

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-GLR

Hon. A. David Copperthite

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO SET A DATE CERTAIN
FOR COMPLIANCE WITH DISCOVERY ORDER**

INTRODUCTION

Plaintiffs' Motion to Set a Date Certain for Compliance with Discovery Order, Dkt. 222, seeks to circumvent proceedings pending before the District Court concerning the Magistrate Judge's Memorandum Opinion and Order (the "Order"), which directed the disclosure of thousands of deliberative documents from the Department of Defense ("DoD") and the Armed Services ("Services") concerning multiple military policies. Plaintiffs acknowledge that Defendants filed both a Motion to Stay Compliance with the Order and Objections to that Order, both of which are fully briefed and pending before the District Court. Even though the District Court's ruling on the Motion to Stay or the Objections may obviate the need for Defendants to produce thousands of deliberative documents, Plaintiffs insist that this Court set a date certain for Defendants to produce the documents subject to Defendants' Motion to Stay and Objections. The Court should decline to do so.

BACKGROUND

In June 2018, Plaintiffs filed a motion to compel three broad categories of documents withheld under the deliberative process privilege. Dkt. 177. On August 14, 2018, this Court granted Plaintiffs' motion and directed Defendants to disclose the following three categories of deliberative documents:

(1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the DoD's so-called panel of experts and its working groups (the 'Panel') tasked with developing a plan to study and implement the President's decision; and (3) Deliberative materials regarding the DoD's implementation Plan and the President's acceptance of the Plan in his March 23 Memorandum, including any participation or interference in that process by anti-transgender activities [*sic*] and lobbyists.

Mem. Op. 3, Dkt. 204. The Order did not set a deadline for compliance.

Three days later, Defendants filed a Motion to Stay Compliance with the Order with the District Court, arguing that DoD and the Services should not have to produce thousands of deliberative documents until the District Court resolved Defendants' then-forthcoming Objections to that Order because Defendants satisfied the factors necessary for a stay. Defs.' Mot. 4, 8–16, Dkt. 208. Specifically, Defendants argued that the balance of harms weighs overwhelmingly in Defendants' favor because DoD and the Services would suffer immediate, irreparable harm absent a stay, as a result of the disclosure's chilling effect on discussions regarding sensitive personnel and security matters. *Id.* at 8–10; *see also* Defs.' Reply 2–6, Dkt. 215. On the other side of the balance, there is plainly no meaningful harm to Plaintiffs simply by staying compliance pending review of the Order because Plaintiffs have a preliminary injunction in place, the discovery deadlines have been suspended, there is no trial date set, and Plaintiffs have moved for summary judgment arguing that there is no genuine dispute as to any material fact. Defs.' Mot. 9–10, Dkt. 208; *see also* Defs.' Reply 2–6, Dkt. 215; Order, Dkt. 213. Defendants also argued that Defendants are likely to succeed on the merits of their then-forthcoming Objections to the Order because, among other things, (1) it was improper to enter the discovery order while threshold jurisdictional matters were pending before the District Court, (2) the Order overlooked the binding Supreme Court precedent in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and (3) the Order did not apply the Fourth Circuit's balancing test before ordering the disclosure of all of Defendants' deliberative documents. Defs.' Mot. 10–16, Dkt. 208; Defs.' Reply 6–19, Dkt. 215. Defendants further argued that a stay is in the public interest because the chilling effect from disclosure

on individuals within DoD and the military could affect their willingness to provide candid views on future policy matters to the Secretary of Defense and military leaders, which could lead to a negative impact on national security. Defs.’ Mot. 16, Dkt. 208; Defs.’ Reply 19, Dkt. 215. The Motion to Stay was fully briefed on September 14, 2018, and remains pending before the District Court. *See* Defs.’ Reply, Dkt. 215.

In addition to demonstrating that the four factors weigh in favor of a stay, Defendants argued that a stay of the Order would be consistent with, and avoid the protracted discovery litigation ongoing in, the related case *Karnoski v. Trump*. Defs.’ Mot. 16–17, Dkt. 208. As Defendants explained,

In *Karnoski*, . . . the plaintiffs filed a similar motion to compel documents withheld under the deliberative process privilege. The *Karnoski* Court . . . granted Plaintiffs’ motion to compel, and ordered the President and the Department of Defense to, among other things, disclose “documents that have been withheld solely under the deliberative process privilege.” Order at 11, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299. Defendants filed a petition for a writ of mandamus in the Ninth Circuit and moved to stay compliance with the *Karnoski* Court’s Order pending appellate review. *See* Defs.’ Mot., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 31, 2018), Dkt. 300.

