

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DECLARATION OF ANDREW E.
CARMICHAEL**

1 I, Andrew E. Carmichael, swear under penalty of perjury under the laws of the United
2 States to the following:

3 1. I am a Senior Trial Counsel at the United States Department of Justice and
4 counsel of record for Defendants in this action. I submit this declaration in support of
5 Defendants' Notice of Compliance Regarding ECF No 569.

6 2. Attached to this declaration as Exhibit A is a true and correct copy of the
7 declaration of Robert Easton, Director of the Office of Litigation Counsel. Exhibit A formally
8 asserts the deliberative process privilege over 52 documents on behalf of the Department of
9 Defense.

10 3. Attached to this declaration as Exhibit B is a true and correct copy of the
11 declaration of Colonel Jacqueline Emanuel, JAGC, USA, Chief of the Litigation Division,
12 United States Army Legal Services Agency. Exhibit B formally asserts the deliberative
13 process privilege over 1 document on behalf of the Department of the Army.

14 4. I have reviewed Exhibits A and B and the 53 documents over which the
15 Department of Defense and the Department of the Army formally asserts the deliberative
16 process privilege, which are being submitted for *in camera* review.

17 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is
18 true and correct.

19 EXECUTED this 28th day of August, 2020.

21 */s/ Andrew E. Carmichael*
22 ANDREW E. CARMICHAEL
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24 United States Department of Justice
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Counsel for Defendants

EXHIBIT A

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

MARK T. ESPER, in his official capacity as
Acting Secretary of Defense, *et al.*,

Defendants.

No. 2:17-cv-1297-MJP

**DECLARATION OF ROBERT E.
EASTON IN SUPPORT OF
DEFENDANTS' SUBMISSION
FOR *IN CAMERA* REVIEW OF
DOCUMENTS WITHHELD
UNDER THE DELIBERATIVE
PROCESS PRIVILEGE**

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel. I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and

coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria (“DoD Transgender Service Policy”).

3. I submit this declaration in response to the Court’s August 24, 2020 order directing the government to provide documents to the Court for *in camera* review. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

MATERIALS SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE

4. The Court directed DoD to submit for *in camera* review certain communications listed on the DoD privilege log that the government withheld from production under the deliberative process privilege. Based on my review of the relevant documents, I have determined that the documents submitted with this Declaration were created as part of DoD’s decision-making process and reflect the deliberative process undertaken by DoD personnel in developing and implementing the DoD Transgender Service Policy. DoD accordingly asserts the deliberative process privilege over each of the documents discussed in this declaration.

A. Documents Protected by the Deliberative Process Privilege

5. Of the documents submitted for *in camera* review, several concern communications from DoD personnel recommending particular DoD responses after the President’s tweet. One such document is DoD00002760. That document is an email from

Juliet Beyler, a senior member of the Transgender Military Service Working Group convened by Secretary Mattis on June 30, 2017, to Stephanie Miller, the Chair of that working group, providing recommendations regarding future work of the working group in light of the President's statements on Twitter. This document is pre-decisional. It was created long before the DoD Transgender Service Policy was finalized by DoD. This document is also deliberative. It reflects suggestions among DoD officials as to how to proceed given the President's Twitter statements.

6. Two other documents recommending particular responses to the President's tweets are DoD00002762 and DoD00002765. These documents reflect deliberations among Stephanie Miller, others in the Office of the Under Secretary of Defense for Personnel and Readiness, and Paul Haverstick, a DoD spokesperson, regarding a further statement from DoD in light of the President's tweets. The documents contain an email chain between senior members of the Department regarding whether and when to provide new guidance to DoD in light of the President's statements on Twitter. The email chain contains proposed questions and answers that were not adopted and never finalized, and were exchanged long before the DoD Transgender Service Policy was itself finalized.

7. A second category consists of drafts of a Transgender policy "briefing card," or briefing paper, from the Navy. Documents DoD00005911, DoD00012348, DoD00012351, DoD00012354, DoD00028488, DoD00086112, and DoD00095679 are all draft versions of that briefing card that were sent out to senior DoD staff members for review and comment. The documents all have a large "DRAFT" watermark appearing diagonally from left to right. These draft talking points are pre-decisional. They preceded DoD's decisions about how to respond to the President's tweets, as well as the Secretary of Defense's

ultimate decision on the DoD Transgender Service Policy. And they are deliberative because they were not the final version of the talking points circulated once all relevant stakeholders had an opportunity to review and edit. They capture the deliberative process undertaken by DoD as it developed and refined its response to the President's tweets.

