IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459-GLR Hon. George L. Russell, III

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION, MOTION TO CONTINUE TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER, AND REQUEST FOR AN ADMINISTRATIVE STAY

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INTRODUCTION

Defendants ask this Court to reconsider its November 30, 2018 Order (the "Order") in which it overruled Defendants' Objections to Magistrate Judge Copperthite's August 14, 2018 Memorandum Opinion and Order (the "Magistrate Judge's Order"). Defendants' Motion is based principally on the recent decision in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam) ("*Karnoski*"). Yet this Court already analyzed the deliberative process privilege in the manner prescribed by the Ninth Circuit in *Karnoski*, including a category-by-category review of the documents and application of a balancing test to the disclosure question. Defendants now urge this Court to hold that the three categories of documents Plaintiffs seek are irrelevant, because, in Defendants' view, the military is owed absolute deference and intent is categorically irrelevant to this case. Far from supporting this position, *Karnoski* refutes it. The Ninth Circuit specifically recognized that "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services, but rather implemented the 2017 Memorandum." 926 F.3d at 1204. Accordingly, *Karnoski* recognized that the litigation "may require the district court to consider the basis of the President's initial decision, as well as the 2018 Policy." *Id.* It is nonsensical for Defendants to contend that documents material to "the basis of the President's initial decision, as well as the 2018 Policy," are not relevant to Plaintiffs' claims. And it is remarkable for Defendants to maintain that *Karnoski* somehow supports such a proposition.

The purpose of the Ninth Circuit's remand of *Karnoski* was for the district court there to apply the applicable four-part balancing test (which this Court has already applied), and to provide Defendants the opportunity to "persuasively argue that a more granular analysis [of specific documents or categories of documents] would be proper." 926 F.3d at 1206. Yet Defendants here do not even propose, much less persuasively argue for, a particular "granular

analysis" showing how the four-part balancing test applies differently to specific documents or categories. It is only *Plaintiffs* who have conducted a granular analysis, proposing three discrete categories and showing in detail, with representative examples, how the four-part balancing test is applied. For the reasons set forth in this brief and the sound reasons already articulated by this Court, Defendants cannot assert the deliberative process privilege over these three categories of documents.

Defendants' request for a further stay of their compliance with the Magistrate Judge's Order should similarly be denied. Defendants have now avoided compliance with that valid discovery order for nearly a full year. In that time, Plaintiffs have been severely prejudiced in their ability to litigate their claims by being denied access to critical documents that this Court has already determined go to the very heart of this case. The preliminary injunction that once offered Plaintiffs partial protection from the harmful effects of Defendants' discriminatory policies has now been stayed, allowing those policies to go into effect and working an ongoing and continuing harm on Plaintiffs. Conversely, any harm to Defendants by disclosure of the subject documents would be easily remedied by the protective order and claw-back procedures already in place. Defendants should be ordered to comply with the Magistrate Judge's Order immediately.

BACKGROUND

This discovery dispute has now lasted more than a year. Plaintiffs served their first set of interrogatories and requests for production ("RFPs") on January 3, 2018. ECF 177-5, 177-6. Those RFPs sought documents relating to President Trump's grounds for issuing his original Twitter announcement and the August 25 Memorandum formalizing the Transgender Service Member Ban (the "Ban" or "2017 Memorandum"); the President's communications with others relating to development of the Ban; Defendants' efforts to implement the Ban; the costs allegedly

associated with military service by transgender individuals; and the effects (if any) of military service by transgender persons on unit cohesion and military readiness. *See, e.g.*, *id.*, ECF 177-5 at 8–12; 177-6 at 10–14. Plaintiffs seek this information to support their claims that the Ban was driven by animus and lacked a legitimate government rationale, and that subsequent steps Defendants have taken to implement the Ban, including the policy that resulted from the "Implementation Plan" (or "2018 Policy") released by then-Secretary of Defense James Mattis on March 23, 2018 (ECF 120-1) and the accompanying Department of Defense Report and Recommendations on Military Service by Transgender Persons (ECF 120-2; the "Report"), are similarly infected.

Plaintiffs have continued to pursue discovery since issuing their initial requests, but their progress has been stymied, in significant part, because Defendants have objected to every single document request and interrogatory on the basis of, *inter alia*, the deliberative process and presidential communications privileges. *See, e.g.*, ECF 177-8 (Mattis RFP Objections). By June 2018, when this Court considered Plaintiffs' Motion to Compel, Defendants had produced to Plaintiffs over a dozen privilege logs, withholding or redacting over 25,000 responsive documents on the basis of a claim of deliberative process privilege. ECF 177-34 at ¶ 6. By Plaintiffs' calculations, Defendants have now produced over 40 privilege logs, withholding or redacting over 50,000 responsive documents on the basis of a claim of deliberative process privilege. *See* Declaration of Peter J. Komorowski III, appended hereto ("Komorowski Decl."), ¶¶ 3–4. Defendants' privilege logs feature repetitive, boilerplate justifications for withholding the allegedly privileged materials. *See id.* ¶¶ 3–7; *see also id.*, Exs. 1–7. Defendants have also

categorically refused to respond to Plaintiffs' interrogatories requesting basic information about how the Implementation Plan was drafted and who participated in that drafting process.[1]

I. The Magistrate Judge Grants Plaintiffs' Motion to Compel.

Following six months of stalled discovery, and futile attempts to resolve the issue with Defendants, *see* ECF 211 at 3, Plaintiffs filed a Motion to Compel Supplemental Interrogatory Answers and Production on June 15, 2018. ECF 177. Plaintiffs' motion was directed to three discrete categories of documents that are central to Plaintiffs' claims in this action, which turn on governmental intent. ECF 177-3. Specifically, Plaintiffs sought a declaration that no deliberative process privilege attaches to three categories of information and documents:

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

Id. at 2. Plaintiffs showed that the deliberative process privilege is inapplicable in a case such as this one, where "the motive underlying government deliberations is central to the claims at issue, there is evidence of government misconduct (here, unlawful discrimination), or where the government has engaged in selective waiver by publicly relying on portions of the withheld

[1] For example, Defendants have asserted the deliberative process privilege in refusing to respond to Interrogatory Nos. 31 and 32, which respectively ask Defendants to "Identify each Person who drafted, revised, or commented on any section identified in the Table of Contents of the Report, and state the role(s) each Person played in drafting, revising, or commenting on the Report[,]" and "Describe in detail the process by which the Report was created, Identifying each Person who participated in or provided input during the creation of the Report and stating the role(s) each Identified Person played in that process."

deliberative material in justifying a challenged policy." *Id.* at 2–3 (citing cases). Plaintiffs argued that the three categories of documents at issue in their motion are highly relevant in assessing whether the Implementation Plan was motivated by a legitimate governmental interest and whether the military did, in fact, exercise independent military judgment. *Id.* at 18–20. Plaintiffs' motion was specifically limited to information within the possession, custody, and control of the agency defendants, and did not include Presidential materials. *See* ECF 216 at 7.

On August 14, 2018, United States Magistrate Judge Copperthite granted Plaintiffs' Motion to Compel. ECF 204, 205. After carefully evaluating the relevance of each of the three requested categories of documents, the Magistrate Judge found that "there are no justifiable reasons to stay decisions on the discovery disputes pending the outcome of the dispositive motions or for any other proffered reasons." ECF 204 at 4–7. The Magistrate Judge further found that "each of the categories of compelled documents is likely to contain evidence reflecting Defendants' intent," which "is at the very heart of this litigation." *Id.* at 5–6. Defendants filed Objections to the Magistrate Judge's Order and moved to stay their compliance with its terms. ECF 208, 209.

II. This Court Affirms the Magistrate Judge's Order but Issues a Stay Pending the Ninth Circuit's Resolution of Discovery Disputes in *Karnoski*.

On November 30, 2018, this Court issued a Memorandum Opinion and Order overruling Defendants' Objections to the Magistrate Judge's Order. ECF 227. The Court agreed with the Magistrate Judge that, under *In re Subpoena Duces Tecum Served on Office of Comptroller of the Currency*, 145 F.3d 1422 (D.C. Cir. 1998), the "deliberative process privilege does not apply to the documents Plaintiffs requested because the government's intent is at the heart of the issue in this case." ECF 227 at 15–16. This Court also determined that "[e]ven if the USMJ had

applied the *Cipollone* [*v. Liggett Group Inc.*, 812 F.2d 1400 (Table), 1987 WL 36515 (4th Cir. 1987) (per curiam),] balancing test, he would have reached the same conclusion." ECF 227 at 16.

> First, the deliberative evidence Plaintiffs seek on government intent is highly relevant to the lawsuit because it may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest. Second, no alternative evidence on government intent is available to Plaintiffs. Third, the Government plays a central role in the litigation because Defendants—the parties being sued—are government officials and the parties that created the challenged Transgender Service Member Ban. These three factors weigh strongly in favor of disclosure and outweigh the fourth factor—the risk that disclosure will chill future policymaking discussions.

