

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

NICK HARRISON and	.	Civil Action No. 1:18cv641
OUTSERVE-SLDN, INC.,	.	
	.	
Plaintiffs,	.	
	.	
vs.	.	Alexandria, Virginia
	.	February 22, 2019
	.	11:30 a.m.
PATRICK M. SHANAHAN, in his	.	
official capacity as acting	.	
Secretary of Defense; MARK	.	
ESPER, in his official	.	
capacity as the Secretary of	.	
the Army; and the UNITED	.	
STATES DEPARTMENT OF DEFENSE,	.	
	.	
Defendants.	.	
	.	
. . . . .	.	

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE IVAN D. DAVIS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	JOHN W.H. HARDING, ESQ. ANDREW R. SOMMER, ESQ. Winston & Strawn LLP 1700 K Street, N.W. Washington, D.C. 20006
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FOR THE DEFENDANTS:	DENNIS C. BARGHAAN, JR., AUSA U.S. Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314 and ROBERT M. NORWAY, ESQ. U.S. Department of Justice Civil Division Federal Programs Branch 20 Massachusetts Avenue, N.W. Washington, D.C. 20001
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(Pages 1 - 68)  
(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

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THE TRANSCRIBER:

ANNELIESE J. THOMSON, RDR, CRR  
U.S. District Court, Third Floor  
401 Courthouse Square  
Alexandria, VA 22314  
(703)299-8595

1 P R O C E E D I N G S

2 THE CLERK: Civil Action No. 18cv641, Nick Harrison,  
3 et al. v. James Mattis, et al. Counsel, please come to the  
4 podium and state your name for the record.

5 MR. BARGHAAN: Good morning, Your Honor. Assistant  
6 U.S. Attorney Dennis Barghaan on behalf of the defendants.  
7 With me today is Robert Norway, from the Department's Civil  
8 Division, who I believe is familiar to you. He will be arguing  
9 the cause on behalf of the government today.

10 THE COURT: Good morning.

11 MR. HARDING: Good morning, Your Honor. John Harding  
12 from Winston & Strawn on behalf of plaintiffs. With me today  
13 is Andrew Sommer.

14 THE COURT: Good morning.

15 This matter is before the Court on a plaintiffs'  
16 motion to compel documents and information that was withheld by  
17 the defendants on the basis of the deliberative process  
18 privilege. The Court had had an opportunity to review the  
19 motion and memorandum in support, the opposition, the reply to  
20 that opposition. The Court then held a hearing on the motion.

21 Based on the oral argument in that hearing, the Court  
22 believed that it was necessary for the parties to conduct some  
23 additional review of the disputed material to narrow the issues  
24 that the Court believed were relevant in regards to dividing  
25 that motion to compel. It appears that the parties disagreed

1 in regards to what falls under the definition of "deliberative  
2 process privilege" and/or whether or not the privilege is  
3 waived under certain circumstances.

4 The Court required the parties to file a joint status  
5 report concerning the resolution of any disputed issues and  
6 the remaining issues that were outstanding to be decided by  
7 this Court pursuant to the motion. The parties did so on  
8 February 5. The Court at that time had basically said that it  
9 probably wasn't necessary to hold another oral argument.

10 However, after receiving the materials that the  
11 parties believe should be reviewed by the Court in camera, the  
12 Court believed that further discussion before the Court was  
13 necessary because it was somewhat unclear over why some of this  
14 information was, either fell under the definition of  
15 "deliberative process privilege" or whether or not a waiver  
16 would apply, so the Court needed additional clarification.  
17 That's why we're here today.

18 Before I give a couple of examples of the material,  
19 is there anything the parties would like -- either party would  
20 like to add, in particular the plaintiff since it was your  
21 motion to begin with?

22 MR. HARDING: Thank you, Your Honor. Just, just  
23 briefly, yesterday's e-mail from Mr. McCotter to Ms. Patel  
24 caused plaintiffs some concern. In that e-mail, he described  
25 the audio recording that was provided to the Court, and he

1 noted that this audio recording was subject to other court  
2 decisions that had occurred.

3 We believe that that -- those court decisions are the  
4 *Karnoski* and *Stone* decision. The *Stone* decision is the  
5 District of Maryland decision that we rely on in this case.

6 THE COURT: Well, you say this was pursuant to a  
7 conversation between counsel?

8 MR. HARDING: Ms. Patel, your clerk, Your Honor.  
9 It's an e-mail between Mr. McCotter and Ms. Patel, where he, he  
10 stated that this audio recording was, I guess, subject to, to  
11 those other court orders, and we would just note that those --  
12 in both those district courts, the, the defendants were ordered  
13 to produce the audio recording. It was found not to be  
14 deliberative privilege process -- deliberative process  
15 privilege.

16 THE COURT: You mean in the underlying discovery  
17 process or provided for purpose of the party disputing whether  
18 or not the information contained on the CD fell under the  
19 deliberative process privilege?

20 MR. HARDING: It was decided in the district court  
21 that the parties there had to move to compel, just as we have  
22 done here. The district courts there found that it did not  
23 fall into the category of deliberative process privilege.

24 THE COURT: Well, that was part of the reason the  
25 Court thought this hearing was necessary again. The Court was

1 informed that that CD that was attached in the file was six  
2 hours long. The Court wasn't going to listen to six hours of  
3 audio to determine what, if any, was deliberative process. The  
4 Court wanted to narrow that issue here in court today. That  
5 was part of the reason we're here.

6 MR. HARDING: Thank you, Your Honor. And, and  
7 Mr. Norway is going to be able to, to help you with that. I  
8 just wanted to, to raise that concern that we had, that this  
9 recording, it seems, has been ordered to be produced in  
10 multiple district courts, and that issue --

11 THE COURT: And where are these district courts?

12 MR. HARDING: My understanding is the District of  
13 Maryland and then *Karnoski* is in Washington, I believe.

14 THE COURT: Is this pursuant to other cases?

15 MR. HARDING: Correct, Your Honor.

16 THE COURT: I mean, that deal with the same issue or  
17 what's going on?

18 MR. HARDING: A, a similar issue. This deals --  
19 Mr. Norway can probably --

20 MR. NORWAY: I was going to say I can clarify for you  
21 but --

22 THE COURT: Well, please do so.

23 MR. NORWAY: So, Your Honor, the materials that are  
24 being sought by the plaintiffs in this case -- and this relates  
25 to the breadth of their discovery requests. The materials that

1 are responsive to the discovery requests touch on many  
2 different personnel issues. One of those issues was the, the  
3 policy for the military regarding the service of transgender  
4 servicemembers. Those policies have been, been challenged in  
5 four other district courts, and those materials are intermixed  
6 with materials that the Court has today.

7 So the deliberative materials that are being  
8 challenged and protected in those other cases are -- there is  
9 some mixed in, and that is all -- it all goes down --

10 THE COURT: I don't know what that means. Let's make  
11 it simple. Was the CD that you provided to this Court provided  
12 to the other courts that you're talking about the exact same  
13 CD, and was that exact same CD that was or was not provided to  
14 those other courts ordered to be produced pursuant to a motion  
15 to compel in those courts?

16 MR. NORWAY: So the, the issues are, are different.  
17 It's different under IM issues, Your Honor. I can't stand --

18 THE COURT: And what's the difference of the issues?

19 MR. NORWAY: They're -- in those other cases, they're  
20 challenging the transgender -- military transgender policy,  
21 and, and I can't stand here today and tell you it's the same  
22 exact one.

23 THE COURT: But you, you -- I'm assuming, which I  
24 hate to do so that's why I ask, you opposed those motions to  
25 compel based on the same basis you're opposing this one,

1 correct: deliberative process --

2 MR. NORWAY: So in the *Stone* court --

3 THE COURT: No, yes or no. Did you oppose the  
4 motions to compel in those other districts based on the  
5 information was privileged based on the deliberative process?

6 MR. NORWAY: Yes, Your Honor. In all of those --

7 THE COURT: So what difference does it make which  
8 policy do you believe the deliberative process applied to in  
9 regards to whether a motion to compel should be granted or not?  
10 The deliberative process based on your representations to this  
11 Court on more than one occasion concerning this motion is the  
12 deliberative process is the deliberative process.

13 Are you representing now to the Court that  
14 deliberative process applies only when we're talking about  
15 certain policies and not others?

16 MR. NORWAY: No, Your Honor. The deliberative --

17 THE COURT: So what's the distinction?

18 MR. NORWAY: It's the, the balance of the need, Your  
19 Honor. It's the balance. We've --

20 THE COURT: So the trans- -- the basis underlying a  
21 transgender policy is different than the basis underlying the  
22 HIV policy at least from a deliberative process standpoint is  
23 what you're saying?

24 MR. NORWAY: No. I'm saying, Your Honor, that the,  
25 the needs of the plaintiffs in those cases are balanced

1 differently based on the government interest in those policies.  
2 I think it's --

3 THE COURT: Does the government represent the same  
4 underlying interest, that they had a legitimate, important, or  
5 compelling government interest to enact the policies that were  
6 in dispute in those other cases? Because that's the -- that's  
7 the defense here.

8 Is the same defense being proffered in those other  
9 cases, that we have an important -- or a legitimate, important,  
10 or compelling government interest to allegedly violate these  
11 individuals' rights? Because even First Amendment has its  
12 restrictions.

13 MR. NORWAY: The, the government asserted  
14 deliberative process in all of those cases, Your Honor, for the  
15 same reason that it is here, and that is, is that the interests  
16 of the government are to protect that information, to allow the  
17 free flow of information --

18 THE COURT: We've made it clear, or at least I  
19 thought I made it clear at previous hearings that that interest  
20 can be overridden.

21 MR. NORWAY: Correct.

22 THE COURT: So the fact that you have that, have that  
23 right doesn't mean it's all-consuming. That means under  
24 certain circumstances, generally speaking, at which the  
25 plaintiffs have argued when the government has placed in issue

1 the intent behind enacting policies or the instructions at  
2 issue, then the deliberative processes-based privilege is  
3 generally speaking overridden, because the only way the Court  
4 can determine intent is to, to provide the other side the basis  
5 for why the government considers its interest important --  
6 legitimate, important, or compelling.

