The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

TABLE OF CONTENTS

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

INTRODUCTION

In granting the extraordinary remedy of a writ of mandamus and vacating the Court's discovery order, the Ninth Circuit made clear both that the deliberative process privilege cannot be swept aside *en masse* over thousands of documents and that principles of military deference apply in this case. Yet from the first line of their motion, Plaintiffs argue that the "Court reached the correct conclusion" in its now-vacated order and urge the Court to ignore binding authority by again ordering the disclosure of all of the Department of Defense's ("DoD") deliberative documents. Pls.' Mot. 1, Dkt. 364. In doing so, Plaintiffs erroneously argue that the deliberative process privilege does not apply as a matter of law, rely almost entirely on the same record and arguments that the Ninth Circuit found inadequate to establish a need for DoD's deliberative documents, apply an incorrect standard of review, and give insufficient consideration to the military's interest in full and frank communication about policymaking. The Court must reject Plaintiffs' arguments and deny their motion in its entirety. To do otherwise would be to contradict the Ninth Circuit.

BACKGROUND

I. The Ninth Circuit Issued the Extraordinary Remedy of a Writ of Mandamus.

On June 14, 2019, the Ninth Circuit granted Defendants' petition for a writ of mandamus and vacated this Court's order compelling disclosure of all DoD deliberative documents. *Karnoski v. Trump*, 926 F.3d 1180, 1207–08 (9th Cir. 2019). The Ninth Circuit directed this Court to "reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Id.* at 1207. The Ninth Circuit cautioned that the "deliberative process privilege[,] although not absolute, require[s] careful consideration by the judiciary[.]" *Id.*

In issuing the extraordinary remedy, the Ninth Circuit held that this Court "did not adequately consider the weighty issues implicated by Plaintiffs' discovery requests" in two key ways. *Id.* at 1206. First, the Ninth Circuit reiterated that to overcome the deliberative process privilege, the balancing test outlined in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984), must weigh in favor of Plaintiffs. *Id.* The Ninth Circuit found that "the existing record is not adequate to evaluate the relevance of all of the requested information, at least in terms of balancing production of materials against the military's countervailing confidentiality interest." *Id.* Noting that in *Trump*

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

v. Hawaii, 138 S. Ct. 2392, 2409 (2018), the 12-page Proclamation "was sufficient to allow for judicial review[,]" *id.* at 1206 n.22, the Ninth Circuit questioned whether information concerning the basis of the August 2017 Presidential Memorandum remained relevant now that the 2018 DoD policy has been adopted, *id.* at 1206. The Ninth Circuit found that the appropriate course may be for the Court "to authorize discovery in stages when the current record is insufficient to establish relevance." *Id.* at 1206. The Ninth Circuit further directed the Court to give "careful consideration" of the "military's interest in full and frank communication about policymaking" because that interest implicates "national defense interests." *Id.* Second, the Ninth Circuit found that "the district court appears to have conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* The Ninth Circuit directed that "in balancing the *Warner* factors, the district court should consider classes of documents separately when appropriate." *Id.*

The Ninth Circuit also concluded that the Court "failed to give the 2018 Policy the thorough consideration due[,]" finding that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Id.* at 1207. The Ninth Circuit unequivocally stated that "the district court must apply appropriate military deference to its evaluation of the 2018 Policy." *Id.* at 1202.

II. Plaintiffs Again Seek the Disclosure of All Deliberative Documents.

After the Ninth Circuit granted the writ vacating the Court's order and remanded the matter, the Court ordered the parties to "meet and confer to try to attempt to narrow any remaining discovery disputes." Am. Order, Dkt. 344. On July 17, 2019, the parties conferred, during which Plaintiffs' counsel stated their intent to again move to compel all documents withheld under the deliberative process privilege. Carmichael Decl. ¶ 2. In an attempt to narrow the dispute, defense counsel requested that Plaintiffs identify specific documents or, at the very least, discrete categories of documents, over which they would like Defendants to consider waiving the deliberative process privilege. Indeed, this is the process that occurred in the related *Doe v. Esper* litigation, resulting in Defendants waiving the privilege and producing certain deliberative documents. *Id.* Plaintiffs refused and instead proposed that Defendants waive the privilege over nine broad categories that together