Defs.’ Mot. 16–17, Dkt. 208. The Court of Appeals for the Ninth Circuit granted an emergency motion to stay the production of the same kind of discovery at issue here pending its consideration of Defendants’ petition for a writ of mandamus. Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36.¹ The stay precludes the disclosure of documents protected by the deliberative process privilege in that case. *See id.* The Ninth Circuit then heard oral argument on the Defendants’ petition for writ of mandamus on October 10, 2018.

While the emergency motion concerning the *Karnoski* Order was pending in the Ninth Circuit, Defendants in this case timely filed Objections to the Court’s Order pursuant to Rule 72(a) of the

¹ Shortly before the Ninth Circuit ruled on the stay motion, the Government filed an application for a stay with the Supreme Court, Application for a Stay, *Trump v. U.S. Dist. Ct. for the W. Dist. of Wash.*, No. 18A276 (Sept. 14, 2018), which the Government withdrew when the Ninth Circuit granted the stay motion, Letter, *Trump v. U.S. Dist. Ct. for the W. Dist. of Wash.*, No. 18A276 (Sept. 17, 2018).

Federal Rules of Civil Procedure. *See* Defs.’ Objs., Dkt. 209. In those Objections, Defendants reiterated and expanded upon their merits arguments first raised in their Motion to Stay. *See id.* at 8–28. In addition, Defendants filed a notice of the Ninth Circuit’s stay in *Karnoskei*, arguing that because the Order directs “Defendants to disclose many of those same deliberative documents, a stay of the Magistrate Judge’s Memorandum Opinion and Order pending further review would be consistent with the current posture of proceedings in the Ninth Circuit.” Defs.’s Notice, Dkt. 217; *see also* Defs.’ Reply, Dkt. 220. The Objections were fully briefed on September 28, 2018, and remain pending before the District Court. *See* Defs.’ Reply, Dkt. 221.

After Defendants filed the Motion to Stay and Objections to the Order, the parties filed a Joint Motion to Suspend Certain Deadlines, requesting that the District Court suspend the discovery deadline “in the interest of judicial economy” because the parties’ cross-motions for summary judgment, Defendants’ Motion to Stay Compliance with the Order, and Defendants’ Objections to the Order are all pending before the District Court. Jt. Mot. 1–2, Dkt. 210. The Court granted the parties’ motion, and the discovery deadline is suspended. Order, Dkt. 213.

On September 21, 2018—just one week after briefing on Defendants’ Motion to Stay concluded and during the pendency of briefing on Defendants’ Objections—Plaintiffs demanded the production of Defendants’ deliberative documents and further requested that Defendants inform Plaintiffs as to the steps Defendants have taken to comply with the Order. *See* Pls.’ Letter, Dkt. 222-3. On October 1, 2018, Defendants reminded Plaintiffs that Defendants’ Motion to Stay (and, by that point, Defendants’ Objections), had been fully briefed and were pending before the District Court. *See* Defs.’ Letter, Dkt. 222-4. Defendants also informed Plaintiffs that “the Department of Defense (“DoD”) and the Services have already devoted significant time and resources toward producing the documents that are subject to the Memorandum Opinion and Order if the motion to stay is denied, subject to the Government considering appellate options” and that additional time and resources

would be required to comply with the Order. *Id.*

Among other things, before any privileged documents can be produced, a careful document-by-document re-review is required to redact other deliberative and pre-decisional information that is not relevant to this case. *See id.*; *see also* Declaration of Robert Easton (“Easton Decl.”) ¶ 12 (Nov. 5, 2018). Many deliberative and pre-decisional documents that contain responsive information also contain information that is not material to this case, but until these documents are re-reviewed, DoD cannot know exactly how many such documents there are. Defs.’ Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 12. For example, the information collected in this and the related cases dates back nearly three years and therefore includes deliberative information not relevant to this litigation that is closely comingled with relevant and responsive, privileged information. Defs.’ Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 12. In addition, some of the non-responsive information contained in responsive documents is considered Controlled Unclassified Information (“CUI”), which would also have to be redacted before production. Defs.’ Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 13. Finally, some deliberative documents contain non-responsive classified national security information, and review, segregation, and redaction of that non-responsive, classified material would need to be performed according to the proper procedures before production. Defs.’ Letter, Dkt. 222-4; *see also* Easton Decl. ¶ 14.

After receipt of Defendants’ letter, Plaintiffs’ counsel stated that they had additional questions, so counsel for the parties spoke on the phone on October 12, 2018. During that call, Plaintiffs’ counsel asked numerous questions concerning the steps Defendants were taking to prepare to comply with the Court’s Order, and Plaintiffs’ counsel stated that she would send the questions in an email. On October 16, 2018, when the undersigned counsel for Defendants was out of the office, Plaintiffs’ counsel emailed the list of questions to Defense counsel. *See* Email, Dkt. 222-5. Before Defense counsel was able to respond to the email, Plaintiffs, without providing any notice to Defendants, filed

the instant motion, in which they request that the Court order Defendants to “begin[] productions of the compelled documents and information within seven calendar days.”² Pls.’ Mot. 4, Dkt. 222.

Had Plaintiffs’ counsel permitted Defendants an opportunity to respond to their questions before filing their motion, Defense counsel would have informed Plaintiffs’ counsel that after the *Karnoski* district court issued its discovery order in July 2018, DoD counsel began undertaking a re-review of the thousands of documents at issue in that case. *See* Easton Decl. ¶ 16. The Order in this case directs disclosure of a large subset of the documents at issue in the *Karnoski* Order. *See id.* Therefore, when the Court issued the Order in August, DoD continued the re-review it was already doing to prepare for compliance with the *Karnoski* Order, which, at that point, had not yet been stayed by the Ninth Circuit. *See id.* DoD counsel have re-reviewed thousands of deliberative documents, which encompasses more than half of DoD’s documents that require re-review to comply with the Order. *See id.* But, owing to the number of deliberative documents at issue and other work that needs to be done in this and other cases, counsel for DoD and the Services still have thousands of deliberative documents to re-review. *See id.* As noted, documents containing comingled, non-responsive information, such as CUI, would need to be redacted prior to production. *Id.* Finally, the re-review and redaction of non-responsive information from documents marked “classified” will take additional time because DoD must follow certain internal procedures. *See id.* In short, the Department of Defense and the Services will continue to work diligently to ensure that production, if ultimately

² Plaintiffs also requested that the Court set “an expedited briefing schedule for [their] motion” and that the Court “direct Defendants to respond to [their] motion within seven calendar days.” Pls.’ Mot. 2, Dkt. 222. Defendants objected to this request because “Plaintiffs failed to comply with Local Rule 104.7 by not meeting and conferring with Defendants before filing their motion,” “Plaintiffs plainly suffer no harm by briefing this matter on the schedule set forth in the Local Rules,” and “counsel for Defendants require more than seven days to adequately respond to Plaintiffs’ unannounced and unexpected motion.” Defs.’ Resp. 1–3, Dkt. 223. Because the Court did not rule on Plaintiffs’ request for expedited briefing, Defendants file their response within the time period set forth in the Local Rules.

required, can occur in a timely manner following final resolution of Defendants' Motion to Stay and Objections. *See id.*

ARGUMENT

As a preliminary matter, Plaintiffs' motion should be denied because they failed to comply with Local Rule 104.7 by not meeting and conferring with Defendants before filing their motion. Although the parties had been discussing issues with the production of documents via correspondence and telephone, *see, e.g.*, Dkt. 222-3–222-5, Plaintiffs' counsel did not inform Defendants' counsel of the instant motion or seek to obtain Defendants' position on such a motion, nor did Plaintiffs discuss moving for expedited briefing on the motion. For that reason alone, their motion should be denied.

Even if the Court overlooks this procedural violation, the Court should nevertheless deny Plaintiffs' motion. Setting a date certain for production of deliberative documents, as Plaintiffs demand, would undermine the District Court's review of Defendants' pending Motion to Stay and Objections. Under Rule 72(a) of the Federal Rules of Civil Procedure, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Thus, "[b]y its explicit language, the Rule allows a party 14 days to file objections to a Magistrate's order, and if it does so, the district court *must* consider the objections." *S.E.C. v. McNaul*, 277 F.R.D. 439, 442 (D. Kan. 2011); *see also In re Brown*, 409 F. App'x 591, 593 (3d Cir. 2011) (noting that because the objections were pending before the district court, "the District Court is obligated to rule" on them). There is no dispute that Defendants filed timely Objections to the Order and that they are pending before the District Court. *See* Defs.' Objs., Dkt. 209. Therefore, the District Court must consider those Objections, Fed. R. Civ. P. 72(a), and this Court should permit the District Court the opportunity to do so. *Cf. L.C. 1 v. Delaware*, No. 07-675-GMS-LPS, 2009 WL 3806335, at *1 (D. Del. Nov. 13, 2009) (refusing to allow plaintiffs to file an "amended complaint to circumvent the court's review of the plaintiffs' objections to the [Magistrate

Judge's Report and Recommendation]”).

Recognizing that under Local Rule 301(5)(a), the effect of a magistrate judge's order is not automatically stayed upon the filing of Objections by one of the parties, within three days of the Court's Order, Defendants filed a Motion to Stay Compliance with the Order. *See* Defs.' Mot., Dkt. 208. At the time Plaintiffs filed their motion, Defendants' Motion to Stay had been fully briefed and pending before the District Court for a little over one month. In recognition of the time it will take to ultimately resolve Defendants' pending Motion to Stay and Objections, the District Court granted the parties' joint motion to suspend discovery deadlines until ultimate resolution—including resolution of any appeal—of those pending matters. Order, Dkt. 213; *see also* Jt. Mot., Dkt. 210. But rather than allow the District Court to consider the merits of Defendants' Motion to Stay, which, if resolved in Defendants' favor, could obviate the need for the production of thousands of deliberative documents, Plaintiffs now request that the Court intervene in those proceedings and direct Defendants to begin production of the deliberative documents within seven days. Pls.' Mot. 4, Dkt. 222. This Court should decline to do so.

Here, the interest of judicial economy is best served by denying Plaintiffs' motion, letting the proceedings proceed before the District Court, and avoiding the potential for litigation before the Fourth Circuit. As noted, when the district court in the related *Karnoski* litigation entered a similar order directing disclosure of thousands of deliberative documents within ten days, Order at 11, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299, Defendants filed a motion to stay with the district court, Defs.' Mot., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 31, 2018), Dkt. 300. Because the district court did not rule and a specific compliance date was approaching, Defendants filed an emergency motion to stay compliance with the district court's order in the Ninth Circuit pending the resolution of their petition for a writ of mandamus related to that Order. Pet. for Writ of Mandamus and Emerg. Mot., *In re Donald J. Trump*, No. 18-72159 (9th Cir.

Aug. 1, 2018), Dkt. 1. The Ninth Circuit granted “a temporary stay of the district court’s July 27, 2018 discovery order pending the district court’s decision on petitioners’ July 31, 2018 motion to stay the July 27, 2018 order.” Order at 2, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 2, 2018), Dkt. 4. After the district court denied Defendants’ motion to stay, Order, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Aug. 20, 2018), Dkt. 311, Defendants filed another emergency motion to stay in the Ninth Circuit, Emerg. Mot. 6, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 23, 2018), Dkt. 20. Again, as noted, the Ninth Circuit granted Defendants’ emergency “motion for a stay pending consideration of the petition for a writ of mandamus,” which precludes the disclosure of documents protected by the deliberative process privilege, remains in effect. Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36.

Plaintiffs cite *Maness v. Meyers*, 419 U.S. 449, 458 (1975), for the proposition that orders “must be complied with promptly.” Pls.’ Mot. 5, Dkt. 222. Since the issuance of the Order in August, Defendants have been taking steps to comply. Although Defendants respectfully request that the Court not set a deadline for disclosure of documents before the District Court has the opportunity to rule on Defendants’ pending Motion to Stay and Objections, Defendants have been preparing to produce the documents. As set forth more fully in the attached declaration from Robert Easton, the Director of DoD’s Office of Litigation Counsel, counsel for DoD have devoted significant time and resources to re-reviewing the thousands of deliberative documents to ensure non-responsive, sensitive information is redacted prior to production. *See* Easton Decl. ¶¶ 12–16. As Mr. Easton states, in the past several months, “DoD counsel have re-reviewed thousands of deliberative documents, which, to the best of [his] knowledge, encompasses more than half of DoD’s documents that require re-review to comply with the Order.” *Id.* ¶ 16. Because thousands of documents are at issue in this case, DoD’s re-review will take several more months to complete. *See id.* DoD counsel will continue to work diligently to ensure that production, if ultimately required, can occur in a timely manner. *See id.* But,

in the meantime, this Court should not set a specific date for production, not only because substantial work remains to be done if compliance is ultimately ordered, but because such a deadline would require the production of privileged material that Defendants continue to reserve the right to protect by law. *See, e.g.,* Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36 (granting a stay to preclude disclosure of deliberative documents pending consideration of the petition for writ of mandamus); *In re United States*, 678 F. App'x 981, 988–91 (Fed. Cir. 2017) (granting in part the Government's petition for writ of mandamus to preclude the disclosure of certain deliberative documents); *In re United States*, 321 F. App'x 953, 958–61 (Fed. Cir. 2009) (same); *In re Perez*, 749 F.3d 849, 854 (9th Cir. 2014) (granting the Government's petition for a writ of mandamus to preclude the disclosure of information protected by the informant privilege).

Plaintiffs rely on cases that are factually distinguishable. None of the cases on which Plaintiffs rely present a situation where, as here, a magistrate judge has issued an order that does not set a deadline for compliance, and a party files both a motion to stay and objections with the district court. In *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985), the party did not even file a motion to stay, and in *United States Home Corporation v. Settlers Crossing, LLC*, 2012 WL 3536691, at *14 (D. Md. Aug. 14, 2012), the party filed a motion for reconsideration rather than a motion to stay. Other cases on which Plaintiffs rely involve appeals of magistrate judge's orders where a party failed to take any steps to comply by a date certain set in the order. *See Alston v. Becton, Dickinson & Co.*, No. 1:12CV452, 2014 WL 338804, at *2 (M.D.N.C. Jan. 30, 2014); *Holly v. UPS Supply Chain Sols., Inc.*, No. 3:13-CV-980-DJH-CHL, 2015 WL 2446110, at *3 (W.D. Ky. May 20, 2015); *Jeld-Wen, Inc. v. Nebula Glass Int'l, Inc.*, No. 05-60860CIV-TORRES, 2007 WL 1625721, at *1 (S.D. Fla. May 26, 2007); *Am. Rock Salt Co., LLC v. Norfolk S. Corp.*, 371 F. Supp. 2d 358, 360 (W.D.N.Y. 2005). None of this authority addresses the circumstances presented here, where there is no deadline for compliance, Defendants are taking steps to ensure timely compliance if ultimately

necessary, and multiple matters are currently pending before the District Court awaiting resolution.

In addition, Plaintiffs' request that the Court order production to begin within seven days is unreasonable. *See* Pls.' Mot. 4, Dkt. 222. That deadline would shorten by half the time Defendants would have under Rule 72(a) to file Objections to any such order, *see* Fed. R. Civ. P. 72(a), and it would not give the District Court sufficient time to consider Objections to such an order or a motion to stay compliance with that order. Nor is there any litigation justification for Defendants to commence production within a week. For one thing, the District Court has suspended discovery deadlines in this case, Order, Dkt. 213, and no trial date has been set. Moreover, Plaintiffs have moved for summary judgment arguing that there is no dispute as to any material fact. *See* Dkt. 163. And there is no risk of prejudice to Plaintiffs given that the preliminary injunction in place since November 2017, Prelim. Inj., Dkt. 84, protects their interests during the pendency of the litigation. *See* Order, *Doe v. Trump*, No. 17-cv- 1597 (D.D.C. June 19, 2018), Dkt. 145 (stating that holding a discovery dispute in abeyance would "not prejudice Plaintiffs, because the Court's preliminary injunction remains in place"). Lastly, because many of the same deliberative documents are at issue in *Karnoski*, disclosure of the deliberative documents could render the majority of the Government's petition for a writ of mandamus in the Ninth Circuit effectively moot. *See* Defs.' Mot. 16–17, Dkt. 208 (arguing that a stay would be consistent with, and would avoid the discovery litigation ongoing in *Karnoski*).

Finally, Plaintiffs argue that production of the documents would not moot Defendants' Motion to Stay because if Defendants ultimately prevail, Defendants could claw back the documents and the Court could exclude them from being used as evidence. Pls.' Mot. 6 n.2, Dkt. 222. Because Plaintiffs raise this argument in a footnote, the Court should decline to consider it. *See Sanders v. Callender*, No. CV DKC 17-1721, 2018 WL 337756, at *7 n.5 (D. Md. Jan. 9, 2018) (noting that because "ruling on an issue minimally addressed is unfair to [opposing party] and would risk an improvident or ill-advised opinion on the legal issues raised," "district courts [have] declined to consider arguments

only raised in a footnote” (citations omitted)). In any event, Plaintiffs’ argument is plainly meritless. As should be obvious, once Defendants produce the deliberative documents, the harm to the deliberative process that Defendants seek to protect will have occurred, *see* Easton Decl. ¶¶ 17–21, and, moreover, Defendants’ Motion to Stay will be rendered moot, *see Am. Rock Salt Co., LLC*, 371 F. Supp. 2d at 361 (denying as moot a motion to stay compliance with the magistrate judge’s order because the deadline for compliance as set forth in that order had passed).

Thus, regardless of Defendants’ ability to claw back the documents and preclude their use in dispositive briefing or at trial, production of the documents would negate the very interests that Defendants have sought to protect by properly raising objections with the District Court and seeking a stay of the Court’s order. Indeed, Plaintiffs’ suggestion illustrates their fundamental misunderstanding of the importance of the deliberative process privilege to Government deliberations. The ability to claw back documents neither eliminates the chilling effect created by disclosure of deliberative materials, nor justifies disregarding the Government’s interest in maintaining the documents’ confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–64 (9th Cir. 2009) (granting defendants’ mandamus petition and overruling a district court’s order compelling the defendants to produce documents whose disclosure threatened to “inhibit[] internal campaign communications that are essential to effective association and expression,” while emphasizing that “[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms”). “The compelled disclosure of deliberative documents and communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to DoD transgender policy and other non-transgender policies, could be open to scrutiny, regardless of any judicial protective order or order permitting Defendants to claw back the deliberative documents.” Easton Decl. ¶ 17. Owing to these unique concerns underpinning

the deliberative process privilege, Plaintiffs' reliance on *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 n.2 (2011), which concerns the attorney-client privilege, is misplaced. *See* Defs.' Reply 5, Dkt. 215 (explaining why Plaintiffs' reliance on cases concerning the attorney-client privilege, and specifically, *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), which the *Jicarilla Apache Nation* Court cites, 564 U.S. at 169 n.2, is misplaced where the deliberative process privilege is at issue).

Indeed, Plaintiffs concede that the concerns raised by Defendants as to production "are the precise purpose of a stay motion." Pls.' Mot. 6 n.2, Dkt. 222. Defendants agree, and have raised these very concerns in their pending Motion to Stay. This Court should wait for the District Court to consider these concerns, as well as Defendants' Objections to the Court's discovery Order, before setting a date certain for Defendants to produce the deliberative documents subject to the Order.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion to set a date certain for compliance with its Order pending a decision by the District Court on Defendants' Motion to Stay and Objections.

Date: November 5, 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
Deputy Director

/s/ Courtney D. Enlow
COURTNEY D. ENLOW
ANDREW E. CARMICHAEL

Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 616-8467
Email: courtney.d.enlow@usdoj.gov

Counsel for Defendants

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DONALD J. TRUMP, in his official capacity as
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Defendants.

Case 1:17-cv-02459-GLR

Hon. A. David Copperthite

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as the Director, Office of Litigation Counsel, within the Department of Defense (“DoD”) Office of General Counsel. I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior Department of Defense (DoD) leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the DoD policy on service by transgender individuals.

3. I submit this declaration in support of Defendants’ Response to Plaintiffs’ Motion to Set a Date Certain for Compliance with Discovery Order. I base this declaration on my personal knowledge and on information made available to me in the performance of my official duties.

Background

4. On January 3, 2018, Plaintiffs served their first set of requests for production on DoD. Plaintiffs sought 21 separate categories of documents. Many of these requests specifically targeted information subject to the deliberative process privilege. For example, Request 16 sought

“[a]ll Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.” Request 8 sought “[a]ll Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.”¹

5. On May 21, 2018, Plaintiffs served a second set of requests for production. This set sought an additional seven categories of documents from DoD. Like the first set, many of these requests specifically targeted information subject to the deliberative process privilege. For example, Request 22 sought “[a]ll Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed concerning the Implementation Plan including any drafts of the Implementation Plan.”² Request 23 sought “[a]ll Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Implementation Plan.” Request 24 sought “[a]ll Documents and Communications that President

¹ Plaintiffs defined “Transgender Service Member Ban” as the “memorandum issued by President Trump on August 25, 2017 titled ‘Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.’ (ECF No. 40-21).”

² Plaintiffs defined “Implementation Plan” as the “Mattis Memorandum, the Report, and the 2018 Trump Memorandum titled ‘Memorandum for the Secretary of Defense, Secretary of Homeland Security,’ with the subject ‘Military Service by Transgender Individuals,’ dated March 23, 2018 and available at ECF No. 120-3. The definition of ‘Implementation Plan’ is inclusive of references to the ‘implementation plan due on February 21, 2018’ in Plaintiffs’ First Set of Interrogatories and Production of Documents to Defendants, served on January 3, 2018.” Plaintiffs further defined the “Mattis Memorandum” as the “Memorandum sent by Secretary Mattis to President Trump titled ‘Memorandum for the President’ with the subject ‘Military Service by Transgender Individuals,’ dated February 22, 2018. (ECF No. 120-1),” and Plaintiffs defined the “Report” as the “‘Department of Defense Report and Recommendations on Military Service by Transgender Persons,’ dated ‘February 2018.’ (ECF No. 120-2).”

Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Implementation Plan, including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.”

6. I am aware that Plaintiffs filed a motion to compel three broad categories of deliberative documents in June 2018, and that on August 14, 2018, the Magistrate Judge issued a Memorandum Opinion and Order (the “Order”) stating that Plaintiffs’ “Motion to Compel disclosure of the three categories of documents described by Plaintiffs is GRANTED.” Mem. Op. 7, Dkt. 204. The Order directs Defendants to disclose the following three categories of documents that were withheld under the deliberative process privilege: “(1) Deliberative materials regarding the President’s July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the DoD’s so-called panel of experts and its working groups (the ‘Panel’) tasked with developing a plan to study and implement the President’s decision; and (3) Deliberative materials regarding the DoD’s Implementation Plan and the President’s acceptance of the Plan in his March 23 Memorandum, including any participation or interference in that process by anti-transgender activities [*sic*] and lobbyists.” Mem. Op. 3, Dkt. 204. I am aware that three days after the Order was issued, Defendants filed a Motion to Stay Compliance with the Order, Dkt. 208, which is fully briefed and pending before the District Court. I am also aware that Defendants timely filed Objections to the Order, Dkt. 209, which is also fully briefed and pending before the District Court.

7. I am aware that on July 27, 2018, in the related case, *Karnoski v. Trump*, the District Court entered an Order (the “*Karnoski* Order”) directing the disclosure of all documents withheld under the deliberative process privilege. Order Granting Motion to Compel, Denying Motion for Protective Order, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299. I am aware that the District Court’s Order is stayed pending resolution of Defendants’ petition for a writ

of mandamus in the Court of Appeals for the Ninth Circuit. Order, *In re Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36.

Information Subject to the Deliberative Process Privilege

8. The current DoD policy on military service by transgender individuals has been under development since the Obama administration, and internal deliberative discussions regarding the policy began in earnest as far back as 2015. Several of Plaintiffs' Requests for Production span nearly three years of policy development and reach multiple components of DoD, including each of the Military Services, the Office of the Secretary of Defense (OSD), and the Defense Health Agency (DHA). For example, in Request 1, Plaintiffs sought "[a]ll Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals" for the "period July 13, 2015 through the present."

9. In response to these and Plaintiffs' other broad Requests for Production, OSD alone has identified tens of thousands of responsive documents. In addition, the uniformed Services performed their own searches for responsive materials. They identified and collected hundreds of thousands of responsive documents in this case.

10. Of the tens of thousands of responsive documents maintained by OSD alone, thousands of documents have been identified as protected by the deliberative process privilege. A subset of these documents are attorney work product or are also protected by other privileges including the attorney-client privilege. That leaves thousands of responsive documents that are protected only by the deliberative process privilege and thus must be produced under the Magistrate Judge's Order.

11. The Order requires disclosure of highly deliberative material reflecting the pre-decisional thought processes of very senior DoD officials. For example, one document consists of a

draft letter to the President, reflecting the Secretary of Defense's thoughts and handwritten notes on the developing transgender policy (DOD00084379). Another example is a memorandum that the Secretary received prior to his briefing from the Under Secretary of Defense for Personnel and Readiness and the Deputy Secretary of Defense on the recommendations from the Panel of Experts (DoD00088408). These examples reflect deliberations at the most senior levels of the Department concerning the history and future of the Department's approach to service by transgender individuals.

12. Before any privileged documents can be produced, a careful document-by-document review is required not only to assess the effect of disclosure on senior leaders' decision-making process, but also to redact other deliberative and pre-decisional information that is not relevant to this case. Many deliberative and pre-decisional documents that contain responsive information also contain information that is not material to this case. Until these documents are reviewed, it is not known exactly how many such documents contain comingled material. The information collected in this case dates back nearly three years and includes deliberative information not relevant to this litigation that is closely comingled with relevant and responsive, privileged information. Documents withheld pursuant to the deliberative process privilege may contain, among other things, information that relates to disciplinary activities, other activities by DoD offices, and other unrelated legal materials. For example, a document listed on DoD privilege log 14 includes information on a DoD policy for recruiting and retention of individuals with critical skills who are non-U.S. citizens (DoD00037586). As another example, a document on DoD privilege log 5 includes information concerning, among other things, DoD's budget and sexual assault (DoD00004577). Each of these examples reflects types of non-responsive information that is prevalent and comingled with responsive transgender material.

13. In addition, some non-responsive information contained in responsive documents is considered Controlled Unclassified Information (“CUI”).³ CUI may include draft briefings to senior DoD leaders on various initiatives, draft policy, pre-decisional commentary on various DoD policies, or commentary on foreign government activities. CUI can be comingled with other information responsive to Plaintiffs’ Requests for Production. Both the CUI and the information regarding the DoD transgender policy can be deliberative and pre-decisional. For example, a document listed on privilege log 14 is considered CUI because it concerns high-level deliberations and the DoD’s strategic response to protests in Iran (DoD00082773). Another document on privilege log 14 is considered CUI because it contains information regarding deliberation on activities in Afghanistan and deliberations regarding North Korea (DoD00083928). For these reasons, documents containing CUI that have been withheld pursuant to the deliberative process privilege must be reviewed again and redacted before they can be produced under the Order.

14. In addition to concerns about CUI, some responsive documents identified as deliberative and pre-decisional contain classified national security information. These documents are currently and properly classified SECRET or SECRET//NOFORN.⁴ The presence of this information was disclosed to Plaintiffs in a privilege log served on June 22, 2018. These documents contain classified information that is closely comingled with transgender policy material. Declassification of these records, review and segregation of non-responsive material, and production to Plaintiffs takes time.

15. The Magistrate Judge’s Order also presents practical obstacles. The Office of Litigation Counsel (OLC), which handles discovery-related matters for OSD, has only six attorneys

³ See generally *DoD Information Security Program: Controlled Unclassified Information (CUI)*, DoDM 5200.01, Volume 4, February 24, 2012.

⁴ See generally *Exec. Order No. 12,356* (Apr. 2, 1982).

and two paralegals. In addition to the transgender litigation, these attorneys and paralegals are responsible for many other ongoing cases of importance to DoD. OLC can obtain the assistance of up to four additional attorneys and staff in the Office of General Counsel who work on litigation involving the Freedom of Information Act (FOIA), but to do so would impair DoD's ability to timely satisfy its obligations in ongoing FOIA litigation. Typically, OLC obtains litigation support when needed from the Military Services, but in this case, the Military Services require all of their assigned personnel to comply with the Service's own obligations in litigation related to the military's transgender policy.

16. Despite these obstacles, DoD counsel have already devoted significant time and resources toward producing the documents that are subject to the Order if Defendants' Motion to Stay is denied, subject to the Government considering appellate options. After the issuance of the *Karnoski* Order in July 2018, DoD counsel began undertaking a re-review of thousands of documents at issue in that case. When the Magistrate Judge issued the Order in August 2018, which directs disclosure of a subset of the documents at issue in the *Karnoski* Order, DoD continued the re-review it was doing at that time to comply with the *Karnoski* Order. DoD counsel have re-reviewed thousands of deliberative documents, which, to the best of my knowledge, encompasses more than half of DoD's documents that require re-review to comply with the Order. DoD counsel have been segregating the documents that have been marked as solely containing deliberative material relevant to this case from documents that contain both deliberative material relevant to this case and material that is not relevant to this case (e.g., CUI). As explained above, the comingled material would need to be redacted prior to release. Owing to the number of deliberative documents at issue in the Order and other work that needs to be done in this and other cases, DoD counsel still have thousands of deliberative documents to re-review. Because DoD counsel took three months to re-review half of the thousands of deliberative documents, I estimate that DoD

counsel would need at least three more months to complete its re-review. Finally, any classification review would likely take additional time. The Department of Defense will continue to work diligently to ensure that production, if ultimately required, can occur in a timely manner.

17. In addition to the above logistical, production, and personnel concerns, and perhaps most importantly, release of DoD information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD. Decision-making within the Department of Defense relies on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military services on various courses of action for any decision. Due to the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted, deliberative and pre-decisional conversations frequently occur over email. The compelled disclosure of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to DoD transgender policy and other non-transgender policies, could be open to scrutiny, regardless of any judicial protective order or order permitting Defendants to claw back the deliberative documents.

18. Indicative of the DoD decision-making process, to address issues surrounding military service by transgender individuals, the Secretary established a Panel of Experts comprised of the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services Vice Chiefs (including the Vice Commandant of the U.S. Coast Guard), and the Armed Services Senior Enlisted Advisors and chaired by the Under Secretary of Defense for Personnel and Readiness (or an official performing those duties). The Panel received input from transgender service members, commanders of transgender service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender

dysphoria. Participants in this panel were encouraged to speak candidly and openly about their experiences and opinions. This input was understood to be confidential. The input from service members included perspectives from enlisted personnel and junior officers and from across the uniformed services.

19. The Panel also received input from various working groups to more fully inform its opinions. The Transgender Service Policy Working Group, which was comprised of medical and personnel experts from across DoD, developed policy recommendations and various implementation plans for the Panel's consideration. The Medical and Personnel Executive Steering Committee, a standing group of the Surgeons General and Service Personnel Chiefs, provided the Panel with an analysis of accession standards, a multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition-related medical care. The groups reported regularly to the Panel and responded to numerous queries for information and analysis to support the Panel's review and deliberations. In so doing, these groups were asked to provide candid and honest analysis.

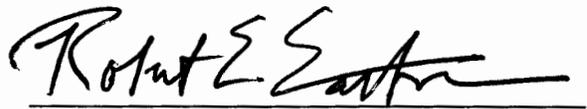
20. The disclosure of deliberative, pre-decisional input, analysis, and opinions from these individuals would breach DoD's commitment to maintain the confidentiality of their honest deliberations regarding the sensitive topic of transgender service and would irreparably harm DoD's ability to obtain candid and honest input on any subject in the future, not just the subject of transgender service.

21. Without assurance that their opinions on aspects of transgender policy would be protected from disclosure, individuals will be much more likely to withhold their participation and candid views in the future. This is especially true given the high-profile and controversial nature of this issue, as well as the allegations of discriminatory treatment made by Plaintiffs against DoD. Subject matter experts, including those with battlefield experience, will decline to lend their unique

expertise for fear that they would be subject to unfair accusations and opprobrium. As a result, DoD's decision-making process would suffer because it would not benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 5th day of November 2018, Arlington, VA.

A handwritten signature in black ink, appearing to read "Robert E. Easton", written over a horizontal line.

ROBERT E. EASTON
Director, Office of Litigation Counsel