IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, Plaintiffs, v. MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*, Defendants.	Civil Action No. 17-cv-1597 (CKK)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

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INTRODUCTION

Plaintiffs' effort to compel production of thousands of documents from the Department of Defense and the Services should be rejected on all facets. Plaintiffs barely acknowledge the D.C. Circuit's January 4, 2019 judgment or concurring opinions. The issue of whether this Court must apply military deference in its review of the Mattis policy has been settled—it must. The D.C. Circuit held that this Court's review must "be 'appropriately deferential' in recognition of the fact that the Mattis [policy] concerned the composition and internal administration of the military." *Doe v. Shanahan*, 755 F. App'x 19, 24 (D.C. Cir. 2019) (per curiam) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981)). Properly applying the D.C. Circuit's judgment, as well as binding Supreme Court precedent pertaining to such appropriately deferential review of a military decision, Plaintiffs' motion fails.

First, Plaintiffs' request for "raw data, personnel files that include performance evaluations and assessments . . . and reports from the field," Pls.' Mot. to Compel ("Pls.' Mot.") 8, Dkt. 216, is an extremely inappropriate and intrusive request for tens of thousands of medical records from third-party service members that is disproportionate to the needs of the case, and clearly runs afoul of military deference principles. Neither Plaintiffs, Plaintiffs' experts, nor the Court are permitted to examine the underlying data and substitute their opinions for those of Defendants as to a more effective way to compose the fighting force. Defendants have provided their justification for the challenged policy, and those justifications either pass constitutional muster or they do not. Any opinions Plaintiffs have to offer after their own review of the "raw data" are "quite beside the point." *Doe v. Shanahan*, 917 F.3d 694 (D.C. Cir. 2019) (Williams, J., concurring in result).

Second, Plaintiffs' request for "all documents relating to the decision to delay implementation of the Carter accession policy and the pre-tweet review process," Pls.' Mot. at 10, likewise fails to acknowledge the D.C. Circuit's decision. Plaintiffs argue that these materials are necessary to determine whether then-Secretary Mattis' decision to delay the Carter accessions policy in June 2017

"was based on independent military judgment," and thus whether the Court should apply military deference. *Id.* But this is merely an expansion of the argument that the D.C. Circuit has already rejected. Again, the D.C. Circuit was clear: this Court must apply military deference. *See Doe*, 755 F. App'x at 24–25.

Third, Plaintiffs' argument that the deliberative process privilege does not apply as a matter of law relies on the misplaced assumption that military deference is a "defense" to be applied only upon a thorough examination of the quality of the military's deliberations. But, as the D.C. Circuit emphasized, military deference is a constitutionally mandated standard of review based on the subject matter of the challenged policy. *See id.* Here, because the subject matter involves the composition of the fighting force, deference is applied and no further inquiry into agency deliberations is warranted.

For these reasons, among others, both Judge Williams and Judge Wilkins wrote to address discovery going forward. Judge Williams explained in his concurring opinion that he would have precluded any further discovery and that "[a]ny further proceedings—including a highly intrusive examination of the President's mental processes—would [ ] be idle, or worse." *Doe*, 917 F.3d at 736 (Williams, J., concurring in result) (citations omitted). And while Judge Wilkins opined that there may still be some leeway for the district court to compel "military or executive officials to explain the operation and purpose of [a military] requirement[,]" *id.* at 705 (Wilkins, J., concurring), both concurring opinions rejected the type of "intrusions into executive decision making[,]" *id.* at 736 (Williams, J., concurring in result), that Plaintiffs contemplate with the present motion. *Compare id.* at 705 (Wilkins, J., concurring) (explaining that "[c]ompelling military or executive officials to explain the operation and purpose of [the policy] would not improperly intrude upon [the Executive Branch's] mental processes" because "[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on") *with id.* at 736–737 (Williams, J., concurring in result).

While Defendants agree with Judge Williams that "the record and the law require dismissal of plaintiffs' claims," *id.* at 77 (Williams, J., concurring in result), and therefore, any further discovery is inappropriate, under the approach of either Judge Williams or Judge Wilkins, Plaintiffs' motion fails. Here, Defendants have already provided documents setting forth the terms of and rationale for the Mattis Policy, plan to supplement those productions with further implementing guidance, and have offered to make available for deposition the Chair of the Panel of Experts, who can "explain the operation and purpose" of the Mattis policy. *Id.* at 705 (Wilkins, J., concurring). Accordingly, none of the discovery Plaintiffs seek to compel through the instant motion comes within the bounds of what the D.C. Circuit would permit. On that basis alone, Plaintiffs' motion should be denied.[1]

BACKGROUND

Plaintiffs filed this action on August 9, 2017, raising constitutional challenges to the President's statements on Twitter concerning military service by transgender individuals. Compl., Dkt. 1. Plaintiffs also filed a motion for a preliminary injunction, Dkt. 13, which the Court granted in part, Dkt. 60. Following the Court's entry of a preliminary injunction, Defendants sought a stay pending the forthcoming policy recommendation from the Panel of Experts for the Transgender Policy Review (the "Panel"),[2] convened by then-Secretary of Defense Mattis on September 14, 2017. Dkt. 62. The

[1] Although Plaintiffs have provided examples of several documents that they are seeking to compel, Plaintiffs have not made clear whether they are seeking to compel only these specific documents, or whether they are seeking to compel *all* of the documents on Defendants' five *Vaughn* Indices, which encompass over a thousand documents from DoD and the Services, as well as all of the documents on Defendants' clawback log, or a narrower subset of those documents. *See infra* pp. 30–31.

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

Court declined to stay the case, and the parties commenced discovery. Dkt. 63.

On December 15, 2017, Plaintiffs issued broad discovery requests specifically targeting Defendants' decision-making processes. Plaintiffs' requests primarily sought information and documents related to: (i) a decision by then-Secretary Mattis to defer the start of accessions by transgender individuals under the Carter policy; (ii) the President's statements on Twitter in July 2017; (iii) the 2017 Presidential Memorandum; and (iv) the Interim Guidance issued by then-Secretary Mattis in September 2017. *See, e.g.*, Exh. 1 (Pls.' First Set of Interrogs., Interrogatories 1–22, 25); Exh. 2 (Pls.' First Set of Reqs. for Prod. ("RFP"), RFP 1–9, 16–19, 22). Only two of Plaintiffs' discovery requests specifically sought information related to the Panel of Experts. *See* Exh. 2, RFPs 20, 21.

In response to Plaintiffs' discovery requests, Defendants objected to discovery requests and withheld documents protected by the deliberative process privilege (among others), but otherwise responded. *See, e.g.*, Defs.' Objs. to Pls.' First Set of Interrogs., Dkts. 86-4, 86-5, 91-4–91-8. Defendants conducted an extensive search and produced tens of thousands of non-privileged, responsive documents. Defendants also produced an administrative record in excess of 3,000 pages to Plaintiffs, which contains meeting minutes from the Panel, as well as the materials considered by the Panel before the formulation of its recommendation to the Secretary of Defense.

In addition to producing the administrative record, tens of thousands of responsive documents, and responding to written discovery, Defendants made witnesses available for depositions. Plaintiffs requested to depose officials in DoD and the armed forces who served on or supported the Panel. In particular, Plaintiffs requested that Defendants schedule the deposition of Anthony Kurta, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Under Secretary of Defense for Personnel and Readiness. Mr. Kurta served as chair of the Panel through late November 2017. *See* USDOE00032824, Dkt. 128-25. Plaintiffs also requested to depose Lernes Hebert, Principal Director, Military Personnel Policy, Office of the Under Secretary of Defense

for Personnel and Readiness. Defendants scheduled the depositions of Mr. Kurta and Mr. Hebert, but Plaintiffs chose not to depose them last spring and have not requested to reschedule those depositions. Plaintiffs did depose five Government officials, including Colonel Mary Krueger and Martha Soper, who served on working groups supporting the Panel. During these depositions, counsel for Defendants objected to questions calling for the disclosure of privileged information.

On March 23, 2018, while the parties were engaging in discovery, the Department of Defense announced its new policy pertaining to military service by transgender individuals ("the Mattis Plan") along with the Department's report and the administrative record supporting that policy. Defendants then moved to dissolve the Court's preliminary injunction. Dkt. 116.[3] The Court denied Defendants' motion to dissolve, finding, *inter alia*, that "the Mattis Implementation Plan effectively implements the policy directives that were already at issue when the Court's preliminary injunction was ordered[]" and therefore, its prior decision declining to apply military deference based on "the unusual factors associated with the issuance of the 2017 directives" extended to its review of the Mattis Plan. Memorandum and Opinion, Dkt 157 at 31-32. Defendants appealed to the D.C. Circuit, Dkt. 162.

Shortly after the Department issued its new policy, Plaintiffs filed their second amended complaint, Dkt. 106, challenging the constitutionality of what they continued to characterize as a "ban on military service by transgender individuals," Second Am. Compl. ¶ 1, Dkt. 106, as allegedly "announced in . . . tweets [by the President on July 26, 2017,] promulgated to the Department of Defense in [the Presidential] Memorandum" issued on August 25, 2017 and finalized in DoD's new policy dated February 22, 2018, *id.* ¶ 83; *see also id.* ¶¶ 37, 38, 74, 75, 79, 80, 85.

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[3] Also, on March 23, 2018, Defendants' moved for a protective order seeking to apply the discovery limitations of the Administrative Procedure Act. Dkt. 97. The Court denied Defendants' motion finding that because Plaintiffs assert constitutional claims the APA's limitations on discovery do not apply. Dkt. 114; *but see, e.g.*, *Bellion Spirits LLC v. United States*, 335 F. Supp. 3d 32, 44 (D.D.C. 2018); *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017).

On April 13, 2018, Plaintiffs sought a teleconference with the Court to resolve several discovery disputes. *See* Dkt. 113-1 at 3–5. Included in Plaintiffs' email to the Court was a request "to set a date certain for the completion of Defendants' production, preferably by early May [2018]." *Id.* at 5. The Court granted Plaintiffs' request and ordered Defendants to produce non-privileged documents to Plaintiffs by May 15, 2018. The Court noted that "[t]here are several substantive motions that are either pending or will be filed soon, the resolution of which may affect the scope of discovery[]" and therefore "[t]he Court will resolve the parties' disputes about privileges—if they are still relevant—after the Court resolves [the parties] substantive motions." Dkt. 113 at 1.

On April 20, 2018, Defendants filed a motion to dismiss the second amended complaint, or, in the alternative, for summary judgment. Dkt. 115. Plaintiffs filed a cross-motion for summary judgment, Dkt. 132; however, citing Federal Rule of Civil Procedure 56(d), Plaintiffs also asked the Court to defer ruling on the parties' motions "[i]f the Court determines that resolution of the parties' cross-motions for summary judgment turns on whether or not the process that resulted in the Mattis Plan and the Panel Report reflected independent military judgment." *Id.* at 18 n.5. The Court denied Defendants' motion to dismiss the second amended complaint, Order, Dkt. 156, and the Court denied both parties' motions for summary judgment based on a finding that "genuine disputes of material fact remain" because "[t]he parties dispute the facts related to the process used by Defendants to prepare the current proposed policy on transgender military service." Mem. Op. 9, Dkt. 160. Citing to the related case, *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018), *vacated and remanded by Karnoski v. Trump*, Nos. 18-35347, 18-72159, 2019 WL 2479442 (9th Cir. June 14, 2019), the Court found that such facts were material because they were necessary to determine if the deferential standard pertaining to judicial review of military decisions articulated in *Rostker* applied to the present case. *See* Mem. Op. 11–15, Dkt. 160.

Upon resolution of the dispositive motions, the Court directed the parties to "meet and confer

and file a Joint Status Report" that proposes a "protocol for the efficient resolution of the parties' outstanding discovery disputes." Minute Order, Aug. 27, 2018. The parties proposed a briefing schedule to resolve the remaining discovery disputes, Joint Status Report 1, Dkt. 167, the Court approved and entered that schedule, Minute Order, Sep. 10, 2018, and the parties submitted briefs in accordance with that schedule. Dkt. 169, 170, 171, 174, 175, 176, 180, 181, 182.

On January 4, 2019, the D.C. Circuit reversed the Court's denial of Defendants' motion to dissolve the preliminary injunction. *Doe*, 755 F. App'x at 19–25. The D.C. Circuit held that "the District Court made an erroneous finding that the Mattis Plan was not a new policy but rather an implementation of the policy directives enjoined in October 2017[,]" noting that the "government took substantial steps to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum." *Id.* at 23. The D.C. Circuit also concluded that this Court "made an erroneous finding that the Mattis Plan was the equivalent of a blanket ban on transgender service." *Id.* Finally, the D.C. Circuit held that "any review must be 'appropriately deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administration of the military." *Id.* at 25 (citing *Rostker*, 453 U.S. at 67 and *Goldman v. Weinberger*, 475 U.S. 503, 507–508 (1986)).

Subsequently, on January 22, 2019, the Supreme Court issued an Order staying the preliminary injunctions in two related cases—*Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017), and *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal. filed Sep. 5, 2017)— "pending disposition of the Government's appeal in the United States Court of Appeal for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Trump v. Karnoski*, No. 18A625 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019). The district court in the related case *Stone v. Trump*, No. 17-cv-2459 (D. Md.), subsequently stayed the preliminary injunction in that case. *Stone v. Trump*, No. 17-cv-2459 (D. Md.), Dkt. 249.

On January 30, 2019, "[b]ased on recent decisions by the D.C. Circuit and the Supreme Court"

this Court denied without prejudice all pending discovery motions. Order 2, Dkt 188. The Court then ordered the parties to meet and confer regarding the scope and breadth of discovery and instructed the parties to "particularly focus on how the scope and breadth of permissible discovery is affected by the D.C. Circuit's determination that the Mattis Plan is not a continuation of the 2017 Presidential Memorandum but is instead a new plan." *Id.*

On March 8, 2019, two judges from the D.C. Circuit issued separate opinions concurring with the Panel's January 4, 2019 judgment. Judge Williams explained that he would have precluded any further discovery in this case, noting that the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point." *Doe*, 917 F.3d at 736 (Williams, J., concurring in result) (quoting *Goldman*, 475 U.S. at 509). Judge Wilkins explained that he would have carefully limited discovery to inquiring "about how military policies operated or what interests they served." *Id.* at 706 (Wilkins, J., concurring).

Between February 1, 2019 and March 28, 2019 the parties met and conferred on multiple occasions in an attempt to resolve the remaining discovery disputes. On March 28, 2019, the parties submitted a joint status report outlining the progress they had made. Dkt. 200. As noted in the joint status report, in response to Plaintiffs' request and in an effort to narrow the remaining discovery disputes, Defendants offered (1) to produce supplemental data involving military personnel diagnosed with gender dysphoria that was used to provide testimony to the House Armed Services Subcommittee on Military Personnel in February 2019, (2) to waive the deliberative process privilege over recommendations from the Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017, (3) to waive the deliberative process privilege over the emails between then-Secretary Mattis and third parties, and (4) to waive the deliberative process privilege over the final versions of the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of

Defense. *Id.* at 4–5. On April 9, 2019, the Court held a telephone conference with the parties regarding the remaining discovery disputes. Dkt. 202. Following the telephone conference, the Court issued a Minute Order outlining the parties' agreements and the remaining disputes. Minute Order, Apr. 9, 2019. The Court ordered the parties to meet and confer by April 16, 2019 and propose a briefing schedule for the remaining discovery disputes. *Id.*

On April 16, 2019, the parties jointly proposed that Defendants would produce the documents that Defendants had offered to produce, *see* Dkt. 203, specifically Defendants would produce a "*Vaughn* Index" to Plaintiffs encompassing documents considered or generated by the Panel of Experts as well as communications to or from members of the Panel regarding their work, drafts of the Panel's report communicated to any third parties and communications that followed the submission of the Panel's report but predated the publication of the implementation plan, and that Plaintiffs would file a motion to compel documents still in dispute, to include any remaining dispute as to Defendants' clawback of certain documents. *See id;* Dkt. 200 at 4–6. On April 16, 2019, the Court entered the parties' proposed schedule. Minute Order, Apr. 16. 2019.

Defendants complied with the deadlines set in the Court's April 16, 2019 Minute Order and produced the aforementioned documents and *Vaughn* indices. On June 4, 2019, Plaintiffs filed the instant motion to compel, seeking documents "showing the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in Secretary Mattis' report," "documents that relate to the decision to delay the date of implementation of the accessions component of the Carter Policy to January 1, 2018," and documents withheld pursuant to the deliberative process privilege. *See* Pls.' Mot. 1.

On June 14, 2019, while the parties were briefing the instant dispute, the Ninth Circuit ruled on a similar discovery dispute involving the deliberative process privilege in the related *Karnoski* case. *See Karnoski v. Trump*, Nos. 18-35347, 18-72159, 2019 WL 2479442 (9th Cir. June 14, 2019). The Ninth

Circuit granted Defendants' petition for a writ of mandamus and vacated the district court's discovery order "so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Id.* at *20. The Ninth Circuit cautioned that the "deliberative process privilege[,] although not absolute, require[s] careful consideration by the judiciary." *Id.* The Ninth Circuit instructed the district court to "consider classes of documents separately when appropriate[,]" explaining that conducting a single deliberative process privilege analysis for multiple categories of documents was improper. *Id.* at *19.

The Ninth Circuit also concluded that the district court erred in striking Defendants' motion to dissolve the preliminary injunction and explained that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Id.* Even though the Ninth Circuit incorrectly concluded that "the 2018 Policy discriminates on the basis of transgender status on its face," *id.* at *14 n.18, the Ninth Circuit unequivocally stated that "the district court *must* apply appropriate military deference to its evaluation of the 2018 Policy," *id.* at *15 (emphasis added).

ARGUMENT

"Plaintiff as the moving party bears an initial burden of informing the Court which discovery requests are the subject of the motion to compel, which of the responding party's responses are disputed, why the responding party's responses are deficient, why the responding party's objections, if any, are not justified, and why the documents sought are relevant to the claims at issue in the action." *Ioane v. Spjute*, 2015 WL 1874789, at *2 (E.D. Cal. Apr. 23, 2015); *see also United States v. All Assets Held at Bank Julius Baer & Co.*, 202 F. Supp. 3d 1, 6 (D.D.C. 2016) ("The party seeking discovery must first demonstrate that the information sought is within the scope of discoverable information under Rule 26."). Plaintiffs have not met their burden, and thus their motion to compel should be denied.

I. The D.C. Circuit's Judgment and Concurring Opinions Indicate that the Discovery Plaintiffs Seek Is Inappropriate.

As an initial matter, the D.C. Circuit's judgment and concurring opinions call into question this Court's prior conclusions concerning the scope of discovery in this case and indicate that the discovery Plaintiffs seek is inappropriate.

Prior to the D.C. Circuit's ruling, this Court denied Defendants' motion to dissolve the preliminary injunction and also denied the parties' cross-motions for summary judgment. Dkts. 156, 157, 159, 160. The Court concluded that "summary judgment is not appropriate at this stage" because "the facts about the process leading up to the development of the [new policy] are both material and in dispute." Mem. Op. 13, Dkt. 160. Citing to a now-vacated decision in the related case, *Karnoski v. Trump*, the Court explained that "the constitutionality of the challenged policy 'necessarily turns on facts related to Defendants' deliberative process.'" Mem. Op. 13, Dkt. 160 (quoting *Karnoski*, 328 F. Supp. 3d at 1161–62, *vacated and remanded by Karnoski*, 2019 WL 2479442). The Court further opined that the facts about the process leading up to the development of the new policy "go to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." *Id.*

In reversing this Court's denial of Defendants' motion to dissolve the preliminary injunction, the D.C. Circuit emphasized that in a constitutional challenge "to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces" "courts must give great deference to the professional judgment of military authorities." *Doe*, 755 F. App'x at 24 (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507); *see also Karnoski*, 2019 WL 2479442 at *20 (concluding that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision"). The D.C. Circuit reaffirmed that "[c]ourts 'must be particularly careful not to substitute [their] own judgment of what is desirable . . . or [their] own evaluation of the evidence'" for that of the executive-branch decision maker "because [i]t is difficult to conceive of an area of governmental

activity in which the courts have less competence." *Doe*, 755 F. App'x at 24 (quoting *Rostker*, 453 U.S. at 68); *see also id.* at 24–25 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2421–22, (2018) (upholding an executive order in part because it "reflect[ed] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," and explaining that "we of course do not defer to the Government's reading of the" Constitution, but "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving sensitive and weighty interests of national security and foreign affairs" (internal quotation marks omitted))); *Karnoski*, 2019 WL 2479442, at *19 n.22 ("We note that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the Court held that 'the 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions'—was sufficient to allow for judicial review." (brackets omitted)).