7 MR. NORWAY: And, and, and that's different, Your  
8 Honor, in those cases because the, the intent that is being  
9 talked about in those cases are -- is the intent behind that  
10 military policy of the transgender service policy.

11 THE COURT: But the policy still -- in order to  
12 believe -- to be legitimate, the government has the obligation  
13 to prove that those policies either were legitimate, important,  
14 or compelling, correct?

15 MR. NORWAY: Your --

16 THE COURT: Which is the same issue in this case.

17 MR. NORWAY: So you've, you've moved to the intent  
18 Honor -- you were talking about the intent, and the intent on  
19 the --

20 THE COURT: The intent is, is inextricably entwined  
21 with whether the government's professed bases or purpose for  
22 enacting the contested instruction or policy was legitimate,  
23 important, or compelling.

24 MR. NORWAY: And the bases for these -- the HIV  
25 policy is different because it's a different policy than the

1 transgender policies.

2 THE COURT: But did the -- what you have to prove is  
3 the same. So the deliberative process privilege would apply no  
4 matter that, because deliberative process applies based upon  
5 what you have to prove. What you have to prove in this case,  
6 what you have to prove in that case, or what the other side has  
7 to disprove is that the professed reason behind the policy or  
8 the instruction or the regulation is pretext because it serves  
9 no legitimate, important, or compelling government interest.

10 MR. NORWAY: But the government's intent related to  
11 the transgender policy is not at issue here, Your Honor.

12 THE COURT: That's not -- obviously, it's not on all  
13 fours. We're not here to argue that. The whole purpose of  
14 this case is to determine whether or not the government had a  
15 legitimate, important, or compelling government interest to  
16 enact a policy that treats certain individuals differently than  
17 others.

18 The intent behind the policy is both relevant whether  
19 the individuals who were being treated differently allegedly  
20 were individuals who suffered from HIV or who were transgender.  
21 The underlying bases for the policy are still at issue. The  
22 people who are being treated -- allegedly being treated  
23 differently is irrelevant.

24 MR. NORWAY: Those policies are different, though,  
25 Your Honor. They're different --

1 THE COURT: But the reason behind the policy is what  
2 is at issue in both cases --

3 MR. NORWAY: But --

4 THE COURT: -- which is the government's intent,  
5 whether or not those policies serve a legitimate, important, or  
6 compelling government interest to treat those individuals,  
7 whether they're HIV-positive or whether they're transgender,  
8 differently than people who are not. That's the issue in both  
9 cases.

10 The fact -- it's the same way, we can say, whether or  
11 not the government at the time it was enacted had a pretextual  
12 reason for treating women differently, important, legitimate,  
13 or compelling government interest not to give women the right  
14 to vote until a certain point in time.

15 MR. NORWAY: So, Your Honor --

16 THE COURT: The same way does the government have a  
17 right to restrict the First Amendment right of freedom of  
18 speech, does it have an important, legitimate, or compelling  
19 government interest to not authorize people to scream, "Fire,"  
20 in a crowded theater.

21 All of those factual scenarios are different, but the  
22 policies that the government is required to prove are the same,  
23 whether or not the government has an important, a legitimate,  
24 or a compelling government interest for treating different  
25 people or what would assume to be like people differently based

1 upon one difference.

2 MR. NORWAY: So, Your Honor --

3 THE COURT: That is, whether they're HIV-positive or  
4 transgender.

5 Let's give a -- let's just move on and give an  
6 example. Deliberative privilege. Exhibit 1, which is a  
7 counseling statement: "I, blank, acknowledge that I have been  
8 counseled by blank and understand the following:

9 "1. That I have the antibodies to human  
10 immunodeficiency virus (HIV)" --

11 MR. NORWAY: Your Honor --

12 THE COURT: That's the result of the deliberative  
13 process privilege. That is a document that would be provided  
14 to individuals that the Army, the Navy, the Air Force, or  
15 someone believe or has informed that they are HIV-positive, so  
16 they are informing them of rights that they do or do not have.

17 That document does not fall under the deliberative  
18 process privilege because it's the result of deliberative  
19 process privilege. It's a fact. It does not -- it would in no  
20 shape or form -- if this document were made public, in no way,  
21 shape, or form would chill the individuals that took part in  
22 the discussion that resulted in this document being produced.

23 MR. NORWAY: Your Honor, this is a draft document  
24 that was, that was --

25 THE COURT: Draft or not is irrelevant. It's a

1 factual document. It does not discuss anybody's opinion about  
2 why this document should be provided to servicemembers or not.  
3 That's deliberative process privilege. It's about people's  
4 opinions in things concerning why or why we shouldn't do this.

5           When you start getting into people's why and why they  
6 shouldn't do it, people may not want the public to know their  
7 opinion in that regard because they may be treated differently  
8 because of their opinion. That would serve a chilling effect  
9 on the process, openly and honestly discussing your opinion.

10           Those are the things, the open and honest discussion,  
11 which falls under deliberative process. The results of the  
12 open, honest discussion are facts. They do not fall under the  
13 deliberative process.

14           MR. HARDING: I'm sorry, Your Honor, can you provide  
15 a Bates number? We don't have the copy of the binders. I just  
16 want to make a note of --

17           MR. NORWAY: It is --

18           THE COURT: They have two numbers, InCamera and US.

19           MR. NORWAY: It is US-13171.

20           MR. HARDING: Thank you very much.

21           MR. NORWAY: And, Your Honor, I'd just like to state  
22 that these documents are, are under seal. They haven't been  
23 disclosed to the plaintiffs at all. If the Court would like to  
24 make detailed discussions about the contents of the, of the  
25 particular documents, the government would request to seal --

1 THE COURT: Well, that's the only way we're going to  
2 resolve this issue.

3 MR. NORWAY: The government would request that you at  
4 least seal the courtroom.

5 Never mind. We'll -- I withdraw that request, Your  
6 Honor.

7 THE COURT: Well, they were sealed because they  
8 were -- they were sealed pursuant to an order granting a motion  
9 to seal or they were marked Confidential.

10 MR. NORWAY: Correct.

11 THE COURT: They were which one? That's two  
12 different things.

13 MR. NORWAY: They were, they were, they were  
14 ordered -- this is -- these are, were submitted to you ex parte  
15 and under seal, and you --

16 THE COURT: Because I was to review them in camera.

17 MR. NORWAY: Correct.

18 THE COURT: Well, the Court has made it clear that  
19 this does not should be under seal at this point in time. You  
20 requested it to be under seal. I order it until I believe it's  
21 not, because -- the only reason I order it is because you  
22 submitted them ex parte in camera.

23 MR. NORWAY: Thank you, Your Honor.

24 THE COURT: That's an appropriate course. I have  
25 just made it clear that this document is not sealable.

1 MR. NORWAY: Thank you, Your Honor.

2 THE COURT: Let's look at another example. Well,  
3 while I'm looking, I can give you the reason why the Court says  
4 it's not deliberative process. Maybe it's a draft, but it's a  
5 draft of a current instruction. I looked online at the draft  
6 and the current instruction that's publicly available online.  
7 The first page is identical. I didn't have to go any further.

8 How is that at all the deliberative process, or if it  
9 was, you have waived it because it's publicly available online.  
10 That's not even sealable. It's publicly available. I pulled  
11 it off the internet.

12 MR. NORWAY: And, Your Honor, if you're saying that  
13 this was officially adopted and this is the version that NAV --  
14 the Navy officially adopted, then --

15 THE COURT: Whether or not it's the version or not,  
16 at least the first page is identical. Once again, that  
17 instruction is the result of deliberative process. It provides  
18 no opinions in regards to the individuals who participated in  
19 the discussion that resulted in the instruction, whether the  
20 instruction was draft or not.

21 We're not here arguing attorney-client work product  
22 in which the draft may suggest legal strategy on behalf of the  
23 attorney and how he is going to conduct his legal strategy.  
24 That's not what we're here about.

25 We're, we're here about a privilege, a privilege

1 essentially even at the very least if it fell under the  
2 privilege, which it doesn't, but even if it did, based on what  
3 I review, at the very least, the first page of that document,  
4 the privilege has been waived because it's publicly available  
5 online.

6 And as I'm quite sure you know, the law is that if  
7 you waive a privilege, the privilege is also waived as to  
8 documents based on the same subject matter, which would be the  
9 rest of that instruction.

10 MR. NORWAY: Your, Your Honor, or deliberative  
11 process privilege, the waiver is -- or the choice is document  
12 by document. This document, this sheet that you're looking at  
13 was a single-page document.

14 THE COURT: No, I'm talking about the instruction. I  
15 said I would talk to you about the instruction because I'm  
16 flipping through to get -- I have several tabs on things. I  
17 was trying to find the exact document I was talking about.

18 MR. NORWAY: Okay.

19 THE COURT: We're not talking about the 17131.

20 MR. NORWAY: Are you referring to the NAV policies,  
21 Your Honor?

22 THE COURT: It's an instruction. It's an Air Force  
23 instruction, I believe, an AFI.

24 MR. NORWAY: So most of the Air Force instructions  
25 are in Tab 13, Your Honor.

1 THE COURT: That would be -- well, you have blue  
2 tabs. That would be US-25497.

3 MR. NORWAY: 25497, yes. And that is --

4 THE COURT: AFI 44 -- the draft of AFI 44-178.

5 MR. NORWAY: Correct, Your Honor. I have it.

6 THE COURT: Yes. You have pink stuff, which as I  
7 believe is what -- I don't know what that is, because it was  
8 the Court's understanding that you wished to -- some of these  
9 are supposed to be, you wanted redacted, and some of them you  
10 wanted just --

11 MR. NORWAY: Not on this document, Your Honor. This  
12 document was withheld in full --

13 THE COURT: What's the -- what's the pink highlight  
14 on the document then? My copy has pink highlights.

15 MR. NORWAY: Can you, can you tell me the in camera  
16 page number you're looking at, Your Honor?

17 THE COURT: 100.

18 MR. NORWAY: Yes, Your Honor. So what you are  
19 looking at, this is a, a Word document. It is marked up by the  
20 Air Force, so what you --

21 THE COURT: Why? What is -- what is the marking  
22 supposed to be representative of?

23 MR. NORWAY: They are comments -- they are  
24 deliberative comments on the language in this draft AFI.

25 THE COURT: No, it's the language. At line 10, this

1 is Chapter 2, HIV Program, Section 2.2.2, ADAF personnel.

