

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity  
as President of the United States, *et al.*,

*Defendants.*

Case 1:17-cv-02459-GLR

Hon. George L. Russell, III

**DEFENDANTS' OBJECTIONS**  
**TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

PROCEDURAL BACKGROUND..... 2

STANDARD OF REVIEW ..... 8

ARGUMENT ..... 8

I. The Magistrate Judge Prematurely Decided the Discovery Motions. .... 8

II. The Memorandum Opinion and Order Is Contrary to Law Because the Magistrate Judge Failed to Apply Supreme Court Precedent and Fourth Circuit Case Law..... 11

A. Deliberative Process Privilege ..... 11

1. The Magistrate Judge’s Ruling that the Deliberative Process Privilege Does Not Apply in this Case is Contrary to Law..... 11

2. The Magistrate Judge Erred by Dismissing as Moot Plaintiffs’ Challenge to Defendants’ Clawback of an Inadvertently Produced, Privileged Document..... 22

B. Presidential Communications and Deliberations ..... 23

III. The Magistrate Judge’s Memorandum Opinion and Order Is Predicated Upon Clearly Erroneous Factual Findings. .... 24

CONCLUSION..... 28

## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 72(a) and Local Civil Rule 301(5)(a), Defendants respectfully file these Objections to the Magistrate Judge’s Memorandum Opinion, Dkt. 204, and Order, Dkt. 205, dated August 14, 2018. Without considering Supreme Court precedent or Fourth Circuit case law, the Magistrate Judge issued a sweeping ruling requiring the Department of Defense (“DoD”) and the Military Services to disclose thousands of privileged documents concerning deliberations about military policies. The Magistrate Judge ordered disclosure notwithstanding the fact that the numerous dispositive motions currently pending before the district court could obviate the need for *any* discovery in this case. By dispensing with the deliberative process privilege in this wholesale fashion, the Magistrate Judge entirely ignored the Fourth Circuit’s directive that this privilege should be evaluated under a balancing test on a document-by-document, or at least category by category, basis. *See Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table). After issuing this broad ruling, the Magistrate Judge compounded these errors by dismissing as moot the parties’ dispute over one inadvertently produced and subsequently clawed back deliberative document, rather than conducting the appropriate balancing test to determine whether Plaintiffs had shown that their need for the document outweighed the harm of production. Finally, the Magistrate Judge permitted Plaintiffs to seek to compel discovery of presidential materials from Defendants other than the President, despite the fact that separation-of-power principles protect such material from disclosure. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 382 (2004).

In making these rulings, the Magistrate Judge largely relied on the Court’s preliminary injunction opinion without recognizing that both the factual circumstances and the case law have significantly changed since the Court issued that opinion in November 2017. Since that time, the

Department of Defense completed its comprehensive study and issued a new policy in March 2018 that substantially differs from the directives set forth in the President’s August 2017 Memorandum. In addition, the Supreme Court issued its opinion in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), which directs the Court to review a current policy itself, not the events preceding it, to determine whether the policy “can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* at 2420. Because the Magistrate Judge failed to apply Supreme Court precedent and Fourth Circuit case law and made erroneous factual findings, the Memorandum Opinion and Order should be set aside, save for the prohibition on seeking discovery from the President pending the resolution of the motion to dismiss the President as a party to this case.

### **PROCEDURAL BACKGROUND**<sup>1</sup>

On August 28, 2017, Plaintiffs filed their complaint, which they amended on September 14, 2017. *See* Compl., Dkt. 1; Am. Compl., Dkt. 39. Plaintiffs alleged that the President’s August 2017 Memorandum concerning military service by transgender individuals violated their equal protection and substantive due process rights under the Fifth Amendment to the Constitution, and contravened 10 U.S.C. § 1074 as well. Am. Compl. ¶¶ 135–69. Plaintiffs also filed a motion for a preliminary injunction, and Defendants moved to dismiss the amended complaint. *See* Pls.’ Mot., Dkt. 40; Defs.’ Mot., Dkt. 52.

On November 21, 2017, the Court dismissed the statutory claim, but otherwise denied Defendants’ motion to dismiss the first amended complaint. Op., Dkt. 85. The Court also granted Plaintiffs’ motion for a preliminary injunction. *Id.* Although the Court stated that it “does not

---

<sup>1</sup> The background regarding the creation of the military’s new policy is set forth in Defendants’ summary judgment briefs. *See* Defs.’ Mot. 3–8, Dkt. 158; Defs.’ Reply 3–10, Dkt. 176.

disagree” that “deference is owed to military personnel decisions and the military’s policymaking process,” it believed that “President Trump’s tweets did not emerge from a policy review” and the “Presidential Memorandum [did not] identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.” *Id.* at 43. Thus, the Court found that Plaintiffs had shown a likelihood of success on the merits of their constitutional challenges to the President’s 2017 Memorandum based upon the “circumstances surrounding the President’s announcement and the departure from normal procedure.” *Id.* The Court preliminarily enjoined Defendants from “implement[ing] the . . . policies and directives encompassed in [the 2017 Presidential Memorandum].” Prelim. Inj. 1, Dkt. 84.

Three sets of dispositive motions are now pending before the Court. First, on March 1, 2018, Defendants filed a motion to dismiss Plaintiffs’ claims against the President and dissolve the preliminary injunction as to the President. Dkt. 115. Defendants argued that the President is not a proper defendant in this case because the Court may not enter injunctive or declaratory relief against the President in his official capacity in the performance of discretionary actions. *Id.* at 3–8. That motion is fully briefed and pending before the Court.

Second, on March 23, 2018, after the President had revoked his August 2017 Memorandum, allowing DoD to adopt a new policy on military service by transgender individuals that it had formulated after convening an independent Panel of Experts, Dkt. 119-1, Defendants moved to dissolve the preliminary injunction that enjoined the enforcement and implementation of the directives set forth in the 2017 Memorandum, Dkt. 120. In that motion, Defendants argued that Plaintiffs’ challenge to the revoked August 2017 Memorandum is moot, that the new policy is subject to a highly deferential form of judicial review consistent with the Court’s reasoning

when it issued its preliminary injunction, and that the new policy withstands such deferential constitutional scrutiny. *See id.* at 9–32. That motion is also fully briefed and pending before the Court.

Third, Plaintiffs then filed their second amended complaint, adding new Plaintiffs and raising constitutional challenges to both the revoked August 2017 Presidential Memorandum and the Department’s new policy, *see* Second Am. Compl. ¶¶ 205–40, Dkt. 148, and motions remain pending relating to that complaint. Specifically, Defendants filed a motion to dismiss, or, in the alternative, for summary judgment, raising jurisdictional and merits arguments, Dkt. 158, and Plaintiffs cross-moved for summary judgment, Dkt. 163. Again, these dispositive motions are fully briefed and pending before the Court.

Discovery nonetheless continue apace after the Court entered its preliminary injunction, while the DoD policy process proceeded to conclusion and the parties filed dispositive motions. Plaintiffs served broad discovery requests on all Defendants, including the President. Plaintiffs issued requests for production and interrogatories seeking information on: (1) the policy announced by former Secretary of Defense Ashton Carter during the prior administration; (2) the June 2017 decision by Secretary of Defense James Mattis to defer the start of accessions by transgender individuals under the Carter policy; (3) the President’s statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (4) the work by the Panel of Experts that was convened to develop policy proposals in 2017; (5) Secretary Mattis’s February 2018 decision memorandum and the accompanying Report regarding the new policy; and (6) the March 2018 Presidential Memorandum that revoked the August 2017 Memorandum. *See, e.g.*, Kies Decl. Exh. 1, 2 (Pls.’ First Set of Interrogs. and Reqs. for Prod., Jan. 3, 2018), Dkt. 177-5, 177-6; Enlow Decl. Exh. 2 (Pls.’ Second Set of Interrogs. and Reqs. for Prod., May 21, 2018), Dkt. 177-30.

In response to discovery requests on these topics, Defendants conducted an extensive search and produced over 30,000 non-privileged, responsive documents consisting of over 150,000 pages. Defendants objected to some discovery requests, however, and withheld information and documents that are protected by the deliberative process privilege (among others). *See, e.g.*, Kies Decl. Exh. 3, 4, 6, 7 (Defs.' Objs. and Resps. to Pls.' First Set of Interrogs. and Reqs. for Prod., Feb. 9, 2018), Dkt. 177-7, 177-8, 177-10, 177-11.

Even after filing a motion for summary judgment, Plaintiffs continued to seek discovery from Defendants. In particular, Plaintiffs filed a Motion to Compel Supplemental Interrogatory Answers and Production, Dkt. 177, and a Motion for Judicial Determination of Privilege, Dkt. 178. In their Motion to Compel, Plaintiffs seek the disclosure of each and every document withheld on the basis of the deliberative process privilege regarding: (1) the President's statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (2) the activities of the Department's Panel of Experts and its working groups; and (3) the February 2018 Memorandum issued by Secretary Mattis and the March 2018 Presidential Memorandum. Pls.' Mem. 2, Dkt. 177-3. Plaintiffs did not identify specific documents that they seek to compel. Rather, Plaintiffs argued that the deliberative process privilege does not apply as a matter of law to any information at issue in discovery in this case. Similarly, in their Motion for a Judicial Determination of Privilege, Plaintiffs challenged Defendants' clawback of a deliberative PowerPoint presentation that was inadvertently produced by the Army on the basis that the deliberative process privilege does not apply as a matter of law in this case. Pls.' Mem. 4, Dkt. 178-2.

Because at least two of the three categories of information in Plaintiffs' motion to compel implicated information and documents concerning presidential communications and deliberations, Defendants moved for a protective order to preclude discovery directed at the President and to

preclude discovery from other sources that seeks information concerning presidential communications and deliberations. Defs.' Mot., Dkt. 179. On June 29, 2018, the parties moved to hold briefing on Defendants' Motion for a Protective Order in abeyance based on Plaintiffs' stipulation that "their pending Motion to Compel does not seek production of (a) any information and documents in the custody, possession or control of the President or the Executive Office of the President or (b) any information and documents (or portions thereof) that Defendants contend are subject to the presidential communications privilege, including any information and documents in the custody, possession, or control of the defendants other than the President that constitute or would disclose any information concerning presidential communications and deliberations, including communications to or from the President or Executive Office of the President." Joint Stipulation, Dkt. 185-2. The Magistrate Judge granted the parties' motion, stating that "the Motion for a Protective Order will be held in abeyance until the parties file a joint stipulation agreeing to a briefing schedule." Order, Dkt. 187.

On August 14, 2018, the Magistrate Judge granted Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production, Dkt. 177, and dismissed as moot Plaintiffs' Motion for Judicial Determination of Privilege, Dkt. 178. *See* Mem. Op., Dkt. 204; Order, Dkt. 205. That order compelled DoD and the Military Services to disclose thousands of deliberative documents concerning military policies. Specifically, the Magistrate Judge ordered DoD and the Services to disclose "(1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the DoD's so-called panel of experts and its working groups (the 'Panel') tasked with developing a plan to study and implement the President's decision; and (3) Deliberative materials regarding the DoD's implementation Plan and the President's acceptance of the Plan in his March 23[, 2018]

Memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists.” Mem. Op. 3. Based on this ruling, the Magistrate Judge also dismissed as moot Plaintiffs’ challenge of Defendants’ clawback of an inadvertently produced document protected by the deliberative process privilege. *Id.* at 11.

In addition, despite previously holding the motion in abeyance, *see* Order, Dkt. 187, the Magistrate Judge granted in part and denied in part Defendants’ Motion for a Protective Order, Dkt. 179. The Magistrate Judge stayed discovery directed to the President pending the Court’s resolution of Defendants’ motion to dismiss the President as a party to the case, but permitted Plaintiffs to seek to compel discovery from other sources concerning presidential communications and deliberations. Mem. Op. 10–11.

Because compliance with the Magistrate Judge’s Memorandum Opinion and Order would result in the disclosure of thousands of deliberative documents concerning military policies and would permit Plaintiffs to move to compel discovery concerning presidential communications and deliberations from Defendants other than the President, Defendants requested that this Court stay the Magistrate Judge’s Order pending this Court’s review of these Objections.<sup>2</sup> Dkt. 208. That motion is pending.

### **STANDARD OF REVIEW**

Pursuant to Federal Rule of Civil Procedure 72(a), the district court “must . . . modify or

---

<sup>2</sup> In addition, as set forth in Defendants’ Motion to Stay Compliance with the Magistrate Judge’s Memorandum Opinion and Order, the Plaintiffs in the related case *Karnoski v. Trump* filed a similar motion to compel documents withheld under the deliberative process privilege and Defendants filed a similar motion for a protective order concerning discovery of the President and of presidential communications and deliberations. *See* Defs.’ Mot. 16–17, Dkt. 208. The district court in *Karnoski* granted Plaintiffs’ motion and denied Defendants’ motion, and Defendants filed a petition for a writ of mandamus in the Ninth Circuit. *See* Petition for Writ of Mandamus, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 1, 2018), Dkt. 1. The petition is pending, and oral argument is scheduled for October 10, 2018.

set aside any part of the [Magistrate Judge’s] order that is clearly erroneous or contrary to law.” See also 28 U.S.C. § 636(b)(1)(A); Local Civil Rule 301(5)(a). “A court’s ‘finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Bruce v. Hartford*, 21 F. Supp. 3d 590, 593–94 (E.D. Va. 2014) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (citing *Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985)). “The standard of review for ‘contrary to law,’ however, is different.” *Perez v. Figi’s Companies, Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at \*2 (S.D.W. Va. Feb. 26, 2016) (quotation omitted). “For questions of law, there is no practical difference between review under Rule 72(a)’s ‘contrary to law’ standard and a *de novo* standard.” *Id.* (citation omitted); see also *Bruce*, 21 F. Supp. at 594. The Court therefore “review[s] the factual portions of the Magistrate Judge’s order under the clearly erroneous standard, but . . . review[s] legal conclusions to determine if they are contrary to law.” *Bruce*, 21 F. Supp. 3d at 594 (citations omitted). “An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure.” *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F.Supp.2d 70, 74 (N.D.N.Y. 2000)).

## **ARGUMENT**

### **I. The Magistrate Judge Prematurely Decided the Discovery Motions.**

As an initial matter, the Magistrate Judge issued the sweeping discovery order even though there are several dispositive motions pending before the Court that raise threshold issues directly affecting the extent and scope of discovery in this case. Specifically, Defendants’ Motion to Dissolve the Preliminary Injunction, Dkt. 120, argues that Plaintiffs’ challenge to the 2017 Memorandum is moot. Defendants’ Motion to Dismiss, or, in the Alternative, for Summary Judgment, Dkt. 158, also raises mootness as a threshold issue and addresses the merits of the new

policy, explaining the proper standard of review and demonstrating that the new policy withstands scrutiny. Even a partial ruling on either motion could affect whether or to what extent any discovery should proceed and obviate the need to address the parties' arguments regarding privilege.

Moreover, Plaintiffs themselves have filed a cross-motion for summary judgment, arguing that there is *already* no genuine dispute of material fact that the Department of Defense's new policy violates the Equal Protection Clause. *See* Pls.' Mot. 26–44, Dkt. 163-2. The Magistrate Judge could not properly impose its discovery obligations on Defendants until this Court had reviewed the several predicates for that discovery. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating court of appeals' denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested discovery). Faced with similar cross-motions for summary judgment, the court in the related case *Doe v. Trump* held in abeyance motions concerning privilege until after the resolution of the parties' cross-motions for summary judgment. *See* Order, *Doe v. Trump*, No. 17-1597 (D.D.C. June 19, 2018), Dkt. 145 (finding that "[i]f summary judgment is granted for either party, there will be no need to resolve the questions of privilege that the parties have raised").<sup>3</sup> The Magistrate Judge should have done the same here. *See Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) ("It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." (quoting *Anderson v. U.S. Attorneys Office*, No. CIV.A. 91–2262, 1992 WL 159186, at \*1 (D.D.C. June 19, 1992)));

---

<sup>3</sup> The *Doe* Court has now ruled on the cross-motions for summary judgment and denied summary judgment. *See* Order, Mem. Op., *Doe v. Trump*, No. 17-cv-1597 (D.D.C. Aug. 24, 2018), Dkt. 159, 160.

*Cleveland Const., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407RJCDCCK, 2009 WL 903564, \*2 (W.D.N.C. Mar. 31, 2009) (“Federal district courts often stay discovery pending the outcome of dispositive motions that will terminate the case.” (citing *Yongo v. Nationwide Affinity Ins. Co. of Am.*, No. 5:07-CV-94-D, 2008 WL 516744, at \*2 (E.D.N.C. Feb. 25, 2008); *Bellamy v. Ford Motor Co.*, No. 3:07-CV-00287, 2007 U.S. Dist. LEXIS 66093 (W.D.N.C. Sept. 5, 2007), *aff’d*, 286 F. App’x 13 (4th Cir. 2008); *Graham v. Stansberry*, No. 5:07-CT-3015, 2008 U.S. Dist. LEXIS 64067 (E.D.N.C. Aug. 19, 2008))).

Instead, the Magistrate Judge decided critical issues that are currently pending before the district court in Defendants’ motion to dissolve the preliminary injunction and the parties’ cross-motions for summary judgment.<sup>4</sup> For example, the Magistrate Judge rejected Defendants’ argument that the express revocation of the August 2017 Presidential Memorandum and “any other directive [the President] may have made with respect to military service by transgender individuals” renders claims against the prior policy moot. Presidential Memorandum, 83 Fed. Reg. 13,367 (Mar. 23, 2018); *see* Defs.’ Mot. to Dissolve the Prelim. Inj. 9–11, Dkt. 120; Mem. Op. 6–7. In doing so, the Magistrate Judge disregarded the fact that the substance of DoD’s new policy departs substantially from the district court’s understanding of the 2017 Presidential Memorandum. *Compare* Mem. from Secretary of Defense James Mattis (Feb. 22, 2018) (“Mattis Mem.”), Dkt. 120-1, *and* DoD Report and Recommendations, Dkt. 120-2, *with* Mem. and Order 10–12, Dkt. 85. If this Court finds that the Magistrate Judge has erroneously focused his analysis on a now-revoked presidential memorandum, the justification for the scope of the discovery order will disappear, as there will be no need to obtain discovery regarding the now-revoked

---

<sup>4</sup> The Magistrate Judge also made several erroneous factual findings concerning matters that are currently before the Court in Defendants’ motion to dissolve the preliminary injunction and the parties’ cross-motions for summary judgment. *See infra* Part III.

memorandum and claims that are moot.

As another example, the Magistrate Judge decided that “Defendants’ intent . . . is at the very heart of this litigation.” Mem. Op. 5–6. But the role of Defendants’ subjective intent in this case is disputed and is currently before the Court in the parties’ cross-motions for summary judgment. *See* Defs.’ Surreply to Pls.’ Cross Mot. for Summ. J. 2–7, Dkt. 203. If the Court finds that, consistent with Supreme Court precedent, *see infra* Part II.A.1, its highly deferential review is focused on the policy itself, then there will be no need to obtain discovery of the deliberative process in order to probe the issue of intent.

Accordingly, because the Magistrate Judge prematurely decided the discovery disputes, while also deciding critical issues currently pending before the district court in several dispositive motions, the Memorandum Opinion and Order should be set aside, except insofar as it stays discovery directed to the President pending resolution of the Motion to Dismiss the President as a party to this action.

**II. The Memorandum Opinion and Order Is Contrary to Law Because the Magistrate Judge Failed to Apply Supreme Court Precedent and Fourth Circuit Case Law.**

**A. Deliberative Process Privilege**

**1. The Magistrate Judge’s Ruling that the Deliberative Process Privilege Does Not Apply in this Case is Contrary to Law.**

The Magistrate Judge’s Memorandum Opinion and Order granting Plaintiffs’ Motion to Compel and directing disclosure of thousands of documents protected by the deliberative process privilege is contrary to law because the Magistrate Judge entirely overlooked binding Supreme Court precedent and Fourth Circuit case law. The Magistrate Judge concluded that the deliberative process privilege “is simply inapplicable where government intent is at the heart of the issue” and that “Defendants’ intent—whether it was for military purposes or whether it was purely for

political and discriminatory purposes—is at the very heart of this litigation.” Mem. Op. 5–6. But in reaching these conclusions, the Magistrate Judge failed to apply the principles of military deference set forth in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Defs.’ Supp. Br. Concerning the Impact of *Trump v. Hawaii* on Pls.’ Mot. to Compel Supp. Interrog. Answers and Prod., Dkt. 197; *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc) (stating that “the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized’ that constitutional challenges to military personnel policies and decisions face heavy burdens”).

As one of the “complex, subtle, and professional decisions as to the composition . . . of a military force, which are essentially professional military judgments,” DoD’s 2018 policy is subject to a highly deferential form of review. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted). This deference stems from the Supreme Court’s recognition that control of the armed forces is vested in the Executive and Legislative branches by the text of the Constitution itself. *See Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (holding, in a case involving facial classifications on the basis of gender, that “the Constitution itself requires such deference”). Thus, civil litigation involving the composition of the military force must be treated differently than ordinary civil litigation.

The Supreme Court recently confirmed this longstanding principle of constitutional law in *Trump v. Hawaii*. As the Court stated in *Hawaii*, when the Government acts in the areas of national security or foreign affairs, its subjective intent is irrelevant so long as the Government’s action, reviewed solely on its face, “can reasonably be understood to result from a justification independent of unconstitutional grounds.” 138 S. Ct. at 2420. Thus, when this Court reviews DoD’s new policy, it must consider the 44-page report that sets out in detail the military

justifications supporting its policy and determine whether or not those justification are rationally related to the policy itself. *See* DoD Report and Recommendations, Dkt. 120-2. That standard is easily met by DoD’s thorough report, which explains in detail the concerns about military lethality and readiness that shaped its recommendation. *See id.* Properly applied, *Hawaii* thus provides that discovery into Defendants’ deliberative process is neither necessary nor appropriate in this case.

*Hawaii* involved an Establishment Clause challenge to a presidential proclamation concerning the entry to the United States of certain foreign nationals. 138 S. Ct. at 2403. The Supreme Court rejected that challenge and vacated a nationwide preliminary injunction issued against the proclamation. *Id.* at 2423. In doing so, the Supreme Court applied a form of “rational basis review,” stressing that judicial “inquiry into matters of . . . national security is highly constrained.” *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)); *see also id.* at 2420 n.5 (underscoring that deferential review applies to “military actions”). The Supreme Court further explained that this deferential review may apply “across different contexts and constitutional claims,” even when evaluating a ““categorical”” classification “on the basis of sex.” *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)). The central consideration in applying this deferential form of review is whether the policy at issue is “plausibly related to the Government’s stated objective.” *Id.* at 2420. Indeed, the Court stated that it would “uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* Although the Court stated that it “may consider plaintiffs’ extrinsic evidence” of previously revoked executive orders and past statements by the President about Muslims, *id.*, it rejected the theory that prior statements forever “contaminated” the proclamation with “impermissible discriminatory animus,” *compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J.,

dissenting). Instead, in analyzing whether a sufficient justification for the policy existed, the Court focused on the proclamation itself and the “multi-agency review” that supported it. *See id.* at 2417, 2421 (majority op.). That targeted inquiry was not influenced by prior, revoked or expired executive orders preceding the proclamation, nor by past statements by the President about Muslims and terrorism. *See id.* at 2417–23.

Here, the Magistrate Judge erroneously agreed with Plaintiffs that deliberative materials related to the President’s statements are relevant to this case by focusing on the President’s statements on Twitter, rather than on the policy itself. *See Mem. Op.* 5–7. In doing so, the Magistrate Judge more closely followed the principal dissent in *Hawaii* rather than the majority opinion. *See Hawaii*, 138 S. Ct. at 2441 n.6 (Sotomayor, J., dissenting) (criticizing the majority opinion for not considering statements “other relevant information.”).<sup>5</sup> But the binding opinion in *Hawaii* instructs that the Court must assess the 2018 policy on its own terms, rather than scrutinize the purported intent behind the policy based on prior statements, including as to an expressly revoked policy.

*Hawaii* is consistent with the Supreme Court’s precedent in *Rostker* and *Goldman v. Weinberger*, 475 U.S. 503 (1986), both of which confirm that “the tests and limitations to be applied may differ because of the military context.” *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507 (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”). Although Plaintiffs and the district courts in the related cases *Doe* and *Karnoski* have attempted to

---

<sup>5</sup> Even the dissent of Justice Breyer, with whom Justice Kagan joined, did not advocate for such expansive judicial review in national security litigation, but instead advocated for discovery into the waiver program established by the Proclamation. However, the majority also rejected this more limited discovery as being inappropriate under the required rational basis review. *See Hawaii*, 138 S. Ct. at 2423 n.7.

distinguish these precedents by claiming that deference can only be applied once the court determines that the military followed what it deems to be an adequate review process, neither case supports that proposition. *See* Mem. Op. 2, 11–15, *Doe v. Trump*, No. 17-1597 (D.D.C. Aug. 24, 2018), Dkt. 160; *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 3608401, at \*4 (W.D. Wash. July 27, 2018). For example, in *Rostker*, the Supreme Court specifically stated that it applied a lower standard of review because “[t]he case ar[ose] in the context of Congress’ authority over national defense and military affairs,” and found that deference to such judgments was “unquestionably due.” 453 U.S. at 64–65. Likewise, the Supreme Court in *Goldman* applied deference based on the “military context” of the case, not because it reviewed the decisionmaking process and determined that the process met its specifications. 475 U.S. at 507.

Thus, Plaintiffs’ demand for all deliberative process materials related to the challenged Department of Defense policy cannot be sustained. Any alleged animus behind prior, revoked presidential statements and policy or the alleged inadequacy of the review process is not pertinent to judicial review of the military’s new policy under binding Supreme Court precedent, and the Magistrate Judge erred by finding that the alleged animus could serve as a basis to negate the deliberative process privilege in this litigation.

Not only did the Magistrate Judge act contrary to Supreme Court precedent in treating judicial review of a military policy in the same manner as review of a civilian policy, but the Magistrate Judge’s ruling that the deliberative process privilege “is simply inapplicable where government intent is at the heart of the issue,” Mem. Op. 5, also is contrary to the Fourth Circuit’s approach in *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table) (quoting *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)). The Fourth Circuit explained in *Cipollone* that courts must balance an articulated need for specific deliberative documents or

information being sought against the Government's interests in non-disclosure to determine whether the deliberative process privilege can be overcome. *See id.*; *see also Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at \*3 (E.D. Va. Sept. 22, 2014) (finding that the court must analyze whether the deliberative process privilege applies "on a case-by-case basis by balancing the damage to the executive department or the public interest and the potential harm to the plaintiffs from nondisclosure"); *Spell v. McDaniel*, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) (finding that the deliberative process privilege "must be demonstrated on a case by case basis by performance of a balancing function"); *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at \*4 (N.D. W. Va. July 20, 2016) ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.") (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)); *In re United States*, 678 F. App'x 981, 987 (Fed. Cir. 2017) (stating that "[i]n deciding whether to compel discovery in the face of asserted executive privileges," the trial court must apply a balancing test "on a document-by-document basis"). Specifically, the four-factor balancing test outlined in *Cipollone* requires weighing "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). But in concluding that the deliberative process privilege is categorically inapplicable when the government's intent is at issue, the Magistrate Judge failed to weigh the relevance of the documents as well as the chilling effect on future policy discussions on sensitive personnel and security matters, which require free and frank communication within the highest ranks of the Department and the military, that would result from the disclosure of thousands of deliberative documents in

this case.

Application of the *Cipollone* balancing test would have precluded the Magistrate Judge's Order because Plaintiffs have failed to demonstrate a compelling, particularized need for thousands of deliberative documents that would outweigh the Government's interest in non-disclosure. *See id.* (affirming the district court's decision to override the privilege after finding that the corporation "demonstrated a compelling need for the materials"); *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at \*3 (E.D.N.C. Sept. 12, 2014) ("The burden of showing an overriding need for the information rests with the party seeking it." (citing *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 853 (3d Cir. 1995) ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest.")); *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a "particularized need" for specific documents to overcome the privilege); *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a "compelling need" to overcome the privilege). In their Motion to Compel, Plaintiffs did not identify any particular document for which they have a compelling need and instead argued that "the government's decision-making processes are critical to determining whether the Ban and the implementation policies stemming from it violate the Plaintiffs' equal protection and substantive due process rights." Pls.' Mot. 18. But this generalized assertion of need is far from the "strong showing of relevance" and "particularized need" required to overcome the privilege for *each and every* document withheld relating to the President's 2017 actions, the Panel of Experts' study, or the 2018 policy.<sup>6</sup> *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at \*10

---

<sup>6</sup> Even accepting Plaintiffs' view that the Department's policy merely "implements" the 2017 Memorandum, Plaintiffs still have not set forth any particularized need for the deliberative materials that went into the 2018 policy, particularly where their focus remains on the intent

(N.D. Cal. Oct. 5, 2011); *Farley*, 11 F.3d at 1389. Moreover, by filing a motion for summary judgment arguing that there is no genuine dispute of material fact and that they are entitled to judgment in their favor, Plaintiffs have effectively conceded that the deliberative material they seek is irrelevant or unnecessary to prove their claims.

Not only have Plaintiffs failed to show that the thousands of deliberative documents are relevant, but they ignore the fact that they have ample evidence available to them. Defendants have produced over 30,000 pages of non-privileged documents, provided non-privileged responses to interrogatories, and produced a 3,000-page administrative record composed of documents explaining why the military adopted its new policy. *See Utah Med. Prods. v. McClellan*, No. 2:03-cv-525-PGC, 2004 WL 988877, at \*5 (D. Utah Mar. 31, 2004) (finding that even though the requested document was relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff with] a clear explanation" as to why the agency took an enforcement action). Taken together, the availability of other evidence strongly undercuts Plaintiffs' demand to negate the deliberative process privilege as a matter of law in this case.

Finally, disclosure of thousands of deliberative documents from the Department of Defense and the Services covering multiple policies plainly risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. *See Cipollone*, 812 F.2d at 1400 (quoting

---

reflected in deliberations that preceded the 2017 Memorandum. And while Plaintiffs argue that the intent behind the 2017 Memorandum is at issue, they have not demonstrated a particularized need for any deliberative materials which preceded that decision, given that the 2017 Memorandum and any preceding directives have been expressly revoked. Although the Magistrate Judge found that their challenge to the 2017 Memorandum is not moot, Mem. Op. 6-7, that issue is before the Court in pending dispositive motions and, in any event, the Magistrate Judge's finding was incorrect, *see supra* Part I.

*Warner*, 742 F.2d at 1161). Plaintiffs have requested from DoD and the Services “All [d]ocuments and [c]ommunications . . . conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed [c]oncerning military service by transgender individuals.” Kies Decl. Ex. 2 (Req. for Prod. No. 1), Dkt. 177-6. That request would encompass, for instance, any candid advice given to Secretary Mattis by the Deputy Secretary of Defense on the topic of the transgender military service—plainly the sort of extremely sensitive advice the disclosure of which could diminish his subordinates’ willingness to present their candid views to the Secretary in the future. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (stating that documents “shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice”); *Coastal States Gas Corp.*, 617 F.2d at 866 (finding that one of the purposes of the deliberative process privilege is “to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism”). If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decisionmaking process will be affected, potentially leading to a direct negative impact to national security. *Cf. Heyer*, 2014 WL 4545946, at \*5 (in a case involving due process claims by inmates, finding that “the unique security and other concerns presented by the correctional setting enhance the need for correctional facility decision makers to be able to freely and openly consider among themselves appropriate accommodations for inmates”). Accordingly, application of the proper balancing test shows that the deliberative process privilege should not be overcome for the thousands of documents Plaintiffs seek to compel.

Rather than apply the *Cipollone* balancing test, the Magistrate Judge relied on out-of-circuit case law to conclude that “[t]he privilege is simply inapplicable where government intent is at the heart of the issue.” Mem. Op. 5 (citing *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001)). But neither of the two out-of-circuit cases cited by the Magistrate Judge involved a military policy concerning the composition of the fighting force, and thus neither court applied the deferential standard required to review challenges to military policies. *See Hawaii*, 138 S. Ct. at 2420 n.5; *see also Rostker*, 453 U.S. at 72–74. *In re Subpoena*, which involved a bankruptcy proceeding, held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made “with actual intent to hinder, delay, or defraud.” 145 F.3d at 1423–24. On rehearing, the D.C. Circuit clarified that its “holding that the deliberative process privilege is unavailable is limited to those circumstances in which the cause of action is directed at the agency’s subjective motivation.” *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *see also In re Subpoena*, 145 F.3d at 1424 (holding privilege inapplicable where “Congress creates a cause of action that deliberatively exposes government decisionmaking to the light”). But *In re Subpoena*, in limiting its applicability to a narrow class of claims, did not state a categorical rule that in every circumstance where a plaintiff questions an agency’s motives, the plaintiff automatically overcomes the deliberative process privilege. Moreover, *McPeck*, which concerned a retaliation claim, held the plaintiff was “simply wrong in asserting that the deliberative process privilege should yield in [that] case because of his claim of governmental misconduct.” 202 F.R.D. at 335. Although the *McPeck* Court stated that the deliberative process privilege may yield due to a challenge to the Government’s subjective intent under certain circumstances, that

discussion is dicta and is merely a reiteration of *In re Subpoena*'s holding. *See id.* Neither decision provides any basis for deviating from the Supreme Court's instruction in *Hawaii* that a policy of this sort be assessed based on its own stated justifications, not the purported intent behind it. 138 S. Ct. at 2417–23.

Even assuming that *In re Subpoena* can be read so broadly, the Fourth Circuit has neither followed *In re Subpoena* nor held that the deliberative process privilege categorically does not apply as matter of law in cases in which the plaintiffs challenge the Government's intent. Other courts also have been skeptical of the categorical approach applied in *In re Subpoena* as well. *See, e.g.,* Order at 2, *State of New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. Aug. 14, 2018), Dkt. 241 (“conclud[ing] that a ‘balancing approach that considers the competing interests of the party seeking disclosure and of the government—specifically, its need to engage in policy deliberations without the omnipresent threat of disclosure—is more appropriate than a *per se* rule’ providing that the deliberative-process privilege does not apply to any claim challenging governmental decisionmaking” (quoting *Winfield v. City of New York*, No. 15-CV-5236 (KHP) (LTS), 2018 WL 716013, at \*5 (S.D.N.Y. Feb. 1, 2018))); *In re Delphi Corp.*, 276 F.R.D. 81, 84–85 (S.D.N.Y. 2011) (rejecting plaintiff's argument that the deliberative process privilege “is not applicable where the litigation ‘involves a question concerning the intent of the governmental decisionmakers or the decisionmaking process itself’” and instead applying the five factor balancing test); *Vietnam Veterans of Am.*, 2011 WL 4635139, at \*10 (declining to adopt a categorical rule that the deliberative process privilege is inapplicable when plaintiffs challenge intent, and explaining that the issue of “intent is properly considered as a factor in the substantial need analysis”); *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321–22 (2000) (“declin[ing] to follow the reasoning of *In re Subpoena* to the extent that it supports an automatic

bar on assertions of deliberative process privilege in any case where the Government's intent is potentially relevant," and applying the balancing test weighing "a showing of evidentiary need" against "the harm that may result from disclosure").

The reason for this widespread rejection of *In re Subpoena*'s categorical approach is obvious: as the Federal Circuit observed, "[t]he privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure." *In re United States*, 678 F. App'x at 990; *see also Utah Med. Prods.*, 2004 WL 988877, at \*8 (finding that a *per se* rule that the deliberative process privilege did not apply when a party challenges the decision-making process would lead plaintiffs to "recast [their] complaints as a challenge to the decision-making process"). This is especially problematic in this case, where Defendants' Motion to Dismiss the second amended complaint remains pending before the Court. The Magistrate Judge has set aside the deliberative process privilege as a matter of law before the Court has even decided whether it presently has jurisdiction. *See Stop Reckless Econ. Instability Caused By Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 228 (4th Cir. 2016) ("[F]ederal courts must determine whether they have subject-matter jurisdiction over a claim before proceeding to address its merits." (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998))).

Accordingly, because the Magistrate Judge failed to apply Supreme Court precedent and Fourth Circuit case law, the Magistrate Judge erred in granting Plaintiffs' Motion to Compel. The Court should therefore set aside the Order requiring disclosure of thousands of documents protected by the deliberative process privilege.

**2. The Magistrate Judge Erred by Dismissing as Moot Plaintiffs' Challenge to Defendants' Clawback of an Inadvertently Produced, Privileged Document.**

The Magistrate Judge's dismissal of the parties' discovery dispute brought by Plaintiffs' Motion for Judicial Determination of Privilege Claims as moot is also contrary to law. Plaintiffs

challenged Defendants' assertion of the deliberative process privilege and attempt to claw back a PowerPoint briefing inadvertently produced by the Army. *See* Pls.' Mot., Dkt. 178.<sup>7</sup> The Magistrate Judge found that Plaintiffs' motion was moot because the deliberative document would be disclosed pursuant to the ruling on Plaintiffs' Motion to Compel. Mem. Op. 11. Because the Magistrate Judge's ruling is based upon the erroneous ruling on Plaintiffs' Motion to Compel and failed to apply the *Cipollone* balancing test, the ruling should be set aside for the reasons set forth above. *See supra* Part II.A.1.

### **B. Presidential Communications and Deliberations**

The Magistrate Judge's denial of Defendants' Motion for a Protective Order as to discovery of presidential communications and deliberations from sources other than the President is also contrary to law. As an initial matter, the Magistrate Judge stayed discovery directed to the President pending the Court's resolution of Defendants' motion to dismiss the President as a party to the case. Mem. Op. 10. Holding resolution of this issue in abeyance pending the Court's resolution of the pending motion was appropriate, especially considering that the court in a related case recently dismissed the President as a party to that case "to avoid unnecessary constitutional confrontations." Op. at 2, *Doe v. Trump*, No. 17-1597 (D.D.C. Aug. 6, 2018), Dkt. 155.

But while the Magistrate Judge appropriately stayed discovery against the President, his decision regarding other presidential materials remains contrary to law. The Magistrate Judge correctly noted that *Cheney* requires district courts to "afford Presidential confidentiality the greatest possible protection," Mem. Op. 7–8 (citing *Cheney*, 542 U.S. at 368), but failed to apply

---

<sup>7</sup> Although the Magistrate Judge stated that Plaintiffs challenged Defendants' clawback of two documents, Defendants withdrew their clawback as to an inadvertently disclosed document from the Air Force, leaving at issue here only the privilege claims related to the Army-released document. *See* Defs.' Resp. 1, Dkt. 186.

this principle to a subset of presidential materials. In particular, the Magistrate Judge failed to recognize that discovery of the President’s communications and deliberations from individuals or agencies *with whom the President or his advisors communicated* implicates the very same separation-of-powers concerns—and thus the same collision between the branches—as discovery served on the President directly. Indeed, as the Magistrate Judge recognized, the core purpose of *Cheney* is to “explore other avenues, short of forcing the Executive to invoke Privilege,” *id.* at 8 (quoting *Cheney*, 542 U.S. at 390), yet discovery of presidential materials from Defendants other than the President inevitably results in just that: forcing the Executive to invoke privilege in response to a motion to compel, *see In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (finding that the privilege does not have to be formally invoked “in advance of the motion to compel”). *Cheney*’s protections would soon become a nullity if litigants could evade them by simply seeking presidential communications from the individuals with whom the President communicated. The Magistrate Judge thus erred in denying Defendants a protective order over such materials.

### **III. The Magistrate Judge’s Memorandum Opinion and Order Is Predicated Upon Clearly Erroneous Factual Findings.**

Along with the legal errors set forth above, the Magistrate Judge made several clearly erroneous factual findings, each of which go to the content of the relevant military policy challenged in this case and the need for discovery on prior policies. As an example, the Magistrate Judge found that a review panel from DoD would not have existed but for the President’s statement on Twitter and the August 2017 Presidential Memorandum. Mem. Op. 6–7. But that is clearly wrong. The Magistrate Judge overlooked that Secretary Mattis ordered a review of the accessions policy “to evaluate more carefully the impact of such accessions on readiness and lethality” on

June 30, 2017—nearly a month *prior to* the President’s Twitter statements.<sup>8</sup> AR 326, Dkt. 133-4; *see also* Mattis Mem. 1, Dkt. 120-1 (stating that prior to the President’s Twitter statements, Secretary Mattis “established a study group that included the representatives of the Service Secretaries and senior military officers, many with combat experience, to conduct the review”); Defs.’ Mot. to Dissolve the Prelim. Inj. 4, Dkt. 120; Defs.’ Mot. to Dismiss 3–4, Dkt. 158. Because the review ordered by Secretary Mattis was ongoing at the time of the President’s statement on Twitter, the Magistrate Judge’s finding that “the only evidence that is before the Court regarding any review panel, investigatory body, or discussions regarding transgender service occurred well after the fact of the Presidential tweets and Memorandum” is clearly erroneous. Mem. Op. 6.

The Magistrate Judge appeared to base this erroneous finding upon the Court’s “previous observ[ation] [in its preliminary injunction opinion] that President Trump’s tweets did not emerge from a policy review” and that “the Presidential Memorandum [did not] identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.” *Id.* (citing Op. 43, Dkt. 85). In doing so, the Magistrate Judge overlooked that DoD’s new 2018 policy was the product of a significantly *different* process than the one the Court believed preceded the President’s 2017 Memorandum. In its preliminary injunction opinion, the Court characterized the President’s 2017 Memorandum and statements on

---

<sup>8</sup> Similarly, the Magistrate Judge’s factual finding that “a previous panel under a previous Secretary of Defense did extensive studies before a decision was rendered,” Mem. Op. 6, overlooks that former Secretary of Defense Ashton Carter directed a working group to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective, practical impediments are identified,” AR 319, Dkt. 133-4. Moreover, the RAND Corporation, which was commissioned by DoD to study the issue of military service by transgender individuals, has recently explained that it was “not ask[ed] . . . to recommend whether” the pre-Carter policy should be abandoned, but simply to answer seven specific questions. Agnes Gereben Schaefer, *On RAND’s Research Findings Regarding Transgender Military Personnel Policy*, COMMENTARY (THE RAND BLOG) (Mar. 27, 2018), Dkt. 158-2.

Twitter as a “departure from normal procedure” because the Twitter statements “did not emerge from a policy review” and the 2017 Memorandum did not “identify any policymaking process.” Op. 43, Dkt. 85. But the same cannot be said of DoD’s new policy. That policy was the result of an extensive and independent deliberative process by military experts, as reflected in the new policy itself, Secretary Mattis’s memorandum, DoD’s 44-page report, and the more than 3,000-page administrative record. *See* Mattis Mem. 1, 2, Dkt. 120-1 (stating that the Panel of Experts was directed to “provide its best military advice, based on increasing the lethality and readiness of America’s armed forces, without regard to any external factors” and that the resulting policy was based on the “Panel’s professional military judgment and [Secretary Mattis’s] own professional judgment”); DoD Report and Recommendations 4, Dkt. 120-2 (stating that “[t]he Panel made recommendations based on each Panel member’s independent military judgment”). The months-long review by the Panel of Experts resulting in DoD’s new policy is precisely the type of military personnel decision and policymaking process that the Court indicated should be given deference in its preliminary-injunction opinion. *See* Op. 43, Dkt. 85 (stating that “[t]he Court does not disagree” that “deference is owed to military personnel decisions and to the military’s policymaking process”). The Magistrate Judge’s factual findings about the process informing the new policy are clearly erroneous, and, in any event, do not support discovery into the Department’s deliberative process is appropriate in this case. *See supra* Part II.A.1.

As a second example, the Magistrate Judge found that “circumstances regarding readiness and deployability [could not] have changed so dramatically” between 2016 and 2018 to warrant the creation of a new policy. Mem. Op. 6. But the Magistrate Judge ignored that the RAND Corporation, which was commissioned by DoD under former Secretary of Defense Ashton Carter to study the issue of military service by transgender individuals, stated that when it conducted its

review, “there was limited data available” and that it “highlighted and caveated those limitations throughout the report so that DoD could understand the limitations and factor them into its decision making process.” Agnes Gereben Schaefer, *On RAND’s Research Findings Regarding Transgender Military Personnel Policy*, COMMENTARY (THE RAND BLOG) (Mar. 27, 2018), Dkt. 158-2. Indeed, in reviewing the RAND Report, DoD found that it “contained significant shortcomings” because, among other things, it relied on “limited and heavily caveated data to support its conclusions.” Mattis Mem. 2, Dkt. 120-1. Rather than rely on RAND’s “limited and heavily caveated data,” *id.*, the Panel of Experts relied on the “the Department’s own data and experience obtained since the [2016] Carter policy took effect,” DoD Report and Recommendations 18, 40, Dkt. 120-2; Mattis Mem. 2, Dkt. 120-1 (stating that “[u]nlike previous reviews on military service by transgender individuals, the Panel’s analysis was informed by the Department’s own data obtained since the new policy began to take effect last year”); *see also* AR2821–47 (Panel Meeting Minutes); AR3059 (Action Memo) (stating that the “Panel considered available DoD data and information on currently-serving transgender personnel”). Because the Magistrate Judge overlooked DoD’s own data and experience since the implementation of the Carter policy, his finding that the “circumstances regarding readiness and deployability [could not] have changed so dramatically” between 2016 and 2018 to warrant the creation of a new policy is clearly erroneous. Mem. Op. 6.

As a final example, the Magistrate Judge found that the Department’s new policy would result in “transgender persons [being] banned from military service.” Mem. Op. 9. But the new policy does not operate on the basis of transgender status and, as under the Carter policy, allows transgender individuals without a history of the *medical condition* of gender dysphoria to serve, if they meet the standards associated with their biological sex. *See* Mattis Mem., Dkt. 120-1; DoD

Report and Recommendations, Dkt. 120-2; *see also* Defs.’ Mot. to Dissolve the Prelim. Inj. 6–8, Dkt. 120; Defs.’ Mot. to Dismiss 6–8, Dkt. 158. The new policy allows service members “who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy,” including those who entered the military “after January 1, 2018,” to “continue to receive all medically necessary care, to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences.” DoD Report and Recommendations 5–6, Dkt. 120-2; *see also* Defs.’ Mot. to Dissolve the Prelim. Inj. 7, Dkt. 120; Defs.’ Mot. to Dismiss 7, Dkt. 158. Because some transgender individuals may serve under the new policy, the Magistrate Judge’s finding that the policy would result in “transgender persons [being] banned from military service” is clearly erroneous. Mem. Op. 9.

Because the Magistrate Judge’s Memorandum Opinion and Order was predicated upon these clearly erroneous factual findings, all of which concern matters that are raised in dispositive motions pending before the Court, the Memorandum Opinion and Order should be set aside.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court set aside the Magistrate Judge’s Memorandum Opinion and Order, except for the prohibition on seeking discovery from the President pending the resolution of Defendants’ motion to dismiss the President as a party to this case.

Date: August 28, 2018

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General  
Civil Division

BRETT A. SHUMATE  
Deputy Assistant Attorney General

JOHN R. GRIFFITHS  
Branch Director

ANTHONY J. COPPOLINO  
Deputy Director

/s/ Courtney D. Enlow  
COURTNEY D. ENLOW  
ANDREW E. CARMICHAEL  
Trial Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Telephone: (202) 616-8467  
Email: [courtney.d.enlow@usdoj.gov](mailto:courtney.d.enlow@usdoj.gov)

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2018, I served the foregoing Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record. I further certify that I have arranged for a paper copy of this filing to be sent to the Court.

Dated: August 28, 2018

/s/ Courtney D. Enlow  
COURTNEY D. ENLOW  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Telephone: (202) 616-8467  
Email: courtney.d.enlow@usdoj.gov

*Counsel for Defendants*

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity  
as President of the United States, *et al.*,

*Defendants.*

Case 1:17-cv-02459-GLR

Hon. George L. Russell, III

**[PROPOSED] ORDER SUSTAINING DEFENDANTS' OBJECTIONS TO  
THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

Upon consideration of Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order, it is ORDERED that Defendants' Objections are SUSTAINED and the Magistrate Judge's Memorandum Opinion and Order, Dkt. Nos. 204 and 205, are SET ASIDE, except for the prohibition on seeking discovery from the President pending the resolution of Defendants' motion to dismiss the President as a party to this case.

DATED this \_\_\_\_ day of \_\_\_\_, 2018

\_\_\_\_\_  
Hon. George L. Russell, III  
United States District Judge