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INTRODUCTION

This Court has held that the process the government used to develop the ban on military service by transgender people is central to this case, bearing on both the level of deference to be applied to the ban and the merits of Plaintiffs' constitutional claims. The government still refuses to accept that holding; it seeks instead to delay any further production of critical documents and information and insists that Plaintiffs and the Court must accept the government's *ipse dixit* about the nature of that process. Moreover, the government has provided only the barest information about the withheld documents, impairing Plaintiffs' ability to challenge overbroad assertions of privilege or explain their need for specific documents.

The government has failed to meet its burden to establish that the deliberative process privilege applies here at all—much less in the staggeringly broad and categorical manner it asserts. Where, as here, the government's decisionmaking and intent in adopting the transgender ban are directly at issue, the deliberative process privilege does not preclude discovery into those very matters—particularly where there is already substantial evidence of discrimination and unconstitutional conduct by government officials. In addition, even if the privilege applied, Plaintiffs have overcome the government's interest in secrecy given the importance of the documents, the lack of alternative evidence, and the seriousness of the case. There is also no basis to further delay discovery during the government's interlocutory appeal of unrelated, non-dispositive issues.

To ensure an efficient resolution of this case and minimize the concerns raised by the government, Plaintiffs are willing to focus their requests on discrete categories of documents that relate to issues this Court has recognized are central to this case—in particular, documents relating to whether the government's process in developing the Mattis Implementation Plan was truly independent from the President's directive to bar transgender persons from military service

(as the government claims), and thus entitled to deference. As to those core categories, there is no substitute for the documents that show whether Defendants' process was truly independent and considered all options. If Defendants wish to claim—as they have done—that their adoption of a facially discriminatory policy under unusual circumstances was truly independent and evenhanded, then they must allow Plaintiffs to test, and this Court to evaluate, whether that claim is true.

ARGUMENT

I. GIVEN THE NATURE OF THE CLAIMS AND DEFENSES IN THIS CASE, THE DELIBERATIVE PROCESS PRIVILEGE DOES NOT BAR DISCOVERY INTO THE DEVELOPMENT OF THE TRANSGENDER BAN

The government contends that neither the nature of the claims at issue nor the defenses it has raised have any implication for the deliberative process privilege in this case. That argument runs counter to both controlling case law and the Court's rulings.

The government first argues that its reliance on deference to the Mattis Implementation Plan does not “waive” the deliberative process privilege because the deference they invoke “requires a subject matter inquiry, not a factual inquiry into the decision-making process.” Dkt. 174 at 14. But the government has not merely invoked military deference as a doctrine; it has also made specific factual assertions in support of its claim that the Mattis Implementation Plan is entitled to deference. For example, the President asserted that he reached his decision to ban transgender people from the military “[a]fter consultation with ... Generals and military experts,” Dkt. 61 at 14 & n.3, and he subsequently ordered the military to submit a plan for implementing that decision, Dkt. 13-2, Ex. A § 3. Yet Defendants have asserted that the Mattis Implementation Plan resulted from the exercise of “independent military judgment,” that the process leading up to the adoption of that Plan did not begin with any assumptions or constraints, and that the process was comprehensive in scope. *See* Dkt. 115 at 4, 43; Appellants' Opening

Br. 44-45, *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir. Sept. 21, 2018).¹ Plaintiffs should be allowed to test those factual assertions.

The government's argument concerning its waiver of the deliberative process privilege largely reflects an attempt to relitigate its broader position that deference applies to any decision by the Executive arising in the military context, regardless of whether the policy discriminates on a suspect or quasi-suspect basis and regardless of how the policy was adopted. *Compare* Dkt. 174 at 12-17 (opposing motion to compel deliberative process privilege) *with* Dkt. 140 at 12-13 (supporting motion to dissolve preliminary injunction). But the Court has already rightly rejected that position and has held that discovery into the nature of the process is necessary. Dkt. 160 at 11-12, 14-15. In any event, the government has gone even further; it has made concrete assertions about the nature of the particular process in this case as a reason why the outcome of that process deserves deference. Given those specific representations, Defendants may not use the deliberative process privilege to prevent Plaintiffs and the Court from evaluating their claims.

Moreover, the deliberative process privilege does not bar discovery into the government's decisionmaking process where the plaintiff raises claims that unconstitutional discrimination infected that process. *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *see also Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995) (“‘[W]here the documents sought may shed light on alleged government malfeasance,’ the privilege is routinely denied.” (citations omitted)).

¹ The government has even asserted that the process supporting the Mattis Implementation Plan started *before* the President's tweets at the behest of Secretary Mattis, when he deferred implementation of the Carter accession standards for six months, rather than at the direction of the President. Dkt. 115 at 43; Appellants' Opening Br. 44-45, *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir. Sept. 21, 2018).

Here—as this Court has recognized—the Mattis Implementation on its face discriminates on the basis of transgender status and is therefore subject to heightened scrutiny. Dkt. 157 at 27-29. Such facial classifications indicate intentional, presumptively unconstitutional discrimination. See *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“[T]he motives underlying the employers’ express exclusion of women did not alter the intentionally discriminatory character of the policy.”); *Lovell v. Chandler*, 303 F.3d 1039, 1057 (9th Cir. 2002) (“[B]y its very terms, facial discrimination is ‘intentional.’”). Defendants have raised a raft of contentions in response—that the Mattis Implementation Plan does not really operate on the basis of transgender status, but rather on gender dysphoria; that the Plan was justified based on military readiness and privacy considerations; and that the government carefully considered a wide range of options. But where, as here, a policy triggers heightened constitutional scrutiny of intentional discrimination, the government’s incantations do not bar judicial examination of their accuracy. Plaintiffs are therefore entitled to discovery to test Defendants’ assertions about the basis for the Mattis Implementation Plan.

The government’s attempts (at 18-20) to distinguish the cases holding the deliberative process privilege inapplicable because they do not involve the military are unpersuasive. Its contention that military deference renders any discovery into the process underlying a decision impermissible has already been rejected by this Court. Moreover, the government fails to identify a material difference between the military and civilian contexts that would lead to a different result here. And courts have expressly rejected application of the deliberative process privilege in similar cases involving the military. See, e.g., *Adair v. Winter*, 451 F. Supp. 2d 202, 209 (D.D.C. 2006), *reconsidered on unrelated statutory grounds sub nom. In re Navy*

Chaplaincy, 512 F. Supp. 2d 58 (D.D.C. 2007); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 258 (D.D.C. 2003), *rev'd in part, vacated in part on unrelated statutory grounds sub nom. In re England*, 375 F.3d 1169 (D.C. Cir. 2004).²

The government overreads the D.C. Circuit's statement that *In re Subpoena*'s "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." 156 F.3d 1279, 1280 (D.C. Cir. 1998). The government also ignores the context of that statement. Following the panel's initial decision there, the government petitioned for rehearing, arguing that if the deliberative process privilege applied only where the government's intent is "collateral," the privilege would not even apply to classic arbitrary-and-capricious challenges under the Administrative Procedure Act because "an illegal motive" would necessarily render the government's action "arbitrary and capricious." *Id.* at 1279. The panel rejected that concern as unfounded because "in the ordinary APA cause of action," review is limited to the administrative record, and "the actual subjective motivation of agency decisionmakers is immaterial as a matter of law." *Id.* at 1280. The D.C. Circuit otherwise reaffirmed its holding that in cases "directed at the government's intent, ... it makes no sense to permit the government to use the privilege as a shield." 145 F.3d at 1424. This Court has already ruled that discovery here is not limited to the administrative record as it would be in an APA case, Dkt. 114 at 1-2, and Plaintiffs have already identified numerous ways in which the government's intent is material.

² Discovery was ultimately foreclosed in those cases because Congress expressly forbade discovery into the promotion and early retirement decisions challenged by plaintiffs there. *In re England*, 375 F.3d at 1181; *accord In re Navy Chaplaincy*, 512 F. Supp. 2d at 61-62. *In re England*, however, did not disturb the district court's holding regarding the inapplicability of the deliberative process privilege, and no statute bars discovery here.

Defendants relatedly suggest that the privilege would be “meaningless” if a challenge focused on the government’s motives were enough to render it inapplicable, but that fear is overblown. Claims of intentional discrimination are subject to Rule 11 and Rule 12(b)(6). Nor is this the kind of fringe case Defendants invoke as throwing open the doors to discovery based on baseless or threadbare allegations: The Court here has already ruled that Plaintiffs are likely to succeed on their equal protection claim, and it subsequently declined to disturb that ruling based on actual evidence from the record. Dkt. 61 at 64-72; Dkt. 157 at 24-34.

Finally, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), does not support the government’s position. *Hawaii* did not nullify decades of case law rejecting the application of the deliberative process privilege in cases concerning unconstitutional discrimination. *Hawaii* involved a facially neutral policy denying entry into the country to certain foreign nationals. *See id.* at 2418 (identifying the policy as “facially neutral toward religion”). The question there was whether the policy violated the Establishment Clause, and because the policy was facially neutral, the Supreme Court upheld it under rational-basis review. *Id.* at 2423. The Mattis Implementation Plan, by contrast, is a facially discriminatory policy that this Court has already held would likely trigger heightened scrutiny. Dkt. 61 at 59-64 (stating that discrimination on the basis of transgender status is subject to at least heightened review); Dkt. 157 at 27-29 (describing how the Mattis Implementation Plan is a facial ban on the basis of transgender status). The government has asserted that the policy nonetheless should be afforded deference as the result of an independent exercise of military judgment. But in cases of facial discrimination implicating heightened scrutiny, Plaintiffs and this Court are not required to accept Defendants’ *ipse dixit*. Here, where the policy is discriminatory on its face, discovery into the government’s decisionmaking process is warranted.

II. PLAINTIFFS' NEED IS SUFFICIENT TO OVERCOME THE DELIBERATIVE PROCESS PRIVILEGE

As a threshold matter, the government faults Plaintiffs for failing to demonstrate the need for discovery on a document-by-document basis. But it is the government's overbroad and insufficiently particularized assertions of privilege that have made such a granular approach unworkable at this stage. Nor is there any doctrinal obstacle preventing Plaintiffs from establishing their substantial need for discovery on a categorical basis—as several courts have recognized. See *Illinois League of Advocates for the Developmentally Disabled v. Quinn*, 2013 WL 4734007, at *5-6 (N.D. Ill. Sept. 3, 2013); *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at *12 (N.D. Cal. Oct. 5, 2011); *Gen. Elec. Co. v. Johnson*, 2007 WL 433095, at *8 (D.D.C. Feb. 5, 2007).

The case that the government cites as requiring a document-by-document inquiry—*In re United States*, 678 F. App'x 981, 986 (Fed. Cir. 2017)—involved an assertion of deliberative process privilege as to only 52 out of 48,000 documents produced. Here, by contrast, the government has asserted the deliberative process privilege as to *40,000 documents*, a volume that far exceeds the number of non-privileged documents thus far produced. Given the minimal information that Defendants have provided about the withheld documents (and about information not produced in response to Plaintiffs' interrogatories), it is completely impracticable for Plaintiffs to test Defendants' privilege assertions document by document. The largely generic assertions on the government's privilege logs—vague claims such as “[d]eliberations regarding the formulation of the transgender policy”—do not identify any specific decision to which the material is related or provide any basis to assess, in a particularized way, the probative value of the information relative to any chill that would result from compelling its disclosure.

The government's call for a document-by-document approach is further undermined by its conduct during the meet-and-confer process earlier this year: Plaintiffs have already voluntarily engaged with the government in an effort to resolve overbroad assertions of privilege with respect to 300 illustrative documents. The government's response was belated, incomplete, and inadequate. To this day, the government has provided revised privilege log entries for only 34 of the illustrative documents. And those revised privilege log entries still fail to provide the particularized information necessary to show that the privilege is being properly asserted or to enable Plaintiffs to engage in document-by-document motions practice. *See* Pls.' Mem. in Supp. of Mot. to Compel 17-18 ("Pls.' Mem.") (Dkt. 169). It is the government, not Plaintiffs, that bears the burden in the first instance to provide "sufficient factual context" to show that the document is both "predecisional" and "deliberative." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 161 (D.D.C. 2012). The government has failed to meet that burden with respect to the 34 illustrative documents, much less the full 40,000.³

Plaintiffs nevertheless remain willing to proceed more incrementally and to narrow their current production requests to specific subcategories of the existing requests. These subcategories reflect the issues that are most critical to resolving this case on the merits in light of this Court's rulings:

1. All documents constituting or evidencing consultation by the President with "Generals and military experts" or others regarding transgender service policy on or before July 26, 2017.

³ The government claims (at 22 n.8) that Plaintiffs' "failure to follow the procedure for challenging the Government's clawback should preclude disclosure of those documents." But if Plaintiffs prevail on this motion, there would be no reason to separately brief the issue of the two clawed back documents, which raise the same issues as the other withheld documents. In any event, as Plaintiffs explained in their email to the Court on April 20, 2018, should the Court find it necessary, Plaintiffs are "prepared to submit the documents at issue under seal for the Court's inspection and to brief the matter under seal on a schedule convenient to the Court." Dkt. 118-1.

2. All documents constituting or evidencing the process by which Defendants initiated a review of policy on transgender military service, including in connection with the Accessions Readiness Memorandum and the Accessions Deferral Memorandum.
3. All documents constituting or evidencing the process by which Defendants developed and adopted the Mattis Implementation Plan submitted to the President.
4. All documents constituting or evidencing the options considered by Defendants in adopting the Mattis Implementation Plan.
5. All documents constituting or evidencing the facts or evidence considered by Defendants in adopting the Mattis Implementation Plan.

Plaintiffs have met any burden to overcome the deliberative process privilege with respect to those subcategories:

Relevance. The Court has already found that these issues are highly relevant to Plaintiffs' claims and Defendants' assertions regarding deference. Although the government contends that deference is due simply by virtue of the fact that this case involves the military, the Court has rejected that claim, and the government has made specific factual assertions about the process to support its claim to deference that Plaintiffs must be able to test. *Supra* pp. 2-3.

The government also argues that, because *some* of the documents captured by Plaintiffs' broader requests may have little relevance to the remaining issues in the case, Plaintiffs have not met their burden with respect to *any* documents.⁴ But if, as the government contends (at 24), the withheld documents "are not susceptible to a one-size-fits-all analysis," then the government cannot provide a one-size-fits-all privilege log with no detail about the withheld documents that

⁴ The government cites as an example of an irrelevant decision (at 23-24 n.9 in its brief—not in any privilege log) Secretary Mattis's decision to defer accessions under the Carter Policy. But the government has made that decision an issue in the case, arguing that the military process should receive deference because "DoD's review of the issue of transgender service began at the initiative of Secretary Mattis nearly a month before the President made his statement on Twitter." Dkt. 115 at 43. The government cannot make a factual assertion about when its process began without being subject to discovery on that point.

are central to the case. In its brief (at 23), the government refers to “different decisions,” including “decisions not even challenged by Plaintiffs,” but its privilege log provides no information about what those decisions might be. And, as explained above, for the purposes of any balancing test, Plaintiffs are willing to limit their requests to the above subcategories, thereby minimizing disclosure of deliberative materials that are not central to this case.

Availability of Other Evidence. The government’s assertions of privilege have clouded in secrecy the process that led to the Mattis Implementation Plan, thereby necessitating Plaintiffs’ resort to this Court to obtain even the most rudimentary details about the process. The government contends that this case must be decided on the administrative record, but this is not an APA case, and Plaintiffs are not limited to that record to support their constitutional claims. *See Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990), *aff’d*, 937 F.2d 623 (Fed. Cir. 1991). Moreover, the government produced many of the documents that purportedly make up the administrative record in highly redacted form, including the minutes for the panel of expert meetings, shielding information in those documents that might have shed light on the nature and scope of the government’s process.⁵

The government also argues that the Mattis Report itself provides evidence of the process that was followed, merely rehashing the government’s rejected argument that military decisions are entitled to absolute deference, whether or not there are legitimate questions about the independence of the process. *Supra* p. 3. On the government’s view, it is entitled to release a

⁵ Similarly, during depositions of government officials, the government has made broad assertions of the deliberative process privilege that have stymied any inquiry into the government’s intent or the independence of the process. *See* Pls.’ Mem. 19-20. The government suggests that alternative evidence might be available from Anthony Kurta, chair of the Panel of Experts, but if the government takes the same overbroad approach to the deliberative process privilege as before, Plaintiffs will continue to be deprived of important evidence they need regarding the nature of the process.

post hoc description of a process, claim that the process was deliberative, independent, and comprehensive, and then deny all discovery into the process by claiming that the only evidence Plaintiffs need is the government’s say-so. But in a case like this, implicating heightened constitutional scrutiny, the Court is not required to accept the government’s *ipse dixit* about the nature of the process, and Plaintiffs are entitled to test the government’s assertions through discovery.

Other Factors. The government concedes (at 26 n.10) that its role in the litigation and the seriousness of the litigation both weigh in Plaintiffs’ favor, but it argues that these factors do not outweigh the government’s strong interest in non-disclosure. That is doubly wrong.

First, the government does not have a strong interest in non-disclosure of discriminatory intent. *See Newport Pac., Inc. v. City of San Diego*, 200 F.R.D. 628, 639-640 (S.D. Cal. 2001); *cf. United States v. Nixon*, 418 U.S. 683, 712 (1974) (“[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”). And Defendants’ decision about whether to allow an entire class of persons to serve in the military does not implicate the sensitivities around national security or individual military personnel decisions that would warrant nondisclosure.⁶ Moreover, there is little reason to expect a chilling effect on government decisionmaking, given that similar decisions in the past—including with respect to the draft for women and military service by gays and lesbians—involved public and highly publicized deliberative processes. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57, 72 (1981) (“The question of registering women for the draft not only received

⁶ The government is not invoking “state secrets” here, and to the extent “military and state secrets” were at all involved in this case, a separate privilege already protects such information. *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

considerable national attention and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee.”); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911 (C.D. Cal. 2010) (discussing legislative history of Don’t Ask Don’t Tell Act), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

Second, any government interest in nondisclosure is outweighed by the interests here in reliable factfinding to secure the Constitution’s guarantees of due process and equal protection. That is why courts routinely reject application of the deliberative process privilege to cases involving unconstitutional discrimination. *Breiterman v. United States Capitol Police*, 323 F.R.D. 36, 48 (D.D.C. 2017) (“[T]he Court concludes that Ms. Breiterman’s need for information supporting her discrimination claims outweighs OIG’s interest in withholding deliberative materials.”); *Smentek v. Sheriff of Cook Cty.*, 2013 WL 2588709, at *4 (N.D. Ill. June 11, 2013) (“[T]he plaintiffs’ theory is that the County allegedly approved the dental services budget despite knowing that it might create unconstitutional conditions at the Jail. Accordingly, plaintiffs’ particularized need for the pre-budget documents that discuss dental services outweighs the County’s need for secrecy.”); *Torres v. City Univ. of New York*, 1992 WL 380561, at *8 (S.D.N.Y. Dec. 3, 1992) (“When the decision making process is itself at issue, particularly in a civil rights action, the deliberative process privilege and other privileges designed to shield that process from public scrutiny may not be raised as a bar against disclosure of relevant information; it must yield to the overriding public interest in challenging discrimination.”); *see also* Pls.’ Mem. 14 (citing cases). The government’s position is effectively that—even where there is facial discrimination and “unusual” circumstances that raise constitutional concerns—the Court must defer to military policy, and Plaintiffs cannot obtain evidence to support their claims of discrimination or to challenge the factual premises for the

government's claims of deference. If accepted, that position would essentially mean that the government's decision to discriminate on a basis that implicates heightened constitutional scrutiny could never be questioned, and that the courts could never entertain a claim challenging the purposeful exclusion of an entire class of citizens from participation in a core institution of civic life for reasons unrelated to their aptitudes or qualifications. No decision supports such a startling claim.⁷

Finally, even if the Court were to determine that Plaintiffs have not yet satisfied a burden to justify disclosure of documents and information falling within the narrower subcategories articulated above, the government should be ordered, at a minimum, (a) to finish its review of the 300 documents for which Plaintiffs have already requested revised logs and to provide Plaintiffs additional information about those documents, and (b) to provide particularized information about the withheld documents and information falling within the subcategories above so that Plaintiffs can meaningfully target specific documents. In the ordinary course, Defendants would be required to respond to a motion to compel by formally invoking the privilege through an affidavit by a high-level official to whom authority has been delegated and who explains, based

⁷ The government cites (at 26 n.10) cases for the proposition that the seriousness of the litigation does not outweigh the government's interests in nondisclosure. But none of those cases involved a challenge to a discriminatory government policy, much less a challenge in which the nature of the process itself is a central issue. *Tumas v. Board of Education of Lyons Township High School District*, 2007 WL 2228695, at *7 (N.D. Ill. July 31, 2007), involved an individual plaintiff's attempt to prove a retaliation claim by obtaining discovery into a school board's discussion of litigation strategy with respect to her case. *Agility Public Warehousing Co. K.S.C. v. Department of Defense*, 110 F. Supp. 3d 215, 222 (D.D.C. 2015), involved an effort to enforce a third-party subpoena against the government in connection with a private dispute between contractors in state court; the court found that any relevance of agency deliberations was "slim." And *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998), involved would-be presidential assassin John Hinckley's attempt to challenge his hospital's denial of his conditional release, without any evidence of misconduct and despite the district court's *de novo* review of the decision (in stark contrast to the absolute deference the government claims here).

on personal review, why each document is privileged and the effects, if any, of disclosure.

Landry v. FDIC, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)); *Martinez v. District of Columbia*, 241 F.R.D. 1, 4-5 (D.D.C. 2006) (Kollar-Kotelly, J.). Defendants should now be required to do so with respect to documents within the critical subcategories above.

III. THE COURT SHOULD NOT WAIT TO RESOLVE THIS DISPUTE

Throughout this litigation, the government has asked the Court to put this case on hold. The Court should decline to do so—just as it has denied each such previous request. As this Court has observed, the government has “strenuously resisted engaging in discovery” and has repeatedly attempted to halt, limit, or delay discovery throughout the course of this litigation. Dkt. 160 at 4-5. The government again seeks to delay discovery here, asking this Court (at 10) to defer deciding this motion until “final resolution” of Defendants’ interlocutory appeal regarding the preliminary injunction, and then to engage in yet another round of briefing about the government’s patently overbroad assertions of privilege. There is neither a need nor a basis for such delay.

Defendants’ speculation (at 8) that their interlocutory appeal from this Court’s denial of their motion to dissolve the preliminary injunction might eliminate or narrow Plaintiffs’ need for discovery is baseless. That appeal focuses on the propriety of keeping the preliminary injunction in place while the case proceeds on the merits. No matter what the court of appeals holds regarding the preliminary injunction, this case will continue forward through the normal course of civil litigation—including discovery. Nor is there any risk that the appeal will definitively resolve whether the development of the Mattis Implementation Plan was constrained by the President’s directive to reinstate a ban. In the course of denying the government’s motion to dissolve the preliminary injunction, this Court concluded only that, *based on the record before it*,

the Mattis Implementation Plan was not truly independent of President's directives. Even were the court of appeals to disagree with that conclusion based on the existing record, that would not implicate the distinct conclusions this Court reached in denying the parties' cross-motions for summary judgment: that there remain genuine disputes of material fact "related to the process used by Defendants to prepare the current proposed policy on transgender military service," and that Plaintiffs are entitled to discovery regarding that process. Dkt. 160 at 9.

The government will suffer no prejudice from resolving this dispute now. The government may have to produce documents and information that it has improperly withheld under its claim of privilege, but that is not a reason to further delay this case; it is just the normal operation of discovery in civil litigation. Even in cases implicating the attorney-client privilege, "clients and counsel must account for the possibility that they will later be required by law to disclose their communications for a variety of reasons—for example, because they misjudged the scope of the privilege, because they waived the privilege, or because their communications fell within the privilege's crime-fraud exception." *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 110 (2009).

Plaintiffs, on the other hand, would suffer substantial prejudice from further delaying discovery in this case. As this Court has already concluded, "Plaintiffs are entitled to complete discovery" about the process that lead to the Mattis Plan, Dkt. 160 at 14-15, and to move this case towards an expeditious resolution on the merits. Delaying resolution of this dispute will only further draw out this litigation and needlessly waste the time and resources of the parties and this Court.

CONCLUSION

Plaintiffs' motion to compel should be granted.

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