Applying these principles to this case, the D.C. Circuit stated that "as in *Rostker* and *Goldman*, any review must be 'appropriately deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administrative of the military." *Doe*, 755 F. App'x at 25. The D.C. Circuit "acknowledge[d] that the military has substantial arguments for why the Mattis Plan complies with the equal protection principles of the Fifth Amendment" and "recognize[d] that the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials.'" *Id.* (quoting *Goldman*, 475 U.S. at 509). Accordingly, the D.C. Circuit made clear that this Court *must* apply military deference in reviewing the new policy and that discovery about the process behind the development of the new policy is irrelevant to determining whether military deference applies.

Moreover, as noted above, Judge Williams would have precluded any further discovery in this case. *Doe*, 917 F.3d at 736 (Williams, J., concurring in result). As Judge Williams explained, the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point." *Id.* (quoting *Goldman*, 475 U.S. at 509). Because the military deference "standard

of review reflects [ ] separation of powers principles," "it is 'quite wrong' and 'palpably exceed[s]' [the court's] authority to 'undertak[e] an independent evaluation of [ ] evidence, rather than adopting an appropriately deferential examination of the *political branches*' 'evaluation of that evidence.'" *Id.* at 719–20 (quoting *Rostker*, 453 U.S. at 81, 82–83) (alterations in original); *see also id.* (citing *Hawaii*, 138 S. Ct. at 2421–22 (declining in matters of national security to "substitute" the Court's own "predictive judgments," or its own "evaluation of the underlying facts," for those of the [decisionmaker])); *Karnoski*, 2019 WL 2479442 at *14 n.18, *15 (unequivocally stating that "the district court must apply appropriate military deference to its evaluation of the 2018 Policy," even after incorrectly concluding that "the 2018 Policy discriminates on the basis of transgender status on its face").

Additionally, Judge Williams explained that this Court's contemplation of "a highly intrusive examination of the mental processes of the civilian and military leadership of a coordinate branch of government" reflects "wholly mistaken assumptions about the nature of constitutional review of military personnel policy." *Doe*, 917 F.3d at 707 (Williams, J., concurring in result). Squarely rejecting "plaintiffs' contention, accepted by the district court, that '[d]eference to military decisionmaking . . . depends on the actual exercise of independent military judgment[,]'" *id.* at 729, Judge Williams emphasized that "'[t]he "Constitution itself requires"' deference to the military choices of the political branches[,]" *id.* at 730 (citing *Rostker*, 453 U.S. at 67; U.S. Const. art. II, § 1, cl. 1).

For these reasons, "facts—about the process leading up to the development of the Mattis [policy]—are irrelevant to the judicial analysis of military personnel policy dictated by Supreme Court authority," *id.* at 736 (citations omitted), and Plaintiffs' argument that military policies are suspect unless they demonstrate independence "verges on weird," *id.* at 730. "Where, as here, plaintiffs cannot save their claims with *any* further discovery because the law so clearly forecloses their demands—both on the current record and with any additions that can plausibly be imagined—the court should not bless (or invite) a futile fishing expedition into the executive's decisionmaking—especially of the

intrusive sort contemplated by the district court." *Id.* at 737. This is especially true because "'judicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of [a coordinate] branch[ ] of government.'" *Id.* (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 n.18, (1977); *see also id.* at 736 (explaining that "[a]ny further proceedings—including a highly intrusive examination of the President's mental processes—would thus be idle, or worse" (citations omitted)).

Judge Wilkins disagreed with his colleague's categorical bar on further discovery but explained that any discovery should be carefully limited to inquiring "about how military policies operated or what interests they served." *Id.* at 706 (Wilkins, J., concurring). Judge Wilkins explained that "[e]ven in a facial challenge, discovery may be necessary where the impact of the regulation is unclear and disputed." *Id.* (citing *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 667–68, (1994)). In his view, "[c]ompelling military or executive officials to explain the operation and purpose of [parts of the new policy] would not improperly intrude upon [the Executive Branch's] mental processes," because "'[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on.'" *Id.* at 705 (quoting 3 Weinstein's Federal Evidence § 509.23 (2019)). The type of "intrusions into executive decision making" that Plaintiffs seek has thus been squarely rejected by both judges, and there is no basis now to demand such intrusive discovery. *Compare id.* at 736–37 (Williams, J. concurring in result) *with id.* at 705–06 (Wilkins, J. concurring).

In keeping with these principles, Defendants have produced an approximately 3,000-page administrative record providing the military justification for the policy at issue. Defendants have also produced tens of thousands of documents, Plaintiffs have deposed several military officials, and Defendants have made available for deposition the Chair of the Panel of Experts to explain the operation of the policy and the interests it serves. Further, in an effort to narrow discovery disputes, Defendants agreed to waive the deliberative process privilege over certain documents to accommodate

Plaintiffs' requests. *See supra* pp. 8–9. If Plaintiffs continue to have questions about the "operation and purpose" of the policy notwithstanding DoD's thorough report and the copious record explaining the operation and purpose of the Mattis policy, *Doe*, 917 F.3d at 705 (Wilkins, J. concurring), Defendants stand ready to explain it—including in sworn testimony. But the intrusive discovery into the agency's deliberations that Plaintiffs seek is neither necessary nor appropriate in this case.

II. Plaintiffs Have Not Met Their Burden to Compel Additional Documents.

A. Plaintiffs Cannot Compel Raw Data, Non-Party Medical Records, or Personnel Files.

Plaintiffs' motion first seeks to compel "documents showing the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in Secretary Mattis' report and other prepared documents, including summary presentations provided to the review panel and the House Armed Services Committee, as well as any other data relating to the readiness and ongoing service of active duty service members diagnosed with gender dysphoria[.]" Pls.' Mot. at 1, 8–10. Plaintiffs' motion to compel these documents should be denied.

As a procedural matter, Plaintiffs have not served a proper discovery request for such documents, and thus Defendants have not yet had the opportunity to respond with formal objections in accordance with the Federal Rules of Civil Procedure.[4] *See* Fed. R. Civ. P. 34(b). To date, Plaintiffs

[4] Plaintiffs' motion to compel these documents is also premature because Plaintiffs did not meet and confer with Defendants after reviewing Defendants' production, as was contemplated by the parties and the Court. *See* Minute Order of April 9, 2019 ("First, Defendant has agreed to produce data generated after the development of the Mattis policy concerning service members who had been diagnosed with gender dysphoria. And, Plaintiffs have agreed to review the supplemental data prior to determining if a dispute remains."). This alone is enough to deny Plaintiffs' motion to compel. *See All Assets Held at Bank Julius Baer & Co., Ltd.*, 202 F. Supp. 3d 6 ("Failure to fulfill the [meet-and-confer] requirements of Local Rule 7(m) is grounds for denial of a discovery motion."). Moreover, a proper meet and confer would have narrowed the issues before the Court, as Defendants would have informed Plaintiffs that Defendants have already produced some of the documents Plaintiffs are seeking to compel. *See* Exh. 3, Declaration of Colonel Andreas Thum, USA ("Thum Decl."), ¶ 14; Exh. 4, Declaration of Martha Soper ("Soper Decl."), ¶ 2 n.1 (noting that some of the data Plaintiffs seek to compel was previously produced to Plaintiffs).

have only served one set of interrogatories and one set of requests for production, which were both served on December 15, 2017. *See* Exh. 1, Pls.' First Set of Interrogs.; Exh. 2, Pls.' First Set of RFPs). And only two of Plaintiffs' discovery requests specifically sought information related to the Panel of Experts. *See* Exh. 2, RFP 20 (seeking "documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the 'panel of experts' or among the 'panel of experts' concerning service, inclusion, or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes"), RFP 21 (seeking "documents provided to, considered by, or generated by the 'panel of experts' referenced in the Interim Guidance"). Notably, neither of these requests encompasses the raw data, personnel files, and medical records that Plaintiffs now seek to compel.[5]

But even assuming, *arguendo*, that Plaintiffs' motion to compel such documents is procedurally proper, it should be denied. Plaintiffs' request seeks the disclosure of thousands of medical records and personnel files of non-party service members that are protected from disclosure by federal law. *See, e.g.,* Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d *et seq*., and the Privacy Act, 5 U.S.C. § 552a, *et seq*. This includes disclosure of over a thousand medical records of non-party service members diagnosed with gender dysphoria. *See* Pls.' Mot. 9. Plaintiffs themselves recognized the importance of the privacy issues at stake in this litigation in seeking to

[5] Plaintiffs' assertion that the Court directed Defendants to produce "raw data, personnel files that include performance evaluations and assessments . . . and reports from the field" as well as "updated data regarding the readiness and performance of active duty service members diagnosed with gender dysphoria" in its Ap. 9, 2019 Minute Order is incorrect. *See* Pls.' Mot. at 8. As explained in the March 28, 2019 Joint Status Report, Defendants agreed to produce "supplemental data that was used to provide testimony to the House Armed Services Subcommittee on Military Personnel in February 2019." Dkt. 200 at 5. Defendants produced this supplemental data but declined to "generate new documents with updated versions of the data considered by the Panel of Experts." *Id.* Plaintiffs never indicated that they were also seeking medical records, service records, evaluations, and reports from the field pertaining to individual service members, and Defendants would have objected in any event.

proceed under pseudonyms, Dkt. 2, and these privacy considerations should also be taken into account for much more intrusive materials from non-party service members. Although an invasion of privacy can be mitigated by providing the material under a protective order and redacting the names of the service members, there is still a substantial risk of an unintentional disclosure of private medical information. Exh. 5, Declaration of Terry Adirim, M.D., M.P.H., ("Adirim Decl."), ¶ 11. DoD itself chose not to incur this risk by using extracted data from its Military Health System Data Depository ("MDR"), rather than the underlying service member medical records, when conducting its own evaluation. *Id.*

Further, the discovery Plaintiffs seek runs afoul of military deference principles and is disproportionate to the needs of the case and thus outside the proper scope of discovery under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1). In particular, the documents Plaintiffs seek are irrelevant and would be unduly burdensome for Defendants to collect and produce. Plaintiffs have not explained why these medical records, service records, evaluations, and field reports pertaining to individual service members are relevant to their facial challenge to the Mattis policy. In their motion, Plaintiffs describe in detail what they believe is missing from Defendants' production but only make cursory statements as to why such highly intrusive discovery is relevant to their case. *See, e.g.,* Pls.' Mot. 9–10 ("Without the underlying data and information on which the government relies, Plaintiffs are restricted in being able to assess Defendants' asserted justifications for the Mattis [policy].").

Indeed, service member medical and personnel records would not assist the Court in analyzing the official objectives of the Mattis policy, *see Hawaii*, 138 S. Ct. at 2420–23, nor would these documents shed light on the "operation and purpose" of the policy. *See Doe*, 917 F.3d at 705–06 (Wilkins, J., concurring in result) (explaining that the only additional discovery that should be permitted should be testimony "about how the policy operates and what military purposes it serves").

In fact, Plaintiffs appear to seek such discovery for reasons that both Judge Williams and Judge Wilkins of the D.C. Circuit agreed were in conflict with Supreme Court precedent—to have their own experts attempt to recreate the study of military experts and offer a contradicting viewpoint. *Id.* at 706 ("[T]he Court noted that it was improper for lower courts to consider plaintiff expert testimony that contradicted the military experts about whether the policies at issue were justified under the circumstances." (citing *Rostker*, 453 U.S. at 80–81; *Goldman*, 475 U.S. at 509–10); *id.* at 728 (Williams, J., concurring in result) ("But when the Supreme Court instructed that we in the judiciary 'must be particularly careful not to substitute . . . our own evaluation of evidence for a reasonable evaluation by' the political branches, it meant it." (quoting *Rostker*, 453 U.S. at 68)).

Moreover, producing such material would be unduly burdensome and time consuming for the Department of Defense. To create the summaries, charts, and documents presented to the Panel, DoD ran searches and extracted data from its MDR. Adirim Decl. ¶ 5. This system is a centralized data repository that receives data from more than 260 healthcare facilities and from the TRICARE Purchase Care program. *Id.* The MDR does not contain the actual medical records of service members but can be used to extract certain data points from medical records as was done in this instance for the Panel. *Id.* at ¶¶ 6-10. To meet Plaintiffs' demands for the actual medical records of service members, documents DoD did not even collect because it would have constituted an undue burden and unwarranted cost, particularly given that the data is already collected in its MDR, "DoD would have to hire a third-party contractor at a cost of likely hundreds of thousands of dollars" and the process could take months or even a year to complete. *Id.* at ¶ 12. And because Plaintiffs' review of medical records, service records, evaluations, and field reports cannot even be considered by the Court because it is "quite beside the point," *Doe*, 917 F.3d at 728 (Williams, J., concurring in result) (quoting *Goldman*, 475 U.S. at 509), Plaintiffs' request for the production of such material is grossly overbroad and disproportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

B. Plaintiffs Cannot Compel Deliberations Regarding the June 2017 Accessions Delay.

Next, Plaintiffs seek deliberative documents related to then-Secretary Mattis' decision to delay implementation of the Carter Accessions Policy in June 2017. *See* Pls.' Mot. at 10–12. Plaintiffs argue that Defendants' assertion of the deliberative process privilege is overcome because they need this information to determine if that process "was based on independent military judgment." *Id* at 10.[6] The D.C. Circuit rejected this argument when it was advanced as to the Mattis policy, and its expansion to the earlier Carter accessions delay fares no better. As the D.C. Circuit emphasized, in constitutional challenges "to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces" "courts must give great deference to the professional judgment of military authorities." *Doe*, 755 F. App'x at 24 (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507). Accordingly, military deference applies to the Carter accessions delay just as it applies to the Mattis policy, and discovery into the deliberations behind the Carter accessions delay is irrelevant. *See supra* pp. 11–15.

Additionally, Defendants have already provided Plaintiffs with documents related to the Carter accessions delay. *See supra* pp. 8–9 (explaining that in response to Plaintiffs' request and in an effort to narrow discovery disputes, Defendants agreed to provide Plaintiff with the recommendations from the Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy); Exh. 6, Decl. of Robert Easton ("Easton Decl."), ¶ 15. During the April 9, 2019 status conference with the Court, the Court noted that Plaintiffs should review these documents to "see whether [they] support[] a further request on [Plaintiffs'] part." Tr. of Telephonic Status Conference, April 9, 2019, 9:8–11; *see also id.* at 14:10–12 (explaining that Plaintiffs should review the

[6] Plaintiffs make no attempt to apply the proper balancing test to this category of documents. *See infra* pp. 30–37; *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998).

provided documents to see if they "give[ ] [Plaintiff] a grounds to ask for something additional").

Notably, Plaintiffs have not explained how the documents they have already received give them any ground for additional discovery into the Carter accessions delay. Plaintiffs cite to one Air Force document to support their argument that they have a "specific basis" for seeking additional deliberative documents to show that the decision to delay the implementation of the Carter accessions policy was not independent.[7] *See* Pls.' Mot. 1—11, 11 n.5; *see also* Pls. Exh. N. However, this document does not support their motion to compel additional documents related to the accessions delay. Plaintiffs note that then-Secretary of the Air Force Wilson raised questions as to whether a delay or revision of the Carter policy was needed due to the "small numbers" of transgender service members, but Plaintiffs do not mention the two preceding lines from that email where the Secretary "accept[s] that deployability is an issue" and "accept[s] that stability is an issue." *See* Pls.' Mot. 11 n.5; Rosenbaum Decl., Exh. N at 5. Moreover, Defendants have already provided Plaintiffs the Air Force's formal recommendation to then-Secretary Mattis regarding the accessions delay. *See* Exh. 7, Department of the Air Force Response to Memorandum for the Secretaries of the Military Departments and Chiefs of the Military Services dated May 8, 2017. Plaintiffs have not demonstrated any reason to compel additional deliberative documents regarding this military decision.

III. Plaintiffs Have Not Overcome the Deliberative Process Privilege.

Even assuming that some discovery is permissible in this case, Plaintiffs have already received all of the discovery that is proportional to the needs of the case, *see* Fed. R. Civ. P. 26(b)(1), *see also Doe*, 917 F.3d at 737 (Williams, J. concurring in result) (warning against intrusions into Executive Branch decisionmaking); *id.* at 705 (Wilkins, J. concurring) (recognizing Judge Williams' concern to be legitimate and suggesting as further discovery only explanations of the operation and purpose of the

[7] Plaintiffs also rely on Exhibit M. However, as explained below, *see infra* pp. 42–43, Plaintiffs' Exhibit M should not be considered by the Court.

new policy), and Plaintiffs have not overcome the deliberative process privilege.

A. The Deliberative Process Privilege

The deliberative process privilege protects the Government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The privilege "reflects the commonsense notion that agencies craft better rules when their employees can spell out in writing the pitfalls as well as strengths of policy options, coupled with the understanding that employees would be chilled from such rigorous deliberation if they feared it might become public." *Judicial Watch, Inc. v. United States Dep't of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017) (citing *Sears*, 421 U.S. at 150); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." (citation omitted)); *Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 462 (D.C. Cir. 2014) ("If agencies were 'to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.'" (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987))). The privilege's "'ultimate purpose'" is to "'prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Sears*, 421 U.S. at 151). "In other words, agency officials 'should be judged by what they decided, not for matters they considered before making up their minds.'" *Nat'l Sec. Archive*, 752 F.3d at 462–63 (quoting *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)).

The deliberative process privilege covers documents and communications that are "pre-

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

"The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 737. "This need determination is to be made flexibly on a case-by-case, ad hoc basis." *Id.* "[A]djudicating such an assertion of need requires a 'balancing of the competing interests, taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees.'" *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998) (quoting *In re Sealed Case,* 121 F.3d at 737–38). The burden is on the "party opposing the privilege to establish that its need for the information outweighs the interest of the government in preventing disclosure of the information." *Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003); *Breiterman v. U.S. Capitol Police*, 323 F.R.D. 36, 46 (D.D.C. 2017) ("The party seeking the document bears the burden of demonstrating the balance of interest tips in his or her favor." (citation omitted)); *see also Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a "compelling need" to overcome the privilege); *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 854 (3d Cir. 1995) ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest."); *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a "particularized need" for specific documents

to overcome the privilege).

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

1. Plaintiffs' Contention that the Deliberative Process Privilege Is Unavailable Due to Defendants' Reliance on Deference to Military Judgment Is Meritless.

Plaintiffs contend that Defendants are relying on the "defense" that deference is owed to military personnel decisions and thus, that Defendants cannot shield any deliberative information, whether from the process of developing the new policy or the process related to then-Secretary Mattis' decision to delay the Carter accessions policy. *See* Pls.' Mot. 13–15. However, this argument misapprehends the constitutional basis for judicial deference to Executive Branch decisions involving the military. The D.C. Circuit decided this issue, holding that in constitutional challenges "to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces" "courts must give great deference to the professional judgment of military authorities." *Doe*, 755 F. App'x at 24 (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507). Accordingly, the D.C. Circuit made clear that this Court must apply military deference in reviewing the new policy and that discovery about the process behind the development of the new policy is inappropriate and irrelevant to determining whether military deference applies. *See supra* pp. 11–15.

This is because deference to military policy judgments stems from the Supreme Court's recognition that the Constitution vests decisions as to the organization of the armed forces in the Executive and Legislative branches, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and that the "military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). Judicial deference is thus applied whenever the challenged decision involves "the composition, training, equipping, and control of a military force." *Morgan*, 413 U.S. at 10.

Judicial deference to military decisions is not a "defense," as Plaintiffs claim, but a

constitutionally mandated standard of review. *Rostker*, 453 U.S. at 67 ("[T]he Constitution itself requires such deference . . . ."). The application of military deference does not mean that the Government must automatically prevail in any litigation challenging a military policy, but it does mean "that constitutional challenges to military personnel policies and decisions face heavy burdens." *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc) (citing *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983)). Thus, "the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized" that litigation involving a challenge to a military policy must be conducted differently than ordinary civil litigation. *Id.* at 928 (citation and alterations omitted). Military deference is one way the Supreme Court has mandated such differing treatment.

And as the Supreme Court made clear in *Rostker*, the decision to apply military deference is based on the constitutional role in national defense and military affairs, not the quality of the policymaker's decision. *See Rostker*, 453 U.S. at 64–65 ("This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises *in the context of Congress' authority over national defense and military affairs*, and perhaps in no other area has the Court accorded Congress greater deference.") (emphasis added)).

Supreme Court cases since *Rostker* have similarly found that application of military deference requires a subject matter inquiry, not a factual inquiry into the decision-making process. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–35 (2010) ("It is vital in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.'") (quoting *Rostker*, 453 U.S. at 68, and referring to cases brought in the national security and foreign relations context); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 58–59 (2006) (Roberts, C. J.) ("[A]s we recognized in *Rostker*, 'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies.") (quoting *Rostker*, 453 U.S. at 70)); *Solorio v. United States*, 483

U.S. 435, 447–48 (1987) ("As we recently reiterated, [j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.") (quoting *Goldman*, 475 U.S. at 508 and *Rostker*, 453 U.S. at 70) (internal quotations omitted)); *Goldman*, 475 U.S. at 508 ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." (quoting *Rostker*, 453 U.S. at 70)); *Chappell*, 462 U.S. at 301–02 (in a case decided two years after *Rostker*, reiterating that when a "case arises *in the context of* Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference" (quoting *Rostker*, 453 U.S. at 64–65) (emphasis added)); *see also Winter v. NRDC*, 555 U.S. 7, 24 (2008) (holding that military deference is applied in cases involving the "composition, training, equipping, and control of a military force") (quoting *Morgan*, 413 U.S. at 10); *Boumediene v. Bush*, 553 U.S. 723, 832 (2008) (Roberts, C. J., dissenting) ("We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. That is especially so in the area of foreign and military affairs; 'perhaps in no other area has the Court accorded Congress greater deference.'") (quoting *Rostker*, 453 U.S. at 64–65) (citations omitted)); *Hawaii*, 138 S. Ct. at 2420 & n.5 (holding the "inquiry into matters of entry and national security is highly constrained[,]" and listing cases involving "immigration policies, diplomatic sanctions, and military actions" as examples when a rational basis review is applied.). Plaintiffs' contention that the deliberative process may be probed to test whether deference is due would stand the very doctrine of military deference on its head. At the core of Plaintiffs' flawed argument is an attempt to conflate the deference due to policies that *result* from the policy process with "deliberations" that led to the policy outcome. The fact that deference is owed to a final military policy, which resulted from deliberations, does not negate protection of those internal deliberations. Plaintiffs' contention that Defendants are using the deliberative process privilege "as a sword and as a shield," Pls.' Mot. 13,

is thus plainly wrong. The "sword/shield" concept applies where a party seeks to *use* privileged information to support its claims while simultaneously attempting to protect that very information from discovery. But in relying on established law recognizing judicial deference to military judgments, Defendants are not relying on deliberative process information and thus not waiving privilege over that information. Rather, Defendants are relying on the *outcome* of the deliberative process: DoD's new policy and the accompanying 44-page report, which provides a detailed explanation for why, in the professional judgment of DoD, this policy is necessary to further military interests. It is Plaintiffs who seek to turn reliance on the deference owed to military judgments into a sword that would eliminate deliberative process protections *per se*. There is no support in the law for this sweeping proposition.[8]

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

Plaintiffs also argue that the deliberative process privilege does not apply in this case because "Plaintiffs' [*sic*] allege that the process was discriminatory" and thus intent is at issue. *See* Pls.' Mot. 15–16. But the Supreme Court's decision in *Trump v. Hawaii* strongly supports Defendants' position

[8] To the extent Plaintiffs are seeking *all* deliberative documents under this theory, *see* Pls.' Mot. 27 n.16, their argument not only goes beyond the scope of the Court's orders to narrow discovery, it is also meritless. Even if the application of military deference turned on factual issues, that would not mean that the deliberative process privilege should fall as to *all* deliberative documents. Even under Plaintiffs' theory, deliberative documents prior to the first meeting of the Panel of Experts, during the week of October 2, 2017, Dkt. 128-25, would be of no help to determine if the Panel acted "unthinkingly or reflexively and not for any considered reason" or whether the Panel "extensively considered" and made a "studied choice of one alternative in preference to another." Mem. Op. 12, Dkt. 160 (quoting *Rostker*, 453 U.S. at 72). Nor would low-level deliberations among military staff who were not members of the Panel help Plaintiffs answer such factual questions. Accordingly, an attempt to ascertain the answer to such questions does not justify the deliberative process privilege being overcome wholesale across thousands of documents over the course of multiple years. *Cf. Karnoski*, 2019 WL 2479442, at *19 ("[T]he district court should consider classes of documents separately when appropriate. It is not clear the district court did so in this case. The district court appears to have conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories.").

that the intent of the government decisionmakers is not at issue and that the Court should instead analyze the official objectives of the current policy. *See* 138 S. Ct. at 2420–23. In *Hawaii*, the Supreme Court assessed the challenged policy on its own terms and rejected the theory that prior statements forever "contaminated" the proclamation with "impermissible discriminatory animus." *Compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J., dissenting). While recognizing that it "may consider plaintiffs' extrinsic evidence," the Court stated that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420 (majority op.). In analyzing whether such a justification existed, the Court focused on the proclamation itself and the "multi-agency review" that supported it. *See id.* at 2417, 2421; *see also Doe*, 755 F. App'x at 24–25 (citing *Hawaii*, 138 S. Ct. at 2421–22 (upholding an executive order in part because it "reflect[ed] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," and explaining that "we of course do not defer to the Government's reading of the" Constitution, but "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving sensitive and weighty interests of national security and foreign affairs" (internal quotation marks omitted))).

In arguing that "[t]he deliberative process privilege is [ ] inapplicable" because Plaintiffs allege that the process was discriminatory, Plaintiffs rely on *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (*partial reh'g*, 156 F.3d 1279 (D.C. Cir. 1998). Pls.' Mot. 15. But the Ninth Circuit implicitly rejected relying on that decision in this context by explaining that the district court should conduct the balancing test, even though the plaintiffs there made the same allegations. *Karnoski*, 2019 WL 2479442 at *9 (noting the plaintiffs' reliance on *In re Subpoena)*, at *19 (implicitly rejecting it). That makes sense, as *In re Subpoena* did not involve a military policy concerning the composition of the fighting force, and thus the court did not apply the deferential standard required to review challenges to military policies. *See Hawaii*, 138 S. Ct. at 2420

n.5; *Doe*, 755 F. App'x at 24 (emphasizing that in a challenge to military decisions, "courts must give great deference to the professional judgment of military authorities" (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507). And *In re Subpoena* did not state a categorical rule that in every circumstance where a plaintiff questions an agency's motives, the plaintiff automatically overcomes the deliberative process privilege.[9] Indeed, "[t]he privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure." *In re United States*, 678 F. App'x 981, 990 (Fed. Cir. 2017); *see also Utah Med. Prods. v. McClellan*, No. 2:03-cv-525, 2004 WL 988877, *8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative process privilege is inapplicable when a party challenges the decision-making process would lead plaintiffs to "recast [their] complaint as a challenge to the decision-making 'process'").

Plaintiffs' reliance on other cases that do not involve military policies is similarly misplaced. In four of the cases Plaintiffs cite for the proposition that the privilege does not apply when plaintiffs allege discrimination, the courts declined to apply the deliberative process privilege to "routine personnel decisions," such as the decision to terminate a single employee, observing that the deliberative process privilege is intended to protect deliberations behind broad policy decisions—precisely the kind of decision at issue here. *See United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 528 (N.D. Ind. 2005); *Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) (finding that the deliberative process privilege did not apply to a document that "speaks to a particular

[9] *In re Subpoena*, which involved a bankruptcy proceeding, held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made "with actual intent to hinder, delay, or defraud." 145 F.3d at 1423 (citation omitted). On rehearing, the D.C. Circuit clarified that its "holding that the deliberative process privilege is unavailable is limited to those circumstances in which the cause of action is directed at the agency's subjective motivation." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *see also In re Subpoena*, 145 F.3d at 1424 (holding privilege inapplicable where "Congress creates a cause of action that deliberatively exposes government decisionmaking to the light").

investigation," and contrasting that situation with "the adoption of a policy that applies to all cases of a particular nature or type," where the privilege would apply); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (in a retaliation case, holding that the plaintiff was "simply wrong in asserting that the deliberative process privilege should yield in [that] case because of his claim of governmental misconduct" and repeating *In re Subpoena's* holding in dicta); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). Further, the court in *Jones* applied a balancing test before ordering disclosure despite finding that "government intent is at the heart of the issue in this case"—contrary to Plaintiffs' own position. 237 F.R.D. at 521. In sum, none of the cases cited by Plaintiffs provides any basis for deviating from the Supreme Court's instruction in *Hawaii* that a policy of this sort be assessed based on its own stated justifications, not the purported intent behind it. 138 S. Ct. at 2417–23.

Finally, Plaintiffs rely on discovery orders in two related cases, *Stone v. Trump*, 356 F. Supp. 3d 505, 510, 514 (D. Md. 2018), and *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018). *See* Pls.' Mot. 15–16. However, on June 17, 2019, the Ninth Circuit issued a writ of mandamus and "vacate[d] the district court's discovery order [that directed, among other things, disclosure of all of Defendants' deliberative documents], so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Karnoski*, 2019 WL 2479442, at *16–*19.[10]

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

[10] The *Stone* Court relied on the same flawed reasoning as the *Karnoski* district court, but stayed its ruling pending the Ninth Circuit's decision in *Karnoski*. In light of the Ninth Circuit's recent ruling, Defendants intend to seek reconsideration. *See Stone v. Trump*, No. 17-cv-2459 (D. Md.), Dkt. 255.

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

Next, Plaintiffs argue that the deliberative process privilege is overcome by their need for the information. Pls.' Mot. 16–19. However, Plaintiffs have a heavy burden of showing a compelling and particularized need for the documents and information they seek. *See Cobell*, 213 F.R.D. at 5; *Marriott Int'l Resorts*, 437 F.3d at 1307; *Farley*, 11 F.3d at 1389; *Viet. Veterans of Am. v. C.I.A.*, No. 09-cv-37, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011). They cannot meet that burden here. As an initial matter, Plaintiffs have not applied the balancing test to any specific documents, nor have they made clear whether they are seeking to compel *all* of the documents on Defendants' five *Vaughn* Indices, which encompass over a thousand documents from DoD and the Services, as well as all of the documents on Defendants' clawback log, or a narrower subset of those documents.[11] Instead, Plaintiffs make generic arguments about the balancing of the applicable factors. However, these generic arguments, which do not specifically identify or address particular documents and instead apply the balancing test *en masse*, are insufficient to overcome Defendants' claims of deliberative process privilege. *See Karnoski*, 2019 WL 2479442 at *19–*20 (granting Defendants' petition for a writ of mandamus and vacating the district court's discovery order, which erroneously conducted the balancing test *en masse* to determine that the deliberative process privilege had been overcome for thousands of Defendants' deliberative documents); *In re United States*, 678 F. App'x at 987 (finding that a "document-by-document" analysis is required in assessing claims that the deliberative process

[11] Indeed, during the April 9, 2019 teleconference, the Court indicated that the parties "should both go back and take a look at [the clawback material] and see if there are issues that can be narrowed." Tr. of Teleconference, 24:10-12. Both parties agreed during the teleconference that there was likely room for compromise on the clawback documents. However, Plaintiffs did not reach out to Defendants to meet and confer about which clawback documents they were challenging. In any event, the documents on Defendants' clawback log are pre-decisional and deliberative, and their release would "have a chilling effect on the Army's personnel when developing forthcoming policies, and thus an adverse effect on the quality and integrity of the Army's future decision making processes." Exh. 3, Thum Decl. ¶ 13; *see also id.* ¶¶ 4–8, 12–13.

privilege has been overcome).

Instead of applying the balancing test to specific documents, Plaintiffs argue that they are "entitled" to broad categories of documents, such as "documents that show the options considered by the [Panel of Experts]." Pls.' Mot. 12-13. However, Plaintiffs do not even attempt to apply the balancing test to this category of documents. Instead, Plaintiffs argue that because they "seek to show that the Mattis [policy] was not based on independent military judgment," they are "entitled" to these documents. *Id.* at 12. However, this argument has been squarely rejected by the D.C. Circuit and is contrary to Supreme Court precedent governing judicial review of military policies. *See supra* pp. 11–15, 23–26.

In any event, even if the Court were to consider Plaintiffs' generic arguments, any balancing of the applicable factors would not justify the disclosure of all of the documents on Defendants' five *Vaughn* Indices and all of the documents on Defendants' clawback log.

Relevance of the evidence. Relying on this Court's opinion denying summary judgment to both parties, Plaintiffs argue that the information they seek goes "to the heart of the degree of deference owed, and the level of scrutiny to be applied." Pls.' Mot. 16 (quoting Mem. Op. at 13, Dkt. 160). This argument merely reiterates Plaintiffs' argument that the deliberative process privilege does not apply in this case because the degree of military deference is a factual question. As demonstrated above, this argument has been squarely rejected by the D.C. Circuit and is contrary to Supreme Court precedent governing judicial review of military policies. *See supra* pp. 11–15, 23–26.

In any event, Plaintiffs' generalized assertion of need for "[i]nformation concerning the delay of the open accessions policy, the work of the [Panel of Experts], and the development of the Mattis [policy]," Pls.' Mot. 16, is far from the "strong showing of relevance" and particularized need required to overcome the privilege for each and every document on Defendants' five *Vaughn* Indices, *Viet. Veterans of Am.*, 2011 WL 4635139, at *10; *see also Marriott Int'l Resorts, L.P.*, 437 F.3d at 1307; *Farley*,

11 F.3d at 1389. "Information concerning the delay of the open accessions policy, the work of the [Panel of Experts], and the development of the Mattis [policy]," Pls.' Mot. 16, would encompass thousands of deliberative documents created over the course of nearly two years and spanning two different administrations. It would include documents from across the Department of Defense and the Services involving communications among officials at different levels at different times with respect to different decisions. And the documents include not only communications involving the Secretary of Defense and his closest aides, but a host of lower-level communications throughout the Department. These documents are not susceptible to a one-size-fits-all analysis. *See Karnoski*, 2019 WL 2479442, at *19 (explaining that the district court "should consider classes of documents separately when appropriate" and that conducting a single deliberative process privilege analysis for multiple categories of documents was improper); *Coastal States Gas Corp.*, 617 F.2d at 867 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process."); *In re United States*, 678 F. App'x at 987 (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been overcome).

In sum, Plaintiffs have not proper applied the balancing test to specific documents or to discrete groups of documents, let alone provided any specific information regarding why their need for such documents outweighs Defendants' interest in non-disclosure. Their failure to do so should preclude disclosure of any of Defendants' deliberative documents.

The availability of other evidence. Aside from failing to demonstrate a particularized need for any specific document or information, Plaintiffs have available to them ample discovery, including over 30,000 non-privileged documents and responses to Plaintiffs' discovery requests. Plaintiffs have also had ample opportunity to take depositions, but have taken only five depositions in this case and have chosen thus far not to depose the chair of the Panel of Experts, Mr. Anthony Kurta. *See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328 (D.D.C. 1966) ("Necessity for production is

sharply reduced where an available alternative for obtaining the desired evidence has not been explored.").

Plaintiffs argue that they "have no reason to expect that the evidence concerning the deliberations that resulted in the Mattis [policy] exist anywhere other than in Defendants' possession." Pls.' Mot. 17. They further argue that they cannot proceed with additional depositions because Defendants will instruct their witnesses not to answer Plaintiffs' questions that seek information subject to the deliberative process privilege. However, these arguments miss the point. When evaluating this factor, the focus is on the availability of other non-privileged evidence to which Plaintiffs have access, not whether Plaintiffs can obtain precisely the same privileged deliberative information from another source. *See Hinckley*, 140 F.3d at 286 (declining to find that the deliberative process privilege was overcome upon noting that "the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board's final decision and explanation for it").

Nor is there any merit to Plaintiffs' assertion that depositions would not be productive at this stage in the litigation. Consistent with Judge Wilkins's view of how discovery should proceed in this case, Plaintiffs could depose agency officials and ask them "to explain the operation and purpose" of the new policy without "improperly intrud[ing] upon [the Executive Branch's] mental processes." *Doe*, 917 F.3d at 705 (explaining that "'[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on'" (quoting 3 Weinstein's Federal Evidence § 509.23 (2019))). For example, Plaintiffs could avoid seeking information subject to the deliberative process privilege (such as whether the Panel considered certain options) by asking whether the Panel of Experts' review process was constrained or predetermined.

Most importantly, the reasoning and evidence behind the Department's new policy is set forth in the Department's Report and Recommendations, and Defendants have produced an administrative

record to Plaintiffs that comprises over 3,000 pages of supporting documentation for that policy. That administrative record contains the Panel's meeting minutes as well as the materials considered by the Panel prior to the formulation of its recommendation to the Secretary of Defense. *See Doe*, 917 F.3d at 737 (Williams, J., concurring in result) (explaining that the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point" (quoting *Goldman*, 475 U.S. at 509)); *Steffan v. Cheney*, 920 F.2d 74, 76 (D.C. Cir. 1990) (per curiam) (finding that judicial review of military policies should be "confined to '[t]he grounds . . . upon which the record discloses that [the] action was based'" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)); *see also Hawaii*, 138 S. Ct. at 2420 (upholding presidential proclamation based solely on its text); *Steffan v. Perry*, 41 F.3d 677, 699–700 (D.C. Cir. 1994) (Randolph, J., concurring) (finding that review should be limited to the agency record and that the mental processes of military decision-makers should not be probed); *Pruitt v. Cheney*, 963 F.2d 1160, 1166–67 (9th Cir. 1992) ("Finally, the Army urges that we should defer to the military judgment. We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary. That admonition, however, is best applied in the process of judging whether the reasons put forth on the record for the Army's discrimination against Pruitt are rationally related to any of the Army's permissible goals." (citing *Rostker*, 453 U.S. at 64–69; *Goldman*, 475 U.S. at 507)). Taken together, the availability of other evidence strongly undercuts Plaintiffs' demand to probe the mental processes of agency officials. *See Hinckley*, 140 F.3d at 286 (declining to find that the deliberative process privilege was overcome upon noting that "the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board's final decision and explanation for it"); *Utah Med. Prods.*, 2004 WL 988877 at *5 (finding that even though the requested document was relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff] with a clear explanation" as to why the

agency took an enforcement action).[12]

The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. This factor strongly weighs against wholesale waiver of the deliberative process privilege for over a thousand documents, especially since Plaintiffs have not made any effort to identify or show any particular need for any specific documents.