2 MR. NORWAY: Right.

3 THE COURT: "All ADAF personnel are screened for"  
4 sociological -- "for" -- excuse me --

5 MR. NORWAY: So, Your Honor --

6 THE COURT: -- "scrological evidence of HIV  
7 infection every two years, preferably as part of their  
8 Preventive Health" -- that's not a comment. That's a proposed  
9 fact.

10 MR. NORWAY: That's, that's the --

11 THE COURT: I looked at the first page of this  
12 enacted instruction online. This is the exact same language  
13 online.

14 MR. NORWAY: And next to that, Your Honor, is --

15 THE COURT: So even if it fell under the deliberative  
16 process privilege, that privilege has been waived because  
17 it's -- that information is publicly available.

18 MR. NORWAY: The column next to it, Your Honor,  
19 contains the comment that is related to that language. So  
20 the --

21 THE COURT: And the comment said, "What AFI?"

22 MR. NORWAY: And, Your Honor, once again, the --

23 THE COURT: But I don't even know what that comment  
24 means because it says, "AFI 44-168." So what's, what's  
25 deliberative about the question, "What AFI?"

1 MR. NORWAY: But these are, these are the --

2 THE COURT: That's not my question. My question is  
3 what is deliberative about the question, "What AFI?"

4 MR. NORWAY: They are having a discussion, Your  
5 Honor, about how to draft and prepare this AFI to go out. So  
6 that includes --

7 THE COURT: What part of, "What AFI?" is a -- what  
8 provides -- what is that is an opinion -- if someone saw the  
9 words "AFI," "What AFI?" --

10 MR. NORWAY: They're --

11 THE COURT: -- how would that chill the effect of the  
12 person who made that statement from further discussing the  
13 enactment of this Air Force instruction or not?

14 MR. NORWAY: They're having a free discussion trying  
15 to coordinate the language of this draft so that it works with  
16 the rest --

17 THE COURT: People have discussions all the time.

18 MR. NORWAY: And those discussions are deliberative,  
19 Your Honor. That is our point.

20 THE COURT: Okay. Well, then you want me to then  
21 fall in their category, because you can say everything is a  
22 discussion. The purpose of determining whether or not an  
23 enacted statute or instruction or regulation meets a  
24 legitimate, important, or compelling government interest is to  
25 determine what the people who discussed it were thinking at the

1 time they discussed it and came up with it, which goes exactly  
2 to their intent.

3           So would you like me to rule in toto, as they have  
4 requested, that because the government has put at issue the  
5 intent behind the enactment of this legislation or these  
6 instructions, now they have opened the door, and the  
7 deliberative process privilege, if applicable before, has now  
8 been waived? Because as soon as you start talking discussions,  
9 that's exactly what they need to see to determine whether your  
10 alleged bases or purpose behind the enactment of this  
11 legislation or policy is legitimate or not.

12           The only way we -- it's the same way we do when we  
13 get to cases, when judges instruct jurors all the time when it  
14 comes to knowledge and intent, rarely do we have direct  
15 evidence because we cannot get in someone's head to determine  
16 what they knew or what they thought at a particular point in  
17 time. Therefore, we must rely on circumstantial evidence.

18           The circumstantial evidence when it comes to intent  
19 would be any documentation referencing the discussions  
20 concerning the underlying policy, why or why not it should be  
21 enacted, why it's legitimate, important, or compelling, and  
22 that's why we need to enact it, or whether or not those  
23 discussions suggest otherwise, which would suggest or the other  
24 side could utilize in arguing that the supposed purpose behind  
25 it being legitimate, important, or compelling was pretextual

1 because the discussions say -- like, if in this comment  
2 section, it says: I think we should enact AFI 128 because I  
3 just don't like people with HIV, that would go to prove that  
4 the alleged purpose is pretextual.

5           The purpose being supposedly, based on this Court's  
6 understanding, was based upon medical information available at  
7 the time of the enactment or at least at the discussion  
8 concerning the enactment of the policies and the instructions.  
9 Medical information, medical evidence has significantly changed  
10 since then, so whether the continued validity of this  
11 instruction which they in part are arguing, the pretext, it's  
12 pretextual because if the basis was medical information  
13 available at the time and the medical information is completely  
14 changed, but they don't know what it was based upon unless they  
15 have the right to look at information and documentation that  
16 represents the discussions between the parties concerning the  
17 basis or purpose behind the policy, do they?

18           How -- you cannot have the sword and the shield. You  
19 cannot argue legitimate, important, or compelling government  
20 interest and then refuse to provide documents to serve the  
21 basis of that legitimate, important, or compelling purpose,  
22 because the documents may suggest otherwise.

23           These documents are not public. I'm assuming there's  
24 a motion to protect in place.

25           MR. NORWAY: There is a protective order in this

1 case, Your Honor.

2 THE COURT: So a protective order so opposing counsel  
3 gets to see it, can't show it to anyone else.

4 MR. NORWAY: So you're --

5 THE COURT: If you want to argue that this  
6 information is such at a certain place and time that the  
7 government has a heightened privilege to assert at trial,  
8 because trials are public, and therefore we move to exclude  
9 that information, that's another matter. All we're talking  
10 about right now is whether or not this information should be  
11 provided under the circumstances to opposing counsel in the  
12 discovery process, which means -- and, of course, once again,  
13 relevance for discovery process is different than relevance at  
14 trial.

15 Are their requests reasonably calculated to lead to  
16 the discovery of admissible evidence? It doesn't even have to  
17 lead to discovery of admissible evidence. If it is reasonably  
18 calculated to do so, it's relevant for discovery.

19 It appears to the Court unless you cite different  
20 cases that once you place the same -- it's the similar  
21 philosophy as medical information generally speaking is  
22 sealable, but that doesn't mean it's not required to be given  
23 to opposing party when they put their medical condition at  
24 issue in a case when they're seeking damages based on a  
25 physical injury that was a result of an accident, the

1     aggravation of a previously existing injury based on the  
2     alleged -- or based on the accident, or emotional distress.

3             As soon as you use those words in a complaint, you  
4     have now opened the door for discovery into what otherwise  
5     would have been sealable information because you put those  
6     issues -- you put that information at issue.

7             You have now by alleging that we have a legitimate,  
8     compelling, or important government interest and that interest  
9     is for the other side to acquire information in the discovery  
10    process to determine whether your alleged purpose is legitimate  
11    or not.

12            MR. NORWAY:    So, Your Honor, I -- two points, and the  
13    first point is that we have put in several declarations, and I  
14    can think of off the top of my head Col. Bahdi's declaration  
15    and Ms. Atliff's (phonetic) declaration, both regarding the  
16    chilling effect that producing documents even to the other  
17    side --

18            THE COURT:    The chilling effect is overridden when  
19    the other party has a -- when you place in issue the facts  
20    sought to be discovered, those facts are important to the other  
21    side, defense or prosecution, of the case, and they can acquire  
22    that information from no other source.

23            MR. NORWAY:    And my --

24            THE COURT:    That is when the privilege is overridden.

25            MR. NORWAY:    My second point really goes to that,

1 that, Your Honor, is the way you frame that, to me, it sounds  
2 like -- or I understand that to be that anytime that a military  
3 personnel policy is challenged, even under rational basis  
4 review, then the other side will be able to pierce --

5 THE COURT: I'm not here to determine what standard  
6 of review. That's for the district judge and trial. We're not  
7 here to say that this information is admissible in court.  
8 We're not here to argue or this Court is not deciding whether  
9 the privilege is waived for purposes of admissibility at trial  
10 and/or summary judgment.

11 We're here to decide whether this opposing party has  
12 the right to review this information pursuant to the discovery  
13 process.

14 MR. NORWAY: And, and we can, we can set aside the  
15 standard of review, but what I understand is that under, under  
16 that formation, anytime a military personnel policy is  
17 challenged, then the deliberative process privilege becomes  
18 nugatory.

19 THE COURT: It depends on the basis of the challenge  
20 and what the defense to that challenge is.

21 MR. NORWAY: Well, the defense to the challenge for a  
22 policy is that it is a legitimate policy, and that's, that's  
23 the basis of the review.

24 THE COURT: It meets a legitimate, important, or  
25 compelling government interest.

1 MR. NORWAY: And so as soon as we make that  
2 statement, then in any policy challenge under Your, Your  
3 Honor's reason -- reasoning, then the deliberative process  
4 really becomes, privilege becomes nugatory.

5 THE COURT: No, because they're -- even when your  
6 view, when you talk about standards of review, they only apply  
7 under certain circumstances. Right now you're talking about  
8 equal protection. The same way different standards apply to  
9 the First Amendment, challenges to the First Amendment,  
10 different standards apply to challenges of other provisions of  
11 the United States Constitution.

12 I'm sure you have the right to argue that, which you  
13 have already argued, which I've already determined is not  
14 relevant for purposes of discovery, but you have the right to  
15 argue further up the ladder what standard of review applies to  
16 the challenge to this policy, so what is and is not  
17 discoverable or what's admissible may be different based upon  
18 the ultimate decision by the district judge of what standard of  
19 review applies.

20 We're not there. All I'm talking about is what  
21 will -- what should or should not be produced in discovery.

22 MR. NORWAY: Right. Part of that, Your Honor, is  
23 proportionality, and their arguments are based on intent.

24 THE COURT: What's ill-proportionate. You've  
25 provided an example of in camera review, which means you have

1 at least this in your possession, which means it doesn't take a  
2 lot to provide it to the other side because you're in  
3 possession of it right now.

4 Disproportionality generally talks about the cost of  
5 things that it would -- like, if you had -- you knew that you  
6 had to search eight servers that probably had 5,000 gigabytes  
7 of information on them and the only information they were  
8 looking for was to prove that -- prove the fact that on  
9 January 3 rather than January 9, this occurred, that would  
10 probably be outweighed in the proportionality of the case, but  
11 in the possibility of figuring out in those 500 gigabytes that  
12 the central issue would be decided, the whole purpose behind  
13 the case, then it may be proportional to the needs of the case.

14 You can't argue that in a vacuum.

15 MR. NORWAY: That, that's correct, Your Honor. Where  
16 I was going with that is that goes back into our discussion in  
17 our papers about whether this privilege should be applied and  
18 the analysis should be applied on a document-by-document basis  
19 or --

20 THE COURT: And that's why I brought you here because  
21 I'm like I'm not going through this entire thing in camera to  
22 decide. I bring the parties in, and I thought this discussion  
23 was necessary to give you the Court's viewpoint on what it  
24 considers privileged, what falls under deliberative process  
25 privilege, what doesn't, and under what circumstances even if

1 it does it's waived.

2 I've given you two examples. I'm sure there's other  
3 information contained in this notebook that probably falls  
4 under those exact same examples. What this Court wants to do  
5 is the parties to narrow this dispute.

6 Your belief is overly broad -- no, overly  
7 restrictive. Their view is probably overly broad. This is why  
8 I had the parties to sit down in another subsequent meet and  
9 confer in good faith to narrow the issues. This Court has  
10 concluded that the parties didn't do a very good job at it.

11 So the Court once again gets involved, hoping that  
12 the parties will consider what is stated by the Court during  
13 this oral proceeding what you should now be discussing in a  
14 further meet and confer, because I can go more examples to  
15 suggest that all the things you've marked as deliberative  
16 process privilege this Court doesn't deem falls under that  
17 privilege.

18 Let's find US-17966.

19 MR. NORWAY: And what tab is that under, Your Honor?

20 THE COURT: 11. Part of what appears to be an e-mail  
21 thread.

22 MR. NORWAY: Yes. And for -- and that is -- that's a  
23 redacted document, Your Honor.

24 THE COURT: Right.

25 MR. NORWAY: So the only material --

1 THE COURT: Under the word "All" at the bottom of the  
2 page, on page 1, which is 17966, what has been redacted is,  
3 "LtCol McCarroll and I have discussed this and are in  
4 concurrence with Mr. Cerny's recommendation to defer."

5 MR. NORWAY: And, Your Honor, that is --

6 THE COURT: What -- where is the recommendation?  
7 What is he concurring about? The fact that he concurs about  
8 something that no one knows he's concurring about provides no  
9 opinion of anything. If you're going to -- if further up, at  
10 some point in time during this e-mail there's a discussion  
11 about the recommendations of parties, that probably would fall  
12 under the deliberative process privilege, but this is not a  
13 discussion of anything to say, "I agree with him."

14 How is that the -- how does someone knowing that this  
15 person agreed with this person chill their discussions  
16 concerning a non-known policy that they're discussing?

17 MR. NORWAY: That was, that was a recommendation  
18 based on this e-mail chain.

19 THE COURT: But if you don't put forth the  
20 recommendation, no one knows what you're talking about. So how  
21 does that chill the effects concerning the -- the discussion  
22 concerning the recommendation if the party -- if the public or  
23 at least opposing counsel doesn't even know what recommendation  
24 they were discussing?

25 MR. NORWAY: And that is what the privilege log is

1 for, Your Honor, and, and with --

2 THE COURT: But we're just talking about this one  
3 particular line. This is what you've redacted. This line the  
4 Court is saying does not fall under the deliberative process  
5 privilege. What this line may be relating to may fall under  
6 it, a discussion of the actual recommendation, but the fact to  
7 say, "I agree to the recommendation," is not an opinion about  
8 anything except he agrees with this person.

9 About what? The what may be privileged, but  
10 saying, "I agree with him about a policy," is not.

11 MR. NORWAY: So, so, Your Honor, two points.  
12 Respectfully, Your Honor, by reading the materials in open  
13 court, you are revealing what the government believes to be  
14 privileged information.

15 THE COURT: And I have just decided it is not.

16 MR. NORWAY: And, and two, Your Honor, that  
17 information is provided in the privilege log entry for that  
18 document. The privilege log entry reads, "Mr. Cerny's e-mail  
19 of 27 July 2018 in re" --

20 THE COURT: No, everything which -- every one of  
21 these privileged bases said nothing except it was  
22 pre-decisional and deliberative. That says nothing to me.  
23 That's a coined phrase.

24 It's pre- -- I've just given you three examples of  
25 what this Court has concluded is not pre- -- it may be

1 pre-decisional, but it's not deliberative. And the privilege  
2 is not pre-decisional privilege. It's deliberative,  
3 deliberative process privilege. Simply because it's  
4 pre-decisional doesn't mean it's deliberative.

5 MR. NORWAY: And I'd like to, to direct Your, Your  
6 Honor's attention to in particular Tab 8. Those summaries,  
7 those privilege log summaries are extremely detailed: Summary  
8 of ongoing policy discussions during the development of HIV  
9 policy regarding issues concerning with allowing HIV applicants  
10 to serve. The second one: Excel spreadsheet consolidating  
11 comments from DA forms, Recommending Changes to the  
12 Publications of the Blank Forms, collecting from the field --

13 THE COURT: Well, and I specifically said I didn't go  
14 through this whole thing because it was too much and the  
15 parties need -- I've given you examples of what the Court has  
16 decided is not privileged. The parties in order to be  
17 judicially economic and to fulfill their obligations pursuant  
18 to the local rules of this Court to meet and confer in good  
19 faith should take it amongst themselves if not by order of this  
20 Court to meet and confer again based on suggestions and  
21 recommendations by this Court during these oral proceedings to  
22 review these documents again and see which one falls under what  
23 the Court has concluded does not meet the deliberative process  
24 privilege and/or which fall under a waiver to said privilege  
25 and which ones don't.

1           If you believe that this -- if I had looked at this  
2 document and not just looking at your representations  
3 concerning the privilege, let's go -- your privilege basis, but  
4 to actually look at it, okay, working -- once again, working  
5 draft of an unpublic version of AR, Army Regulation 600-110.

6           MR. NORWAY: And what --

7           THE COURT: I've already decided that the draft of  
8 AFI 44-168 or 128, whichever it was, was not -- did not fall  
9 under deliberative process privilege because it had nothing to  
10 do about the opinion, it was the result of the deliberative  
11 process. A draft of an AR would fall under the same category.

12           MR. NORWAY: This AR has not been issued yet, Your  
13 Honor. It is still being adjudicated, still going through the  
14 process.

15           THE COURT: What in the AR talks about their -- the  
16 people who were discussing it, what in the AR discusses their  
17 opinion?

18           MR. NORWAY: And, and we can go to their --

19           THE COURT: Or their recommendations, or is it just a  
20 draft AR?

21           MR. NORWAY: And this AR -- this version of the AR,  
22 Your Honor, once again, it's a Word document that is marked up.  
23 It has comments in it. The comments are --

24           THE COURT: Give me an example of a comment and  
25 something other than "What AR?"

1 MR. NORWAY: And for counsel's benefit, we're  
2 discussing US-26150.

3 There are comments -- for instance, if you can go to  
4 the InCamera page 285, there is a back-and-forth about  
5 revisions of these comments, and once again, Your Honor, this  
6 is an ongoing deliberative discussion, so I would ask that  
7 you don't --

8 THE COURT: Using those buzzwords aren't going to get  
9 you anywhere here today. I specifically asked for an example.  
10 Tell me the words you're looking at.

11 MR. NORWAY: Your Honor --

12 THE COURT: You're saying it's discussion. Give me a  
13 portion of the discussion.

14 MR. NORWAY: I can't do that in open court without  
15 revealing the privileged information, Your Honor.

16 THE COURT: Who is in the courtroom that's not part  
17 of these two parties?

18 MR. NORWAY: The -- Your Honor, it's the disclosure  
19 of the information. It's the, the government's --

20 THE COURT: The information has been filed that way.  
21 The Court has the right to order any discussion, any portion  
22 that discusses this in any transcript to be redacted.

23 MR. NORWAY: But then it would also be --

24 THE COURT: It doesn't prevent you from discussing it  
25 in the courtroom.

1 MR. NORWAY: But it would also be then disclosed to  
2 plaintiffs' counsel and plaintiffs, Your Honor.

3 MR. SOMMER: Your Honor, Andrew Sommer for  
4 plaintiffs. This is part of the problem that we're having in  
5 further meet-and-confer processes.

6 THE COURT: Right.

7 MR. SOMMER: We don't know what those documents say.  
8 It's very difficult for us to have a rational discussion with  
9 the government when they're claiming it's privileged, they're  
10 not going to share it with us, and I think we're at loggerheads  
11 on this issue. Thank you.

12 THE COURT: Especially when you just talk about a lot  
13 of them, it's deliberative -- I mean, it's pre-decisional and  
14 deliberative. That says nothing.

15 I mean, you have a harder row to hoe.  
16 Attorney-client privilege is easier. It's the most difficult  
17 to overcome, but it's easier because if you say it's a  
18 discussion between the attorney and the client regarding those  
19 attorney-client communications during the representation --

20 MR. NORWAY: Right, and --

21 THE COURT: -- that automatically falls under the  
22 definition.

23 MR. NORWAY: And exactly, Your Honor.

24 THE COURT: This does not because things that you  
25 have already said are pre-decisional and deliberative I have

1 determined are not.

2 MR. NORWAY: It's, it's the same -- it's the same  
3 problem, Your Honor, when you talk about attorney-client  
4 communications, like, you can't -- you can, you can describe  
5 those communications without describing the substance of that  
6 communication, and that's what I'm trying to do here today.

