

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

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

**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
TO COMPEL PRODUCTION OF DOCUMENTS IMPROPERLY WITHHELD BY
DEFENDANTS**

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ARGUMENT

Plaintiffs seek to compel the production of documents that bear on two critical and disputed issues in this case: (i) whether, or to what extent, the Mattis Plan¹ warrants deference as the product of an independent and considered military judgment; and (ii) whether Defendants’ factual justifications for the Mattis Plan pass muster under the level of scrutiny or deference that properly applies. On both fronts, Defendants’ main response is to insist that the D.C. Circuit already resolved the relevant legal issues against Plaintiffs in the appeal of this Court’s earlier preliminary injunction, making further discovery unwarranted. But that argument rests on a misreading of the *per curiam* judgment—and it flatly contradicts Judge Wilkins’ concurrence, which offered specific “guidance” regarding the open issues for this Court. *Doe v. Shanahan*, 917 F.3d 694, 704 (D.C. Cir. 2019) (Wilkins, J., concurring). Defendants’ remaining arguments regarding the deliberative process privilege also fail. Defendants themselves have put the character of their deliberative process centrally at issue, and any burdens on the government are both overstated and outweighed by Plaintiffs’ interest in obtaining the evidence that will bear out their serious constitutional claims.

I. THE D.C. CIRCUIT’S JUDGMENT AND MILITARY DEFERENCE PRINCIPLES DO NOT BAR THE DISCOVERY THAT PLAINTIFFS SEEK.

A. Discovery Into the Process Giving Rise to the Mattis Plan Is Warranted.

Discovery regarding the process leading up to the Mattis Plan is necessary for this Court to determine whether, or to what extent, the judgments embodied in that plan are entitled to deferential review. As this Court explained, if Defendants claim deference on the ground that “appropriate military officials” made a “considered professional judgment,” *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986), factual questions about the nature and independence of

¹ Capitalized terms not defined herein are defined in Plaintiffs’ Moving Brief (“Pls.’ Br.”).

that process are critical. *See* Dkt. 160 at 9. Defendants’ contention that the D.C. Circuit has “settled” those questions by holding that “this Court must apply military deference” is incorrect. Defendants’ Response to Plaintiffs’ Motion to Compel (“Defs.’ Br.”) at 1-2.

To be sure, in its judgment in the preliminary injunction appeal, the D.C. Circuit held that “the public interest weighs in favor of dissolving the [preliminary] injunction” in part because—based on the limited existing record—the Mattis Plan *plausibly* relies upon the ‘considered professional judgment’ of ‘appropriate military officials.’” *Doe*, 755 F. App’x 19, 25 (D.C. Cir. 2019) (quoting *Goldman*, 475 U.S. at 509) (emphasis added). But the D.C. Circuit made clear that it was addressing only whether the existing record *already* warranted injunctive relief—not making or forecasting “a final determination on the merits.” *Id.* The D.C. Circuit thus did not resolve—and could not properly resolve—the factual question of whether (or to what extent) the Mattis Plan *actually* relies upon the considered and independent professional judgment of appropriate military officials.²

Judge Wilkins’ separate opinion offering “guidance to the parties and the District Court” is instructive. *Doe*, 917 F.3d at 704, 706. In discussing why the panel rejected Judge Williams’ suggestion to “reach the merits of the constitutional issues,” Judge Wilkins explained that “[h]ere,” unlike in the authority cited by Judge Williams, “the constitutional claims are not purely legal in nature, and the District Court has found that some factual issues are in dispute.”³

² The Ninth Circuit recently took much the same approach in reviewing another preliminary injunction, concluding that “[o]n the current record, a presumption of deference is owed” to the Mattis Plan. It specifically observed that “Plaintiffs on remand may present additional evidence to support” their contrary claim that “the deliberative process that led to the 2018 Policy was not an exercise of independent military judgment.” *Karnoski v. Trump*, No. 18-35347, 2019 WL 2479442, at *15 (9th Cir. June 14, 2019) (emphasis added). Defendants do not explain why Plaintiffs here would not be entitled to the same opportunity.

³ Internal citations and quotations are omitted from, and emphasis added to, citations herein unless otherwise stated.

Id. at 705. That reference dovetails with this Court’s holding that “[t]he parties dispute the facts related to the process used by Defendants to prepare the current proposed policy on transgender military service”—facts that “are material because they affect the degree of deference owed by this Court to Defendants’ policy decisions[.]” Dkt. 160 at 9. Judge Wilkins, moreover, repeatedly identified the nature of the process leading to the Mattis Plan as one of the unresolved issues that it would be premature for the court of appeals to resolve on the current record. *See id.* at 704. He reasoned that determining the “standard of review” requires a “careful assessment of a number of factors” by this Court, “including . . . whether Congress or the Executive used considered professional judgment” and, relatedly, “whether the policy was motivated by animus.” *Id.* Judge Wilkins thus expressed “no views” on “whether the Mattis Plan was a product of comparable ‘considered professional judgment’ as the policy in *Goldman*.” *Id.*

Defendants’ contrary argument rests on three errors. *First*, Defendants assert that the D.C. Circuit’s judgment held that “military deference is a constitutionally mandated standard of review based on the *subject matter* of the challenged policy,” and that therefore “no further inquiry into agency deliberations is warranted.” Defs.’ Br. at 2. But, as explained above, the panel held only that it was “plausibl[e]” that the Mattis Plan rests on a considered military judgment—which was enough to make preliminary injunctive relief unjustified while litigation proceeds. If Defendants’ broad “subject matter” theory were sound, it would have been irrelevant whether the preliminary injunction record even *plausibly* suggested that the Mattis Plan rested on a considered and independent judgment. And while the *per curiam* judgment said 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 administration of the military,” *Doe*, 755 F. App’x at 25, the panel did not resolve what level of deference *is*

appropriate here under a fair application of those precedents. As Judge Wilkins went on to explain, “[t]he fact that a military policy is involved certainly counsels greater deference to Congress and the Executive, but *Rostker*, *Goldman*, and the other precedent cited above teach that the standard of review cannot be easily quantified using a specific degree of deference or level of scrutiny. *Doe*, 917 F.3d at 704. Rather, the appropriate degree of deference or skepticism depends precisely on the disputed factual issues that the panel majority—over Judge Williams’ objection—left to this Court to resolve. *See id.*

Second, apart from their reliance on the D.C. Circuit, Defendants also insist that the level of deference *ought* to depend exclusively on subject matter, and not on whether a policy is actually the product of considered military judgment. Defs.’ Br. at 23-25. But as Judge Wilkins explained at length, the better reading of Supreme Court precedent is that “Congress and the Executive receive deference *only* where military policies are based upon the considered professional judgment of appropriate military officials” (and even then “only after finding that the policies reasonably and evenhandedly regulate the matter at issue”). *Doe*, 917 F.3d at 703-04; *accord* Dkt. 160 at 12 (explaining that it matters whether “the military has conducted the sort of reasoned decisionmaking that warrants deference”). That threshold question of process is particularly critical here, where the military made what was undisputedly a considered professional judgment worthy of deference in June 2016—when it decided to *allow* transgender people to openly serve—and then reversed course little more than a year later, under highly irregular circumstances. Nothing remotely similar transpired in *Rostker*, *Goldman*, or the other cases on which the government relies, so it is no surprise that no comparable inquiry into the nature of the military’s decisionmaking process was needed. Nor is there anything unusual about the basic premise that judicial deference to the Executive Branch is improper when the latter’s

stance does not actually “reflect the agency’s fair and considered judgment on the matter in question.” *Kisor v. Wilkie*, 588 U. S. ___, 2019 WL 2605554, at *10 & n.6 (June 26, 2019).