Disclosure of over a thousand deliberative documents from the Department of Defense and the Services covering multiple policies plainly risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. *See* Exh. 6, Easton Decl. ¶ 24–28; Exh. 3, Thum Decl., ¶¶ 12–13 ("Disclosure would . . . have a chilling effect on the Army's personnel when developing forthcoming policies, and thus an adverse effect on the quality and integrity of the Army's future decision making processes."); Exh. 8, Declaration of Grant E. Lattin ("Lattin Decl."), ¶¶ 5–7 ("Compelled disclosure of the preliminary analysis demanded by Plaintiffs would inhibit the candor and effectiveness of subject matter experts assigned to make recommendations and develop military personnel policies."); Exh. 4, Soper Decl., ¶¶ 4–6 ("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 honest views in the future."). Indeed, the

[12] The next factors in the balancing test are the role of the Government in the litigation and the seriousness of the litigation. *See Hinckley*, 140 F.3d at 286 (quoting *In re Sealed Case*, 121 F.3d at 737–38). There is no dispute that the Government's policy is at issue or that this case, which involves a military policy that affects national security, is a serious one. But these factors do not outweigh the Government's strong interests in non-disclosure, especially given the availability of other evidence and Plaintiffs' failure to articulate a need for any particular document. *See Hinckley*, 140 F.3d at 286 ("[T]he balance weighs strongly against granting . . . access to the [agency's] internal deliberations, notwithstanding the seriousness of the present litigation."); *Agility Pub. Warehousing Co. v. Dep't of Def.*, 110 F. Supp. 3d 215, 222 (D.D.C. 2015) (finding that although the case was serious, "this single factor cannot outweigh the others stacked against it").

Ninth Circuit vacated the *Karnoski* district court's discovery order granting plaintiffs' motion to compel and directed that district court to give "careful consideration" of the "military's interest in full and frank communication about policy-making," which "raises serious—although not insurmountable—national defense interests." *Karnoski* 2019 WL 2479442 at *19.

The chilling effect would be especially severe in this case given the breadth of Plaintiffs' request. Plaintiffs are seeking "all documents considered or generated both during the panel review process and between the conclusion of the review process and the adoption of Secretary Mattis' plan, including documents considered or generated by the [] Panel, communications to or from members of the [] Panel regarding their work, drafts of the [] Panel's report communicated to any third parties, and communications that post-date the [] Panel's report but pre-date the Mattis [policy]." Pls.' Mot. 27. This would encompass, for example, candid advice given to then-Secretary Mattis by the Deputy Secretary of Defense on the topic of the transgender military service—the kind of sensitive advice that, if disclosed, could diminish his subordinates' willingness to present their candid views to the Secretary in the future. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (documents "shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice"); *Coastal States Gas Corp.*, 617 F.2d at 866 (one purpose of the deliberative process privilege is "to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism"). If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. *See* Exh. 6, Easton Decl. ¶ 27 ("The lack of essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk."); Exh. 3, Thum Decl. ¶¶ 12–13 ("Without this full and frank

discourse, the integrity of the Army's decision making processes suffers."); Exh. 8, Lattin Decl. ¶¶ 5–7 ("Without such discourse, the Navy's ability to implement high quality, mission-enabling policies will suffer."); Exh. 4, Soper Decl. ¶ 4 ("Disclosure of these documents . . . would have a negative effect on the quality of the Air Force's policymaking process."). Such harm to the core Government responsibility to protect its citizens should carry overwhelming weight.

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

1. The Materials Withheld by Defendants Are Pre-Decisional.

Plaintiffs next assert that the Government has "improperly withheld post-decisional communications." Pls.' Mot. 19. They point out that some of the Government's withholdings concern "implementation," and contend that such documents are, "by definition, post-decisional and thus not deliberative." *Id.* at 21. But this argument misunderstands the law governing the deliberative process privilege. First, it fails to recognize that documents generated after a decision has been made can be predecisional for *subsequent* decisions. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) ("[D]ocuments dated after [a decision was made] may still be predecisional and deliberative with respect to other, nonfinal agency policies."); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 162 (D.D.C. 2012) (Kollar-Kotelly, J.) ("[E]ven documents dated after a decision has been made may still be eligible for protection under the deliberative process privilege."). Second, it ignores that deliberations concerning policy "implementation" can relate to later decisions about how to execute a particular policy, and thus can be protected by the deliberative process privilege. *See Bloche v. Dep't of Defense*, 279 F. Supp. 3d 68, 83 (D.D.C. 2017) (finding that DoD's discussion of "how [a] current policy is implemented and potential recommendations for changes are properly characterized as predecisional and deliberative"). Indeed, "[e]ven after a path has been cut by an agency, it is the very process of debating, shaping, and changing a . . . policy that needs candor, vigorous to-and-fro, and freedom of expression." *Judicial Watch*, 841 F.

Supp. 2d at 162 (Kollar-Kotelly, J.) (quotation omitted).

Here, Plaintiffs cite documents relating to the Services' efforts to implement the Carter accessions policy by January 1, 2018—as required by the preliminary injunctions in this and the related cases—and argue that such documents are post-decisional because, in broad strokes, the accessions policy already had been decided. Pls.' Mot. 20–21. Again, this argument finds no support in the law; deliberations related to the implementation of the Carter accessions policy still reflect the give and take of agency policymaking and qualify as pre-decisional.

Plaintiffs' argument is also contrary to the facts. Once the district courts ruled that the accessions policy had to be implemented by January 1, 2018, the Services "had to rapidly develop a plan to effectively and efficiently begin accessing transgender applicants in a standardized manner." Exh. 3, Thum Decl. ¶ 7. This required staff officials to issue "recommendations and proposed courses of action for how to implement the court orders"—content that is indisputably deliberative and pre-decisional. *Id.*; *see also* Exh. 8, Lattin Decl. ¶ 12 ("[W]hen DoD or a federal court directs the Navy to implement a policy, the Navy then undertakes a deliberative process to decide how to best implement that policy."); Exh. 6, Easton Decl. ¶ 21 ("[T]he decision-making process for any major policy decision, such as a recommended policy on military service by transgender individuals, includes numerous ancillary considerations about how and when the policy would be implemented, and each of those additional decisions and accompanying processes are also deliberative in nature."); Exh. 4, Soper Decl. ¶ 8–10.

Consider Plaintiffs' own examples. They point to documents labeled "Deliberative email conversation regarding clarifying guidance to USMEPCOM[13] on processing applicants who are applying to the military under the DoD's transgender policy." Rosenbaum Decl., Exh. A at 7

[13] United States Military Entrance Processing Command.

(entries for USDOE00083070; USDOE00083071); Pls.' Mot. 20. These documents are clearly pre-decisional to later decisions about what guidance should be developed and provided to USMEPCOM. *See* Exh. 6, Easton Decl. ¶ 20 (explaining that the documents "contain[] underlying reasoning used by DoD personnel in the development and eventual publication of guidance to US Military Entrance Processing Command"). Likewise, documents labeled as "Deliberative email conversation between DoD personnel regarding products that were developed in conjunction with the transgender policy for senior leader briefings," Rosenbaum Decl., Exh. A at 5; Pls.' Mot. 20, similarly "reflect the real-time thoughts and deliberations of senior DoD personnel as they worked to develop and refine the Department's policy."[14] Exh. 6, Easton Decl. ¶ 21; *see also Judicial Watch*, 841 F. Supp. 2d at 162 (Kollar-Kotelly, J.) (finding documents were part of a "continuing process of examining [agency] policies" and therefore privileged).

Accordingly, contrary to Plaintiffs' characterization, the documents they seek do not reflect an agency "simply stat[ing] or explain[ing] a decision the government has already made." Pls.' Mot. 21 (quoting *In re Sealed Case*, 121 F.3d at 737). Nor do they merely show the agency's "formal or informal policy on how it carries out its responsibilities." *Id.* at 20–21 (quoting *Public Citizen, Inc. v. Off. of Mgmt. and Budget*, 598 F.3d 865, 875-76 (D.C. Cir. 2010)). Rather, they reflect that the agency is engaged in a continual process of implementing and evaluating its policies—a process plainly protected by the deliberative process privilege.

Finally, Plaintiffs contend that certain documents cannot be privileged because they

[14] The same is true of documents concerning the "rescission" of transgender policy, Pls.' Mot. 21, which reflect ongoing agency evaluation of previous decisions, *see, e.g.*, Exh. 3, Thum Decl. ¶ 9 ("[E]ven once a final policy is announced, the Army continually engages in a process of assessing the policy's effectiveness in order to determine whether the policy should be modified in any way or *rescinded*." (emphasis added)).

postdate either the Panel of Experts' final vote or the date of then-Secretary Mattis' 44-page report. Pls.' Mot. 21–22. Setting aside the fact that such documents may nonetheless relate to later decisions about policy implementation or reevaluation, "even post-decisional documents properly fall under the deliberative process privilege when they recount or reflect pre-decisional deliberations." *Judicial Watch*, 841 F. Supp. 2d at 163 (Kollar-Kotelly, J.). Here, the example Plaintiffs cite of January 10, 2018 communications between high-level officials from the Navy and DoD, *see* Pls.' Mot. 21–22, reflect prior deliberations because, among other things, they include a prior dissenting opinion from the review panel's majority recommendation. *See* Rosenbaum Decl., Exh. C at 2 (entry for document titled "TG Dissenting opinion (Dee 14 Dec 2017).pdf").

2. The Materials Withheld by Defendants Are Deliberative.

Plaintiffs' argument that Defendants have improperly withheld certain factual information fares no better. Pls.' Mot. 22–23. Although purely factual material is not ordinarily protected from disclosure, where factual material is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations," the government may permissibly withhold such material. *In re Sealed Case*, 121 F.3d at 737; *see, e.g.*, *Citizens for Responsibility & Ethics v. DHS*, 514 F. Supp. 2d 36, 46 (D.D.C. 2007) (finding factual reports and timelines of events were privileged because they were inextricably intertwined with DHS's policy for its ongoing response to Hurricane Katrina). Applying this standard, Defendants properly determined that any factual information contained within the documents they withheld was closely and inextricably intertwined with Defendants' deliberations. *See* Exh. 6, Easton Decl. ¶ 23 (referring to documents "contain[ing] deliberative information that is closely and inextricably intertwined with factual information such it that renders the entire document deliberative."); Exh. 3, Thum Decl. ¶ 11 ("[N]one of the documents contain purely factual information. Instead, any factual material in the documents is intertwined with deliberations."); Exh. 8, Lattin Decl. ¶ 13 (explaining

that the documents Plaintiffs claim contain factual material instead "contain deliberative material that is not purely factual"); Exh. 4, Soper Decl. ¶ 16 (similar).

Nevertheless, Plaintiffs point to descriptors like "information briefing" to argue that documents so labeled must contain standalone factual information. Pls.' Mot. 22. But Plaintiffs offer no support for their speculation, and, indeed, the examples they present only demonstrate why Defendants' withholdings were proper. Plaintiffs cite, for instance, a PowerPoint presentation titled "Non-deployable working group information briefing to the Review Panel of experts." Pls.' Mot. 22. But as explained in DoD's declaration, this presentation conveyed the progress of a working group and "provid[ed] policy recommendations on the non-deployable population." Exh. 6, Easton Decl. ¶ 13. Accordingly, any factual information in the briefing was so "closely and inextricably intertwined" with deliberative information that "the entire document [was] deliberative." *Id.* at ¶ 23.

Plaintiffs also cite two emails with the subject line "Transgender framework questions" and a description that includes "development of requests for information for transgender accessions." Pls.' Mot. 23. However, as the Navy's declaration explains, the responses in the email are to questions relating to topics including "how the [transgender] policy fits into the military's broader goals such as deployability, the extent to which transgender identity can be separated [from] gender dysphoria, how treatment for gender dysphoria should compare to treatment for other psychiatric conditions, and how to address the practical logistics of gender transition when it comes to berthing, showers, and bathrooms." Exh. 8, Lattin Decl. ¶ 13. Answers to such questions regarding "how" to proceed as a matter of military policy would indisputably reveal the underlying opinions of the person responding and the deliberations of those involved in the conversation. This is a classic example of factual material inextricably intertwined with deliberations and subject to the deliberative process privilege.

IV. Defendants Did Not Waive Privilege by Inadvertently Producing Plaintiffs' Exhibit M.

Plaintiffs argue that Defendants have intentionally waived privilege over the litigation risk memorandum attached to Plaintiffs' motion as Exhibit M and that Defendants must now produce documents related to the subject matter of this memorandum. Pls.' Mot. 23. However, this document—which is quintessential attorney work product and also protected from disclosure under the deliberative process privilege and the attorney-client privilege—was inadvertently produced and is now subject to separate clawback litigation.[15] Indeed, numerous versions of this document were processed for production and were withheld for privilege. Promptly after learning that this document was inadvertently disclosed, Defendants sent Plaintiffs a notice of recall to claw back the document on June 7, 2019. *See* Exh. 9, Defendants' Notice of Recall for Inadvertently Disclosed Privileged Document. Accordingly, Defendants did not waive privilege over this document, much less over related documents.

Additionally, the vast majority of documents that Plaintiffs seek to compel under the subject matter waiver doctrine were withheld based on multiple privileges.[16] *See* Rosenbaum Decl., Exh. O. Accordingly, even if Defendants had waived the attorney-client privilege over the litigation risk memorandum, this would not waive separate privileges, such as the deliberative process privilege or the presidential communications privilege, for related documents. *Cf. In re Sealed Case*, 121 F.3d at 741 (explaining that there is no subject matter waiver for "executive privileges generally, or . . . the deliberative process privilege in particular"); *Trustees of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 16 (D.D.C. 2010) ("[T]here is not now, and there has never been, the

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[15] Plaintiffs challenge Defendants' clawback of this document, and the Court has set a briefing schedule for this separate clawback dispute. Minute Order, June 24, 2019.

[16] For example, Plaintiffs seek to compel DoD00143328, but this document was withheld pursuant to the deliberative process privilege, executive privilege, and personal privacy interests. Rosenbaum Decl., Exh. O at 1.

absolute subject-matter waiver that supposedly flows from the disclosure of work-product.").

V. Defendants' *Vaughn* Indices and Claw-Back Logs Are Sufficient.

Finally, Plaintiffs complain that certain of the entries on Defendants' *Vaughn* indices and claw-back logs are insufficiently specific, and ask the Court to order Defendants to supplement those entries. However, any dispute over the entries on the indices and logs has not yet ripened for this Court's consideration. Plaintiffs did not meet and confer with Defendants about the sufficiency of Defendants' entries before filing this motion, and thus failed to comply with the rules of this Court. *See* Local Civil Rule 7(m) (requiring counsel to "discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement"); Order Establishing Procedures For Cases Assigned To Judge Colleen Kollar-Kotelly § 8 (requiring counsel to "confer in good faith in an effort to resolve any discovery dispute before bringing it to the Court's attention"); *All Assets Held at Bank Julius Baer & Co., Ltd.*, 202 F. Supp. 3d at 6 ("Failure to fulfill the requirements of Local Rule 7(m) is grounds for denial of a discovery motion."). Nor did the Court's minute orders on April 9, 2019 and April 16, 2019—which ordered the filing of the instant motion—contain any mention of a challenge to privilege log entries. *See, e.g.*, Minute Order, April 16, 2019 (ordering Plaintiffs "to file a motion to compel *documents* still in dispute . . . including any remaining dispute as to Defendants' clawback of certain *documents*" (emphases added)).

Indeed, if Plaintiffs had conferred with Defendants about challenges to particular entries before filing this motion, Defendants could have reviewed those entries and potentially resolved any dispute between the parties. But having not done so, Plaintiffs should not now be permitted to enlist the Court in resolving this potentially avoidable issue. *See Alexander v. FBI*, 186 F.R.D. 197, 199 (D.D.C. 1999) ("The entire purpose of the meet-and-confer rule is to force litigants to attempt to resolve, or at least narrow, the disputed issues to prevent the unnecessary waste of time and effort on

any given motion.").

At any rate, Plaintiffs' contention that certain of Defendants' privilege entries are deficient is meritless. Plaintiffs cite to pages 9 and 22 of DoD's *Vaughn* index, asserting that "some entries are missing a document title or description." Pls.' Mot. 26. That is simply incorrect. In fact, every document listed on pages 9 and 22 (and on every other page of DoD's index) includes an entry in the "TITLE/DESCRIPTION" column.[17] And while Plaintiffs complain that descriptions like "deliberations regarding the formulation of the transgender policy" or "deliberations regarding the implementation of the transgender policy" are insufficiently detailed, in nearly every instance in which either of those phrases are used, they are coupled with additional descriptions of the document. *See, e.g.*, Rosenbaum Decl., Exh. D at 52 (description for USDOE00237924–USDOE00237924 includes both "Deliberations regarding the implementation of the transgender policy" and "Email dated 1/4/18 between OUSD Health Affairs and service SG offices providing comments and suggestions on a draft white paper addressing Cross-sex Hormone therapy").

There is thus no basis for finding that Defendants' entries are deficient. For example, one of the entries Plaintiffs challenge is a December 5, 2017 email sent by Laura Ochoa, a public affairs official in the Office of the Secretary of Defense, to numerous senior DoD officials with the subject line "DoD Communications Playbook for December." Rosenbaum Decl., Exh. A at 22. The entry describes the document as an "[e]mail conversation between DoD personnel on possible questions

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[17] Indeed, the only documents that appear to be missing entries in either the "TITLE/DESCRIPTION" or "PRIVILEGE BASIS" fields are two documents listed on Plaintiffs' exhibit containing the Air Force *Vaughn* Index. *See* Rosenbaum Decl., Exh. D at 25 (entries for USDOE00005901–USDOE00005904 and USDOE00005928–USDOE00005930). However, the missing fields in this exhibit appear to be due to a formatting error by Plaintiffs, not missing descriptions by Defendants, as the *Vaughn* index Defendants served on Plaintiffs in fact included descriptions in all fields for those two documents. *See* Exh. 10, Excerpt of As-Served Air Force Vaughn Index.

from the media and answers on the transgender policy and its implementation," and explains that it was withheld based on the deliberative process privilege. *Id.* This entry is plainly sufficient for Plaintiffs to determine that the document contains internal recommendations relating to future press inquiries and is thus protected by the deliberative process privilege. *See, e.g.*, *Am. Ctr. for Law & Justice v. Dep't of State*, 330 F. Supp. 3d 293, 304 (D.D.C. 2018) (holding press guidance developed to address future press inquiries is pre-decisional and deliberative). As this example shows, Defendants have satisfied their obligation to describe withheld documents "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A).

Perhaps in recognition of the sufficiency of Defendants' entries, Plaintiffs attempt to introduce an inapplicable and erroneous standard. They cite case law from the Freedom of Information Act context and argue that the indices themselves must "indicate whether the documents have been reviewed to identify reasonably segregable information, such as data." Pls.' Mot. 26–27. But Defendants have provided precisely those assurances in their declarations, s*ee, e.g.*, Exh. 6, Easton Decl. ¶ 23 (explaining that certain documents Plaintiffs challenge "contain deliberative information that is closely and inextricably intertwined with factual information such that it renders the entire document deliberative"), and Plaintiffs point to no authority suggesting that a civil discovery privilege log must state the same.

As explained above, Defendants are willing to review any document descriptions that Plaintiffs believe are inadequate. But at this time, their request for an order compelling Defendants to supplement their *Vaughn* indices should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied. Defendants respectfully request that the Court schedule oral argument on Plaintiffs' motion.

June 25, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, I electronically filed the foregoing Response to Plaintiffs' Motion to Compel using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: June 25, 2019

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Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER,[1] in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' FIRST SET OF INTERROGATORIES

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

Pursuant to Federal Rules of Civil Procedure 26 and 33, Plaintiffs in the action captioned above hereby request that the Defendants in the action captioned above respond to the following interrogatories within 30 days from the date of service hereof in accordance with Rule 33, the Local Rules of this Court, and the Definitions set forth below.

DEFINITIONS

1. The term "Individual Defendants" shall refer to Defendants Donald J. Trump, James N. Mattis, Joseph F. Dunford, Jr., Mark T. Esper, Richard V. Spencer, Heather A. Wilson, Kirstjen Nielsen, and Raquel C. Bono.

