

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

No. 2:17-cv-1297-MJP

**DECLARATION OF ROBERT E.  
EASTON IN SUPPORT OF  
DEFENDANTS' SUBMISSION ON  
THE FOURTH *WARNER* FACTOR**

DONALD J. TRUMP, *et al.*,

Defendants.

**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” or “DoD Policy”).

3. I submit this declaration in response to the Court’s November 25, 2020 Order Re: Documents Submitted for *In Camera* Review (Dkt. Nos. 599, 624, 633, 639). *See* Dkt. No. 641. In particular, I submit this declaration to demonstrate how DoD would be injured, now or in the future, upon the release of the following documents designated by this Court as pre-decisional and deliberative but requiring supplementation with respect to the fourth *Warner* factor.

4. First, there is foreseeable harm in the release of documents that contain the candid thoughts, impressions, edits, and suggestions of senior DoD officials. The information in these documents pertains to a sensitive, high-profile, and politicized topic and demonstrates the extent of individual participation in the formulation of DoD policy. It is with respect to such sensitive issues that DoD relies most heavily on the candid assessments of its subject matter experts, typically career civilian and military officials, who would be less willing to fully share their opinions if their deliberative and editorial processes were subject to external, third-party scrutiny. Some of the documents at issue in this declaration involve deliberations of the most

senior officials at the Department of Defense, including the Secretary of Defense himself. The most senior officials at the Departments of Defense and Homeland Security and the Military Services must be able to converse freely and candidly amongst themselves and with their staffs to make well-informed decisions concerning the composition of the fighting force. The release of these documents would deter senior officials—often possessing the most experience and greatest subject matter expertise—from participating in open discussions concerning sensitive issues, especially when these candid thoughts are specifically attributable to them. Any inhibition on senior officials’ ability to speak candidly to one another concerning the composition of the fighting force would directly affect national security.

5. In addition, release of draft, non-final communications and memoranda could cause public confusion and likely would deter senior DoD officials from seeking comments and input from subject matter experts out of fear that early drafts of their non-final work product would be released before the authorized signer had the opportunity to review language and had obtained approval from superiors within the Department. Direct, unguarded communication between subject matter experts within DoD is critical to improving its policies and processes, and to achieve its mission. Reluctance of its personnel to communicate freely and openly would degrade DoD’s decision-making process writ large.

6. Moreover, release of edits, comments, opinions, and recommendations pertaining to drafts from subject matter experts specifically attributable to those experts would likely deter their participation in future projects. This is particularly true when the policy concerns a sensitive subject involving issues likely to be litigated. If subject matter experts know that their candid advice could be used against them or others within the DoD, or against the Department itself in legal proceedings, they would be less likely to participate in the policy

development process, thereby depriving DoD of the recommendations and opinions of some of its most valued experts.

7. Relatedly, the disclosure of internal deliberations may cause professional harm to career DoD officials due to their close association with a controversial DoD policy. For example, Mr. Anthony Kurta's nomination as Deputy Under Secretary of Defense for Personnel and Readiness ("DUSD (P&R)") stalled in the Senate after being reported favorably by the Senate Committee on Armed Services largely because of his involvement in the transgender service policy. This has resulted in harm to the Department of Defense as well as Mr. Kurta because his extensive expertise and experience could not be utilized in the Deputy Under Secretary position. Similarly, release of these documents is likely to cause further harm to the Department and other senior individuals who may be considered for appointments. Consider the notes of Ms. Rachel Gleischman, Special Assistant to the Secretary of Defense and White House Fellow, from the November 9, 2017 Panel of Experts meeting where at least one Panel member raised this career advancement issue if Panel members took attributed positions.<sup>1</sup> It was in part because of this type of concern that the Panel agreed that deliberations should occur on a non-attribution basis. DoD officials were acutely aware of this risk and counseled that the participants' opinions and thoughts would be protected. If officials believe that they face harms to their careers as a result of their involvement in sensitive or high-profile matters, they may be less willing to participate in policy development concerning those matters and less willing to provide their candid assessments, which would harm the overall quality of DoD's final policies.

8. In addition, release of these deliberations would break faith with military and senior civilian officials who took part in the Panel of Experts under a non-attribution promise.

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<sup>1</sup> See DOD00001691.

At the beginning of the Panel process, a policy of non-attribution was established for Panel meetings. Under that policy, anything said in a particular meeting was not attributed, directly or indirectly, to the person who said it without the speaker's express permission, a common practice within DoD when sensitive topics are addressed. The underlying purposes of DoD's non-attribution policy include encouraging the free, open, and robust exchange of information and ideas and facilitating the full and candid expression of opinions and recommendations. Non-attribution applies to both oral and written statements.<sup>2</sup>

9. Finally, this chilling effect harm would occur even with the protective order because a party would have the opportunity to use the material to examine or cross examine witnesses in depositions or other proceedings in an effort to second-guess their underlying advice and analysis, highlight any preliminary or contrary views of certain Department officials, and use the views of some Department officials to attack the views of other officials. This would seriously undermine the working relationships among national security officials and influence their decisions to abstain or provide less than complete candor during policy development.

10. This declaration identifies 11 categories of documents that are subject to the deliberative process privilege and that, if released, would harm DoD. Numbered paragraphs 11 to 46 below address specific categories of such documents and the harm that their release would foreseeably cause.

**A. Documents Critiquing the 2016 Study by RAND Corporation**

11. As previously stated in the Declaration of Platte B. Moring In Support Of Defendants' Submission For *In Camera* Review Of Documents Withheld Under the Deliberative

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<sup>2</sup> See Defendants' Objections, Responses, and Supplemental Responses to Plaintiffs' Interrogatories 16, 17, and 18 to Secretary Esper and the United States Department of Defense; Second Supplemental Response to Interrogatory 18.

Process Privilege submitted on September 14, 2020 (“Moring Declaration”), several DoD officials provided non-final views, edits, and opinions regarding DoD policy that are specifically attributable to them. As noted in the paragraphs above and in further detail as to each document below, there is foreseeable harm in the release of these documents. DoD00007452, DoD00007451, DoD00087724, DoD00137997, DoD00137999, DoD00141675, DoD00133478, DoD00138045, DoD00141490, and DoD00133477 are all draft information papers discussing and critiquing the 2016 study by DoD contractor RAND Corporation entitled “Assessing the Implications of Allowing Transgender Personnel to Serve Openly,” prepared for the benefit of senior officials in the Office of the Under Secretary of Defense for (Personnel and Readiness) (“OUSD (P&R)”) and the Office of the Secretary of Defense (“OSD”) in formulating DoD’s policy and drafting the DoD Report and Recommendations on Military Service by Transgender Persons (“DoD Report”).<sup>3</sup>

12. The draft papers themselves were primarily written by senior officials from OUSD (P&R) who participated in the formation and implementation of the Department’s prior policy and were present for several briefings from RAND regarding its findings. Portions of these information papers were later incorporated into the DoD Report.<sup>4</sup> As drafts, these documents were not finalized and their disclosure would reveal the preliminary thoughts and opinions of senior DoD officials prior to official approval by the individuals with the proper statutory authority to approve military personnel policy.<sup>5</sup> Release of a draft policy position concerning the 2016 RAND study could result in public and internal confusion between the official DoD position regarding the RAND study (included in the DoD Report and Secretary

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<sup>3</sup> See Dkt. 598-1, Paragraph 8 of the “Moring Declaration.”

<sup>4</sup> See, e.g., Dkt. 216-2 at 13-14, 23-24, 26-27, 31, 33-35, 38-40, 44.

<sup>5</sup> See, e.g., 10 U.S.C. Chapter 4.

Mattis's cover memorandum) and the unapproved preliminary opinions of Department officials. That confusion could then give rise to a breakdown of relations between the Department of Defense and its contractor RAND as RAND attempts to distinguish between official DoD positions and preliminary opinions of senior DoD officials.

13. Moreover, release of non-final drafts would deter senior DoD officials from seeking the full and frank assessments of other officials, including in this case, subject matter experts from the Office of the Assistant Secretary of Defense for Health Affairs ("DoD Health Affairs"). This is due to fear that early drafts of their non-final work product would be released and become the basis for examination and cross-examination in litigation against them or the DoD, or used against them in the public forum, possibly harming them professionally due to their close association with a controversial DoD policy. This risk is further heightened here where the draft documents are primarily attributed to specific individuals who had not yet had the opportunity to finish their individual review or solicit internal review and input from other DoD officials, and critically had not yet obtained ultimate approval from the senior official authorized to release views regarding the RAND Report on behalf of DoD.

14. DoD00122716 and DoD00140449 are identical versions of a separate memorandum prepared by Dr. Terry Adirim, then a senior doctor and subject matter expert in DoD Health Affairs. DoD00127172 is an email from Dr. Adirim to Mr. Hebert, then-Deputy Assistant Secretary of Defense (Military Personnel Policy), which transmitted her memorandum. The body of the email contains a characterization of the draft information paper and expresses the opinions of two senior DoD officials concerning the content of the draft information paper. DoD00087717 and DoD00087723 are separate email chains containing additional draft

comments to the draft RAND memorandum from senior officials within OUSD (P&R) including deliberations attributable specifically to them.

15. These emails reflect Mr. Hebert's solicitation of input from Dr. Adirim on the draft RAND information paper and contain her opinion and recommended changes regarding that draft paper based on her subject matter expertise. DoD relies on the coordinated relationship between senior personnel officials and its medical officials to craft DoD policy that impacts the total force, which includes those seeking entry into the armed forces and those who must depart prior to completion of an enlistment or career.

16. For example, at the time of this email exchange Mr. Hebert and Dr. Adirim served as co-chairs of the Medical Personnel Executive Steering Committee (MEDPERS) that periodically reviews and provides recommended updates to the USD (P&R) regarding DoD Instruction ("DoDI") 6130.03, DoD's Medical Standards for Appointment, Enlistment, or Induction into the Military Service. The release of opinions and recommendations attributable to specific senior individuals and the possibility that their opinions would become the subject of examination and cross-examination, possibly juxtaposed against other DoD experts in civil proceedings, or used against them publically would deter personnel experts like Mr. Hebert from soliciting input from specialized medical experts in an area of particular concern for DoD—fitness for military duty. It likewise would deter the participation of medical experts like Dr. Adirim. Reluctance of personnel and medical experts to communicate freely and openly would degrade MEDPERS decision-making as well as DoD decision-making writ large.

**B. Documents Regarding Under Secretary Wilkie's Memorandum on Universal Non-Deployability**

17. The next category of documents—DoD00000311, DoD00000314, and DoD00138056—relates to an action memorandum from Under Secretary of Defense for

Personnel and Readiness Wilkie to the Secretary of Defense providing detailed recommendations regarding the future development of a military policy on universal accession and retention standards and the drafting of that policy's DoD Instruction.<sup>6</sup> Disclosure of the Under Secretary's early policy advice to the Secretary of Defense, which occurred approximately five months before the instruction was finalized, could result in public confusion between the official DoD position regarding universal accession and retention standards reflected in the published DoDI and the unapproved preliminary opinions of Under Secretary Wilkie or those who provided information to him. Moreover, disclosure of the Under Secretary's early policy advice to the Secretary of Defense could result in confusion among the Military Services, who are ultimately tasked with carrying out DoD's policy.

18. In addition, the document identifies, critiques and offers proposed solutions to the perceived shortfalls in DoD personnel policies that in the opinion of Under Secretary Wilkie necessitated additional guidance to the force at large. Release of this document, which promoted a change in policy, would reduce the willingness of senior DoD officials to provide their uninhibited opinions, discuss policies' perceived deficiencies, and offer solutions. Again, DoD personnel would be less willing to share such opinions if they were subject to external scrutiny and could become the basis for litigation, or could harm them professionally. As a result, DoD leadership would be less likely to learn of potential problems with its current policies or recommendations for improving them.

**C. Documents Reflecting Non-Final Views, Edits and Opinions Regarding the DoD Transgender Service Report Attributable to Specific Officials**

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<sup>6</sup> See Dkt. 598-1, Paragraph 9 of the "Moring Declaration."

19. As stated in Paragraph 10 of the Moring Declaration, several DoD officials provided non-final views, edits, and opinions regarding the DoD Report specifically attributable to them. Release of such documents, especially where comments are attributable to specific DoD employees, would chill future participation in DoD policy making due to fear of external scrutiny and would cause confusion as to the final position of DoD among the evolving draft versions and the differing, even contrasting, views found within DoD. Moreover, the release of these documents could harm internal relations between DoD senior leaders and subject matter experts by allowing a motivated litigant to set the views of various DoD officials against each other. The harms caused by the release of particular documents in this category are further discussed below.

20. DoD00000364 is an early working outline of the DoD Report used to brief both the Secretary of Defense and the USD (P&R) shared by Ms. Stephanie Barna, then-Acting Assistant Secretary of Defense for Manpower and Reserve Affairs, with senior OUSD (P&R) officials Mr. Hebert and Ms. Miller, Director of Military Accessions Policy, and Deputy General Counsel (Legal Counsel), Mr. Ryan Newman. DoD00000363 is the circulating email in which Ms. Barna seeks input from Mr. Hebert, Ms. Miller, and Mr. Newman. DoD00007828 and DoD00007829 are comments from Mr. Hebert, Ms. Miller, and Mr. Newman on that early working outline. As an early working outline of the DoD Report, DoD00000364 contains the preliminary thoughts and opinions of senior DoD officials prior to the official approval of DoD's policy by individuals with the proper statutory authority to approve personnel policy applicable to the military force.<sup>7</sup> Ms. Barna, Mr. Hebert, and Ms. Miller are all senior DoD officials who are subject matter experts in the field of military personnel matters from whom Mr. Newman

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<sup>7</sup> See, e.g., 10 U.S.C. Chapter 4.

sought frank and fulsome comments in drafting early outlines of the DoD Report. Release of early drafts may cause public and internal confusion between the official DoD policy set by the proper authorities and the unapproved preliminary opinions of Department officials. That confusion could then give rise to public distrust of the DoD by leading others to believe that DoD policy was not approved by the proper legal authorities delegated to DoD by statute. Further, release of non-final drafts would deter senior DoD officials from seeking the full and frank assessments of other officials, including in this case subject matter experts from OUSD (P&R), due to fear that early drafts of their non-final work product would be released and used in examination and cross-examination, or used in a public forum to harm them professionally due to their close association with a controversial DoD policy. This risk is greater here where the draft documents are primarily attributable to individuals who had not yet had the opportunity to finalize their review or receive input from other DoD officials.

21. DoD00086397, DoD00086895, DoD00122709, DoD00122714, DoD00127163, DoD00127164, DoD00127165, and DoD00137650 are email deliberations among senior OUSD (P&R) and OSD staff seeking and obtaining comments from Dr. Adirim and medical subject matter experts on the DoD Health Affairs staff specifically attributable to them. DoD00122597, DoD00127095, DoD00127103, and DoD00139728 are copies of a memo from Dr. Adirim, which contains her review and comments regarding some of the studies cited in a draft of the DoD Report. DoD00118874, DoD00120582, and DoD00127119 are documents where Dr. Adirim separately seeks input from other medical professionals to help her answer questions from senior DoD and OUSD (P&R) officials pertaining to the DoD Report. DoD00122665, DoD00140098, DoD00122713, DoD00127142, DoD00140066, and DoD00140117 are email communications that reflect Dr. Adirim separately seeking and receiving input from medical

professionals on her own staff to help her answer questions from senior DoD and OUSD (P&R) officials pertaining to the DoD Report and their response to those questions. DoD00137509 is a document discussing some of the input OUSD (P&R) received back from Dr. Adirim and her staff of medical experts.

22. These emails all reflect the solicitation of input by military personnel and medical experts within DoD. Release of edits, comments, opinions, and recommendations pertaining to a draft of the DoD Report specifically attributable to Dr. Adirim and medical professionals on her staff would likely deter subject matter experts from participating in future DoD policy making. This is particularly true where the topic of review is of a politically sensitive nature likely to give rise to future litigation. If subject matter experts know that their candid advice could become a liability, they would be less likely to participate in the policy development process, depriving DoD of the recommendations and opinions of some of its most valued experts. DoD routinely relies on the coordinated relationship between senior military personnel experts and medical officials (and these two DoD offices in particular) to craft DoD policy that impacts the total military force. The release of opinions and recommendations attributable to specific senior individuals would deter personnel experts from soliciting input from specialized medical experts in an area of particular concern for DoD—fitness for military duty. It likewise would deter the participation of medical experts in open discussions with personnel experts concerning these sensitive issues. Reluctance of personnel and medical experts to communicate freely and openly would degrade decision-making with respect to medical readiness of the force as well as DoD decision-making at large.

23. DoD00086835, DoD00086891, Army\_10030439, Army\_10030440, and Army\_10030923 are e-mails that reflect deliberations between DoD and Army personnel in

drafting the DoD Report. In each of these emails Mr. Newman solicited comments, edits, and suggestions on a working draft of the DoD Report on behalf of OSD and OUSD (P&R) from a senior Army medical doctor, Colonel Mary Krueger, who had extensive experience working on issues involving military service by transgender individuals and individuals diagnosed with or having a history of gender dysphoria.

24. There is foreseeable harm in the release of these documents, which contain the candid thoughts, impressions, edits, and suggestions of a senior ranking Army officer and senior DoD attorney. The information in these documents pertains to a sensitive and politicized topic and demonstrates the extent of Mr. Newman's and Colonel Krueger's participation in the formulation of the DoD policy, including non-final views, edits, and opinions attributable to Mr. Newman and Colonel Krueger. Both DoD00086835 and DoD00086891 reflect Mr. Newman's solicitation of input (along with that input and back and forth deliberations regarding that input) from Colonel Krueger on the draft DoD Report. Army\_10030439 and Army\_10030440 contain specific follow up questions Mr. Newman had in response to Colonel Krueger's comments and her responses and additional proposed edits to a draft of the DoD Report. Army\_10030923 contains an additional recommendation from Colonel Krueger offered to Mr. Newman pertaining to DoD's proposed policy based on her experience implementing DoD's prior policy regarding transgender military service and service by individuals with gender dysphoria.

25. The release of these documents would deter senior officials from the Military Services—often possessing the most experience and greatest subject matter expertise because they have on-the-ground experience implementing DoD policy—from participating in open discussions concerning sensitive issues. It is in connection to such issues that DoD most relies

on the candid assessments of experts from the Military Services, and as a result, DoD senior officials would be less willing to seek input from the Services experts if their deliberative, editorial processes and unapproved draft policy language were subject to external scrutiny and could be the subject of examination and cross-examination in civil proceedings. And for the same reason, the release of these documents would deter the subject matter experts within the Military Services from providing full and frank assessments to DoD, thereby degrading communication between the Services and DoD. Direct, unguarded communication between the Military Services and DoD is critical. DoD needs Service input to improve its policies and processes, and to achieve its mission; for the same reasons, the Services must be able to provide unvarnished input to DoD. Simply put, reluctance of Service personnel to communicate freely and openly, both internally and to DoD, would harm national security.

**D. Draft Outlines of Potential "Ways Forward" on Military Service By Transgender Individuals**

26. DoD00137623, DoD00141426, DoD00141428, DoD00141691, and DoD00141693 are five documents that contain draft outlines of potential “ways forward” for accessing transgender individuals and individuals with gender dysphoria into the military on January 1, 2018 and thereafter, pursuant to preliminary injunctions issued by several federal district courts. The draft outlines were prepared by senior DoD officials in OUSD (P&R) for use in briefing the Secretary of Defense.<sup>8</sup>

27. Release of these documents would cause public and internal confusion (within the Department of Defense and the Military Services) as to the DoD policy that is currently in place (reflected in the DoD Report and Secretary Mattis’s cover memorandum) as they specifically discuss potential ways forward in implementing the Carter accessions policy, which

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<sup>8</sup> See Dkt. 598-1, Paragraph 15 of the “Moring Declaration.”

became moot following the Supreme Court’s stay of the district court injunctions. These documents also specifically attribute positions and courses of action (contemplated but not necessarily taken) to individual DoD officials, and the release of these views could chill future participation by these or other officials in future DoD policy making.

**E. Draft Sec. Wilkie Action Memo Providing Policy Guidance Regarding Military Service of Transgender Individuals**

28. The next category involves a draft action memorandum containing policy guidance from Under Secretary Wilkie to the Military Services on the proposed policy regarding military service of transgender individuals and individuals with gender dysphoria. These documents—DoD00141762, DoD00010487, DoD00010488, DoD00137639, DoD00141440, DoD00141506, and DoD00142675—reflect the advice, opinions and recommendations of senior DoD officials in the form of comments and edits they provided on the draft guidance.<sup>9</sup> DoD00137639 and DoD141440 include comments and edits attributable to specific individuals. In addition, AF\_00038439, Army\_10024452, and Army\_10024592 are versions of this draft action memorandum containing suggested edits from Air Force officials, again attributable to these officials.<sup>10</sup>

29. There is significant foreseeable harm in the release of these documents as it would chill candid, unguarded feedback at all levels of DoD and between DoD and the Military Services. If senior and even lower-level personnel learned of the release of their work product in this manner, they may be less likely to provide unfiltered feedback to their superiors. In addition, at the time of these edits to the draft DoD memorandum, the above-referenced case and three

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<sup>9</sup> See Dkt. 598-1, Paragraph 16 of the “Moring Declaration.”

<sup>10</sup> I understand that the declaration of Lieutenant Colonel (and Colonel-select) Jacqueline M. Stingl addresses the harm of disclosure of the edits to this draft action memorandum by senior Air Force officials. See AF Decl., Paragraph 5.

related cases were in active, high-profile litigation. DoD and military officials may be understandably concerned about the negative consequences to their personal and professional reputations if they become associated with controversial or high-profile policies and decisions. If their names are tied to such documents, the risk of harm is significant regardless of whether they made substantive or administrative inputs. Moreover, the risk of harm is present regardless of whether a protective order is in place because a motivated party could still second-guess the underlying advice and analysis in depositions and other proceedings, potentially confronting deponents with the document in question. Such a confrontation could later influence these officials to abstain or provide less-than-complete candor regarding this or any future policy that is politically sensitive. Ensuring vigorous contribution at all levels of the organization is essential to effective decision-making at the top. Reluctance to provide candid input among lower ranking personnel would directly impede the ability of senior officials to be well informed. Further, release of such correspondence could also deter senior DoD officials from seeking the assessments of the Military Services due to fear that early drafts of their non-final work product would be released before the author had the opportunity to finish editing language and had briefed the Secretary of Defense prior to its publication.

**F. Early Drafts of an Action Memo for Secretary Mattis Regarding Military Service of Transgender Individuals**

30. The next category of documents consists of two documents, DoD00141600 and DoD00141343, which are early drafts of an Action Memo to be sent by Under Secretary Wilkie to the Secretary of Defense, via the Deputy Secretary of Defense, regarding military service by transgender individuals.<sup>11</sup> This document is an early draft prepared by Mr. Hebert for internal

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<sup>11</sup> See Dkt. 598-1, Paragraph 16 of the “Moring Declaration.”

staffing and had not been reviewed or approved by Mr. Wilkie, the Deputy Secretary of Defense, or the Secretary of Defense.

31. Similar to other documents discussed above, disclosure of this Action Memo could result in public confusion regarding the final aspects of the policy, especially a policy that is controversial, where the actual contours of the policy may be misrepresented. Moreover, release of early drafts of an Action Memo that has yet to undergo internal review by more senior officials may cause internal confusion between the official DoD policy set by the proper authorities and the unapproved preliminary drafts of Department officials. That confusion could then give rise to public distrust of the Department by leading others to believe that DoD policy was not approved by the proper legal authorities delegated to the Department by Congress. Further, as these drafts identify specific individuals, it would reduce the willingness of senior Department officials to provide their uninhibited opinions, discuss perceived policy deficiencies, and offer solutions. This is particularly harmful when this advice comes from subject matter experts, such as those within OUSD (P&R), due to fear that early drafts of their non-final work product would be released and become the subject of litigation or enter the public discourse, possibly hindering them professionally due to their close association with a controversial DoD policy.

**G. Draft Action Memo Regarding Additional Information Requested by Secretary Mattis**

32. The next category consists of three draft action memoranda from Under Secretary Wilkie to the Secretary of Defense regarding requests by the Secretary of Defense for additional information pertaining to military service by transgender individuals and individuals with gender dysphoria. The three documents are DoD00141480, DoD00131384 and

DoD00142951.<sup>12</sup> These contain specific questions of the Secretary of Defense on an evolving policy, attributable directly to him, as well as the answers provided by his most senior officials, attributable to them.

33. Disclosure of these three documents would result in direct harm to DoD. If senior military officials knew that their candid deliberations could harm them professionally or could become the subject of examination and cross-examination, then they would be less likely to participate in the policy development process, depriving DoD of the recommendations and opinions of some of its most valued experts. The release of these documents would deter senior DoD officials, like Mr. Wilkie, or subject matter experts within the Department from participating in open discussions concerning sensitive issues. It is in connection with such issues that DoD most relies on the candid assessments of its experts, but DoD senior officials would be less willing to seek input from them if their deliberative, editorial processes and unapproved draft policy language were subject to external scrutiny and could be the subject of examination and cross-examination in civil proceedings. For the same reason, release of these documents would deter subject matter experts from providing full and frank assessments to DoD, degrading communication internally within DoD. DoD needs such input to improve its policies and processes, and to achieve its mission; for the same reasons, senior officials and subject matter experts must be able to provide unvarnished input to the Secretary of Defense. Reluctance of its personnel to communicate freely and openly would degrade policy development within DoD.

**H. Draft of a Secretary of Defense Briefing Card that Includes Secretary Mattis's Handwritten Markings and Emails Pertaining to that Briefing Card**

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<sup>12</sup> See Dkt. 598-1, Paragraph 17 of the "Moring Declaration."

34. The next category of documents includes DoD00083667, DoD00010501, DoD00142957, DoD00142994, DoD00088299, DoD00007804, which relate to preparations for meetings with Secretary Mattis to discuss policy concerning military service by transgender individuals and individuals diagnosed with gender dysphoria.<sup>13</sup> These documents include a “briefing card” for a January 17, 2018 meeting created in advance of the meeting that reflects advice and recommendations to be presented to Secretary Mattis, as well as the Secretary’s handwritten markings (DoD00083667),<sup>14</sup> emails pertaining to that meeting (D00007804, DoD00142994, DoD00142957) and a follow-up meeting on January 19, 2018 (DoD00010501), and discussions between Secretary of Defense Senior Advisor Mr. William Bushman and Mr. Wilkie concerning the January 17, 2018 meeting including topics the Secretary of Defense would likely want to discuss (DoD00088299).

35. The briefing card and the email between senior DoD officials contains deliberations on how to prepare for the meeting with Secretary Mattis that are attributable to specific individuals, including details from the meeting with the Secretary of Defense, the questions Secretary Mattis asked (shown through email discussions of OSD staff following briefing), and handwritten comments indicating questions he had during the briefing. Thus, these documents involve deliberations of the most senior officials at the Department of Defense, including the Secretary of Defense himself, and the harm from the release of these documents is easily foreseeable. These senior officials must be able to converse freely and candidly amongst themselves and their staff to make well-informed decisions concerning the composition of the fighting force. The release of these documents would deter senior officials—often possessing

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<sup>13</sup> See Dkt. 598-1, Paragraph 20 of the “Moring Declaration.”

<sup>14</sup> The Court has found that four versions of this document D0D00088300, D0D00088391, D0D00083670, and D0D00088408 do not require a separate *Warner* analysis.

the most experience and greatest subject matter expertise—from participating in open discussions concerning sensitive issues, especially when these candid thoughts are specifically attributable to them. Any inhibition on senior officials’ ability to speak candidly to each other concerning the composition of the fighting force would directly affect national security. Moreover, if senior military officials knew that their candid deliberations could be used against them in the public or used in litigation against the Department, then they would be less likely to participate in the policy development process, depriving DoD of the recommendations and opinions of some of its most valued experts.

**I. Draft Presidential Memo Prepared by DoD for the President’s Signature**

36. The next category consists of three non-final drafts of the March 2018 Presidential Memorandum.<sup>15</sup> DoD00086339 is a draft that was sent to DoD’s Office of the General Counsel and Mr. Kurta. DoD00086344 and DoD00141629 are drafts of the March 2018 Presidential Memorandum.

37. As this is not the final Memorandum signed by the President, release of the draft could cause confusion as to whether DoD actually concurred with the wording or effect of the final 2018 Presidential Memorandum or whether concerns were left unresolved. Further, release of non-final draft memoranda specifically circulated among senior members of the staff of the Secretary of Defense would deter senior DoD officials from seeking the full and frank assessments of other officials due to fear that early drafts of their non-final work product would be released and used against them or the Department in civil proceedings, or used against them professionally due to their close association with a controversial DoD policy. The most senior officials at the Department of Defense must be able to converse freely and candidly amongst

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<sup>15</sup> See Dkt. 598-1, Paragraph 26 of the “Moring Declaration.” Again, the final version of the March 2018 Presidential Memorandum was filed on the docket on March 23, 2018. Dkt. 216-3.

themselves and with the White House to make well-informed decisions concerning Defense policy. Any inhibition on senior officials' ability to speak candidly to one another concerning the composition of the fighting force would directly affect national security, especially in draft communications with the White House.

**J. Deliberations Regarding How DoD's Office of People Analytics Could Conduct a Survey to Collect Data.**

38. The next category concerns deliberative discussions regarding a possible survey on the accession of transgender individuals and individuals with a diagnosis or history of gender dysphoria.<sup>16</sup> These documents consist of: DoD00137668, DoD00137669, DoD00138040, DoD00141460, DoD00141475, DoD00141477, DoD00141481, DoD00141495, DoD00141507, DoD00141508, DoD00141724, DoD00141738, DoD00141740, DoD00141741, DoD00141743, DoD00141747, DoD00141777, DoD00142646, and DoD00142953. These capture the deliberative conversation among DoD officials from several offices and DoD officials from the Office of People Analytics ("OPA") concerning the pros and cons of conducting an internal DoD survey to assist the development of policy for accessions of transgender individuals as well as various options for conducting such a survey.

39. DoD is likely to suffer harm if these documents are released. DoD officials must be able to consult internally within the various components regarding options for obtaining additional data to improve their studies and policies without the possibility that such data requests could be used against DoD in litigation. These emails regarding the feasibility of obtaining additional data are easily attributable to specific individuals within OUSD (P&R) and OPA, and their release could discourage such individuals or those in similar positions from providing candid advice and comments on matters involving sensitive or high-profile issues. If

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<sup>16</sup> See Dkt. 598-1, Paragraph 32 of the "Moring Declaration."

individuals in OPA and OUSD (P&R) are chilled from providing their candid views on methods to obtain data and options for improving studies, then OPA may not be able to conduct high-quality studies, which would deprive DoD leadership of important data required to make personnel policy decisions. It is in connection with such issues that DoD most relies on candid assessments of its experts such as OPA and its personnel policy office, and DoD personnel experts would be less willing to seek the input from their analytics experts if their deliberative, editorial processes and unapproved draft policy language were subject to external scrutiny and could be the subject of examination and cross-examination in civil proceedings. For the same reason, release of these documents would deter the OPA analytics experts (or similar subject matter experts) from providing their full and frank assessments to senior DoD officials, degrading communication internally within DoD. DoD needs the highest quality input available to improve its policies and processes and to achieve its mission, and subject matter experts like OPA must be able to provide their unvarnished input.

**J. Drafts of a Memorandum Prepared by Deputy Secretary of Defense Robert Work to Secretary Mattis, which includes Secretary Mattis’s Comments to the Memorandum**

40. Another category of documents includes DoD00002814, DoD00002820, DoD00004747, DoD00096902, DoD00096903, DoD00096908, DoD00096913, DoD00097036, DoD00097057, DoD00097076, DoD00094654, DoD00095869, DoD00130634, and DoD00097079.<sup>17</sup> These are versions of a memorandum (including draft versions) from then-Deputy Secretary of Defense Robert Work to then-Secretary of Defense Mattis, prepared to assist Secretary Mattis in his decision regarding the delay of accessions of transgender individuals into the military in June 2017.

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<sup>17</sup> These documents are described in paragraph 7 of my Declaration from October 30, 2020 (“Easton Declaration”). See Dkt. 632-1 at 4-5.

41. In 2008, Mr. Work served on President Obama's DoD Transition Team and later served as Under Secretary of the Navy from 2009 to 2013. On April 30, 2014, Mr. Work was confirmed as Deputy Secretary of Defense and continued to serve in that position until July 2017, when Deputy Secretary Shanahan was confirmed. Because Deputy Secretary Work was a senior leader who assisted in a prior transition and had been in the Department during the majority of the Obama administration, Secretary Mattis sought his advice regarding the possible delay of accessions of transgender individuals in response to concerns raised by the Military Services. Deputy Secretary Work responded with a candid memorandum that provided his insights and opinions of the review conducted by then-Secretary Carter and his recommendations as to possible ways forward with accession of transgender individuals into the military.

42. Release of this memorandum (as well as drafts of the memorandum) would likely harm deliberations in future transitions. Transition officials would be less likely to provide their candid assessments and recommendations or to identify problems or issues that still need resolution if they knew their assessments would be subject to external scrutiny and could become the subject of examination and cross-examination if the opinions of current or previous DoD officials differ, or could be used against them as individuals in public.

43. DoD00018197 is a scanned copy of Mr. Work's cover message to Secretary Mattis and the same memorandum on accessions of transgender individuals that includes Secretary Mattis's handwritten notes. The Court has found that two other versions of this document, DoD00002877 and DoD00004686, do not require a separate *Warner* analysis.<sup>18</sup> Secretary Mattis's notes on Mr. Work's memorandum show his thought processes, questions, and areas of concern in response to that memorandum. Similar to the memorandum itself,

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<sup>18</sup> See Dkt. 641-3 at 7-8.

release of Secretary Mattis’s candid response to that memorandum would harm future transitions. Like the chilling effect on transition officials if their advice, assessments, and recommendations were released, there would be a similar chilling effect on incoming officials if they knew that their follow up questions, comments, and opinions could harm them professionally or become the subject of litigation. As a result, officials would be less likely to candidly discuss potential issues with outgoing transition officials, thereby depriving DoD of the benefit of smooth and thorough transition.

**K. Documents and Emails Concerning Whether to Delay Accessions**

44. Another category of documents consists of emails, PowerPoint slides, and memoranda conveyed internally within OSD, from the Army to DoD, and from the Chairman of the Joint Chiefs of Staff to the Secretary of Defense concerning whether to delay military accessions by transgender individuals.<sup>19</sup> These communications set out various concerns about how and whether to delay accessions and the rationale for these concerns. Specifically:

- Army\_10002510, Army\_10019791.0001, Army\_10019795.0001, and Army\_10019799.0001 are Army PowerPoint slides presenting concerns and opinions raised by General Milley.
- DoD00010019 and DoD00128781 are DoD slides containing handwritten notes by Mr. Anthony Kurta.
- DoD00004938, DoD00004939, DoD00004940, DoD00004941, DoD00097250, DoD00097252, DoD00097258, DoD00097260, DoD00097262, DoD00097264, DoD00097266, DoD00097291, DoD00097293, DoD00018188, DoD00018201, and DoD00018225 contain email communications and deliberations among General Selva,

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<sup>19</sup> See Paragraph 12 and 13 of the “Easton Declaration” dated October 30, 2020.

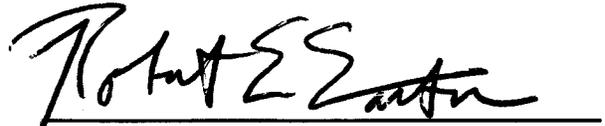
Mr. Work, and others regarding the Military Services' request to delay accessions for a period of time.

45. For several of the reasons cited previously for other documents, there is foreseeable harm in the release of these documents. Army\_10002510, Army\_10019791.0001, Army\_10019795.0001, and Army\_10019799.0001 reflect General Milley's candid opinions provided in response to the request of the Secretary of Defense. These concerns, which these documents reveal in detail, relate to several topics, including recruitment of, and medical care for, transgender applicants. If these documents are released, these concerns—and the thought processes underlying them—will be directly attributed to General Milley. DoD00010019 and DoD00128781 would likewise be attributable to Mr. Kurta, and the emails cited above to General Selva and Mr. Work.

46. Additional harm would likely be caused to DoD and the Military Services writ large as release of these specific documents would deter the most senior officials and subject matter experts from engaging in the type of uninhibited conversations required to make, change, develop, and implement policy. Moreover, if senior military officials knew that their candid deliberations regarding the recruitment of, and medical care for, service members (which also often contain PII) could ultimately be used against them in litigation, as deponents, or against the Department itself, then these officials would be less likely to participate in the policy development process, depriving DoD of the recommendations and opinions of some of its most valued experts.

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

EXECUTED this 9th day of December 2020, at Arlington, Virginia.

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

ROBERT E. EASTON  
Director, Office of Litigation Counsel