8. The next category consists of a single email chain, document DoD00026991, which contains communications regarding proposed talking points to be sent to the White House about DoD's forthcoming actions in light of the President's statements on Twitter. The document in particular contains proposed questions and answers sent by Paul S. Koffsky, a senior DoD attorney performing the duties of the DoD General Counsel, to senior members of the staff of the Secretary of Defense for review and comment. In response, a senior staff member offered a reaction to the proposed questions and answers. This conversation is pre-decisional. It preceded the White House's decisions about how to explain DoD's forthcoming actions, as well as the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy. The conversation is also deliberative. It shows the mental impressions and thoughts of senior DoD officials as the Department worked to respond to the President's tweets. The initial email in the chain reflects a discussion with an attorney in the Office of the White House Counsel, and has been separately redacted of information subject to the Presidential Communications Privilege and attorney-client privilege.

9. The next category of documents reflects a high-level email conversation that includes Secretary of Defense Mattis concerning recommended next steps after the President's statements on Twitter. Documents DoD00083396, DoD00083400, DoD00083402 and DoD00085502 consist of an email chain providing recommendations to Secretary Mattis from senior staff members regarding potential courses of action to be taken in response to the

President's tweets. These documents are pre-decisional. They precede DoD's decision about how to respond to the statements, as well as the Department's February 22, 2018 final recommendation to the President on military service by transgender personnel. These documents are also deliberative. They contain recommendations from senior policy makers on how to proceed with policy on military service by transgender individuals and individuals with gender dysphoria. Documents DoD00083390 and DoD00084565 contain the same email discussion providing recommendations to Secretary Mattis, but also include a draft statement for review and comment by the senior staff members. Again, these documents are pre-decisional and deliberative because they capture the active decision-making process of senior DoD officials as they collaborated across email to provide comments and thoughts on draft documents.

10. Another category concerns draft Defense Health Agency ("DHA") talking points and media responses. Within DoD, talking points are developed by staff for senior leaders to arm these leaders with correct facts and policy positions so that DoD is speaking with one voice to its components, the Services, other parts of the U.S. Government, and the public. Talking points in draft form have not been approved by DoD leadership and therefore are not deemed appropriate for release. Here, document DoD00124749 entitled "Draft Talking Points POTUS Transgender Tweets 7/26/17" consists of draft talking points and proposed questions and answers to address media inquiries and inquiries from the Military Services in light of the President's statements on Twitter. The talking points and proposed questions and answers were sent to Raquel C. Bono, the Director of the DHA, by a senior member of her staff for her review and comment. Similarly, documents DoD00006295 and DoD00006370 consist of an email chain among senior staff members of DHA deliberating on

possible responses to several media inquiries they had received following the President's statements on Twitter. Again, these documents reflect the review, comment, and reflection by senior DoD officials concerning policy and possible public statements.

11. Another category of documents contains deliberations on a draft statement from the Secretary of Defense in light of the President's tweet. Documents DoD00033282, DoD00083972, DoD00083984, DoD00083986, DoD00083988, DoD00083990, DoD00083992, DoD00083994, DoD00084541, DoD00084545, and DoD00085464 are an email chain entitled "DRAFT Statement on TG" consisting of deliberations among senior officials within DoD. The emails contain a draft statement seeking review and comment from senior staff members from the Office of the Secretary of Defense. In addition, documents DoD00083326, DoD00083328, DoD00083330, and DoD00084539 comment on a version of a draft statement. These documents demonstrate the typical back-and-forth that takes place among senior officials in the development and refinement of a public statement by DoD before the statement is made public. They thus reflect DoD's deliberative process. They also are pre-decisional to the final public statement released by DoD, as well as the Department's ultimate policy decisions on the issue.

12. The next category of documents contains deliberations by Office of the Secretary of Defense staff concerning a news article unrelated to transgender service. Documents DoD00084000, DoD00084002, and DoD00085466 contain email deliberations of senior officials in the Office of the Secretary of Defense regarding a senior military official's response to certain international events affecting national security. The discussion is unrelated to the topic of transgender military service and appears in the collection only because an accompanying news story mentions the President's statements on Twitter. A

redacted version of this email disclosing the news story on the President's statements on Twitter will be provided to Plaintiffs.

13. The next category of documents concerns a draft statement on North Korea. Documents DoD00084535 and DoD00084537 entitled "Statement by Chief Pentagon Spokesperson Dana W. White on North Korea IBCM launch" contain a draft statement by the Chief Pentagon spokesperson on the launch of an ICBM from North Korea and comments on that draft statement. The statement is unrelated to transgender military service and appears in the collection only because the email chain briefly references the release of a separate and unrelated statement on military service by transgender individuals. A redacted version of this email disclosing the reference to the statement on military service by transgender individuals will be provided to Plaintiffs.

14. An additional category of documents concerns recommendations on how to respond to other news items unrelated to transgender service. Documents DoD00083924 and DoD00083928 contain recommendations from the Pentagon Chief Spokesperson regarding how to respond to various press inquiries involving the U.S. presence in Afghanistan and DoD's South Asia and Afghanistan strategy. The deliberations and recommendations contained in the email do not involve military service by transgender individuals and appear in the collection only because an inquiry from a reporter concerning military service by transgender individuals is briefly mentioned at the bottom of the chain. A redacted version of this email disclosing the comment on the reporter's inquiry will be provided to Plaintiffs.

15. Another category consists of a single withheld document dealing with talking points for a phone call between the Secretary of Defense and Senator Mitch McConnell. Document DoD00095473 contains notes prepared for the Secretary of Defense for a phone

call with the Senate Majority Leader on August 2, 2017. The notes contain many of the Secretary's strategic, national security, and budgetary priorities for the Department of Defense. The notes do not mention military service by transgender individuals and appear in the collection only because they were attached to an email chain that earlier had referenced other potential topics for discussion, including transgender service. This withheld document is deliberative. It reflects the confidential opinions and deliberations of the Secretary of Defense and Deputy Secretary of Defense. It is also pre-decisional. It precedes both the call with Senator McConnell and subsequent decisions on the strategic, national security, and budgetary priorities addressed in the notes.

16. The next category of withheld documents consists of a discussion between the Secretary of Defense and Chairman of the Joint Chiefs of Staff regarding the development of a statement in light of the President's tweet. Documents DoD00085436, DoD00085460, and DoD00085462 contain email deliberations between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff regarding a statement issued to other senior officers following the President's statements on Twitter. The documents reflect thoughts and opinions about the DoD Transgender Service Policy between the most senior officials within DoD. In addition, it is pre-decisional to both the immediate question of how DoD would respond to the President's tweets and the ultimate issue of policy concerning military service by transgender individuals.

17. A final category of documents concerns recommendations from Stephanie Miller on a Department response after the President's tweet. Documents DoD00002750, DoD00002754, DoD00002759, DoD00012356, DoD00052032, and DoD00128609 are an email chain from Ms. Miller to senior officials from the Office of the Under Secretary for

Personnel and Readiness providing recommendations pertaining to the future duties of the Transgender Military Service Working Group and recommendations regarding personnel policy changes in light of the President's statements on Twitter. These documents reflect the real-time thoughts and deliberations of senior DoD personnel as they worked to develop and refine the Department's policy.

18. As these descriptions demonstrate, these documents are privileged because they reflect the frank discourse and dialogue between senior DoD officials that lead to robust and well-informed decision-making. In addition, as discussed below, compelled disclosure of these documents would substantially and materially chill deliberative discussions across the Department.

B. The Chilling Effect of Compelled Release

19. As mentioned in other filings, release of DoD information protected by the deliberative process privilege in this case would have a substantial and immediate chilling effect on policy deliberation and development within DoD writ large. The DoD decision-making apparatus relies on open and candid conversations among leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military Services on various courses of action for any decision. Matters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests, and leaders within the Department encourage open and candid discussions about the merits of such actions. Opinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process.

20. In addition, the geographically dispersed nature of DoD activities and the

high operational tempo with which many of the Department's activities are conducted mean that deliberative and pre-decisional conversations frequently occur via email. Leaders across the Department routinely solicit feedback, thoughts, and opinions on highly sensitive topics, including those with national-security implications, using email so that those who need to review and weigh-in on a decision can do so in real time regardless of their physical location.

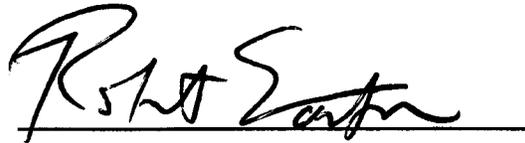
21. The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DoD personnel knew that their thoughts, impressions, and opinions, including those reflected in draft documents, whether related to DoD transgender policy or otherwise, would be open to scrutiny, they may hesitate to provide their genuine positions on potential courses of action, not only as to military personnel decisions but regarding any politically sensitive decision that DoD faces in the future, for fear that these discussions could be revealed to wider audiences. The lack of essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk.

22. These risks are heightened with respect to the documents discussed in this declaration. These documents involve discussions among the highest levels of the military and the Department including, for example, the Secretary of Defense and the Chairman of the Joints Chiefs of Staff. The potential consequences for national security of chilling the decision-making process at that level are significant and should be given due weight and consideration.

23. Finally, the disclosure of deliberative, pre-decisional input, analysis, and opinions from these individuals would breach DoD's commitment to maintain the confidentiality of participants' honest deliberations regarding the sensitive and complex topic of transgender service. This would irreparably harm DoD's ability to obtain candid and open input on any subject in the future, not just regarding military service by transgender individuals.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 28th day of August 2020, Arlington, VA.

A handwritten signature in black ink, appearing to read "Robert Easton", written over a horizontal line.

ROBERT E. EASTON
Director, Office of Litigation Counsel

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,)
)
 Plaintiffs,)
 v.)
)
 DONALD J. TRUMP, et al.,)
)
 Defendants.)
 _____)

No. 2:17-cv-1297-MJP

DECLARATION OF COLONEL JACQUELINE L. EMANUEL

I, Jacqueline L. Emanuel, hereby state and declare as follows:

1. I am a Colonel (COL) in the U.S. Army currently assigned as the Chief, Litigation Division, United States Army Legal Services Agency. I have been in this position since July 2019. As a part of my duties, I am responsible for providing oversight for litigation concerning the Department of the Army, to include the matters in the above-entitled case.

2. I make this declaration in my official capacity as the Chief of the U.S. Army Litigation Division and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties. I submit this declaration in response to the Court's Order Re: August 24, 2020 Status Conference (Doc. 569). In particular, on behalf of the Army, I am asserting the deliberative process privilege over one document, discussed below, and addressing the basis for withholding that document solely pursuant to the deliberative process privilege.

3. Army_10010473.0001(USDOE00119503) is a word document that contains a series

of questions posed by Dr. Mark T. Esper, then a nominee to be Secretary of the Army (currently the Secretary of Defense), in order to prepare and develop talking points for his confirmation hearing as Secretary of the Army before the United States Senate Committee on Armed Services (SASC). In response to Dr. Esper's questions, this document contains recommended responses on several topics, only one of which is military service of transgender individuals and individuals with gender dysphoria. The other topics discussed in the document include personnel readiness and unit deployability, retention rates, and the Army's position on gender integration. This document is an incomplete draft—while certain topics (highlighted in green) include recommended responses to Dr. Esper's questions, other topics (highlighted in yellow) do not.

4. The recommendations contained in this document were generated prior to, and in preparation for, Dr. Esper's SASC confirmation hearing. They are thus pre-decisional to the testimony he ultimately offered in that hearing. The entire document is also a non-final draft, which by its very nature is predecisional and deliberative. Dr. Esper's questions and the associated recommendations reflect the candid advice of government officials on how to address topics critical to the Army's operations in the context of his confirmation hearing. Disclosure of the document would reveal the deliberative process undertaken by the Army in preparing Dr. Esper for Senate confirmation.

5. Obtaining Senate confirmation of the Army's leadership is critical to the operations of the Army. The release of this document would harm the Army by chilling open and candid requests for, and the provision of, information and advice necessary for its leaders

to make fully-informed decisions and to prepare for their confirmation hearings. If the individuals responsible for providing the information in this document were aware that their comments would be subject to external scrutiny, they would be less willing to provide open and honest input regarding their views on a host of policies likely to be discussed during confirmation hearings. Likewise, if Army nominees were aware that the development of material generated in preparation for their confirmation hearings would be subject to external scrutiny, it would have a chilling effect on their own requests for advice and recommendations. In short, disclosure of the document at issue would lead to a direct harm to the Army's capacity to successfully obtain Senate confirmation of its nominees and thus execute its mission.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of August 2020.

A handwritten signature in black ink, appearing to read "Jacqueline L. Emanuel". The signature is fluid and cursive, with a large initial "J" and "E".

JACQUELINE L. EMANUEL
Colonel, Judge Advocate
U.S. Army