

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

JANE DOE 2, *et al.*,

Plaintiffs,

v.

JAMES MATTIS, in his official capacity as
Secretary of Defense, *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND INFORMATION WITHHELD
UNDER THE DELIBERATIVE PROCESS PRIVILEGE**

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INTRODUCTION

Plaintiffs seek a sweeping ruling that the deliberative process privilege does not apply to tens of thousands of deliberative documents touching on numerous policies and decisions made by the President and the Department of Defense (“DoD”) related to military service by transgender individuals, purely as a matter of law. At bottom, Plaintiffs’ argument depends on the acceptance of two predicates, both incorrect: 1) that application of judicial deference to military decisions is a “defense” that can be invoked only if the Government first surrenders all deliberative information; and 2) that if a plaintiff claims that intent is at issue (even in the context of military and national security litigation), the deliberative process privilege is eviscerated in its entirety as a matter of law. As explained below, both grounds for their motion are contrary to law, including established Supreme Court precedent.

As a threshold matter, however, this Court should decline to rule on the applicability of the deliberative process privilege at this time because underlying legal questions needed to resolve the matter, along with questions pertaining to the merits of Plaintiffs’ constitutional claims, are currently before the D.C. Circuit on interlocutory appeal. Because a ruling by the D.C. Circuit is likely to substantially impact this Court’s consideration of Plaintiffs’ motion and provide further insight into whether the discovery Plaintiffs seek here is even relevant to their claims, the Court should defer ruling on Plaintiffs’ motion.

In any event, even if the Court were to rule on Plaintiffs’ motion and accept both of their legally erroneous predicates, Plaintiffs would still not be entitled to the order they seek. Plaintiffs have not shown that all deliberative documents related to military service by transgender individuals over a period of two years and across numerous offices throughout DoD and the Military Services are necessary to the claim regardless of their timeframe, context, author, or recipient, and that any such

need would outweigh the chilling effect of disclosure. Accordingly, Plaintiffs' motion should be denied for this reason as well.

PROCEDURAL BACKGROUND¹

Plaintiffs filed this action on August 9, 2017, raising constitutional challenges to the President's statements on Twitter concerning military service by transgender individuals. Compl., Dkt. 1. Plaintiffs also filed a motion for a preliminary injunction, Dkt. 13, which the Court granted in part, Dkt. 60.

After DoD issued its new policy in March 2018, Defendants filed a motion to dissolve the preliminary injunction, Dkt. 116, and Plaintiffs filed their second amended complaint, Dkt. 106. Plaintiffs challenge the constitutionality of what they characterize as a "ban on military service by transgender individuals," Second Am. Compl. ¶ 1, as allegedly "announced in . . . tweets [by the President on July 26, 2017,] promulgated to the Department of Defense in [the Presidential Memorandum] issued on August 25, 2017 ("2017 Presidential Memorandum"), and finalized in DoD's new policy dated February 22, 2018, *id.* ¶ 83; *see also id.* ¶¶ 37, 38, 74, 75, 79, 80, 85. Defendants filed a motion to dismiss the second amended complaint, or, in the alternative, for summary judgment, Dkt. 115, and Plaintiffs filed a cross-motion for summary judgment, Dkt. 132.

Meanwhile, the parties engaged in discovery. Plaintiffs issued broad discovery requests specifically targeting Defendants' decision-making processes. Plaintiffs sought information and documents related to: (i) the policy put in place in June 2016 by then-Secretary of Defense Ash Carter (the "Carter policy"); (ii) a decision by Secretary of Defense James Mattis to defer the start of accessions by transgender individuals under the Carter policy; (iii) the President's statements on

¹ The background regarding the creation of the military's new policy is set forth in Defendants' motion to dissolve the preliminary injunction. *See* Defs.' Mot. 3–9, Dkt. 96.

Twitter in July 2017; (iv) the 2017 Presidential Memorandum; (v) the Interim Guidance issued by Secretary Mattis in September 2017; (vi) the work by the DoD Panel of Experts that was convened to develop policy proposals in fall 2017; (vii) Secretary Mattis’s February 2018 decision memorandum and the accompanying DoD Report supporting the new DoD policy; and (viii) the Presidential Memorandum issued on March 23, 2018 (“2018 Presidential Memorandum”) that revoked the 2017 Presidential Memorandum. *See, e.g.*, Pls.’ First Set of Interrogs. ¶¶ 11–25, Dkt. 89-1; Ex. 1 (Pls.’ First Set of Reqs. for Prod. ¶¶ 4–22, 24–25).

In response to discovery requests on these topics, Defendants conducted an extensive search and produced tens of thousands of non-privileged, responsive documents. Defendants also objected to discovery requests and withheld documents protected by the deliberative process privilege (among others),² but otherwise responded. *See, e.g.*, Defs.’ Objs. to Pls.’ First Set of Interrogs., Dkts. 86-4, 86-5, 91-4—91-8. Following the issuance of DoD’s new policy in March 2018, Defendants produced an

² Plaintiffs assert that “[t]he government also invoked the presidential communications privilege in response to several of Plaintiffs’ discovery requests and refused to provide even an *in camera* privilege log of documents withheld on that ground.” Pls.’ Mot. 5 n.2, Dkt. 169. But that is not correct for multiple reasons. As an initial matter, Defendants did not formally “invoke” the presidential communications privilege via affidavit because doing so was (and still is) premature in light of separation-of-powers concerns. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 388 (2004); Dkts. 89, 171. Nevertheless, Defendants provided Plaintiffs with an initial White House privilege log on February 7, 2018, and a subsequent White House privilege log on July 16, 2018, in which Defendants identified categories subject to the presidential communications privilege. Plaintiffs attached the first log as an exhibit to their letter to the Court on February 16, 2018. *See* Pls.’ Letter, Ex. E, Dkt. 86-6. Defendants objected to providing substantive responses to certain interrogatories (either to Plaintiffs or to the Court for *in camera* review) because of separation-of-powers concerns, *see Cheney*, 542 U.S. at 388, and because the Court could conclude as a matter of law, without *in camera* review, that the substantive information sought by Plaintiffs is subject to the presidential communications privilege. Tr. 5:9–22 (Feb. 16, 2018), Dkt. 87; *see also* Dkt. 89. The Court allowed the parties to brief the issue, Tr. 5:23–24 (Feb. 16, 2018), and Defendants filed a motion for a protective order to preclude the President from having to provide substantive information in response to Plaintiffs’ interrogatories, even for *in camera* review, Dkt. 89. The Court subsequently dismissed the President as a party to the case and denied Defendants’ motion as moot. Dkts. 154, 155. The applicability of the presidential communications privilege as it relates to documents and information in the possession of the other Defendants is the subject of Defendants’ Motion for a Protective Order, Dkt. 171, which is currently pending before the Court.

administrative record in excess of 3,000 pages to Plaintiffs, which contains meeting minutes from the Panel of Experts for the Transgender Policy Review (the “Panel”),³ as well as the materials considered by the Panel prior to the formulation of its recommendation to the Secretary of Defense.

In addition to producing the administrative record, tens of thousands of responsive documents, and responding to written discovery, Defendants made witnesses available for depositions. Plaintiffs requested to depose officials in DoD and the armed forces who served on or supported the Panel. In particular, Plaintiffs requested that Defendants schedule the deposition of Anthony Kurta, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Under Secretary of Defense for Personnel and Readiness.⁴ Mr. Kurta served as chair of the Panel through late November 2017. *See* USDOE00032824, Dkt. 128-25. Plaintiffs also requested to depose Lernes Hebert, Principal Director, Military Personnel Policy, Office of the Under Secretary of Defense for Personnel and Readiness. Defendants scheduled the depositions of Mr. Kurta and Mr. Hebert, but Plaintiffs chose not to depose them last spring and have not requested to reschedule those depositions. Although Plaintiffs chose not to depose Mr. Kurta or Mr. Hebert, Plaintiffs did depose

³ The Panel consisted of the members of senior military leadership who had “the statutory responsibility to organize, train, and equip military forces” and were “uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force.” DoD Report and Recommendations at 18, Dkt. 96-2. The Panel’s task was to “conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members.” *Id.* at 17. The Panel was supported by working groups, which were assigned areas of focus and expertise. *See id.* Additional details of the work of the Panel and its working groups are set forth in Defendants’ Motion to Dissolve the Preliminary Injunction. *See* Defs.’ Mot. 5–7, Dkt. 96.

⁴ Plaintiffs also requested to schedule the deposition of General Paul Selva, Vice Chairman of the Joint Chiefs of Staff, who attended one meeting of the Panel and was briefed on the Panel’s work by Mr. Kurta or another official from the Office of the Under Secretary of Defense for Personnel and Readiness. *See* Dkt. 112-1. Defendants objected to the deposition of the Vice Chairman because he is a high-ranking Government official and Plaintiffs did not establish that the Vice Chairman possessed unique, non-privileged, relevant information that could not be obtained through other means. *See id.* The Court determined that Defendants were not required to schedule the Vice Chairman’s deposition at that time. *See* Order, Dkt. 112.

five Government officials, including Colonel Mary Krueger and Martha Soper, who served on working groups supporting the Panel.⁵ During the depositions, counsel for Defendants objected to questions calling for the disclosure of privileged information.

