

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

The Honorable Marsha J. Pechman

Case No. 2:17-cv-01297-MJP

**DECLARATION OF REAR ADMIRAL BRENDAN C. MCPHERSON**

I, Brendan C. McPherson, hereby state and declare as follows:

1. I am a Rear Admiral (RDML) in the U.S. Coast Guard currently assigned as the Military Advisor to the Acting Secretary of Homeland Security. I have been in this position since July 2019. As a part of my duties, I represent the Secretary of Homeland Security and serve as an advisor regarding military issues, major policies, and homeland security initiatives within the Secretary's responsibility. In the exercise of my official duties, I have been made aware of this lawsuit involving the Department of Defense ("DoD") Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria (the "DoD Policy") and am familiar with the government's efforts to defend the DoD Policy.

2. I make this declaration in my official capacity as the Military Advisor 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 supplemental declaration in response to the Court's November 25, 2020 Order. *See* Dkt. No. 641. In particular, I submit this declaration to demonstrate how the Department of Homeland Security (DHS) and the U.S. Coast Guard would be injured, now or in the future, upon the release of DHS00000141 and DHS00002532, which were designated by this Court as pre-decisional and deliberative, but requiring supplementation with respect to the fourth factor in *FTC v. Warner Commc'n Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

3. Based on my review of the relevant documents, I have determined that the two documents identified by the Court were created as part of DHS's and the Executive Branch's decision-making process and reflect the deliberative process undertaken by DHS and Executive Branch personnel in developing the DoD Policy. DHS accordingly maintains its assertion of the deliberative process privilege over each of the documents discussed in this declaration and contends that disclosure would hinder the military's frank and independent discussion regarding contemplated policies and decisions.

4. Documents DHS00000141 and DHS00002532 are identical copies of a February 16, 2018 email from Admiral Charles Michel, Vice Commandant, U.S. Coast Guard, to Deputy Secretary of Homeland Security Elaine Duke.<sup>1</sup> In the email, Admiral Michel describes the content of the draft DoD Report and recommended policy changes, as well as the advice and level of involvement of senior military officials regarding the proposed recommendations. Admiral Michel further makes a recommendation to the Deputy Secretary as to the action DHS should take with

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<sup>1</sup> The Vice Commandant of the Coast Guard is the second-most senior officer in the Coast Guard, and the Deputy Secretary of Homeland Security is the second-highest official in the Department.

regard to the DoD Report.

5. Specifically, this email attributes the advice, recommendations, and opinions of the Vice Commandant of the Coast Guard and the Master Chief Petty Officer of the Coast Guard (MCPOCG).<sup>2</sup> The Vice Commandant's email also specifically identifies a senior Coast Guard Judge Advocate as having reviewed the proposed recommendations and policy change. Finally, the Vice Commandant's email has a specific recommendation to the Deputy Secretary on DHS's strategic public-facing position in relation to the Department of Defense on transgender policy, a politically sensitive issue that had garnered high media attention.

6. Disclosure of DHS00000141 and DHS00002532 would injure both the Department of Homeland Security and the U.S. Coast Guard. The high operational tempo with which many of DHS's activities are conducted mean that deliberative and pre-decisional conversations frequently occur via email. If individuals in the Coast Guard knew that their advice, input and recommendations could be used against them in litigation or in the public forum they would be less likely to give DHS leadership candid advice on politically sensitive topics or issues that attract media attention. In particular, the attribution of advice and recommendations to specific individuals increases the risk of chilling candid deliberations as there would be a higher likelihood these individuals would be targeted in litigation for offering their views and assessments on particular policy positions (positive or negative) during deliberation and development. Moreover, in issues involving politically sensitive topics with high media attention, such as DoD's policy concerning military service by transgender individuals, the risk of public disclosure and potential stigmatization becomes an additional, individualized risk factor that would lead to chilling frank and open communications on

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<sup>2</sup> The Master Chief Petty Officer of the Coast Guard is the most senior enlisted member of the Coast Guard and the principal advisor to the Commandant of the Coast Guard on all enlisted personnel matters.

policymaking. The emails' specific identification of the Vice Commandant and MCPOCG's advice and recommendations exposes those two Coast Guard members to such risks if these documents are disclosed. Additionally, because the emails also identify a senior Coast Guard attorney by name as having reviewed the recommended policy change that attorney is similarly exposed by disclosure. Although not necessarily breaching Attorney-Client or Work Product privileges, disclosure of individual attorneys' identities in connection with their review of particularly sensitive issues would nevertheless have a chilling effect on legal review of the military's operational and policy decisions.

7. In addition to these harms, there is organizational risk caused by disclosure of pre-decisional communications that is unique to the United States Coast Guard because of its position as the only Armed Force in the Department of Homeland Security and not in the Department of Defense. As a result, the Coast Guard must navigate policy objectives from DoD that may be applicable due to the Coast Guard's status as an Armed Force as well as the policy goals of DHS. Candid and frank discussion between senior military members of the Coast Guard with the leadership of DHS is essential for the Coast Guard to effectively carry out its multiple statutory missions, which include missions that require close collaboration with the Department of Defense, as well as missions that are unique to the Coast Guard and the Department of Homeland Security. The Vice Commandant's recommendation regarding where DHS should align itself in relation to DoD is an example of this type of critical communication that allows DHS leadership to make strategic decisions with respect to the Coast Guard that comport with the overarching goals of national defense and broader military policy. Release of this email could cause public confusion and sow doubt as to the appropriateness of the Coast Guard's and DHS's roles with respect to development of the DoD policy concerning military service by transgender individuals. Disclosure of these communications would chill the open

communications between Coast Guard and DHS leaders necessary for these high-level strategic decisions. If Coast Guard members knew that their thoughts, impressions, and opinions, especially in relation to Coast Guard and DHS alignment with DoD policy, would be open to scrutiny when communicated to DHS, they may hesitate to provide their genuine positions on potential courses of action, not only as to the decisions at issue in this litigation, but regarding any politically sensitive decision that DHS faces in the future, for fear that these discussions could be revealed to wider audiences. The chilling effect would occur even with protective orders because the advice givers would still potentially be subject to depositions or other proceedings that would challenge the quality and judgment of the advice and analysis. The threat of having advice second-guessed by other outside parties and the risk of being entangled in a future litigation over that advice would influence individuals to “hedge” their recommendations, or otherwise provide analyses and opinions with less than complete candor during policy-making. The loss of essential, unvarnished, and open input from military commanders would degrade DHS’s decision-making process and could expose the nation to greater overall risk.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9<sup>th</sup> day of December, 2020.

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Brendan C. McPherson  
Rear Admiral, U.S. Coast Guard  
Military Advisor to the Acting Secretary of  
Homeland Security