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INTRODUCTION

After serving broad discovery requests touching on numerous policies and decisions made by the President and the Department of Defense (“DoD”), Plaintiffs now seek a sweeping ruling from the Court that the deliberative process privilege does not apply, purely as a matter of law, to *any* document or discovery response withheld on the basis of that privilege. Such a broad-brush ruling would be contrary to law. The deliberative process privilege is a critical protection to enable effective governmental decision-making, and the Court cannot set it aside *per se* as a matter of law in this case.

BACKGROUND

Throughout this litigation, Plaintiffs have challenged the constitutionality of the Presidential Memorandum issued on August 25, 2017 (“2017 Memorandum”), which Plaintiffs characterize as a “Ban” on military service by transgender individuals. Am. Compl. ¶¶ 5, 224, 227, 233, Dkt. 30; *see also* Order, Dkt. 103. Following the revocation of the 2017 Memorandum (and other Presidential directives) in March 2018, and the issuance of DoD’s new policy, *see* Dkt. 214-1, Plaintiffs did not supplement their complaint to challenge the new DoD policy. Instead, they continue to challenge the constitutionality of a policy that no longer exists, arguing that DoD’s new policy is merely an “‘Implementation Plan’ for the policy directives set forth in the President’s tweets and August 2017 Presidential Memorandum.” Pls.’ Mot. 2, Dkt. 245.

Nonetheless, although they challenge only the 2017 Memorandum, Plaintiffs issued broad discovery requests seeking information that goes well beyond that action, including: (i) information and/or “all documents” related to the policy put in place by then-Secretary of Defense Ash Carter and the RAND Report on which the Carter policy was based; (ii) a decision by DoD Secretary James Mattis to defer the start of accessions by transgender individuals under the Carter policy; (iii) the work by the DoD Panel of Experts that was convened to develop policy proposals in fall 2017; (iv) Secretary Mattis’s February 2018 decision memorandum and the accompanying DoD Report regarding the new DoD policy; and (v) the Presidential Memorandum issued on March 23, 2018 (“2018 Memorandum”) that revoked the 2017 Memorandum. *See, e.g.*, Siegfried Decl. Exh. 1, Interrogatories 7, 9, 10, 13, 14, Dkt. 246-1; *id.*

1 at Exh. 2, Requests for Production 1, 8, 14, 15, 23, Dkt. 246-2; Parker Decl. Exh. 1, Second
2 Requests for Production 27–33; *id.* at Exh. 2, Second Interrogatories 16–20. In response to
3 discovery requests on these topics, Defendants conducted an extensive search and have produced
4 (or are shortly producing) over 30,000 non-privileged, responsive documents (consisting of over
5 150,000 pages). Defendants also objected to discovery requests and withheld information and
6 thousands of documents because they are protected by the deliberative process privilege (among
7 others). *See* Siegfried Decl. Exh. 4, 11–27, Dkt. 246-4, 246-11–246-27. Defendants also
8 objected to interrogatories and requests for admission when they called for privileged
9 information, but otherwise responded. *See, e.g., id.* at Exh. 5, 9, Dkt. 246-5, 246-9.

10 After Plaintiffs indicated, by letter dated April 26, 2018, that they plan to challenge *all* of
11 Defendants’ withholdings on the basis of the deliberative process privilege, *see id.* at Exh. 28,
12 Dkt. 246-28, the parties met and conferred in an attempt to resolve the dispute. During the call,
13 defense counsel requested that Plaintiffs identify specific documents or discovery responses or,
14 at the very least, specific categories of documents or discovery responses, to which Plaintiffs
15 contest Defendants’ privilege assertions. Parker Decl. ¶ 4. Defense counsel further stated that if
16 Plaintiffs identified specific documents, Defendants could review the documents to determine
17 whether to perfect the deliberative process privilege over those documents or whether to
18 withdraw the assertion of privilege over the documents with the goal of narrowing the dispute.
19 *Id.* Plaintiffs’ counsel stated that Plaintiffs intended to bring a motion to compel that would
20 address threshold legal issues, rather than challenging withholdings from individual documents
21 or specific discovery responses. *Id.* Plaintiffs’ instant Motion to Compel thus argues that “the
22 deliberative process privilege does not apply in this case” and seeks the “disclos[ure of] all
23 information and documents withheld on that basis.” *See* Pls. Mot. 12. Accordingly, because
24 Plaintiffs have refused to identify specific documents or categories of documents that they
25 presently seek to compel, the only issue before the Court at this time is the “threshold” legal issue
26 of whether the deliberative process privilege *per se* applies as a matter of law to any information
27
28

1 at issue in discovery in this case.¹

2 LEGAL STANDARD

3 The deliberative process privilege protects the Government’s decision-making process by
 4 shielding from disclosure documents “reflecting advisory opinions, recommendations and
 5 deliberations comprising part of a process by which governmental decisions and policies are
 6 formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The purpose of the
 7 privilege “is to allow agencies freely to explore possibilities, engage in internal debates, or play
 8 devil’s advocate without fear of public scrutiny.” *Assembly of State of Cal. v. Dep’t of*
 9 *Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). “Documents must be both ‘predecisional’ and
 10 ‘deliberative’ to qualify for this privilege.” *Hongsermeier v. C.I.R.*, 621 F.3d 890, 904 (9th Cir.
 11 2010). A “document is predecisional if it was prepared in order to assist an agency decisionmaker
 12 in arriving at his decision.” *Id.* A document is “deliberative in nature” if it contains “opinions,
 13 recommendations, or advice about agency policies.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d
 14 1156, 1161 (9th Cir. 1984). The deliberative process privilege may be overcome only if Plaintiffs
 15 show that their particularized need for privileged material outweighs the Government’s interest
 16 in non-disclosure. *See id.*; *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993).
 17 To make this determination, courts consider: “1) the relevance of the evidence; 2) the availability
 18 of other evidence; 3) the Government’s role in the litigation; and 4) the extent to which disclosure
 19 would hinder frank and independent discussion regarding contemplated policies and decisions.”
 20 *Warner*, 742 F.2d at 1161.

21 ARGUMENT

22 **I. Plaintiffs’ Contention that the Deliberative Process Privilege Does Not Apply as 23 a Categorical Matter of Law is Meritless.**

24 Plaintiffs argue that the deliberative process privilege does not apply as a matter of law
 25 to any document in this case first because Plaintiffs “challenge Defendants’ decision-making and

26 ¹ As a result, Defendants are not required to perfect the privilege at this time as to documents or information
 27 contained in each of the thousands of documents, as well as information that has been withheld on the basis of the
 28 deliberative process privilege in response to other discovery requests, and it would be wholly unreasonable to have
 expected Defendants to do so when Plaintiffs have not sought to compel specific documents or categories of
 documents.

1 intent.” Pls.’ Mot. 5. But Plaintiffs’ assertion is contrary to the Ninth Circuit’s approach in
2 *Warner*, 742 F.2d at 1161, which requires a balancing of an articulated need for specific
3 deliberative documents being sought against the Government’s interests in non-disclosure to
4 overcome the privilege. This balancing test necessarily requires an examination of specific
5 documents or categories of documents, which is precisely the kind of examination undertaken by
6 the Ninth Circuit in *Warner*. See at 742 F.2d at 1161–62. District courts in this Circuit have also
7 applied the *Warner* balancing test to determine whether plaintiffs’ need for specific privileged
8 documents or information outweighs the Government’s interest in non-disclosure, even when
9 intent is at issue. See *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010) (“adopting
10 the balancing approach set forth in *Warner* . . . with respect to each individual discovery
11 request”); *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011)
12 (“VVA”) (declining to adopt a categorical rule that the deliberative process privilege is
13 inapplicable when plaintiffs challenge intent, and explaining that the issue of “intent is properly
14 considered as a factor in the substantial need analysis” and applying the balancing test for each
15 category of withheld documents); see also *In re Delphi Corp.*, 276 F.R.D. 81, 84–85 (S.D.N.Y.
16 2011); *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321–22 (2000). To hold
17 otherwise would have the extraordinary consequence of eviscerating the deliberative process
18 privilege in any case in which “plaintiffs challenge the constitutionality of a government decision
19 and allege animus or discriminatory intent.” Pls.’ Mot. 5; see *Utah Med. Prods. v. McClellan*,
20 2004 WL 988877, *8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative
21 process privilege did not apply when a party challenges the decision-making process would lead
22 plaintiffs to “recast [their] complaints as a challenge to the decision-making process”).

23 Moreover, even assuming that “intent” is at issue, Plaintiffs’ argument misapplies
24 nonbinding authority, in particular a D.C. Circuit case, *In re Subpoena Duces Tecum Served on*
25 *the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), which held
26 that the deliberative process privilege did not apply in a fraudulent transfer action in which the
27 plaintiff was required to show that the transfers were made “with actual intent to hinder, delay,
28 or defraud.” However, the Ninth Circuit has not followed *In re Subpoena*, nor held that the

1 deliberative process privilege categorically does not apply as matter of law in cases in which the
2 plaintiffs challenge the Government's intent. *See VVA*, 2011 WL 4635139, at *10 ("This appears
3 to be an open question in the Ninth Circuit."); *Thomas*, 715 F. Supp. 2d at 1021. Other cases
4 cited by Plaintiffs actually support the Government's view: in three of the cases Plaintiffs cite
5 for the proposition that the privilege is "simply inapplicable," Pls.' Mot. 5–6, the courts declined
6 to apply the deliberative process privilege to "routine personnel decisions," such as the decision
7 to terminate an employee, but observed that the deliberative process privilege is intended to
8 protect deliberations behind broad policy decisions—precisely the kind of information at issue
9 here. *See United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005);
10 *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006); *Waters v. U.S. Capitol Police*
11 *Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003). Further, in *Jones*, the court applied the balancing test
12 despite finding that "government intent is at the heart of the issue in this case"—contrary to
13 Plaintiffs' own position. *See* 237 F.R.D. at 521. In three other cases cited by Plaintiffs, the
14 discussion of the deliberative process privilege was either dicta or a summary of the plaintiff's
15 argument. *See Allen v. Woodford*, 2007 WL 309945, at *9 (E.D. Cal. Jan. 30, 2007); *In re Sealed*
16 *Case*, 121 F.3d 729, 746 (D.C. Cir. 1997); *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C.
17 2001). Accordingly, the authority on which Plaintiffs rely to foreclose application of the
18 privilege as a matter of law in this case is inapposite generally, and in any event distinguishable
19 from the circumstances here, where deliberations on broad military personnel policy are at issue.

20 **II. Information Post-Dating the 2017 Twitter Statements is Subject to the** 21 **Deliberative Process Privilege.**

22 Plaintiffs next contend that the privilege cannot apply to any materials that were created
23 after the President's Twitter statements in July 2017. They assert that such materials relate only
24 to the how to implement the 2017 "Ban," not whether to do so. Pls.' Mot. 1–2. But Plaintiffs'
25 attempt to narrow the scope of the deliberative process privilege in this manner is without merit.
26 The withheld materials that were created after the President's statements on Twitter on July 26,
27 2017, are predecisional and properly fall within the scope of the deliberative process privilege.
28 Although Plaintiffs argue that "no claim of privilege can attach to documents generated after July

1 26, 2017, . . . [because] those documents could not have assisted the President in arriving at his
2 decision,” Pls.’ Mot. 11, Plaintiffs ignore that documents generated after the President’s 2017
3 statements on Twitter were predecisional for *subsequent* decisions and policies. These
4 subsequent decisions and policies include not only the August 2017 Presidential Memorandum
5 and the September 2017 Interim Guidance, but also the recommendations prepared by DoD’s
6 Panel of Experts with respect to the new DoD policy, Secretary Mattis’s memorandum and the
7 accompanying DoD Report on the new policy issued in February 2018, and the March 2018
8 Presidential Memorandum. Each of these actions were discrete decisions for which deliberative
9 documents and information were generated before their adoption and thus plainly qualify as
10 “predecisional.” *Warner*, 742 F.2d at 1161.

11 In addition, the law is clear that a document recounting or reflecting pre-decisional
12 deliberations may be protected by the privilege even if it post-dates the decision at issue. Indeed,
13 the Supreme Court has recognized that “the line between pre-decisional documents and
14 postdecisional documents may not always be a bright one.” *Sears*, 421 U.S. at 152 n.19. The
15 “issuance of a ‘final decision’ with respect to a particular issue does not necessarily preclude the
16 agency from withholding documents prepared in a subsequent evaluation of the question with
17 the goal of confirming or rejecting its earlier conclusions.” *Lahr v. Nat’l Transp. Safety Bd.*, 569
18 F.3d 964, 981 (9th Cir. 2009). Moreover, “documents dated after [a decision was made] may
19 still be predecisional and deliberative with respect to other, nonfinal agency policies.” *Judicial*
20 *Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006); *see also Judicial Watch, Inc. v. Dep’t*
21 *of Homeland Sec.*, 841 F.Supp.2d 142, 162–63 (D.D.C. 2012). Thus, Plaintiffs’ broad argument
22 that documents generated after July 26, 2017 Twitter statements are not subject to the deliberative
23 process privilege as a matter of law is incorrect not only as a matter of fact—the post-July 2017
24 actions involved pre-decisional deliberations—but also as a matter of law.

25 In particular, documents and communications generated by DoD’s Panel of Experts and
26 other DoD officials after the issuance of the President’s statements on Twitter and the 2017
27 Memorandum are deliberative because they contain “opinions, recommendations, or advice
28 about agency policies,” *Warner*, 742 F.2d at 1161, as well as “reflect[] the give-and-take of the

1 consultative process,” *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010). Plaintiffs
2 argue that these documents cannot be deliberative because DoD had “very limited policy-making
3 authority and did not exercise any policy-making judgment.” Pls.’ Mot. 11 (quotation omitted).
4 But that argument conflicts with the clear authority noted above and is contradicted by the
5 existing record, which reflects that DoD exercised its discretion in the development of a new
6 policy. The President’s 2017 Memorandum itself directed that “further study” was needed as to
7 the policies at issue, and specifically contemplated further “determinations” by the Secretary of
8 Defense and “recommendations” to the President with respect to the policy at issue. It also stated
9 that the Secretary of Defense should advise him at any time if a change in policy is warranted.
10 *See* 2017 Memorandum §§ 1(a), 1(b), Dkt. 34-7. Secretary Mattis then directed the Panel of
11 Experts to “develop policy proposals based on data, as well as their professional military
12 judgment.” Mattis Mem. 1, Dkt. 224-1. After the completion of a months-long study, DoD
13 developed policy recommendations that were submitted to the President in February 2018 that
14 not only differed from pre-August 2017 DoD policy but indeed led to the revocation of the 2017
15 Memorandum challenged in this case. *Compare* Am. Compl. ¶ 3, *with* Mattis Mem. Regardless
16 of how the Court may view the ultimate merits of this case, the deliberations which occurred
17 after the July 2017 statements on Twitter are pre-decisional in leading up to the policy announced
18 in February 2018, and materials underlying that process, such as meeting minutes of the Panel of
19 Experts “reflect[ing] the give-and-take of the consultative process,” are properly subject to the
20 deliberative process privilege. *See Pub. Citizen*, 598 F.3d at 874.

21 Finally, Plaintiffs argue that Defendants have improperly withheld factual information.
22 Pls.’ Mot. 11. Although “[p]urely factual material that does not reflect deliberative processes is
23 not protected,” factual material that “is so interwoven with the deliberative material that it is not
24 severable” is protected by the deliberative process privilege. *Warner*, 742 F.2d at 1161. Factual
25 material that exposes the decision-making process itself or the mental processes of
26 decisionmakers is likewise protected from disclosure. *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*,
27 861 F.2d 1114, 1118–20 (9th Cir. 1988). Absent a motion to compel particular documents, and
28 any showing of particularized need, the question of whether the factual material contained in the

1 withheld documents is interwoven with the deliberative material or would reveal the decision-
 2 making process cannot be decided as a *per se* legal matter on a categorical basis. For this reason
 3 as well, the Court should reject Plaintiffs’ request for a blanket ruling and require Plaintiffs to
 4 move to compel specific documents, after meeting and conferring, that they contend have been
 5 improperly withheld.²

6 **III. The Warner Factors Weigh in Favor of Upholding Defendants’ Privilege Claims.**

7 Because Plaintiffs have failed to demonstrate that the deliberative process privilege
 8 cannot apply as a matter of law in this case, and they admittedly decided not to seek to compel
 9 at this time any specific documents being withheld on the basis of privilege, their motion should
 10 be denied on this basis alone. Beyond this, however, Plaintiffs have a heavy burden of showing
 11 a substantial and particularized need for the documents and information they seek. *VVA*, 2011
 12 WL 4635139, at *10; *Farley*, 11 F.3d at 1389. But they cannot meet that burden over documents
 13 or categories of documents or information not specifically identified or addressed in their motion
 14 to compel. Thus, even if the Court were to consider Plaintiffs’ generic arguments, any balancing
 15 of the *Warner* factors would not justify the disclosure of each and every document subject to a
 16 claim of the deliberative process privilege in this case.

17 Relevance of the evidence: Plaintiffs argue that “Defendants’ process, motive, and intent
 18 behind the Ban is at the heart of this case, making this discovery necessary to Plaintiffs’ claims.”
 19 Pls.’ Mot. 9. But this generalized assertion of need is far from the “strong showing of relevance”
 20 and particularized need required to overcome the privilege for *each and every* document
 21 withheld. *VVA*, 2011 WL 4635139, at *10. Plaintiffs have not identified any particular document
 22 over which they have a substantial need, let alone provided any specific information regarding
 23 why their need for such a document outweighs Defendants’ interest in non-disclosure.

24 For example, Plaintiffs fail to show how deliberative documents related to the Carter

25
 26 ² In a footnote, Plaintiffs identify only four documents as examples of what they claim Defendants have improperly
 27 withheld under the deliberative process privilege. Pls.’ Mot. 11 n.5. Because Plaintiffs sought to brief the
 28 “threshold” issue of the applicability of the deliberative process privilege in this case rather than challenge the
 applicability of the privilege s to specific documents, *id.* at 4, the withholding of any particular documents is not
 presently at issue. In any event, Defendants produced the final versions of these documents to Plaintiffs in connection
 with the administrative record for the new DoD policy.

1 policy, which was in place well before the President issued his statements on Twitter, are relevant
2 to their case, much less, that they have a substantial need for these documents. *See Utah Med.*
3 *Prods.*, 2004 WL 988877, at *9 (declining to pierce the deliberative process privilege upon
4 finding that the plaintiffs failed to show documents that were “written well before” the ultimate
5 decision were relevant); *Farley*, 11 F.3d at 1390 (holding that a party could not establish “need”
6 as a matter of law where it could not establish relevance). Plaintiffs’ failure to explain the
7 relevance of these documents should preclude their disclosure, and certainly cannot justify
8 wholesale disclosure without a case-by-case determination.

9 Similarly, Plaintiffs fail to show a particularized need for deliberative materials related to
10 the Panel of Experts who considered and recommended DoD’s new policy, or Secretary Mattis’s
11 February 2018 Memorandum and the accompanying DoD Report. In the first place, as noted,
12 Plaintiffs still have not yet even challenged the constitutionality of the 2018 DoD policy, and
13 instead continue to challenge only the 2017 Presidential Memorandum. Am. Compl. ¶¶ 224,
14 227, 233. Indeed, they claim to need documents concerning the “process, motive, and intent
15 behind the Ban,” Pls.’ Mot. 9 (emphasis added), which they claim was set forth in the 2017
16 Memorandum, Am. Compl. ¶ 5. On its face, this assertion of need does not address the
17 deliberative materials related to the subsequent 2018 policy actions. But even accepting
18 Plaintiffs’ view that the 2018 policy merely “implements” the 2017 Memorandum, Plaintiffs still
19 have not set forth any particularized need for the deliberative materials that went into the 2018
20 policy, particularly where their focus remains on the intent reflected in deliberations that
21 preceded the 2017 Memorandum. And while Plaintiffs argue that the intent behind the 2017
22 Presidential Memorandum is at issue, they have not demonstrated a particularized need for any
23 deliberative materials which preceded that decision where the 2017 Memorandum and any
24 preceding directives have been expressly revoked. *See* Dkt. 214-1; Defs.’ Mot. 7–9, Dkt. 223.³

25 Availability of other evidence: Aside from failing to show a particularized need for any

26 ³ The Court need not decide whether the deliberative process privilege is overcome for documents and information
27 reflecting presidential decisionmaking because those materials would also be subject to the presidential
28 communications privilege. Plaintiffs do not seek to compel such materials in their present motion, *see* Pls.’ Mot. 3
n.2, and Defendants have separately filed their own motion for a protective order with respect to presidential
deliberations and communications.

1 document or information, Plaintiffs have available to them ample discovery and other
2 information (including over 35,000 non-privileged documents and upcoming responses to
3 Plaintiffs' second set of discovery requests). In addition, although not expressly challenged in
4 their amended complaint, the rationale behind the new DoD policy is set forth in DoD's Report,
5 Dkt. 224-2, and Defendants have produced an administrative record to Plaintiffs that comprises
6 over 3,000 pages of supporting documentation for that policy.⁴

7 The extent to which disclosure would hinder frank and independent discussion regarding
8 contemplated policies and decisions. This factor strongly weighs against wholesale waiver of
9 the deliberative process privilege or the disclosure of any information, especially without any
10 effort to compel, or any showing of need for, particular documents. Plaintiffs argue that there
11 would be no "chilling effect on frank and independent discussion because the government has
12 already unveiled its conclusions and does not seek to study them further." Pls.' Mot. 9. But that
13 is not the relevant inquiry, and in any event is simply wrong. The question is not just whether
14 disclosure will chill discussions on the same policy, but whether disclosure will chill discussions
15 on a *future* policy. *Warner*, 742 F.2d at 1162. Indeed, the Supreme Court has held that
16 documents "shielded by executive privilege remain privileged even after the decision to which
17 they pertain may have been effected, since disclosure at any time could inhibit the free flow of
18 advice[.]" *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979).
19 Disclosure of deliberative material, whether on the wholesale basis sought or even as to particular
20 material, from DoD and the military Services plainly risks chilling future policy discussions on
21 sensitive personnel and security matters that require free and frank communication within the
22 highest ranks of DoD and the military. In particular, disclosure of deliberative material related
23 to Secretary Mattis's decisions could diminish his subordinates' willingness to present their
24 candid views to the Secretary in the future. If subordinates are chilled from providing their
25 candid views on future policy matters to the Secretary of Defense and military leaders, the overall
26 quality of the decision-making process would be affected, potentially leading to a direct negative

27 _____
28 ⁴ The next factor in the *Warner* balancing test is the role of the Government in the litigation. 742 F.2d. at 1161.
There is not dispute that the Government's policy is at issue in this case.

1 impact to national security. Such harm to the core Government responsibility to protect its
2 citizens should carry overwhelming weight.

3 **IV. Plaintiffs' Contention that Reliance on Deference to Military Judgement Waives**
4 **the Deliberative Process Privilege is Clearly Meritless.**

5 Lastly, the Court should reject Plaintiffs' argument that Defendants have somehow
6 "waived" the deliberative process privilege on a blanket basis as to thousands of pages of
7 information by "put[ting] their deliberative process 'in issue' by premising their defense on
8 purported military judgment." Pls.' Mot. 7. Specifically, Plaintiffs assert that Defendants are
9 "touting their deliberative process as a defense" by arguing that deference is owed to military
10 personnel decisions, and thus cannot shield any deliberative information from the process of
11 deciding policy. This argument is illogical on its face, fundamentally misunderstands the very
12 concept of military deference, is unsupported by any law, and thus clearly wrong.

13 Defendants' contention that judicial deference is due to military judgment on matters of
14 policy cannot serve to negate the deliberative process privilege as a matter of law in this case.
15 Deference to military policy judgments stems from the Supreme Court's recognition that the
16 Constitution vests control of the armed forces in the Executive and Legislative branches.
17 *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Courts therefore "give great deference to the
18 professional judgment of military authorities concerning the relative importance of a particular
19 military interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted). Military
20 deference is thus a constitutionally-mandated prerequisite for an Article III court's review of a
21 decision involving military affairs. *See Morgan*, 413 U.S. at 10; *Rostker v. Goldberg*, 453 U.S.
22 57, 65-66 (1981). To apply deference, the court looks only at whether the decision at issue
23 involves "the composition, training, equipping, and control of a military force." *Morgan*, 413
24 U.S. at 10. If it does, then deference to policy judgments must be applied. *See Winter*, 555 U.S.
25 at 27.

26 Plaintiffs' contention that, once this established approach to judicial review is at issue in
27 a challenge to military policy, the deliberative process by which that policy was determined is
28 inapplicable, would stand the very doctrine of military deference on its head. As should be

1 apparent, many military policy judgments, to which deference is owed as a matter of law, are the
 2 result of a deliberative process. If application of deference would itself require disclosure of
 3 internal deliberations, including candid assessments and opinions by military officials, the very
 4 notion of deference would be eliminated, in disregard of its constitutional underpinnings.

5 At the core of Plaintiffs' flawed argument is an attempt to conflate the deference due to
 6 policies that *result* from the policy process with "deliberations" that led to the policy outcome.
 7 The fact that deference is owed to a final military policy, which resulted from deliberations, does
 8 not negate protection of those internal deliberations. Plaintiffs' contention that Defendants are
 9 using the deliberative process privilege as a "sword and a shield," Pls.' Mot. 8, is thus plainly
 10 wrong. The "sword/shield" concept applies where a party seeks to *use* privileged information to
 11 support its claims. But in relying on established law recognizing judicial deference to military
 12 judgments, defendants are not relying on deliberative process information and thus not waiving
 13 privilege over that information. Rather, Defendants are relying on the *outcome* of the deliberative
 14 process: DoD's new policy and the accompanying 44-page report, which provides a detailed
 15 explanation for why, in the professional judgment of DoD, this policy is necessary to further
 16 military interests. Indeed, it is Plaintiffs who seek to turn reliance on the principle of deference
 17 to military judgments into a sword that would eliminate deliberative process protections *per se*.
 18 There is no support in the law for this sweeping proposition.⁵

19 CONCLUSION

20 For the foregoing reasons, Plaintiffs' Motion to compel all deliberative process
 21 information withheld, as a *per se* legal matter, should be denied.

22
 23
 24 ⁵ It also bears noting that there is no general subject matter waiver for the deliberative process privilege. *See Mobil*
 25 *Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989) ("[Plaintiff] cites no case and we have found none in which the
 26 release of certain documents waived the exemption as to other documents."); *Assembly of State of Cal.*, 968 F.2d at
 27 923. Thus, Plaintiffs' demand that the deliberative process privilege be set aside *en masse* finds no support in the
 28 law of the privilege itself. Plaintiffs cite *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992),
Kintera, Inc. v. Convio, Inc., 219 F.R.D. 503, 512 (S.D. Cal. 2003), and *Bittaker v. Woodford*, 331 F.3d 715, 720
 (9th Cir. 2003), but all three of these cases involve the waiver of the attorney-client privilege, and there is no
 authority for applying the waiver rule to the deliberative process privilege. *Gen. Elec. Co. v. Johnson*, 2006 WL
 2616187, at *17 (D.D.C. Sept. 12, 2006).

1 Dated: May 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing Opposition to Plaintiffs' Motion to Compel Defendants' Discovery Withheld Under the Deliberative Process Privilege using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: May 21, 2018

/s/ Ryan Parker

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