Despite the availability of non-privileged discovery, in February 2018, Plaintiffs sought the disclosure of *all* of Defendants' deliberative documents, arguing that documents created after the President's statements on Twitter are not predecisional and that, in any event, the privilege does not apply at all in this case. *See* Defs.' Letter, Dkt. 86; Pls.' Letter, Dkt. 86-1. During a meet and confer with Plaintiffs' counsel on February 8, 2018, counsel for the Government "repeatedly requested that Plaintiffs identify those documents that they contend contain information that Defendants improperly withheld. Beyond identifying seven documents as exemplars, Plaintiffs refused to do so." Defs.' Letter 3, Dkt. 86. On February 13, 2018, the Court held a telephone conference on the discovery dispute, during which the Court directed Plaintiffs to identify specific documents that they contend contain non-privileged information or identify entries on the privilege log that they contend need additional information before Plaintiffs can challenge Defendants' privilege assertions. *See* Tr. 29:22–30:3, 32:12–18 (Feb. 13, 2018), Dkt. 88; Minute Order (Feb. 16, 2018). In response, Plaintiffs provided Defendants with a list of approximately 300 documents. *See* Tr. 3:12–16 (Feb. 16, 2018), Dkt. 87. Soon thereafter, Defendants provided their position on 34 of the documents, but, as counsel for the Government explained to Plaintiffs, because many of the documents "implicate the equities of multiple offices or sections," "it has taken longer than we expected to reexamine them and determine whether additional information can be released." Ex. 2, Email from Ryan Parker to Daniel McFadden (Mar. 6, 2018); *see also id.* at Email from Ryan Parker to Daniel McFadden (Mar. 7, 2018). Government

⁵ Although Plaintiffs state that they "held those depositions open," Pls.' Mot. 5, Plaintiffs did not request to hold Ms. Soper's deposition open, and Defendants objected to Plaintiffs' request to hold Colonel Krueger's deposition open, *see* Ex. 3 (Krueger Dep. 177:3–19 (Apr. 17, 2018)); Ex. 4 (Soper Dep. 244:13–17 (Feb. 1, 2018)).

counsel also informed Plaintiffs that “many of the individuals reviewing these documents are also reviewing other documents for release in future productions and creating privilege logs.” *Id.* Despite these representations, Plaintiffs informed the Court that Defendants had been unable to provide their position on all 300 documents, and requested that the court set a “concrete timeline” for Defendants’ responses. Email from Daniel McFadden to Chambers of Judge Kollar-Kotelly (Apr. 13, 2018), Dkt. 113-1. Plaintiffs also sought “documents and information concerning the deliberations of the Panel of Experts,” as well as a “concrete timeline for the completion of Defendants’ document production.” *Id.* The Court then issued an Order directing Defendants to “produce responsive, *non-privileged* documents to Plaintiffs” by May 15, 2018. Order, Dkt. 113. The Court declined to rule on the parties’ privilege disputes, finding that the resolution of then-pending dispositive motions “may affect the scope of discovery.” *Id.* The Court concluded that it “will resolve the parties’ disputes about privileges—if they are still relevant—after the Court resolves these substantive motions.” *Id.*

Plaintiffs then challenged Defendants’ clawback of certain inadvertently produced, privileged documents, *see* Order Ex. A, Dkt. 118, and, aside from one document,⁶ the Court again determined that it would resolve the dispute “at a later time,” Order 2, Dkt. 118. The parties continued with discovery until Plaintiffs sought to depose Vice Admiral David Kriete, a high-ranking Government official who is the Deputy Commander of U.S. Strategic Command. In declining to order his deposition, the Court reiterated that “[t]he parties’ disputes about privilege will be addressed, if necessary, after these dispositive motions have been resolved.” Order, Dkt. 145.

⁶ The Court directed Defendants to file a response regarding its clawback of one document. Order, Dkt. 118. In Defendants’ response, Defendants “withdr[e]w their clawback request over the partially redacted version” of a presentation. Letter from Ryan Parker to Chambers of Judge Kollar-Kotelly 3 (Apr. 23, 2018), Dkt. 124. “Defendants maintain[ed] their claw back requests over the *unredacted* version” of the presentation, as well as the other documents described in the clawback request. *See id.*

Two months after the resolution of the dispute concerning Vice Admiral Kriete's deposition, the Court ruled on pending dispositive motions. The Court denied Defendants' motion to dismiss and the parties' cross-motions for summary judgment. Order, Dkts. 156, 159. The Court found that "genuine disputes of material fact remain" because "[t]he parties dispute the facts related to the process used by Defendants to prepare the current proposed policy on transgender military service." Mem. Op. 9, Dkt. 160. The Court also denied Defendants' motion to dissolve the preliminary injunction. Order, Dkt. 156. Defendants filed an appeal of the Court's denial of the motion to dissolve the preliminary injunction, Dkt. 162, which is currently pending before the D.C. Circuit.

Upon resolution of the dispositive motions, the Court directed the parties to "meet and confer and file a Joint Status Report" that proposes a "protocol for the efficient resolution of the parties' outstanding discovery disputes." Minute Order, Aug. 27, 2018. In the parties' Joint Status Report, Plaintiffs stated that they would "move to compel the production of documents and testimony withheld on the basis of the deliberative process privilege." Joint Status Report 1, Dkt. 167.

Plaintiffs' instant Motion to Compel argues that "the deliberative process privilege does not apply" in this case as a matter of law, and seeks the disclosure of all documents and testimony withheld on that basis. *See* Pls.' Mot. 1, Dkt. 169. Accordingly, the only issue before the Court at this time is the "threshold" legal issue of whether the deliberative process privilege *per se* applies as a matter of law to any information at issue in discovery in this case.⁷

⁷ As a result, Defendants are not required to perfect the privilege at this time as to documents or information contained in each of the thousands of documents, as well as testimony and information that has been withheld on the basis of the 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.

ARGUMENT

I. The Court Should Hold Plaintiffs' Motion to Compel in Abeyance Pending Final Resolution of the Interlocutory Appeal Currently Before the D.C. Circuit.

As an initial matter, this Court should wait to resolve Plaintiffs' Motion to Compel because key issues underlying the motion are currently before the D.C. Circuit on interlocutory appeal of the denial of Defendants' motion to dissolve the preliminary injunction, to be heard on December 10, 2018. Order, *Doe v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1755741. Because that appeal raises fundamental questions about the merits of Plaintiffs' constitutional claims, its outcome is likely to affect substantially this Court's consideration of whether the discovery Plaintiffs seek is relevant to their claims.

Plaintiffs argue that they need *all* of Defendants' deliberative documents because "the process surrounding the announcement of the ban and leading up to the issuance of the Mattis Implementation Plan is central to this case." Pls.' Mot. 8. Plaintiffs cite the Court's determination that the "level of scrutiny the Court should apply, and how much deference should be given, when reviewing the challenged policy" should be decided based on factual inquiries. Mem. Op. 11, Dkt. 160; *see also id.* at 13–15. But the proper standard of scrutiny under which to review DoD's new policy is one of the central issues raised in the Government's interlocutory appeal. *See* Appellant's Opening Br., 19–23, *Doe v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1752076. The Government's position is that because DoD's new policy arises in the area of military affairs it should be reviewed under a highly deferential standard that "most closely resembles rational-basis review." *Id.* at 21; *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (stating that "the Constitution itself requires such deference"). If the Government's argument prevails, Plaintiffs would be left with no reason to probe the Government's decision-making process, and discovery of documents purportedly related to how the Government made its decision would be unnecessary.

Plaintiffs further contend that the deliberative “information is also central to Plaintiffs’ claims, which contend that the [G]overnment acted with an unconstitutional discriminatory purpose in developing and implementing its transgender service policies.” Pls.’ Mot. 9. But, again, this question is directly at issue in the interlocutory appeal. The Government argues on appeal that DoD’s new policy should be reviewed on its own terms, without regard to any alleged subjective intent behind it or prior rescinded presidential directives. Appellant’s Opening Br., 46, *Doe v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1752076; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding presidential proclamation based solely on its text, without regard to previous executive orders or past statements by the President). Again should the Government’s position prevail, discovery to support Plaintiffs’ claims of alleged unconstitutional animus would be unnecessary to resolve the underlying litigation.