Third, the government cherry-picks language from Judge Wilkins’ opinion to suggest that even he contemplated discovery only into “how the policy operates and what military purposes it serves.” *Doe*, 917 F.3d at 705-06. But that interpretation cannot be squared with Judge Wilkins’ repeated statements that unresolved factual disputes *identified by this Court*—such as “whether the Mattis Plan was a product of comparable ‘considered professional judgment’ as the policy in *Goldman*”—stand in the way of resolving the merits. *Id.* at 704. In fact, the entire discussion by Judge Wilkins on which Defendants rely was noting that Judge Williams’ “astounding” proposal to shut off *all* discovery could not be justified, even by the perceived intrusion into deliberative processes that Judge Williams himself “fret[ted] about.” *Doe*, 917 F.3d at 705. Judge Wilkins did not thereby recant his conclusion, two pages earlier, that it was inappropriate on the record before him to say whether the Mattis Plan was “a product of comparable considered professional judgment.” *Id.* at 704. Nor did he suggest that, when this Court addresses the *factual* issues in this case, the government’s deliberative process should enjoy any more protection than the deliberative process privilege, applied in ordinary fashion, would (or would not) provide. *See id.*

B. Discovery of the Underlying Evidence About Transgender Service Is Warranted.

Plaintiffs also seek records about transgender service that will speak not to the *process* through which the Mattis Plan was formulated, but rather to the *merits* of the rationales the government has asserted for that policy. Defendants respond that Plaintiffs have no legitimate interest in the evidence purportedly justifying the Mattis Plan because, under Defendants’ understanding of military deference, any “contradicting viewpoint” about that evidence is irrelevant. Defs.’ Br. at 18. This argument also fails.

First, even assuming that Defendants will be entitled to some measure of deference, neither the Supreme Court nor the D.C. Circuit has ever taken deference to mean that the military is flatly immune from any challenge to the substance of its analysis. As the Supreme Court put it, “[s]imply labeling the legislative decision ‘military’ . . . does not automatically guide a court to the correct constitutional result.” *Rostker*, 453 U.S. at 70. “[D]eference does not mean abdication”; it means that a court should not “substitute . . . [its] own evaluation of evidence for a *reasonable* evaluation” by the military. *Id.* at 68, 70; *see also Goldman*, 475 U.S. at 510 (concluding that “those portions of the regulations challenged here *reasonably* and *evenhandedly* regulate dress in the interest of the military’s perceived need for uniformity”); *Karnoski*, 2019 WL 2479442, at *14 (holding that “[military] deference informs the application of intermediate scrutiny, but it does not displace intermediate scrutiny and replace it with rational basis review”). In short, even assuming that Defendants’ “evaluation of evidence” need only be “reasonable,” a fair assessment of that issue still requires access to the “evidence” that Defendants “evaluate[d].” *Rostker*, 453 U.S. at 68.

Second, Defendants are wrong to suggest that Judge Wilkins’ concurrence supports their effort to bar discovery into the evidence on which the Mattis Plan relies. *See* Defs.’ Br. at 17-18. In fact, the evidence Plaintiffs seek is directly relevant to many of the questions Judge Wilkins identified for this Court to address—including “whether the class [targeted by the Mattis Plan] is similarly situated to others” and “whether [the military] . . . accommodated the servicemembers’ rights in a reasonable and evenhanded manner.” *Doe*, 917 F.3d at 704. As explained in detail at Part II *infra*, the data regarding transgender military service will cast light on whether the Mattis Plan was actually a “reasonable” and “evenhanded” response to the challenges asserted by Defendants. It would be nonsensical for Judge Wilkins to identify these as pivotal, unresolved

factual issues, but then concur in a disposition that barred the discovery that would inform this Court's resolution of those factual disputes.

Contrary to Defendants' suggestion, Judge Wilkins never endorsed the Government's position that it would be improper for Plaintiffs' expert to review the relevant evidence and "offer a conflicting viewpoint." Defs.' Br. at 18. Rather, in the passage cited by Defendants, he simply summarized the Supreme Court's holdings in *Rostker* and *Goldman* that the district courts in those cases had erred in relying on plaintiffs' evidence over the military's judgment "under the circumstances." *Doe*, 917 F.3d at 706. Those circumstances were markedly different from the situation here. *Rostker* faulted the district court not for permitting plaintiffs to put forward expert analysis of underlying evidence (which they did not do), but rather for outright "ignor[ing] Congress' considered response to th[e] line of reasoning" advanced in congressional testimony that the district court embraced. *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981).⁴

Finally, Defendants' appeal to military deference as a bar to discovery also fails because many of the critical issues in this case simply do not implicate the military's expertise in any meaningful way and thus could not be a proper basis of military deference. *See Goldman v. Sec'y of Def.*, 734 F.2d 1531, 1539 (D.C. Cir. 1984) (finding deference warranted because the military's judgment concerned matters of military discipline "on which its expertise is high and on which judicial competence is low"), *aff'd*, 475 U.S. 503 (1986); *cf. Kisor*, 2019 WL 260555417, at *9 (explaining, in context of agency rules, that deference is less appropriate when

⁴ *Goldman* does not support the government's broad discovery bar either. There, the Court simply rejected the district court's reliance on an expert opinion that allowing yarmulkes would "mak[e] the Air Force a more humane place"—explaining that the concern was "quite beside the point" in light of the military's "reasonabl[e]" conclusion that the practice "would detract from the uniformity sought by the dress regulations." 475 U.S. at 509-10. Here, Plaintiffs are not seeking discovery so that they can offer their own opinion about what objectives the military should prioritize; rather, they are seeking relevant evidence that goes to the question of whether the Panel Report was the product of considered professional judgment.

the disputed subject matter is removed from that agency’s regular duties and “the agency has no comparative expertise”). For example, much of the Mattis Report relies on assertions about the alleged ineffectiveness of medical treatments for gender transition and the alleged mental instability of transgender people. Dkt 96-2 at 23, 29. But while deference may be owed to “the professional judgment of military authorities concerning the relative importance of a particular military interest,” *Goldman*, 475 U.S. at 507 — such as an interest in maintaining a high rate of deployability — the military has no particular competence in the underlying questions of transgender health or psychiatry. To the contrary, both Plaintiffs’ medical expert and the American Medical Association have previously explained that the Mattis Report is marred by glaring errors, including objective misreadings of the statistical findings of medical studies. *See* Dkt. 128-43; Brief of Amici Curiae AMA *et al.* in Support of Plaintiffs-Appellees, *Doe v. Trump*, No. 18-5257, 2018 WL 5619820 (D.C. Cir. Oct. 29, 2018). Appropriate deference to the military’s expertise concerning *inherently military matters* is no reason to deny Plaintiffs access to the evidence that will further demonstrate the extent to which Defendants made errors regarding *medical and scientific evidence*, which are not inherently military matters.

II. THE DISCOVERY SOUGHT BY PLAINTIFFS IS RELEVANT AND WOULD NOT IMPOSE A SIGNIFICANT BURDEN ON THE GOVERNMENT.

In addition to their broader arguments against discovery, the government contends that the particular documents sought by Plaintiffs are irrelevant, and that producing those documents would impose an undue burden. The government is incorrect. Plaintiffs seek targeted discovery that is directly relevant to their challenge of the Mattis Plan, and producing those documents—which the government has presumably already reviewed—would not be burdensome.

The underlying data, personnel files, field reports and back-up documentation relating to mental health visits, limited duty status, alleged suicidality, unit cohesion, and costs that

plaintiffs seek⁵ are directly relevant to their case because they go to the heart of the rationales the government has asserted for the Mattis Plan.⁶

For example, Defendants argue that transgender servicemembers are mentally unstable because their records reflect a high number of mental health visits. Dkt. 96-2 at 22. But that argument ignores that transgender servicemembers were *required* to seek such visits for administrative, not medical, reasons under the military's protocol for authorizing gender transition. Plaintiffs seek the underlying records in order to differentiate visits required administratively from visits that reflect actual mental health issues. That information is critical to Plaintiffs' ability to rebut Defendants' false claims about the mental stability of transgender servicemembers and to show that the target group was, in Judge Wilkins' words, "similarly situated to others." *Doe*, 917 F.3d at 704.

Similarly, the government has claimed that transgender servicemembers purportedly have a high rate of nondeployability, but its sole support for that contention is a single line in the Mattis Report stating: "Although limited and incomplete because many transitioning service members either began treatment before the Carter policy took effect or did not require sex reassignment surgery, currently available in-service data already show that cumulatively, transitioning service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period." *Id.* at 35. As an initial matter, as noted in the

⁵ Contrary to Defendants' assertion, this information is encompassed by Plaintiffs' Requests for Production Nos. 1, 8, and 12. *See* Defs.' Br. Ex. 2.

⁶ The parties met and conferred for months before the filing of this Motion. Dkt. 200. This Court directed Plaintiffs to review Defendants' production of supplemental data used to provide testimony to the House Armed Services Subcommittee on Military Personnel in February 2019 and determine if a dispute remained. Minute Order (Apr. 9, 2019). As set forth in Plaintiffs' opening brief, Defendants' production was insufficient, and thus, Plaintiffs moved to compel further production. No additional meeting and conferring was contemplated—let alone required—by the Minute Order. *See* Declaration of Matthew E. Miller.

Mattis Report itself, the data relied upon by Defendants is limited because of the recency of the Carter Policy. At a minimum, Plaintiffs properly seek the additional deployability data that has become available since the issuance of the Mattis Report, which is directly relevant to the legitimacy of the Defendants' reliance on this justification.

In addition, the government's presentation of extracted data is limited in an inherently misleading way that only a full disclosure of the underlying raw data can correct. Rather than disclosing the incidence of *actual non-deployment* by transgender troops, the Mattis Report refers only to the average number of days transitioning Army and Air Force servicemembers were assigned to "limited duty"—which is not the same as failing to meet a deployment obligation. The government's presentation also misleadingly omits data relating to transgender servicemembers in the Navy—which, in contrast to the Army and Air Force—does not automatically place transitioning servicemembers on limited duty status regardless of their actual medical condition and ability to perform regular duties. Brief of Amici Curiae Vice Admiral Donald C. Arthur, USN (Ret.) *et al.* in Support of Plaintiffs-Appellees, *Doe v. Trump*, No. 18-5257; 2018 WL 5619826, at *16 (D.C. Cir. Oct. 29, 2018) ("SG Br."). The data Plaintiffs seek is necessary to provide accurate information about the actual deployability of transitioning servicemembers. That data is highly relevant to Plaintiffs' ability to rebut the government's reliance on claims about deployability as one of the three main justifications for its transgender policy.⁷

The government also relies on a misleadingly limited presentation of data to support its claims that transgender servicemembers are more likely to attempt suicide than other

⁷ As noted in the amicus brief filed by three surgeons general with the D.C. Circuit, "[t]he DoD Report does not . . . acknowledge how separate standards of fitness targeted at transgender service members can create the incorrect impression that transgender personnel are less medically fit and deployable than other troops." SG Br., 2018 WL 5619826, at *16.

servicemembers. In fact, the government's own data refers to suicidal ideation, not suicide attempts, and other DoD studies have shown comparably high rates of suicidal ideation by servicemembers as a whole. SG Br., 2018 WL 5619826, at *20-*21. No accurate evaluation of this asserted justification for the Mattis Plan is possible without full discovery of this data, including data relating to suicide attempts and suicidal ideation by both transgender and non-transgender servicemembers, both before the Mattis Report was written and since.

The government also claims that the mere presence of transgender servicemembers undermines unit cohesion, and yet cites only a single field report in support of that claim. Dkt. 96-2 at 39. If any other such reports exist either before or since the drafting of the Mattis Report, Plaintiffs are entitled to them. And if they do not, the absence of such reports is highly relevant to this Court's evaluation of the legitimacy of the government's unit cohesion argument.

Defendants' conclusory assertions that producing this underlying data about transitioning servicemembers will be unduly burdensome have no merit. Defendants cannot plausibly argue that producing the service records reflecting the actual deployment of transgender troops or any field reports regarding problems or complaints about transitioning servicemembers would be unduly burdensome, since these documents are in their possession and readily available. Nor can Defendants have it both ways—on the one hand relying on the Mattis Report's factual findings while on the other denying Plaintiffs access to the *actual* facts. Plaintiffs' request is, at base, akin to the requirements for using summary charts or calculations to prove the content of voluminous data which, under Federal Rule of Evidence 1006, *can only be admitted* into evidence if the proponent has made "the originals or duplicates available for examination or copying." Fed. R. Evid. 1006.

