IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	Case No. 1:17-cv-02459 Date: October 27, 2017

CORRECTED BRIEF OF RETIRED MILITARY OFFICERS AND FORMER NATIONAL SECURITY OFFICIALS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTEREST OF *AMICI CURIAE*

Amici are retired military officers and former national security officials, who have collectively devoted countless decades to strengthening U.S. security interests. They have been responsible for the readiness of the service members under their command in times of hostilities and peace, and supervised and participated in policy processes involving military readiness and personnel at the senior-most levels of the U.S. government, across the administrations of both major political parties. They greatly appreciate and value military expertise and the need for the judiciary to defer to it when the circumstances demand. They file this submission to offer their perspective that this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes. Furthermore, amici contend that the categorical exclusion of transgender individuals on the basis of group characteristics rather than individual fitness to serve is inimical to the national security interests of the United States.

ARGUMENT

On the morning of July 26, 2017, President Donald Trump issued three tweets that suddenly announced a ban on transgender service members serving in the military. The tweets did not emerge from a policy review of any kind. In advance of his decision, he did not consult his military officials; his Joint Chiefs of Staff were unaware that he planned to make this decision at all. Less than a month later, President Trump issued a Presidential Memorandum that formalized the tweets, but that document again did not identify any policymaking process or consultations with senior military officials leading to the decision. The Presidential Memorandum also did not point to a single piece of evidence demonstrating that the ban was necessary for reasons of military necessary, national security, or any other legitimate national interest.[1]

He now seeks to shield that decision from judicial review, claiming throughout his papers that he is owed "the utmost deference" in cases "involving the judgment of military authorities."[2] These assertions neglect the very simple fact that the President's tweets and Memorandum did not involve the judgment of any military authorities at all. In fact, the President's actions at issue here are about as far removed as one could imagine from those cases where courts have deferred to the genuine "considered" or "professional judgment" of the executive branch on military matters. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (quotations and citations omitted); *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986).

[1] Presidential Memorandum from the President of the United States to Secretaries of Defense and Homeland Security, 82 Fed. Reg. 41,319 (Aug. 25, 2017) [hereinafter "Presidential Memorandum"].

[2] Mem. in Supp. of Def. Mot. to Dismiss, *Stone v. Trump*, 17-cv-02459, Oct. 12, 2017, at 3, 22 [hereinafter "Def. Mem."]; *see also id.* at 23-25.

Defendants are unable to point to a single case where a court afforded deference to a President's military judgment when that President undertook no considered review, consulted no military officials, and cited no evidence in support of his decision. Indeed, the President's actions here represent a remarkable departure from decades of practice across multiple administrations regarding the proper approach to making major policy changes on personnel issues within the U.S. military. And perhaps it should not come as a surprise that such an arbitrary process resulted in a policy that the evidence overwhelmingly shows will impair our military's readiness, harm unit cohesion, deplete urgently needed military resources, and undermine the foreign policy of the United States.

Although this case *affects* national security, it involves no identifiable national security *judgment* of the sort that deserves—much less compels—judicial deference. Amici know quite well the critical importance of military expertise to the security of our nation, and the need for the judiciary to defer to that expertise when the circumstances demand. However, the President should not be allowed to hide behind a cloak of deference a capricious and discriminatory act that involved no considered consultation, no professional military decision-makers and no evidentiary basis or review, and will do grievous harm not only to the service members immediately affected, but to the national security and foreign policy interests of the United States.

I. The President's actions departed sharply from decades of practice involving similar military policy changes.

Throughout its history, the U.S. military has exercised great care in the selection, training, and retention of qualified personnel as an integral aspect of military readiness. Significant changes to its personnel policies—particularly those involving the categorical exclusion of entire groups from military service—have been subjected time and again to a

process that includes: 1) a searching policy review, 2) involving senior military officials, 3) that thoroughly examines the best available evidence on the impact and consequences of the change. This practice is a reflection of the gravity of such decisions and a realization that even incremental changes in military policy can dramatically affect our Armed Forces' overall readiness to protect our country.

The paradigmatic case of a major personnel change in the U.S. military is President Truman's decision seven decades ago to integrate African Americans into the Armed Forces. Although African Americans had served in the United States military since the Revolutionary War,[3] many had served in segregated units due to perceived concerns about unit cohesion and morale.[4] Prompted by growing concern about racial inequality and unrest in the United States, on December 5, 1946 President Truman issued an Executive Order appointing the President's Committee on Civil Rights, a presidential commission comprised of senior defense officials, religious leaders, and civil rights activists to study, *inter alia*, the desegregation of the military.[5] Over nearly a year, the Committee deliberated across ten meetings, undertook multiple studies, heard from numerous witnesses in public and private hearings, received hundreds of communications from private organizations and individuals, and was assisted in its work by twenty-five agencies across the federal government.[6]

In December 1947, the Committee issued its final report. The report found that the practices of the military services in excluding African-Americans was "indefensible", concluding

[3] Michael Lee Lanning, *African Americans in the Revolutionary War* 73 (2000).
[4] Martin Binkin & Mark J. Eitelberg, *Blacks and the Military* 25-26 (1982).
[5] Harry S. Truman Library and Museum, *Records of the President's Committee on Civil Rights* (2000), available at http://www.trumanlibrary.org/hstpaper/pccr.htm.
[6] President's Committee on Civil Rights, *To Secure These Rights: The Report of the President's Committee on Civil Rights* XI (1947), http://www.trumanlibrary.org/civilrights/srights1.htm; *Records of the President's Committee on Civil Rights*, *supra* note 5.

that that practice had "cost[] lives and money in the inefficient use of human resources," "weaken[ed] our defense" by "preventing entire groups from making their maximum contribution to the national defense," and "impose[d] heavier burdens on the remainder of the population."[7] As a result, the Committee called for an immediate end to discrimination and segregation based on "race, color, creed, or national origin, in the organization and activities of all branches of the Armed Services."[8] Several months later, President Truman issued an executive order declaring that it would be the policy of the United States to require equality of treatment and opportunity for all persons in the U.S. Armed Services without regard to race, and convening a Committee on Equality of Treatment and Opportunity in the Armed Services to "recommend revisions in military regulations in order to implement the government's policy of desegregation of the armed services."[9]

The Obama Administration's repeal of the Don't Ask, Don't Tell directive, which allowed gay, lesbian or bisexual people to serve openly in the military, followed a similarly searching process. The repeal came on the heels of a comprehensive Pentagon review—in March 2010, Secretary of Defense Gates convened a working group co-chaired by the General Counsel of the Department of Defense and the General of the U.S. Army and comprised of senior civilian and military leaders from across the Armed Services to undertake a comprehensive review of the impacts of a repeal of the law.[10] The working group conducted 95

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[7] *To Secure These Rights: The Report of the President's Committee on Civil Rights* XI, *supra* note 5, at 46-47, 162-63.
[8] *Id.* at 163.
[9] Harry S. Truman Library and Museum, *Records of the President's Committee on Equality of Treatment and Opportunity in the Armed Services*, available at http://www.trumanlibrary.org/hstpaper/fahy.htm; Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).
[10] U.S. Dep't of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* Nov. 30, 2010,

"information exchange forums" at 51 bases and installations around the world, conducted 140 focus groups, solicited input from nearly 400,000 active duty and reserve service members, engaged the RAND Corporation to update its earlier 1993 study, *Sexual Orientation and U.S. Military Personnel Policy*, studied foreign militaries' integration of gays and lesbians, and conducted a thorough legal review.[11]

On November 30, 2010, the working group issued a 256-page report rejecting the contention that allowing gays to serve openly in the military would result in long-lasting and detrimental effects on unit cohesion or the ability of units to conduct military missions.[12] It also offered a series of recommendations for implementing a repeal of the law in the areas of leadership, training, education and the management of moral and religious objections.[13] Shortly thereafter, Secretary Gates and Chairman of the Joint Chiefs Admiral Mullen called on Congress to immediately repeal the Don't Ask, Don't Tell law. Congress passed just such a bill, which President Obama signed into law. Seven months later, President Obama, newly confirmed Secretary of Defense Panetta, and Admiral Mullen formally certified under the new statute that the American military was ready to repeal the old policy.[14]

The decision to include female service members in combat roles likewise emerged from a careful evidence-based process—this time, a congressionally mandated policy and legal review undertaken by the Secretary of Defense, in consultation with the Military Department Secretaries, of the policies and regulations that had officially barred women from serving in combat positions. After an "extensive review" of the policies and laws governing the assignment

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http://archive.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf.

[11] *Id.* at 33-39.

[12] *Id.* at 119.

[13] *Id.* at 3.

[14] Jody Feder, *"Don't Ask, Don't Tell": A Legal Analysis,* CRS Rep. R40795, Aug. 6, 2013.

of women in the Armed Forces and the feasibility of opening to women military occupational specialties that were then closed to them, the Department of Defense found in a February 2012 report that, given the "dynamics of the modern-day battlefield . . . there is no compelling reason for continuing the portion of the policy that precludes female service members from being assigned to . . . direct ground combat units", and declared its intent to rescind the "co-location rule" that prevented female Service members from being assigned to units that were doctrinally required to physically co-locate with direct ground combat units.[15]

Secretary Panetta also issued a directive at that time to conduct an in-depth review of the remaining barriers to service for women. After several months of additional study, on January 24, 2013, Secretary Panetta announced that the Department would rescind the Direct Combat Exclusion Rule on women serving in previously restricted occupations.[16] He also called on each of the services to undertake their own separate "women in the service" reviews of how to move forward with the integration of women into previously closed positions, and identify any recommended exemptions for particular positions.[17] This process led to more than thirty additional studies over the next three years to inform the contours of the policy change.[18] After the Secretaries of each of the services completed their reviews and submitted their final

[15] U.S. Dep't of Defense, *Report to Congress on the Review of Laws, Policies, and Regulations Restricting the Service of Female Members in the U.S. Armed Forces*, Feb. 2012; Fact Sheet: Women in Service Review (WISR) Implementation, https://www.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_WISR_FINAL.pdf.
[16] Kristy N. Kamarck, *Women in Combat: Issues for Congress*, Cong. Res. Serv. R42075, Dec. 13, 2016.
[17] U.S. Dep't of Defense, *Statement from Pentagon Press Secretary Peter Cook on Secretary Carter's Approval of Women in Service Review Implementation Plans*, March 10, 2016.
[18] Fact Sheet, *supra* note 15.

recommendations, Secretary of Defense Ashton Carter on December 3, 2015 ordered the military to open all combat jobs to women who meet the validated occupational standards.[19]

Finally, the very opening of military service to transgender personnel that President Trump now seeks summarily to reverse emerged from its own rigorous policymaking process. In July 2015, Secretary Carter issued a directive creating a formal working group to study the "policy and readiness implications of welcoming transgender persons to serve openly" in the military.[20] Over the course of the following year, the working group engaged in what one senior member described as a "detailed, deliberative, [and] carefully run process."[21] Each military service was represented in the working group by a senior uniformed officer, a senior civilian official, and various staff members.[22] The working group created sub-groups to investigate specific issues, consulted with medical, personnel, and readiness experts, and spoke with health insurance companies and commanders of transgender service members.[23] At the end of this comprehensive process, the working group unanimously concluded that transgender individuals should be permitted to serve openly in the Armed Forces.[24]

Meanwhile, the Department also had commissioned a separate, independent study from the RAND Corporation. The study focused on seven broad research questions, among them the cost of providing medical coverage to transgender individuals, the readiness implications of the

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[19] U.S. Sec'y of Defense, *Remarks on the Women-in-Service Review*, Dec. 3, 2015, https://www.defense.gov/News/Speeches/Speech-View/Article/632495/remarks-on-the-women-in-service-review/; Kamarck, *supra* note 16.
[20] U.S. Dep't of Defense, *Statement by Secretary of Defense Ash Carter on DOD Transgender Policy,* Release No: NR-272-15, July 13, 2015.
[21] Decl. of Raymond Edwin Mabus, Jr. In Support of Plaintiffs' Motion for Preliminary Injunction at 3, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. 28 Aug. 2017).
[22] Decl. of Brad R. Carson in Support of Plaintiffs' Motion for Preliminary Injunction at 3, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. 28 Aug. 2017).
[23] *Id*. at 3.
[24] *Id*. at 7.

proposed policy, and any applicable lessons from the eighteen foreign militaries that already allowed open transgender service.[25] RAND laid out its findings in a 71-page report, concluding that allowing transgender people to serve openly would place an "exceedingly small" burden on health care expenditures and have a "minimal impact" on readiness.[26] Based on the thorough review carried out by these two groups, Secretary Carter announced the policy change in June 2016. For more than a year after that change, transgender individuals currently in the military were able to serve openly alongside their fellow service members. The Department released a 71-page handbook specifying implementation strategies,[27] and issued guidelines for both in-service medical transition procedures and treatment of gender dysphoria.[28] But for President Trump's abrupt about-face, this studied, measured, and incremental process would have concluded on January 1, 2018 with the accession of openly transgender individuals into the U.S. military.

Each of the above personnel decisions was the product of a rigorous policy review involving senior military officials and an evidence-based examination of the likely impact of the proposed change. In sharp contrast, on the morning of July 26, 2017, President Trump suddenly announced a ban on transgender persons serving in the military. In a series of three tweets, the President (speaking as @realDonaldTrump) declared,

> "The United States Government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and

[25] RAND Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* ix (2016).
[26] *Id*. at xi and 47.
[27] U.S. Dep't of Defense, *Transgender Service in the U.S. Military: An Implementation Handbook* (2016).
[28] U.S. Dep't of Defense, *Instr. 1300.28, In-Service Transition for Transgender Service Members* (Oct. 1, 2016); Memorandum, Assistant Secretary of Defense for Health Affairs, to Assistant Secretary of the Army et al., *Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members*, July 29, 2016.

> overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender [sic] in the military would entail. Thank you[.]"

No effort was made—nor evidence presented—to show that this pronouncement resulted from any analysis of the cost or disruption allegedly caused by allowing transgender individuals to serve openly in the military. The Joint Chiefs of Staff were not consulted at all on the decision before the President issued the tweet. Secretary of Defense James N. Mattis, who was on vacation at the time, was given only a single day's notice that the decision was coming.[29] The decision was announced so abruptly that White House and Pentagon officials were unable to explain the most basic of details about how it would be carried out.[30]

About four weeks later, President Trump followed up the tweets with a Memorandum entitled "Military Service by Transgender Individuals," directed to the Secretary of Defense and the Secretary of Homeland Security.[31] This Memorandum instructs the Department of Defense to return to the earlier policy of discrimination against transgender service members, including by involuntary or dishonorable discharge, and maintains and extends in time the current bar on accession of transgender individuals into the military.[32] Again, the Memorandum does not point to any policy process that led to the decision, does not cite consultations with any military officers, and does not identify a single piece of evidence to support the decision. The

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[29] Barbara Starr et al., *US Joint Chiefs blindsided by Trump's transgender ban*, CNN (July 27, 2017), http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html; Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y.Times (July 26, 2017), https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0.

[30] Davis & Cooper, *supra* note 29.

[31] Presidential Memorandum, *supra* note 1.

[32] The Proclamation states that the new policies will go into effect by March 23, 2018, and the Department of Defense has already started to develop plans to carry out the directive. Presidential Memorandum, *supra* note 1; Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals, Aug. 29, 2017.

Memorandum suggests in passing that the Departments would "continue to study the issue," even as it declares a sweeping change affecting thousands of transgender service-members.

The President now seeks to shield this decision from judicial scrutiny by invoking "the highly deferential review" that the Constitution has historically afforded national security and military judgments.[33] He claims that such deference is appropriate here because the lawsuit is challenging "military decision-making," and "professional military judgments."[34] However, there is no sign of respect for military decision-making or professional military judgments to be found anywhere in the President's actions. He not only failed to involve senior military officials in his decision at all, but he is seeking to displace the considered judgment of military officials regarding the treatment of transgender individuals in the military from just a year earlier. The Supreme Court in fact has given "great deference to the *professional judgment of military authorities* concerning the relative importance of a particular military interest," *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (emphasis added) (quotations and citations omitted), and the "*considered professional judgment*" of "appropriate military officials," *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986) (emphasis added). But the record in this case hints at nothing remotely resembling a considered or professional judgment of this sort.

Earlier cases show how the courts have looked for considered judgment before affording constitutional deference to the coordinate branches in areas of policy making involving military personnel. For example, in *Rostker v. Goldman*, 453 U.S. 57 (1981), the Supreme Court upheld the constitutionality of provisions that authorized the President to require men, but not women, to register for the draft. The Court deferred to "Congress' evaluation of th[e] evidence," noting that "[t]his case is quite different from several of the gender-based discrimination cases we have

[33] Def. Mem. at 3.
[34] Def. Mem. at 3, 24.

considered in that . . . Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'" *Id.* at 72, 83 (quoting Br. for Appellees) (emphasis omitted). The Court pointed to the fact that the issue was "extensively considered by Congress in hearings, floor debate, and in committee." *Id.* at 72; *see also, e.g.*, *id.* at 63, 79.

On the other hand, the U.S. District Court for the District of Columbia found unconstitutional a statutory provision barring the assignment of female personnel to duty on navy vessels other than hospital ships and transports. *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978). The court acknowledged that "a high degree of deference is owed to the political branches of government in the area of military affairs," in part because "oversight of military operations typically involves complex, subtle, and professional judgments that are best left to those steeped in the pertinent learning." *Id.* at 299 (quotations and citations omitted). But the court noted that the provision in that case "was added casually, over the military's objections and without significant deliberation," and the Court found compelling "the results of the experiment conducted by the Navy on the USS Sanctuary . . . that assigning women to noncombat duty on vessels will pose no insurmountable obstacles." *Id.* at 305, 309.

The Fourth Circuit also has chosen or declined to afford deference to the national security prerogatives of the executive based on whether the decision reflected a considered policymaking process. In *Thomasson v. Perry*, the court premised its decision upholding the constitutionality of the Don't Ask, Don't Tell policy on a lengthy discussion of the policy deliberations that took place before the enactment of the directive, including studies and reviews undertaken by the Department of Defense, the RAND Corporation, and congressional committees, and consultations with the Joint Chiefs of Staff and leaders of each service. 80 F.3d 915, 921-23 (4th Cir. 1996). Emphasizing that the directive emerged from an "exhaustive review" and "extensive

deliberation" by the executive branch and Congress, the court only then went on to defer to what it described as the "considered judgment" of those coordinate branches of government. *Id.* at 922-27.

But when the record shows no such considered judgment or process, the Fourth Circuit has chosen not to defer to the President. Recently, in *Int'l Refugee Assistance Project ("IRAP") v. Trump*, the Fourth Circuit ruled that the plaintiffs challenging President Trump's second Executive Order[35] restricting the entry of individuals from several Muslim-majority countries would likely succeed on the merits of their Establishment Clause claim, over the President's attempt to invoke deference on national security grounds. 857 F.3d 554 (4th Cir. 2017), *vacated as moot sub nom.*, *Trump v. Int'l Refugee Assistance Project*, __ S.Ct. __, 2017 WL 4518553.[36] In reaching that conclusion, the Court gave significant weight to "the exclusion of national security agencies from the decision-making process," and the fact that "President Trump issued the First Executive Order without consulting the relevant national security agencies," to conclude that the Order's "stated national security interest was provided in bad faith, as a pretext for its religious purpose." *Id.* at 592, 596.

President Trump's actions in this case show no signs of the policy judgment that traditionally has given rise to judicial deference on military issues. This is not a case involving the "professional judgment" of "appropriate military officials," as no military officials were involved in the decision at all. *Goldman*, 475 U.S. at 508-09. Nor is this a case where the decision resulted from an "exhaustive review", as in fact there was no review to speak of.

[35] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[36] Although the decision was vacated as moot, such decisions are relied on by courts for their persuasive value, including those in the Fourth Circuit. *See, e.g.*, *United States v. Kanasco, Ltd.*, 123 F.3d 209, 211 (4th Cir. 1997); *Nuclear Regulatory Comm'n v. Fed. Labor Relations Auth.*, 859 F.2d 302, 309 (4th Cir. 1988); *Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police*, 72 F. Supp. 2d 560, 567 (D. Md. 1999) (same).

Thomasson, 80 F.3d at 927. The President's tweets and Memorandum far more closely resembles those where the decision was made "casually," *Owens,* 455 F. Supp. at 305, or "reflexively and not for any considered reason," *Rostker*, 453 U.S. at 72, or "without consulting the relevant national security agencies" in the process, *IRAP*, 857 F.3d at 596.

Indeed, the process that led to the decision in this case is not only wanting, but is a departure from the steps that were followed in considering similar personnel changes in cases throughout history. The Supreme Court has emphasized that "[d]epartures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role" in government action. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). The President's failure to consult any military experts, his failure to ground his decision in any evidence or facts, indeed his failure to undertake any considered review at all, is so dramatic a break from precedent for such a major personnel change that it only provides further reason to question his insistence now to this Court that national security concerns, and not discriminatory animus, motivated the decision.

II. The President's actions will harm the national security and foreign policy interests of the United States.

The Presidential Memorandum asserts that a ban on transgender service members is necessary to avoid "hinder[ing] military effectiveness and lethality, disrupt[ing] unit cohesion, or tax[ing] military resources."[37] However, the Memorandum offers not a single piece of evidence to support these assertions. In fact, the evidence is overwhelmingly to the contrary—the categorical exclusion of transgender individuals on the basis of group characteristics rather than individual fitness will gravely harm the effectiveness of our military and the national security and foreign policy interests of the United States.

First, the President's actions will negatively impact military readiness. Imposing a ban on transgender service will significantly disrupt and distract from the core mission of the military services, by pulling people out of mission-ready, mission-critical units. President Trump proposes to expand the number of active duty Army and Marine Corps service members by 70,000 personnel—but to accomplish such an ambitious goal without degrading the effectiveness of our troops, the U.S. military will need to recruit all qualified individuals, not to exclude entire groups from military service based on rank prejudice and sweeping generalizations and without regard for individuals' capacity to serve.[38] Significantly, the RAND Corporation found that transition-related health care would have a negligible impact on the ability of any affected soldiers to deploy.[39]

Second, these actions pose a serious threat to unit cohesion. They order transgender troops to live a lie, authorize discriminatory behavior among fellow service members, and place troops in the unconscionable position of having "to choose between reporting their comrades or

[37] Presidential Memorandum, *supra* note 1.
[38] K.K. Rebecca Lai et al., *Is America's Military Big Enough?*, N.Y. Times, Mar. 22, 2017.
[39] RAND Corp., supra note 25.

disobeying policy."[40] Transgender service members have long been allowed to serve openly in the militaries of such close United States allies as Israel and the United Kingdom without any evidence of harm to unit cohesion, and these transgender service members have already served alongside U.S. troops in NATO units without any demonstrated adverse effect. In fact, the RAND study looked at the experiences of the 18 foreign countries that permit open transgender military service and found not only that such a policy did not negatively affect cohesion, but "direct interactions with transgender individuals significantly reduce negative perceptions and increase acceptance, which would suggest that those who have previously interacted with transgender individuals would be more likely to be accepting of them in the future."[41]

Third, the President's decision will deplete the military of valuable funds at a moment of budget austerity. According to one estimate, the financial cost to recruit, replace, and retrain the estimated 12,800 service members who would be ejected from the military under the new policy would be $960 million.[42] On the other side of the ledger, the RAND report found that even in "the most extreme scenario that we were able to identify using the private health insurance data, we expect only a 0.13-percent ($8.4 million out of $6.2 billion) increase in active component health care spending" as a result of incorporating openly transgender troops into the military.[43] And so, the President's decision will cost the U.S. military more money than it saves by a ratio of nearly 115 to 1.

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[40] Palm Center, Fifty-Six Retired Generals and Admirals Warn That President Trump's Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness 1 (Aug. 1, 2017), http://www.palmcenter.org/wp-content/uploads/2017/08/56-GOFO-statement-2.pdf.
[41] RAND Corp., *supra* note 25, at 44 (internal citations omitted).
[42] Palm Center, Discharging Transgender Troops Would Cost $960 Million (Aug. 2017), http://www.palmcenter.org/wp-content/uploads/2017/08/cost-of-firing-trans-troops-3.pdf.
[43] RAND Corp., *supra* note 25, at xi-xii.

Finally, judicial deference to the President's actions would send a troubling signal to those abroad, showing both allies and adversaries that the United States military is willing to distort its justly admired personnel polices to serve prejudice and political expediency. The President's tweets and Memorandum convey to the world that able and patriotic American citizens, eager and qualified to serve their country's military, can nevertheless be denied equal rights and opportunity based on illusory arguments. That message undermines the efforts of the U.S. government to advance principles of non-discrimination and equality throughout the world as a longstanding central tenet of its foreign policy, and erodes the credibility of the United States as a leader in seeking to hold governments accountable to their human rights obligations, not least of all as a critical avenue for promoting peace and security and avoiding humanitarian crises around the globe.

Against all of the above evidence of harm, the President's tweets and Memorandum did not cite a single piece of information to the contrary. In their papers to this Court, Defendants mostly gesture towards language from the RAND study that they claim could have served as the basis for this decision, while even they are forced to acknowledge the study's own conclusions (still undisputed in this record) that there will be a "negligible" impact on readiness, a "minimal" impact on unit cohesion and "relatively low" costs.[44] For the most part though, Defendants seek to defend the President's actions not on the evidence or the facts, but by falling back on their core argument: "it is not this Court's role to resolve a battle of the experts in reviewing a military policy."[45] But there is no battle, because they cite no experts as the basis for this decision to overturn abruptly a considered policy, only tweets and a memorandum benefiting from no

[44] Def. Mem. at 27-28; RAND Corp. *supra* note 5, at 47, 70.
[45] Def. Mem. at 28.

process, citing no evidence, and soliciting none of the vast professional expertise that comprises the ranks of our Nation's military leaders.

Such a shallow, transparently discriminatory façade is unworthy of the deference that the Constitution has historically afforded to genuine national security and military judgment.

CONCLUSION

For all of the foregoing reasons, the plaintiffs' requests for relief should be granted.

Respectfully submitted,

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APPENDIX

LIST OF AMICI

1. Brigadier General (Ret.) Clara L. Adams-Ender, USA

2. Brigadier General Ricardo Aponte, USAF (Ret.)

3. Vice Admiral Donald Arthur, USN (Ret.)

4. Major General (Ret.) Donna Barbisch, USA

5. Michael R. Carpenter served as Deputy Assistant Secretary of Defense for Russia, Ukraine, Eurasia from 2015 to 2017.

6. Brigadier General Stephen A. Cheney, USMC (Ret.)

7. Brigadier General (Ret.) Julia Cleckley, USA

8. Derek Chollet served as Assistant Secretary of Defense for International Security Affairs from 2012 to 2015.

9. Rear Admiral Christopher Cole, USN (Ret.)

10. Major General J. Gary Cooper, USMC (Ret.)

11. Rudy DeLeon served as Deputy Secretary of Defense from 2000 to 2001. Previously, he served as Under Secretary of Defense for Personnel and Readiness from 1997 to 2000.

12. Rear Admiral Jay A. DeLoach, USN (Ret.)

13. Brigadier General John W. Douglass, USAF (Ret.) served as Assistant Secretary of the Navy for Research, Development and Acquisition from 1995 to 1998.

14. Major General (Ret.) Paul D. Eaton, USA

15. Major General (Ret.) Mari K. Eder, USA

16. Andrew Exum served as Deputy Assistant Secretary of Defense for Middle East Policy from 2015 to 2017.

17. Brigadier General (Ret.) Evelyn "Pat" Foote, USA

18. Lieutenant General Walter E. Gaskin, USMC (Ret.)

19. Vice Admiral Kevin P. Green, USN (Ret.)

20. General Michael Hayden, USAF (Ret.), served as Director of the Central Intelligence Agency from 2006 to 2009, and Director of the National Security Agency from 1995 to 2005.

21. Chuck Hagel served as Secretary of Defense from 2013 to 2015. From 1997 to 2009, he served as U.S. Senator for Nebraska.

22. Kathleen Hicks served as Principal Deputy Under Secretary of Policy from 2012 to 2013.

23. Brigadier General (Ret.) David R. Irvine, USA

24. Lieutenant General Arlen D. Jameson (USAF) (Ret.), served as the Deputy Commander of U.S. Strategic Command.

25. Brigadier General (Ret.) John H. Johns, USA

26. Colin H. Kahl served as Deputy Assistant to the President and National Security Advisor to the Vice President. Previously, he served as Deputy Assistant Secretary of Defense for the Middle East from 2009 to 2011.

27. Rear Admiral Gene Kendall, USN (Ret.)

28. Lieutenant General (Ret.) Claudia Kennedy, USA

29. Major General (Ret.) Dennis Laich, USA

30. Major General (Ret.) Randy Manner, USA

31. Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.)

32. General (Ret.) Stanley A. McChrystal, USA, served as Commander of Joint Special Operations Command from 2003 to 2008, and Commander of the International Security Assistance Force and Commander, U.S. Forces Afghanistan from 2009 to 2010.

33. Kelly E. Magsamen served as Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs from 2014 to 2017.

34. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.

35. Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN.

36. Rear Admiral Harold Robinson, USN (Ret.)

37. Brigadier General (Ret.) John M. Schuster, USA

38. David Shear served as the Assistant Secretary of Defense for Asian and Pacific Security Affairs from July 2014 to June 2016.

39. Rear Admiral Michael E. Smith, USN (Ret.)

40. Brigadier General (Ret.) Paul Gregory Smith, USA

41. Julianne Smith served as Deputy National Security Advisor to the Vice President of the United States from 2012 to 2013. Previously, she served as the Principal Director for European and NATO Policy in the Office of the Secretary of Defense in the Pentagon.

42. Admiral James Stavridis, USN (Ret.), served as the 16th Supreme Allied Commander at NATO.

43. Brigadier General (Ret.) Marianne Watson, USA

44. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.

45. Christine E. Wormuth served as Under Secretary of Defense for Policy from 2014 to 2016.

46. Rear Admiral Dick Young, USN (Ret.)

CERTIFICATE OF SERVICE

I, Phillip Spector, hereby certify that on October 27, 2017, the foregoing document was filed and served through the CM/ECF system.

Respectfully Submitted,

/s/
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General Information

Court	United States District Court for the District of Maryland; United States District Court for the District of Maryland
Federal Nature of Suit	Civil Rights - Other[440]
Docket Number	1:17-cv-02459