Finally, even if the interlocutory appeal does not entirely eliminate Plaintiffs’ asserted bases for discovery, it is likely to narrow the scope of discovery relevant to the underlying lawsuit. For example, the D.C. Circuit could conclude that Plaintiffs’ challenge to the 2017 Presidential Memorandum is moot or that the substance of DoD’s new policy is wholly distinct from the 2017 Presidential Memorandum, which would render discovery of materials predating the establishment of the Panel of Experts irrelevant. *See, e.g.*, Appellant’s Opening Br., 38–41, 46 n.3, *Doe v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1752076. Such a ruling would counsel that this Court should, at a minimum, substantially narrow the scope of Plaintiffs’ motion to compel to exclude the disclosure of deliberative documents predating the establishment of the Panel of Experts.

In sum, the issues presently before the D.C. Circuit in the interlocutory appeal may likely affect or even eliminate the bases for the pending motion in this Court. At a minimum, those proceedings may narrow the issues for this Court’s consideration or narrow the appropriate scope of Plaintiffs’ discovery requests and motion to compel. Given that possibility, there is no reason to compel

production of *all* documents withheld under the deliberative process privilege—tens of thousands in all—while the preliminary injunction appeal is pending. A ruling by this Court now could conflict in material ways with a subsequent decision by the D.C. Circuit, which may in turn lead to further litigation in this Court and Circuit. In the related *Karnoski* litigation, the Government has appealed a similar order denying its motion to dissolve the preliminary injunction and filed a petition for writ of mandamus of a discovery order similar to the one Plaintiffs seek here, and the Court of Appeals for the Ninth Circuit has stayed compliance with the discovery order. *See Order, In re Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36. Accordingly, the Government respectfully requests that this Court hold Plaintiffs’ motion to compel in abeyance pending final resolution of the interlocutory appeal, including any *en banc* or Supreme Court review. Once those proceedings have reached final resolution, the Government proposes that the parties file supplemental briefs on the instant dispute.

II. If the Court Reaches the Merits of Plaintiffs’ Motion, the Motion Should Be Denied.

A. The Deliberative Process Privilege

The deliberative process privilege protects the Government’s decision-making process by shielding from disclosure documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The privilege “reflects the commonsense notion that agencies craft better rules when their employees can spell out in writing the pitfalls as well as strengths of policy options, coupled with the understanding that employees would be chilled from such rigorous deliberation if they feared it might become public.” *Judicial Watch, Inc. v. United States Dep’t of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017) (citing *Sears*, 421 U.S. at 150); *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of

agency decisions, by protecting open and frank discussion among those who make them within the Government.”) (citation omitted); *Nat’l Sec. Archive v. C.I.A.*, 752 F.3d 460, 462 (D.C. Cir. 2014) (“If agencies were ‘to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.’”) (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987)). The privilege’s “ultimate purpose” is to “prevent injury to the quality of agency decisions’ by allowing government officials freedom to debate alternative approaches in private.” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Sears*, 421 U.S. at 151). “In other words, agency officials ‘should be judged by what they decided, not for matters they considered before making up their minds.’” *Nat’l Sec. Archive*, 752 F.3d at 462–63 (quoting *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)).

The deliberative process privilege covers documents and communications that are “pre-decisional and deliberative.” *Id.* at 463 (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). Predecisional documents are “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)). “Deliberative’ . . . means, in essence, that the communication is intended to facilitate or assist development of the agency’s final position on the relevant issue.” *Nat’l Sec. Archive*, 752 F.3d at 463 (citing *Russell*, 682 F.2d at 1048). Deliberative material “reflects the give-and-take of the consultative process,” by revealing the manner in which the agency evaluates possible alternative policies or outcomes. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

“The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need.” *In re Sealed Case*, 121 F.3d at 737. “This need determination is to be made flexibly on a case-by-case, ad hoc basis.” *Id.* “[A]djudging such an assertion of need requires a ‘balancing of the competing interests, taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the

possibility of future timidity by government employees.” *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998) (quoting *In re Sealed Case*, 121 F.3d at 737–38). The burden is on the “party opposing the privilege to establish that its need for the information outweighs the interest of the government in preventing disclosure of the information.” *Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003); *Breiterman v. U.S. Capitol Police*, 323 F.R.D. 36, 46 (D.D.C. 2017) (“The party seeking the document bears the burden of demonstrating the balance of interest tips in his or her favor.”) (citation omitted); *see also 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); *Redland Soccer Club, Inc. v. Dep’t of Army*, 55 F.3d 827, 854 (3d Cir. 1995) (“The party seeking discovery bears the burden of showing that its need for the documents outweighs the government’s interest.”); *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).

B. Plaintiffs’ Contention that the Deliberative Process Privilege Does Not Apply as a Matter of Law Is Meritless.

1. Plaintiffs’ Contention that Reliance on Deference to Military Judgment Waives the Deliberative Process Privilege Is Meritless.

Plaintiffs contend that Defendants are “invoking [their] deliberative process as a substantive defense” by arguing that deference is owed to military personnel decisions, and thus, that Defendants cannot as a result shield any deliberative information from the process of deciding policy. Pls.’ Mot. 9. As set forth below, this contention would not in any event warrant the wholesale waiver of the deliberative process privilege. But, as a threshold matter, this argument also misapprehends the constitutional basis for judicial deference to Executive and Legislative decisions involving the military.

Deference to military policy judgments stems from the Supreme Court’s recognition that the Constitution vests decisions as to the organization of the armed forces in the Executive and Legislative branches, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and that the “military constitutes a specialized

community governed by a separate discipline from that of the civilian,” *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). Judicial deference is thus applied whenever the challenged decision involves “the composition, training, equipping, and control of a military force.” *Morgan*, 413 U.S. at 10.

Accordingly, judicial deference to military decisions is not a “defense,” as Plaintiffs claim, but a constitutionally mandated standard of review. *Rostker*, 453 U.S. at 67 (“[T]he Constitution itself requires such deference . . .”). The application of military deference does not mean that the Government must automatically prevail in any litigation challenging a military policy, but it does mean “that constitutional challenges to military personnel policies and decisions face heavy burdens.” *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc) (citing *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983)). Thus, “the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized” that litigation involving a challenge to a military policy must be conducted differently than ordinary civil litigation. *Id.* (citation omitted). Military deference is one manner in which the Supreme Court has mandated such differing treatment.

Here, the Court has found that the degree of military deference to be applied to the Department’s policy is a factual question that necessitates further discovery into DoD’s decision-making process, Mem. Op. 11, Dkt. 160, and Plaintiffs rely on that finding in their attempt to eviscerate the deliberative process in its entirety, *see* Pls.’ Mot. 8–12. In reaching this finding, the Court relied on the observation in *Rostker* that “Congress did not act unthinkingly or reflexively and not for any considered reason” when it decided not to require women to register for the selective service, but had “extensively considered” and made a “studied choice of one alternative in preference to another.” Mem. Op. 12, Dkt. 160 (quoting *Rostker*, 453 U.S. at 72). The Court reasoned that a similar factual determination must be made in this case before military deference can be applied.

But the Supreme Court based its decision to apply military deference in *Rostker* on Congress' constitutional role in national defense and military affairs, not the quality of Congress' decision. *See Rostker*, 453 U.S. at 64–65 (“This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises *in the context of Congress' authority over national defense and military affairs*, and perhaps in no other area has the Court accorded Congress greater deference.”) (emphasis added); *see also id.* at 68 (“The District Court purported to recognize the appropriateness of deference to Congress *when that body was exercising its constitutionally delegated authority over military affairs*, but it stressed that ‘[we] are not here concerned with military operations or day-to-day conduct of the military into which we have no desire to intrude.’”) (emphasis added) (citation omitted)). Indeed, in that way, *Rostker* was merely following the large body of Supreme Court case law that applied judicial deference whenever a policy involves Congress' constitutional authority to raise and support armies.

Supreme Court cases since *Rostker* have similarly found that application of military deference requires a subject matter inquiry, not a factual inquiry into the decision-making process. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–35 (2010) (Roberts, C. J.) (“It is vital in this context ‘not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.’”) (quoting *Rostker*, 453 U.S. at 68, and referring to cases brought in the national security and foreign relations context); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 58–59 (2006) (Roberts, C. J.) (“[A]s we recognized in *Rostker*, ‘judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies.”) (quoting *Rostker*, 453 U.S. at 70); *Solorio v. United States*, 483 U.S. 435, 447–48 (1987) (“As we recently reiterated, [j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) and *Rostker*, 453 U.S. at 70) (internal quotations omitted); *Goldman*, 475 U.S. at 508 (“[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to

raise and support armies and make rules and regulations for their governance is challenged.”) (quoting *Rostker*, 453 U.S. at 70); *Chappell*, 462 U.S. at 301–02 (in a case decided two years after *Rostker*, reiterating that when a “case arises *in the context of* Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference”) (quoting *Rostker*, 453 U.S. at 64–65) (emphasis added); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (Roberts, C. J.) (holding that military deference is applied in cases involving the “composition, training, equipping, and control of a military force”) (quoting *Morgan*, 413 U.S. at 10); *Boumediene v. Bush*, 553 U.S. 723, 832 (2008) (Roberts, C. J., dissenting) (“We have frequently stated that we owe great deference to Congress’s view that a law it has passed is constitutional. That is especially so in the area of foreign and military affairs; ‘perhaps in no other area has the Court accorded Congress greater deference.’”) (quoting *Rostker*, 453 U.S. at 64–65) (further citations omitted); *Hawaii*, 138 S. Ct. at 2420, 2420 n.5 (holding the inquiry into matters of entry and national security is highly constrained[.]” and listing cases involving “immigration policies, diplomatic sanctions, and military actions” as examples when a rational basis review is applied.).

Here, it is without question that the Secretary of Defense, in issuing a policy that governs aspects of the accession of new members into the military and the retention of current service members, is acting under statutory authority provided by Congress pursuant to its constitutional authority to raise and support armies. *See* 10 U.S.C. §§ 532, 12201 (pertaining to original active duty and reserve officer appointments); 10 U.S.C. §§ 505, 12102 (pertaining to original active duty and reserve enlistments); *see also* 32 C.F.R. § 66.6(b)(5) (setting medical requirements for enlistment, appointment, and induction into the military). No discovery is required to determine whether judicial deference applies to that decision.

In any event, Plaintiffs’ contention that the deliberative process may be probed to test whether deference is due would stand the very doctrine of military deference on its head. Military policy

judgments, to which deference is owed as a matter of law, are the result of a deliberative process. To use the deference owed to the military to require disclosure of its internal deliberations, including candid assessments and opinions by military officials, would frustrate the very notion of deference, in disregard of its constitutional underpinnings.

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

And even if the application of military deference turned on factual issues, that would not mean that the deliberative process privilege should fall as to *all* deliberative documents. Even under Plaintiffs' theory, deliberative documents prior to the first meeting of the Panel of Experts, during the week of October 9, 2017, Dkt. 128-25, would be of no help to determine if the Panel acted "unthinkingly or reflexively and not for any considered reason" or whether the Panel "extensively considered" and made a "studied choice of one alternative in preference to another." Mem. Op. 12,

Dkt. 160 (quoting *Rostker*, 453 U.S. at 72). Nor would low-level deliberations among military staff who were not members of the Panel help Plaintiffs answer such factual questions. On the other hand, the administrative record containing the minutes from the Panel of Experts' meetings along with the materials the Panel considered or a deposition of the chair of the Panel might help Plaintiffs obtain the answers to these questions. Defendants have already provided this administrative record to Plaintiffs with minimal redactions and have made the chair of the Panel, Mr. Anthony Kurta, Dkt. 128-25, available for deposition. If Plaintiffs contend that they require an entirely unredacted administrative record or that Mr. Kurta has been instructed not to answer questions pertaining to the deliberations of the Panel that are vital to resolving the degree of deference to be applied in this case, they can file a motion to compel that targets specific documents and questions. But an attempt to ascertain the answer to such questions does not justify the deliberative process privilege being overcome wholesale across thousands of documents over the course of two years.

2. Plaintiffs' Contention that the Deliberative Process Privilege Does Not Apply When Intent Is at Issue Is Meritless.

Plaintiffs also argue that the deliberative process privilege does not apply in this case as a matter of law because "intent" is at issue. *See* Pls.' Mot. 10–12. But the Supreme Court's recent decision in *Trump v. Hawaii* strongly supports Defendants' position that the President's purported intent in issuing a prior, now-revoked policy is not at issue, and that the Court should instead analyze the official objectives of the current policy. *See* 138 S. Ct. at 2420–23. In *Hawaii*, the Supreme Court assessed the challenged policy on its own terms and 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). While recognizing that it "may consider plaintiffs' extrinsic evidence," 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.* at 2420 (majority op.). In analyzing whether such a justification existed, the Court focused on the

proclamation itself and the “multi-agency review” that supported it. *See id.* at 2417, 2421. That targeted inquiry was not influenced by the revoked executive orders preceding the challenged policy or past statements by the President about Muslims and terrorism. *See id.* at 2417–23.

In this case, Plaintiffs’ theory is more similar to the one adopted by Justice Sotomayor’s dissent in *Hawaii* than to the controlling majority opinion. Plaintiffs argue that the military’s 2018 policy continues an alleged “ban” announced by the President on Twitter last year and is the product of “an unconstitutional discriminatory purpose.” *See* Pls.’ Mot. 9. To bolster their theory, Plaintiffs seek, among other things, deliberative materials concerning “the development of the Presidents tweets” and the 2017 Presidential Memorandum, *id.* at 12, which the President expressly revoked in his March 2018 Memorandum, 83 Fed. Reg. 13,367 (Mar. 23, 2018). But *Hawaii* instructs that the Court must assess the 2018 policy on its own terms, not on the purported intent behind the policy as evidenced by prior statements or an expressly revoked policy. Plaintiffs’ demand for all deliberative process materials related to the challenged DoD policy, and assertion that the deliberative process privilege does not apply to these materials, cannot be sustained based on alleged animus behind prior, revoked presidential statements and policy. Such alleged animus is not pertinent to judicial review of the military’s new policy, and thus cannot serve as a basis to negate the deliberative process privilege wholesale in this litigation.

In arguing that “the privilege is inapplicable” because the government’s “intent” is at issue, Plaintiffs primarily rely on *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Pls.’ Mot. 10–11. But that case did not involve a military policy concerning the composition of the fighting force, and thus the court did not apply 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 (citation omitted). 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 deliberately 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. Indeed, “[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 981, 990 (Fed. Cir. 2017); *see also Utah Med. Prods. v. McClellan*, No. 2:03-cv-525, 2004 WL 988877, *8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative process privilege is inapplicable when a party challenges the decision-making process would lead plaintiffs to “recast [their] complaint as a challenge to the decision-making process”).

Plaintiffs’ reliance on other cases that do not involve military policies is similarly misplaced. In four of the cases Plaintiffs cite for the proposition that the privilege does not apply when intent is at issue, the courts declined to apply the deliberative process privilege to “routine personnel decisions,” such as the decision to terminate an employee, observing that the deliberative process privilege is intended to protect deliberations behind broad policy decisions—precisely the kind of decision at issue here. *See United States v. Lake Cty. Bd. of Comm’rs*, 233 F.R.D. 523, 528 (N.D. Ind. 2005); *Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) (finding that the deliberative process privilege did not apply to a document that “speaks to a particular investigation,” and contrasting that situation with “the adoption of a policy that applies to all cases of a particular nature or type,” where the privilege would apply); *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (in

a retaliation case, holding that the plaintiff was “simply wrong in asserting that the deliberative process privilege should yield in [that] case because of his claim of governmental misconduct” and repeating *In re Subpoena’s* holding in dicta); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). Further, the court in *Jones* applied a balancing test before ordering disclosure despite finding that “government intent is at the heart of the issue in this case”—contrary to Plaintiffs’ own position. 237 F.R.D. at 521. Plaintiffs cite to one case that involved a challenge to a state agency’s policy. Pls.’ Mot. 11 (citing *Children First Found., Inc. v. Martinez*, No. 1:04-cv-927, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007)). But that case did not involve a challenge to a military policy, and, in any event, other courts within the Second Circuit have rejected the approach applied in that case. *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 balancing test) (citation omitted). In sum, none of the cases cited by Plaintiffs provide 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.

Finally, Plaintiffs rely on discovery orders in two related cases, *Stone v. Trump*, No. 17-cv-2459, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018), and *Karnoski v. Trump*, No. 17-cv-1297, 2018 WL

3608401, at *4 (W.D. Wash. July 27, 2018), that are currently under review for the same flawed reasoning that Plaintiffs advance in this case. *See* Pls.’ Mot. 11–12. Like Plaintiffs here, the Magistrate Judge in *Stone* entirely overlooked *Hawaii*. *See Stone*, 2018 WL 3866676, at *2–3. Because of this error (and others), the Government filed objections to the Magistrate Judge’s order, which are pending in the district court. And, like Plaintiffs here, the *Karnoski* Court purported to apply the appropriate balancing test *en masse* to tens of thousands of deliberative documents, rather than explain why the plaintiffs had demonstrated a need for specific documents or categories of documents. *Karnoski*, 2018 WL 3608401, at *4. Again because of this error (and others), the Government filed a petition for a writ of mandamus, which was argued on October 10, 2018, and remains pending in the Court of Appeals for the Ninth Circuit.

Accordingly, the authority on which Plaintiffs rely to foreclose application of the privilege as a matter of law in this case is inapposite and distinguishable from the circumstances here, where deliberations on a military personnel policy are at issue.

C. The Balancing Test Weighs in Favor of Upholding Defendants’ Privilege Claims.

Because Plaintiffs have failed to demonstrate that the deliberative process privilege cannot apply as a matter of law in this case, and they decided not to seek to compel at this time any specific documents being withheld on the basis of privilege, their motion should be denied on this basis alone. Beyond this, however, Plaintiffs have a heavy burden of showing a compelling and particularized need for the documents and information they seek. *See Cobell*, 213 F.R.D. at 5; *Marriott Int’l Resorts, L.P.*, 437 F.3d at 1307; *Farley*, 11 F.3d at 1389; *Vietnam Veterans of Am. v. C.I.A.*, No. 09-cv-37, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011). They cannot meet that burden over documents or categories of documents or information not specifically identified or addressed in their motion to compel.⁸ *See*

⁸ Although Plaintiffs refer to a list of 300 documents that Defendants withheld under the deliberative process privilege, Pls.’ Mot. 17, Plaintiffs do not specifically seek to compel them or provide anything

In re United States, 678 F. App'x at 987 (finding that a “document-by-document” analysis is required in assessing claims that the deliberative process privilege has been overcome). Thus, even if the Court were to consider Plaintiffs’ generic arguments, any balancing of the applicable factors would not justify the disclosure of each and every document subject to a claim of the deliberative process privilege in this case.

Relevance of the evidence. Plaintiffs argue that “the centrality of the withheld evidence to both Plaintiffs’ claims and Defendants’ defenses counsels strongly in favor of disclosure.” Pls.’ Mot. 13. But this argument merely reiterates Plaintiffs’ argument that the deliberative process privilege does not apply as a matter of law in this case because the degree of military deference is a factual question. As demonstrated above, this argument is contrary to Supreme Court precedent governing judicial review of military policies and is currently on appeal before the D.C. Circuit. *See supra* 8–10, 12–18.

Plaintiffs rely on *United States v. Board of Education of the City of Chicago*, 610 F. Supp. 695 (N.D. Ill. 1985), for their argument that Defendants’ deliberative process is central to the claims of this case, but their reliance on *Board of Education* is misplaced. *See* Pls.’ Mot. 13. In concluding that certain deliberative documents were relevant to the plaintiff’s claim, the court found that the “issue here *is* the deliberative process” because, among other reasons, the “Court of Appeals has remanded this case for . . . an inquiry into the decisionmaking process” and “the government has conceded that its

but a generalized assertion that these documents are not pre-decisional and deliberative. Had Plaintiffs limited their motion to this subset of documents, this would be a much narrower dispute, as the parties could have met and conferred about those documents and litigated any questions of privileged reserved as to particular materials. Instead, Plaintiffs make their generalized assertion in the same sweeping manner in which they have approached all of Defendants’ privilege claims. In addition, although Plaintiffs refer to inadvertently produced privileged documents the Government has sought to claw back, Plaintiffs fail to meet their burden of showing that the balancing test weighs in their favor for those documents. *See* Pls.’ Mot. 20 n.7. Moreover, Plaintiffs’ failure to follow the procedure for challenging the Government’s clawback should preclude disclosure of those documents. *See* Fed. R. Evid. 502(d) Order 3, Dkt. 85 (requiring the party challenging a clawback to “make a sealed motion for a judicial determination of the privilege claim”).

decisionmaking process is relevant to the Court’s decision.” *Bd. of Educ.*, 610 F. Supp. at 700. The court stressed the “unique” nature of the case, which involved an allegation that the school board had violated a consent decree, and contrasted it to “the usual ‘deliberative process’ case in which a private party challenges governmental action . . . , and the government tries to prevent its decisionmaking process from being swept up unnecessarily into public,” *id.*—precisely the case here. Thus, the *Board of Education* Court’s reasoning in overcoming the deliberative process privilege is inapposite to the instant dispute.

In any event, Plaintiffs’ generalized assertion of need for “information concerning the development of the President’s tweets, his subsequent memoranda, and the Mattis Implementation Plan,” Pls.’ Mot. 12, is far from the “strong showing of relevance” and particularized need required to overcome the privilege for *each and every document* withheld, *Vietnam Veterans of Am.*, 2011 WL 4635139, at *10; *Marriott Int’l Resorts, L.P.*, 437 F.3d at 1307; *Farley*, 11 F.3d at 1389. This case involves thousands of deliberative documents created over the course of nearly two years and spanning two different administrations. They include documents from across the Department of Defense and the Services involving communications among officials at different levels at different times with respect to different decisions. Many of the documents involve decisions not even challenged by Plaintiffs, such as deliberative documents preceding Secretary Mattis’s decision to delay implementation of the Carter policy’s accession standards.⁹ And the documents include not only communications involving the

⁹ As just one example, in their discovery requests, Plaintiffs seek the production of “[a]ll non-final drafts of the . . . Accessions Deferral Memorandum” and “[a]ll documents relied on by any person in connection with the drafting of the . . . Accessions Deferral Memorandum.” Ex. 1 (Pls.’ First Set of Reqs. for Prod. ¶¶ 16, 19). But Plaintiffs fail to show how deliberative documents related to Secretary Mattis’s decision to defer the start of accessions by transgender individuals under the Carter policy, which was in place before the President issued his statements on Twitter, are relevant to their case, much less, that they have a substantial need for these documents. *See Utah Med. Prods.*, 2004 WL 988877, at *9 (declining to pierce the deliberative process privilege upon finding that the plaintiffs failed to show documents that were “written well before” the ultimate decision were relevant); *Farley*, 11 F.3d at 1390 (holding that a party could not establish “need” as a matter of law where it could not

Secretary of Defense and his closest aides, but a host of lower-level communications throughout the Department. These documents are not susceptible to a one-size-fits-all analysis. *See Coastal States Gas Corp.*, 617 F.2d at 867 (“[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.”); *In re United States*, 678 F. App’x at 987 (noting “document-by-document” analysis required in assessing claims that the deliberative process privilege has been overcome). Nor can Plaintiffs credibly argue that *all* of these documents are relevant to their claims. *See Winfield v. City of New York*, No. 15-cv-5236, 2018 WL 716013, at *10 (S.D.N.Y. Feb. 1, 2018) (noting that “[r]elevance for purposes of invading a privilege is a narrower concept than relevance for purposes of establishing the scope of discovery” and stating that “[i]nformation that is presumptively privileged will be deemed relevant only if it is *central* to the proper resolution of the controversy”) (emphasis added) (citation omitted).

In sum, Plaintiffs have not identified any particular document or category of documents over which they have a substantial need, let alone provided any specific information regarding why their need for such a document outweighs Defendants’ interest in non-disclosure. Their failure to do so should preclude disclosure of any of Defendants’ deliberative documents.

The availability of other evidence. Aside from failing to demonstrate a particularized need for any document or information, Plaintiffs have available to them ample discovery, including over 30,000 non-privileged documents and responses to Plaintiffs’ discovery requests. Plaintiffs have also had ample opportunity to take depositions, but have only taken five depositions in this case and have chosen thus far not to depose the chair of the Panel of Experts, Mr. Anthony Kurta. *See Carl Zeiss*

establish relevance). Moreover, “[d]rafts, by their very nature, rarely satisfy the test of relevance.” *Winfield v. City of New York*, No. 15-cv-5236, 2018 WL 716013, at *10 (S.D.N.Y. Feb. 1, 2018) (quoting *Grossman v. Schwarz*, 125 F.R.D. 376, 385 (S.D.N.Y. 1989)). As with all of the deliberative documents, Plaintiffs’ failure to mention these specific documents in their motion, much less explain their relevance, should preclude their disclosure.

Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 328 (D.D.C. 1966) (“Necessity for production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored.”).

Most importantly, the reasoning and evidence behind the Department’s new policy is set forth in the Department’s Report and Recommendations, and Defendants have produced an administrative record to Plaintiffs that comprises more than 3,000 pages of supporting documentation for that policy. That administrative record contains the Panel’s meeting minutes as well as the materials considered by the Panel prior to the formulation of its recommendation to the Secretary of Defense. *See Steffan v. Cheney*, 920 F.2d 74, 76 (D.C. Cir. 1990) (per curiam) (finding that judicial review of military policies should be “confined to [t]he grounds . . . upon which the record discloses that [the] action was based” (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)); *see also Hawaii*, 138 S. Ct. at 2420 (upholding presidential proclamation based solely on its text, without regard to previous executive orders or past statements by the President); *Steffan v. Perry*, 41 F.3d 677, 699–700 (D.C. Cir. 1994) (Randolph, J., concurring) (finding that review should be limited to the agency record and that the mental processes of military decision-makers should not be probed); *Pruitt v. Cheney*, 963 F.2d 1160, 1166–67 (9th Cir. 1992) (“Finally, the Army urges that we should defer to the military judgment. We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary. That admonition, however, is best applied in the process of judging whether the reasons put forth on the record for the Army’s discrimination against Pruitt are rationally related to any of the Army’s permissible goals.”) (citing *Rostker*, 453 U.S. at 64–69; *Goldman*, 475 U.S. at 507). 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. *See Hinckley*, 140 F.3d at 286 (declining to find that the deliberative process privilege was overcome upon noting that “the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board’s final decision and explanation for it”); *Utah*

Med. Prods., 2004 WL 988877 at *5 (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).¹⁰

The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. This factor strongly weighs against wholesale waiver of the deliberative process privilege or the disclosure of any information, especially without any effort to compel, or any showing of need for, particular documents. Plaintiffs argue that "to the extent disclosure would cause future governmental actors to think twice before adopting discriminatory policies and then attempting to justify those policies after the fact, that is beneficial, not a reason to shield such discussions from the normal discovery process." Pls.' Mot. 15 (emphasis omitted). But this privilege would be largely vitiated if the mere assertion of unconstitutional action were sufficient to effect its wholesale negation.

Plaintiffs also argue that the specific circumstances of these deliberations are so "extraordinary" and "unlikely to be repeated" that disclosure should not chill future "legitimate" policy discussions. *Id.* Plaintiffs cite no case law for this proposition. *See id.* And disclosure of thousands

¹⁰ The next factors in the balancing test are the role of the Government in the litigation and the seriousness of the litigation. *See Hinckley*, 140 F.3d at 286 (quoting *In re Sealed Case*, 121 F.3d at 737–38). There is no dispute that the Government's policy is at issue or that this case, which involves a military policy that affects national security, is a serious one. But these factors do not outweigh the Government's strong interests in non-disclosure, especially given the availability of other evidence and Plaintiffs' failure to articulate a need for any particular document or category of documents. *See Hinckley*, 140 F.3d at 286 ("[T]he balance weighs strongly against granting . . . access to the [agency's] internal deliberations, notwithstanding the seriousness of the present litigation."); *Agility Pub. Warehousing Co. K.S.C. v. Dep't of Def.*, 110 F. Supp. 3d 215, 222 (D.D.C. 2015) (finding that although the case was serious, "this single factor cannot outweigh the others stacked against it"); *Tumas v. Bd. of Educ. of Lyons Twp. High Sch. Dist.*, No. 06 C 1943, 2007 WL 2228695, at *7 (N.D. Ill. July 31, 2007) (finding that "although Plaintiff's claim involves serious issues, the fact that she alleges discrimination and civil rights violations does not automatically trump the Board's interest in protecting the information").

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. Plaintiffs have requested from DoD and the Services “[a]ny documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the present concerning . . . military service or accessions of transgender people.” Ex. 1 (Pls.’ First Set of Reqs. for Prod. ¶ 4). That request would encompass, for example, any candid advice given to Secretary Mattis by the Deputy Secretary of Defense on the topic of the transgender military service—the kind of sensitive advice that, if disclosed, 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”); *Nat’l Sec. Archive*, 752 F.3d at 464 (stating that “[p]remature release of material protected by the deliberative process privilege would have the effect of chilling current and future agency decisionmaking because agency officials . . . would no longer have the assurance that their communications would remain protected” and thus would “not feel as free to advance the frank and candid ideas and advice that help agencies make good decisions”); *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 decision-making process will be affected, potentially leading to a direct negative impact to national security. *Cf. Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at *5 (E.D.N.C.

Sept. 12, 2014) (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”). Such harm to the core Government responsibility to protect its citizens should carry overwhelming weight.

* * *

In sum, because Plaintiffs have failed to show that any document or category of documents is relevant to their claims, Plaintiffs have ample, non-privileged discovery available to them, and wholesale disclosure of deliberative documents spanning two years and multiple military policies plainly risks chilling future policy discussions within the Department of Defense and the Services, Plaintiffs have failed to meet their burden to overcome the deliberative process privilege over all deliberative information and documents in this case.

D. Defendants Properly Withheld Pre-decisional and Deliberative Materials Subject to the Deliberative Process Privilege.

1. Defendants Did Not Assert the Privilege Too Broadly.

Plaintiffs point to the thousands of documents withheld under the deliberative process privilege and make the generalized argument that “Defendants have invoked the privilege far too broadly.” Pls.’ Mot. 16–20. But the number of documents at issue is the result of the sweeping nature of Plaintiffs’ discovery requests, which sought all deliberative documents and information related to multiple decision-making processes. *See, e.g.*, Ex. 1 (Pls.’ First Set of Reqs. for Prod. ¶ 4) (seeking “[a]ny documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential

Memorandum; or (d) military service or accessions of transgender people”); *id.* ¶ 11 (seeking “[a]ny documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016”); *id.* ¶ 15 (seeking “[a]ny documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents discussing the possible deferment of the date for beginning accessions of transgender applicants into military service”); *id.* ¶ 16 (seeking “[a]ll non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance”); *id.* ¶ 19 (seeking “[a]ll documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance”); *id.* ¶ 20 (seeking “[a]ny documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the “panel of experts” or among the “panel of experts” concerning service, inclusion, or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes”). Precisely because Plaintiffs requested all documents underlying the decision-making processes of multiple military policies, it is not surprising that many responsive documents are pre-decisional and deliberative, and thus protected under the deliberative process privilege. If anything, the sheer volume of documents demanded underscores Plaintiffs’ error in their motion in not targeting specific documents or information that they allegedly need to prove their claims.

Plaintiffs also point to two objections made by counsel for Defendants during the depositions of Colonel Krueger and Ms. Soper in an attempt to argue that Defendants’ privilege assertions are overbroad.¹¹ *See* Pls.’ Mot. 19–20. During Colonel Krueger’s deposition, Plaintiffs’ counsel inquired

¹¹ To the extent that Plaintiffs specifically seek to compel the answers to the two questions directed to Colonel Krueger and Ms. Soper, that request should be denied because Plaintiffs have failed to

as to the courses of action DoD considered during the Panel of Experts process and whether DoD considered keeping the Carter policy in effect. *See* Kreuger Dep. 95:3–9, Dkt. 169-6. Counsel for Defendants objected, *id.* at 95:10–11, and explained that “[t]he different courses of action or policies that they considered are predecisional and deliberative, and therefore, squarely covered by the deliberative process privilege,” *id.* at 95:24–96:2. Indeed, the D.C. Circuit has recognized that one of the purposes of the deliberative process privilege is to “protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.” *Coastal States Gas Corp.*, 617 F.2d at 866. Plaintiffs appear to argue that the objection was improper because “Defendants have affirmatively represented in their briefing that the [P]anel of [E]xperts conducted its analysis without any starting assumptions or any presumptions for or against certain outcomes.” Pls.’ Mot. 20 (citing Defs.’ Mot. 43, Dkt. 115). But the fact that the Panel was directed to conduct its analysis without any assumptions does not mean that Plaintiffs are entitled to discovery into the various courses of action the Panel considered. *See In re Sealed Case*, 121 F.3d at 737 (stating that the “privilege’s ‘ultimate purpose . . . is to prevent injury to the quality of agency decisions’ by allowing government officials freedom to debate alternative approaches in private”) (quoting *Sears*, 421 U.S. at 151). Moreover, that representation is supported by final documents that are not subject to the deliberative process privilege. *See* Terms of Reference 1–2, Dkt. 128-24 (in ordering the creation of the Panel of Experts, Secretary Mattis directed the Panel to engage in “an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members”); DoD Report and Recommendation 4, Dkt. 96-2 (stating that “[t]he Panel made recommendations based on each Panel member’s independent military judgment”); *id.* at 18–19 (After considering “those recommendations

meet their burden of showing that their need for the information overcomes the Government’s interest in non-disclosure. *See In re Sealed Case*, 121 F.3d at 737–38; *Cobell*, 213 F.R.D. at 5.

and the information underlying them, as well as additional information,” DoD conducted an analysis that did not “start with [a] presumption” in favor of an outcome, but “ma[de] no assumptions” at all.).

During Ms. Soper’s deposition, Plaintiffs’ counsel asked whether the Panel of Experts “recommended in favor of accessing only transgender people who will not seek transition to the preferred gender.” Soper Dep. 230:13–15, Dkt. 169-7. Counsel for Defendants objected and explained that the question asked “for the recommendation of a panel for a decision process that’s ongoing. There hasn’t been a final decision. So it’s both predecisional and deliberative.” *Id.* at 230:16–17, 230:21–24. Although Plaintiffs argue that the objection was improper because “the recommendation had already been decided on” and “the policy as framed in the question is exactly what was later announced,” Pls.’ Mot. 20, at the time of the deposition—February 1, 2018—DoD had not yet issued its final policy. Secretary Mattis’s memorandum to the President is dated February 22, 2018, Dkt. 96-1, and the President’s Memorandum revoking the 2017 Memorandum to allow Secretary Mattis to implement the new policy is dated March 23, 2018, Dkt. 96-3. Thus, when counsel for Defendants made the objection, the information was predecisional and deliberative, and thus properly subject to the deliberative process privilege. *See Judicial Watch, Inc.*, 449 F.3d at 151 (finding that material is “predecisional if “it was generated before the adoption of an agency policy”) (quoting *Coastal States Gas Corp.*, 617 F.2d at 862).

Finally, Plaintiffs point to a smattering of entries on Defendants’ privilege logs in an attempt to show that Defendants’ privilege assertions are overbroad. Pls.’ Mot. 17–19. Although Plaintiffs point to the “privilege basis” column in the logs and state that the “generic descriptions are insufficient,” *id.* at 18–19, Plaintiffs apparently ignore the column containing a description of the document itself, which provides additional facts supporting the privilege assertion. For example, document USDOE00073622 contains the privilege bases “[d]eliberations regarding the formulation of the transgender policy” and “[d]eliberations regarding the implementation of the transgender

policy,” but the document description states that it is an “[e]mail discussion between a member of DoD’s Personnel and Readiness and the Director of Military Accessions Policy concerning policies governing transgender individuals’ service in military in view of Presidential announcement.” Dkt. 169-3 at 2. This additional information cannot be considered “generic and non-specific,” as Plaintiffs claim. Pls.’ Mot. 19. In any event, any dispute over the description of particular privileged documents cannot serve to negate the deliberative process privilege as a matter of law in every instance in which it may apply.¹²

2. Information Post-dating the 2017 Twitter Statements Is Subject to the Deliberative Process Privilege.

Plaintiffs next contend that the privilege cannot apply to any materials that were created after the President’s statements on Twitter in July 2017. Pls.’ Mot. 18–19. They assert that such materials relate only to how to implement the 2017 the policy, not whether to do so. *Id.* But Plaintiffs’ attempt to narrow the scope of the deliberative process privilege in this manner is without merit. The withheld materials that were created after the President’s statements on Twitter on July 26, 2017, are predecisional for subsequent decisions and policies. These subsequent decisions and policies include not only the August 2017 Presidential Memorandum and the September 2017 Interim Guidance, but also the recommendations prepared by DoD’s Panel of Experts with respect to the new DoD policy, Secretary Mattis’s memorandum and the accompanying DoD Report on the new policy issued in February 2018, and the March 2018 Presidential Memorandum. Each of these actions was a discrete decision for which deliberative documents and information were generated, and those documents and information thus plainly qualify as “predecisional.” *See Renegotiation Bd.*, 421 U.S. at 184. Because these documents contain “opinions, recommendations, or advice about agency policies,” *FTC v. Warner*

¹² To the extent Plaintiffs argue that the privilege logs contain insufficient information for Plaintiffs to adequately challenge Defendants’ assertions of privilege, Plaintiffs never sought to compel revised logs.

Comm's Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), as well as “reflect[] the give-and-take of the consultative process,” *Pub. Citizen, Inc. v. OMB*, 598 F.3d 865, 874 (D.C. Cir. 2010), they likewise qualify as “deliberative.”

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

CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion to Compel Production of Documents and Information Withheld Under the Deliberative Process Privilege should be denied.

October 30, 2018

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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/s/ Andrew E. Carmichael

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Trial Attorney

United States Department of Justice

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2018, I electronically filed the foregoing Response to Plaintiffs' Motion to Compel Production of Documents and Information 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: October 30, 2018

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
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Civil Division, Federal Programs Branch
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Counsel for Defendants

Exhibit 1

Plaintiffs' First Set of Requests for Production to All Defendants,
dated December 15, 2017

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, JANE DOE 2, JANE DOE 3,
JANE DOE 4, JANE DOE 5, JOHN DOE 1,
REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States; JAMES N.
MATTIS, in his official capacity as Secretary of
Defense; JOSEPH F. DUNFORD, JR., in his
official capacity as Chairman of the Joint Chiefs
of Staff; the UNITED STATES DEPARTMENT
OF THE ARMY; MARK T. ESPER, in his
official capacity as Secretary of the Army; the
UNITED STATES DEPARTMENT OF THE
NAVY; RICHARD V. SPENCER, in his official
capacity as Secretary of the Navy; the UNITED
STATES DEPARTMENT OF THE AIR
FORCE; HEATHER A. WILSON, in her
official capacity as Secretary of the Air Force;
the UNITED STATES COAST GUARD;
KIRSTJEN NIELSEN, in her official capacity as
Secretary of Homeland Security; the DEFENSE
HEALTH AGENCY; RAQUEL C. BONO, in
her official capacity as Director of the Defense
Health Agency; and the UNITED STATES OF
AMERICA,

Defendants.¹

Civil Action No. 17-cv-1597 (CKK)

**PLAINTIFFS' FIRST SET OF REQUESTS
FOR PRODUCTION TO ALL DEFENDANTS**

¹ Mark T. Esper has been substituted as the Secretary of the Army and Kirstjen Nielsen has been substituted as the Secretary of the Department of Homeland Security pursuant to Federal Rule of Civil Procedure 25(d).

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Jane Doe Nos. 1 – 5, John Doe No. 1, Regan V. Kibby and Dylan Kohere hereby request that Defendants produce for inspection and copying the documents and things set forth in the Requests for Production (“Requests”) below at the offices of Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Ave. NW, Washington, DC 20006, within 30 days from the date of service hereof, in accordance with Rule 34, the Local Rules of this Court, the Court’s Scheduling and Procedures Order (ECF No. 71), and the Definitions set forth below.

DEFINITIONS

1. The term “Individual Defendants” shall refer to Defendants Donald J. Trump, James N. Mattis, Joseph F. Dunford, Jr., Mark T. Esper, Richard V. Spencer, Heather A. Wilson, Kirstjen Nielsen, and Raquel C. Bono.
2. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.
3. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated June 30, 2017.
4. The “DoD Initiative” shall refer to the request by the Department of Defense, responded to by John Doe 1, seeking to obtain information relating to transgender servicemembers.
5. The “Twitter Statement” shall refer to the statement issued by President Trump on twitter on July 26, 2017 that: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to

serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]”

6. The “Presidential Memorandum” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

7. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum: Military Service of Transgender Individuals – Interim Guidance,” dated September 14, 2017.

8. “Service Branch” shall refer to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

9. “CCC” shall refer to the Office of the Under Secretary of Defense for Personnel & Readiness Central Coordination Cell or any Central Coordination Cell organized within any Service Branch.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All documents identified in the responses to Plaintiffs’ interrogatories.

REQUEST FOR PRODUCTION NO. 2: All documents on which Defendants intend to rely in support of any motion for summary judgment or intend to introduce as evidence in any trial in this matter.

REQUEST FOR PRODUCTION NO. 3: All documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs’ interrogatories.

REQUEST FOR PRODUCTION NO. 4: Any documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 5: All agendas or minutes for any meetings attended by any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 6: All documents concerning military service by transgender people provided to President Trump before July 26, 2017.

REQUEST FOR PRODUCTION NO. 7: All documents constituting, summarizing, reflecting, or evidencing communications between any member of the United States Congress (or staff member acting on his/her behalf) and President Trump or any individual within the Executive Office of the President concerning military service by transgender people between January 20, 2017 and July 26, 2017.

REQUEST FOR PRODUCTION NO. 8: Any documents generated by the Department of Defense or any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

REQUEST FOR PRODUCTION NO. 9: Any documents generated between June 30, 2016 and July 26, 2017 estimating costs by month or year incurred as a result of military service by transgender persons.

REQUEST FOR PRODUCTION NO. 10: All documents generated by or for any Service Branch(s) constituting or evidencing training sessions or training materials on the provision of health care to transgender servicemembers or servicemembers with gender dysphoria, including but not limited to, any Marine Corps training that occurred in 2016 and any tri-service training in 2016.

REQUEST FOR PRODUCTION NO. 11: Any documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016.

REQUEST FOR PRODUCTION NO. 12: Any documents constituting or evidencing any request for information, assessments, or evaluations of military service of transgender persons or of accessions by transgender persons sent by the Department of Defense between June 30, 2016 and the present to any Service Branch, and any documents constituting or evidencing any response to any such request.

REQUEST FOR PRODUCTION NO. 13: Any documents constituting or evidencing the DoD Initiative, including any requests for information, any reports of information, any summary of reports, and any de-identified reports relating to any service member.

REQUEST FOR PRODUCTION NO. 14: Any documents constituting, evidencing, reflecting, or discussing any request made by the Department of Defense to any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

REQUEST FOR PRODUCTION NO. 15: Any documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents discussing the possible deferment of the date for beginning accessions of transgender applicants into military service.

REQUEST FOR PRODUCTION NO. 16: All non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

REQUEST FOR PRODUCTION NO. 17: All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the “judgment” that “the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.”

REQUEST FOR PRODUCTION NO. 18: Documents sufficient to show the amount of “DoD or DHS resources” used to “fund sex reassignment surgical procedures for military personnel” before August 25, 2017.

REQUEST FOR PRODUCTION NO. 19: All documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

REQUEST FOR PRODUCTION NO. 20: Any documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the “panel of experts” or among the “panel of experts” concerning service, inclusion,

or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes.

REQUEST FOR PRODUCTION NO. 21: Any documents provided to, considered by, or generated by the “panel of experts” referenced in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 22: Any documents constituting, describing, reflecting, or evidencing any “appropriate evidence and information” referred to in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 23: All documents specifically concerning each individual Plaintiff, including: (a) any comprehensive service records; (b) any documents evaluating or discussing the training, readiness, lethality, skills, promotion, or discipline of any Plaintiff; (c) any documents estimating, summarizing, or commenting upon costs spent to train any Plaintiff, including, without limitation, tuition bills from colleges or universities; (d) any documents commenting upon, observing, or assessing any Plaintiff’s integration into their unit; (e) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for gender dysphoria for any Plaintiff; (f) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for any Plaintiff for any condition other than gender dysphoria; and (g) any documents commenting upon, observing, or assessing cohesion of any unit in which any Plaintiff has served since June 30, 2016.

REQUEST FOR PRODUCTION NO. 24: Any documents constituting, reflecting, or evidencing any communications from or to a CCC, including between or among a CCC and any Individual Defendant or Service Branch, concerning the Interim Guidance or military service or accessions of transgender people, including any agenda or minutes of any meetings of or with a

CCC concerning or discussing the Interim Guidance or military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 25: Any documents provided to, considered or generated by the CCC concerning the military service or accession of transgender persons.

December 15, 2017

Claire Laporte (*pro hac vice*)
Matthew E. Miller (*pro hac vice*)
Daniel L. McFadden (*pro hac vice*)
Kathleen M. Brill (*pro hac vice*)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 15, 2017 by e-mail upon the following:

RYAN B. PARKER
United States Department of Justice
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov
Counsel for Defendants

/s/ Daniel L. McFadden
Daniel L. McFadden

Exhibit 2

Excerpt from email chain between Ryan Parker and Daniel McFadden,
dated March 6 and 7, 2018

From: [Parker, Ryan \(CIV\)](#)
To: [McFadden, Daniel L](#)
Cc: [Norway, Robert M. \(CIV\)](#); [Alan Schoenfeld](#); [Laporte, Claire](#); [Enlow, Courtney D. \(CIV\)](#); [Skurnik, Matthew \(CIV\)](#)
Subject: RE: Doe v. Trump
Date: Wednesday, March 07, 2018 5:42:08 PM
Attachments: [DoD Production 5 Privilege Log \(7 Mar 2018\) - Copy.xlsx](#)

Dan,

I have attached the privilege log for Defendants' Fifth Production.

In addition, the Department of Defense has reviewed the documents that you identified as containing information that you believe has been inappropriately withheld under the deliberative process privilege and has made the following determinations:

USDOE00073590 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073591 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073592 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073593 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073594 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073595 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073596 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073597 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073598 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073599 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073600 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073601 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073602 – DoD plans to release information that was withheld from this document;

USDOE00073603 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073604 – DoD plans to release information that was withheld from this document;

USDOE00073605 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073606 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073611 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073614 – DoD plans to provide a more detailed description of the information that has

been withheld from this document;

USDOE00073615 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073617 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073618 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073619 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073620 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073622 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073623 – DoD plans to provide a more detailed description of the information that has been withheld from this document;

USDOE00073624 – DoD plans to provide a more detailed description of the information that has been withheld from this document; and

USDOE00073625 – DoD plans to provide a more detailed description of the information that has been withheld from this document.

We are continuing to work through the list of over 300 documents that you provided with the different agencies and offices that have equities in the documents and anticipate being in a position to provide information about additional documents from your list in the next couple of days. We hope to provide the documents that will include previously withheld information in the next production.

Best,

Ryan B. Parker

Senior Trial Counsel

United States Department of Justice

Civil Division, Federal Programs Branch

Tel: 202-514-4336 | ryan.parker@usdoj.gov

From: Parker, Ryan (CIV)

Sent: Tuesday, March 06, 2018 5:29 PM

To: 'McFadden, Daniel L'

Cc: Norway, Robert M. (CIV) ; Alan Schoenfeld ; Laporte, Claire ; Enlow, Courtney D. (CIV) ; Skurnik, Matthew (CIV)

Subject: RE: Doe v. Trump

Dan,

I received your email below. As I explained to you during our most recent call, we are continuing to work through the list of documents you provided with our clients to determine if there is additional information that can be released.

With regard the Office of the Chairman of the Joint Chiefs of Staff, we have made the following determinations:

- CJCS 00000302-00000352 – we intend to release additional information that was previously withheld under the deliberative process privilege;
- CJCS 00000715 – we intend to release the document without redactions;
-

CJCS 00000716 – we intend to release the document with redactions;

- CJCS 00000756-00000759 – we do not intend to release additional information; and
- CJCS 00001137-00001138 – we plan to withdraw our assertion of the deliberative process privilege but continue to withhold the information at issue under the Attorney Work Product Doctrine; the document is a communication between two attorneys regarding pending litigation.

With regard to the Department of the Navy, the documents that you identified came from different offices and components within the Navy. While some of those offices and components are still reviewing the documents you identified, we have been able to make the following determination:

- Navy 00000479-486 – we intend to release the document without redactions.

We are making a good faith effort to reexamine the documents that you identified in an attempt to narrow the issues in dispute. You provided us with a large list of documents, over 300, many of which implicate the equities of multiple offices or sections, and it has taken longer than we expected to reexamine them and determine whether additional information can be released. In addition, many of the individuals reviewing these documents are also reviewing other documents for release in future productions and creating privilege logs. We intend to continue working to provide you with additional information this week and hope to include documents from which redactions have been withdrawn, with the appropriate bates stamps, in the next production.

Best,

Ryan B. Parker

Senior Trial Counsel

United States Department of Justice

Civil Division, Federal Programs Branch

Tel: 202-514-4336 | ryan.parker@usdoj.gov

Remainder of Email Chain Omitted

Exhibit 3

Excerpts from the deposition of Colonel Mary Krueger,
dated April 17, 2018

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2,)	Civil Action
JANE DOE 3, JANE DOE 4,)	No. 17-cv-1597 (CKK)
JANE DOE 5, JOHN DOE 1,)	
REGAN V. KIBBY, and)	
DYLAN KOHERE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
DONALD J. TRUMP, in his)	
official capacity as)	
President of the)	
United States; et al.,)	
)	
Defendants.)	
-----)	

Complete caption on Page 2.

Tuesday, April 17, 2018

Deposition of COL. MARY KRUEGER, M.D., taken at
the offices of Foley Hoag LLP, 1717 K Street NW,
Washington, D.C., beginning at 9:11 a.m., before
Nancy J. Martin, a Registered Merit Reporter,
Certified Shorthand Reporter.

1 to 3:32 p.m.)

2 MS. LAPORTE: Back on the record.

3 Okay. So we are going to suspend the
4 deposition for today. I'm not concluding it because
5 we are very concerned about the level of document
6 production that we have received so far. You know,
7 the redactions, the withholdings, the nonproduction
8 and all of that. So we're reserving our rights to
9 continue the deposition later. But for today, our
10 questioning is concluded

11 MS. ENLOW: And, of course, we would reserve
12 our rights to not have Colonel Krueger come back for a
13 second day as well. So we'll have to discuss that at
14 a later time.

15 MS. LAPORTE: I understand we're not going to
16 resolve that question now, and it's certainly quite a
17 hypothetical at this point since we don't have more
18 document production. So we'll kick that can down the
19 road.

20 MS. ENLOW: We would like Colonel Krueger to
21 read and sign.

22 MS. LAPORTE: Great. All right.

23 (Witness excused.)

24 (Deposition concluded at 3:32 p.m.)

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Exhibit 4

Excerpts from the deposition of Martha Soper,
dated February 1, 2018

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2,) Civil Action
JANE DOE 3, JANE DOE 4,) No. 17-cv-1597 (CKK)
JANE DOE 5, JOHN DOE 1,)
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DYLAN KOHERE,)

Plaintiffs,)

v.)

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

Defendants.)

-----)

Complete caption on Page 2.

- - -
Thursday, February 1, 2018
- - -

Deposition of MARTIE SOPER, taken at the offices
of Foley Hoag LLP, 1717 K Street NW, Washington, D.C.,
beginning at 9:13 a.m., before Nancy J. Martin, a
Registered Merit Reporter, Certified Shorthand
Reporter.

1 responses from people?

2 A. Yes, ma'am.

3 Q. And did you compile them?

4 A. Yes, ma'am.

5 Q. And send them in?

6 A. Yes, ma'am.

7 Q. Okay. So -- all right. So somewhere there's
8 a document that contains not only these questions but
9 also the answers?

10 A. Correct.

11 Q. And they're answers you helped to compile?

12 A. Correct.

13 MS. LAPORTE: Okay. I think that that's all
14 the questions we have.

15 MR. PARKER: We have nothing on redirect.

16 MS. LAPORTE: Okay.

17 Read and sign.

18 (Witness excused.)

19 (Deposition concluded at 4:57 p.m.)

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