IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-GLR

Hon. A. David Copperthite

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING REMANDED DISCOVERY PROCEEDINGS

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INTRODUCTION

Plaintiffs' supplemental brief contends that the production of thousands of the Department of Defense's deliberative documents is "long overdue," Pls.' Supp. Br. 1, Dkt. 276, but they ignore that courts—including the District Court here—repeatedly have rejected plaintiffs' attempts to obtain such a sweeping ruling over thousands of deliberative documents. Rather than reasonably request discrete categories of deliberative documents, Plaintiffs have continued to press for the disclosure of the same thing that the District Court here rejected. But the Court cannot reinstate the same discovery order that the District Court vacated and cannot conduct the required balancing for thousands of deliberative documents included in the three broad categories of materials that Plaintiffs demand. Each of Plaintiffs' categories consists of a variety of types of documents from all levels of civilian and military personnel pertaining to deliberations about a variety of decisions, and are simply not susceptible to a one-size-fits-all analysis. Because a much more granular analysis of the documents is warranted here, Plaintiffs' present motion to compel must be denied in its entirety.

As set forth further below, the Court should follow the process taken by the parties and the district court in the related *Doe 2 v. Esper*, No. 17-cv-1597 (D.D.C.) litigation, which focused on particular categories of potentially relevant deliberative documents. Pursuant to that court's recent ruling, Defendants intend to produce additional deliberative material, including deliberations and communications of the Department of Defense's ("DoD") Panel of Experts and an unredacted administrative record and Panel meeting minutes (except for possible redactions of personally identify information), that should resolve core aspects of Plaintiffs' demands at issue here. The *Doe* decision also puts in place a process for resolving further disputes about specific documents or discrete categories of deliberative materials. Rather than consider Plaintiffs' demands for an *en masse* production of myriad deliberative materials, the path outlined in *Doe* offers a more efficient and productive way forward and is the only way the balancing test mandated by the Fourth Circuit can be

properly conducted. Through this process, Plaintiffs will have other available information concerning the deliberations of the decision-makers on which to formulate targeted remaining requests and focus any remaining disputes.

If the Court proceeds to consider Plaintiffs' *en masse* demands at this time and conducts the balancing test for Plaintiffs' three broad categories, the test weighs against disclosure. Application of the balancing test to each of Plaintiffs' three broad categories plainly shows that the remaining documents Plaintiffs seek have little or no relevance and that disclosure of thousands of deliberative documents would cause a chilling effect on future deliberations at all levels of DoD and the Military Services. Because the balancing test weighs heavily against disclosure, Plaintiffs' motion should be denied.

BACKGROUND

I. The Department of Defense's Extensive Efforts to Search for and Produce Non-Privileged Documents Responsive to Plaintiffs' Broad Discovery Requests

Plaintiffs in this case have served numerous requests for production on DoD and the Military Services. Plaintiffs across the four related cases challenging the military policy at issue in this case have served DoD with a total of 218 requests for production. Exh. A, Decl. of Robert E. Easton ¶¶ 13, 18 (Oct. 25, 2019) (hereinafter, "Easton Decl.").

In response to this large group of requests for production, Defendants undertook a rigorous effort to collect, review, and produce responsive materials. The Department of Defense and the Military Services collected more than 225,200 documents for review, applying an expansive set of search terms to a lengthy list of custodians. *Id.* ¶ 10. The Military Services separately identified key custodians, gathered data, and reviewed such documents. *Id.* Responsive, non-privileged documents were produced to Plaintiffs as they were maintained in the ordinary course of business, that is, by component of DoD and the Military Services and by custodian. *Id.* ¶¶ 13, 18.

The Department of Defense and the Services have also produced privilege logs reflecting the

responsive documents withheld pursuant to privileges. *Id.* ¶ 17. These logs contain information for the documents, like the author of the email or the creator of the document, the recipient of any email, the date of creation or the date the email was sent, the title of the document, a privilege determination, and the basis for the privilege determination. *Id.* This information was provided for every single document that DoD has withheld as privileged in this case. *Id.*

II. Plaintiffs' Broad Motion to Compel and this Court's Discovery Order

Rather than using Defendants' detailed privilege logs to identify documents or discrete categories of documents to seek to compel, on June 15, 2018, Plaintiffs filed a motion to compel three broad categories of deliberative documents. Dkt. 177.

On August 14, 2018, this Court granted Plaintiffs' motion to compel, directing the Department of Defense and the Military Services to disclose thousands of deliberative documents concerning military policies.[1] *See* Mem. Op., Dkt. 204; Order, Dkt. 205 (hereinafter, "Discovery Order"). Specifically, this Court ordered DoD and the Services to disclose, consistent with Plaintiffs' three broad categories:

> (1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the 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 the DoD's implementation Plan and the President's acceptance of the Plan in his March 23[, 2018] Memorandum, including any participation or interference in that process by anti-transgender [activists] and lobbyists.

Mem. Op. 3, Dkt. 204. The Discovery Order did not set a deadline for compliance. *See generally* Mem. Op., Dkt. 204; Order, Dkt. 205.

[1] Plaintiffs also challenged Defendants' clawback of an inadvertently produced Army PowerPoint presentation that was protected by the deliberative process privilege. *See* Pls.' Mot. for Judicial Determination of Privilege, Dkt. 178. The Court dismissed this motion as moot based upon its ruling on the motion to compel. Mem. Op. 11, Dkt. 204.

III. Extensive Litigation Following this Court's Discovery Order

Defendants then filed Objections to the Discovery Order. Dkt. 209. In the Objections, Defendants argued, among other things, that the ruling is contrary to law because "the Fourth Circuit[] direct[ed] that [the deliberative process] privilege should be evaluated under a balancing test on a document-by-document, or at least category by category, basis." Defs.' Objs. 1, Dkt. 209 (citing *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table)); *see also id.* at 15–22.

On November 30, 2018, the District Court overruled Defendants' Objections to the Discovery Order, but stayed compliance with the Discovery Order pending the Ninth Circuit's resolution of the Government's mandamus petition in the related *Karnoski v. Trump* case. In so doing, the District Court noted that because the *Karnoski* case "raise[s] similar discovery issues," Mem. Op. 5 n.9, Dkt. 227, the Ninth Circuit's decision "may affect the outcome of the pending case," *id.* at 20. The District Court emphasized that it "has a strong interest in consistency with the parallel proceeding in the Ninth Circuit." *Id.* at 22.

IV. The Ninth Circuit's Ruling in the Related *Karnoski* Litigation

On June 14, 2019, the Ninth Circuit Court of Appeals granted Defendants' petition for a writ of mandamus and vacated a district court order on a motion to compel similar to the motion Plaintiffs filed in this case. There, the district court had ordered the Department of Defense to disclose "documents that have been withheld solely under the deliberative process privilege." *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1163 (W.D. Wash. 2018), *mandamus granted, order vacated*, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit vacated the district court's discovery order "so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Karnoski*, 926 F.3d at 1207. The Ninth Circuit cautioned that the "deliberative process privilege[,] although not absolute, require[s] careful consideration by the judiciary." *Id.*

The Ninth Circuit held that "the district 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 the 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 v. Hawaii*, the 12-page Proclamation "was sufficient to allow for judicial review," *id.* at 1206 n.22, the Ninth Circuit directed the district court to reassess whether information concerning the basis of the August 2017 Presidential Memorandum was still 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 district court "to authorize discovery in stages when the current record is insufficient to establish relevance." *Id.* The Ninth Circuit further directed the district court to give "careful consideration" of the "military's interest in full and frank communication about policymaking" because that interest "raises serious—although not insurmountable—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.*

V. The District Court Reconsidered Its Order Based on the Ninth Circuit's Ruling in *Karnoski*.

On June 27, 2019, Defendants filed a motion for reconsideration of the District Court's Order based on the Ninth Circuit's mandamus ruling. Dkt. 257. On September 3, 2019, the District Court granted in pertinent part Defendants' motion. *See* Mem. Op., Dkt. 267; Order, Dkt. 268. The District Court vacated the Discovery Order in this case insofar as it granted Plaintiffs' motion to compel three

broad categories of documents. *See* Mem. Op., Dkt. 267; Order, Dkt. 268.

As a preliminary matter, the District Court recognized that because the balancing test set forth in *Warner* is identical to and provided the basis for the balancing test set forth in *Cipollone*, the Ninth Circuit's application of the *Warner* factors in *Karnoski* informs this Court's application of the *Cipollone* factors in this case. *See* Mem. Op. 6; *see also Cipollone*, 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). Noting that the Ninth Circuit in *Karnoski* found that the balancing test must be applied to "'classes of documents separately when appropriate,'" Mem. Op. 10 (quoting *Karnoski*, 926 F.3d at 1206), the District Court determined that its "appli[cation] [of the *Cipollone*] factors to discovery in this case as a whole" was in error, *id.* Therefore, the District Court sustained Defendants' Objections as to the deliberative process privilege analysis in the Discovery Order and directed this Court to "apply the *Cipollone* factors to the categories of documents Plaintiffs seek in their Motion to Compel and permit Defendants to argue that Plaintiffs should more narrowly define the categories of documents." *Id.* (citing *Karnoski*, 926 F.3d at 1206). The District Court further directed that "due consideration" be given "to whether a document or category of documents requires greater deference depending on who is involved." *Id.* at 10–11 (citing *Karnoski*, 926 F.3d at 1206). Finally, as to the clawback dispute, the District Court vacated the portion of the Discovery Order dismissing the dispute as moot and found that "depending on the . . . ruling on Plaintiffs' Motion to Compel, [this Court] may need to consider Plaintiffs' Motion for Judicial Determination of Privilege on the merits." *Id.* at 11.

VI. Plaintiffs Continue to Seek Disclosure of Thousands of Deliberative Documents.

After the District Court granted in pertinent part Defendants' motion for reconsideration, the parties conferred about further proceedings in this case.

In an attempt to narrow the dispute, defense counsel requested that rather than continuing to seek their three broad categories of documents, 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. *See* Exh. B (email from Courtney Enlow to Nicholas Lampros (Sept. 26, 2019)). Defense counsel explained that this is the process that occurred in the related *Doe 2 v. Esper* litigation, resulting in Defendants (who are the same defendants in both cases) waiving the privilege and producing certain deliberative documents. *See id.* The *Doe* plaintiffs identified four discrete categories of documents withheld under the deliberative process privilege and requested that Defendants waive their assertions of the privilege over those documents. *See id.* In response to that request and in an effort to narrow the remaining discovery disputes in *Doe*, Defendants agreed in that case to waive the deliberative process privilege over three discrete categories of documents: (1) the official recommendations from the Military Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017; (2) emails between then-Secretary Mattis and non-governmental third parties; and (3) the final versions of the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of Defense.[2] *See id.* The *Doe* plaintiffs informed defense counsel in that case that they also sought deliberative documents considered or generated by the Panel of Experts, as well as communications to or from members of the Panel regarding their work. *See id.*

The parties in *Doe* then proceeded to litigate a more specific set of deliberative documents than at issue here, including deliberative documents considered or generated by the Panel of Experts, as well as communications to or from members of the Panel regarding their work. *See id.* Defendants produced "*Vaughn* Indexes" to the *Doe* plaintiffs encompassing these remaining documents in dispute so that the plaintiffs could review the indexes to determine which of those documents to move to compel. *See id.*

[2] These documents were produced to Plaintiffs in this case pursuant to the cross-use agreement.

As noted, the *Doe* Court recently granted the *Doe* plaintiffs' motion to compel in part and ordered Defendants to disclose documents withheld under the deliberative process privilege that were "used or considered in the Panel of Experts for the Transgender Policy Review's (the 'Panel') development of the Mattis Plan." *Doe 2 v. Esper*, No. CV 17-1597 (CKK), 2019 WL 4394842, at *1 (D.D.C. Sept. 13, 2019). (The *Doe* Court also found that because the "relevant time-period for discovery is the development of the Mattis Plan," further discovery into the President's 2017 statements on Twitter and the 2017 Presidential Memorandum was not warranted. *Id.*) As a result of the *Doe* Court's order, Defendants will produce in November an unredacted Administrative Record, unredacted meeting minutes of the Panel of Experts (which contain a record of the deliberations of the Panel members), and documents and communications to or from voting members of the Panel of Experts from September 14, 2017 (the date of the Interim Guidance creating the Panel of Experts), to March 23, 2018 (the date of the Presidential Memorandum).[3] *See* Joint Status Report, *Doe 2 v. Esper*, No. 17-1597 (D.D.C. Oct. 25, 2019), Dkt. 238. These documents will be produced to Plaintiffs in this case as well. *See* Uniform Protective Order & Cross-Use Agreement, Dkt. 111.

Defendants encouraged Plaintiffs to engage in a process similar to the *Doe* process to both narrow the dispute before the Court and to present discrete categories of documents that would allow the Court to conduct a proper analysis under *Cipollone*. *See* Exh. B. Plaintiffs refused to narrow their request in any way and continue to seek to compel the same three broad categories of documents withheld under the deliberative process privilege.

[3] Defendants respectfully disagree with the *Doe* Court's decision to direct disclosure of the Panel's deliberative documents, maintain their right to challenge the decision in further proceedings, and have complied with the *Doe* order as described herein. In addition, Defendants will continue to withhold any information protected by other privileges (*e.g.*, the attorney-client privilege, etc.), as those privileges were not at issue in *Doe* (nor are they at issue here) and reserve their right to preserve certain redactions of personally identifiable information in these documents.

ARGUMENT

I. Plaintiffs' Categories Are Far Too Broad for the Court to Conduct the Required *Cipollone* Balancing Test.

A. A Much More Granular Analysis Is Warranted.

Plaintiffs have not amended the substance of their original motion to compel and request that the Court reinstate a discovery order that compels Defendants to disclose deliberative documents based on three broad categories. *See* Pls.' Supp. Br. 1 (arguing that "there is no reason to depart from the Court's original conclusion"). Plaintiffs retread the same arguments and the result that Plaintiffs seek is not meaningfully different than the Discovery Order that the District Court vacated. The motion should be denied.

Plaintiffs again urge the Court to adopt their balancing of the *Cipollone* factors for their three broadly defined categories of documents. *See* Pls.' Supp. Br 7–19. But the District Court rejected the Discovery Order that required disclosure of those three categories, and a much more granular analysis is warranted here. *See Karnoski*, 926 F.3d at 1206. Plaintiffs' three categories of deliberative materials—documents "regarding the President's original July 2017 Tweets and August 2017 Memorandum," the "Panel of Experts and [its] working groups," and the "DoD's Mattis Policy . . . and the President's acceptance of the Policy in his memorandum of March 23, 2018," Pls.' Supp. Br. 2—are far too broadly defined for the Court to properly apply the *Cipollone* balancing test. Simply put, a category of documents "regarding" a certain subject (or multiple subjects, as Plaintiffs have lumped two subjects even within their broad categories) is inherently overbroad, requesting in essence everything related to that subject. Indeed, courts have recognized that a similar 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." *See Massachusetts v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989).

Turning to the categories at issue here, each of Plaintiffs' categories comprises thousands of

documents and communications generated and transmitted by officials at varying levels in the Department of Defense, 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, across numerous ranks, positions, and areas of professional expertise as they worked to develop and refine DoD's policy over several years. Easton Decl. ¶¶ 24, 30. These categories would include, for example, communications by 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; communications to and from the ultimate decision-maker, the Secretary of Defense; and communications that post-date the Secretary's decision. *Id.* ¶ 24. And these communications span various topics, including analyses of the 2016 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 under the policy, and discussions about how to address the practical logistics of gender transition when it comes to berthing, showers, and bathrooms and other unit-level issues. *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.*

Category 1: 2017 Twitter Statements and Presidential Memorandum. Specifically, Plaintiffs' first category, deliberations "regarding the President's original July 2017 Tweets and August 2017 Memorandum," Pls.' Supp. Br. 2, consists of various types of deliberative documents that were drafted for different purposes and for differing audiences, Easton Decl. ¶ 25. For example, this category includes "a deliberative e-mail chain among DoD health affairs personnel regarding DoD's assessment of health care costs of transgender care being cited in connection with legislative proposals then under consideration," "a draft deliberative talking paper concerning possible responses to media

queries regarding transgender policy and its implementation following the President's social media posts," "a draft briefing paper with suggested talking points regarding transgender policy for use by senior individuals preparing for Senate confirmation hearings updated to reflect changes resulting from the President's August 2017 memorandum," and "an e-mail exchange between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff discussing post-Tweet messaging and information leaks." *Id.*

Category 2: Panel of Experts and Its Working Groups. Similarly, Plaintiffs' second category, deliberations regarding the "Panel of Experts and [its] working groups," Pls.' Supp. Br. 2, contains communications among individuals at varying levels in the Government about numerous topics. This category includes, for example, "an email sent on December 27, 2017[,] from the Military Assistant to the Vice Chairman of the Joint Chiefs of Staff to the Chair of the Panel of Experts . . . seeking updates that may have been provided to leadership on the progress of the transgender working groups," "an email between senior DoD personnel . . . about a draft communication to the Panel circulated for review and feedback," and an email discussing attendance at Panel meetings. Easton Decl. ¶ 26. The relevance of emails concerning Panel attendance, drafts of information to later be presented to the Panel, and updates on the progress of the Panel's working groups is plainly not the same.

Moreover, although some of the documents in this category contain deliberations by Panel members that will be disclosed to Plaintiffs as a result of the *Doe* order and the cross-use agreement (*e.g.*, meeting minutes of the Panel), many of these documents in this category "had no bearing on the Panel of Experts' decision-making process." *Id.* ¶ 27. For example, this category also includes "an email from a member of the Medical Personnel Executive Steering Committee ('MEDPERS') to a co-chair of that Committee discussing the results of a data pull regarding medical accession waivers for applicants with genital abnormalities." *Id.* ¶ 26. This email is representative of the many deliberative

documents included in this category "that reflect the behind-the-scenes efforts of the working groups that were not presented to the Panel of Experts." *Id.* The relevance of documents not were not considered by the Panel is plainly different from the relevance of materials that were considered by the Panel. Yet all of these documents are encompassed within the same broad category.

Category 3: 2018 Mattis Memorandum and Presidential Memorandum. And Plaintiffs' third category, deliberations regarding the "DoD's Mattis Policy . . . and the President's acceptance of the Policy in his memorandum of March 23, 2018," Pls.' Supp. Br. 2, likewise contains numerous deliberative documents that were drafted for different purposes and for differing audiences that require consideration on a case-by-case basis. This category includes, for example, "a draft version of the February 2018 Report," "an email communication regarding edits to a draft version of the February 2018 Report that was received by the US Army," "a draft executive summary of the recommendations made by the Panel of Experts," "draft talking points for senior leadership as DoD prepared to issue Secretary Mattis['s] February 22, 2018 Memorandum," and "communications and draft talking points for DoD public affairs officials regarding the President's decision" in March 2018. Easton Decl. ¶ 28. The relevance of these documents discussing various deliberations is not the same, yet here again, they are included in Plaintiffs' broad category.

Because the categories contain various types of documents generated by officials at all different levels containing deliberations about numerous issues, the Court cannot conduct the *Cipollone* balancing test for these three broad categories. Indeed, as both the District Court and the Ninth Circuit recognized, "[d]ocuments involving the most senior executive branch officials . . . may require greater deference." *Karnoski*, 926 F.3d at 1206; Mem. Op. 7, 10–11. And here, each category contains documents involving senior officials. For example, Category 1 contains "an e-mail exchange between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff discussing post-Tweet messaging and information leaks." Easton Decl. ¶ 25. As for Category 2, DoD's declarant, Robert

Easton, cites to various representative examples of emails between senior DoD personnel "that took place at the highest levels of DoD while the Panel of Experts reviewed and developed policy." *Id.* ¶ 26. Senior officials sending or receiving these communications include, for example, the Under Secretary of Defense for Personnel and Readiness, the Principal Director for Military Personnel Policy, and the Director of Accessions Policy. *Id.* And Category 3 contains, for example, a "draft executive summary of the recommendations made by the Panel of Experts," which "contains high-level summaries of the Panel's analysis, summarizes the data the Panel received, and captures the Panel's recommendations." *Id.* ¶ 28. Pursuant to the District Court's Order and the Ninth Circuit's order in *Karnoski*, these documents, and many others by senior officials, cannot and should not be evaluated in the same analysis as the thousands of documents in each category drafted by lower-level personnel. *See* Mem. Op. 7, 10–11; *Karnoski*, 926 F.3d at 1206.

Finally, the Court cannot conduct an *en masse* evaluation of the relevance of thousands of documents within Plaintiffs' three broad categories. For example, the relevance of the Panel meeting minutes that reflect the deliberations of decision-makers[4] is vastly different from the relevance of an email between two members of a working group that was never shown to a decision-maker. *See* Easton Decl. ¶¶ 26, 27. And the relevance of deliberations about health care costs is plainly different from the relevance of draft responses to media queries concerning the President's social media posts. *See id.* ¶ 25. Thus, these examples illustrate why the Court cannot conduct the *Cipollone* balancing test *en masse* for all documents within each of the three broad categories. Indeed, by listing various documents within their three broad categories in their brief and making individualized arguments as to why those specific documents are relevant, Plaintiffs appear to concede that the relevance of individual documents differs depending on the type of document at issue. *See* Pls.' Supp. Br. 8–16.

[4] Again, Plaintiffs will receive the Panel meeting minutes in November as a result of the *Doe* order and the cross-use agreement.

In sum, because these documents are not susceptible to a one-size-fits-all analysis, Plaintiffs' categories are simply too broadly defined to properly conduct the *Cipollone* analysis. *See Karnoski*, 926 F.3d at 1206; *see also In re United States*, 678 F. App'x 981, 987 (Fed. Cir. 2017) (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been overcome); *Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *3 (E.D. Va. Sept. 22, 2014) (finding that the court must analyze whether the deliberative process privilege applies "on a case-by-case basis by balancing the damage to the executive department or the public interest and the potential harm to the plaintiffs from nondisclosure"); *Spell v. McDaniel*, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) (finding that the deliberative process privilege "must be demonstrated on a case by case basis by performance of a balancing function"); *cf. Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (noting that application of "the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process"). Plaintiffs' motion fails for this reason.

B. Plaintiffs Have Repeatedly Refused To Identify More Discrete Categories of Documents.

Plaintiffs' primary response is that they cannot identify more discrete categories of documents because of alleged deficiencies in Defendants' privilege logs.[5] *See* Pls.' Supp. Br. 20–22. But that plainly is not so—Plaintiffs can, and did, point to several specific documents in their brief that they claim are relevant to their case. *See id.* at 8–16. In doing so, Plaintiffs quote from Defendants' privilege logs. *See id.*

Plaintiffs' ability to identify discrete categories of documents becomes even more apparent

[5] The adequacy of Defendants' logs is not before the Court. Accordingly, this brief does not address the sufficiency of the privilege logs, aside from noting that to the extent there may be defects in the logs, it is a result of the broad discovery requests issued by Plaintiffs. *See Rein v. PTO*, 553 F.3d 353, 370 n.24 (4th Cir. 2009) ("Parties who frame massive and all-inclusive requests for documents should expect some fall-off from perfection when the agency responds.").

when the Court considers the procedure undertaken in the related *Doe* case. As described in detail above, in *Doe*, the plaintiffs identified four discrete categories of documents withheld under the deliberative process privilege and requested that Defendants waive their assertions of the privilege over those documents. The *Doe* plaintiffs provided descriptions of discrete categories of documents (*e.g.*, they requested the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of Defense), and Defendants identified those documents within the production, reviewed the documents, withdrew the privilege claim, and produced them to the plaintiffs in all four cases. Had Plaintiffs here identified discrete categories, Defendants could have provided narrowed privilege logs for such discrete categories, which Defendants did in *Doe*. But in this case, despite repeated requests from Defendants that Plaintiffs identify discrete categories of documents, Plaintiffs refused to do so. *See* Decl. of Courtney Enlow ¶ 2 (May 29, 2018), Dkt. 177-28 (explaining that before Plaintiffs filed a motion to compel, "if Plaintiffs identified specific documents, Defendants could review the documents to determine whether to perfect the deliberative process privilege over those documents or whether to withdraw the assertion of privilege over the documents with the goal of narrowing the dispute"); Exh. B (Enlow email) (explaining the process that occurred in *Doe* and requesting that Plaintiffs engage in a similar process). Thus, Plaintiffs' argument that "since the Magistrate Judge's original ruling, Defendants have refused to propose any narrower categories or provide any meaningful method for the Plaintiffs to do so" is unfounded. *See* Pls.' Supp. Br. 20.

Plaintiffs' contention that Defendants' document collection and production process prevents them from identifying specific categories of documents is equally baseless. *See id.* at 20–21. Many, if not all, of Plaintiffs' requests for production are exceedingly broad, and Defendants' organization of

their responses was clearly proper.[6] In any event, how Defendants organized their production of responsive documents is immaterial to a dispute regarding privilege, especially where privilege logs set forth precisely what documents are deliberative, and does not somehow excuse Plaintiffs from reviewing those productions and logs. DoD's collection and production of responsive documents was no barrier to the *Doe* plaintiffs, who were able to identify discrete categories of deliberative documents.

Citing to *Karnoski*, Plaintiffs also contend that it is Defendants' burden to "persuasively argue that a more granular analysis would be proper." *Id.* at 21–22 (citing *Karnoski*, 926 F.3d at 1206) (emphasis omitted). Defendants have done so. As explained above, Plaintiffs' three broad categories encompass various types of documents generated by officials at varying levels of seniority in numerous agencies across a large time span and accordingly implicate different analyses that must be considered separately as contemplated by *Karnoski*, *Cipollone*, and *Warner*.

More fundamentally, it is *Plaintiffs'* motion to compel, and they bear the burden of identifying any specific documents or discrete categories of documents they seek to compel. Obligating Defendants to identify the categories of documents that Plaintiffs should seek to compel to support their claims is both backwards and not contemplated either by the District Court here *or* by the Ninth Circuit in *Karnoski*.

[6] The adequacy of Defendants' collection and production of responsive documents is not before the Court. But even if Defendants' collection and production efforts were somehow in dispute, they are plainly sufficient under the Federal Rules of Civil Procedure. As described in detail above and in Mr. Easton's declaration, *see* Easton Decl. ¶¶ 5–20, Defendants undertook extensive efforts to search for and produce responsive documents in this case and in the related cases. Defendants collected documents from dozens of custodians, used broad search terms, and produced documents as they were kept in the ordinary course of business. Although Plaintiffs suggest otherwise, *see* Pls.' Supp. Br. 20–21, the Federal Rules of Civil Procedure simply do not require parties to undertake a cumbersome and inefficient effort to search for, organize, and produce documents according to categories specified in an opposing party's requests for production, *see* Fed. R. Civ. P. 34(b)(2)(E)(i) (stating that a party may either "produce documents as they are kept in the usual course of business *or* must organize and label them to correspond to the categories in the request" (emphasis added)).

Plaintiffs' failure to identify discrete categories of documents in their motion to compel prevents the Court from being able to undertake the required balancing test under *Cipollone*. As such, Plaintiffs' motion should be denied.

II. Application of the *Cipollone* Factors Heavily Weighs Against Production.

If the Court conducts the *Cipollone* balancing test for Plaintiffs' three broad categories of documents, it should conclude that the balancing test weighs against disclosure for each category. The four-factor balancing test outlined in *Cipollone* requires weighing "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). Application of the *Cipollone* factors to each of Plaintiffs' three broad categories plainly shows that the documents Plaintiffs seek have little or no relevance, that there is other available information concerning the deliberations of the decision-makers, and that there would be a chilling effect on future deliberations at all levels of DoD and the Services if thousands of deliberative documents were disclosed.[7] Because the balancing test weighs heavily against disclosure, Plaintiffs' motion should be denied.

A. Plaintiffs Have Failed to Meet Their Burden to Show the Relevance of All Documents in Each of Their Three Broad Categories.

As an initial matter, Plaintiffs continue to argue that all documents in each of their three broad categories are "highly relevant to Plaintiffs' claims." Pls.' Supp. Br. 7. In doing so, Plaintiffs rely on two orders that have been vacated or overruled—namely, the now-vacated District Court order, Dkt. 227, and the overruled Discovery Order, Dkt. 204—and ignore more recent case law to the contrary.

[7] The third factor in the *Cipollone* balancing test is the role of the Government in the litigation. 812 F.2d at 1400 (citing *Warner*, 742 F.2d. at 1161). As there is no dispute that the Government's policy is at issue in this case, this brief does not address that factor.

See id. at 8. Indeed, recent decisions specifically question the relevance of many of the documents at issue in Plaintiffs' motion.

1. Deliberative Materials Regarding the President's July 2017 Statements on Twitter and August 2017 Memorandum are Plainly Irrelevant.

Plaintiffs argue that all documents in Category 1—deliberative materials regarding the President's statements on Twitter and the 2017 Presidential Memorandum—are relevant because they would "help 'determine how much deference, if any, the Court should afford'" DoD's policy. Pls.' Supp. Br. 8 (quoting Mem. Op. 58, Dkt. 263; Mem. Op. 14–15, Dkt. 267). But by selectively quoting from the District Court's opinion, Plaintiffs suggest that the District Court found that the Category 1 documents are relevant to this inquiry. They are not. The District Court found only that "[t]o determine how much deference, if any, the Court should afford the Implementation Plan"—which post-dates these presidential pronouncements—"the Court must be able to assess *the evidence the Panel gathered and the military's evaluation of that evidence.* Plaintiffs are, therefore, entitled to discovery *on this issue.*"[8] Mem. Op. 58, Dkt. 263 (emphasis added). To be sure, the District Court could have—but clearly did not—state that materials pre-dating the formation of the Panel of Experts were relevant to this inquiry. *See id.* Thus, Plaintiffs' suggestion that the Category 1 materials are relevant to determining the level of deference to be afforded DoD's new policy is entirely unfounded.

In fact, no court has found that on the current record (which, at least for Defendants' document production, is the same in all four cases given the cross-use agreement), materials related to the President's 2017 statements on Twitter or the 2017 Presidential Memorandum are relevant. To the contrary, courts have repeatedly found that materials pre-dating the creation of the Panel of

[8] The other opinion by the District Court that Plaintiffs cite merely refers to the earlier opinion; it does not state or imply that Category 1 documents are relevant to determining how much deference the Court should afford DoD's policy. *See* Mem. Op. 14–15, Dkt. 267. Defendants respectfully maintain their position that the level of deference to be afforded DoD's policy is not dependent upon documents or information produced in discovery.

Experts in September 2017 are irrelevant. In *Doe*, the Court found that the "relevant time-period for discovery is the development of the Mattis Plan" and determined that further discovery into the President's 2017 statements on Twitter and the 2017 Presidential Memorandum was not warranted. *Doe 2*, 2019 WL 4394842, at *1. And the Ninth Circuit stated, "[I]s information concerning the basis for the 2017 Memorandum still relevant now that the 2018 Policy has been adopted?" *Karnoski*, 926 F.3d at 1206.[9] Therefore, because the relevant time period for discovery is the development of DoD's new policy, materials pre-dating the creation of the Panel of Experts in September 2017 are irrelevant.

As just one example of the irrelevant documents Plaintiffs seek, Plaintiffs cite to an Army document dated August 10, 2017, denoted as an "Execution matrix used in preparation for the release of the Presidential Memorandum." Pls.' Supp. Br. 9. Plaintiffs contend this and other documents will "show the Army's reaction to the Tweets, its evaluation of the new Ban compared to the prior Open Service Directive, and its understanding of the degree of autonomy it would have in implementing actions to effectuate the President's policy." *Id.* But "[t]he draft Army document does none of that." Easton Decl. ¶ 36. "Rather, it merely proposes a timeline for the first 30 days following the expected Presidential announcement, during which [time] specific Army staff elements would accomplish specified tasks," such as notifying House and Senate Oversight Committees and providing face-to-face updates to congressional staffers. *Id.* Thus, "[r]ather than informing any relevant issue in the litigation, this document merely illustrates the process by which the Army plans and synchronizes policy execution." *Id.* This document is just one of many that Plaintiffs cite that are simply irrelevant.

[9] The Ninth Circuit then "note[d] that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the [Supreme] 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 (emphasis added). Although the District Court found otherwise, Defendants respectfully maintain that DoD's 44-page Report and Recommendations accompanying the 2018 policy, and the Administrative Record for that policy, is sufficient to allow for judicial review.

See id.

Accordingly, Plaintiffs have failed to establish the relevance of the thousands of documents included in this category, and the Court should find that the *Cipollone* balancing test for these documents weighs in Defendants' favor.

2. Defendants Will Provide Plaintiffs with the Documents Reflecting the Deliberations of the Panel of Experts, But Additional Deliberative Materials Regarding the Panel of Experts and Its Working Groups Are Irrelevant.

In compliance with the *Doe* Court's order, Defendants will produce to plaintiffs in all four cases an unredacted Administrative Record consisting of the documents used or considered by the Panel of Experts, all of the Panel of Experts' meeting minutes (which reflect the deliberations of Panel members during each meeting), and documents to or from voting members of the Panel of Experts from September 14, 2017 (the date of the Interim Guidance creating the Panel of Experts), to March 23, 2018 (the date of the Presidential Memorandum).[10] These are the only documents from Category 2 that are even arguably relevant to the District Court's evaluation of DoD's policy.

Although Plaintiffs argue that all of the thousands of deliberative documents regarding the activities of DoD's Panel of Experts and its working groups are relevant on the issue of the level of deference to be afforded DoD's policy, Pls.' Supp. Br. 10, a review of the District Court's Opinion shows that this is not the case. Instead, the documents that Defendants will produce in November show the evidence the Panel gathered and the military's evaluation of that evidence and are thus the only deliberative documents that are relevant to determine the level of deference to be applied under the standard set by the District Court. *See* Mem. Op. 58, Dkt. 263. And although Plaintiffs argue that the *Doe* Court "affirmed the relevance of documents within this category in ordering the production of the larger category of 'documents which were used or considered in the development of the Mattis

[10] Defendants will continue to withhold any protected information that was not subject to the *Doe* order (*e.g.*, information protected by the attorney-client privilege, etc.).

Plan,'" Pls.' Supp. Br. 12–13 (quoting *Doe 2*, 2019 WL 4394842, at *10), the *Doe* order repeatedly stated that the documents encompassed by the order were those "that were used or considered in the Panel of Experts for the Transgender Policy Review's (the 'Panel') development of the Mattis Plan, as those documents go to the heart of Defendants' intent and decision-making process,"[11] *Doe 2*, 2019 WL 4394842, at *1; *see also id.* at *3 (stating that "[a]dditional discovery into the decision-making process of the Panel's development of the Mattis Plan is required"); *id.* at *4 (stating that "[a]dditional discovery into the process of the Panel in developing the Mattis Plan is needed"); *id.* at *6 ("Because Defendants' decision-making process in developing the Mattis Plan is central in this case, the deliberative process privilege does not apply to documents used or considered by the Panel."); *id.* at *8 (finding that "Plaintiffs' need for documents which were used or considered in the Panel's development of the Mattis Plan overcomes Defendants' assertion of privilege"). Thus, neither the District Court nor the *Doe* Court found that *all* of the documents falling within Category 2 are relevant.

Plaintiffs also argue that the documents in Category 2 are relevant to determine "whether the adoption of the total ban directed by the President was a foreordained conclusion." Pls.' Supp. Br. 10. Plaintiffs point to DoD's Terms of Reference that created and provided guidelines for the Panel of Experts, and argue that the Panel was directed to implement the 2017 Presidential Memorandum. *See id.* at 10–11. But Plaintiffs need no additional documents on this issue because the District Court has already concluded that DoD's policy is not a "total ban" and differs from any policy announced by the President in 2017, either on social media or in the 2017 Presidential Memorandum. *See* Mem. Op. 19–20, Dkt. 263; *compare* Mattis Mem., Dkt. 120-1, *with* 2017 Presidential Mem., Dkt. 40-21, *and* Second Am. Compl. ¶ 6, Dkt. 148 (Twitter statements). Indeed, in determining that Plaintiffs'

[11] The parties in *Doe* disagree as to the scope of the *Doe* order and likely will continue their discussions regarding the scope of that order. *See* Joint Status Report, *Doe 2 v. Esper*, No. 17-1597 (D.D.C. Oct. 25, 2019), Dkt. 238.

challenge to the 2017 Presidential Memorandum is moot, the District Court recognized that DoD's policy "permits at least some transgender individuals to serve in the military, unlike the August 2017 Memorandum, which set forth an outright ban on transgender military service." Mem. Op. 19–20, Dkt. 263. Because, as the District Court found, DoD's policy "does not contain any of the directives from the August 2017 Memorandum," *id.* at 22, it is apparent that DoD's policy was not a "foreordained conclusion" meant to implement a "total ban" on transgender military service, *see* Pls.' Supp. Br. 10; *see also Doe v. Shanahan*, 755 F. App'x 19, 23 (D.C. Cir. 2019) (noting the differences between the President's statements and 2017 Memorandum and DoD's policy and finding that it was error for the district court "to conclude that the Mattis Plan was foreordained"); *Karnoski*, 926 F.3d at 1199 (stating that "the 2018 Policy is significantly different from the 2017 Memorandum in both its creation and its specific provisions"); *id.* at 1202 (stating that "the 2018 Policy is a significant change from the 2017 Memorandum"). Thus, the Court should reject outright this purported basis for obtaining all the deliberative documents falling within Category 2.

Plaintiffs also argue that all of the documents in Category 2 are relevant to show whether "the Panel narrowly considered its options because it was influenced by the President's 2017 Memorandum" and whether the Panel "had authority to, and in fact did, independently analyze the impact of transgender individuals serving armed services." Pls.' Supp. Br. 10, 11. But the *Karnoski* Court found that Secretary Mattis directed the Panel of Experts to "bring a comprehensive, holistic, and objective approach to study military service by transgender individuals," and, referring to DoD's Report, the Ninth Circuit determined that the Panel "appears to have construed its mandate broadly."[12] 926 F.3d at 1202; *see also* Terms of Reference, Administrative_Record_00331, Dkt. 133-4

[12] Although Plaintiffs criticize DoD for contracting with Kennell and Associates ("Kennell"), Pls.' Supp. Br. 11, part of the mandate to the Panel from Secretary Mattis included "obtain[ing] advice from outside experts," Terms of Reference, Administrative_Record_00331, Dkt. 133-4. Thus, DoD contracted with Kennell, "a research and consulting firm specializing in healthcare policy analysis," to

(creating and providing directions to the Panel). Furthermore, the options that the Panel considered and Panel members' analysis of those options will be reflected in the unredacted meeting minutes from the Panel that Defendants will provide to Plaintiffs in November. Accordingly, the additional deliberative documents that Plaintiffs' seek in their Category 2 would be the deliberations and communications of non-Panel members that were never seen or considered by voting members of the Panel. Plaintiffs should at least review the Panel's meeting minutes and deliberations, as well as the unredacted Administrative Record and hundreds of documents to or from voting members of the Panel drafted during and after the Panel's work before seeking additional documents of non-Panel members.[13] *See id.* at 1206 n.22 (noting that "the district court may wish to authorize discovery in stages when the current record is insufficient to establish relevance").

Finally, Plaintiffs argue, in a cursory manner, that "review of the activities of the Panel of Experts (including the [P]anel's working groups) is highly likely to yield evidence" on "whether the Panel's conclusions were supported by the evidence presented to it." Pls.' Supp. Br. 12. Although the Panel was supported by several working groups composed of subject-matter experts, including the Medical and Personnel Executive Steering Committee ("MEDPERS"), the Retention and Non-

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create "a comparison of mental health diagnoses in service members with gender dysphoria and mental health diagnoses in service members without gender dysphoria." Decl. of Terry Adirim, M.D., M.P.H. ¶ 9, *Doe 2 v. Esper*, No. 17-cv-1597 (D.D.C. June 24, 2019), Dkt. 218-5.