2. The term "President Trump" shall refer to Defendant Donald J. Trump.

3. The term "Secretary Mattis" shall refer to Defendant James N. Mattis.

4. The term "General Dunford" shall refer to Defendant Joseph F. Dunford.

5. The term "Accessions Readiness Memorandum" shall refer to the memorandum issued by Secretary of Defense James Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services" dated May 8, 2017.

6. The term "Accessions Deferral Memorandum" shall refer to the memorandum issued by Secretary of Defense James Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services" dated June 30, 2017.

7. The term "DoD Initiative" shall refer to the request by the Department of Defense, responded to by John Doe 1, to obtain information relating to transgender servicemembers.

8. The term "Twitter Statement" shall refer to the statement issued by President Trump on Twitter on July 26, 2017 that: "After consultation with my Generals and military

experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

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

10. The term "Interim Guidance" shall mean the memorandum issued by Secretary Mattis titled "Memorandum: Military Service of Transgender Individuals – Interim Guidance" dated September 14, 2017.

11. The term "Service Branch" shall mean any or all of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

12. The "SCCC" shall refer to any and all Service Central Coordination Cells concerning military service and/or accessions by transgender people, including any established pursuant to or consistent with DoD Instruction 1300.28.

13. The term "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Fed. R. Civ. P. 34(a), including without limitation letters, memoranda, articles, notes, email, and electronic files of all kinds. A draft or non-identical copy is a separate document within the meaning of this term.

14. The term "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) by any means, including orally, electronically, or by means of or contained in any Document.

15. The term "Organization" shall refer to a corporation, partnership, business, association, or other private or governmental entity.

16. The terms "Identify", "Identity", and "Identification" mean, at a minimum, and in addition to any other information requested by a particular Interrogatory:

a. when referring to a person, (i) the person's full name and present or last known address, and (ii) the person's last known title and place of employment;

b. when referring to an Organization, the name and address of the Organization;

c. when referring to a Document, (i) the type of Document (e.g., letter, memorandum, email, etc.) and its title or other designation, (ii) its general subject matter, (iii) its date of creation, (iv) if an email, letter, memorandum, written instruction, or other correspondence, its date of transmittal, (v) the Identity of all author(s), addressee(s), and recipient(s) of the Document at any time, and (vi) a statement of whether the Document is unclassified, is classified in part, or is classified in its entirety, and, if the Document is classified, the level(s) of classification (e.g., Confidential, Secret, etc.);

d. when referring to a Communication, (i) the date of the Communication; (ii) the means of the Communication (*e.g.*, telephonic, in person meeting, letter, email, etc.); (iii) the general subject matter; (iv) for any Communication by telephone or in person meeting, the location and Identity of all attendees and participants; (v) for any Communications by means of or contained in a Document, Identification of the Document containing such Communication; and

e. when referring to information, facts, data, and research, the complete substance of the information, facts, data, or research.

17. The term "State the Basis" means that a responding party shall, at a minimum, and in addition to any other information requested by a particular Interrogatory:

a. Identify each and every Document (and, where pertinent, the section, article, or subsection thereof), which forms any part of the source of the party's information regarding the referenced assertions, facts, or legal conclusions;

b. Identify each and every Communication which forms any part of the source of the party's information regarding the referenced assertions, facts or legal conclusions;

c. State separately the acts or omissions to act on the part of any person or Organization (Identifying the acts or omissions to act by stating their nature, time, and place and Identifying the persons involved) which form any part of the party's information regarding the referenced assertions, facts, or legal conclusions; and

d. Identify separately any other information, facts, data, and research which forms the basis of the party's information regarding the referenced assertions, facts, or legal conclusions.

INTERROGATORIES TO BE ANSWERED BY DEFENDANT TRUMP

1. State the date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

2. Identify all Documents reviewed, relied upon, and/or considered by President Trump in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" on or before July 26, 2017.

3. Identify all information, facts, data, and research reviewed, relied upon, and/or considered by President Trump in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" on or before July 26, 2017.

4. Identify the "Generals and military experts" referenced in the Twitter Statement, and, for each such person, Identify all Communications between that person and President Trump concerning military service by transgender people.

5. Identify all Communications between President Trump and any other person concerning President Trump's decision that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" from January 20, 2017, to the present.

6. State the Basis for President Trump's assertion in the Twitter Statement that military service by transgender individuals would entail "tremendous medical costs."

7. State the Basis for President Trump's assertion in the Twitter Statement that military service by transgender individuals would entail "disruption."

8. State whether President Trump received advice or counsel from any attorney in the process of deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military," and for each such attorney (a) state the date the advice was communicated to President Trump; (b) state the subject matter of such advice;

(c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

9. State the "meaningful concerns" referenced in the Presidential Memorandum, and Identify all Documents and Communications relating to those concerns considered by President Trump prior to issuing the Presidential Memorandum and all persons who expressed those concerns to President Trump, including the specific "meaningful concern[]" articulated by each such person.

10. Identify all Documents that are assessments, reports, evaluations, studies, or other research regarding the impact of military service by transgender individuals on military effectiveness and lethality, unit cohesion, or military resources considered by President Trump in preparing and issuing the Presidential Memorandum.

INTERROGATORIES TO BE ANSWERED BY DEFENDANT MATTIS

11. Identify all persons who participated in the drafting of the Accessions Deferral Memorandum, including without limitation all persons who reviewed the memorandum or any draft thereof prior to its release, and, for each such person (1) state their role in drafting the Memorandum; (2) state the date(s) of their participation in drafting the Memorandum; and (3) Identify all Documents memorializing or reflecting such participation.

12. State the Basis for Secretary Mattis' assertion in the Accessions Deferral Memorandum that "it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018]."

13. Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, concerning the Accessions Deferral Memorandum.

INTERROGATORIES TO BE SEPARATELY ANSWERED BY DEFENDANTS TRUMP, MATTIS, AND DUNFORD

14. Identify all Documents that are assessments, reports, evaluations, studies, or other research concerning military service by transgender people that were transmitted to, received by, or considered by President Trump from January 20, 2017, to July 26, 2017, and, for each such Document, Identify the person or Organization who transmitted it to President Trump and state the date(s) of transmission to and receipt by President Trump.

15. Identify all persons involved in drafting the Twitter Statement, including all persons who reviewed the statement or any draft thereof prior to its release to the public via Twitter and, for each such person, (a) state their role in drafting the statement; (b) state the date(s) of their participation in drafting the statement; and (c) Identify all Documents memorializing or reflecting such participation.

16. Identify all persons involved in drafting the Presidential Memorandum, including without limitation all persons who reviewed it or any draft thereof prior to its release to the public, and for each such person, (a) state their role in drafting the Presidential Memorandum; (b) state the date(s) of their participation in drafting the Presidential Memorandum; and (c) Identify all Documents memorializing or reflecting such participation.

17. For every meeting attended by President Trump, Secretary Mattis and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

18. Identify all Communications between a United States Senator or member of the United States House of Representatives, on the one hand, and President Trump or any officer or

employee of the Executive Office of the President, on the other, from January 20, 2017, to July 26, 2017, concerning military service by transgender persons.

INTERROGATORIES TO BE SEPARATELY ANSWERED BY ALL DEFENDANTS

19. Identify all Communications requesting or providing information between January 20, 2017, and August 25, 2017, concerning the military service and/or accession of transgender persons between or among the Executive Office of the President and any of the following: the Department of Defense, the Department of Homeland Security, and/or any Service Branch.

20. Identify all Communications between President Trump and Secretary Mattis, the Department of Defense, General Dunford, the Joint Chiefs of Staff, the Department of Homeland Security, and/or any Service Branch from January 20, 2017, to August 25, 2017, concerning military service by transgender individuals, including Communications concerning: (a) any evaluation(s) conducted by the Department of Defense on the impact of accessions of transgender applicants on readiness or lethality; (b) the issuance of or assessments or other responses provided in response to Accessions Readiness Memorandum; (c) the decision announced in the Accessions Deferral Memorandum; (d) the President's Twitter Statement; (e) the Presidential Memorandum; and/or (f) the Interim Guidance.

21. For every meeting attended by any representative of the Executive Office of the President, the Department of Defense, a Service Branch or the Defense Health Agency between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

22. Identify all Documents that are assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning (a) the impact of transgender individuals serving in the military on military readiness and/or lethality; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

23. Identify all persons employed by or working in an SCCC at any time from June 30, 2016, to the present, and for each such person state the person's dates of employment or work in the SCCC, the person's role and title, and the nature of the person's responsibilities.

24. Describe the DoD Initiative, including, without limitation, the information sought and the manner in which the information was sought, and Identify all persons involved in the dissemination of the request for information pursuant to the DoD Initiative, all persons involved in the collection and reporting of responses to such request, and all persons responsible for reviewing submissions tendered to the Office of the Secretary of Defense in response to the DoD Initiative.

25. Identify all Documents that are (a) responses to any request for information that was part of the DoD Initiative, and/or (b) assessments submitted in response to the memorandum dated May 8, 2017, entitled "Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service."

December 15, 2017

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CERTIFICATE OF SERVICE

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

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Counsel for Defendants

/s/ Daniel L. McFadden
Daniel L. McFadden

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER, in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA, Defendants.[1]	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' FIRST SET OF REQUESTS
FOR PRODUCTION TO ALL DEFENDANTS

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

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

DEFINITIONS

1. The term "Individual Defendants" shall refer to Defendants Donald J. Trump, James N. Mattis, Joseph F. Dunford, Jr., Mark T. Esper, Richard V. Spencer, Heather A. Wilson, Kirstjen Nielsen, and Raquel C. Bono.

2. The "Accessions Readiness Memorandum" shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services," dated May 8, 2017.

3. The "Accessions Deferral Memorandum" shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services," dated June 30, 2017.

4. The "DoD Initiative" shall refer to the request by the Department of Defense, responded to by John Doe 1, seeking to obtain information relating to transgender servicemembers.

5. The "Twitter Statement" shall refer to the statement issued by President Trump on twitter on July 26, 2017 that: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to

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

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

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

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

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

REQUESTS FOR PRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

December 15, 2017

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CERTIFICATE OF SERVICE

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

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Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov
Counsel for Defendants

/s/ Daniel L. McFadden
Daniel L. McFadden

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 17-cv-1597 (CKK)
	)	
MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*,,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF COL ANDREAS THUM

I, Andreas Thum, hereby state and declare as follows:

1. I am a Colonel (COL) in the U.S. Army currently assigned as the Deputy Director of Military Personnel Management (Reserve Components), Office of the Deputy Chief of Staff, G-1, at the Pentagon. I have been in this position since September 5, 2017. I am the senior reserve component policy integrator in the Directorate of Military Personnel Management. As a part of my duties, I am also the Deputy Chair of the Army's Service Central Coordination Cell (SCCC). The SCCC is a working group responsible for developing, planning, and implementing the Army's personnel policies for soldiers who are transgender or are diagnosed with gender dysphoria, on behalf of the Secretary of the Army. Members of the SCCC served as custodians for document collections and productions in this and related litigation due to their close relationship to the military's policy concerning transgender individuals and individual with gender dysphoria.

2. From my official duties related to these responsibilities, I have an understanding of the Army's assertions of privilege in the above-titled litigation. I make this declaration based upon my personal knowledge and upon information that has been provided to me in the course of my official duties. I submit this declaration in support of Defendants'

opposition to Plaintiffs' motion to compel in the above-titled case. In particular, I address below the Army's basis for withholding certain documents solely on the basis of the deliberative process privilege in response to Plaintiffs' requests for production.

3. I have reviewed the disputed documents identified by Plaintiffs. Based on my review, I have determined that these documents were created as part of, and reflect, the Department of Defense's and Army's deliberative processes for developing and implementing their policies on the military service of transgender persons and persons with gender dysphoria.

Claw Back Documents Protected by the Deliberative Process Privilege[1]

4. One category of documents on the Army's June 2019 clawback log includes working drafts of policy documents and documents reflecting comments or edits to those drafts.[2] For example, USDOE00101366–USDOE00101368 is a working draft of the memo establishing the Army's Transgender Service Implementation Group (TSIG), the final signed version of which the Army has already produced. USDOE00103262–USDOE00103269 is a working draft of the Army's order to the field on how to implement court-ordered accessions of transgender applicants, which was submitted for review and comments. The Army has already produced the final version of this document. Another document, USDOE00101245–

[1] Defendants have withdrawn their claim of privilege over USDOE00102831–USDOE00102834, USDOE00103259–USDOE00103260, USDOE00104705–USDOE00104706, and USDOE00109154.

[2] USDOE00101245–USDOE00101246; USDOE00101366–USDOE00101368; USDOE00103262–USDOE00103269; USDOE00103437–USDOE00103443; USDOE00104693; USDOE00104697; USDOE00107339–USDOE00107340.

USDOE00101246, is a working draft of a proposed Army-wide communication from the Vice Chief of Staff of the Army (VCSA) regarding the status of the Army's transgender service policy, which the VCSA never actually sent or otherwise made public. Other documents reflect comments from staff officials reviewing the drafts and providing specific feedback on the working drafts. USDOE00103437–USDOE00103443 is a "comments matrix" from a staff official providing specific recommendations on what changes or edits should be incorporated into the working draft of the Department of Defense Instruction regarding transgender military service and service by individuals with gender dysphoria. Similarly, USDOE00104693 and USDOE00104697 are two email chains from staff officials providing specific comments to working drafts of slide presentations used during the policy development process.

5. A second category of documents relate to draft versions of public affairs guidance and recommendations distributed to Army staff officials in preparation for inquiries from the media regarding pending changes to Department of Defense (DoD) and Army policies and significant events during the policy development and implementation process.[3] Notably, the proposed guidance contains hypothetical questions that might be posed by members of the media, along with proposed recommendations for how senior officials could possibly respond in order to prepare them for strategic communications. One document, USDOE00107334–USDOE00107338, is an email from a staff official providing comments on a working copy of another document, USDOE00107339–USDOE00107340,

[3] USDOE00098957–USDOE00098961; USDOE00101211–USDOE00101212; USDOE00107334– USDOE00107338; USDOE00107339– USDOE00107340.

consisting of draft public affairs guidance. These documents were not prepared in response to a specific press inquiry, but rather were developed to provide recommendations and proposals to senior officials on how to address future inquiries and how to communicate updates to the military's transgender policies to the media and the public.

6. A third category of documents reflect the coordination efforts between staff officials when developing and implementing policy.[4] For example, USDOE00103057–USDOE00103059 is an execution matrix showing tentative future events and the proposed tasks that would need to be completed to accomplish the event. This document was used to coordinate and synchronize efforts between the various staff officials that contributed to the military's personnel policies concerning transgender individuals and individuals with gender dysphoria. Similarly, USDOE00109111 is a proposed timeline mapping out a future plan for how the Army could assess the implementation and impact of the Carter policy on various aspects of the organization. The information in these documents is arranged in such a way that it necessarily reveals the Department of Defense's internal decision making process for updating the Department's polices concerning military service by transgender individuals and individuals with gender dysphoria. The documents reveal sensitive information about how the Army and DoD develop their policies and continue to assess those policies' effectiveness. In addition, the documents relate to how staff officials synchronize their processes for developing and implementing these policies.

7. A fourth category of documents relate to the Army's process for determining how

[4] USDOE00103057–USDOE00103059; USDOE00109111; USDOE00105856 (timeline slide).

best to implement the accession of transgender applicants beginning January 1, 2018. In light of court orders requiring the military to implement the accessions policy by that date, the Services, in coordination with the Department of Defense, had to rapidly develop a plan to effectively and efficiently begin accessing transgender applicants in a standardized manner. Documents in this fourth category contributed to this process and reflect staff officials' recommendations and proposed courses of action for how to implement the court orders. For example, USDOE00103262–USDOE00103269 is a draft order outlining the details of how the Army would execute accessions. This document was distributed for review so staff officials could identify potential problems, provide comments, and recommend potential solutions.

8. Finally, a fifth category of documents summarize the recommendations proposed by the working groups and sub-groups tasked with developing the military's policy concerning service by transgender individuals and individual with gender dysphoria, including the Panel of Experts, along with comments, concerns, and recommendations from Army staff officials regarding discussions and proposals articulated during the working groups.[5] They represent the frank discourse and dialogue between staff officials that leads to healthy decision making. For example, USDOE00101201–USDOE00101202 is an email from an SCCC member to the rest of the SCCC offering her thoughts on ways the Army could collect data and information in support of the policy development process.

[5] USDOE00101201–USDOE00101202; USDOE00101518; USDOE00101555–USDOE00101556; USDOE00101588–USDOE00101589; USDOE00107059–USDOE00107063; USDOE00107290–USDOE00107294; USDOE00107781–USDOE00107786; USDOE00109530–USDOE00109534; USDOE00105856–USDOE00105861.

USDOE00107290–USDOE00107294 is a slideshow presentation for Army senior leaders summarizing the Panel's recommendation under consideration as of December 21, 2017, and includes a proposed course of action from the Marine Corps on how the proposal could be implemented. Similarly, USDOE00109530–USDOE00109534 is a slideshow presentation summarizing three proposed courses of action for how to address the accession of applicants and five proposed courses of action for how to address retention of transgender soldiers already serving. On the same note, USDOE00101555–USDOE00101556 is an email from the Deputy Assistant Secretary of the Army (Military Personnel & Quality of Life) to the Assistant Secretary of the Army (Manpower & Reserve Affairs) summarizing proposed courses of action regarding accession and retention and associated comments from group members discussed during a January 1, 2018 meeting of the Medical Personnel Executive Steering Committee (MEDPERS) working group supporting the Panel of Experts, before the Panel provided its recommendations to the Secretary of Defense.

Vaughn Index Documents Protected by the Deliberative Process Privilege

9. Plaintiffs have also identified as disputed documents in the Army's Vaughn Index. Although many of these documents relate to the implementation of a particular policy or court order, as explained *supra* ¶ 7, even once a final policy is announced, the Army continually engages in a process of assessing the policy's effectiveness in order to determine whether the policy should be modified in any way or rescinded. The documents in this category reflect such deliberations. For example, USDOE00103668 is an email from the G-1, U.S. Army Cadet Command, to the Chief of Accessions, G-1, HQDA,

recommending an update to the Army's transgender accessions policy in order to address nuances in how ROTC cadets are accessed into service compared to regular enlistees, which was an issue not contemplated or addressed by the Carter policy.

10. In addition, whenever the Army is directed to implement a new or changed policy (for example, by the Department of Defense or by court order), the Army must undertake a separate deliberative process to determine how the Army should best implement the policy. *See supra* ¶ 7. This independent process with respect to implementation involves the same kind of confidential deliberations as those that led to the initial policy, since the process for how a policy is implemented is often just as important to the Army as the policy itself. Some of the documents Plaintiffs identify as disputed on the Vaugh index reflect such deliberations. For example, USDOE00103581–USDOE00103582 is an email from an SCCC member providing input on the plan to begin accessing transgender applicants in accordance with the Carter policy by January 1, 2018. Thus, these materials are part of the Army's continuing process of evaluating policies and their implementation.

11. Moreover, based on a review of a sampling of documents Plaintiffs identify as disputed on the Army's *Vaughn* index, none of the documents contain purely factual information. Instead, any factual material in the documents is intertwined with deliberations. For example, USDOE00103831 is an email between medical staff officers discussing medical conditions that require specific monitoring as part of the larger policy process for evaluating the impact of cross-sex hormone therapy on military readiness. Another example, USDOE00104196–USDOE00104199, is an email between medical staff officers discussing a request from DoD Health Affairs for health-related data from the

Services on service members with gender dysphoria. The email discusses how the Army could accomplish the request, including the challenges involved. In contrast, the Army previously produced the data collected in response to the request because it contained purely factual matter. As another example, USDOE00104475–USDOE00104476, is an email discussing the Army's comments to a draft DHA Interim Procedures Manual, which establishes policies within the medical community for treating patients with gender dysphoria, and comments on a draft checklist for standardizing sex reassignment surgery waivers.

Harm to the Army if the Documents are Released

12. When developing policies, or assisting the Department of Defense develop its policies, the Army depends on the open and candid conversations between senior leaders, advisors, and policy analysts in order to fully examine the issues and to provide honest assessments and recommendations, which provides decision makers with complete and accurate information. Without this full and frank discourse, the integrity of the Army's decision making processes suffers. Because of the Army's global mission and structure, much of its policy deliberations occur over email or transmittable briefings. If the individuals responsible for these communications knew their comments would be subject to outside scrutiny, they would be less willing to provide open and honest input in developing policies critical to the Army's success.

13. The withheld documents record the frank and candid recommendations, proposals, opinions, and suggested courses of action for developing Army policy by those staff personnel directly responsible for reviewing and revising the Army's policies on the military service of

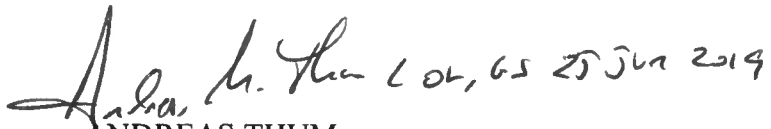
transgender persons and persons diagnosed with gender dysphoria, including the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs; the Office of the Deputy Chief of Staff, G-1; the Office of the Surgeon General of the Army; the Office of the General Counsel; the Office of the Judge Advocate General; and other personnel whose recommendations and opinions were solicited as part of the policy development and implementation processes. They represent the deliberations and back-and-forth discourse between the personnel responsible for promulgating the Army's personnel policies on a sensitive and delicate topic that is subject to public and political scrutiny. Participants in this process were encouraged to speak candidly and openly, and these documents and communications were made under an expectation that they were confidential and would be protected from disclosure by federal law, regulations, and legal privilege. The Army depends on the frank and candid discussions and deliberations of its staff in order to develop or revise its personnel policies, especially those involving the military service of personnel with service- and/or deployment-limiting medical conditions. Disclosure would, therefore, have a chilling effect on the Army's personnel when developing forthcoming policies, and thus an adverse effect on the quality and integrity of the Army's future decision making processes.

Previously Produced Documents

14. Plaintiffs contend that Defendants have not produced the data referenced in footnote 121 of DoD's report. Pls.' Mot. 9. The Assistant Secretary of Defense (Health Affairs) sent out a data request to the Services for appropriate medical data to enable an analysis of the effect of treatment for gender dysphoria on the deployability of affected servicemembers, including the number of servicemembers in each component diagnosed with gender dysphoria, information pertaining to the number of gender

dysphoria treatment plans and treatments included on those plans, and the number of individuals diagnosed with gender dysphoria on some form of limited or restricted duty. The data collection covered the time period from September 1, 2016 to August 31, 2017 and was provided to the Assistant Secretary of Defense (Health Affairs) on or before October 15, 2017. The data provided by the Army is "the data reported by the Department of the Army" in footnote 121. This data was previously provided to Plaintiffs as Army_100002491.0103 in Production 12 and Army_10000157 in Production 009.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of June 2019.



ANDREAS THUM
Colonel, U.S. Army
Pentagon

Exhibit 4

IN THE UNITED STATES DISTTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 17-cv-1597 (CKK)
	)	
MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF MS. MARTHA SOPER

I, Martha Soper, hereby state and declare as follows:

1. I work for the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR). My office is located at the Pentagon in Arlington, Virginia, within the Deputy Assistant Secretary's office, which is responsible for personnel and airmen readiness issues. My specific duties within the office deal with health policy, to include, among other responsibilities, coordination and oversight on the Air Force's policy concerning military service by transgender individuals and individuals with gender dysphoria. Among other duties, I served as the primary point of contact for the Air Force Service Central Coordination Cell (SCCC), which is a primary resource for providing commanders with guidance for all inquiries related to service by transgender airmen and for inquiries about the policy on how transgender airmen would undertake their gender transition.

2. In the exercise of my official duties, I am aware of this lawsuit and the related litigation involving the Department of Defense (DoD) policy for service members diagnosed with gender dysphoria. The information in this declaration is based on my personal knowledge and upon my

personal review of the information made available to me in my official capacity. I am submitting this declaration in support of Defendants' Responseto Plaintiffs' Motion to Compel, Dkt. 216 ("Plaintiffs' Motion"). Plaintiffs' Motion seeks to compel, among other documents, those considered or generated both during the Panel of Experts review process and between the conclusion of the panel review process and the adoption of the Mattis policy, which Defendants logged on five *Vaughn* Indexes.[1] One of those indexes covers documents maintained by the Department of the Air Force.

3. I have reviewed the Air Force documents that Plaintiffs have moved to compel and determined that information contained in those documents is pre-decisional and deliberative. Producing those documents to Plaintiffs would require disclosing sensitive deliberative material reflecting the pre-decisional processes of both junior and senior Air Force officials, in the latter case, often at the General Officer and political appointee or Senior Executive Service (SES) levels. The disclosure of such documents will inhibit the future free and open exchange of ideas and opinions within the Department as both junior subject-matter-experts and more senior decisionmakers come to realize that their frank assessments, intended for a narrow, Air Force or DoD-only audience, could be broadcast to the public at large.

[1] Plaintiffs contend that Defendants have not produced the data referenced in footnote 121 of DoD's report. Pls.' Mot. 9. The Assistant Secretary of Defense (Health Affairs) sent out a data request to the Services for appropriate medical data to enable an analysis of the effect of treatment for gender dysphoria on the deployability of affected servicemembers, including the number of servicemembers in each component diagnosed with gender dysphoria, information pertaining to the number of gender dysphoria treatment plans and treatments included on those plans, and the number of individuals diagnosed with gender dysphoria on some form of limited or restricted duty. The data collection covered the time period from September 1, 2016 to August 31, 2017 and was provided to the Assistant Secretary of Defense (Health Affairs) on or before October 15, 2017. This data provided by the Air Force is referenced in footnote 121 and was previously produced to Plaintiffs as AF_00005636 in Production 2.

Harm to the Air Force if the Documents are Released

4. When developing policies or assisting the Department of Defense in the development of its policies, the Air Force depends on open and frank conversations among senior leaders, advisors, and policy analysts to thoroughly assess the relevant issues and to provide honest opinions and recommendations in order to provide decisionmakers with complete and accurate information. The withheld documents reflect candid recommendations, opinions, and proposals, as well as the give-and-take necessary in the policymaking process. Disclosure of these documents would have a substantial chilling effect on the willingness of Air Force personnel to participate in future deliberations and provide honest input when developing future policies, and this would have a negative effect on the quality of the Air Force's policymaking process.

5. 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 honest views in the future. This is especially true given the high-profile and controversial nature of this issue. The medical and personnel issues involved in this type of policymaking often involve heated debates. In my opinion, and based on my observations of how both the Carter policy and the Mattis policy were developed, the medical, legal, and personnel specialists and policymakers who made contributions in this effort carried out their responsibilities with professionalism and objectivity. However, because of the public scrutiny associated with such a high-profile and sensitive issue, many of the fair and impartial individuals with whom I work, at both the subject-matter-expert and senior policymaker levels, would simply not have been willing to share their forthright and unvarnished remarks if they had known that their inputs would be attributable to them in the public spotlight. Further, they would be unwilling to share their honest opinions in the future if their deliberations are not protected from disclosure.

6. The chilling effect is particularly acute here because the deliberative process carried out in the emails discussed within this declaration occurred over an extended period of time, and one individual email or even part of an email chain often represents only one fragment of a broader conversation and deliberation. Accordingly, the disclosure of these communication without additional context could lead to opinions being taken out of context and causing confusion. This would discourage individuals from participating in future deliberations and policymaking processes for fear that their frank comments would be taken out of context and subject them to unfair accusations. As a result, the Air Force's decisionmaking process would suffer.

Documents Protected by the Deliberative Process Privilege

7. In their motion, Plaintiffs challenge the Air Force's assertion of the deliberative process privilege over USDOE00000252[2]. However, this document is plainly pre-decisional and deliberative. It concerns an email exchange originating with Colonel Douglas Schiess, who at the time was an executive officer to the Undersecretary of the Air Force, Matthew Donovan. Secretary Donovan was a member of the Panel, and as part of his responsibilities on the Panel, received a worksheet entitled "Transgender Review Panel Policy Recommendation Worksheet" which contains assumptions and planning considerations underlying the Panel's deliberations, along with a series of questions upon which the individual Service Secretaries would express their opinions to the Secretary of Defense. Colonel Schiess distributed the Worksheet to a number of Air Force offices, ranging from the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (SAF/MR) to the office of the Deputy Chief of Staff for Manpower, Personnel, and Services (AF/A1) to the office of the Air Force Surgeon General

[2] Plaintiffs erroneously refer to this document as USDOE00003252 in their brief.

(AF/SG) for their inputs back to the Secretary. The Worksheet questions delved into detailed, nuanced aspects of the draft policy; divulging these questions would reveal the deliberative approach and decisionmaking process of the Panel, arguably to the same degree that the answers to the questions would reveal the approach and process of the Panel.

8. The documents on the Air Force *Vaughn* Index can generally be broken down into two main categories: (1) emails seeking or expressing opinions, recommendations, and perspective on how to implement the Carter policy, and (2) emails seeking or expressing opinions, recommendations, and perspective in furtherance of establishing Air Force positions or inputs ultimately for the benefit of the Panel of Experts. Both groups of emails contain various sub-categories of emails, and both occasionally contain contacts with other Services and DoD.

9. The first category of documents contains email deliberations regarding how the Air Force would implement the Carter policy beginning January 1, 2018 in accordance with court orders. One group of emails, for instance, contains deliberations concerning the recruiting dimension of transgender accessions and how Air Force Public Affairs would explain the policy implementation to the public. USDOE00001138 to USDOE00001160. Input from a number of individuals in the personnel and medical community was solicited; attached to the email is a document entitled "Potential questions for Recruiters concerning Transgender Accessions" with proposed answers, which email recipients were asked to comment upon. USDOE00001142. An additional example in this vain is USDOE00005230, which is an email chain within the military personnel community (AF/A1) requesting talking points on transgender policy for Lieutenant General Grosso (AF/A1) in anticipation of her attending the Air Force's Chief of Staff weekly staff meeting. Attached to the email is a draft unsigned letter from AF/A1 (General Grosso) to

Major Command (MAJCOM) vice commanders from AF/A1 updating them on transgender policy based on the aforesaid court orders. USDOE00005233.

10. Another example of a Carter-policy implementation email is USDOE00190281. This document is an email dated March 9, 2018, from myself, SAF/MR to various Lieutenant Colonels and Colonels in the personnel, medical and legal offices. The email characterizes the policy then in-place (the Carter policy), offers an educated estimate on the number of Air Force personnel ready for a gender-marker change at that point in time, and then poses three questions to the recipients regarding specific data about such individuals, the status of these, and the impact of that status on potential future gender-marker changes. The observations and questions in the email are intertwined with Air Force data on those diagnosed with gender dysphoria. While the email postdates the Panel of Experts' final vote, the document remains pre-decisional and deliberative because the aim of the email is to explore the considerations and criteria by which airmen could effectuate a gender marker change. That effort was in furtherance of implementation of the Carter policy, which remained in-effect at that point in time. This email was specifically intended for the aforementioned audience and release outside of that group was not contemplated. The email calls for a number of specialists to make judgment calls on the extremely sensitive topic of whether certain individuals diagnosed with gender dysphoria had received the necessary treatment to justify a gender-marker change.[3]

11. Another subcategory of documents on the Air force's *Vaughn* Index includes documents concerning the Exception to Policy (ETP) waiver process. These documents are a subcategory

[3] This example also serves to illustrate that Plaintiffs' challenges to Air Force assertions of the deliberative process privilege on the grounds that the timeframe of the documents post-dates the Panel of Experts' report are unavailing. Such documents nonetheless contain pre-decisional and deliberative content concerning the Air Force's decisions about implementation of the policy and on-going consideration of its impact on the Air Force specifically.

of the above relating to implementation of the Carter policy. Some documents in this category are emails regarding ETPs concerning specific military members (e.g. USDOE00190605).[4] Other emails contain discussion on how the ETP process will work. For instance, in USDOE00001454, I have a correspondence with individuals in the personnel (AF/A1) and logistics, installations, and mission support (AF/A4) communities concerning a decision we had to make about who should have authority to grant ETPs for facilities usage by individuals undergoing gender transition. The email describes the interim consensus to which the SCCC arrived at that point in time on the question of whether an ETP waiver for dress and appearance should also include a provision for facilities usage in accordance with the gender change sought by the applicant. The email contains my candid views, and I conclude the email by asking for opinions on the follow-up question of which Air Force entity (personnel versus logistics) should have the authorization to approve such waivers. Neither I nor the individuals who responded to this email contemplated release to an outside audience on the sensitive topic of transgender facilities usage, compounded by the further controversy of intra-agency Air Force competencies. If I had known that these deliberations would be disclosed, I would not have been as candid or open about sharing my opinions.

12. Many of the emails dealing with ETPs were part of Air Force SCCC responsibilities.[5] A typical email is USDOE00190101. I wrote this email, which was sent from the SCCC's organization email address to other Air Force SCCC members. In the email, I offer my opinion

[4] *See, e.g.*, DOE00000370, USDOE00000372, USDOE00000430, USDOE00000515, USDOE00000519, USDOE00000522, USDOE00005492, USDOE00005555, USDOE00010211, USDOE00010213, USDOE00187105, USDOE00187147, USDOE00190056, USDOE00190057, USDOE00190076, DOE00190098, DOE00190102, DOE00190104, DOE00190105, DOE00190107, DOE00190109, USDOE00190222, USDOE00190223.

[5] *See, e.g.*, USDOE00000376, USDOE00000495, USDOE00000499, USDOE00001333, USDOE00001337, USDOE00004472, USDOE00004476, USDOE00001454.

on how the draft ETP template, which was still under development, should be fashioned and how the processing should take place.

13. The second overarching category of documents contains communications within the Air Force and between the Air Force and the other Services and DoD providing opinions, recommendations, and perspectives to the Panel of Experts. These documents include communications and deliberations between high-level Air Force leadership and high-level officials at DoD and the other Services. One example is USDOE00238799, which is an email from the Vice Chief of Staff of the Air Force (AF/CV), General Stephen Wilson to Mr. Robert Wilkie, the then-Under Secretary of Defense for Personnel and Readiness (OUSD P&R). Numerous other senior officials within the Air Force, other Services, and OUSD were copied on this email. This particular email is the end of an email chain initiated by Secretary Wilkie wherein the Secretary expresses his opinions on the importance of a particular stage of the Panel's proceedings, along with his direction and explanation for why the Panel's membership should be constituted in a particular fashion.

14. Other documents in this category are communications made within the Air Force in an effort to develop its inputs for the Panel. For instance, in USDOE00005244, a staff official send an email alerting an assistant to the Deputy Chief of Staff for Manpower, Personnel, and Services (AF/A1), Lieutenant General Gina Grosso, that General Grosso will need to establish a position on the question of how diagnoses of gender dysphoria should be handled after March 22, 2018, *i.e.* whether there should be a "grace period" for those receiving such a diagnosis. To facilitate the General's development of a formal position, the staff official includes a draft proposed email from the assistant to the Deputy to General Grosso outlining the pros and cons of having and not having a grace period. Another example in this category is USDOE00005937,

which is an email from the same A1 staff member updating senior A1 officials on the status of Panel proceedings, providing commentary and perspective on various proposals being considered by the Panel, and advising that a formal position will have to be presented from the Air Force to the Panel on three particular points of contention.

15. Other documents in this category are internal Air Force communications discussing proceedings by the Panel, which detail the pre-decisional proposals and recommendations being considered by the Panel at that time. One such example is USDOE00005783, which is an email in which a senior official in Manpower, Personnel and Services (A1) informs General Grosso of the most recent inputs from the Services to the Panel regarding the amount of time ("period of stability") that a person diagnosed with gender dysphoria must be stable in his or her new gender prior to accessing into the Armed Forces. Another example from A1 is USDOE00005225, which is an email in which a staff official in AF/A1 updates a higher-ranking official in A1 on positions expressed to date by the Air Force and other Services to the Panel on a variety of aspects of transgender policy. Similarly, USDOE 00186825 is an email from the Air Force Surgeon General's Transgender Policy and Program Manager to two other Air Force medical officials passing along information from me on a variety of topics being considered by the Panel. The email contains commentary regarding the attachments and discusses opinions from a number of working groups providing feedback to the Panel. Finally, USDOE00189966 is an example of Air Force discussions at the highest level of Air Force leadership about the potential terms of the Mattis policy. In that email, the Air Force Chief of Staff, General David Goldfein (AF/CC) asks Matthew Donovan about a potential provision in the Mattis policy that ultimately was not adopted by the Panel.

16. I have also reviewed the documents that Plaintiffs argue contain purely factual material. However, these documents are pre-decisional and deliberative, and any factual material in the documents is intertwined with deliberations. One example is USDOE00000407-USDOE00000409. The Air Force description of the document reads "Email dated Sep 26, 2017 from Ms. Soper to AF/A1 discussing data elements to be considered in the assessment of TG military service, with attachment of such from the Army." Plaintiffs' challenge to the document states that "discussion of data indicates document contains factual information." However, the Air Force's description indicates that there is a "discussion," in this case between myself and the office of Manpower, Personnel and Services (AF/A1). A policy cannot be formulated or implemented without discussion, and here the discussion relates to the nature of factors and weight of each factor that should be considered in developing and implementing the policy. Accordingly, any factual material is intertwined with those deliberative discussions. Moreover the breadth of the discussion in this case is inter-service, as the Air Force is receiving suggestions from the Army, reflecting on those suggestions, and then preparing to remit those discussions back to the Army. Accordingly, producing this document would compromise the willingness of subject-matter-experts and advisors in not just one, but two, military services to candidly reveal their thoughts in evaluating potential policy.

17. Another document that Plaintiffs challenge as containing purely factual material is USDOE00000483-USDOE0000487. This document is an email between myself and a number of individuals involved in arranging the presence of military personnel at the Medical and Personnel Executive Steering Committee (MEDPERS) and Panel of Experts. The Air Force describes the email as "discussing potential participation of TG servicemembers and their commanders at a TG working group panel…" Plaintiffs assert that the document is a "discussion

of logistics of personnel" which, according to Plaintiffs, indicates that "the document contains factual information." However, Plaintiffs are mistaken. The inter-service email exchange—which involves Army, Navy, and Air Force personnel—contains comments on and deliberations about the degree of preparation expected of participant transgender servicemembers and their respective medical providers and commanders, the substantive extent of their testimony, and quite specifically, the possible impacts of transgender medical care on deployability and readiness. All of those factors are intertwined and inseparable from any discussion of logistics. Producing this document would reveal how three separate Service branches interfaced with one another in developing policy by illustrating key operative details about the deliberations that were fundamental to that policy.

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

Executed this 25th day of June 2019.

MARTHA P. SOPER

Assistant Deputy Health Policy

Exhibit 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

MARK T. ESPER, in his official capacity as Acting Secretary of the Department of Defense, *et al.*,

Defendants.

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

DECLARATION OF TERRY ADIRIM, M.D., M.P.H.

I, Terry Adirim, declare as follows:

1. I am Terry Adirim, M.D., M.P.H., Deputy Assistant Secretary of Defense for Health Policy and Oversight in the Office of the Assistant Secretary of Defense for Health Affairs. I have held this position since July 2016. Before coming to the Department of Defense (DoD), my prior positions included: Professor of Pediatrics and Emergency Medicine at Drexel University College of Medicine and attending physician at St. Christopher's Hospital for Children (2014-2016); Director of the Office of Special Health Affairs at the Health Resources and Services Administration in the U.S. Department of Health and Human Services (2010-2014); and Senior Advisor in the Office of Health Affairs at the U.S. Department of Homeland Security (2007-2010). I graduated from the University of Miami Miller School of Medicine with research distinction and completed pediatrics training at the Children's Hospital of Philadelphia. I completed pediatric emergency medicine and sports medicine fellowship training at Children's

National Medical Center in Washington, D.C. I also earned a Master's degree in Public Health from the Harvard School of Public Health. I am board certified in pediatrics, pediatric emergency medicine and sports medicine. I have been significantly involved since coming to DoD in matters of DoD policy on transgender healthcare.

2. The information in this declaration is based on my personal knowledge and upon my personal review of information made available to me in my official capacity. I am submitting this declaration in support of Defendants' opposition to Plaintiffs' Motion to Compel, Dkt. 216 ("Plaintiffs' Motion"). I have reviewed Plaintiffs' Motion, including various categories of healthcare-related disputed documents identified by Plaintiffs.

3. During the course of the Panel of Experts review process, my office compiled and presented to the Panel for their consideration relevant health-related data, information, and statistics. I understand that the three versions of this Administrative Data presented to the Panel was produced in this litigation as part of the Administrative Record at Tabs 92, 96, and 100.[1] In addition, we produced to the Panel data and analysis compiled as "Health Data for Service Members with Gender Dysphoria." I understand that the two versions of this compilation were produced in this lawsuit as part of the Administrative Record at Tab 82 (dated November 2, 2017) and Tab 99 (dated December 13, 2017). In addition, at the end of the Panel of Experts process, portions of this data was compiled in a document titled, "Data Extracts: Key information used by the Panel to make recommendations" and presented to the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff. Again, I understand this document was made

[1] I understand that the final version of this Administrative Data was also provided to the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff as part of a "Summary of Information Presented to the Panel," and has been furnished to the Plaintiffs in this litigation. *See* Rosenbaum Decl., Dkt. 214, Ex. K.

available to the Plaintiffs as Tab 98 of the Administrative Record. *See also* Rosenbaum Decl., Dkt. 214, Ex. H. Subsequently, in 2019, my office compiled and produced in response to requests by the House Armed Services Committee ("HASC"), certain data relating to service members with a diagnosis of gender dysphoria, including medical treatment and costs, as well as a chart comparing the average cost of medical treatment of service members generally with the cost for members with gender dysphoria. The data for the information provided at the HASC's request was current as of February 1, 2019. I understand the data provided to the HASC were produced to the Plaintiffs here on April 30, 2019. *See* Rosenbaum Decl., Dkt. 214, Ex. G and I.

4. In their Motion to Compel, I understand the Plaintiffs to complain that DoD has not produced "the underlying data, personnel files, field reports and other back-up documentation" that support the data compilations, analysis, and conclusions described above and previously produced to Plaintiffs. Plaintiffs' complaint reflects their misunderstanding of how DoD manages healthcare data.

5. To create the summaries, charts, and documents described above for the Panel of Experts, the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff, and the HASC, my office ran searches and extracted data from the Administrative Database Military Health System Data Repository ("MDR" or "Admin Database"). The MDR is DoD's centralized data repository that captures, validates, integrates, distributes, and archives the Military Health System healthcare data. It receives and validates data from DoD's worldwide network of more than 260 healthcare facilities and from the TRICARE Purchase Care program. The MDR processes more than 60 billion records annually and provides support information to DoD decision-makers responsible for managing healthcare policy.

6. The MDR is similar to an administrative claims database used by other health plans and health systems. The Administrative Database does not contain the actual medical records but rather certain data points that were extracted from the medical records. No personnel medical records were searched and no documents were created, rather searches were run within the database and analyzed using a standard statistical analytic package called SAS, which produced the numbers and outputs that supported the summaries, charts, and documents given to the Panel of Experts and HASC.

7. The MDR permits searches by using the International Classification of Disease (ICD) codes. These codes allowed my office to identify active duty service members with a diagnosis of gender dysphoria and to create comparisons of healthcare utilization between service members with gender dysphoria and service members without gender dysphoria, as requested by the Panel of Experts.

8. Plaintiffs reference footnotes 64, 65, 66 of the February 2018 Department of Defense Report and Recommendation on Military Service by Transgender Persons in their Motion. To create the chart and documents referenced in footnotes 65 and 66 regarding mental health visits, my office extracted data from the Admin Database by using ICD codes. This is likewise true for the data collected comparing average costs seen at Exhibit I to the Rosenbaum Declaration and for the document entitled "Summary of Information Presented to the Panel" seen at Exhibit K to the Rosenbaum Declaration.

9. Regarding footnote 64, which analyzes the suicidality of service members with gender dysphoria, DoD contracted Kennell and Associates, Inc., ("Kennell") a research and consulting firm specializing in healthcare policy analysis. My office shared our methodology for using the Admin Database once filtered to service members with gender dysphoria and then

Kennell used their own analysis to create comparison of mental health diagnoses in service members with gender dysphoria and mental health diagnoses in service members without gender dysphoria.

10. My office used the Admin Database rather than pulling the underlying medical records for all service members with gender dysphoria because collecting these medical records would have constituted a considerable burden at an unwarranted cost, particularly given that the data is already collected. Because medical records and personnel files are kept in hundreds of separate locations and databases, based on each Service member's military component, gathering each individual's record would have proven incredibly challenging and wholly unnecessary. Such an effort would likely have taken many months, and would have cost the Department hundreds of man-hours and considerable resources. Moreover, give the diffuse nature of the records at issue, gathering the personnel files for these Service members would have created a stronger likelihood of the unintentional disclosure of private medical information, as opposed to using the Admin Database.

11. Likewise, the Plaintiffs' request for data, personnel files, and field reports would constitute an undue burden on the Department, entail considerable cost, and would likely lead to the unintentional disclosure of private medical information. Harms the Department purposefully avoided by extracting data from the Admin Database instead of gathering the individual medical records, personnel files and other raw data.

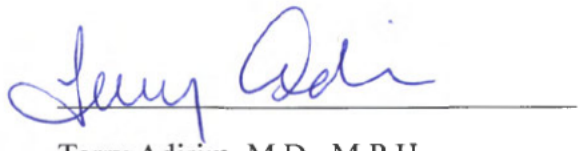
12. To meet the Plaintiff's demands to produce "the underlying data, personnel files, field reports and other back-up documentation," DoD would have to hire a third-party contractor at a cost of likely hundreds of thousands of dollars. DoD does not have the manpower within the Office of the Assistant Secretary for Health Affairs or its other health agencies to perform this

task. This is primarily because the task demanded as noted above, would require extracting the electronic medical records from multiple, separate data systems, for example a pharmacy system, our patient records system and the test result system. This would take a third-party contractor considerable time. It could take months if a team of analysts were hired, and would likely take over a year if only a few people were hired full-time.

13. Moreover, even if DoD were to produce the records after many months of collecting them from multiple data systems, Plaintiffs would need to review each record and then upload the material into a database in order to perform any statistical analysis. The database would include millions of data points for 1.4 million active duty service members, and this data would have personal identifying information and thus would have to be maintained in a highly secure environment.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2019.



Terry Adirim, M.D., M.P.H.

Exhibit 6

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JANE DOE 2, et al.,

Plaintiffs,

v.

MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*,

Defendants.

No. 17-cv-1597 (CKK)

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

DECLARATION OF ROBERT E. EASTON

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

1. I currently serve as Director, Office of Litigation Counsel, in 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 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 March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria ("DoD Transgender Service Policy").

3. I submit this declaration in response to Plaintiffs' Motion to Compel Production of Documents filed on June 4, 2019 ("Motion To Compel"). I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

MATERIALS SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE

4. In the Motion to Compel, Plaintiffs claim that the government withheld from production several categories of documents based on improper assertions of the deliberative process privilege and seek release of these documents. *See* Rosenbaum Decl., Ex. A. Based on my review of the relevant documents, I have determined that they were created as part of DoD's decision-making process and reflect the deliberative process undertaken by DoD personnel in developing and implementing the DoD Transgender Service Policy.

A. *Vaughn* Index Documents Protected by the Deliberative Process Privilege

5. Plaintiffs have identified and disputed documents in DoD's *Vaughn* index. Of these documents, several concern communications about the DoD Panel of Experts. For example, one consists of an email chain between senior DoD officials that captures their back-and-forth deliberations, including professional opinions, thoughts, and recommendations on the activity and reporting of the DoD Panel of Experts (USDOE00083196-USDOE00083198). Another is an email from senior DoD personnel to the Under Secretary of the Army in which a senior DoD official discusses a DoD position on a question posed by the Army as to whether efforts by the Services to develop information outside the Panel of Experts would be considered

by the Panel of Experts (USDOE00083212). This email identifies a course of action that the Services offered and DoD personnel reviewed but ultimately did not adopt.

6. Another category contains documents that are part of a single email chain discussing requests for data on various aspects of the DoD Transgender Service Policy (USDOE00083156). In this email, senior DoD officials discuss various topics relating to the DoD Transgender Service Policy and consider requests to the Services for additional data to better understand these topics. Again, the email chain records thoughts and recommendations of these senior personnel as they work to develop the DoD Transgender Service Policy.

7. A third category consists of documents that concern draft processes or policy positions for senior leaders. One example is an email chain between senior DoD personnel regarding an update for the Secretary of Defense on the proposed process that applicants will undergo during screening at initial entry locations (USDOE00083065). This document is pre-decisional because it contains the process contemplated by DoD staff before the proposal received final approval by Secretary Mattis. Another email in this category is a communication from the Under Secretary of Defense for Personnel and Readiness to senior DoD personnel regarding draft interim guidance on sex reassignment surgical procedures and the need to ensure proper coordination (USDOE00083214). This communication is deliberative because the DoD personnel discuss possible outcomes and additional courses of action that could be considered by the Department given changing conditions on this topic.

8. The next category consists of documents that contain internal opinions of DoD personnel. One example is an email from the Under Secretary of the Navy to other senior DoD personnel containing his opinion and the underlying reasoning for his opinion on the DoD Transgender Service Policy (USDOE00083077). Another email between senior DoD personnel

and the Under Secretary of Defense for Personnel and Readiness shares the Under Secretary of the Navy's email to other senior DoD personnel about the approach being taken by DoD to research and develop this policy (USDOE00083084). A final example is a DoD document from the Coast Guard, which consists of the draft DoD Instruction on military service by personnel with gender dysphoria and includes redline edits and comments from DoD personnel as they developed the issuance (USDOE00277127). The information contained in these emails precisely exemplifies the deliberative policy making process at senior levels in DoD, where individuals share frank thoughts and opinions on policy positions without fear of their positions being revealed.

9. A fifth category of documents reflects DoD coordination and responses to various inquiries as the DoD Transgender Service Policy was developed and later implemented. For example, an email from the Under Secretary of Defense for Personnel and Readiness to other senior DoD personnel discusses erroneous media reporting on the DoD Transgender Service Policy and suggested talking points for public affairs personnel (USDOE00083086). Another example is an email on the DoD "communications playbook" for media engagement from public affairs personnel to other DoD personnel, which contains the reasoning for what the document is designed to do and summarizes its contents (USDOE00083178). A final email chain shows public affairs personnel coordinating with various DoD offices on messaging and talking points as DoD prepares to respond to congressional inquiries on a surgical waiver (USDOE00083161). These emails show the internal coordination by DoD officials responding to media and congressional inquiries and how they worked to ensure that DoD issued accurate information to the public about the DoD Transgender Service Policy.

10. A sixth category involves documents relating to medical accession standards for the DoD Transgender Service Policy and the applicability of those standards to individual requests. These documents capture dialogue between senior DoD personnel working to standardize medical accession standards across DoD.[1] For example, one document is an email communication to the field providing guidance and underlying reasoning on the issuance of supplemental accessions guidance by the military components (USDOE00083094). Another example is an email to the field for review and comment on transgender accessions implementation information, timelines for meetings to discuss the issue and conduct training on the new standards, and draft US Military Entrance Processing Command (MEPCOM) guidance (USDOE00083176).[2] A final example is a draft spreadsheet compiled by DoD but contained in the Coast Guard Vaughn Index that was developed as a "cheat sheet" to summarize the standards from each Service and provide information about the specifics of each policy (USDOE00274418).

11. The next category of documents concerns the Panel of Experts.[3] This broad category generally includes documents that relate to communications about the specifics of Panel meetings, discussions about draft communications to the Panel, draft presentations given or reviewed by the Panel, the work of the Panel and progress it was making, and attendance at Panel meetings.[4] An example is an email chain between senior DoD personnel regarding attendance by specific people at Panel meetings and who should attend (USDOE00083080-USDOE00083082). Another email in this category reflects a discussion about draft minutes

[1] *See, e.g.*, USDOE00277743, USDOE00279923
[2] *See also* USDOE00280908, USDOE00281761.
[3] *See, e.g.*, USDOE00279925, USDOE00277121.
[4] *See, e.g.*, USDOE00272054, USDOE00272056.

from the eighth meeting of the Panel and also contains discussion about how the DoD medical community defines terms from various DoD instructions applicable to military personnel policy (USDOE00083180). Another example is an email between senior DoD personnel about a draft communication to the Panel that was circulated for review and feedback (USDOE00083181). A final example from this category is an email between senior DoD personnel capturing the criteria for the selection of individuals on the Panel and leadership's expectations regarding how these individuals should approach their work on the Panel (USDOE00083199). These documents are representative of the internal back-and-forth conversations that took place at the highest levels of DoD while the Panel of Experts reviewed and developed policy.[5]

12. An eighth category of withheld documents consists of those dealing with policy questions. These documents reflect the dialogue between DoD personnel about how DoD should approach the topic of transgender military service. For example, an email between senior DoD personnel discussed the types of questions being asked about details in the DoD Transgender Service Policy, such as how terms were going to be defined, how and what types of medical conditions were going to be addressed, what the limits on treatment would be, and how logistics would factor into the analysis (USDOE00083186). This email reflects the careful consideration and deliberate focus given to imbedded policy questions underlying the DoD Transgender Service Policy.

[5] This is likewise true of the deliberations, thoughts, impressions and opinions of the prior Transgender Service Review Working Group that Plaintiffs also seek to compel. *See, e.g.,* USDOE00274416; USDOE00274417; USDOE00273597; USDOE00273602; USDOE00273603; USDOE273604, which are the agendas of the prior senior transgender working group. *See also* USDOE00274420; USDOE00276750, which are documents that discuss the prior Working Group's proposed courses of action as well as a presentation reflecting input from active duty Service members.

13. A final category of documents contains staff products, emails, and documents concerning updates created or conducted as government policy is developed. These include emails coordinating briefing efforts, information papers (white papers), PowerPoint presentations developed for briefings, and documents generated for updating leadership on the progress of policy development.[6] An example of this category is an email from senior DoD personnel to Army personnel seeking input on a draft presentation to be briefed to the Secretary of Defense (USDOE00083206). The email captures internal discussion on the merits of the presentation and asks Army personnel for their review and input on specific aspects of the presentation. Another example is an email between senior DoD personnel that provides read-ahead materials for the Deputy Secretary of Defense, explains what the materials are, and describes the plan for additional review by other DoD offices before they are presented for final coordination (USDOE00083076). A further example (USDOE00277121) is a draft presentation from the non-deployable working group to the Panel of Experts conveying the work being done in that working group and providing policy recommendations on the non-deployable population.[7] USDOE00083054 is an email chain between DoD personnel regarding a request for an update for DoD leadership on the progress being made by the Panel of Experts. In another example, a DoD document from the Coast Guard Vaughn Index consists of a draft "timeline matrix" developed by the Panel of Experts that lays out the briefing schedule of the various DoD Transgender Service Policy working groups, the tentative topics for each briefing, and the

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[6] *See, e.g.*, USDOE00272111, USDOE00273734, USDOE00274304, USDOE00274393, USDOE00274419, USDOE00278851, USDOE00278933, USDOE00277119.

[7] Near-duplicates of this document were withheld pursuant to the deliberative process privilege at Bates numbers USDOE00272056 and USDOE00279925.

proposed dates for each briefing (USDOE00272060).[8] USDOE00273728 is a draft version of a presentation for the Transgender Senior Implementation Group Meeting and contains questions from the Services about implementation of the Carter policy as well as Service inputs for the implementation plan. A similar DoD document from the Coast Guard Vaughn Index (USDOE00272063) places the proposed briefing schedule on a notional timeline and coordinates the briefings with other milestones to meet the macro policy development timeline.[9] A final example consists of an email with updated transgender accessions information gathered in anticipation of a briefing for senior executive branch personnel (USDOE00083034).

14. Although documents in these nine categories have been withheld under the deliberative process privilege, some documents in these categories also are protected from disclosure pursuant to the attorney-client privilege or executive privilege. For example, a document regarding an update to a White House official on the status of policy development has been withheld under both the deliberative process privilege and executive privilege (USDOE00083039). Other documents that discuss litigation strategy have been withheld under both the attorney-client and deliberative process privileges (USDOE00083046). Similarly, a document containing a legal opinion from a DoD OGC attorney on DoD's plan to coordinate responses to media inquiries on the DoD Transgender Service Policy has been withheld (USDOE00083044). Although the Plaintiffs have not challenged attorney-client or executive

[8] A near-duplicate of this document was withheld pursuant to the deliberative process privilege at Bates number USDOE00277125. *See also* USDOE00278848.
[9] A near-duplicate of this document was withheld pursuant to the deliberative process privilege at Bates number USDOE00273192. *See also* USDOE00277128.

privilege assertions, documents protected by these privileges also fall within the categories above and therefore are entitled to protection under the deliberative process privilege.[10]

B. Documents that relate to the decision to delay the date of implementation of the accessions component of the Carter policy and the study ordered by Secretary Mattis

15. In the Motion to Compel, Plaintiffs seek documents relating to the scope and purpose of Secretary Mattis's June 2017 decision to delay military accessions of transgender individuals. In fact, Defendants already have released a memorandum to the Services signed by Deputy Secretary of Defense Robert Work calling for assessments of DoD's readiness to access transgender applicants into the military Services, as well as recommendations from the Services and the Surgeons General in response.[11]

16. Other than producing this memorandum, DoD has consistently maintained privilege over documents describing the review process of the Carter policy. For example, DoD has consistently withheld under the deliberative process privilege a memo from Deputy Secretary Work dated June 28, 2017, in which he provides candid advice and recommendations to Secretary Mattis on DoD's transgender policy (USDOE00219987). DoD also has withheld under the deliberative process privilege the reply to Deputy Secretary Work's memo on which there are handwritten notes from Secretary Mattis and questions concerning the review process

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[10] *See e.g.*, USDOE00083039, USDOE00083040, USDOE00083041, USDOE00083042, USDOE00083043, USDOE00083044, USDOE00083046, USDOE00083048, USDOE00083164, and USDOE00083166.

[11] The Navy recommendation was produced in full to Plaintiffs in production 24 on April 30, 2019 (USDOE00283976-USDOE00283997); the Air Force recommendation was produced in full to Plaintiffs in production 26 on April 30, 2019 (USDOE00009460_0001-USDOE00009460_0009); the Army recommendation was produced to Plaintiffs in production 26 on April 30, 2019 (USDOE00073649_0001-USDOE00073649_0003); and the Service Surgeons General recommendation was produced in production 26 on April 30, 2019 (USDOE00239052_0001).

(USDOE000083257). These withheld documents reflect the confidential opinions and deliberations of the Secretary of Defense and Deputy Secretary of Defense.

C. Documents that Show Options Considered By the Panel of Experts

17. Plaintiffs also seek to compel the production of numerous categories of documents appearing on DoD's *Vaughn* Index. *See* Rosenbaum Decl., Ex. A. The first is the category of documents identified by plaintiffs as reflecting options considered or generated by the DoD Panel of Experts when it developed the DoD Transgender Service Policy. These documents reflect deliberations at the most senior levels of DoD concerning the history and future of DoD's approach to service by transgender individuals or individuals with gender dysphoria.

18. One such document cited by Plaintiffs is an email between senior DoD civilian personnel responsible for DoD personnel policy (USDOE00083079). Although Plaintiffs erroneously categorize this document, the sender poses a real-life scenario contemplated by one of the military Services concerning a service member with gender dysphoria in the middle of a gender transition treatment plan. The sender then considers different ways this situation could progress until resolution and possible effects on the individual, other service members, and the unit as a whole. This document contains the kind of candid deliberative communication that policy makers must have to evaluate options in connection with fact patterns likely to recur. Another document cited by Plaintiffs is an email chain from a senior DoD medical provider to a member of the Panel of Experts and several key Department leaders in which the medical provider opines on hormone treatment in accessions and deployments (USDOE00083025). The document is deliberative because it captures the thoughts and questions being considered by, and asked of, senior DoD personnel while the DoD Transgender Service Policy was being developed.

19. As these descriptions demonstrate, these documents must remain privileged because they reflect the frank discourse and dialogue between senior DoD officials that leads to robust and well-informed decision-making. In addition, as discussed below, compelled disclosure of these and similar documents would substantially and materially chill deliberative discussions across the Department.

C. Categories of Alleged Deficiencies

1. Post-Decisional Documents

20. Plaintiffs assert that documents created during the "implementation" phase of the transgender policy are "post-decisional." However, these documents are pre-decisional and deliberative. For example, one document challenged by Plaintiffs is an email and a reply sent on December 19, 2017 between DoD personnel regarding clarifying guidance to the field on transgender applicant processing at the military entrance processing stations given the ongoing deliberations (USDOE00083070 to USDOE00083071). This communication contains underlying reasoning used by DoD personnel in the development and eventual publication of guidance to US Military Entrance Processing Command. Another example is an email sent on December 27, 2017 from the Military Assistant to the Vice Chairman of the Joint Chiefs of Staff to a senior DoD executive (USDOE00083056). This document seeks updates that may have been provided to leadership on the progress of the transgender working groups.

21. These two documents reflect the real-time thoughts and deliberations of senior DoD personnel as they worked to develop and refine the Department's policy. Both of these emails were sent in December 2017, just two months before Secretary Mattis's February 22, 2018 recommendation to the President and during the period when the Panel of Experts was finalizing its review of the evidence and drafting its recommendations to Secretary Mattis.

Moreover, the decision-making process for any major policy decision, such as a recommended policy on military service by transgender individuals, includes numerous ancillary considerations about how and when the policy would be implemented, and each of those additional decisions and accompanying processes are also deliberative in nature and protected by the deliberative process privilege. In sum, despite Plaintiffs' assertion that these communications were part of the implementation of the Department's new policy, they concerned decisions that were under consideration by policy makers and staff as they prepared and finalized policy recommendations.

2. Documents Containing Factual Information

22. Plaintiffs also assert that several documents should be produced because they contain purely factual information. Plaintiffs argue that where the DoD *Vaughn* Index uses terms such as "[d]evelopment of products," "TG update," "Status of applicants," "attendance at meetings," "Hormone Therapy White Paper," or "medical standards," the documents must contain purely factual information.

23. In fact, documents identified by Plaintiffs within this category contain deliberative information that is closely and inextricably intertwined with factual information such that it renders the entire document deliberative. For example, one document is an email exchange between senior DoD personnel regarding questions from the Vice Chairman of the Joints Chiefs of Staff and additional questions from the Chair of the Panel of Experts regarding hormone therapy and accessions (USDOE00083026). The questions are phrased in a way that would reveal underlying deliberations. Accordingly, although a "Hormone Therapy White Paper" is discussed, the body of the document includes substantive and deliberative questions related to the development of military policy.

D. The Chilling Effect of Compelled Release

24. In addition to the concerns described above, and perhaps most important, release of DoD information protected by the deliberative process privilege in this case would have a substantial and immediate chilling effect on policy deliberation and development within DoD writ large. The DoD decision-making apparatus 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. Matters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests, and leaders within the Department encourage open and candid discussions about the merits of such actions. Opinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process.

25. In addition, the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted mean that deliberative and pre-decisional conversations frequently occur via email. Leaders across the Department routinely solicit feedback, thoughts, and opinions on highly sensitive topics, including those concerning national-security implications, using email so that those who need to review and weigh-in on a decision can do so in real time regardless of their physical location.

26. Here, with respect to the DoD Transgender Service Policy, the decision-making process was robust and highly deliberative. The Panel of Experts established by the Secretary comprised the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services Vice Chiefs of Staff (including the Vice Commandant of the U.S. Coast Guard), and the Armed Services Senior Enlisted Advisors, and it was chaired by the Under

Secretary of Defense for Personnel and Readiness (or an official performing those duties). The Panel of Experts 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. Those appearing before the 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.

27. The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DoD personnel knew that their thoughts, impressions, and opinions on various topics, related both to DoD transgender policy and other policies, would be open to scrutiny, they may hesitate to provide their true positions on potential courses of action, not just related to military personnel decisions but as to any politically sensitive decision that the DoD faces in the future, for fear that these discussions could be revealed to wider audiences. This would be the case regardless of the entry of a judicial protective order. The lack of essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk.

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

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

EXECUTED this 25th day of June 2019, at Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

Exhibit 7

[Document filed under seal]

Exhibit 8

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*,

Defendants.

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

DECLARATION OF GRANT E. LATTIN

ASSERTING THE DELIBERATIVE PROCESS PRIVILEGE

I, Grant E. Lattin, do hereby declare as follows:

1. I am currently the Director, General Litigation Division, Office of the Judge Advocate General, Department of the Navy. I have either been the Deputy Director or the Director of this division since March 2008. In this capacity, I supervise the conduct and oversight of litigation support to the Department of Justice for all civil cases incident to the operation of the Navy and Marine Corps except those involving admiralty, common-law torts, and matters reserved to the Navy General Counsel.

2. In the exercise of my official duties, I am aware of this lawsuit and the related litigation involving the Department of Defense (DoD) policy for military service by individuals diagnosed with gender dysphoria.

3. The information in this declaration is based on my personal knowledge and upon my personal review of information made available to me in my official capacity.

4. I am submitting this declaration in support of Defendants' opposition to Plaintiffs' Motion to Compel, Dkt. 216 ("Plaintiffs' Motion"). Plaintiffs' Motion seeks to compel, among

other documents, those considered or generated both during the Panel of Experts review process and between the conclusion of the panel review process and the adoption of the Mattis policy, which Defendants logged on five *Vaughn* Indexes. One of these indexes covers documents maintained by the Department of the Navy.

Information Subject to the Deliberative Process Privilege

5. I have reviewed the Navy documents that Plaintiffs have moved to compel and determined that the information contained in these documents is pre-decisional and deliberative. Producing these documents to Plaintiffs would require disclosing sensitive deliberative material reflecting the pre-decisional processes of senior Navy officials. These documents contain actual, internal deliberations for providing then-Secretary Mattis with informed, measured opinions in developing DoD's transgender policy. In developing any policy, or advising DoD on its policies, the Navy is foremost concerned with meeting its mission to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas. By necessity, decision-making within the Navy must consider the implications on national security, which requires open and candid conversations between leadership, advisors, and policy analysts. The individuals must examine all angles of an issue honestly and thoroughly to provide policymakers with full and accurate information, including analysis of the legal and litigation effects associated with various policy options. Without such discourse, the Navy's ability to implement high quality, mission-enabling policies will suffer.

6. Compelled disclosure of the preliminary analysis demanded by Plaintiffs would inhibit the candor and effectiveness of subject matter experts assigned to make recommendations and develop military personnel policies. Because the Navy deploys globally and has a high-operational tempo, much of its deliberative and pre-decisional conversation occurs over email. If

these individuals knew that their thoughts, impressions, and opinion would be subject to scrutiny or public censure, they would be less willing to provide open and honest input in developing military policies, whether related to the Mattis policy or other matters. This chilling effect will inevitably impede the quality and integrity of military personnel policies.

7. To address issues surrounding military service by transgender individuals and individuals with gender dysphoria, the Secretary of Defense established a Panel of Experts, which included the Under Secretary of the Navy, an authorized substitute of the Vice Chief of Naval Operations, the Assistant Commandant of the Marine Corps, the Master Chief Petty Officer of the Navy, and the Sergeant Major of the Marine Corps. 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 and understood their input to be confidential. Disclosing deliberative, pre-decisional input, analysis, and opinions from these individuals would breach this understanding and irreparably harm DoD's ability to obtain candid and honest input on any subject, not just the subject of this policy.

8. The Navy's *Vaughn* index includes 197 documents. Of those, several documents are working drafts of policy documents or are documents reflecting comments or edits to those drafts. Navy_00003769, for example, is a draft memorandum for the Deputy Secretary of Defense from the acting Secretary of the Navy, assesses the Navy's readiness to implement the transgender accessions policy, and includes the Under Secretary of the Navy's suggested edits and comments. Navy_00026296 is a draft memorandum from the Under Secretary of the Navy, with tracked changes, analyzing the Panel of Experts' policy recommendations. And

Navy_00020011 is draft guidance from 2015 on the Navy's interim transgender policy intended for future, public release by the Chief of Naval Personnel.

9. Another category of documents involves Navy leadership's efforts to synthesize medical opinions, data, and research collected by the various transgender policy working groups to formulate the Navy's policy recommendations for DoD. Navy_00050156, for example, is a pre-determinative, deliberative email chain between the Vice Chief of Naval Operations and the Navy's Director of Military Personnel, Plans and Policy, discussing the transgender policy given the projected impact of gender transition on deployability. It includes deliberations over how to properly interpret medical research and available data when developing the policy. Likewise, Navy_00050062 is an email chain including the Chief of Naval Operations, Vice Chief of Naval Operations, and the Deputy Chief, Readiness and Health Directorate, Bureau of Medicine and Surgery. The emails discuss issues addressed in a transgender policy working group such as research on likely medical impact and deliberations on how to balance readiness requirements with the requirements of individual members.

10. Other documents on the Navy's *Vaughn* index memorialize in-person, pre-decisional deliberations over the military's policy on individuals diagnosed with gender dysphoria. For instance, Navy_00019948 is a summary of discussions from an in-person meeting with the Deputy Secretary of Defense. The notes include analysis presented by the Navy and other military services on readiness for implementing the accessions policy and recommendations on changes to the stability requirements. Another example is Navy_00046568, which is an email chain including an email from the Chief of Naval Operations where he discusses the opinions of Navy leadership overseas on readiness to implement the policy.

11. Plaintiffs have marked as post-decisional several documents listed on the Navy's *Vaughn* index, pointing to the words such as "task" and "implementation" in the privilege basis and arguing that these documents are not subject to the deliberative process privilege. These documents, however, are pre-decisional and deliberative. Even once a final policy is announced, the Navy continues to assess the policy's effectiveness to determine whether the policy should be modified or rescinded. Documents in this category reflect such deliberations. Navy_00046525, for instance, is an email from the Navy's Director of Military Personnel, Plans and Policy to the Chief of Naval Personnel, sent in advance of an upcoming discussion with the Vice Chief of Naval Operation to prepare for a future meeting with DoD on the gender-dysphoria accessions policy. The email includes recommendations from the military services, including the Navy, on readiness to begin accessing individuals under the policy so that DoD could accurately assess whether any changes or delays in implementation of the policy were necessary.

12. Additionally, when DoD or a federal court directs the Navy to implement a policy, the Navy then undertakes a deliberative process to decide how to best implement that policy. Deliberations surrounding these decisions involve the same confidential communications between agency officials as deliberations that led to the initial policy itself. Such deliberations are protected by the deliberative process privilege and releasing these documents would chill open and honest discussion. As an example, Navy_00051997 is a draft PowerPoint brief on the pre-Mattis policy's implementation for a meeting of senior Navy officials, and includes opinions from the Senior Enlisted Leaders of the Army and Navy. The brief analyzes legal challenges to implementing the policy, such as how to resolve apparent conflicts between the policy and federal statutes. The brief also discusses how to resolve potential conflicts related to living

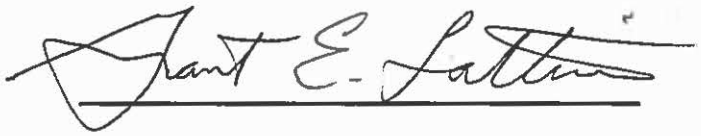
quarters accommodations and works through scenario-based hypotheticals. Finally, it includes recommendations of the Service Surgeon Generals on whether to change the policy's months of stability requirement.

13. Plaintiffs also marked many documents on the Navy's *Vaughn* index as containing factual information, citing terms such as "request for information," "timeline development," and "status of policy" in the privilege basis descriptions. But these documents contain deliberative material that is not purely factual. For instance, Navy_00050179 is an email chain between the Chief of Naval Personnel, the Vice Chief of Naval Operations, and the Under Secretary of the Navy, in which the Under Secretary requests information relevant to the transgender policy. The information requested, however, is analysis of questions posed by the Under Secretary regarding the policy. These questions include how the policy fits into the military's broader goals such as deployability, the extent to which transgender identity can be separated from gender dysphoria, how treatment for gender dysphoria should compare to treatment for other psychiatric conditions, and how to address the practical logistics of gender transition when it comes to berthing, showers, and bathrooms. Accordingly, the email chain includes a back-and-forth preliminary discussion leading up to a policy decision and is clearly subject to the deliberative process privilege. Also, when documents discuss "timelines" it is done in the context of deliberative and pre-decisional discussions, For example, Navy_00049876 discusses transition timelines in discussions on challenges experienced and concerns raised in implementing the policy. This document also discusses the Panel of Experts' timeline for resolving policy issues and presenting recommendations to the President. Moreover, the discussion of timelines is intertwined with discussions of other policy matters such as how to interpret data on transgender individuals and recommendations on transgender accessions. Finally, when documents discuss

the "status" of policy deliberations, they are protected by the deliberative process privilege, such as the status updates discussed in Navy_00046803. This document is an email chain between the Vice Chief of Naval Operations and the Chief of Naval Personnel, where they discuss the status of policy considerations not yet resolved by the Panel of Experts, such as concerns over how the policy affects military family members.

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

EXECUTED on this 25th day of June, 2019, in Washington, D.C.



GRANT E. LATTIN
Director, General Litigation Division
Office of the Judge Advocate General
Department of the Navy

Exhibit 9

U.S. Department of Justice
Civil Division, Federal Program Branch

Andrew E. Carmichael
Trial Attorney

Tel: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

June 7, 2019

By Email

Matt Miller
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

Counsel for Plaintiffs

Re: *Doe v. Shanahan*, No. 17-1597 – Notice of Recall for Inadvertently Disclosed Privileged Document

Dear Counsel,

We write concerning a privileged document that was inadvertently disclosed during our production. The document is titled "Litigation Risks Associated with Revising Transgender Service Policy," and it is bates stamped USDOE00269008–USDOE00269013 and identified as DoD00034167. We first learned that this document was disclosed late in the evening on June 3, 2019, when Plaintiffs' counsel contacted me via email to inquire whether Defendants would oppose their motion to seal certain documents that they planned to attach to their forthcoming motion to compel. The next day, Plaintiffs attached the document as Exhibit M to their motion to compel.

The document was originally coded as privileged in the document database and was withheld for privilege from our eleventh production, which was served on April 6, 2018. In that production, the document was marked as a slip sheet and was bates stamped USDOE00140468 (the document had the same identifier—DoD00034167). Even though the document identified as DoD00034167 was withheld for privilege in the production, the document was erroneously marked as "not privileged" on the privilege log. (The error was made on a privilege log with more than 2,800 entries.) Because the document was erroneously marked as "not privileged" on the privilege log, it was inadvertently produced in our nineteenth production on August 31, 2018. Although the nineteenth production consisted of documents over which Defendants stated they withdrew prior claims of privilege, as explained above, this document was inadvertently included in that production.

The document is quintessential attorney work product and also is protected from disclosure under the deliberative process privilege and the attorney-client privilege. Thus, the document should have been withheld for privilege, as it was originally. As stated above, the document is titled "Litigation Risks Associated with Revising Transgender Service Policy," and is labeled "Attorney Work Product" at the top of each page and "Confidential" on the bottom of each page. The custodian of the document is Paul Koffsky, who, at that time was Performing the Duties of the Department of Defense General Counsel and is now the Senior Deputy General Counsel and Deputy General Counsel (Personnel and Health Policy) at the Department of Defense.

Numerous versions of this document were processed for production and were withheld for privilege, except for this one inadvertently produced document. The custodians for all versions are attorneys.

In sum, the document titled "Litigation Risks Associated with Revising Transgender Service Policy," bates stamped USDOE00269008–USDOE00269013, and identified as DoD00034167, is privileged and was inadvertently produced. Accordingly, pursuant to the provisions of Part III of the stipulated Fed. R. Evid. 502(d) order, Dkt. 85, we request that you destroy the document and copies of the document, if any, and certify that the document and copies have been destroyed. Please also certify that you have retrieved the document from every person to whom you have disclosed this document.

Thank you for your cooperation.

Sincerely,

/s/ Andrew E. Carmichael
Andrew E. Carmichael

Exhibit 10

[Document filed under seal]

Exhibit 11

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, Plaintiffs, v. MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*, Defendants.	No. 1:17-cv-1597 DECLARATION OF BRIAN JUDGE IN SUPPORT OF DEFENDANTS' OPPOSITION

DECLARATION OF BRIAN JUDGE

I, Brian Judge, make the following declaration:

1. I am employed by the United States Coast Guard within the Department of Homeland Security and am located in Washington, D.C. I have been employed by the U.S. Coast Guard as a civilian for over five years. I also served on active duty in the Coast Guard for over 24 years. I am currently the Chief of the Office of Claims and Litigation within the Office of the Judge Advocate General. As the Chief of the Office of Claims and Litigation, my duties include advising Coast Guard programs on matters that are or may be involved in litigation and providing any necessary litigation support to the Department of Justice.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the related cases involving the Coast Guard and Department of Defense ("DoD") policy relating to military service by individuals diagnosed with gender dysphoria. I base this declaration on my personal knowledge and on information made available to me in the performance of my official duties.

3. I submit this declaration in support of Defendants' Opposition to Plaintiffs' Motion to Compel, Dkt. 213. In their Motion to Compel, Plaintiffs generally seek documents considered or

generated during the Panel of Experts Review process and between the conclusion of the panel review process and the adoption of the Mattis policy. Plaintiffs annotated five *Vaughn* Indices produced by Defendants, one of which addressed documents maintained by the Coast Guard.

4. I have reviewed the documents on the Coast Guard *Vaughn* Index as well as Plaintiffs' color-coding, annotations and comments on the Coast Guard's *Vaughn* Index.

5. Of the 38 documents on the *Vaughn* Index, the Coast Guard generated only two of these documents: USCG 00007108 and USCG 00009301. However, the Coast Guard is no longer asserting the deliberative process privilege ("DPP") over these two documents. In fact, the Coast Guard already produced USCG 00007108 in full as USCG 00008377 and USCG 00008912, and produced USCG 00009301 in full as USCG 00007063 and USCG 00008855.

6. The remaining 36 documents on the Coast Guard's *Vaughn* index came from the Department of Defense, as noted in the Title/Description column of the Coast Guard's *Vaughn* Index. Accordingly, these documents are addressed in DoD's declaration, and the Coast Guard incorporates by reference DoD's declaration for assertions of privilege over these documents.

7. Additionally, of those 36 documents, there are two for which the Coast Guard is no longer asserting DPP and Defendants have produced the documents in full. The Coast Guard initially withheld USCG 00007620 under DPP, but Defendants produced in full a duplicate of this document as USDOE00075650. Similarly, the Coast Guard withheld USCG 00007742 under DPP, but Defendants produced in full a duplicate of this document as USDOE00075656.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Executed on this 25th day of June, 2019.

Brian Judge
Chief, Office of Claims and Litigation
Office of the Judge Advocate General
U.S. Coast Guard

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

MARK T. ESPER, in his official capacity as Acting Secretary of Defense, et al.,

Defendants.

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

[PROPOSED] ORDER

Upon Consideration of Plaintiffs' Motion to Compel, Defendants' response, and Plaintiffs' reply, it is hereby ORDERED that Plaintiffs' Motion is DENIED.

Dated:

_____
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE