent:** Friday, July 20, 2018 9:53 AM  
**To:** Blanks, Julie A SES OSD OUSD P-R (US) <julie.a.blanks.civ@mail.mil>; Maxwell, Jessica R CIV OSD PA (US) <jessica.r.maxwell8.civ@mail.mil>; Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>  
**Cc:** Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Clark, Robert E CIV OSD OUSD P-R (US) <robert.e.clark114.civ@mail.mil>; OSD Pentagon PA List DPO PR <osd.pentagon.pa.list.dpo-pr@mail.mil>  
**Subject:** RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

-----Original Message-----

**From:** Blanks, Julie A SES OSD OUSD P-R (US)  
**Sent:** Friday, July 20, 2018 9:47 AM  
**To:** Maxwell, Jessica R CIV OSD PA (US) <jessica.r.maxwell8.civ@mail.mil>; Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>  
**Cc:** Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Clark, Robert E CIV OSD OUSD P-R (US) <robert.e.clark114.civ@mail.mil>; OSD Pentagon PA List DPO PR <osd.pentagon.pa.list.dpo-pr@mail.mil>  
**Subject:** RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

Thanks, Jessica---  
[REDACTED]

Julie Blanks  
(703) 571-2367

-----Original Message-----

From: Maxwell, Jessica R CIV OSD PA (US)  
Sent: Friday, July 20, 2018 9:39 AM  
To: Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>; Blanks, Julie A SES OSD OUSD P-R (US) <julie.a.blanks.civ@mail.mil>  
Cc: Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Clark, Robert E CIV OSD OUSD P-R (US) <robert.e.clark114.civ@mail.mil>; OSD Pentagon PA List DPO PR <osd.pentagon.pa.list.dpo-pr@mail.mil>  
Subject: RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Ms. Mulcahy, Ms. Blanks -

Combining the conversation threads on two queries we've received on the HIV policy...  
[REDACTED]

HIV policy -

-- An active duty service member with laboratory evidence of HIV or hepatitis B infection is evaluated and managed in the same manner as a service member with other chronic or progressive illnesses. The policies for management of DoD personnel with HIV or HBV are evidence-based, medically accurate, and are reviewed regularly and updated as practices, guidelines, and standards of care evolve.

-- For service members diagnosed with HIV or HBV, a treatment plan is established and any indicated treatment is initiated. The member may be allowed to continue to serve in a manner that ensures ongoing access to appropriate medical care, provided that she or he is fit for duty. Infected reserve component members who are fit for duty are also managed in the same manner as those with chronic or progressive illnesses and their medical condition is monitored periodically. If it is determined they are unfit for duty, the service member will be separated or retired. They may not deploy without a waiver and the approval of the Combatant Commander. The factors considered ensure the service member will be able to perform duties.

-- Service members may not be subjected to adverse personnel action solely due to infection status. However, a service member with laboratory evidence of HIV infection who disobeys an order to inform current or potential sexual partners of their infected status or to engage in safe sex practices may be subject to disciplinary action.

-- Individuals under consideration for appointment, enlistment, or induction into the military services with evidence of HIV or HBV infection do not meet accession standards, which require healthy recruits free of communicable diseases or medical conditions that may require excessive time lost for treatment or probably will result in separation for medical unfitness. Recruits must also be capable of functioning in the demanding military environment without aggravation of existing medical conditions.

-- DoDI 6485.01 requires all service members to be screened periodically for laboratory evidence of HIV infection. Active and reserve component Selected Reserve personnel are screened every two years unless more frequent screenings are

clinically indicated. Reserve personnel are screened when called to a period of active duty greater than 30 days if they have not received an HIV test within the last two years.

Jessica R. Maxwell  
Office of the Secretary of Defense Public Affairs  
Defense Press Operations  
Office: 703-697-7794  
Cell: 703-473-0159  
jessica.r.maxwell8.civ@mail.mil

-----Original Message-----

From: Mulcahy, Patricia SES OSD OUSD P-R (US)  
Sent: Thursday, July 19, 2018 5:22 PM  
To: Maxwell, Jessica R CIV OSD PA (US) <jessica.r.maxwell8.civ@mail.mil>  
Cc: Eastburn, David W LTC USARMY OSD PA (US) <david.w.eastburn.mil@mail.mil>; Dyer, Evelyn J CIV OSD OUSD P-R (US) <evelyn.j.dyer.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Clark, Robert E CIV OSD OUSD P-R (US) <robert.e.clark114.civ@mail.mil>  
Subject: RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

Jessica -- it's in motion, but it may not be tonight.

Pat Mulcahy  
Director, Officer and Enlisted Personnel Management  
OUSD(P&R), OASD(M&RA), ODASD(MPP-OEPM)  
(703)-695-3080  
Room 3C1063  
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-----Original Message-----

From: Maxwell, Jessica R CIV OSD PA (US)  
Sent: Thursday, July 19, 2018 5:14 PM  
To: Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>  
Cc: Eastburn, David W LTC USARMY OSD PA (US) <david.w.eastburn.mil@mail.mil>; Dyer, Evelyn J CIV OSD OUSD P-R (US) <evelyn.j.dyer.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Clark, Robert E CIV OSD OUSD P-R (US) <robert.e.clark114.civ@mail.mil>  
Subject: RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Thank you! I'll stand by.

Jessica R. Maxwell  
Office of the Secretary of Defense Public Affairs  
Defense Press Operations  
Office: 703-697-7794  
Cell: 703-473-0159  
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-----Original Message-----

From: Mulcahy, Patricia SES OSD OUSD P-R (US)

Sent: Thursday, July 19, 2018 5:13 PM

To: Maxwell, Jessica R CIV OSD PA (US) <jessica.r.maxwell8.civ@mail.mil>

Cc: Eastburn, David W LTC USARMY OSD PA (US) <david.w.eastburn.mil@mail.mil>; Dyer, Evelyn J CIV OSD OUSD P-R (US) <evelyn.j.dyer.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Clark, Robert E CIV OSD OUSD P-R (US) <robert.e.clark114.civ@mail.mil>

Subject: RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

Jessica -- MPP press inquiries typically go thru Mr. Hebert and Ms. Penrod before being released -- will get this in motion.

Pat Mulcahy

Director, Officer and Enlisted Personnel Management

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-----Original Message-----

From: Maxwell, Jessica R CIV OSD PA (US)

Sent: Thursday, July 19, 2018 4:58 PM

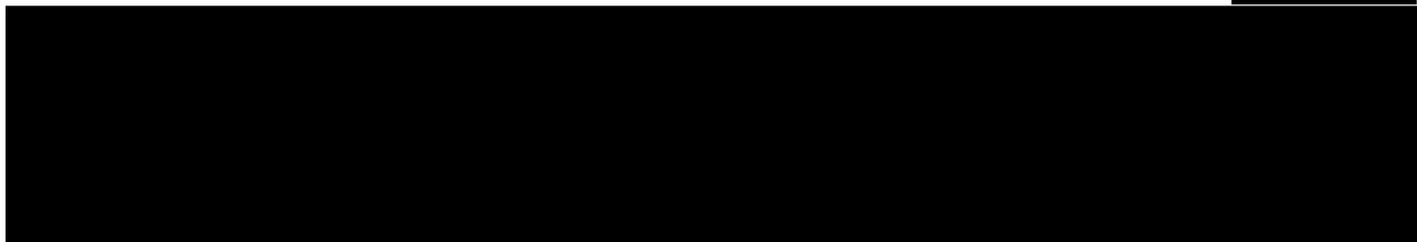
To: Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>

Subject: RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Ms. Mulcahy,

With thanks to MPP/AP for pointing me in your direction, I would like to issue the following statement. 



Open to additional thoughts & edits.

Jessica R. Maxwell

Office of the Secretary of Defense Public Affairs

Defense Press Operations

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jessica.r.maxwell8.civ@mail.mil

-----Original Message-----

From: Dyer, Evelyn J CIV OSD OUSD P-R (US)

Sent: Thursday, July 19, 2018 4:45 PM

To: Maxwell, Jessica R CIV OSD PA (US) <jessica.r.maxwell8.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Drogo, Dennis J CIV OSD OUSD P-R (US) <dennis.j.drogo.civ@mail.mil>; Lovisone, Gail R CIV (US) <gail.r.lovisone.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; Mulcahy, Patricia SES OSD OUSD P-R (US) <patricia.mulcahy.civ@mail.mil>  
Subject: RE: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Pat,

Chris suggested that this PA inquiry is in your lane.

Vr/Evelyn

-----Original Message-----

From: Maxwell, Jessica R CIV OSD PA (US)

Sent: Thursday, July 19, 2018 4:00 PM

To: MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Drogo, Dennis J CIV OSD OUSD P-R (US) <dennis.j.drogo.civ@mail.mil>; Dyer, Evelyn J CIV OSD OUSD P-R (US) <evelyn.j.dyer.civ@mail.mil>; Lovisone, Gail R CIV (US) <gail.r.lovisone.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>

Subject: FW: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg) (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Hi all,

I'm not sure if this falls within your shop or if I've included the correct people, so please redirect me if necessary...

The story below popped this afternoon about the non-deployable policy. We are pushing back, as the reporter didn't contact me for a comment, so now we have a chance to inject a comment.

Jessica R. Maxwell  
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Defense Press Operations  
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Cell: 703-473-0159  
jessica.r.maxwell8.civ@mail.mil

-----Original Message-----

From: OSD Pentagon PA Mailbox Media Analysis

Sent: Thursday, July 19, 2018 3:22 PM

To: OSD Pentagon PA List DPO PR <osd.pentagon.pa.list.dpo-pr@mail.mil>

Cc: White, Dana W SES OSD (US) <dana.w.white6.civ@mail.mil>; Manning, Robert III COL USARMY OSD PA (US) <robert.manning97.mil@mail.mil>; Crosson, Thomas C CIV OSD PA (US) <thomas.c.crosson.civ@mail.mil>; Summers, Charles E II SES OSD PA (US) <charles.e.summers4.civ@mail.mil>; Alexander, Jessica F CIV OSD PA (US) <jessica.f.alexander2.civ@mail.mil>; Sheets, John J Col USAF OSD PA (US) <john.j.sheets.mil@mail.mil>; Fullwood, Sarah Q Col USMC OSD PA (US) <sarah.q.fullwood.mil@mail.mil>; Seal, Laura M CIV OSD PA (US) <laura.m.seal.civ@mail.mil>; OSD Pentagon PA Mailbox Media Analysis <osd.pentagon.pa.mbx.media-analysis@mail.mil>  
Subject: FYSA: "U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out" (Bloomberg)

U.S. Soldiers With HIV Say Trump's New Policy Will Force Them Out - 7/19  
Bloomberg | Erik Larson

A U.S. soldier asked a federal judge to bar the Trump administration from firing HIV-positive service members from the military under a new "Deploy or Get Out!" policy intended to improve readiness.

The policy, announced in February, directs the Pentagon to discharge service members who can't be deployed outside of the U.S. for more than 12 consecutive months "for any reason." It takes effect Oct. 1.

An earlier directive put in place at the height of the AIDS crisis prevents service members with HIV from deploying overseas, meaning the new policy "makes it effectively impossible for people living with HIV to serve," the soldier said Thursday in a filing seeking an injunction against the rule. There are about 1,200 soldiers with HIV, according to the complaint.

"Soldiers, sailors, fighter pilots and marines are seeing their promising careers cut short, their dreams of service shattered and their health jeopardized due to antiquated notions about HIV and the stigma that results," Scott Schoettes, the soldier's lawyer with Lambda Legal, said in a statement.  
Afghanistan, Kuwait

Defense Secretary Jim Mattis said in February that the directive will ensure fairness in deployment rates by preventing some service members from being deployed more than others, the Military Times reported then.

Jessica Maxwell, a spokeswoman for the Department of Defense, didn't immediately respond to a request for comment.

The suit in federal court in Alexandria, Virginia, was filed in May by Nicholas Harrison, a 41-year-old Oklahoman whose National Guard unit was deployed to Afghanistan in 2006 and Kuwait in 2011, according to the complaint. He was diagnosed with HIV in 2012, shortly after returning from Kuwait.

Under the new policy, HIV-positive service members are already being discharged and having their duties restricted, according to his suit.

"People living with HIV have served in this nation's armed services with distinction for decades," according to the filing. "For much of that time, their service has been unjustifiably restricted based on misconceptions regarding the consequences of an HIV diagnosis."  
Outdated Policies

The soldier argues in his lawsuit that drugs developed in recent years allow HIV-positive people to live and work effectively for years without medical issues that get in the way of their duties.

"These medical advances should have resulted in an overhaul of military policies related to people living with HIV," Harrison said in the suit.

Harrison is joined in the case by OutServe-SLDN, a network of LGBT military personnel. The suit also seeks to block the policy that bars HIV-positive Americans from enlisting and prohibits them from obtaining officer status if they are diagnosed with HIV while already serving.

According to Harrison, that policy wrongfully prevented him from becoming a Judge Advocate General officer of the D.C. National Guard.

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Cheryl Ambalada  
Office of the Assistant to the Secretary of Defense for Public Affairs  
Media Analysis (OMNITEC Solutions, Inc.)  
Desk: (703) 695-0644

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