Id. This Court also noted that "Defendants argue that disclosure of deliberative documents will chill candid discussions about military policy between subordinates and military leaders" but "Defendants do not explain . . . why the chilling effect is particularly great in this case or why it is great enough to outweigh the other three *Cipollone* factors." *Id.* at 16 n.10.

In reaching that conclusion, this Court rejected the government's argument that "the *Cipollone* balancing test would not weigh in favor of disclosure because government intent is not at issue" under *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). ECF 227 at 16–17. This Court explained that the policy in *Trump v. Hawaii* was facially neutral. *Id.* By contrast, the policy embodied in Secretary Mattis's Implementation Plan facially discriminated based on transgender status and was, therefore, subject to intermediate scrutiny. *Id.*

Although it affirmed the Magistrate Judge's Order, the Court stayed enforcement "until the Ninth Circuit issues its opinion in [*Karnoski*]," where the defendants had appealed the district court's orders that struck the defendants' motion to dissolve the 2017 preliminary injunction and sought a writ of mandamus on the district court's decision granting the plaintiffs' motion to compel documents protected by the presidential communications and deliberative process

privileges. *See* ECF 227 at 19–22; *see also Karnoski*, 926 F.3d at 1187 (discussing district court's rulings). In its discovery ruling, the district court there had ordered the President to produce a privilege log for documents withheld on the basis of presidential communications privilege and had found that plaintiffs had overcome defendants' assertion of deliberative process privilege based on application of the balancing test described in *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156 (9th Cir. 1984) ("*Warner*"). *See Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018), *mandamus granted, order vacated*, 926 F.3d 1180.

III. The D.C. Circuit Opinions in *Doe 2*.

On January 4, 2019, the D.C. Circuit issued a per curiam decision vacating the preliminary injunction in *Doe 2 v. Shanahan*, noting that additional concurring opinions would be issued at a later date. 755 F. App'x. 19, 23 (D.C. Cir. 2019). One member of the panel, Judge Williams, concurred only in the result.

On March 8, 2019, Judge Wilkins issued a separate concurring opinion, and Judge Williams issued an opinion concurring in the result. *See Doe 2 v. Shanahan* 917 F.3d 694, 695 (D.C. Cir. 2019) (Wilkins, J., concurring) ("*Doe*"); *id.* at 706 (Williams, J., concurring in the result). Judge Williams contended that instead of remanding to the district court, the panel should have ordered the case dismissed on the current record without permitting further discovery into Defendants' intend or decision making process. Judge Wilkins wrote separately to respond to Judge Williams' arguments and explain the limited scope of the panel's per curiam ruling.

The parties in this case have filed notices of supplemental authority regarding the *Doe* panel's original order and the two concurring opinions. *See* ECF 230, 231, 251, 252.

IV. The Ninth Circuit Issues a Decision in *Karnoski.*

On June 14, 2019, the Ninth Circuit issued its decision in *Karnoski*—thus triggering a lifting of this Court's November 30, 2018 stay of Defendants' compliance with the Magistrate

Judge's Order granting Plaintiffs' Motion to Compel. *See* ECF 256. In considering the factors governing dissolution of a preliminary injunction—the level of constitutional scrutiny to be applied and the degree of deference owed to the defendants—the Ninth Circuit held that discrimination based on transgender status is subject to heightened scrutiny and "the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class," because "the 2018 Policy on its face treats transgender persons differently than other persons." 926 F.3d at 1200–01. The Ninth Circuit held that the district court should apply "appropriate" military deference to its evaluation of the 2018 Policy for purposes of the defendants' motion to dissolve. *Id.* at 1202. Nonetheless, "Defendants bear the burden of establishing that they reasonably determined the policy 'significantly furthers' the government's important interests, and that is not a trivial burden." *Id.* The Ninth Circuit vacated the district court's denial of the government's motion to dissolve the preliminary injunction and remanded for the district court to reevaluate whether the injunction should be dissolved.

At the same time, the Ninth Circuit expressly recognized that the independence of the process leading up to the Implementation Plan—or lack thereof—remains a central question for further discovery. The Ninth Circuit concluded that "*[o]n the current record*, a presumption of deference is owed, because the 2018 Policy *appears to have been* the product of independent military judgment." *Id.* (emphasis added). But the court noted that "Plaintiffs on remand may present additional evidence" to support their argument that the military's decisionmaking process was circumscribed by the President's orders. *Id.* The court also stated that "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services, but rather implemented the 2017 Memorandum." *Id.* at 1204.

In reviewing the district court's ruling on the deliberative process privilege, the Ninth Circuit held that the district court had correctly applied the four-factor balancing test from *Warner*. *Karnoski*, 926 F.3d at 1206. But the Ninth Circuit nevertheless vacated and remanded the district court's ruling on the motion to compel for further consideration because "[t]he 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." *Id*. The court stated that "in balancing the *Warner* factors, the district court should consider classes of documents separately when appropriate." *Id.*

Critically, even as it vacated and remanded the district court's order, the Ninth Circuit noted that the government's inadequate "responses to [plaintiffs' discovery] requests may not have helped the district court in performing its difficult task." *Id.* The Ninth Circuit warned the government that "[w]e do expect . . . that the parties will provide the district court with the information and arguments it needs to balance the significant interests at play under the tests we have discussed above." *Id.* at 1206–07.

LEGAL STANDARD

A court should revise interlocutory orders only "under the same circumstances in which it may depart from the law of the case: (1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice." *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (quoting *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003)). A motion for reconsideration is "'not a license to reargue the merits or present new evidence' that was previously available to the movant." *Carrero v. Farrelly*, 310 F. Supp. 3d 581, 584 (D. Md. 2018) (quoting *Royal Ins. Co. of Am. v. Mikes & Stockbridge, P.C.*, 142 F. Supp. 2d 676, 677 n.1 (D. Md. 2001)).

ARGUMENT

I. There Is No Reason for the Court to Reconsider Its Order.

Defendants provide no justification for this Court to reconsider its Order. The Court already applied the same balancing test Defendants argue the *Karnoski* decision mandates and already considered the appropriate level of deference to the military, consistent with the *Karnoski* and *Doe* decisions. Neither decision, nor any new evidence, provides any support for a reconsideration of this Court's factual findings. Indeed, even if the Court were to reconsider its rulings de novo, the *Karnoski* and *Doe* decisions only confirm that this Court was correct. Defendants' claim of deliberative process privilege is meritless.[2]

A. The *Karnoski* and *Doe* Decisions Support This Court's Previous Conclusion That the Government's Intent Is "Highly Relevant."

When Defendants first appealed the Magistrate Judge's Order, they argued that Secretary Mattis's Implementation Plan was facially neutral and that the government's intent was, therefore, irrelevant to Plaintiffs' claims under *Trump v. Hawaii*. ECF 209 at 14–17. This Court rejected that argument, explaining that—unlike the policy in *Trump v. Hawaii*—the policy embodied in Secretary Mattis's Implementation Plan facially discriminates based on transgender status and is, therefore, subject to intermediate scrutiny. ECF 227 at 16–17.

Far from supporting Defendants' argument that intent is irrelevant, the Ninth Circuit's decision in *Karnoski* supports this Court's original conclusions. The Ninth Circuit agreed with this Court that the Implementation Plan facially discriminates based on transgender status. *See Karnoski*, 926 F.3d at 1200–01. The Ninth Circuit agreed that discrimination based on

[2] Because no justification exists for this Court to reconsider its Order, neither should this Court reconsider its determination that the clawback dispute is moot. *See* ECF 257-1 at 19–20. In support of their argument to reconsider the clawback dispute, Defendants simply refer to evidence they previously presented to the Court, which this Court has already considered, plainly falling short of the standard for reconsideration. *See Carrero*, 310 F. Supp. 3d at 584.

transgender status is subject to heightened scrutiny. *See id.* at 1201. And the Ninth Circuit held this heightened scrutiny applies even in the military context: "deference informs the application of intermediate scrutiny, but it does not displace intermediate scrutiny and replace it with rational basis review." *Id.*[3]

The *Karnoski* decision also makes clear that the independence—or lack thereof—of the process leading up to the Implementation Plan remains a central question in the case. Although the Ninth Circuit concluded that, "[o]n the current [preliminary injunction] record, a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment," 926 F.3d at 1202, the court went on to note that "Plaintiffs on remand may present additional evidence" to support their argument that the military's decision-making process was circumscribed by the President's orders, *id*. Because the plaintiffs in *Karnoski* "raise[d] non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services, but rather implemented the 2017 Memorandum," the Ninth Circuit determined that "the litigation may require the district court to

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[3] The Ninth Circuit's decision is also consistent with Judge Wilkins's concurring opinion in *Doe.* Although the panel in *Doe* concluded that the Implementation Plan did not prevent 100% of transgender people from serving, Judge Wilkins noted that did not necessarily make the Implementation Plan facially neutral. *Doe,* 917 F.3d at 701–02. Judge Wilkins also observed that the level of scrutiny applied to the policy would turn on:

> whether [the Implementation Plan] targets a suspect class, whether the class is similarly situated to others affected, whether the policy was motivated by animus, whether it infringes upon a fundamental right (and, if so, how), what military purposes are furthered by the policy, whether those purposes are legitimate, and whether Congress or the Executive used considered professional judgment and accommodated the servicemembers' rights in a reasonable and evenhanded manner, given the rights at issue.

Id. at 704. Judge Wilkins explained that courts are not required to defer to legislators or military officials who implement a facially discriminatory policy. *See id.* at 704–05.

consider the basis of the President's initial decision, as well as the 2018 Policy." *Id.* at 1204; *see also Kravitz et al. v. U.S. Dep't of Commerce et al.*, No. 18-1041, ECF 188 (Letter Order) (D. Md. Jul. 5, 2019) ("Regardless of the justification Defendants may now find for a 'new' decision, discovery related to the origins of the question will remain relevant [for purposes of equal protection claim]."). Under *Karnoski*, the documents that Defendants have withheld under the deliberative process privilege thus continue to be highly relevant in assessing whether the 2018 Policy was motivated by a legitimate governmental interest and whether the military did, in fact, exercise independent military judgment in implementing President Trump's orders.

The unanimous ruling in *Karnoski* is also consistent with the per curiam decision in *Doe*, and Judge Wilkins's concurrence. Defendants ask this Court to reconsider its previous decision in light of Judge Williams's separate opinion concurring only in the result, but the panel majority did not share the view of Judge Williams. As Judge Wilkins noted, the per curiam decision did *not* find that the Implementation Plan was facially neutral and did not foreclose the *Doe* plaintiffs from conducting further discovery into whether the policy was truly an exercise of independent military judgment. *Doe*, 917 F.3d at 704–05; *see also* ECF 252 at 2–3.

Defendants also focus on a footnote in which the *Karnoski* panel observed "that in *Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2409, 201 L.Ed.2d 775 (2018), the Court held that '[t]he 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." *Karnoski*, 926 F.3d at 1206 n.22. But *Trump v. Hawaii* was a preliminary injunction decision, not a ruling on the permissible scope of discovery, and the Court still concluded that it could "consider plaintiffs' extrinsic evidence" of discriminatory intent. 138 S. Ct. at 2420. Indeed, litigation concerning the travel ban has continued and a court in this District

has recently denied the government's motion to dismiss the plaintiffs' constitutional claims. *Int'l Refugee Assistance Proj. v. Trump*, No. 8:17-cv-00361-TDC, ECF 276 (D. Md. May 2, 2019). Thus, even if *Trump v. Hawaii* were relevant to the scope of discovery in this case, the decision fails to support the government's attempt to foreclose discovery.

B. This Court Already Applied the Balancing Test Adopted by the *Karnoski* Decision, and That Test Continues to Support the Court's Conclusion for Each Category of Documents Plaintiffs Seek.

The *Karnoski* decision also supports this Court's prior conclusion that Plaintiffs have overcome the deliberative process privilege with respect to the three categories of documents and information subject to Plaintiffs' Motion to Compel. In upholding the Magistrate Judge's Order, this Court applied the four-factor balancing test from *Cipollone*, which mirrors the Ninth Circuit's four-factor balancing test in *Warner*. Under both tests, when determining whether the deliberative process privilege applies, courts consider: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Warner*, 742 F.2d at 1161; *Cipollone*, 1987 WL 36515, at *2. Defendants do not seriously contest that factors (2) and (3) favor disclosure here, because the evidence Plaintiffs seek plainly is not available from other sources and the government plays an undeniably central role in this case. Contrary to Defendants' assertion, factor (1) also favors disclosure because each of the three categories of documents is highly relevant to Plaintiffs' claims under *Karnoski*. And nothing in *Karnoski* disturbs this Court's prior conclusion that whatever interest the government may have in factor (4) is easily outweighed by the balance of the other factors.

1. Deliberative Materials Regarding the President's Original July 2017 Tweets and August 2017 Memorandum Are Relevant to Plaintiffs' Claims.

The first category of information subject to the motion to compel is: "Deliberative materials regarding the President's original July 2017 Tweets and August 2017 Memorandum." ECF 177-1. This information is relevant in determining whether military officials believed that the Open Service Policy should be reevaluated, whether the military interpreted the President's Tweets as binding and thus attempted to devise a policy effectuating those Tweets rather than conducting an independent analysis, and whether the Department of Defense's ("DoD") "Panel of Experts" would have existed but for President Trump's Tweets on transgender military service. Plaintiffs provided specific examples of withheld materials falling within the first category in their Motion to Compel, ECF 177-3 at 20, and Defendants have made no attempt to contest the relevance of these documents. The following are just a few representative examples of materials Defendants have withheld in the first category, and a brief explanation for why they are relevant to Plaintiffs' claims:

- Defendants have withheld a document on the Navy privilege log described as "Transgender Policy Status Briefing Card" and dated July 26, 2017, the same day President Trump sent the original Tweets announcing the Ban. ECF 177-20. Similarly, Defendants have withheld documents on the Defense Health Agency privilege log identified as "Intradepartment email concerning implementation of transgender policy[,]" which were generated between July 24 and July 26, 2017. ECF 177-21. These documents and others like them, relating to the status of the military's transgender policy review at the time of the Tweets, are relevant to assessing Defendants' claim that the Panel of Experts and the military's reevaluation of the Open Service Directive would have existed in the absence of

the Tweets, *see* ECF 257-1 at 21, and whether the Tweets impacted any ongoing policy review.

- Defendants have withheld documents on the Army privilege log dated August 10, 2017, and described as "Execution matrix used in preparation for the release of the Presidential Memorandum"; documents dated August 17, 2017 described as "Presentation discussing the impact of transgender service on readiness"; and documents dated August 17, 2017 described as "Presentation showing timeline of events in preparation for release of the Presidential Memorandum." ECF 177-17. These documents are relevant to show the Army's reaction to the Tweets, its evaluation of the new Ban as compared to the prior Open Service Directive, and its understanding of the degree of autonomy it would have in implementing policies to effectuate the President's policy.
- Several entries on the DoD privilege log, dated the same day as the Tweets and related to the Tweets, are relevant in determining the extent to which the DoD's policy views were considered in the President's original decision. For example, one email is titled "Re_ Important - READ BEFORE YOU GET TO HILL - FW_ Transgender Tweets by POTUS" and another "Re_ Statement to press_ _Please call the WH." Komorowski Decl., Ex. 1.

As *Karnoski* held, "the litigation may require the district court to consider the basis of the President's initial decision, as well as the 2018 Policy [Implementation Plan]." 926 F.3d at 1204. These represent just a handful of examples among thousands of documents identified in Defendants' privilege logs as having been withheld under the deliberative process privilege, which are highly relevant to show "the basis of the President's initial decision."

2. Deliberative Materials Regarding the Activities of the DoD's Panel of Experts Are Relevant to Plaintiffs' Claims.

The second category of information subject to the Motion to Compel is: "Deliberative materials regarding the activities of DoD's so-called 'Panel of Experts' and its working groups tasked with developing a plan to study and implement the President's decision." ECF 177-1. This information is relevant in determining whether the Panel of Experts had independent authority to decide whether to allow accessions of new transgender service members, or whether the adoption of the restrictive accessions policy directed by the President was a foreordained conclusion. Plaintiffs have already put forward substantial evidence suggesting it was the latter, notably the Terms of Reference for the Panel of Experts that states that the Panel was to develop "an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum," which "direct[ed] that the Department return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016." ECF 177-24. Even if the Panel of Experts were not viewed as operating under such a directive, the information in this category is also relevant in determining whether the Panel of Experts was at least influenced by a perceived need to present recommendations that would be accepted by the President. Either way, as *Karnoski* recognized, "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services, but rather implemented the 2017 Memorandum." 926 F.3d at 1201. Discovery into whether the Panel of Experts had authority to, and in fact did, *independently* analyze the impact of transgender individuals serving in the armed services is unquestionably relevant.

Again, Plaintiffs provided specific examples of withheld materials falling within this category, and, again, Defendants have made little or no attempt to dispute their relevance. For

example:

- Defendants have produced a heavily redacted document recording the "dissenting opinion" of Acting Under Secretary of the Navy Thomas Dee, which notes in the unredacted portion of the document that the Panel's recommendations "are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law." ECF 177-3 (citing ECF 177-16, 177-22). This directly contradicts the stated rationale of the Implementation Plan, and suggests that the Plan was not, in fact, the product of an independent and fair study; the unredacted portion of this document is likely to provide additional relevant evidence on this point.
- Approximately 65 different entries on the Joint Chiefs of Staff privilege log reflect documents that were received by the Panel of Experts, ECF 117-18, and an entry on the Army privilege log is described as "Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria." ECF 177-17. Documents considered by the Panel of Experts and related communications are relevant to assess whether the Panel's conclusions were supported by the evidence presented.
- Defendants have withheld communications between the DoD and an outside consulting group, Kennell and Associates, regarding studies of transgender service members and resulting data. Komorowski Decl., Ex. 2. These communications are relevant to determining what data the Panel considered, the sources and reliability of that data, and whether the data underlying the Panel's conclusions are supported by reliable data.

These examples are representative of the types of documents Defendants are withholding within this category, which even from the limited information Defendants have provided are plainly relevant to Plaintiffs' claims.

3. Deliberative Materials Regarding the DoD's Implementation Plan and the President's Acceptance of the Plan Are Relevant to Plaintiffs' Claims.

The third category of information is: "Deliberative materials regarding DoD's Implementation Plan and the President's acceptance of the Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists." This information relates to a crucial time period between when the Panel of Experts completed their work and when political appointees at the DoD developed the proposed policy for the President's review. The final Report accompanying the Implementation Plan developed by the political appointees makes several controversial assertions regarding transgender individuals and gender dysphoria based on new materials and arguments that do not appear to have been advanced by the Panel of Experts. News reports have also indicated that White House officials and outside groups may have exerted significant political pressure on the DoD during this period. Once again, *Karnoski* squarely recognized that Plaintiffs have raised legitimate concerns surrounding the actual basis for the Implementation Plan, and documents in this category are plainly relevant to that important question, as described below.[4]

- Defendants have withheld two documents on the Army privilege log dated February 3, 2018, and authored by Mary Krueger, which, according to their description, "Suggest[] SECDEF will talk to POTUS ***and then make a decision regarding TG policy regardless of what any study asserts***." (emphasis added).

[4] Plaintiffs' Motion to Compel was filed before Defendants had provided privilege logs identifying any documents from this time period, so no examples from this time period could be identified in Plaintiffs' original Motion.

Id., Ex. 3. These documents are directly relevant to Plaintiffs' claims, as—by Defendants' own description—they suggest that the Implementation Plan was predetermined by the Secretary of Defense and the President and not the result of an objective study.

- An entry on the Army privilege log reflects a document authored by Mary Krueger, dated March 13, 2018, which, according to its description, "Discusses ***hearing policy from WH*** and then moving forward with SCCC talks." *Id.*, Ex. 3 (emphasis added). This document is directly relevant to Plaintiffs' claims, as it suggests a military doctor who was a member of the Army Service Central Coordination Cell meeting on transgender issues heard about the policy change *from* the White House, as opposed to having been involved in formulating a policy recommendation submitted *to* the White House. This supports Plaintiffs' claims that the policy change was not the result of independent military study.
- Defendants have withheld two documents on the Navy privilege log, dated January 18 and 19, 2018 entitled "Clinical Research Questions," for which no author or recipient has been provided. *Id.*, Ex. 4. Both documents are described as reflecting transgender clinical research that appears to have circulated not long before the Implementation Plan's report was completed. The result of this research, and its bearing on the ultimate Implementation Plan that issued, is relevant to evaluate whether the Plan was the product of independent study.
- A document withheld by the DoD dated January 18, 2018, is described as "PoE TG Review Recommendations to SD Wilkie SIGNED 2018.01.18.pdf." *Id.*, Ex. 5. Similarly, the Army withheld a document dated January 11, 2018, described as

"Signed action memo from USD-PR to SD providing a summary of the final recommendations of the PoE." *Id.*, Ex. 3. Both documents, purporting to show or summarize the final recommendations of the Panel of Experts, are relevant to determining what, if any, differences exist between the Panel's recommendations and the final policy that was issued.

- A document withheld by the DoD that Secretary Mattis sent to himself is described as "E-mail of 12/26/2017 regarding Transgender and Ability to Serve." *Id.*, Ex. 6. This email, purporting to reveal Secretary Mattis's considerations regarding the transgender service members' ability to serve, occurred six days before the court-mandated date requiring the military to allow transgender individuals to access. *See, e.g.*, ECF 91, 99, 101. It was at this time that the government was considering asking the Supreme Court for a stay, and Secretary Mattis's considerations are relevant to the government's decision not to seek a stay and may show that Secretary Mattis believed that transgender individuals were fully capable of service.
- Various documents withheld by the DoD reflect communications with the House Armed Services Committee and its members. These documents may be relevant to Plaintiffs' allegations that the animus of certain Representatives improperly influenced not only the President's initial decision to ban transgender military service, but the Implementation Plan. *See* ECF 40-2 at 27; ECF 40-14. For example, one entry dated December 14, 2017, is described as "Email between DoD personnel discussing HASC medical policy questions regarding transgender

service members," *id.*, Ex. 2, and another dated December 15, 2017, is described as "Email concerning HASC Staff & Rep. Hartzler TG Data Request." *id.*, Ex. 7.

- Documents withheld by the DoD from the beginning of January 2018 show that the DoD was seeking input from the service branches regarding an update to President Trump. For example, several entries are described as "Email concerning TG POTUS Update and the Service's inputs into the update," *id.*, Ex. 7, and others as "RE: URGENT: Memo for Services TG Policy," *id.*, Ex. 5. Any feedback received by the service branches regarding the transgender service policy, and whether that feedback impacted the recommendations to the President, is directly relevant to the allegation that the final policy was not simply the product of an independent review process.
- Documents withheld by the DoD reflect deliberations by "DoD personnel" following the Panel's recommendations, suggesting that members of the DoD's front office may have revised the Panel's recommendations. For example, entries dated January 23 and 24, 2018, after the Panel's recommendations, are described as "Email between DoD personnel discussing transgender materials," "Email between DoD personnel gathering statistics about transgender service members for policymaking," and "Email between DoD personnel regarding policy document" and are withheld solely on the basis of the deliberative process privilege. *Id.*, Ex. 2.

Once again, these represent just a small sampling of examples of documents within this category that demonstrate the critical relevance of this information.

In addition, Defendants have asserted the deliberative process privilege in refusing to respond to certain interrogatories entirely. This includes Interrogatory No. 31, which asks Defendants to: "Identify each Person who drafted, revised, or commented on any section identified in the Table of Contents of the Report, and state the role(s) each Person played in drafting, revising, or commenting on the Report." Defendants have also refused to respond to Interrogatory No. 32, which asks Defendants to "Describe in detail the process by which the Report was created, Identifying each Person who participated in or provided input during the creation of the Report and stating the role(s) each Identified Person played in that process." The answers to these interrogatories, which fall squarely within the third category of information that Plaintiffs moved to compel, are directly relevant for the same reasons.

4. Any Governmental Interest in Non-Disclosure Is Overcome Given the Central Role Governmental Intent Plays in This Case.

Defendants also urge the Court to reconsider its prior analysis of the fourth factor under the balancing test: the "extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." ECF 257-1 at 17 (quoting *Cipollone*, 1987 WL 36515, at *2). In doing so, Defendants quote the same arguments they made in objecting to the Magistrate Judge's Order, arguments this Court already considered and determined were outweighed by the weight of the other three factors favoring disclosure. ECF 227 at 16 n.10 ("Defendants do not explain . . . why the chilling effect is particularly great in this case or why it is great enough to outweigh the other three *Cipollone* factors"). This Court's decision was entirely consistent with the weight of the caselaw determining that the deliberative process privilege is not available in cases such as this one where the decision-maker's intent is a central issue, and which reject the argument that the privacy of governmental discussion is a sufficient interest to outweigh the need for disclosure. *See, e.g., In re Delphi Corp.*, 276 F.R.D.

81, 85 (S.D.N.Y. 2011) ("Where the deliberative or decisionmaking process is the 'central issue' in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers." (*quoting In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998))); *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521–22 (N.D. Ga. 2006) (in a case alleging intentional discrimination, "the government's interest in protecting . . . communications is outweighed by the Plaintiff's interest in disclosure"); *Hinsdale v. City of Liberal, Kan.*, 1997 WL 557314, at *1 (D. Kan. 1997) ("Courts have consistently found that the privilege is outweighed by the interest in disclosure where a case is based on alleged violations of federally-protected civil rights."). That is because, in cases such as this one where the case turns on governmental intent, documents reflecting that intent of the government and the options it considered are of paramount importance:

> [I]t is hard to imagine a case in which the government's deliberative process is more relevant or crucial . . . . [T]his is not the usual "deliberative process" case in which a private party challenges governmental action or seeks documents via the Freedom of Information Act, and the government tries to prevent its decisionmaking process from being swept up unnecessarily into public. ***Here, the decisionmaking process is not "swept up into" the case, it is the case*** . . . . The nature of this unique case is such that the "roads not taken" are as relevant as those taken.

Ferrell v. U.S. Dep't of Hous. & Urban Dev., 177 F.R.D. 425, 430 (N.D. Ill. 1998) (emphasis added) (*quoting United States v. Bd. Of Educ. Of City of Chi.*, 610 F. Supp. 695, 699 (N.D. Ill. 1985)).

Defendants ask the Court to reconsider its Order in view of the *Karnoski* court's observation that "the military's interest in full and frank communication about policymaking raises serious—although *not insurmountable*—national defense interests." ECF 257-1 at 18 (quoting *Karnoski*, 926 F.3d at 1206) (emphasis added). But this Court already gave those interests the careful consideration *Karnoski* called for, and determined that those interests must

yield in view of the high relevance of such documents. While Plaintiffs recognize that national security concerns could, at times, call for a higher degree of sensitivity around the privacy of policy deliberations, Defendants have yet to demonstrate that the documents in question here implicate any such heightened standard. To the extent Defendants assert that a heightened level of deference is required for certain documents, they must make their case for that deference more specifically. This would be consistent with the *Karnoski* court's guidance that documents from senior executive branch officials, which may (but may not) require a higher level of deference to agency decision-making, "may, of course, also be the most relevant." *Karnoski*, 926 F.3d at 1206. Because Defendants still have not explained "why the chilling effect is particularly great in this case or why it is great enough to outweigh the other three *Cipollone* factors," ECF 227 at 16 n.10, the Court's prior decision remains fully supported by law and should not be disturbed. Far from finding support for their position in *Karnoski*, Defendants would have this Court read the words "not insurmountable" out of that opinion.

C. Defendants Fail to Propose an Alternative Categorical Analysis.

Defendants complain that the three categories already considered by the Magistrate Judge and this Court are not sufficiently "discrete," because they encompass a large number of documents. ECF 257-1 at 18–19. But by Defendants' own admission, every single one of the documents being withheld based on deliberative process contains "deliberations regarding the formulation of the transgender policy," "deliberations regarding the implementation policy," or "deliberations" regarding related issues, generally described in boilerplate fashion. *See, e.g.*, Komorowski Decl., Exs. 1–7. Defendants have no proposal for what narrower categories must be analyzed. Nor have they submitted a categorical privilege log that would enable the Court to

conduct that analysis. *See Mayor & City Council of Balt. v. Unisys Corp.*, 2014 WL 12738272, at *1 (D. Md. June 6, 2014) (discussing categorical privilege logs).[5]

The closest Defendants come to identifying any additional subcategory of documents is when Defendants assert that

> [E]mails among members of the working groups supporting the Panel of Experts would not "explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest," Mem. Op. 16, Dkt. 227, because these individuals did not serve on the Panel of Experts and did not create DoD's 2018 policy.

ECF 257-1 at 16. But, as noted above, a critical question in this case is whether the information considered in forming the Implementation Plan was presented in an objective and accurate

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[5] As explained in *Mayor and City Council of Baltimore*:

> A categorical log may be used in place of a traditional, itemized log 'where (a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-grounded.' *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 109 (S.D.N.Y. 2008) (quoting *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 87 (S.D.N.Y. 2006)); see also Fed. R. Civ. P. 26 Commentary (stating that where voluminous documents are claimed to be privileged, a categorical description may be more appropriate than a log that lists particularized details). Regardless, a party must still 'justify its assertion of privilege with regard to each category, and the description of each category must provide sufficient information for [the opposing party] to assess any potential objections to the assertions of attorney-client privilege.' *Orbit One*, 255 F.R.D. at 109. The Sedona Principles suggest that it is best practice for the parties to 'agree to accept privilege logs that will initially classify categories or groups of withheld documents' where an enormous amount of electronically stored information is involved. Judge Paul W. Grimm, Charles S. Fax, and Paul Mark Sandler, Discovery Problems and Their Solutions, 90 (2nd ed. 2009).

2014 WL 12738272, at *1.

manner, or whether the information was misleadingly presented to arrive at a pre-determined conclusion. As noted, *Karnoski* directly supports the relevance of these questions to this litigation. Emails among the working groups supporting the Panel of Experts are obviously relevant to that question. Indeed, the government's new assertion that such documents are not relevant contradicts its own privilege logs, which routinely describe the withheld working group documents as containing "deliberations regarding the formulation of the transgender policy." *See, e.g.*, Komorowski Decl., Ex. 3.

Instead of arguing that particular types of documents are not relevant, or that particular types of documents threaten their interests in confidentiality, Defendants simply assert that Plaintiffs are not entitled to "disclosure of any of Defendants' deliberative documents." ECF 257-1 at 17. Defendants thus continue to engage in the same stonewalling tactics that the Ninth Circuit criticized in *Karnoski*. The Ninth Circuit made clear that the burden is on Defendants to propose narrower categories for consideration, instructing that "*[i]f Defendants persuasively argue* that a more granular analysis would be proper, the district court should undertake it." 926 F.3d at 1206 (emphasis added). The Ninth Circuit also warned that Defendants have a responsibility to "provide the district court with the information and arguments it needs to balance the significant interests at play under the tests we have discussed above." *Id.* at 1206–07. Despite these warnings, Defendants continue to oppose discovery on a blanket basis without providing the parties or the Court any of the information necessary to meet Defendants' demands for a more particularized analysis. Defendants are free to adopt any litigation strategy they wish, but they cannot urge reconsideration on the basis of *Karnoski* without following *Karnoski* themselves and attempting to make a persuasive showing for what a more "granular analysis" would look like, and why it "would be proper."

At minimum, if Defendants wish the Court to undertake this analysis, Defendants should be required to prepare detailed categorical privilege logs identifying the categories of documents for which they assert the deliberative process privilege and their argument for why those documents are privileged under *Cipollone*. That would at least permit Plaintiffs to fairly respond.

II. The Relevant Factors Weigh Against a Further Stay of Defendants' Compliance with the Magistrate Judge's Order.

In evaluating entry of a stay, or maintenance of a stay that has already been entered, the factors to be considered are "the length of the requested stay, the hardship that the movant would face if the motion were denied, the burden a stay would impose on the nonmovant, and whether the stay would promote judicial economy by avoiding duplicative litigation." *Donnelly v. Branch Banking & Trust Co.*, 971 F. Supp. 2d 495, 501–02 (D. Md. 2013) (quoting *In re Mut. Funds Inv. Litig.*, 2011 WL 3819608, at *1 (D. Md. Aug. 25, 2011)). Defendants bear the burden of establishing the need for a stay, and do "not enjoy an automatic stay as a right." *District of Columbia v. Trump*, 344 F. Supp. 3d 828, 843 (D. Md. 2018) (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). In fact, the "the presumption . . . is against a stay" pending interlocutory appeal. *See id.*

To justify such a stay, a litigant "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Defendants cannot meet that standard given the harm a further stay of Defendants' compliance with the Magistrate Judge's Order would work on Plaintiffs, who suffer irreparable harm from the discriminatory Implementation Plan and are unable to fully litigate their claims arising from that discrimination against Defendants. More than seven months have passed since the stay was entered in this case. Since the stay was entered, the Court's preliminary injunction has itself been

stayed and the challenged policies have gone into effect, causing immediate and ongoing harm to Plaintiffs. Because of these developments, the balancing of the relevant factors weigh against staying compliance with the Magistrate Judge's Order and against any administrative stay pending the outcome of Defendants' motion for reconsideration.

A. Defendants Face No Irreparable Harm from Complying with the Magistrate Judge's Order.

Defendants argue that absent a further stay, they face irreparable harm because the disclosure of documents and information cannot be undone. However, under the Fed. R. Evid. 502(D) Order issued by the Court on February 12, 2018, the production of documents does not constitute a waiver of privilege. *See* ECF 110. Defendants would have the opportunity to claw back any documents later determined to be privileged following appellate review under the same procedure Defendants have already employed several times in this case. *See, e.g.*, ECF 178 (Plaintiffs' motion regarding Defendants' attempt to claw back several produced documents). Further, under the Uniform Protective Order issued by the Court in February 2018, Defendants have had the opportunity to designate as confidential and subject to the protective order any "sensitive information not generally disclosed to the public." ECF 111 at 2.

Additionally, given the Court's interpretation of the Magistrate Judge's Order to include a protective order "encompass[ing] communications both to and from the President," the potential for Defendants to face irreparable harm through disclosure is greatly reduced. ECF 227 at 19; *see also* ECF 208 at 9 ("absent a stay, Plaintiffs may move to compel information concerning presidential communications and deliberations from sources other than the President, which would put at issue the need to invoke the presidential communications privilege—a circumstance that the Supreme Court has warned 'should be avoided whenever possible'" (internal citations omitted)).

B. Without the Preliminary Injunction in Place, Plaintiffs Suffer Immediate and Ongoing Harm.

Conversely, the burden the stay imposes on Plaintiffs is significant. This extensive delay has prejudiced Plaintiffs by preventing them from proceeding expeditiously with their case. As set forth in prior briefing, the materials covered by the Magistrate Judge's Order are important to Plaintiffs' case in the event their pending motion for summary judgment is not granted. *See, e.g.*, ECF 211 at 16; ECF 216 at 13–17. In overruling Defendants' objections to the Magistrate Judge's Order last November, the Court agreed these materials should be produced. ECF 227 at 15–17. Defendants' continued refusal to produce these documents—which was ordered by the Magistrate nearly a full year ago—severely prejudices Plaintiffs' case.

This delay continues to harm Plaintiffs. Plaintiffs are harmed so long as the discriminatory Implementation Plan remains in place, barring the accession of enlisting Plaintiffs and placing the careers of serving Plaintiffs in jeopardy. When asking this Court to stay compliance with the Magistrate Judge's Order, Defendants repeatedly stressed that Plaintiffs would not be prejudiced by a delay in discovery because the preliminary injunction remained in place to protect Plaintiffs in the interim. *E.g.* ECF 208 at 10; ECF 215 at 6 ("Plaintiffs will suffer *no* harm because a preliminary injunction is in place"). That preliminary injunction has now been stayed, and the challenged policies have gone into effect. ECF 250.

Without the preliminary injunction in place, all Plaintiffs suffer immediate, practical harm every day that the discriminatory Implementation Plan is in effect. *See* ECF 139 at 31–32; ECF 163-2 at 21–22; *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127–28 (4th Cir. 1983) (denying defendants' motion to stay in case pending bankruptcy proceedings, holding that a stay would work "manifest injustice to the claimant," an individual with declining health alleging injuries due to exposure to asbestos, even though the denial of the stay would

likely result in piecemeal litigation and cause practical problems for defendants). Further delaying discovery until decisions are rendered on Defendants' motions, including potential appellate decisions, could extend this harm for many months, or even years, unnecessarily.

C. The Stay Could Further Delay Discovery While Plaintiffs Continue to Suffer Harm.

The Court previously determined that the length factor favored the issuance of a stay, because "the length of the stay should be brief, given that the Ninth Circuit heard oral argument on the issue on October 10, 2018," more than one month prior to the issuance of the stay. ECF 227 at 21. Now, however, more than eight months have passed since compliance with the Magistrate Judge's Order was stayed in this case on November 30, 2018. *See* ECF 228.

Defendants argue that compliance with the Magistrate Judge's Order should be stayed pending the Court's determination on their motion for reconsideration, "and appellate review, if any," suggesting that Defendants may seek the extraordinary remedy of a writ of mandamus if their motion for reconsideration is denied. ECF 257 at 24. Such a stay could further delay the already-delayed discovery in this case for many more months, if not years, while Defendants pursue appellate relief and Plaintiffs continue to suffer harm. *See District of Columbia*, 344 F. Supp. 3d at 844 (denying a motion to stay discovery pending interlocutory appeal, in part because "the President could, on the basis of piecemeal appeals, potentially delay resolution of a good part of this case for years"); *see also Unidisco v. Schattner*, 1981 WL 40523 at *6 (D. Md. June 15, 1981) (denying stay pending related federal agency proceeding in part because "it is an abuse of discretion to grant a stay for an indefinite period of time, even in a case of great public moment . . . absent a showing of 'pressing need,'" and because the proceeding would likely be, "even if not indefinite, sufficiently lengthy so as to outweigh any benefit to the court") (citing

Landis, 299 U.S. at 255). Accordingly, this factor weighs against a further stay for compliance with the Magistrate Judge's Order, or an administrative stay.

D. A Further Stay Does Not Promote Judicial Economy.

Now that the *Karnoski* and *Doe* decisions have been issued, there is no longer any pending appeal that could create duplicative litigation of proceedings here. The so-called judicial economy interests Defendants cite to support a continued stay are nothing more than their own threat to seek mandamus review. But if Defendants continue to disagree with the Magistrate Judge's Order—which was now entered close to one year ago—they are free to seek that extraordinary relief from the Court of Appeals. Should the Court lift the stay, Defendants would be free to petition for mandamus review and seek a further stay of compliance with the Magistrate Judge's Order from the Fourth Circuit, if they so choose. Defendants need not hold this threat over the Court, and can employ the standard clawback procedure in the unlikely event that the appellate court decides that Defendants can meet the heavy burden of mandamus relief. Granting a stay delaying compliance with the Magistrate Judge's Order or an administrative stay in anticipation of some future, potential related litigation would not further the Court's interest in judicial economy. *See Mullins v. Suburban Hosp. Healthcare Sys., Inc.*, 2017 WL 30232282, at *2 (D. Md. July 17, 2017) (denying plaintiff's motion for a stay in anticipation of rejoining previously dismissed claims where the case was pending for over a year, the parties had begun discovery, and the other claims might have taken several months to reach discovery). Accordingly, this factor weighs against granting a further stay.

III. The Court Should Not Enter an Administrative Stay.

For the same reasons discussed in Section II, *supra*, the Court should not enter an Administrative Stay. However, in the event the Court denies Defendants' Motion, Plaintiffs would consent to a limited, 48-hour extension of the stay of Defendants' compliance with the

Magistrate Judge's Order, to permit Defendants time to seek a stay from the Fourth Circuit pending any petition for a writ of mandamus, if Defendants elect to pursue such relief.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration, Motion to Continue to Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order, and Request for an Administrative Stay, should all be denied.

Dated: July 22, 2019

Respectfully submitted,

/s/ Peter J. Komorowski III
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CERTIFICATE OF SERVICE

I hereby certify that, on July 22, 2019, a copy of the foregoing and its exhibits were served on Defendants via CM/ECF. In addition, a courtesy copy will be mailed to the Chambers of Judge Russell on July 23, 2019.

/s/ Peter J. Komorowski III
Peter J. Komorowski III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459

DECLARATION OF PETER J. KOMOROWSKI III IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION, MOTION TO CONTINUE TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER, AND REQUEST FOR AN ADMINISTRATIVE STAY

I, PETER J. KOMOROWSKI III, depose and say as follows:

1. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Reconsideration, Motion to Continue to Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order, and Request for an Administrative Stay. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in this action.

3. Plaintiffs have received approximately 42 privilege logs from Defendants.

4. Approximately 51,464 privilege log entries withhold or redact information at least in part on the basis of the deliberative process privilege, exclusive of deliberative process privilege claims on the White House's privilege log.

5. Approximately 37,116 privilege log entries withhold or redact information on the basis of the deliberative process privilege alone.

6. Due to the enormous number of entries on Defendants' privilege logs, providing hard copies of the privilege logs to the Court for its review would be impractical and cumbersome. For example, one privilege log Plaintiffs received from Defendants on November 9, 2018, lists 11,709 entries and would comprise 1,912 pages if printed. Plaintiffs will provide electronic copies of Defendants' privilege logs to the Court upon request.

7. Defendants' privilege logs feature repetitive, boilerplate justifications for withholding the allegedly privileged materials. True and correct excerpts from seven of Defendants' privilege logs, illustrative of Defendants' boilerplate justifications, are attached hereto as Exhibits 1–7.

8. Attached hereto as "Exhibit 1" is a true and correct copy of excerpted entries from a privilege log listing Department of Defense documents, served by Defendants on June 22, 2018.

9. Attached hereto as "Exhibit 2" is a true and correct copy of excerpted entries from a privilege log listing Department of Defense documents, served by Defendants on November 9, 2018.

10. Attached hereto as "Exhibit 3" is a true and correct copy of excerpted entries from a privilege log listing Army documents, served by Defendants on June 22, 2018.

11. Attached hereto as "Exhibit 4" is a true and correct copy of excerpted entries from a privilege log listing Navy documents, served by Defendants on February 13, 2018.

12. Attached hereto as "Exhibit 5" is a true and correct copy of excerpted entries from a privilege log listing Department of Defense documents, served by Defendants on March 20, 2018.

13. Attached hereto as "Exhibit 6" is a true and correct copy of excerpted entries from a privilege log listing Department of Defense documents, served by Defendants on June 15, 2018.

14. Attached hereto as "Exhibit 7" is a true and correct copy of excerpted entries from a privilege log listing Department of Defense documents, served by Defendants on March 20, 2018.

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

Executed this 22nd day of July, 2019.

/s/ Peter J. Komorowski III
Peter J. Komorowski III

Exhibit 1

Stone v. Trump,
1:17-cv-02459-GLR
Department of Defense Privilege Log

DoD BEGIN BATES	PROD014 BEGIN BATES	PROD014 END BATES	DATE	AUTHOR	RECIPIENT(S)	TITLE/ DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD 00083394	USDOE 00202178	USDOE 00202178	7/26/2017	DeMartino, Tony SES SD <Tony.DeMartino@sd.mil>	Higgins, Sarah C CDR USN OSD PA (US) <sarah.c.higgins.mil@mail.mil>SD - DepSecDef SAs & MAs <DepSecDefSAMA@sd.mil>; Donnelly, Sally SES SD <Sally.Donnelly@sd.mil>	Re_ Statement to press_ _Please call the WH_ .msg	DP - Deliberative Process	Deliberations regarding the rescission of the transgender policy
DoD 00083396	USDOE 00202180	USDOE 00202180	7/26/2017	Sweeney, Kevin SES SD <Kevin.Sweeney@sd.mil>	Raymond, Lacey CIV SD <Lacey.Raymond@sd.mil>; DeMartino, Tony SES SD <Tony.DeMartino@sd.mil>	RE_ Transgender tweets by POTUS .msg	DP - Deliberative Process	Deliberations regarding the rescission of the transgender policy
DoD 00083400	USDOE 00202182	USDOE 00202182	7/26/2017	Raymond, Lacey CIV SD <Lacey.Raymond@sd.mil>	Sweeney, Kevin SES SD <Kevin.Sweeney@sd.mil>; DeMartino, Tony SES SD <Tony.DeMartino@sd.mil>	Email conversation regarding message to the force on the transgender policy	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations

								regarding the rescission of the transgender policy
DoD000834 02	USDOE002 02184	USDOE 00202184	7/26/2017	Sweeney, Kevin SES SD <Kevin.Sweeney @sd.mil>	DeMartino, Tony SES SD <Tony.DeMartino @sd.mil>; Raymond, Lacey CIV SD <Lacey.Raymond@ sd.mil>	FW_ Transgender tweets by POTUS .msg	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD000834 05	USDOE002 02187	USDOE 00202187	7/26/2017	Donnelly, Sally SES SD <Sally.Donnelly @sd.mil>	DeMartino, Tony SES SD <Tony.DeMartino @sd.mil>McFarlan e, Matthew BG SD <Matthew.McFarla ne@sd.mil>	Email regarding Tweet on transgender. msg	DP - Deliberative Process	Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Draft litigation filing that contains an attorney's conclusions;
DoD000834 07	USDOE002 02189	USDOE 00202189	7/26/2017	DeMartino, Tony SES SD <Tony.DeMartin o@sd.mil>	DuFrayne, Francis CIV SD <Francis.DuFrayne @sd.mil>Johnson, Justin CIV SD <Justin.Johnson@s d.mil>	Re_ Important - READ BEFORE YOU GET TO HILL - FW_ Transgender tweets by POTUS .msg	DP - Deliberative Process	Deliberations regarding the implementation of the transgender policy
DoD 00083409	USDOE 00202191	USDOE 00202191	7/26/2017	DeMartino, Tony SES SD <Tony.DeMartin o@sd.mil>	Donnelly, Sally SES SD <Sally.Donnelly@s d.mil>	Tweet on transgender. msg	DP - Deliberative Process	Deliberations regarding the rescission of the transgender policy
DoD 00083411	USDOE 00202193	USDOE 00202193	7/26/2017	Johnson, Justin CIV SD	DuFrayne, Francis CIV SD <Francis.DuFrayne	Re_ Important - READ BEFORE	DP - Deliberative Process	Deliberations regarding the

				<Justin.Johnson @sd.mil>	@sd.mil>DeMartino, Tony SES SD <Tony.DeMartino @sd.mil>	YOU GET TO HILL - FW_ Transgender tweets by POTUS .msg		rescission of the transgender policy
DoD 00083413	USDOE 00202195	USDOE 00202195	7/26/2017	Raymond, Lacey CIV SD <Lacey.Raymond @sd.mil>	Sweeney, Kevin SES SD <Kevin.Sweeney@sd.mil>; Donnelly, Sally SES SD <Sally.Donnelly@sd.mil>; Walsh, Laurel Col SD <Laurel.Walsh@sd.mil>DeMartino, Tony SES SD <Tony.DeMartino @sd.mil>; McFarlane, Matthew BG SD <Matthew.McFarlane@sd.mil>	FW_ Transgender tweets by POTUS .msg	DP - Deliberative Process	Deliberations regarding the rescission of the transgender policy

Exhibit 2

Stone v. Trump,
1:17-cv-02459-GLR
Department of Defense Privilege Log

DOD BEGIN BATES	PROD018 BEGIN BATES	PROD018 END BATES	DATE	Putative DATE	AUTHOR	Putative AUTHOR	RECIPIENT(S)	Putative RECIPIENT(S)	TITLE/ DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD 00127520	USDOE 00258848	USDOE 00258848	11/7/2017	11/16/2017	Findley, Andrew, CIV, DHA	Adirim, Terry A SES OSD HA (US) </O=EASF /OU=EXC HANGE ADMINIST RATIVE GROUP (FYDIBOH F23SPDLT) /CN=RECI PIENTS/C N=TERRY. A.ADIRIM. CIVC79>		Funk, Wendy L CTR (US) <wfunk@ken nellinc.com>	Slides with transgender data for the Panel of Experts.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementatio n of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD 00123232	USDOE 00254687	USDOE 00254687	11/21/2017	11/21/2017	Findley, Andrew L Jr CIV (US) <andrew. l.findley. civ@mail .mil>	Findley, Andrew L Jr CIV (US) <andrew.l .findley.ci v@mail.m il>	Frazier, Kim L CIV DHA J-5 (US) <kim.l.frazier 2.civ@mail.m il>Adirim, Terry A SES OSD HA (US) <terry.a.adiri m.civ@mail. mil>; Funk, Wendy L CTR (US) <wfunk@ken nellinc.com>	Frazier, Kim L CIV DHA J-5 (US) <kim.l.frazier 2.civ@mail.m il>; Adirim, Terry A SES OSD HA (US) <terry.a.adiri m.civ@mail. mil>; Funk, Wendy L CTR (US) <wfunk@ken nellinc.com>	Email between DoD personnel gathering transgender medical data.	DP - Deliberative Process	Deliberations regarding the implementatio n of the transgender policy

DoD 00127557	USDOE 00258882	USDOE 00258882	11/15/2017	11/15/2017	Adirim, Terry A SES OSD HA (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=TERRY.A.ADIRIM.CIVC79>	Adirim, Terry A SES OSD HA (US) </O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=TERRY.A.ADIRIM.CIVC79>	Findley, Andrew L Jr CIV (US) <andrew.l.findley.civ@mail.mil>Fraine, Melissa C CTR DHA HEALTH OPNS (US) <melissa.c.fraine.ctr@mail.mil>; Funk, Wendy L CTR (US) <wfunk@kennellinc.com>	Findley, Andrew L Jr CIV (US) <andrew.l.findley.civ@mail.mil>; Fraine, Melissa C CTR DHA HEALTH OPNS (US) <melissa.c.fraine.ctr@mail.mil>; Funk, Wendy L CTR (US) <wfunk@kennellinc.com>	Email between DoD personnel discussing transgender data.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD 00122986	USDOE 00254047	USDOE 00254047	12/14/2017	12/14/2017	Flossos, Anna S CIV (US) <anna.s.flossos.civ@mail.mil>	Flossos, Anna S CIV (US) <anna.s.flossos.civ@mail.mil>	Adirim, Terry A SES OSD HA (US) <terry.a.adirim.civ@mail.mil>DHA NCR Prog Integ List PI List <dha.ncr.prog-integ.list.pi-list@mail.mil>; Rychalski, Jon J SES OSD HA (US) <jon.j.rychalski.civ@mail.mil>; Mitchell, Ashley M CTR DHA HA SUPPORT (US) <ashley.m.mitchell28.ctr@mail.mil>	Adirim, Terry A SES OSD HA (US) <terry.a.adirim.civ@mail.mil>; DHA NCR Prog Integ List PI List <dha.ncr.prog-integ.list.pi-list@mail.mil>; Rychalski, Jon J SES OSD HA (US) <jon.j.rychalski.civ@mail.mil>; Mitchell, Ashley M CTR DHA HA SUPPORT (US) <ashley.m.mitchell28.ctr@mail.mil>	Email between DoD personnel discussing HASC medical policy questions regarding transgender service members.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy

DoD 00141507	USDOE 00267035	USDOE 00267035	1/24/2018	1/24/2018	Boehmer, Matthew D (Matt) SES DODHRA OPA (US) <matthew.d.boehmer.civ@mail.mil>	Boehmer, Matthew D (Matt) SES DODHRA OPA (US) <matthew.d.boehmer.civ@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Email between DoD personnel discussing transgender materials.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy
DoD 00141508	USDOE 00267036	USDOE 00267036	1/24/2018	1/24/2018	Boehmer, Matthew D (Matt) SES DODHRA OPA (US) <matthew.d.boehmer.civ@mail.mil>	Boehmer, Matthew D (Matt) SES DODHRA OPA (US) <matthew.d.boehmer.civ@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Email between DoD personnel discussing transgender materials.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy

DoD 00142672	USDOE 00267703	USDOE 00267703	1/23/2018	1/23/2018	Percich, David M CIV OSD OUSD P-R (US) <david.m.percich.civ@mail.mil>	Percich, David M CIV OSD OUSD P-R (US) <david.m.percich.civ@mail.mil>	Brown, Gary W LTC USARMY OSD OUSD P-R (US) <gary.w.brown.mil@mail.mil>MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Brown, Gary W LTC USARMY OSD OUSD P-R (US) <gary.w.brown.mil@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>	Email between DoD personnel gathering statistics about transgender service members for policymaking.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD 00142674	USDOE 00267705	USDOE 00267705	1/23/2018	1/23/2018	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Email between DoD personnel regarding policy document.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy

Exhibit 3

Stone v. Trump,
1:17-cv-02459-GLR
Army Privilege Log

ARMY BEGIN BATES	PROD014 BEGIN BATES	PROD014 END BATES	DATE	AUTHOR	RECIPIENT(S)	TITLE/DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
Army_ 10031103	USDOE 00194566	USDOE 00194567	2/3/2018	Krueger, Mary V COL USARMY HQDA ASA MRA (US)	Kramer, Christine M COL USARMY MEDCOM RHC-P (US) [christine.m.kramer12.mil@mail.mil]	Suggests SECDEF will talk to POTUS and then make a decision regarding TG policy regardless of what any study asserts.	DP - Deliberative; EP - Executive Privilege	Deliberations regarding the formulation of the transgender policy
Army_ 10031105	USDOE 00194568	USDOE 00194569	2/3/2018	Krueger, Mary V COL USARMY HQDA ASA MRA (US)	Crosland, Telita BG USARMY MEDCOM HQ (US) [telita.crosland.mil@mail.mil]	Suggests SECDEF will talk to POTUS and then make a decision regarding TG policy regardless of what any study asserts.	DP - Deliberative; EP - Executive Privilege	Deliberations regarding the formulation of the transgender policy
Army_ 10030728	USDOE 00194434	USDOE 00194435	3/13/2018	Krueger, Mary V COL USARMY HQDA ASA MRA (US)	MCTIGUE, Daniel C LTC USARMY HQDA DCS G-1 (US) [daniel.c.mctigue.mil@mail.mil]	Discusses hearing policy from WH and then moving forward with SCCC talks.	DP - Deliberative; EP - Executive Privilege	Deliberations regarding the formulation of the transgender policy
Army_10042579	USDOE00196839	USDOE00196839	1/11/2018	CCSIUSER		Signed action memo from USD-PR to SD providing a summary of the final recommendations of the PoE.	DP - Deliberative	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy
Army_10040927	USDOE00196363	USDOE00196363	12/20/2017	COL Lisa Griffin		Briefing slides in preparation for a PoE meeting, summarizing current recommendations from the working group and a proposal by the	DP - Deliberative	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy

						USMC on accessions.		
Army_10040935	USDOE00196364	USDOE00196364	12/20/2017	COL Lisa Griffin		Briefing slides in preparation for a PoE meeting, summarizing current recommendations from the working group and a proposal by the USMC on accessions.	DP - Deliberative	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy

Exhibit 4

Stone v. Trump,
1:17-cv-02459-GLR
Navy Privilege Log

Beg Bates	End Bates	Date	Author	Recipient	Title	Privilege(s)	Privilege Basis
Navy_ 00045823	Navy_ 00045823	1/18/2018 19:40			Clinical Research Questions	Privileged; Deliberative Process Privilege	Draft document pertaining to transgender clinical research is predecisional and consists of deliberative process information
Navy_ 00045826	Navy_ 00045826	1/19/2018 15:46			Clinical Research Questions	Privileged; Deliberative Process Privilege	Draft document re: transgender clinical research is predecisional and consists of privileged deliberative process communications

Exhibit 5

Stone v. Trump,
1:17-cv-02459-GLR
Department of Defense Privilege Log

DOD BEGIN BATES	PROD004 BEGIN BATES	PROD004 END BATES	DATE	AUTHOR	RECIPIENT(S)	TITLE/ DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD 00000352	USDOE 00068630	USDOE 00068630				PoE TG Review Recommendations to SD Wilkie SIGNED 2018.01.18.pdf	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy
DoD 00000362	USDOE 00068639	USDOE 00068639				PoE TG Review Recommendations to SD Wilkie SIGNED 2018.01.18.pdf	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy
sDoD 00000407	USDOE 00068679	USDOE 00068679	1/12/2018	MSG ROBERSON		Memo for Services TG Policy (SAB, 12 Jan).docx	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy
DoD 00000408	USDOE 00068680	USDOE 00068680	1/12/2018	Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>Sims, Pettis N LCDR USN OSD OUSD P-R (US) <pettis.n.sims.mil@mail.mil>; Carnell, C M (Cherre) SMSgt USAF OSD OUSD P-R (US) <cherreonda.m.carnell.mil@mail.mil>; Warren, Jill M CIV OSD OUSD P-R (US) <jill.m.warren4.civ@mail.mil>; Koprowski, Daniel C COL USARMY OSD OUSD P-R (US) <daniel.c.koprowski.mil@mail.mil>; Kelly, Michael J CIV OSD OUSD P-R (US) <michael.j.kelly51.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>	RE: URGENT: Memo for Services TG Policy	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy

DoD 00000409	USDOE 00068681	USDOE 00068681	1/12/2018	MSG ROBERSON		Memo for Services TG Policy (SAB, 12 Jan).docx	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy

Exhibit 6

Stone v. Trump,
1:17-cv-02459-GLR
Department of Defense Privilege Log

DoD DOC ID	PROD010 BEGIN BATES	PROD010 END BATES	DATE	AUTHOR	RECIPIENT(S)	TITLE/ DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD 00084842	USDOE 00134726	USDOE 00134726	12/26/17	Jim Mattis <jimmattis @jimmattis. com>	SecDef26 <SecDef26@sd.mil>	E-mail of 12/26/2017 regarding Transgender and Ability to Serve	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy

Exhibit 7

Stone v. Trump,
1:17-cv-02459-GLR
Department of Defense Privilege Log

DOD BEGIN BATES	PROD005 BEGIN BATES	PROD005 END BATES	DATE	AUTHOR	RECIPIENT(S)	TITLE/ DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD 00009202	USDOE 00086497	USDOE 00086497	12/15/17	MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Gruber, David J CIV OSD OGC (US) <david.j.gruber.civ@mail.mil>; Hatch, Richard O CIV OSD OGC (US) <richard.o.hatch.civ@mail.mil>Cooper, Willie L (Will) III Lt Col USAF OSD OASD LA (US) <willie.l.cooper10.mil@mail.mil>; Wellman, Aaron C LTC USARMY OSD OUSD P-R (US) <aaron.c.wellman.mil@mail.mil>; Brown, Gary W LTC USARMY OSD OUSD P-R (US) <gary.w.brown.mil@mail.mil>	Email concerning HASC Staff & Rep. Hartzler TG Data Request	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy
DoD 00004402	USDOE 00083034	USDOE 00083034	1/3/18	Gainey, Andrew C COL USARMY OSD OUSD P-R (US) <andrew.c.gainey.mil@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>; Hofmann, Matthew T (Matt) MAJ USARMY OSD OUSD P-R (US) <matthew.t.hofmann.mil@mail.mil>; Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>; Sims, Pettis N LCDR USN OSD OUSD P-R (US) <pettis.n.sims.mil@mail.mil>; Arendt, Christopher P CIV OSD OUSD P-R (US) <christopher.p.arendt.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>	Email concerning TG POTUS Update and the Service's inputs into the update.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy
DoD 00004403	USDOE 00083035	USDOE 00083035	1/3/18	Gainey, Andrew C COL USARMY OSD OUSD P-R (US) <andrew.c.gainey.mil@mail.mil>	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>; Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>; Hofmann, Matthew T (Matt) MAJ USARMY OSD OUSD P-R (US) <matthew.t.hofmann.mil@mail.mil>	Email concerning TG POTUS Update and the Service's inputs into the update.	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy

DoD 00004404	USDOE 00083036	USDOE 00083036	1/3/18	Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>	Gainey, Andrew C COL USARMY OSD OUSD P-R (US) <andrew.c.gainey.mil@mail.mil>Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>; Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>; Hofmann, Matthew T (Matt) MAJ USARMY OSD OUSD P-R (US) <matthew.t.hofmann.mil@mail.mil>	Email concerning TG POTUS Update and the Service's inputs into the update.	DP - Deliberative Process	Deliberations regarding the implementation of the transgender policy; Deliberations regarding the rescission of the transgender policy; Draft litigation filing that contains an attorney's conclusions