7 THE COURT: But you have to do -- but in this one,  
8 you may have a point, but in other ones, when you simply say  
9 "pre-decisional and deliberative," if another party had come to  
10 this Court and requested that that privilege log be  
11 supplemented, I would order it because that tells me nothing.  
12 "Pre-decisional and deliberative," if that's all you have to  
13 say, then everything would fall under the deliberative process  
14 privilege, even though I've just shown you it does not.

15 You can't just use buzzwords: It's pre-decisional  
16 and deliberative. It doesn't work. You have to say:  
17 Discussions concerning why this policy -- discussions between  
18 so-and-so and so-and-so and so-and-so discussing the purpose of  
19 enacting that would strongly recommend to the Court that those  
20 are deliberative process privilege, because it specifically  
21 says discussions between people who were in attendance at a  
22 meeting discussing the reasons we believed that this policy  
23 should be enacted.

24 That's the deliberative process, because you used the  
25 right words, the reasons behind the policy. We are discussing

1 the purpose of enacting this instruction. That's the  
2 deliberative process.

3 Pre-decisional and deliberative tells me nothing.

4 MR. NORWAY: Yes, Your Honor.

5 THE COURT: So let's give me -- what did you say,  
6 which page? 285 or 25 -- under Tab 8.

7 MR. NORWAY: I've closed that page. Sorry, Your  
8 Honor.

9 MR. HARDING: That's 285, Your Honor.

10 THE COURT: 2 --

11 MR. HARDING: -- 85.

12 MR. NORWAY: So, for instance, Your Honor, actually,  
13 here's another one. I wonder if I'm in the same document  
14 again. This might be a separate document.

15 THE COURT: You say under Tab 8?

16 MR. NORWAY: So under Tab 8, I'm actually looking at,  
17 I believe, the second, second document. It's a markup of the  
18 same, of the same AR.

19 The, the US Bates number for opposing counsel is  
20 25675, and it's, it's, it's another document.

21 THE COURT: Are these in order? Because I go  
22 from a -- which -- are you referencing in camera numbers?

23 MR. NORWAY: No. I'm, I'm referencing the number  
24 that's in the center of the page.

25 THE COURT: Well, this redacted document has no

1 number in the center of the page. It has a number on the right  
2 side of the page.

3 MR. NORWAY: Correct, because that was produced in  
4 the, in the production in a redacted form, and the next  
5 document in your book should be Bates stamped in, in the center  
6 25675.

7 THE COURT: Well, I don't appear to have -- is this  
8 all one document? Because I don't appear to have any  
9 redactions on this. That means this entire document, you say,  
10 falls under the deliberative process privilege?

11 MR. NORWAY: Correct.

12 THE COURT: Which goes from 25675 --

13 MR. NORWAY: They're, they're all the same Bates  
14 stamp, Your Honor, because it was withheld in full. You're  
15 correct.

16 THE COURT: Right. 25 -- oh, they're all just 25675.

17 MR. NORWAY: Correct.

18 THE COURT: Which appear to be InCamera-153 through  
19 227.

20 MR. NORWAY: Correct. This entire document is a  
21 draft filled with revisions and comments of the current  
22 revision process, and I'd like to just draw your attention to,  
23 for instance, InCamera page 186.

24 THE COURT: Okay.

25 MR. NORWAY: And this is a -- this is a discussion of

1 a comment, where, where there is a back-and-forth about a  
2 particular issue, and once again, the government considers this  
3 a privileged issue, and so we'd ask the Court not to read the  
4 comment into the record.

5 THE COURT: Well, what is this, what is this comment  
6 referencing? The entire document, what's the, what's the  
7 document about?

8 MR. NORWAY: So the document you're looking at, Your  
9 Honor --

10 THE COURT: Because why would the entire document  
11 be -- fall under deliberative process privilege rather than  
12 just a pinked comment in the --

13 MR. NORWAY: Because the, the entire document  
14 incorporates changes, so it's a Word document with red lines.  
15 It is a working draft. This is from the, the privilege log  
16 description, a working draft of the unpublished version of  
17 AR 600-1 with edits, and, and what you're looking at are  
18 comments and edits in an unpublished draft for a revision that  
19 is currently ongoing.

20 THE COURT: I see that there are what appears to be  
21 initials, which, of course, the military is well known for,  
22 they probably stand for something, some acronym, that goes from  
23 stricken out four letters and replace them with four different  
24 letters, which means someone decided to call something that was  
25 previously called this, to call it that, and therefore, the

1 abbreviation changed.

2 MR. NORWAY: So there are, there are those, Your  
3 Honor. There are more substantive changes.

4 THE COURT: And that's deliberative.

5 MR. NORWAY: There are more substantive changes  
6 including on InCamera page 184.

7 THE COURT: At line 960, "IAW," in accordance with?

8 MR. NORWAY: And above that, Your Honor.

9 THE COURT: In accordance with what the -- that part  
10 has been stricken out, right. Well, let's stick with 960. In  
11 accordance with, and then it cites "in AR." What's  
12 deliberative? What opinion does that suggest?

13 MR. NORWAY: I was referring to the revisions above  
14 that, Your Honor.

15 THE COURT: But I'm --

16 MR. NORWAY: Right.

17 THE COURT: -- referring to this one.

18 So this is another example of what I'm saying does  
19 not fall under deliberative process privilege. So if you're  
20 referring to that one, then maybe the other one does, but you  
21 still haven't answered my question or my preconclusion that the  
22 one down below it does not.

23 MR. NORWAY: This may or may not be -- this change,  
24 the one that you're referring to, may or may not be in the  
25 final version of this document, which we don't know yet because

1 the decision --

2 THE COURT: Well, whether it's in the final version  
3 or not, there's nothing about that clause that sets forth the  
4 opinion or the recommendation of anybody who participated in  
5 the discussions.

6 MR. NORWAY: But if you release the drafts of these  
7 decisions and over time you can see how drafts change, that  
8 does provide information.

9 THE COURT: It shows the results.

10 MR. NORWAY: It provides the information about the  
11 deliberations that are ongoing.

12 THE COURT: How? It doesn't say who said what and  
13 when and why they said it. It just says this was changed from  
14 this to this.

15 MR. NORWAY: And --

16 THE COURT: Somebody concluded that this was better  
17 than that. That -- the fact that someone says at some future  
18 point in time that on February 22 of 2019, when the final draft  
19 of this AFI came out, it's in four places different than the  
20 draft that was -- we were discussing on February 22 of 2017, so  
21 the final version of the AFI came out two years later, and four  
22 different sections two years before, there's a little different  
23 language.

24 Parties or the public putting together those two  
25 versions, the 2017 final draft it appears and the 2019 version

1 that was made public would not discern what the parties  
2 discussed coming up, why they changed this final, final version  
3 from the final draft version. They would not know who  
4 participated in discussions, whose opinion it was to change it,  
5 why they thought change was necessary, under what purpose they  
6 believed it was necessary, and what they thought would be  
7 satisfied by changing it from this to that.

8 All of that is the deliberative process. The fact  
9 that the words are different just means the words are  
10 different. That does not set forth a deliberative process.

11 The fact that I saw this draft and it had four things  
12 different than the final version would not -- and the public  
13 realized that would not chill Lt. Col. So-and-so's discussion  
14 in that meeting, it wouldn't chill Capt. So-and-so's, Chief  
15 Sgt. So-and-So's. It wouldn't chill anybody's discussion  
16 because their discussions aren't set forth in here. The only  
17 things that are set forth is the results of those discussions,  
18 which is language.

19 MR. NORWAY: Yes.

20 THE COURT: And the language don't say, "What I  
21 believe" and "this and that." It doesn't. How is that  
22 deliberative process?

23 MR. NORWAY: It does provide --

24 THE COURT: Help me out. I'm trying -- I'm trying  
25 real hard, but it is not being made easy. None of the -- we --

1 does the DOJ or who you're -- do you have a policy that defines  
2 "deliberative process" and what falls under deliberative  
3 process?

4 MR. NORWAY: I, I don't know the answer to that, Your  
5 Honor. The -- I don't know if there is an official --

6 THE COURT: Because it appears that the Court has  
7 concluded that its definition of "deliberative process" is  
8 different than yours, which may be somewhat different also than  
9 opposing counsel.

10 MR. NORWAY: So these --

11 THE COURT: The problem with that issue is it appears  
12 that in previous discussions in front of Judge Brinkema, she  
13 appears to be concluding that your more restrictive view is  
14 just what I said it was, too restrictive.

15 MR. NORWAY: So these draft documents --

16 THE COURT: And I have to follow at least in part  
17 discussions that occurred in front of her in order not to make  
18 a ruling that's inconsistent with her comments.

19 MR. NORWAY: Your, Your Honor, I think there is a, an  
20 abundant amount of authority regarding whether draft  
21 documents are indeed deliberative and can be protected under  
22 the deliberative process.

23 THE COURT: And whether or not the privilege is  
24 waived, because under your opinion, there would be no reason to  
25 have the case law that says when the government places its

1 intent in enacting legislation or a statute or a regulation  
2 doesn't make a difference when if they ever placed that at  
3 issue, there's no -- there's not a waiver of, of the privilege.  
4 That would be your position.

5 Well, then what's the purpose of that case law that  
6 says there is?

7 MR. NORWAY: Well, I don't think there is any  
8 controlling case law in the Fourth Circuit, Your Honor,  
9 regarding the claim that intent --

10 THE COURT: That makes your row even tougher to hoe.

11 MR. NORWAY: Well, that intent will obviate the  
12 deliberative process. There -- the only -- what we have here  
13 is, like, only the issues are -- I'm sorry.

14 THE COURT: Well, you show me a case that says draft  
15 of enacted, draft of final versions, or drafts of versions that  
16 are not yet final always -- of government policies or  
17 instructions or regulations are always -- always meet the  
18 definition of the deliberative process privilege, and there is  
19 never a waiver even when the government utilizes or even when  
20 the government places its intent in enacting that legislation  
21 or instruction or regulation at issue in a case. Show me a  
22 case that says that.

23 MR. NORWAY: So, Your Honor, I think that goes back  
24 to our point that you really need to have a  
25 document-by-document analysis, because we'd agree you --

1           THE COURT: And every document that I've looked at so  
2 far I'm saying you're wrong, so why should I go through every  
3 single one when you should just take my viewpoint out of this  
4 discussion, parties get back together, and utilize that  
5 discussion and recommendation and my suggestions and come up  
6 with what's right?

7           MR. NORWAY: And in the intent, Your Honor, when it  
8 comes to the intent, it can't -- it can't be that an intent  
9 with regards to one policy would, would cause the privilege to  
10 be removed or obviated with regards to another policy.

11           THE COURT: The point is nothing about this even  
12 talks about intent, so how is it falling on -- it -- this gives  
13 no opinion. It gives no recommendation.

14           We have gone through this many times with the  
15 government, and yes, sometimes they do it very well, because  
16 they're doing the discussions and then they get a report from  
17 those discussions, kind of like board meeting minutes --

18           MR. NORWAY: And we have examples of those here.

19           THE COURT: And they have the factual part first and  
20 everything, and then at the bottom, they clearly set forth  
21 opinion section, recommendations and conclusions. Everything  
22 outside of those portions don't fall under the privilege.

23           But the state of the law is even if it's included in  
24 the portion that says opinion, recommendation, it can still be  
25 raised if the government places its intent at issue, the other

1 side needs the information to support prosecution or defense of  
2 its claim, and they can acquire that information from no other  
3 source.

4 Your representation or opinion appears to be that the  
5 deliberative process privilege is all -- it's in toto, it's  
6 all-encompassing, that it cannot be waived under any set of  
7 circumstances, and that's not the current state of the law.

8 MR. NORWAY: The -- our position is, is the, the  
9 balancing -- after it's determined that the deliberative  
10 process privilege applies, that the balancing --

11 THE COURT: And out of the examples I gave you, I've  
12 concluded that the, the privilege doesn't even apply to those  
13 because it doesn't discuss opinions and recommendations. So  
14 it's impossible to provide a chilling effect upon the  
15 participants of the discussion.

16 MR. NORWAY: So I could, I could give you an example.

17 THE COURT: Please, give me an example.

18 MR. NORWAY: Under Tab --

19 THE COURT: Because you -- this was your example.  
20 You pointed me to this page, and I just told you it doesn't.  
21 So do you have another example?

22 MR. NORWAY: Under Tab 3 -- and for the benefit of  
23 counsel, we're going to ask -- direct the Court to US-13841 --  
24 this is a, a meeting minutes, deliberative meeting minutes from  
25 the Accession Medical Standards Working Group, where there was

1 a discussion about communicable and infectious diseases,  
2 including HIV, and it discusses -- it goes through this, this  
3 meeting minutes, Your Honor. You see that it really is a  
4 report of the discussion that occurred --

5 THE COURT: Okay. Well --

6 MR. NORWAY: -- in the meeting.

7 THE COURT: -- the first three pages are only the  
8 attendees.

9 MR. NORWAY: Correct.

10 THE COURT: How does that fall under deliberative  
11 process privilege?

12 MR. NORWAY: And beginning on page 4 --

13 THE COURT: No, no. Answer that question first  
14 before you point me to something else. The first three pages  
15 of the document you just pointed or directed me to just talk  
16 about who's attending the meeting. How does that fall under  
17 the deliberative process privilege?

18 MR. NORWAY: That would be --

19 THE COURT: It doesn't. That was a rhetorical  
20 question.

21 MR. NORWAY: Okay, Your Honor.

22 THE COURT: So now you are supporting my  
23 representation that this claim of privilege is overly broad.

24 MR. NORWAY: And is, is the Court --

25 THE COURT: Because --

1 MR. NORWAY: Is the Court really directing us --

2 THE COURT: -- Lt. Col. Brown, Lt. Col. Gary Brown  
3 has no deliberative process or privilege or reason to keep his  
4 name from the public.

5 I'm sure his name is out there somewhere. I'm sure  
6 you probably could Google him, and it will probably tell you  
7 the organization that he falls under. It may even give his  
8 e-mail address, which is the only information cited on the  
9 first three pages of this document.

10 MR. NORWAY: Is, is the Court's point really trying  
11 to focus in on having the government do a more thorough job  
12 redacting these documents?

13 THE COURT: I thought I said that the last time we  
14 left. Go back -- that was the reason I said the parties to  
15 meet and confer again and then file with this Court a joint  
16 status report over the disputes that remain and those that have  
17 been resolved.

18 It appears that during that discussion, we just  
19 remained at our positions in regards to what fell under the  
20 deliberative process privilege and when it's waived. Both  
21 parties went into the meeting with an opinion; they came out of  
22 the meeting with the same opinion. That's not a good faith  
23 meet and confer because there was no compromise in between the  
24 two opinions, at least not appears to be in regards to the  
25 information that was submitted in camera.

1 MR. HARDING: Your Honor, just to clarify, in our  
2 last meet and confer, plaintiffs withdrew approximately 700  
3 challenges to documents in a good faith effort to, to move this  
4 process along.

5 MR. NORWAY: And we also have withdrawn several  
6 hundred privilege claims, over 700 documents, six or seven. I  
7 don't remember the exact number.

8 THE COURT: But the ones I pointed out we didn't come  
9 to a compromise on --

10 MR. NORWAY: Correct, Your Honor.

11 THE COURT: -- when it appears clear to the Court  
12 that they don't even fall under the privilege, let alone a  
13 waiver.

14 So let's get past the first three pages.

15 MR. NORWAY: So the rest of this document, Your  
16 Honor, is, is a reduction of the discussions that occurred at  
17 the meeting.

18 THE COURT: See, this is the type of stuff we're  
19 talking about. See, paragraph 2, Administrative Business,  
20 doesn't fall under deliberative process. Opening Remarks, it  
21 talks about this person opened the meeting, reviewed the  
22 meeting agenda. So-and-so stated he will discuss certain  
23 things. It doesn't, doesn't discuss it, just says he will  
24 discuss it later on, and that -- the fact that somebody may  
25 need to address what we discuss here today.

1           None of that sets forth an opinion or a  
2 recommendation about anything. Paragraph 2 does not fall under  
3 deliberative process privilege.

4           MR. NORWAY: Well --

5           THE COURT: See, this is what parties do a lot.  
6 Instead of the parties themselves going through stuff and  
7 putting forth the effort, because it's a lot of work, you like  
8 to submit it to the Court and make the Court go through all the  
9 effort. It's like why people want to seal -- sometimes we get:  
10 Let's seal this material. I've actually had cases in which  
11 people have submitted four Banker Boxes and said: We would  
12 like to seal all of the -- four Banker Boxes of material, and  
13 it's all sealable.

14           Really? I don't even have to look at that to know  
15 that's not right. It's impossible for four Banker Boxes' worth  
16 of material to be sealable, and as soon as I open it and start  
17 looking, I'm like: I'm right; go back and do it again.

18           And they come back with one or two folders or  
19 notebooks out of four Banker Boxes.

20           This is what I require the parties to do. Go back,  
21 come back with less. That's all I'm saying. Because do you  
22 know how long we will sit here today if I have to go through  
23 every one of these pages?

24           MR. NORWAY: So respectfully, Your Honor, I -- we  
25 understand. We will meet and confer with opposing counsel

1 regarding these documents. We do reserve our right to, to  
2 continue our position.

3 Thank you, Your Honor.

4 MR. HARDING: Your Honor, I know you spent a lot of  
5 time here. I just have a quick request. There are two  
6 documents that I would appreciate your guidance on. We've  
7 actually gone to the government multiple times on one of them  
8 and asked them to reconsider it, and they've maintained their  
9 position. That's going to be -- and I direct you to -- I going  
10 to be, I think, at Tab 8. It's US-2428. This is actually a  
11 similar document -- well, a continuation of the chain that I  
12 discussed with you last time.

13 Do you want to give him the binder number?

14 THE COURT: The entire document or are we looking for  
15 a redaction?

16 MR. HARDING: It's a redaction, Your Honor. And it  
17 should be page -- it's US-2430. I don't know if you -- on the  
18 right-hand side of it.

19 THE COURT: And that falls under the deliberative  
20 process privilege.

21 MR. NORWAY: Thank you, Your Honor.

22 MR. HARDING: Is there -- Your Honor, we believe --

23 THE COURT: That's specifically talking about  
24 discussions between them --

25 MR. HARDING: Your Honor --

1 THE COURT: -- and people's thoughts about those  
2 discussions.

3 MR. HARDING: And I understand that, Your Honor. We  
4 think that the exception would apply to this specifically  
5 because this document relates to the named plaintiff in this  
6 case, Sgt. Harrison, and specifically, if you go up to the  
7 next --

8 THE COURT: So what -- I mean, just because it  
9 relates to your client doesn't mean it falls under -- the  
10 exception is when they place at issue their intent. Do you  
11 think this document has something concerning their intent?

12 MR. HARDING: We do, Your Honor. If you go to the --  
13 I'm sorry, the next -- I guess the page before that, it would  
14 be the next, most recent e-mail. Lt. Col. Lawrence --

15 THE COURT: Which page?

16 MR. HARDING: Sorry, this is 2429.

17 THE COURT: Okay.

18 MR. HARDING: She -- Ms. -- Lt. Col. Lawrence says,  
19 "Thank you for the information below. Indeed, the timeliness  
20 of the revision of AR 600-110 is relevant."

21 THE COURT: Timeliness of everything is relevant.  
22 That's why we put a time clock on it.

23 MR. HARDING: I understand that, Your Honor, but I  
24 think that the deliberations -- it appears to us that the  
25 deliberations that are redacted in this e-mail were actually

1 part of the decision-making process on whether to grant, grant  
2 Sgt. Harrison an exception to policy. This is information that  
3 we -- is highly relevant to the case. It -- we believe it --

4 THE COURT: Why? I thought your -- you were  
5 challenging the policy.

6 MR. HARDING: We, we are challenging the policy, Your  
7 Honor, and we're challenging it facially and as applied to  
8 Sgt. Harrison.

9 THE COURT: And this applies -- just because it  
10 applies, it gives you a reason for why they made their  
11 decision?

12 MR. HARDING: Well, Your Honor, as you said earlier,  
13 that --

14 THE COURT: It's a simple question. Does it give you  
15 a reason why they made that decision? Simply because it  
16 mentions his name doesn't mean it's -- it could say, you know:  
17 Despite this dispute, we all love Sgt. Harrison. Could we have  
18 him over for New Year's Eve?

19 It mentions his name, serves no basis to support your  
20 claim at all. That's why the Court asks questions. I ask  
21 questions looking for the answer. You have not yet provided  
22 it.

23 MR. HARDING: I'm sorry, maybe I misunderstood your  
24 question. Can you repeat it?

25 THE COURT: You believe that this information

1 provides the reason for which they took whatever action they  
2 took concerning your client.

3 MR. HARDING: We, we believe that it is one of the  
4 reasons, correct, Your Honor. They say that that is relevant  
5 to the decision.

6 THE COURT: So you reading the, the words,  
7 "Timeliness of the revision of this Army regulation is  
8 relevant."

9 MR. HARDING: Yes.

10 THE COURT: And that makes the discussion about the  
11 decision concerning your client, you think that refers to that?

12 MR. HARDING: That, that is our understanding of the  
13 reading of this document, Your Honor, given the relationship in  
14 the chain. If you look back to US-2430, Lt. Col. Lawrence is  
15 actually citing the regulation. It said, "According to AR  
16 600-110 . . . the G-1 has authority to approve ETP; however,  
17 the office requests MEDCOM to review," etc., etc.

18 THE COURT: Well, when you say it mentions your  
19 client's name --

20 MR. HARDING: Yeah. If you look, if you look at the  
21 subject line, it says "ETP" -- that means exception to  
22 policy -- "Harrison." This is, this is an internal discussion  
23 on whether or not an exception to policy will be granted for  
24 Mr. Harrison that would allow him to commission into the JAG  
25 Corps.

1 MR. NORWAY: Your Honor --

2 THE COURT: This discussion goes to the heart of the  
3 basis for the policy. Will you give them this page and none of  
4 the rest of it?

5 MR. HARDING: We understand that it's at the heart,  
6 Your Honor.

7 THE COURT: It is, can be read as partially  
8 inconsistent with the proposed basis for the policy.

9 MR. HARDING: If it's inconsistent with the proposed  
10 basis, then we think that this --

11 THE COURT: You --

12 MR. HARDING: I'm sorry.

13 THE COURT: Do you want to argue me out of this?

14 MR. HARDING: No. Go ahead.

15 THE COURT: This document, this Court has concluded  
16 you've waived any -- this goes to the heart of this issue, and  
17 they can get this from nowhere else.

18 MR. HARDING: Thank you.

19 THE COURT: It specifically discusses the current  
20 state of medicine, and despite of, we still believe. That goes  
21 to the heart of whether or not the policy or the purpose of the  
22 policy was legitimate, important, or compelling.

23 MR. HARDING: Thank you, Your Honor.

24 And then finally, our last one -- and then we'll let  
25 you go for the day; I'm sorry to keep you so late; it's in the

1 same tab. The Bates number, I believe, is US-25961. It should  
2 be a, a redacted criteria matrix. I believe that's -- I  
3 printed it out this morning. It's that same document?

4 A VOICE: Yes.

5 MR. HARDING: Thank you.

6 THE COURT: All right, 25961.

7 MR. HARDING: 25961, correct, Your Honor. It says  
8 "Criteria Matrix" up top. This is also redacted. Again, we're  
9 relying significantly on the redacted documents because we have  
10 more information on those.

11 I would like to point out to Your Honor --

12 THE COURT: Well, this -- the Court had previously  
13 looked at this one as well, and the only thing the Court found  
14 that could possibly fall under deliberative process privilege,  
15 at least on page -- this is just the redactions, or is this the  
16 entire document?

17 MR. NORWAY: It's the entire document, Your Honor.

18 THE COURT: Because page 1, the Court sees almost  
19 nothing. Maybe the middle category, Rationale.

20 MR. NORWAY: So, Your Honor, the -- to put it into  
21 context, the privilege log description is that it is a redacted  
22 proposed course of action from a working group assessing and  
23 recommending --

24 THE COURT: Well, if it's redacted, that would  
25 suggest to the Court that the redacted portion the government

1 found falls under deliberative process privilege, but you just  
2 noted the entire document. The first page of this document is  
3 not redacted, so why do we have the entire document that we're  
4 looking to say falls under deliberative process privilege?

5 MR. NORWAY: And what document are you looking at,  
6 Your Honor?

7 THE COURT: The one he's -- 25961.

8 MR. HARDING: Maybe I cited the incorrect document.

9 THE COURT: The first page says -- both pages --  
10 well, the first -- yes, that's Criteria Matrix.

11 MR. NORWAY: So, Your Honor, I think there's a little  
12 misunderstanding for these redacted documents, we have provided  
13 two copies, so we've provided the redacted copy that opposing  
14 counsel has, and then we've provided unredacted copy. So when  
15 you're --

16 THE COURT: Right. And when I asked are you talking  
17 about the entire document falls under the privilege or -- then  
18 you started saying: No, we're talking about -- we're looking  
19 now at the redacted part.

20 Well, if you're looking -- if you redacted it, that  
21 means or suggests to the Court that the only part you find  
22 falls under the privilege is the part you redacted.

23 MR. NORWAY: Correct, Your Honor.

24 THE COURT: But you said, you answered -- when I said  
25 the entire document, you said yes.

1 MR. NORWAY: I misunderstood you, Your Honor.

2 THE COURT: Okay.

3 MR. HARDING: We do think, Your Honor, that that  
4 fourth column, the "Rationale, (Can this be supported  
5 Medically)," again goes to the heart of this case. This case  
6 is about whether or not individuals with HIV can deploy outside  
7 the United States.

8 THE COURT: Do we not notice that the Court is  
9 flipping through --

10 MR. HARDING: Oh, I'm sorry.

11 THE COURT: -- trying to find stuff?

12 MR. HARDING: I'm sorry, Your Honor.

13 THE COURT: Because while you're discussing while I'm  
14 trying to find, you're probably not getting my entire  
15 attention.

16 MR. HARDING: That's my, my fault, and I apologize.  
17 Let me know when you're ready.

18 THE COURT: Right. And I just made a comment that  
19 the only thing that possibly could fall under the privilege  
20 would be the middle section that starts "Rationale." The far  
21 right corner says "Current Regulation," and all it does is  
22 discuss what the current public regulation says.

23 How does that fall under the deliberative process  
24 privilege unless by "Current Regulation," they mean current  
25 draft regulation?

1 MR. NORWAY: I think it may be, Your Honor, a summary  
2 or an opinion of the, of the particular officer of the --

3 THE COURT: Not opinion. It's -- all the other  
4 one -- if this is a current regulation, you can't even meet  
5 your own definition of pre-decisional deliberative because if  
6 this talks about the current regulation, it's post-decisional  
7 because it's enacted as a current regulation.

8 MR. NORWAY: This is, this is a pre-decision  
9 document, Your Honor. The, the, the --

10 THE COURT: No. A pre-decision document that  
11 discusses a post-decision regulation?

12 MR. NORWAY: A revision of the current regulation.  
13 It says, "an ongoing revision process."

14 THE COURT: Do you read the first current regulation  
15 in the right-hand column, the first entry -- you don't have to  
16 read it for me because I have it in front of me -- that doesn't  
17 talk about any revisions. That just says what the, what the  
18 instruction does and doesn't do.

19 MR. NORWAY: Correct, Your Honor.

20 THE COURT: It doesn't say what the instruction  
21 should or shouldn't do and why it should or shouldn't. That  
22 would be deliberative process. This says what the instruction  
23 does and doesn't do. Either that -- that's a fact. Facts do  
24 not fall under deliberative process.

25 MR. NORWAY: Yes, Your Honor.

1 THE COURT: Once again, overly broad.

2 MR. HARDING: Your Honor, we, we believe even if the  
3 column "Rationale" did fall under the deliberative process  
4 privilege, that the exception or waiver would apply in this  
5 instance because again, whether or not -- or the reasons behind  
6 whether an individual with HIV can deploy goes to the heart of  
7 this case.

8 THE COURT: No, this falls under the same thing the  
9 other one does. It talks about medical, essentially the  
10 current state of medical evidence, and our opinion in regards  
11 to essentially. Is that medical basically almost, if you read  
12 between the lines, suggests whether or not the person  
13 commenting believes that the current state of medical evidence  
14 supports their opinion. That goes to the heart of the intent.

15 MR. HARDING: Thank you, Your Honor. I think we have  
16 the clarification that we need, unless my cocounsel has  
17 anything else.

18 THE COURT: I'm just trying to get the government to  
19 understand. If your defense is we can legally and rationally  
20 support our, our position because our position is that we  
21 enacted this instruction or statute or regulation or whatever  
22 it was based on our belief that it would serve an important,  
23 legitimate, or compelling government interest, and this is that  
24 important, compelling, or legitimate government interest, and  
25 because of that, we believe it's necessary to enact this to

1 support that decision as well as the service that our military  
2 personnel must do, either OCONUS or overseas, that's the way  
3 you're defending this case.

4 Anything that would suggest that their decision or  
5 their statement saying this is the legitimate, important, or  
6 government -- compelling government interest and this is why we  
7 believe it is, anything that suggests that they enacted the  
8 statute or regulation or instruction for any reason other than  
9 what they said it was is relevant.

10 MR. NORWAY: So, Your Honor, what I, what I  
11 understand you to be saying is that you are inclined to grant  
12 their motion to compel all of these documents based on that  
13 rationale, and that is, is that because the government's intent  
14 is at issue, the deliberative process --

15 THE COURT: I don't know. I didn't go through all of  
16 the documents.

17 MR. NORWAY: Right, but the reasoning that you've  
18 just given, Your Honor, really --

19 THE COURT: But the reasoning because this document  
20 could suggest an argument that your stated reason may not be  
21 the reason, all of these documents may not do that.

22 MR. NORWAY: But I think your reasoning would apply  
23 to all of those documents. That's why I'm trying --

24 THE COURT: No, they wouldn't. I just said it  
25 applies to this because without having reviewed the other

1 documents, how do I -- no, because this seems to fall to the  
2 intent, which this specific document falls under the waiver  
3 portion because you have placed your intent at issue.

4           The previous documents except that last one that we  
5 talked about, the four documents I discussed before then did  
6 not fall under the waiver portion. It falls under this Court's  
7 decision that the deliberative process privilege simply didn't  
8 apply to that information. Those are two separate decisions  
9 made by this Court.

10           MR. NORWAY: Okay, Your Honor. And specifically when  
11 it comes to the Army documents, that rationale, the Army  
12 documents are very well documented. They have very good  
13 descriptions in their, in their policy descriptions, and there  
14 were very -- there were a limited number of them, and I think I  
15 can represent to you that your rationale here today would  
16 require us to produce all of those documents.

17           THE COURT: Well, if that's your conclusion based on  
18 my representations, so be it.

19           MR. NORWAY: Okay. Thank you.

20           THE COURT: The Court has given you the ability to  
21 sit down with counsel to discuss it. If you prefer not to take  
22 on that task based on what you believe the Court has concluded  
23 here today, that's a legal strategy that you will undertake or  
24 not. The Court does not get into counsel's legal strategies.

25           MR. NORWAY: Thank you, Your Honor.

1 THE COURT: Anything further?

2 MR. HARDING: Nothing further, Your Honor. Thank  
3 you.

4 THE COURT: Government?

5 MR. NORWAY: Nothing further, Your Honor.

6 THE COURT: So what are the parties expecting? You  
7 haven't done a final review. The Court obviously hasn't  
8 concluded that the motion is granted in toto. On the  
9 discussions here today, it would be difficult to point -- to  
10 put out an order that says granted in part and denied in part,  
11 which normally the Court does based -- saying hope that counsel  
12 took copious notes, but we haven't discussed everything in the  
13 book, so if you took copious notes, you could not have taken  
14 them regarding certain things we haven't discussed, so you  
15 would not be equipped to determine whether -- what "granted in  
16 part and denied in part" actually meant. You wouldn't know  
17 which part was granted and which part was denied.

18 MR. SOMMER: Your Honor, Andrew Sommer for the  
19 plaintiffs. If I may address that, would Your Honor be  
20 inclined to issue an order saying granted in part as to the  
21 documents that we discussed today and held in abeyance in part  
22 to allow the parties to give you a status update as to where  
23 they are perhaps in a week from today?

24 MR. NORWAY: Your Honor, the, the problem I have with  
25 that is that we will then be piecemealing the particular

1 documents, and I do think that there are some documents that  
2 are going to be swept up with that, and we will have to --

3 THE COURT: What does that mean, "swept up with  
4 that"?

5 MR. NORWAY: So, so like I indicated with the Army  
6 documents and the rationale that you used for the two Army  
7 documents that we discussed here today, I believe that if --  
8 what Mr. Sommer is requesting, that would be unclear whether or  
9 not those Army documents that we -- that we did not review  
10 today would be swept up with an, an order granting in part.

11 THE COURT: So would an order saying granted in part  
12 as to documents discussed in the oral proceedings and all the  
13 documents that the parties conclude in a good faith meet and  
14 confer falls under the same subject matter discussed by the  
15 Court?

16 MR. NORWAY: That would be fine, Your Honor.

17 MR. SOMMER: That's acceptable to us.

18 THE COURT: And held in abeyance as to others.

19 MR. NORWAY: Yes, Your Honor.

20 MR. SOMMER: Yes, Your Honor.

21 THE COURT: Until next Friday, when the parties are  
22 to submit a report.

23 What's the status of this case?

24 MR. NORWAY: In, in order to preserve our -- okay.

25 MR. BARGHAAN: Your Honor, Dennis Barghaan. I just

1 want to -- I want to make clear something so that we don't get  
2 ourselves into a position where we have to, if the government  
3 seeks the ability to do so, take objections on three documents  
4 to Judge Brinkema and then have to wait in abeyance, like  
5 Mr. Sommer says, about others.

6           Would Your Honor -- the order that you issue granting  
7 in part as to the documents that are discussed today, would  
8 this Court please place a stay on the requirement to produce  
9 those documents until after the good faith meet and confer that  
10 we are supposed to have such that we can if --

11           THE COURT: They're not -- that doesn't make any  
12 sense. Then I'd just hold the whole thing in abeyance. Why  
13 would I put out any order?

14           MR. BARGHAAN: Well, if that's the case, if that is  
15 the better approach, so that we're not piecemealing potential  
16 objections to Judge Brinkema from this Court's conclusions  
17 about the breadth of the deliberative process privilege, I  
18 think that's better for not only the parties in the case but  
19 for, you know, judicial economy, and not only this Court but  
20 Judge Brinkema as well.

21           THE COURT: Yes, the Court will then not -- the Court  
22 will put out an order saying it's held in abeyance. The  
23 parties will submit a status report, as the Court ordered  
24 before, no later than close of business this upcoming Wednesday  
25 the 27th.

1 MR. SOMMER: Your Honor, to address your question  
2 about what the status of this case is, we have two of these  
3 cases proceeding in parallel on an agreed-to discovery track,  
4 this, this Harrison case and a case involving Messrs. Roe and  
5 Voe. Those are set to close discovery March 15.

6 THE COURT: Has -- does Judge Brinkema have that  
7 case, too?

8 MR. SOMMER: She does, Your Honor.

9 THE COURT: Has there been something ruled on in that  
10 case --

11 MR. SOMMER: There was an injunction --

12 THE COURT: -- that the parties are, someone is  
13 appealing?

14 MR. SOMMER: I don't know about the status of any  
15 appeal. As of this morning, I was unaware of one, but the  
16 judge -- Judge Brinkema granted a preliminary injunction  
17 against the Air Force from separating people living with HIV  
18 solely due to their non-deployable status last week.

19 THE COURT: I think that that's what I'm aware of.  
20 It's my understanding -- has the government not filed -- it was  
21 suggested, maybe I misheard her, that maybe parties haven't but  
22 maybe they suggested that that was -- the government suggested  
23 that that would be forthcoming to Judge Brinkema, because she  
24 kind of suggested that, something about the possibility of an  
25 appeal.

1 MR. NORWAY: Your Honor, the time limit for an appeal  
2 from PI hasn't been reached yet, and I can't make a  
3 representation here today whether the government will appeal  
4 the PI in that case. The status of the case, as Mr. Sommer has  
5 indicated, fact discovery closes March 15, which is followed by  
6 a period of expert discovery, and I believe we have our  
7 pretrial status conference in May.

8 THE COURT: Because that case would have been  
9 referred to me for discovery as well if it has the same  
10 district judge.

11 MR. NORWAY: Yes, Your Honor. The discovery in those  
12 cases are consolidated. We're, we're, we're using the same --  
13 a lot of the same witnesses are in both cases, so we are --

14 THE COURT: What, for that case and this case?

15 MR. NORWAY: Correct, Your Honor.

16 THE COURT: Well, are these discovery disputes in  
17 that case if the discovery has been consolidated? I don't  
18 recall hearing from you in regards to that case.

19 MR. SOMMER: Your Honor, because the Roe and Voe case  
20 was filed in January, the parties negotiated in early January a  
21 consolidated discovery plan. Discovery in Roe and Voe isn't  
22 yet ripe for any adjudication here. Many of Your Honor's  
23 rulings in the Harrison case, we believe, are going to be  
24 applicable and certainly provide a lot of guidance as to the  
25 discovery that will take place with respect to the Air Force.

1           The Department of Defense has already provided  
2 discovery and made it available.

3           THE COURT: Is there, is there anything -- did Judge  
4 Brinkema put out an order or a memorandum opinion concerning  
5 the preliminary injunction in the other case?

6           MR. SOMMER: There was an order and a memorandum  
7 opinion, Your Honor.

8           THE COURT: Is there anything that the parties  
9 believe in that memorandum opinion that would impact my  
10 decision concerning this discovery dispute?

11          MR. SOMMER: I, I don't believe so, Your Honor.

12          MR. NORWAY: Not, not that I can speak of today, Your  
13 Honor.

14          THE COURT: All right. All right. Well, once again,  
15 the Court will hold this matter in abeyance and say the parties  
16 are to submit a joint status report close of business Wednesday  
17 the 27th. The Court will rule upon -- and I don't think we  
18 need any further discussion. Do the parties?

19          MR. SOMMER: I hope not, Your Honor.

20          MR. NORWAY: Thank you, Your Honor.

21          THE COURT: Well, let's just say the Court intends to  
22 rule on the papers when you submit the joint status report. If  
23 the parties believe that further -- they desire further oral  
24 argument, then you will note so in this status report.

25          MR. SOMMER: Thank you, Your Honor.

1 MR. NORWAY: Thank you, Your Honor.

2 THE COURT: And I started with what the status of  
3 this case was. I don't think I got the answer.

4 MR. SOMMER: We're scheduled to close discovery  
5 March 15. There will be a period of expert discovery following  
6 that, and we have our final pretrial conference in May.

7 THE COURT: In May?

8 MR. SOMMER: May 10, I believe.

9 MR. NORWAY: I believe that's correct, Your Honor.

10 THE COURT: Is that because of this case or the other  
11 case and the consolidation?

12 MR. SOMMER: It's because of the consolidation. The  
13 track for the Harrison case was extended to allow discovery to  
14 proceed in parallel in both cases.

15 THE COURT: Okay. All right, thank you.

16 MR. NORWAY: Thank you, Your Honor.

17 THE COURT: There appearing nothing further, this  
18 Court stands adjourned.

19 (Which were all the proceedings  
20 had at this time.)

21 CERTIFICATE OF THE TRANSCRIBER

22 I certify that the foregoing is a correct transcript from  
23 the official electronic sound recording of the proceedings in  
24 the above-entitled matter.

25 \_\_\_\_\_  
/s/  
Anneliese J. Thomson