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

comprise nearly all of Defendants' deliberative documents. *See* Ltr. from Siegfried to Carmichael at 3–4 (July 25, 2019), Dkt. 365-55. In response, Defendants stated that the Ninth Circuit questioned the relevance of much of the material requested by Plaintiffs and again urged Plaintiffs to identify discrete categories of documents over which they would like Defendants to waive the privilege. Ltr. from Carmichael to Siegfried at 2 (Aug. 2, 2019), Dkt. 365-56. To assist Plaintiffs in identifying documents related to the Panel of Experts—the only deliberative material even arguably relevant under the Ninth Circuit's ruling—Defendants provided Plaintiffs with tailored privilege logs before Plaintiffs filed their motion. *See id.* But rather than using the tailored logs to identify documents or discrete categories of documents to seek to compel as the *Doe* plaintiffs did, *see* Pls.' Mot. to Compel, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. June 6, 2019), Dkt. 216, Plaintiffs filed the instant motion, again seeking all of DoD's deliberative documents.

ARGUMENT

I. This Court Is Bound By the Ninth Circuit's Ruling.

It is settled that a "district court is required to follow and implement [the Ninth Circuit's] decisions[.]" *Brown v. Baden*, 815 F.2d 575, 576 (9th Cir. 1987). "District courts must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Vizcaino v. U.S. Dist. Court*, 173 F.3d 713, 719 (9th Cir. 1999). This is especially true for a writ of mandamus, which is "a drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). The writ is issued only if the petitioner's "right to the writ is clear and indisputable[,]" such that "[t]he district court's order is clearly erroneous as a matter of law[.]" *Karnoski*, 926 F.3d at 1203. Thus, this Court cannot conclude, as Plaintiffs urge, that it reached the "correct conclusion" in its now-vacated order, Pls.' Mot. 1, and must instead "reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Id.* at 1207.

II. Plaintiffs' Contention that the Deliberative Process Privilege Does Not Apply as a Categorical Matter of Law is Directly Contrary to the Ninth Circuit's Ruling.

Plaintiffs again argue that the "deliberative process privilege is inapplicable in this case because the government's decisionmaking is the central issue." Pls.' Mot. 4. This argument is

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

directly contrary to the Ninth Circuit's mandamus ruling and must be rejected in its entirety.

To support their assertion, Plaintiffs again rely upon *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), which held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made "with actual intent to hinder, delay, or defraud." But Plaintiffs made *this same argument* before the Ninth Circuit. *See Karnoski*, 926 F.3d at 1195 (acknowledging that Plaintiffs, citing to *In re Subpoena,* argued that the deliberative process privilege "does not apply where, as here, plaintiffs challenge the constitutionality of a government decision and alleged animus or discriminatory intent"). The Ninth Circuit did not adopt Plaintiffs' argument, instead instructing this Court to apply the *Warner* balancing test and "consider classes of documents separately when appropriate." *Id.* This Court thus cannot set aside the deliberative process privilege *en masse* as Plaintiffs again request and must balance "production of materials against the military's countervailing confidentiality interest." *Id.*

III. Plaintiffs' Categories Are Far Too Broad for the Court to Conduct the Required *Warner* Balancing Test and a More Granular Analysis is Warranted.

Implicitly acknowledging that the Court may not again set aside the deliberative process privilege *en masse*, Plaintiffs purport to balance the *Warner* factors across nine broadly defined categories of documents. *See* Pls.' Mot. 6–10. But these nine categories are so broad that together they comprise nearly all of DoD's deliberative documents. Plaintiffs again seek deliberative materials concerning the Carter policy and its formation, materials preceding the President's July 2017 Twitter statements, communications and deliberations of the Panel of Experts, and materials related to Secretary Mattis' February 2018 Memorandum, the DoD Report, President's March 2018 Memorandum, and the implementation of the DoD policy. *See id.* Thus, Plaintiffs entirely bypass the Ninth Circuit's guidance to conduct "discovery in stages[,]" *Karnoski*, 926 F.3d at 1206, and again seek nearly all deliberative materials in the same motion. By creating these nine categories, Plaintiffs merely re-characterize the categories they previously presented to the Court. *Compare* Pls.' Mot. 6–8, *with* Pls.' Reply 4, Dkt. 273 (identifying categories as deliberative materials concerning the Carter Policy, the President's tweets and 2017 Memorandum, the Panel of Experts, and the 2018 policy).

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

Moreover, Plaintiffs' categories are far too broadly defined for the Court to properly apply the *Warner* balancing test.[1] A much more granular analysis is necessary here. *See Karnoski*, 926 F.3d at 1206. Each of Plaintiffs' categories comprises thousands of documents and communications generated and transmitted by officials at varying levels in DoD, Department of Homeland Security, Army, Navy, Air Force, Coast Guard, Defense Health Agency, the National Guard Bureau, and the Office of the Chairman of the Joint Chiefs of Staff, both uniformed and civilian, career employees and political appointees from two administrations, across numerous ranks, positions, and areas of professional expertise as they worked to develop and refine DoD's policy over a period of four years. Ex. A, Easton Decl. ¶ 11. These categories would include, for example, communications by lower-level officials who were not a part of the Panel of Experts; communications among Panel members; communications that pre-date the formation of the Panel of Experts, in some cases by years; communications to and from the ultimate decision-maker, the Secretary of Defense; and communications that post-date the Secretary's decision by over a year. *Id.* And these communications span various topics, including analyses of the policy's effectiveness, development of key aspects of the policy such as the months of stability requirement, the personal experiences of commanders and transgender individuals regarding challenges faced by the policy, and discussions about how to address the practical logistics of gender transition when it comes to berthing, showers, and bathrooms. *Id.* Moreover, each category of documents comprises various types of materials, including, for example, emails, calendars, thousands of pages of draft memoranda, briefs, meeting notes, spreadsheets, and PowerPoint presentations. *Id.* As the Ninth Circuit recognized, "[d]ocuments involving the most senior executive branch officials . . . may require greater deference" and may "also be the most relevant[,]" *Karnoski*, 926 F.3d at 1206, but balancing these two factors simply cannot be done when each of the categories Plaintiffs propose include such a wide range of documents generated by officials at all different levels.

[1] Plaintiffs' categories are so broad that for some of them, it is unclear what documents they are seeking to compel. For example, Plaintiffs seek the "[d]ecision" of the Panel of Experts, Pls.' Mot. 7, but Secretary Mattis' decision is the February 2018 Memorandum (which is public), Dkt. 216-1, and the Panel of Experts' recommendation, and the Panel's briefings to the Secretary and Deputy Secretary were previously provided, *see* Easton Decl. ¶ 8.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

IV. The Record Does Not Support Plaintiffs' Relevance Arguments.

The Ninth Circuit determined that the record is "not adequate to evaluate the relevance of all of the requested information," and questioned the relevance of material pre-dating the formation of the Panel of Experts, noting that in some instances an agency's explanation of the policy by itself is sufficient for judicial review. *Karnoski,* 926 F.3d at 1206, 1206 n.22. Despite these findings, Plaintiffs cite to record material to support their relevance argument for only one of their nine categories. Specifically, Plaintiffs cite two communications between DoD and Dr. Paul McHugh[2], a psychiatrist from Johns Hopkins University, which DoD produced (unredacted) to Plaintiffs.[3] Plaintiffs claim that these communications establish the relevance of deliberative materials pertaining to Secretary Mattis' February 2018 Memorandum and DoD's accompanying report. But a review of this material makes short work of their relevance claims.

DoD's communications with Dr. McHugh reflect only DoD's efforts to consider input from medical professionals with a variety of views as part of its policy process; they offer no support for Plaintiffs' claims. Plaintiffs essentially argue that because senior DoD officials spoke with a psychiatrist with a different viewpoint from that of the Plaintiff advocacy groups, Secretary Mattis' motivations were not "genuine" but were instead based on "non-military political or other considerations" that do not warrant deference. Pls.' Mot. 8. But Plaintiffs ignore that DoD considered the opinions and studies of multiple experts, including Plaintiffs' own expert, Dr. George Brown, *see* Dkt. 373 at 9–10, and military mental health specialists, surgeons, endocrinologists and general practitioners from the Army, Navy and Air Force who had collectively advised on more than 250 transgender service member medical treatment plans, Ex. 2, AR 002830-5. There is nothing nefarious or indicative of bad faith about receiving input from experts with differing views. *See*

[2] Dr. Paul McHugh is a University Distinguished Service Professor of Psychiatry and Professor of Psychiatry and Behavioral Sciences at Johns Hopkins University and previously served as the Psychiatrist-in-Chief for the Johns Hopkins Hospital. *See* https://www.hopkinsmedicine.org/profiles/results/directory/profile/0003340/paul-mchugh.

[3] Plaintiffs are thus wrong to suggest that they obtained these two documents only "[a]fter a prolonged discovery dispute with a third party." Pls.' Mot. 8 n.2; Ex. 3, Production Ltr. of Oct. 10, 2018; Ex. 4, USDOE00206512–13. Thus, Plaintiffs' assertion that they need all DoD's deliberative documents to discover similar communications is unfounded.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

Gibson v. Collier, 920 F.3d 212, 220–22 (5th Cir. 2019) (citing Dr. McHugh among many medical experts in finding that "there is robust and substantial good faith disagreement dividing respected members of the expert medical community" concerning the necessity and efficacy of sex reassignment surgery). Indeed, Plaintiffs' own expert Major General (Ret.) Margaret Wilmoth, *see* Ex. 5, Wilmoth Expert Report, recommended that the Carter Transgender Working Group ("TGWG") speak with Dr. McHugh. *See* Ex. 6-7; Ex 8, Wilmoth email of Oct. 15, 2015 (recommending Dr. McHugh and stating "I would rather [the TGWG] get to a decision knowing how we got there by hearing from all sides of this important decision rather than just hearing from advocates."). Therefore, the fact that DoD communicated with Dr. McHugh does not support Plaintiffs' speculation that Secretary Mattis' motivations were not genuinely based on military considerations, and Plaintiffs offer no other record evidence or argument to establish the relevance of all deliberations concerning the February 2018 Memorandum and DoD's accompanying report.

For their remaining eight categories, Plaintiffs rely solely on argument to establish relevancy. Pls.' Mot. at 6–8. But argument alone—much of which was previously advanced before the Ninth Circuit—cannot support disclosure of all DoD deliberative materials. *See Karnoski,* 926 F.3d at 1206.

As an initial matter, Plaintiffs repeatedly argue that DoD deliberations are needed to determine if there is a "less intrusive means" of achieving its goals or to determine if DoD's justifications for the policy are "genuine." Pls.' Mot. 6–8. But this is not the standard set by the Ninth Circuit. The Ninth Circuit conducted a three part analysis in which it: 1) reviewed and analyzed cases involving intermediate scrutiny; 2) reviewed and analyzed cases applying military deference; and 3) synthesized the two sets of cases into one cogent standard. *See Karnoski*, 926 F.3d at 1199–1202. Plaintiffs ignore the latter two parts and entirely fail to acknowledge that intermediate scrutiny must be applied in conjunction with military deference. Thus, Defendants need only establish "that they reasonably determined the policy 'significantly furthers' the government's important interests." *Id.* at 1202 (citation omitted). Plaintiffs make no attempt to argue the relevance of the deliberative materials they seek under this standard.

When applying the Ninth Circuit's standard, five of the nine categories can be eliminated on relevancy grounds based on the timeframe of the category alone. The first three categories—Carter

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

Policy Formulation; Carter Policy Implementation; and Military Service by Transgender People between the Inauguration and July 2017 Tweets, *see* Pls.' Mot. 6–7, involve documents created well before the establishment of the Panel of Experts, and the Ninth Circuit specifically questioned the relevance of material falling into such categories. *Karnoski,* 926 F.3d at 1206. Two other categories—the President's March 2018 Memorandum and implementation of DoD's 2018 policy, *see* Pls.' Mot. 8—involve documents created after DoD made its policy decision. (As set forth below in Part VI, material post-dating the creation of DoD's 2018 policy is nevertheless privileged.) Thus, deliberative material regarding these two categories cannot be relevant to whether DoD "reasonably determined the policy significantly furthers the government's important interests." *Karnoski,* 926 F.3d at 1202.

Documents included in the remaining three categories—Panel Communications; Testimony, Documents, and Data the Panel Received; Panel Deliberations and Decisions—are listed on the tailored privilege logs Defendants provided Plaintiffs before Plaintiffs filed their motion. *See* Carmichael Ltr. at 2 (Aug. 2, 2019), Dkt. 365-56. While these documents are arguably relevant under the Ninth Circuit's standard, Plaintiffs fail to show a particularized need for all of the Panel's deliberative materials and certainly not one that would overcome the national defense interests in maintaining full and frank communications about military policymaking. *Karnoski*, 926 F.3d at 1206.

Moreover, the majority of Plaintiffs' arguments contradict the Ninth Circuit's guidance. For example, Plaintiffs argue that they require deliberative documents to test "whether the evidence and data provided was incomplete or insufficient to justify [the Panel's] recommendations." Pls.' Mot. 7. But under the Ninth Circuit's standard, Plaintiffs' proposed use of these materials is flatly prohibited and thus cannot establish relevancy under *Warner.* As the Ninth Circuit emphasized, "the district court may not substitute its 'own evaluation of evidence for a reasonable evaluation' by the military." *Karnoski*, 926 F.3d at 1202 (quoting *Rostker*, 453 U.S. at 68).

Plaintiffs also claim to need such documents to determine if DoD's reasons were "genuine" or may "reveal impermissible discriminatory intent, stereotypes and overbroad generalizations, suppression of additional dissenting views, or that the panel's process was pretextual." Pls.' Mot. 7. But, as discussed above, this is not a proper subject of inquiry under the established standard of review. And Plaintiffs provide nothing to support their speculation that Secretary Mattis' reasons

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

for DoD's policy were made in bad faith, essentially conceding that their need for these deliberative materials is to conduct a fishing expedition into their own unsupported allegations of animus.

Finally, Plaintiffs speculate that the Panel's deliberations may "reveal whether the panel was told what it could and could not consider and its perceived freedom to oppose the President's announced policy." *Id.* But the Ninth Circuit previously rejected such speculation. *Karnoski*, 926 F. 3d at 1202 ("On the current record, a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment."); *see also Doe v. Shanahan*, 755 F. App'x 19, 25 (D.C. Cir. 2019). Plaintiffs offer no additional record evidence that would call into question the Circuit Courts' prior findings and Plaintiffs' continued speculation alone cannot establish their need for the Department's deliberative documents.

V. Plaintiffs Give Insufficient Consideration to the Military's Interest in Full and Frank Communication about Policymaking.

Plaintiffs continue to give short shrift to the military's serious national defense interests. The Ninth Circuit emphasized that the fourth *Warner* factor "deserves careful consideration, because the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Karnoski*, 926 F.3d at 1206. Significantly, Plaintiffs cite no case where a party's need for deliberative documents has overcome the military's serious interest in non-disclosure when national defense interests are at stake. *See* Pls.' Mot. 8–10. Instead, relying on *In re Subpoena* and similar cases not involving the military or the nation's defense, Plaintiffs again argue that the privilege is overcome where a plaintiff challenges the constitutionality of a government decision and alleges animus or discriminatory intent. *See id.* But the Ninth Circuit rejected this argument and directed the Court to carefully consider DoD's interest in non-disclosure. *See Karnoski*, 926 F.3d at 1195, 1206. Moreover, the analysis Plaintiffs urge this Court to adopt would result in the release of all deliberative documents in *any* case. Plaintiffs argue, based on pure speculation, that DoD's deliberations will reveal discriminatory views that should not be protected, Pls.' Mot. 9, and insofar as they reveal only non-discriminatory views that "truly focused on the merits[,]" *id.,* there would be "no chilling effect[.]" But under that view, *all* deliberative documents would fall into one of Plaintiffs' two proposed categories—discriminatory and non-discriminatory—

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

and DoD's national security concerns in releasing such material would never be addressed.

Release of the military's deliberative material spanning several years and various decisions "would have an immediate chilling effect on future deliberations" among all levels of military and civilian officials at DoD. Easton Decl. ¶ 24. "The DoD decision-making apparatus relies on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military Services on various courses of action for any decision." *Id.* Because "[m]atters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests," "leaders within [DoD] encourage open and candid discussions about the merits of such actions" and need to hear "[o]pinions identifying risks or areas of concern" with a particular course of action. *Id.* If Panel members or those who appeared before the Panel knew that their candid opinions regarding risks or areas of concern with the DoD policy would be disclosed, in the future they "may hesitate to provide their true positions on potential courses of action, not just related to military personnel decisions but as to any politically sensitive decision that the DoD faces in the future, for fear that these discussions could be revealed to wider audiences," "regardless of the entry of a judicial protective order." *Id.* ¶ 27. Lack of "essential input" from these individuals and other DoD personnel in future policy-making processes "would degrade DoD's decision-making process and could expose the nation to greater overall risk." *Id.*

And just as relevance of documents cannot properly be assessed *en masse*, neither can the chilling effect of disclosure. Indeed, as the Ninth Circuit recognized, "[d]ocuments involving the most senior executive branch officials, for example, may require greater deference." *Karnoski*, 926 F.3d at 1206. For good reason: disclosure of deliberative material involving Secretaries Carter and Mattis and other senior DoD officials could diminish subordinates' willingness to present their candid views to the Secretary and military leaders in the future. Easton Decl. ¶¶ 24-28. If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process would be affected, potentially leading to a direct negative impact to national security. *Id.* ¶¶ 27-28.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

VI. Privileged Material Responsive to Discovery Requests Was Properly Withheld.

Plaintiffs argue that Defendants cannot assert the deliberative process privilege to material responsive to certain of Plaintiffs' Requests for Production ("RFPs"). Pls.' Mot. 11–12. Plaintiffs again misconstrue Defendants' application of the privilege. As previously explained, DoD only made privilege determinations after its search, collection, and responsiveness determination; no documents were excluded from responsiveness review on the basis that they contained or were anticipated to contain privilege materials; and DoD did not apply any other objections to exclude from production any documents that were reviewed. *See* Defs.' Resp. 3, Dkt. 370. Accordingly, privileges were not applied by individual RFPs; rather, where a privilege was asserted, DoD provided a privilege log describing each document withheld and the basis of the privilege. *Id.* at 5.

Plaintiffs seek rulings that the privilege is overcome by individual RFPs, but that approach is both not possible and not warranted. In accord with the Federal Rules of Civil Procedure, Defendants produced documents in this case according to the manner in which they are stored in the ordinary course of business, by component of DoD and the Military Services and by custodian. *Id.* at 10 (citing Fed. R. Civ. P. 34(b)(2)(E)(i)). Thus, privileges cannot be overruled by RFP because documents were not produced and privilege determinations were not made by RFP. But, even if such determinations could be made by Plaintiffs' RFP, the categories Plaintiffs have identified plainly contain both privileged and non-privileged material. For example, Plaintiffs identify requests seeking "operative military policies and procedures []; documents related to waiver applications and discharge proceedings [];" and various categories of statistical data as seeking information "outside the privilege's scope[,]" Pls.' Mot. 11–12, but these requests seek not only factual data and operative policies but anything "relating" to such materials, Ex. 9, Pls.' Third RFP Nos. 36, 39-41, 53-54, 58, 60–68, including draft documents, *id.* Definition 7. (A request for documents "relating to" a subject "is usually subject to criticism as overbroad since life, like law, is a seamless web, and all documents 'relate' to all others in some remote fashion." *Mass. v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989)). Accordingly, Defendants' responsive documents not only include factual materials and operative policies, but also DoD deliberations on those materials and drafts of those policies, which are properly subject to the deliberative process privilege. Easton Decl. ¶ 21.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

Plaintiffs also contend that the privilege cannot apply to any materials regarding the implementation of the Carter policy or DoD's 2018 policy because such material post-dates the decisions. Pls.' Mot. 11–12. But "documents dated after [a decision was made] may still be predecisional and deliberative with respect to other, nonfinal agency policies[.]" *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). In addition, a document reflecting pre-decisional deliberations may be protected by the privilege even if it post-dates the decision at issue. *See Lahr v. NTSB*, 569 F.3d 964, 981 (9th Cir. 2009); *Judicial Watch, Inc. v. DOJ*, 800 F. Supp. 2d 202, 218 (D.D.C. 2011). DoD withheld pre-decisional and deliberative information such as clarifying guidance, communications containing the underlying reasoning used in policy development, or progress reports containing ongoing deliberations. Easton Decl. ¶ 22. Plaintiffs' argument that documents generated after the creation of policies are not subject to the deliberative process privilege is incorrect both as applied to these documents and as a matter of law.

Plaintiffs further argue that "information about non-policy oriented decisions" cannot be withheld under the deliberative process privilege. Pls.' Mot. 11. But Plaintiffs' argument that the "privilege is limited to protecting only agency processes in which 'policy' is formulated, is inconsistent with Ninth Circuit precedent[,]" *Ctr. for Biological Diversity v. Norton*, No. CIV. 01-409 TUC ACM, 2002 WL 32136200, at *2 (D. Ariz. July 24, 2002); *see Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988), and must be rejected by this Court.

Finally, Plaintiffs argue that Defendants have improperly withheld factual information. Pls.' Mot. 11–12. But factual material that "is so interwoven with the deliberative material that it is not severable" is protected by the deliberative process privilege, *Warner*, 742 F.2d at 1161, as is factual material that exposes the decision-making process itself or the mental processes of decision-makers, *Nat'l Wildlife Fed'n*, 861 F.2d at 1118–20. Whether the facts contained in the withheld documents are interwoven with deliberative material or would reveal the decision-making process cannot be decided on a categorical basis, and Plaintiffs have refused to proceed in any other manner.

CONCLUSION

Because Plaintiffs fail to properly apply the Ninth Circuit's decision throughout their motion no part of it is salvageable and it should be denied in its entirety.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20530
Tel: (202) 514-3346

Dated: September 13, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ALEXANDER K. HAAS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2019, I electronically filed the foregoing Opposition to Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: September 13, 2019

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants