

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' Second Notice of Compliance Regarding ECF No 629.

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 on behalf of the Department of Defense over the 13
9 documents submitted for *in camera* review.

10 3. Also attached to this declaration as Exhibit B is a privilege log that identifies the
11 document, date, DoD number, and PrivWithhold number of the 13 documents listed in the
12 declaration of Robert Easton submitted for *in camera* review.

13 4. Attorneys of record in this litigation have reviewed Exhibits A and B and the 13
14 documents over which the Department of Defense formally asserts the deliberative process
15 privilege, which are being submitted for *in camera* review.

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

18 EXECUTED this 11th day of December, 2020.

19
20 /s/ Andrew E. Carmichael
21 ANDREW E. CARMICHAEL
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EXHIBIT A

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
FOR *IN CAMERA* REVIEW OF
DOCUMENTS WITHHELD
UNDER THE DELIBERATIVE
PROCESS PRIVILEGE**

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”).

3. I submit this declaration in response to the Court’s July 15, 2020, September 29, 2020, and October 28, 2020 orders directing the government to provide documents to the Court for *in camera* review, and to formally assert the deliberative process privilege on behalf of DoD over the documents and information described below. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

4. The Court directed DoD to submit for *in camera* review certain documents dated September 14, 2017 to November 17, 2017 that have been listed on the DoD privilege log as withheld from production pursuant to the deliberative process privilege.

5. Based on my review of the relevant documents, I have determined that the documents submitted with this Declaration, described below, were created as part of DoD’s decision-making processes. These documents reflect the deliberative process undertaken by senior DoD officials as they developed DoD’s 2018 policy on military service by transgender individuals and individuals with or having a history of gender dysphoria and DoD’s Report and

Recommendations on Military Service by Transgender Persons (“DoD Report”) before submitting DoD’s policy recommendation and the DoD Report to the President on February 22, 2018. They consist of a draft email written for the Chief of Staff to the Deputy Secretary of Defense and the final version of that email as sent to the Chief of Staff to the Secretary of Defense, which contains deliberative discussions of priorities and logistical decisions for the Panel of Experts and working groups supporting the panel; draft emails to the White House to update the White House Chief of Staff on the progress of the Panel circulated among senior staff members of the Office of the Secretary of Defense and the Office of the Under Secretary of Defense for Personnel and Readiness; and an email containing deliberations from the Secretary of Defense regarding the Panel. Further, as discussed in detail below, release of these documents protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD writ large. Accordingly, DoD formally invokes the deliberative process privilege over each of these documents and specifically describes the harm that would be caused by their individual release.

Documents Subject to the Deliberative Process Privilege

6. The first category of documents consists of emails on the progress and priorities of the DoD Panel of Experts. DoD00082952, titled “Ghost Email – Sweeney,” is a draft email authored by White House Fellow and Special Assistant to the Deputy Secretary of Defense, Ms. Rachel Gleichman, for then-Chief of Staff to the Deputy Secretary of Defense, Mr. Tony DeMartino, to send to then-Chief of Staff to the Secretary of Defense, Mr. Kevin Sweeney, explaining the priorities of the transgender working groups supporting the Panel of Experts, discussing early logistical details about Panel meetings, and reporting on the general progress of the Panel meetings. DoD00090820 is the same email, as sent by Mr. DeMartino to Mr. Sweeney. These are pre-decisional because they were drafted during the period of time when the

Panel was meeting and before the Panel developed its final recommendation for Secretary Mattis. They are also deliberative. These documents show requests made by staff supporting the Panel of Experts sent to better understand the scope of the Panel's mandate early in the policy development process. They also include additional internal deliberations on meeting attendance by specific personnel, the context behind data being presented to the Panel, and note taking procedures for the meetings.

7. Releasing a draft email written by a staff member for a senior DoD official to send to another senior official would deter such officials from seeking the full and frank assessments of officials on their own staff due to fear that draft emails would be released and become the subject of examination and cross-examination to be used against them, other Department experts, or the Department itself in civil proceedings. This risk is further heightened where the draft emails are attributed to specific individuals who had not yet obtained approval from a supervisor to send the draft "ghost" email. Any chilling effect on a senior official's ability to speak candidly to members of his or her own staff in drafting deliberative material would inhibit full and frank DoD decision-making at large.

8. Further, release of the final email from the Chief of Staff for the Deputy Secretary of Defense to the Chief of Staff for the Secretary of Defense providing specific recommendations for utilization of the transgender working groups would deter senior officials from participating in open discussions concerning sensitive issues, especially when these candid thoughts and recommendations are specifically attributable to them. Any inhibition to a senior official's ability to speak candidly to his or her staff or DoD colleagues 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

forum (possibly harming them professionally) or could become the subject of examination and cross-examination in civil proceedings, they would be less likely to participate in the policy development process, depriving DoD of the recommendations and opinions of its most senior officials.

9. DoD00082956, DoD00082958, DoD00090772, DoD00090795, DoD00090801, DoD00090807, DoD00090860, DoD00090900, DoD00090910, and DoD00090927 are email chains containing several iterations of a draft email to be sent by Mr. Sweeney to the President's Chief of Staff, Mr. John Kelly, updating him on the status of the ongoing review by the Panel of Experts. These emails are pre-decisional and deliberative. They are pre-decisional because they contain various iterations of draft emails being revised prior to any email being sent to Mr. Kelly. They are also deliberative. The email chains show DoD's editorial process and the revisions of several senior officials within the front office of the Secretary of Defense on draft versions of an email to the White House.

10. Release of non-final draft emails specifically circulated among senior members of the Secretary of Defense's staff 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 become the subject of examination and cross-examination in civil proceedings against the Department or used against them publicly, possibly hindering their professional aspirations due to their close association with a controversial DoD policy. This risk is further heightened here because the draft emails are primarily attributed to a single author who had not yet had an opportunity to finish editing his own language, was in the process of soliciting internal review and input from other Department officials, and had not yet obtained approval from his supervisor. Again, any inhibition on the ability of senior officials to speak candidly

with one another concerning the composition of the fighting force would directly affect national security.

11. The final category consists of a single document, DoD00090946, which contains a question asked by Secretary Mattis regarding the Panel of Experts policy review. This email is pre-decisional and deliberative. It is pre-decisional because it predates Secretary Mattis' decision to accept the Panel's policy recommendation and the DoD Report. It is deliberative because it is a specific request for information from Secretary Mattis regarding the DoD review of its policy on military service by transgender individuals and individuals with gender dysphoria.

12. This document involves deliberations of the most senior officials at DoD, in this case the Secretary of Defense himself. Senior officials at DoD 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 this document would deter senior officials from participating in open discussions concerning sensitive issues, especially when these candid thoughts are specifically attributable to them. Any reluctance by senior officials to speak candidly to one another 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 professionally or could become the subject of examination and cross-examination in civil proceedings against DoD, they would be less likely to participate in the policy development process, depriving DoD of the recommendations and opinions of its senior officials and subject matter experts.

13. In addition to the specific harms articulated above, and as discussed in my prior declarations, release of DoD information protected by the deliberative process privilege in this

case, including the materials described above, 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.

14. 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.

15. 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.

16. 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 similarly sensitive 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 11th day of December 2020, at Arlington, Virginia.



ROBERT E. EASTON
Director, Office of Litigation Counsel

EXHIBIT B

Karnoski v. Trump
Privilege Log for In Camera Review
12/11/2020

DOCID	Priv Withhold Begin Bates	Priv Withhold End Bates	Date	Privilege(s)	Privilege Description (See DoD Declaration)
DoD00082952	PrivWithhold00014116	PrivWithhold00014116	11/7/2017	Deliberative Process Privilege	Draft email authored by White House Fellow and Special Assistant to the Deputy Secretary of Defense, Ms. Rachel Gleischman, for then Chief of Staff to the Deputy Secretary of Defense, Mr. Tony DeMartino to send to then Chief of Staff to the Secretary of Defense, Mr. Kevin Sweeney, explaining the priorities of the transgender working groups supporting the Panel of Experts, early logistical details about Panel meetings, and to report on the general progress of the Panel meetings. The email is pre-decisional because it was drafted during the period of time when the Panel was meeting and before the Panel developed its final recommendation for Secretary Mattis. The email is deliberative because it shows requests made by staff supporting the Panel of Experts sent to better understand the scope of the Panel's mandate early in the policy development process and it also includes additional internal deliberations on meeting attendance by specific personnel and the context behind data being presented to the Panel. See Easton Decl. ¶¶ 6-8, 13-16.
DoD00090820	PrivWithhold00014129	PrivWithhold00014129	11/7/2017	Deliberative Process Privilege	Draft email authored by White House Fellow and Special Assistant to the Deputy Secretary of Defense, Ms. Rachel Gleischman, for then Chief of Staff to the Deputy Secretary of Defense, Mr. Tony DeMartino. Mr. DeMartino sent the email to then Chief of Staff to the Secretary of Defense, Mr. Kevin Sweeney. The email explains the priorities of the transgender working groups supporting the Panel of Experts, early logistical details about Panel meetings, and to report on the general progress of the Panel meetings. The email is pre-decisional because it was drafted during the period of time when the Panel was meeting and before the Panel developed its final recommendation for Secretary Mattis. The email is deliberative because it shows requests made by staff supporting the Panel of Experts sent to better understand the scope of the Panel's mandate early in the policy development process and it also includes additional internal deliberations on meeting attendance by specific personnel and the context behind data being presented to the Panel. See Easton Decl. ¶¶ 6-8, 13-16.
DoD00082956	PrivWithhold00014117	PrivWithhold00014118	11/6/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00082958	PrivWithhold00014119	PrivWithhold00014120	11/6/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090772	PrivWithhold00014121	PrivWithhold00014122	11/9/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090795	PrivWithhold00014123	PrivWithhold00014124	11/8/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.

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DOCID	Priv Withhold Begin Bates	Priv Withhold End Bates	Date	Privilege(s)	Privilege Description (See DoD Declaration)
DoD00090801	PrivWithhold00014125	PrivWithhold00014126	11/8/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090807	PrivWithhold00014127	PrivWithhold00014128	11/8/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090860	PrivWithhold00014130	PrivWithhold00014131	11/7/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090900	PrivWithhold00014132	PrivWithhold00014133	11/6/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090910	PrivWithhold00014134	PrivWithhold00014135	11/6/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090927	PrivWithhold00014136	PrivWithhold00014136	11/6/2017	Deliberative Process Privilege	Email chain containing several iterations of a draft email to be sent by Mr. Sweeney to the President's then-Chief of Staff, Mr. John Kelly, in order to update him on the status of the ongoing review by the Panel of Experts. The emails are pre-decisional because they contain various iterations of draft emails being revised prior to any email ever being sent to Mr. Kelly. They are deliberative because the email chain shows DoD's editorial process and the revisions of several senior officials of the staff of the Secretary of Defense on draft versions of an email to the White House. See Easton Decl. ¶¶ 9-10, 13-16.
DoD00090946	PrivWithhold00014137	PrivWithhold00014137	11/6/2017	Deliberative Process Privilege	Email containing a question asked by Secretary Mattis regarding the Panel of Experts' policy review. The email is pre-decisional because it predates Secretary Mattis' decision to accept the Panel's policy recommendation and the DoD Report. The email is deliberative because it is a specific request for information from Secretary Mattis regarding the DoD review of its policy on military service by transgender individuals and individuals with gender dysphoria. See Easton Decl. ¶¶ 11-16.