Additionally, Defendants contend that they cannot produce the medical records of transitioning servicemembers because such records are protected by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), which they argue would require the government to risk violating HIPAA by examining the underlying servicemember medical records rather than “extracted data” from its Military Health System Data Depository (“MDR”). This position has no merit. *First*, this Court can require the redaction of personal identifying information, and issue a protective order to prevent any inadvertent disclosure of private medical records. *Second*, for the reasons detailed above, “extracted data” from the MDR is inherently misleading regarding the number of mental health visits by transitioning servicemembers, and also fails to provide an accurate basis to determine how many transitioning servicemembers were medically, as opposed to administratively, placed on limited duty status.

Further, Plaintiffs have never demanded that the government create new documents to produce this information, contrary to the government’s assertions. Defs.’ Br. at 18; Dkt. 200 at 5. Defendants’ claim that collecting the actual medical records of transitioning servicemembers would be prohibitively expensive and “could take months or even a year to complete” is not credible. These records already exist, and the number of servicemembers with a diagnosis of gender dysphoria is finite, relatively small, and already known.

Finally, although courts limit discovery that “can be obtained from some other source that is more convenient, less burdensome, or less expensive,” (Fed. R. Civ. P. 26(b)(2)(C)(i)), here the relevant underlying data is solely and exclusively in Defendants’ possession.⁸

⁸ The Ninth Circuit’s recent decision in *Karnoski v. Trump* does not alter this analysis. 2019 WL 2479442. Applying the circuit’s balancing test in accordance with *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984) does not constitute implicit rejection of D.C. Circuit precedent, which in any event is not binding on that court as it is here. *See Vietnam Veterans of Am.*, No. 09-cv-0037, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011).

III. DELIBERATIVE PROCESS PRIVILEGE DOES NOT SHIELD THE WITHHELD DISCOVERY.

A. Defendants Have Failed to Rebut Plaintiffs' Argument that Defendants Cannot Wield the Deliberative Process Privilege As Both Sword and Shield.

Plaintiffs seek discovery into the process leading to the Mattis Plan in order to determine whether it was the product of considered professional judgment or—as significant evidence already suggests—constrained by a predetermined goal of reversing the Carter Policy and distorted by discriminatory intent. Defendants claim that permitting such discovery “would stand the very doctrine of military deference on its head,” Defs.’ Br. at 25, but that argument disregards the circumstances of this case. As explained in Part I.A, in June 2016, the military adopted a policy permitting open service by transgender people based on what was undisputedly considered professional judgment. When the military reversed course scarcely a year later, it did so under highly irregular circumstances, apparently spurred by an impulsive Presidential directive to reinstate a ban. The government now claims that its decision to reverse the Carter Policy was not only entirely independent of the President’s direct order to do so, but that Secretary Mattis had already decided to undertake a new review process even before the President’s July 2016 Tweet and had delayed the start of the new accession policy for that reason.⁹ Under these circumstances, where the government is asserting the purported independence of its decisionmaking in response to strong circumstantial evidence of discrimination, it cannot simultaneously rely on the alleged independence of its process and yet shield that process from any meaningful discovery.

⁹ Notwithstanding that claim, the few documents Defendants have provided to Plaintiffs on this subject raise more questions than they answer about the reasons behind the delay. One such document is now the subject of a claw-back dispute and therefore, Plaintiffs will rely on their separately briefing on that issue. *See* Minute Order (June 24, 2019).

Defendants assert that “the ‘sword/shield’ concept applies only when a party seeks to *use* privileged information to support its claims while simultaneously attempting to protect that very information from discovery.” Defs.’ Br. at 26. And that is exactly what Defendants seek to do here. In the face of highly irregular circumstances, Defendants claim that their privileged deliberations were entirely independent and unaffected by any predisposition to reverse the Carter open service policy; at the same time, they are attempting to protect the nature of those deliberations from discovery. The deliberative process privilege is inapplicable in such a case. *Id.*

Plaintiffs do not contend that “the deliberative process privilege should fall as to *all* deliberative documents.” Defs.’ Br. at 26 n.8. Rather, Plaintiffs have identified three categories of documents relating to the nature of Defendants’ process, including those: (i) relating to the nature of any alleged pre-Tweet process, (ii) relating to the nature of the process in the period of time after the Tweet up to and including the final meeting of the Review Panel; and (iii) relating to the process between the period of time after the conclusion of the Review Panel up to the date of the issuance of the Mattis Plan. And far from claiming a “wholesale” overcoming of the privilege, Plaintiffs have identified which documents on the *Vaughn* indexes are post-decisional, which appear to contain factual information, and which do not contain sufficient information to assess the privilege.¹⁰

B. The Deliberative Process Privilege Does Not Apply Where Plaintiffs Have a Credible Basis for Alleging Discriminatory Intent.

Defendants’ reliance on *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) to argue that “the intent of the government decisionmakers is not at issue and that the Court should instead analyze the

¹⁰ Defendants erroneously claim that deliberative documents prior to the Review Panel are necessarily irrelevant to assessing whether the review process was independent and evenhanded. In fact, documents from that period might well indicate the scope or purpose of the review process, including an intention to constrain the panel’s determinations. Similarly, “low-level deliberations among staff who were not members of the Panel,” could show that military input was discounted in the ultimate decisionmaking.

official objectives of the current policy,” Defs’ Br. at 27, is misplaced. First, as Judge Wilkins explained, “the Court’s first step [in *Hawaii*] was to determine that the Proclamation was facially neutral,” which the Mattis Plan is not. *Doe*, 916 F.3d at 703; *see Karnoski*, 2019 WL 2479442 at *14 (“On its face, the 2018 Policy regulates on the basis of transgender status.”). Second, while *Hawaii* applied longstanding precedent holding that policies “concerning the entry of foreign nationals” are subject only to the lowest level of constitutional review, 138 S. Ct. at 2420 & n.5, the Supreme Court has made clear that military policies that discriminate on a suspect or quasi-suspect basis must satisfy heightened scrutiny. *See Rostker*, 463 U.S. at 69-70. And third, even *Hawaii* held that “we may consider plaintiffs’ extrinsic evidence” and expressly affirmed that a policy based on animus violates the requirement of equal protection. 138 S. Ct. at 2420 (citing *Romer v. Evans*, 517 U.S. 620 (1995)).

Defendants’ reliance on the recent Ninth Circuit decision in *Karnoski* fares no better. Contrary to Defendants’ strained argument, nothing in that opinion “implicitly” rejected *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), which held that the deliberative process privilege does not apply where the government’s intent is at issue. In vacating the district court’s discovery order, the Ninth Circuit provided guidance for how the district court might apply that circuit’s ordinary balancing test for determining when deliberative materials may be discoverable. *Karnoski*’s silence hardly constitutes a rejection of D.C. Circuit precedent, which in any event is not binding on that court as it is here. 2019 WL 2479442.

Defendants concede, as they must, that the deliberative process privilege is unavailable where “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). “If the plaintiff’s cause of action is directed at the government’s intent, [] it makes no sense to permit the government to use the privilege as a shield.” *Id.*

This rule is no less true in the military context, as evidenced by decisions in which courts in this circuit have expressly rejected assertions of deliberative process privilege in litigation involving the military where discriminatory intent was alleged. *See, e.g., Adair v. Winter*, 451 F. Supp. 2d 202, 209 (D.D.C. 2006), *reconsidered on other statutory grounds sub nom. In re Navy Chaplaincy*, 512 F. Supp. 2d 58 (D.D.C. 2007); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 258 (D.D.C. 2003), *rev’d in part, vacated in part on other statutory grounds sub nom. In re England*, 375 F.3d 1169 (D.C. Cir. 2004).¹¹

Neither of the cases upon which Defendants rely are to the contrary. In *In re United States*, 678 F. App’x 981, 986 (Fed Cir. 2017), the court rejected Plaintiffs’ argument that certain documents were not subject to deliberative process privilege because Plaintiff had no evidence of unlawful motive. *Id.* at 990 (finding that the plaintiff shareholders’ only support for that claim was “hardly probative evidence of such motive”). In contrast, as this Court has already found, Plaintiffs here have pointed to significant evidence that the decision to reverse the open service policy was based on an improper discriminatory purpose, not on reasoned military judgment. Dkt. 61 at 72.

Similarly, in *Utah Medical Products v. McClellan*, No. 03-cv-525, 2004 WL 988877 (D. Utah Mar. 31, 2004), the court rejected Plaintiffs’ argument challenging the withholding of certain documents based on the deliberative process privilege where the Plaintiff “did not raise a claim for a faulty decision-making processes in its complaint” and lodged “no specific objections

¹¹Discovery was ultimately foreclosed in these cases because of an express statutory bar to it that does not exist here. *In re England*, 375 F.3d at 1181; *accord In re Navy Chaplaincy*, 512 F. Supp. 2d at 61-62. And the D.C. Circuit in *England* did not disturb the trial court’s holding concerning the inapplicability of the deliberative process privilege.

to the process . . . until the deliberative process privilege was asserted.” *Id.* at *8. In contrast, Plaintiffs here directly challenged the process in their complaint. Dkt. 106. In addition, they have already identified significant evidence that the process leading to the Mattis Plan lacked independence and reflected a discriminatory intent to arrive at a policy excluding transgender persons from military service.

IV. ALTERNATIVELY, PLAINTIFFS ARE ENTITLED TO PRODUCTION UNDER THE BALANCING TEST.

Even if the deliberative process privilege applied here, Plaintiffs would be entitled to production of documents in the three categories they have identified. *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997). Each factor of the balancing test supports production of these categories of documents.^{12 13}

A. Plaintiffs Are Not Required to Address Relevance on a Document-By-Document Basis.

Plaintiffs have explained at length why documents in the identified categories are centrally relevant to their claims. *See Part II supra*. Defendants argue that Plaintiffs are required to demonstrate relevance with specificity as to “each and every document on Defendants’ five *Vaughn* Indices.” Defs.’ Br. at 31. Contrary to Defendants’ position, however, the Ninth Circuit in *Karnoski* expressly approved the approach of “consider[ing] classes of documents” or “categories” of documents “when appropriate” in conducting the balancing test. *Karnoski*, 2019 WL 2479442 at *19. To the extent Defendants assert that a document-by-document showing is required for the Court to conclude that Plaintiffs are entitled to obtain the requested categories of

¹² To the extent this Court finds that the deliberative process privilege shields some subset of the documents withheld, Plaintiffs respectfully request the opportunity to submit exemplars for *in camera* inspection as set forth in Part V.B *infra*.

¹³ Defendants did not attempt to argue two of the five balancing test factors: the seriousness of the litigation, and the role of the government in the case. Defs.’ Br. at 35 n.12. Thus, the government concedes that both factors weigh in Plaintiffs’ favor.

documents, they are mistaken. What is required to overcome the privilege is “a sufficient showing of need,” a determination that “is to be made flexibly on a case-by-case, ad hoc basis.” *In re Sealed Case*, 121 F.3d at 737. The non-binding authorities on which Defendants rely do not hold otherwise. *See, e.g., Vietnam Veterans of Am.*, 2011 WL 4635139 at *10-*12 (ordering *in camera* review of eight out of nine categories of documents over which deliberative process privilege was claimed but finding one category irrelevant).

The government also relies on *In re United States* to claim that a document-by-document analysis is required. Defs.’ Br. at 30-31 (citing 678 F. App’x at 987). That case involved review of 52 documents withheld on the basis of deliberative process privilege. Here, by contrast, the government has withheld tens of thousands of documents, a volume that far exceeds the number of documents Defendants have produced to date. For this reason, Plaintiffs have reasonably challenged Defendants’ assertion of privilege on a categorical basis in the first instance. Should any question arise as to whether a particular document falls into one of the identified categories, it can be addressed following resolution of this Motion.

B. The Discovery Plaintiffs Seek Is Not Available From Any Other Sources.

The Ninth Circuit in *Karnoski* held that the second factor weighs in favor of overcoming the privilege, because “the evidence sought is primarily, if not exclusively, under Defendants’ control[.]” *Karnoski*, 2019 WL 2479442 at *19. The same is plainly true here.

Defendants suggest that Plaintiffs must rely on the “ample discovery” the government has produced to date. Defs.’ Br. at 32. Defendants, however, are not entitled to simply withhold large swaths of relevant information because they have produced some 30,000 documents thus far. The government prefers for this case to be decided on the administrative record, but Plaintiffs are not limited to that record to support their constitutional claims. *See Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990), *aff’d*, 937 F.2d 623 (Fed. Cir. 1991).

The cases relied on by Defendants do not tip this factor in the government's favor. *Carl Zeiss* involved civil litigation between two private parties in which the government moved to quash and to modify a subpoena. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966). The government's role here as defendant rather than a third party makes the case easily distinguishable. And *Hinckley* concerned attempted presidential assassin John W. Hinckley's effort to obtain the records of the hospital review board that recommended against granting him conditional release. *Hinckley v. United States*, 140 F.3d 277 (D.C. Cir. 1998). The court noted that Hinckley "had access to every piece of evidence that was before the Hospital Review Board." *Id.* at 282-83. Here, by contrast, Defendants have withheld, among other things, *evidence* considered by the Review Panel and the data underlying the conclusions contained in the Mattis Report.

The government continues to suggest that Plaintiffs obtain the sought information through depositions. Defendants' circular reasoning is unavailing. The government has withheld tens of thousands of relevant documents on the basis of the deliberative process privilege but suggests that the evidence is "available" to Plaintiffs through depositions. Defs.' Br. at 32-33. Yet the government goes on to suggest what kinds of questions might be permissible—*i.e.*, unobjected to—in those depositions, noting that others would be "subject to the deliberative process privilege," including "whether the Panel considered certain options." Defs' Br. at 33. The evidence cannot possibly be "available" from a witness who is instructed not to answer questions about that evidence.¹⁴

Nor have Defendants explained why Plaintiffs are not entitled to fulsome document production *before* deposing their witnesses. Documentary evidence is critical to establish an

¹⁴ Defendants' assertion of deference is irrelevant to this discovery dispute, for the reasons set forth in Part I.A *supra*.

evidentiary foundation, refresh witnesses' recollection, and impeach evasive witnesses. Plaintiffs are not required to depose key witnesses in this litigation while the bulk of the relevant documents remain withheld.

C. Discovery Will Not Significantly Chill Future Government Deliberations.

The discovery Plaintiffs seek will not chill frank government policy discussion because the Protective Order (Dkt. 84) prevents the public dissemination of confidential documents outside of this litigation. Courts routinely find that any chilling effect can be overcome by the issuance of a protective order. *See, e.g., Dukes v. NYCERS*, No. 15-cv-03846, 2019 WL 2571987, at *6 n. 10 (S.D.N.Y. June 24, 2019) (granting disclosure because plaintiff was “willing to enter into a protective order”); *FDIC v. Giancola*, No. 13 C 3230, 2015 WL 5559599, at *6 (N.D. Ill. Sept. 18, 2015) (finding that “effects of disclosure can be mitigated by a protective order aimed at guarding the document’s confidentiality”); *Rhodenizer v. City of Richmond Police Dep’t*, No. 3:09CV306, 2009 WL 3334744, at *3 (E.D. Va. Oct. 14, 2009) (finding that a protective order alleviates the defendant’s concerns of a chilling effect); *Sanchez v. Johnson*, No. C-00-1593, 2001 WL 1870308, at *7 (N.D. Cal. Nov. 19, 2001) (same).

The Court can order the redaction of certain information or have the documents restricted to attorneys’ eyes only. *See Rhodenizer*, 2009 WL 3334744 at *4 (permitting the police department to redact names and contact information for each officer who assisted in the investigation to protect their identities); *Cal. State Foster Parent Ass’n v. Wagner*, No. C 07-05086 WHA, 2008 WL 2872775, at *6 (N.D. Cal. July 23, 2008) (finding the government’s chilling concerns “may be mitigated by issuing a protective order or having the documents disclosed under seal.”). In addition, the Court can conduct an *in camera* review of particularly sensitive or high-level documents. *Gaskin v. Com. of Pennsylvania*, No. 94-4048, 1997 WL 734031, at *1 n. 2 (E.D. Pa. Nov. 4, 1997) (“[T]he Third Circuit has counselled district

courts that in camera review is a highly appropriate and useful means of dealing with claims of [the deliberative process] privilege.”¹⁵

Finally, “where there is reason to believe the documents sought may shed light on government misconduct, ‘the privilege is routinely denied,’ on the grounds that shielding internal government deliberations in this context does not serve the ‘public’s interest in honest, effective government,’” even if the production of documents could have a chilling effect on government deliberations. *Cobell v. Norton*, 213 F.R.D. 1, 4 (D.D.C. 2003) (citing *In re Sealed Case*, 121 F.3d at 737); *Newport Pac., Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) (“[I]f because of this case, members of government agencies acting on behalf of the public at large are reminded that they are subject to scrutiny, a useful purpose will have been served.”). At a minimum, the balance of the other factors at issue outweighs this single factor, particularly given that one of the central issues in this case is whether Defendants acted with a constitutionally improper purpose in enacting the Mattis Plan.

V. THE DECLARATIONS DO NOT RESOLVE DEFICIENCIES ON THE GOVERNMENT’S LOGS.

A. Documents on the Vaughn Indexes Must Be Produced Because the Government Has Not Met its Burden Under Rule 26.

Defendants make a host of arguments in their brief, as well as in six belatedly produced declarations, in support of their assertion that the documents logged on the *Vaughn* indexes have been properly withheld because either: (i) they are pre-decisional, deliberative material; or (ii) the factual material contained therein is inextricably intertwined with deliberative material, such that it cannot be produced in redacted form. The government’s arguments are flawed, as they have not met their burden under Rule 26 by describing the documents sufficiently to allow Plaintiffs to assess the claim of privilege. Fed. R. Civ. P. 26(b)(5)(A).

¹⁵ See Part V.B *infra*.

While documents that are post-decisional as to some deliberations may still be predecisional as to others, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir 2006), the government's *Vaughn* indexes here fail to identify the precise decision being deliberated, referring instead to deliberations regarding the "transgender policy" broadly. This is plainly not adequate under D.C. Circuit precedent. *Id.* (finding that the FDA's failure to provide an adequate explanation prevents us from determining whether every piece of correspondence *after a policy is decided* constitutes a new final agency action of its own) (emphasis in original).

The requirement to provide an adequate explanation of the document being withheld is particularly important because "even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also Aaron v. U.S. Dep't of Justice*, No. 09-00831, 2011 WL 13253641 (D.D.C. July 15, 2011). That is why, in the FOIA context, the D.C. Circuit has required the government to provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *King v. U.S. Department of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987).¹⁶ Here, the *Vaughn* indexes are inadequate because they do not provide enough information for the Court or Plaintiffs to evaluate whether the logged documents were properly withheld. The Defendants' after-the-fact declarations simply highlight that inadequacy.

¹⁶ Plaintiffs' reliance on FOIA caselaw is not improper. The rationale of these cases is equally applicable where the government asserts the privilege to protect documents from disclosure during civil discovery. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148-50 (1975).

In addition, factual information cannot be withheld “unless it is inextricably intertwined with the deliberative material.” *Judicial Watch*, 841 F. Supp. 2d at 161. “But this exception cannot be read so broadly as to undermine the basic rule; in most situations factual summaries prepared for informational purposes will not reveal deliberative processes and hence should be disclosed.” *Paisley v. CIA*, 712 F.2d 686, 699 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984). If the factual material is severable from the information protected under the privilege, the former must be disclosed. *See, e.g., United States v. Exxon Corp.*, 87 F.R.D. 624, 636-37 (D.D.C. 1980) (ordering the Department of Energy to excise factual materials from information protected by the privilege and produce it).

The government’s logs are plainly insufficient to test whether documents contain pre-decisional, deliberative material, and whether documents containing factual material have been properly withheld as inextricably intertwined. Moreover, the Defendants’ declarations purporting to support the assertion of the privilege with respect to certain exemplar documents identified by Plaintiffs in their brief or hand-picked by Defendants do not remedy those flaws. If the government’s *Vaughn* indexes and privilege logs were sufficient to carry its burden in demonstrating that it is entitled to the privileges asserted, these declarations would not have been necessary. Thus, if anything, the government’s logs show that its privilege descriptions are insufficient.

Furthermore, in many cases, the declarations either support Plaintiffs’ substantive arguments, or raise more questions than they answer. For example, Exhibit 4 references an Air Force document, USDOE000000252, which is described as “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 . . . [who was] a member of the Panel[.]” Defs.’ Br., Ex. 4 ¶ 7.

The declaration goes on to explain that, “as part of his responsibilities on the Panel, [Donovan] received a worksheet entitled “Transgender Review Panel Policy Recommendation Worksheet” which contains assumptions and planning considerations underlying the Panel’s deliberation[.]” *Id.* As noted in Section III above, the assumptions provided to Panel members, which potentially constrained their work and prevented a reasonable process from unfolding, is not entitled to deliberative process protection. In addition, the government fails to explain in Exhibit 3 why USDOE00107290-94, (*see* Defs.’ Br., Ex. 3 ¶ 8) “a slideshow presentation for Army senior leaders summarizing the Panel’s recommendation under consideration as of December 21, 2017,” was not produced to Plaintiffs, at the very least in redacted form, as the government has produced the Panel’s recommendations, thus providing further support for Plaintiff’s argument that the government has over-redacted documents being withheld on deliberative process grounds.¹⁷

Finally, while the declarations expound upon a handful of log entries, they say nothing about Defendants’ assertion of privilege with respect to one thousand documents on their *Vaughn* indexes, let alone the many thousands more that have been withheld on, *inter alia*, deliberative process grounds, as reflected on the government’s prior privilege logs. *Judicial Watch*, 449 F.3d at 150 (holding that demonstrating why deliberative process privilege should apply is “no good if the court cannot tie the affidavits to the documents.”).

B. The Court Should, at a Minimum, Order 30(b)(6) Depositions to Test the Assertions in the Declarations, and Conduct a Limited, *In Camera* Review.

The Court should not accept the government’s *ipse dixit* as to every withheld document. Rather, Plaintiffs respectfully submit that, if the Court is inclined to consider the declarations belatedly provided by Defendants, even as to the small number of documents that they address,

¹⁷ However, as noted in Plaintiff’s Moving Brief, the government produced only in redacted form the dissenting opinion by Panel member Thomas Dee. Pls.’ Br. at 13 & Rosenbaum Decl., Ex. P.

that it permit Plaintiffs to conduct three-hour 30(b)(6) depositions of the declarants, so that Plaintiffs may test their assertions and characterizations of the documents highlighted in the declarations and the categories of information withheld by the government.

Moreover, to the extent this Court finds that deliberative process privilege shields any category Plaintiffs seek, Plaintiffs respectfully request a limited *in camera* inspection of representative sample documents. As set forth above, Defendants' *Vaughn* indexes and privilege logs are insufficient under Rule 26; thus, without more information, it is impossible for Plaintiffs, or this Court, to assess whether documents are truly pre-decisional, or whether the government has narrowly tailored its redactions to deliberative material, as opposed to facts and data. An *in camera* review of exemplar documents reflected on Appendix A will test Defendants' proffered justifications and enable the Court to make specific document-level findings, which would provide broader guidance to the parties as to the categories of discovery sought on this motion.¹⁸

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the relief requested by Plaintiffs' in their motion to compel.

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Jennifer Levi (*pro hac vice*)
Mary L. Bonauto (*pro hac vice*)
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont Street, Suite 950
Boston, Massachusetts 02108
Tel: 617-426-1350
Fax: 617-426-3594

Respectfully Submitted,

s/ Zachary D. Rosenbaum
Zachary D. Rosenbaum
Jennifer Fiorica Delgado
Meg Slachetka
LOWENSTEIN SANDLER LLP
1251 Avenue of the Americas
New York, New York 10020
Tel: 212-262-6700
Fax: 212-262-7402

¹⁸ Appendix B reflects select documents referenced in Defendants' Brief and Declarations that were not raised in Plaintiffs' Moving Brief or included on Appendix A.

Shannon P. Minter (*pro hac vice*)
Amy Whelan (*pro hac vice*)
Chris Stoll (*pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Tel: 415-392-6257
Fax: 415-392-8442

Adam G. Unikowsky (DC Bar No. 989053)
JENNER & BLOCK LLP
1099 New York Ave., NW, Suite 900
Washington, DC 20001
Tel: 202-639-6041
Fax: 202-639-6066
Attorneys for Plaintiffs

Matthew E. Miller (*pro hac vice*)
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Tel: 617-832-1000
Fax: 617-832-7000

Appendix A

Doe v. Esper, No. 17-1597
Appendix A

Document (Bates)	Plaintiff's Brief at page	Exhibit to the Declaration of Z. Rosenbaum	Defendants' Brief at page	Exhibit to the Defendants' Brief	Category
USDOE00284622	8	Ex. G			Data
USDOE00088637 001	9	Ex. H			Data
USDOE00283408	9	Ex. I			Data
Administrative Record 002821	9	Ex. J			Data
USDOE00088638 009	10	Ex. K			Data
USDOE00003284	11	Ex. N			Delay
USDOE00269008		Ex. M			Delay
USDOE00003252	12	Ex. S			Delay
USDOE00000644	13	Ex. D at page 6			Delay
USDOE00000583	13	Ex. D at page 6			Delay
USDOE00000591	13	Ex. D at page 6			Delay
USDOE00000627	13	Ex. D at page 7			Delay
USDOE00081122	13	Ex. P			Panel
USDOE00083070	20	Ex. A at page 7	39	Ex. 6, ¶ 20	Panel
USDOE00083071	20	Ex. A at page 7	39	Ex. 6, ¶ 20	Panel
USDOE00083056	20	Ex. A at page 5	39	Ex. 6, ¶ 21	Panel
USDOE00000383	20	Ex. D at page 3			Panel
USDOE00129165	21	Ex. B at page 41	39	Ex. 3, ¶ 19	Panel
USDOE00129184	21	Ex. B at page 41	39	Ex. 3, ¶ 19	Panel
Navy 00017609	21	Ex. C at page 2	40		Panel
Navy 00017662	21	Ex. C at page 2	40		Panel
USDOE00191076	22	Ex. D at page 47			Panel
USCG 00008375	22	Ex. E. at page 2			Panel
Navy 00050179	23	Ex. C at page 18	41	Ex. 8, ¶ 13	Panel
Navy 00050188	23	Ex. C at page 18	41	Ex. 8, ¶ 13	Panel
DoD00033496	24	Ex. O at page 1			Delay
DoD00034142	24	Ex. O at page 1			Delay
USDOE00103668		Ex. B at page 4		Ex. 3, ¶ 9	Panel
USDOE00103581		Ex. B at page 1		Ex. 3, ¶ 10	Panel
USDOE00103831		Ex. B at page 5		Ex. 3, ¶ 11	Panel
USDOE00104196		Ex. B at page 7		Ex. 3, ¶ 11	Panel
USDOE00104475		Ex. B at page 12	19	Ex. 3, ¶ 11	Panel
USDOE00140250		Ex. O at page 1			Delay
USDOE00140455		Ex. O at page 1			Delay
USDOE00140466		Ex. O at page 1			Delay
USDOE00239217		Ex. O at page 1			Delay
USDOE00204254		Ex. O at page 3			Delay
USDOE00204264		Ex. O at page 3			Delay
USDOE00219987				Ex. 6 ¶ 16	Delay
USDOE000083257				Ex. 6 ¶ 16	Delay
Navy_00041020 (Partially redacted at Dkt 124-2)					Panel
USDOE00083083		Ex. A at page 9			Panel
USDOE00083189		Ex. A at page 24			Panel
USDOE00104471		Ex. B at page 11			Panel
USDOE00113410		Ex. B at page 31			Panel
USDOE00145919		Ex. B at page 49			Panel
Navy 00017597		Ex. C at page 2			Panel
Navy 00020953		Ex. C at page 4			Panel
Navy 00046701		Ex. C at page 10			Panel
USCG 00007540		Ex. E at page 1			Panel

Appendix B

Doe v. Esper, No. 17-1597
Appendix B

Document (Bates)	Exhibit to the Defendants' Brief	Citation
USDOE00101211–USDOE00101212	Declaration of Col. Andreas Thum, Ex. 3	Page 3 / ¶ 5 / Footnote 3
USDOE00107290–USDOE00107294	Declaration of Col. Andreas Thum, Ex. 3	Pages 5-6 / ¶ 8 / Footnote 5
USDOE00109530–USDOE00109534	Declaration of Col. Andreas Thum, Ex. 3	Page 6 / ¶ 8
USDOE00101555–USDOE00101556	Declaration of Col. Andreas Thum, Ex. 3	Page 6 / ¶ 8
USDOE00000252 (Referred to as USDOE00003252 in Pls' Br.)	Declaration of Ms. Martha Soper, Ex. 4	Page 5 / ¶ 7 & Footnote 2
USDOE00238799	Declaration of Ms. Martha Soper, Ex. 4	Page 9 / ¶ 13
USDOE00005937	Declaration of Ms. Martha Soper, Ex. 4	Page 9 / ¶ 14
USDOE00000407-USDOE00000409	Declaration of Ms. Martha Soper, Ex. 4	Page 11 / ¶ 16
USDOE00000483-USDOE00000487	Declaration of Ms. Martha Soper, Ex. 4	Page 11 / ¶ 17
USDOE00083196-USDOE00083198	Declaration of Robert E. Easton, Ex. 6	Page 2 / ¶ 5
USDOE00083156	Declaration of Robert E. Easton, Ex. 6	Page 3 / ¶ 6
USDOE00083084	Declaration of Robert E. Easton, Ex. 6	Page 4 / ¶ 8
USDOE00274418	Declaration of Robert E. Easton, Ex. 6	Page 5 / ¶ 10
USDOE00083080-USDOE00083082	Declaration of Robert E. Easton, Ex. 6	Page 5 / ¶ 11
USDOE00272054	Declaration of Robert E. Easton, Ex. 6	Page 5 / ¶ 11 / Footnote 4
USDOE00272056	Declaration of Robert E. Easton, Ex. 6	Page 5 / ¶ 11 / Footnote 4
USDOE00083199	Declaration of Robert E. Easton, Ex. 6	Page 6 / ¶ 11
USDOE00083054	Declaration of Robert E. Easton, Ex. 6	Page 7 / ¶ 13
USDOE00083034	Declaration of Robert E. Easton, Ex. 6	Page 8 / ¶ 13
USDOE00083039	Declaration of Robert E. Easton, Ex. 6	Page 8 / ¶ 14
USDOE00083026	Declaration of Robert E. Easton, Ex. 6	Page 12 / ¶ 23
Navy_00026296	Declaration of Grant Lattin, Ex. 8	Page 3 / ¶ 8
Navy_00049876	Declaration of Grant Lattin, Ex. 8	Page 6 / ¶ 13

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

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

**DECLARATION OF MATTHEW E. MILLER
IN SUPPORT OF MOTION TO COMPEL**

I, Matthew E. Miller, declare under penalty of perjury that the following is true and correct:

1. I am a partner at the law firm of Foley Hoag LLP, co-counsel for Plaintiffs in this action. I am providing this Declaration in support of Plaintiffs’ Motion to Compel. I make this Declaration based on my own knowledge and review of the record.

2. The parties have repeatedly met and conferred concerning the issues that are the subject of this Motion since at least the beginning of February 2019. Plaintiffs identified for the Court the areas in which they believed further document production and other discovery was needed, including the categories that are the subject of this Motion, in a Joint Status Report filed on March 28, 2019. Dkt. 200.

3. On April 9, 2019, the Court held a telephonic status conference and ordered the parties to file by April 16th a proposed briefing schedule for resolution of any remaining disputes over the categories of documents that are the subject of this motion. The parties did so, and on April 16, the Court ordered Defendants to produce a *Vaughn* Index to Plaintiffs encompassing the documents identified in the second paragraph of the Court’s April 9, 2019 Minute Order by May

14, 2019. On April 16th, the Court further ordered Plaintiffs to file a motion to compel documents still in dispute as described in paragraph two of the Court's April 9, 2019 Minute Order, including any remaining dispute as to Defendants' clawback of certain documents, by June 4, 2019. Neither the briefing schedule proposed by the parties nor the Court's April 16th Order provided for additional meet and confers on the previously identified disputes beyond that which had already occurred prior to the April 9th teleconference.

4. Defendants produced the *Vaughn* indexes as directed by the Court, and on June 4, 2019, Plaintiffs filed their motion to compel as directed by the Court in its April 16th Order.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: July 2, 2019

Matthew Miller

Matthew E. Miller