

# **Exhibit A**

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

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

**BRIEF OF RETIRED MILITARY  
OFFICERS AND FORMER NATIONAL  
SECURITY OFFICIALS AS AMICI  
CURIAE IN SUPPORT OF PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT**

**NOTED ON MOTION CALENDAR:  
February 16, 2018**

**I. 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

1 warranted, in light of the absence of any considered military policymaking process, and the  
2 sharp departure from decades of precedent on the approach of the U.S. military to major  
3 personnel policy changes. Furthermore, amici contend that the categorical exclusion of  
4 transgender individuals on the basis of group characteristics rather than individual fitness to  
5 serve is inimical to the national security interests of the United States.  
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## 7 II. ARGUMENT

8 On the morning of July 26, 2017, President Donald Trump issued three tweets that  
9 suddenly announced a ban on transgender service members serving in the military. The  
10 tweets did not emerge from a policy review of any kind. In advance of his decision, he did  
11 not consult his military officials; his Joint Chiefs of Staff were unaware that he planned to  
12 make this decision at all. Less than a month later, President Trump issued a Presidential  
13 Memorandum that formalized the tweets, but that document again did not identify any  
14 policymaking process or consultations with senior military officials leading to the decision.  
15 The Presidential Memorandum also did not point to a single piece of evidence demonstrating  
16 that the ban was necessary for reasons of military necessary, national security, or any other  
17 legitimate national interest.<sup>1</sup>  
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19 He now seeks to shield that decision from judicial review, claiming throughout his  
20 papers that he is owed “the utmost deference” in cases “involving the judgment of military  
21 authorities.”<sup>2</sup> These assertions neglect the very simple fact that the President’s tweets and  
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24 <sup>1</sup> Presidential Memorandum from the President of the United States to Secretaries of Defense and Homeland  
25 Security, 82 Fed. Reg. 41,319 (Aug. 25, 2017) (hereinafter “Presidential Memorandum”).

26 <sup>2</sup> Defs.’ Mot. to Dismiss and Opp’n to Pls.’ Mot. for a Preliminary Inj., *Karnoski v. Trump*, 2:17-cv-1297-MJP,  
Oct. 16, 2017, Dkt. #69 at p. 6, 28 (hereinafter “Def. Mot.”); *see also id.* at 29-33.

1 Memorandum did not involve the judgment of any military authorities at all. In fact, the  
2 President's actions at issue here are about as far removed as one could imagine from those  
3 cases where courts have deferred to the genuine "considered" or "professional judgment" of  
4 the executive branch on military matters. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24  
5 (2008) (quotations and citations omitted); *Goldman v. Weinberger*, 475 U.S. 503, 508-09  
6 (1986).  
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8 Defendants are unable to point to a single case where a court afforded deference to a  
9 President's military judgment when that President undertook no considered review, consulted  
10 no military officials, and cited no evidence in support of his decision. Indeed, the President's  
11 actions here represent a remarkable departure from decades of practice across multiple  
12 administrations regarding the proper approach to making major policy changes on personnel  
13 issues within the U.S. military. And perhaps it should not come as a surprise that such an  
14 arbitrary process resulted in a policy that the evidence overwhelmingly shows will impair our  
15 military's readiness, harm unit cohesion, deplete urgently needed military resources, and  
16 undermine the foreign policy of the United States.  
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18 Although this case *affects* national security, it involves no identifiable national  
19 security *judgment* of the sort that deserves—much less compels—judicial deference. Amici  
20 know quite well the critical importance of military expertise to the security of our nation, and  
21 the need for the judiciary to defer to that expertise when the circumstances demand.  
22 However, the President should not be allowed to hide behind a cloak of deference a capricious  
23 and discriminatory act that involved no considered consultation, no professional military  
24 decision-makers, and no evidentiary basis or review, and will do grievous harm not only to  
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1 the service members immediately affected, but to the national security and foreign policy  
2 interests of the United States.

3 **A. The President’s actions departed sharply from decades of practice**  
4 **involving similar military policy changes.**

5 Throughout its history, the U.S. military has exercised great care in the selection,  
6 training, and retention of qualified personnel as an integral aspect of military readiness.  
7 Significant changes to its personnel policies—particularly those involving the categorical  
8 exclusion of entire groups from military service—have been subjected time and again to a  
9 process that includes: 1) a searching policy review, 2) involving senior military officials,  
10 3) that thoroughly examines the best available evidence on the impact and consequences of  
11 the change. This practice is a reflection of the gravity of such decisions and a realization that  
12 even incremental changes in military policy can dramatically affect our Armed Forces’  
13 overall readiness to protect our country.  
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15 The paradigmatic case of a major personnel change in the U.S. military is President  
16 Truman’s decision seven decades ago to integrate African Americans into the Armed Forces.  
17 Although African Americans had served in the United States military since the Revolutionary  
18 War,<sup>3</sup> many had served in segregated units due to perceived concerns about unit cohesion and  
19 morale.<sup>4</sup> Prompted by growing concern about racial inequality and unrest in the United  
20 States, on December 5, 1946 President Truman issued an Executive Order appointing the  
21 President’s Committee on Civil Rights, a presidential commission comprised of senior  
22 defense officials, religious leaders, and civil rights activists to study, *inter alia*, the  
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25 <sup>3</sup> Michael Lee Lanning, *African Americans in the Revolutionary War* 73 (2000).

26 <sup>4</sup> Martin Binkin & Mark J. Eitelberg, *Blacks and the Military* 25-26 (1982).

1 desegregation of the military.<sup>5</sup> Over nearly a year, the Committee deliberated across ten  
2 meetings, undertook multiple studies, heard from numerous witnesses in public and private  
3 hearings, received hundreds of communications from private organizations and individuals,  
4 and was assisted in its work by twenty-five agencies across the federal government.<sup>6</sup>

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6 In December 1947, the Committee issued its final report. The report found that the  
7 practices of the military services in excluding African-Americans was “indefensible,”  
8 concluding that that practice had “cost[] lives and money in the inefficient use of human  
9 resources,” “weaken[ed] our defense” by “preventing entire groups from making their  
10 maximum contribution to the national defense,” and “impose[d] heavier burdens on the  
11 remainder of the population.”<sup>7</sup> As a result, the Committee called for an immediate end to  
12 discrimination and segregation based on “race, color, creed, or national origin, in the  
13 organization and activities of all branches of the Armed Services.”<sup>8</sup> Several months later,  
14 President Truman issued an executive order declaring that it would be the policy of the United  
15 States to require equality of treatment and opportunity for all persons in the U.S. Armed  
16 Services without regard to race, and convening a Committee on Equality of Treatment and  
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<sup>5</sup> Harry S. Truman Library and Museum, *Records of the President’s Committee on Civil Rights* (2000), available  
23 at <http://www.trumanlibrary.org/hstpape/pccr.htm>.

24 <sup>6</sup> 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.

25 <sup>7</sup> *To Secure These Rights: The Report of the President’s Committee on Civil Rights XI*, *supra* note 5, at 46-47,  
162-63.

26 <sup>8</sup> *Id.* at 163.

1 Opportunity in the Armed Services to “recommend revisions in military regulations in order  
2 to implement the government’s policy of desegregation of the armed services.”<sup>9</sup>

3 The Obama Administration’s repeal of the Don’t Ask, Don’t Tell directive, which  
4 allowed gay, lesbian or bisexual people to serve openly in the military, followed a similarly  
5 searching process. The repeal came on the heels of a comprehensive Pentagon review. In  
6 March 2010, Secretary of Defense Gates convened a working group co-chaired by General  
7 Counsel Jeh Johnson of the Department of Defense and General Carter F. Ham of the U.S.  
8 Army, and comprised of senior civilian and military leaders from across the Armed Services,  
9 to undertake a comprehensive review of the impacts of a repeal of the law.<sup>10</sup> The working  
10 group conducted 95 “information exchange forums” at 51 bases and installations around the  
11 world, conducted 140 focus groups, solicited input from nearly 400,000 active duty and  
12 reserve service members, engaged the RAND Corporation to update its earlier 1993 study,  
13 *Sexual Orientation and U.S. Military Personnel Policy*, studied foreign militaries’ integration  
14 of gays and lesbians, and conducted a thorough legal review.<sup>11</sup>

17 On November 30, 2010, the working group issued a 256-page report rejecting the  
18 contention that allowing gays to serve openly in the military would result in long-lasting and  
19 detrimental effects on unit cohesion or the ability of units to conduct military missions.<sup>12</sup> It  
20 also offered a series of recommendations for implementing a repeal of the law in the areas of  
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22 <sup>9</sup> Harry S. Truman Library and Museum, *Records of the President’s Committee on Equality of Treatment and*  
23 *Opportunity in the Armed Services*, available at <http://www.trumanlibrary.org/hstpape/fahy.htm>; Exec. Order  
No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

24 <sup>10</sup> U.S. Dep’t of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t*  
25 *Ask, Don’t Tell,”* Nov. 30, 2010,  
[http://archive.defense.gov/home/features/2010/0610\\_dadt/DADTRReport\\_FINAL\\_20101130\(secure-hires\).pdf](http://archive.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130(secure-hires).pdf).

26 <sup>11</sup> *Id.* at 33-39.

<sup>12</sup> *Id.* at 119.

1 leadership, training, education, and the management of moral and religious objections.<sup>13</sup>

2 Shortly thereafter, Secretary Gates and Chairman of the Joint Chiefs Admiral Mullen called  
3 on Congress to immediately repeal the Don't Ask, Don't Tell law. Congress passed just such  
4 a bill, which President Obama signed into law. Seven months later, President Obama, newly  
5 confirmed Secretary of Defense Panetta, and Admiral Mullen formally certified under the new  
6 statute that the American military was ready to repeal the old policy.<sup>14</sup>

8 The decision to include female service members in combat roles likewise emerged  
9 from a careful evidence-based process—this time, a congressionally mandated policy and  
10 legal review undertaken by the Secretary of Defense, in consultation with the Military  
11 Department Secretaries, of the policies and regulations that had officially barred women from  
12 serving in combat positions. The process involved an “extensive review” of the policies and  
13 laws governing the assignment of women in the Armed Forces, and the feasibility of opening  
14 to women military occupational specialties that were then closed to them. After that review,  
15 the Department of Defense found in a February 2012 report that, given the “dynamics of the  
16 modern-day battlefield . . . there is no compelling reason for continuing the portion of the  
17 policy that precludes female service members from being assigned to . . . direct ground  
18 combat units,” and declared its intent to rescind the “co-location rule” that prevented female  
19 Service members from being assigned to units that were doctrinally required to physically co-  
20 locate with direct ground combat units.<sup>15</sup>

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24 <sup>13</sup> *Id.* at 3.

25 <sup>14</sup> Jody Feder, “*Don't Ask, Don't Tell*: A Legal Analysis, CRS Rep. R40795, Aug. 6, 2013.

26 <sup>15</sup> 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](https://www.defense.gov/Portals/1/Documents/pubs/Fact_Sheet_WISR_FINAL.pdf).



1 Secretary Panetta also issued a directive at that time to conduct an in-depth review of  
2 the remaining barriers to service for women. After several months of additional study, on  
3 January 24, 2013, Secretary Panetta announced that the Department would rescind the Direct  
4 Combat Exclusion Rule on women serving in previously restricted occupations.<sup>16</sup> He also  
5 called on each of the services to undertake their own separate “women in the service” reviews  
6 of how to move forward with the integration of women into previously closed positions, and  
7 identify any recommended exemptions for particular positions.<sup>17</sup> This process led to more  
8 than thirty additional studies over the next three years to inform the contours of the policy  
9 change.<sup>18</sup> After the Secretaries of each of the services completed their reviews and submitted  
10 their final recommendations, Secretary of Defense Ashton Carter on December 3, 2015  
11 ordered the military to open all combat jobs to women who meet the validated occupational  
12 standards.<sup>19</sup>

15 Finally, the very opening of military service to transgender personnel that President  
16 Trump now seeks summarily to reverse emerged from its own rigorous policymaking process.  
17 In July 2015, Secretary Carter issued a directive creating a formal working group to study the  
18 “policy and readiness implications of welcoming transgender persons to serve openly” in the  
19 military.<sup>20</sup> Over the course of the following year, the working group engaged in what one  
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22 <sup>16</sup> Kristy N. Kamarck, *Women in Combat: Issues for Congress*, Cong. Res. Serv. R42075, Dec. 13, 2016.

23 <sup>17</sup> 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.

24 <sup>18</sup> Fact Sheet, *supra* note 15.

25 <sup>19</sup> 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.

26 <sup>20</sup> 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.

1 senior member described as a “detailed, deliberative, [and] carefully run process.”<sup>21</sup> Each  
2 military service was represented in the working group by a senior uniformed officer, a senior  
3 civilian official, and various staff members.<sup>22</sup> The working group created sub-groups to  
4 investigate specific issues, consulted with medical, personnel, and readiness experts, and  
5 spoke with health insurance companies and commanders of transgender service members.<sup>23</sup>  
6 At the end of this comprehensive process, the working group unanimously concluded that  
7 transgender individuals should be permitted to serve openly in the Armed Forces.<sup>24</sup>

9         Meanwhile, the Department also had commissioned a separate, independent study  
10 from the RAND Corporation. The study focused on seven broad research questions, among  
11 them the cost of providing medical coverage to transgender individuals, the readiness  
12 implications of the proposed policy, and any applicable lessons from the eighteen foreign  
13 militaries that already allowed open transgender service.<sup>25</sup> RAND laid out its findings in a  
14 71-page report, concluding that allowing transgender people to serve openly would place an  
15 “exceedingly small” burden on health care expenditures and have a “minimal impact” on  
16 readiness.<sup>26</sup> Based on the thorough review carried out by these two groups, Secretary Carter  
17 announced the policy change in June 2016. For more than a year after that change,  
18 transgender individuals currently in the military were able to serve openly alongside their  
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22 <sup>21</sup> Decl. of Raymond Edwin Mabus, Jr. In Support of Plaintiffs’ Motion for Preliminary Injunction at 3,  
23 *Karnoski v. Trump*, No. 2:17-cv-1297, Dkt. #48 at p. 3 (W.D. Wash. 28 Aug. 2017).

24 <sup>22</sup> Decl. of Brad R. Carson in Support of Plaintiffs’ Motion for Preliminary Injunction at 3, *Karnoski v. Trump*,  
25 No. 2:17-cv-1297, Dkt. #46 at p. 3 (W.D. Wash. 28 Aug. 2017).

26 <sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> RAND Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* ix (2016).

<sup>26</sup> *Id.* at xi and 47.

1 fellow service members. The Department released a 71-page handbook specifying  
2 implementation strategies,<sup>27</sup> and issued guidelines for both in-service medical transition  
3 procedures and treatment of gender dysphoria.<sup>28</sup> But for President Trump’s abrupt about-  
4 face, this studied, measured, and incremental process would have concluded on January 1,  
5 2018 with the accession of openly transgender individuals into the U.S. military.  
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7 Each of the above personnel decisions was the product of a rigorous policy review  
8 involving senior military officials and an evidence-based examination of the likely impact of  
9 the proposed change. In sharp contrast, on the morning of July 26, 2017, President Trump  
10 suddenly announced a ban on transgender persons serving in the military. In a series of three  
11 tweets, the President (speaking as @realDonaldTrump) declared,  
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13 “The United States Government will not accept or allow . . . [t]ransgender  
14 individuals to serve in any capacity in the U.S. Military. Our military must be  
15 focused on decisive and overwhelming . . . victory and cannot be burdened  
16 with the tremendous medical costs and disruption that transgender [sic] in the  
17 military would entail. Thank you[.]”

18 No effort was made—nor evidence presented—to show that this pronouncement  
19 resulted from any analysis of the cost or disruption allegedly caused by allowing transgender  
20 individuals to serve openly in the military. The Joint Chiefs of Staff were not consulted at all  
21 on the decision before the President issued the tweet. Secretary of Defense James N. Mattis,  
22 who was on vacation at the time, was given only a single day’s notice that the decision was  
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24 <sup>27</sup> U.S. Dep’t of Defense, *Transgender Service in the U.S. Military: An Implementation Handbook* (2016).

25 <sup>28</sup> U.S. Dep’t of Defense, *Instr. 1300.28, In-Service Transition for Transgender Service Members* (Oct. 1, 2016);  
26 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.

1 coming.<sup>29</sup> The decision was announced so abruptly that White House and Pentagon officials  
2 were unable to explain the most basic of details about how it would be carried out.<sup>30</sup>

3 About four weeks later, President Trump followed up the tweets with a Memorandum  
4 entitled “Military Service by Transgender Individuals,” directed to the Secretary of Defense  
5 and the Secretary of Homeland Security.<sup>31</sup> This Memorandum instructs the Department of  
6 Defense to return to the earlier policy of discrimination against transgender service members,  
7 including by involuntary or dishonorable discharge, and maintains and extends in time the  
8 current bar on accession of transgender individuals into the military.<sup>32</sup> Again, the  
9 Memorandum does not point to any policy process that led to the decision, does not cite  
10 consultations with any military officers, and does not identify a single piece of evidence to  
11 support the decision. The Memorandum suggests in passing that the Departments would  
12 “continue to study the issue,” even as it declares a sweeping change affecting thousands of  
13 transgender service-members.  
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16 The President now seeks to shield this decision from judicial scrutiny by invoking “the  
17 highly deferential review” that the Constitution has historically afforded national security and  
18 military judgments.<sup>33</sup> He claims that such deference is appropriate here because the lawsuit is  
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21 <sup>29</sup> Barbara Starr et al., *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 27, 2017),  
22 <http://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html>; Julie  
23 Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*,  
24 N.Y. Times (July 26, 2017), [https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-](https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0)  
25 [military.html?\\_r=0](https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0).

26 <sup>30</sup> Davis & Cooper, *supra* note 29.

<sup>31</sup> Presidential Memorandum, *supra* note 1.

<sup>32</sup> 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.

<sup>33</sup> Def. Mot. at 6.

1 challenging “military decision-making,” and “professional military judgments.”<sup>34</sup> However,  
2 there is no sign of respect for military decision-making or professional military judgments to  
3 be found anywhere in the President’s actions. He not only failed to involve senior military  
4 officials in his decision at all, but he is seeking to displace the considered judgment of  
5 military officials regarding the treatment of transgender individuals in the military from just a  
6 year earlier. The Supreme Court in fact has given “great deference to the *professional*  
7 *judgment of military authorities* concerning the relative importance of a particular military  
8 interest,” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (emphasis added)  
9 (quotations and citations omitted), and the “*considered professional judgment*” of  
10 “appropriate military officials,” *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986)  
11 (emphasis added). But the record in this case hints at nothing remotely resembling a  
12 considered or professional judgment of this sort.  
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15 Earlier cases show how the courts have looked for considered judgment before  
16 affording constitutional deference to the coordinate branches in areas of policy making  
17 involving military personnel. For example, in *Rostker v. Goldman*, 453 U.S. 57 (1981), the  
18 Supreme Court upheld the constitutionality of provisions that authorized the President to  
19 require men, but not women, to register for the draft. The Court deferred to “Congress’  
20 evaluation of th[e] evidence,” noting that “[t]his case is quite different from several of the  
21 gender-based discrimination cases we have considered in that . . . Congress did not act  
22 ‘unthinkingly’ or ‘reflexively and not for any considered reason.’” *Id.* at 72, 83 (quoting Br.  
23 for Appellees) (emphasis omitted). The Court pointed to the fact that the issue was  
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26 <sup>34</sup> Def. Mot. at 6, 29.

1 “extensively considered by Congress in hearings, floor debate, and in committee.” *Id.* at 72;  
2 *see also, e.g., id.* at 63, 79.

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

14 The courts have also chosen or declined to afford deference to the national security  
15 prerogatives of the executive based on whether the decision reflected a considered  
16 policymaking process. In *Thomasson v. Perry*, the Fourth Circuit premised its decision  
17 upholding the constitutionality of the Don’t Ask, Don’t Tell policy on a lengthy discussion of  
18 the policy deliberations that took place before the enactment of the directive, including studies  
19 and reviews undertaken by the Department of Defense, the RAND Corporation, and  
20 congressional committees, and consultations with the Joint Chiefs of Staff and leaders of each  
21 service. 80 F.3d 915, 921-23 (4th Cir. 1996). Emphasizing that the directive emerged from  
22 an “exhaustive review” and “extensive deliberation” by the executive branch and Congress,  
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1 the court only then went on to defer to what it described as the “considered judgment” of  
 2 those coordinate branches of government. *Id.* at 922-27.

3 But when the record shows no such considered judgment or process, the courts have  
 4 chosen not to defer to the President. Recently, in *Int’l Refugee Assistance Project*  
 5 (*“IRAP”*) *v. Trump*, the Fourth Circuit ruled that the plaintiffs challenging President Trump’s  
 6 second Executive Order<sup>35</sup> restricting the entry of individuals from several Muslim-majority  
 7 countries would likely succeed on the merits of their Establishment Clause claim, over the  
 8 President’s attempt to invoke deference on national security grounds. 857 F.3d 554 (4th Cir.  
 9 2017), *vacated as moot sub nom., Trump v. Int’l Refugee Assistance Project*, \_\_ S. Ct. \_\_,  
 10 2017 WL 4518553.<sup>36</sup> In reaching that conclusion, the Court gave significant weight to “the  
 11 exclusion of national security agencies from the decision-making process,” and the fact that  
 12 “President Trump issued the First Executive Order without consulting the relevant national  
 13 security agencies,” to conclude that the Order’s “stated national security interest was provided  
 14 in bad faith, as a pretext for its religious purpose.” *Id.* at 592, 596.

17 President Trump’s actions in this case show no signs of the policy judgment that  
 18 traditionally has given rise to judicial deference on military issues. This is not a case  
 19 involving the “professional judgment” of “appropriate military officials,” as no military  
 20 officials were involved in the decision at all. *Goldman*, 475 U.S. at 508-09. Nor is this a case  
 21 where the decision resulted from an “exhaustive review,” as in fact there was no review to  
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23 \_\_\_\_\_  
 24 <sup>35</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

25 <sup>36</sup> Although the decision was vacated as moot, such decisions are relied on by courts for their persuasive value,  
 26 including those in the Ninth Circuit. *See, e.g., In re SNTL Corp.*, 571 F.3d 826, 843 n.19 (9th Cir. 2009); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1176 (9th Cir. 2005); *Gherebi v. Bush*, 374 F.3d 727, 737 n.14 (9th Cir. 2004); *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994).

1 speak of. *Thomasson*, 80 F.3d at 927. The President’s tweets and Memorandum far more  
2 closely resemble those where the decision was made “casually,” *Owens*, 455 F. Supp. at 305,  
3 or “reflexively and not for any considered reason,” *Rostker*, 453 U.S. at 72, or “without  
4 consulting the relevant national security agencies” in the process, *IRAP*, 857 F.3d at 596.  
5

6 Indeed, the process that led to the decision in this case is not only wanting, but is a  
7 departure from the steps that were followed in considering similar personnel changes in cases  
8 throughout history. The Supreme Court has emphasized that “[d]epartures from the normal  
9 procedural sequence . . . might afford evidence that improper purposes are playing a role” in  
10 government action. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267  
11 (1977). The President’s failure to consult any military experts, his failure to ground his  
12 decision in any evidence or facts, indeed his failure to undertake any considered review at all,  
13 is so dramatic a break from precedent for such a major personnel change that it only provides  
14 further reason to question his insistence now to this Court that national security concerns, and  
15 not discriminatory animus, motivated the decision.  
16

17 **B. The President’s actions will harm the national security and foreign policy**  
18 **interests of the United States.**

19 The Presidential Memorandum asserts that a ban on transgender service members is  
20 necessary to avoid “hinder[ing] military effectiveness and lethality, disrupt[ing] unit cohesion,  
21 or tax[ing] military resources.”<sup>37</sup> However, the Memorandum offers not a single piece of  
22 evidence to support these assertions. In fact, the evidence is overwhelmingly to the  
23 contrary—the categorical exclusion of transgender individuals on the basis of group  
24

25  
26 <sup>37</sup> Presidential Memorandum, *supra* note 1.



1 characteristics rather than individual fitness will gravely harm the effectiveness of our  
2 military and the national security and foreign policy interests of the United States.

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

15 Second, these actions pose a serious threat to unit cohesion. They order transgender  
16 troops to live a lie, authorize discriminatory behavior among fellow service members, and  
17 place troops in the unconscionable position of having “to choose between reporting their  
18 comrades or disobeying policy.”<sup>40</sup> Transgender service members have long been allowed to  
19 serve openly in the militaries of such close United States allies as Israel and the United  
20 Kingdom without any evidence of harm to unit cohesion, and these transgender service  
21 members have already served alongside U.S. troops in NATO units without any demonstrated  
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24 <sup>38</sup> K.K. Rebecca Lai et al., *Is America’s Military Big Enough?*, N.Y. Times, Mar. 22, 2017.

25 <sup>39</sup> RAND Corp., *supra* note 25.

26 <sup>40</sup> 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>.

1 adverse effect. In fact, the RAND study looked at the experiences of the 18 foreign countries  
2 that permit open transgender military service and found not only that such a policy did not  
3 negatively affect cohesion, but “direct interactions with transgender individuals significantly  
4 reduce negative perceptions and increase acceptance, which would suggest that those who  
5 have previously interacted with transgender individuals would be more likely to be accepting  
6 of them in the future.”<sup>41</sup>

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

18 Finally, judicial deference to the President’s actions would send a troubling signal to  
19 those abroad, showing both allies and adversaries that the United States military is willing to  
20 distort its justly admired personnel policies to serve prejudice and political expediency. The  
21 President’s tweets and Memorandum convey to the world that able and patriotic American  
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<sup>41</sup> RAND Corp., *supra* note 25, at 44 (internal citations omitted).

<sup>42</sup> 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>.

<sup>43</sup> RAND Corp., *supra* note 25, at xi-xii. **Error! Bookmark not defined.**

1 citizens, eager and qualified to serve their country's military, can nevertheless be denied equal  
2 rights and opportunity based on illusory arguments. That message undermines the efforts of  
3 the U.S. government to advance principles of non-discrimination and equality throughout the  
4 world as a longstanding central tenet of its foreign policy, and erodes the credibility of the  
5 United States as a leader in seeking to hold governments accountable to their human rights  
6 obligations, not least of all as a critical avenue for promoting peace and security and avoiding  
7 humanitarian crises around the globe.

9         Against all of the above evidence of harm, the President's tweets and Memorandum  
10 did not cite a single piece of information to the contrary. In their court papers, Defendants  
11 mostly have gestured towards language from the RAND study that they claim could have  
12 served as the basis for this decision, while even they are forced to acknowledge the study's  
13 own conclusions (still undisputed in this record) that there will be a "negligible" impact on  
14 readiness, a "minimal" impact on unit cohesion and relatively low costs.<sup>44</sup> For the most part  
15 though, Defendants have sought to defend the President's actions not on the evidence or the  
16 facts, but by falling back on their core argument: "it is not this Court's role to resolve a battle  
17 of the experts in reviewing a military policy."<sup>45</sup> But there is no battle, because they cite no  
18 experts as the basis for this decision to overturn abruptly a considered policy, only tweets and  
19 a memorandum benefiting from no process, citing no evidence, and soliciting none of the vast  
20 professional expertise that comprises the ranks of our Nation's military leaders.  
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25 <sup>44</sup> Def. Mot. at 7; RAND Corp. *supra* note 5, at 47, 70.

26 <sup>45</sup> Def. Mot. at 34.

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

3 **III. CONCLUSION**

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

5 Dated this 26th day of January, 2018.

6 Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Jake Ewart, certify under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in this case are registered CM/ECF users. I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, and that service of the foregoing document will be accomplished by the CM/ECF system on January 26, 2018.

DATED this 26th day of January, 2018.

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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.

- 1
- 2 18. Lieutenant General Walter E. Gaskin, USMC (Ret.).
- 3 19. Vice Admiral Kevin P. Green, USN (Ret.).
- 4 20. General Michael Hayden, USAF (Ret.), served as Director of the Central Intelligence  
5 Agency from 2006 to 2009, and Director of the National Security Agency from 1995  
6 to 2005.
- 7 21. Chuck Hagel served as Secretary of Defense from 2013 to 2015. From 1997 to 2009,  
8 he served as U.S. Senator for Nebraska.
- 9 22. Kathleen Hicks served as Principal Deputy Under Secretary of Policy from 2012 to  
10 2013.
- 11 23. Brigadier General (Ret.) David R. Irvine, USA.
- 12 24. Lieutenant General Arlen D. Jameson (USAF) (Ret.), served as the Deputy  
13 Commander of U.S. Strategic Command.
- 14 25. Brigadier General (Ret.) John H. Johns, USA.
- 15 26. Colin H. Kahl served as Deputy Assistant to the President and National Security  
16 Advisor to the Vice President. Previously, he served as Deputy Assistant Secretary of  
17 Defense for the Middle East from 2009 to 2011.
- 18 27. Rear Admiral Gene Kendall, USN (Ret.).
- 19 28. Lieutenant General (Ret.) Claudia Kennedy, USA.
- 20 29. Major General (Ret.) Dennis Laich, USA.
- 21 30. Major General (Ret.) Randy Manner, USA.
- 22 31. Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.).
- 23 32. General (Ret.) Stanley A. McChrystal, USA, served as Commander of Joint Special  
24 Operations Command from 2003 to 2008, and Commander of the International  
25 Security Assistance Force and Commander, U.S. Forces Afghanistan from 2009 to  
26 2010.
33. Kelly E. Magsamen served as Principal Deputy Assistant Secretary of Defense for  
Asian and Pacific Security Affairs from 2014 to 2017.



- 1 34. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to  
2 2011, he served as Director of the Central Intelligence Agency.
- 3 35. Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN.
- 4 36. Rear Admiral Harold Robinson, USN (Ret.).
- 5 37. Brigadier General (Ret.) John M. Schuster, USA.
- 6 38. David Shear served as the Assistant Secretary of Defense for Asian and Pacific  
7 Security Affairs from July 2014 to June 2016.
- 8 39. Rear Admiral Michael E. Smith, USN (Ret.).
- 9 40. Brigadier General (Ret.) Paul Gregory Smith, USA.
- 10 41. Julianne Smith served as Deputy National Security Advisor to the Vice President of  
11 the United States from 2012 to 2013. Previously, she served as the Principal Director  
12 for European and NATO Policy in the Office of the Secretary of Defense in the  
13 Pentagon.
- 14 42. Admiral James Stavridis, USN (Ret.), served as the 16th Supreme Allied Commander  
15 at NATO.
- 16 43. Brigadier General (Ret.) Marianne Watson, USA.
- 17 44. William Wechsler served as Deputy Assistant Secretary for Special Operations and  
18 Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.
- 19 45. Christine E. Wormuth served as Under Secretary of Defense for Policy from 2014 to  
20 2016.
- 21 46. Rear Admiral Dick Young, USN (Ret.).
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