[13] Plaintiffs cite to, for example, the dissenting opinion of the Acting Under Secretary of the Navy, as being particularly relevant to this issue. Pls.' Supp. Br. 12. While Defendants dispute the relevance of one Panel member's opinion to the Court's consideration of DoD's policy, Defendants will produce the unredacted dissenting opinion to Plaintiffs in compliance with the *Doe* order and the cross-use agreement. Plaintiffs also cite to an Army presentation that was included on an Army privilege log produced before DoD had announced its new policy, *id.*, but, after the policy was announced, the presentation that was considered by the Panel was included as part of the Administrative Record, *see* Easton Decl. ¶ 22 n.8 (citing Administrative_Record_003011–42, Dkt. 133-15). Similarly, Plaintiffs cite to 65 entries on the Joint Chiefs of Staff privilege logs to show that DoD withheld information presented to the Panel, but those documents largely have either already been produced to Plaintiffs or are drafts of final versions that were presented to the Panel. *See* Easton Decl. ¶ 38 n.18.

Deployability Working Group, and the Transgender Personnel Policy Working Group, members of the working groups were not decision-makers and "[m]ost of the working groups' products and communications were not presented to or seen by the Panel of Experts or its members." Easton Decl. ¶ 26 n.15. As an example of the behind-the-scenes efforts of the working groups, Category 2 includes an email from a member of the MEDPERS working group to one of the co-chairs of the group discussing the results of a data pull regarding accession medical waivers for genital abnormalities. *See id.* ¶ 26. Because this document was not presented to the Panel, *see id.*, it, and many others like it, *see id.* ¶ 26 n.15, is not relevant to "whether the Panel's conclusions were supported by the evidence presented to it," Pls.' Supp. Br. 12.

Given that Plaintiffs shortly will receive the deliberations of the Panel showing the military's assessment of the evidence, Plaintiffs are unable to establish the relevance of the remaining thousands of documents included in this category. Accordingly, the Court should find that the *Cipollone* balancing test for these documents weighs in Defendants' favor.

3. Deliberations Concerning the Mattis Memorandum and the 2018 Presidential Memorandum Are Irrelevant.

Plaintiffs argue that the thousands of deliberative documents concerning the Mattis February 2018 Memorandum, its accompanying Report, and the 2018 Presidential Memorandum are relevant because the Report was "developed by the political appointees" and it "cit[es] new materials and arguments that do not appear to have been advanced by the Panel of Experts." Pls.' Supp. Br. 13. As an initial matter, the ultimate conclusion of the Panel and the policy the Panel recommended was reflected in the Mattis Memorandum and in its accompanying Report. *Compare* Administrative_Record_003059–60 (Action Memo from the Under Secretary of Defense for Personnel and Readiness to the Secretary of Defense), Dkt. 133-15 (describing "[r]ecommendations by the Transgender Review Panel of Experts"), *with* Mattis Mem., Dkt. 120-1, *and* Report, Dkt. 120-2. And the ultimate decision-maker was Secretary Mattis, who exercised his own independent military

judgment and was entitled to consider further materials and arguments to the extent they exist. Mattis Mem. 2, Dkt. 120-1 (setting forth the policy DoD should implement "in light of the Panel's professional military judgment and [Secretary Mattis's] own professional judgment").

Plaintiffs cite internet news articles in an attempt to show that the White House and/or so-called "anti-transgender lobbyists and activists operating under the aegis of Vice President Mike Pence" may have intervened in the Department's process, *see* Pls.' Supp. Br. 14–15, but such unsubstantiated hearsay should be entirely disregarded, *see In re Neustar Sec.*, 83 F. Supp. 3d 671, 686 (E.D. Va. 2015) (refusing to rely on anonymously sourced news article because the court had "no way to assess the credibility of anonymous sources quoted in the article, whether the sources have personal knowledge of the events described, and whether the sources were in a position to learn of such events personally").

Plaintiffs also cite to communications between DoD and Dr. Paul McHugh[14], a psychiatrist from Johns Hopkins University.[15] *See* Pls.' Supp. Br. 13–14. Plaintiffs claim that these communications establish the relevance of deliberative materials pertaining to Secretary Mattis's February 2018 Memorandum and DoD's accompanying Report. *See id.* at 15–16. But a review of this material makes short work of Plaintiffs' relevance claim.

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

[14] 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.

[15] Although Plaintiffs imply that they received the email chain only as a result of a third party subpoena issued to Dr. McHugh, DoD actually produced it (unredacted) to Plaintiffs before the subpoena dispute. *See* Easton Decl. ¶ 23; *see also* Defs.' Resp. Exh. 4, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Sept. 13, 2019), Dkt. 381-4 (showing the same emails with DoD document identifiers).

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's motivations were not genuine but were instead influenced by discriminatory intent or animus from third parties. *See id.* at 14–16. But Plaintiffs ignore that DoD considered the opinions and studies of multiple experts, including Plaintiffs' own expert, Dr. George Brown, 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. *See* Mattis Mem. 1–2, Dkt. 120-1; Panel of Expert Meeting Minutes, Administrative_Record_002830–5, Dkt. 133-14. There is nothing nefarious or indicative of bad faith about receiving input from experts with differing views. *See 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* Wilmoth Decl. 1, Dkt. 40-38, recommended that the Carter Transgender Working Group ("TGWG") speak with Dr. McHugh, 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," *see* Exh. C Email from Margaret Wilmoth to Karen Guice (Oct. 15, 2015). Therefore, the fact that DoD communicated with Dr. McHugh does not support Plaintiffs' speculation that Secretary Mattis's 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.[16]

[16] Although Plaintiffs cite to Army documents that they claim "suggest the Mattis policy was predetermined by a conversation between the Secretary of Defense and the President and not the result of an objective study," Pls.' Supp. Br. 16, these documents do not show that the Mattis policy was predetermined, *see* Easton Decl. ¶ 37 n.17. Stated differently, the statement on the privilege log

In addition, documents in Category 3 regarding the President's March 2018 Memorandum include documents created after DoD made its policy decision. Thus, deliberative material regarding the 2018 Presidential Memorandum was not used or considered in the development of the Mattis policy and simply cannot be relevant to whether DoD "reasonably determined the policy significantly furthers the government's important interests." *Karnoski*, 926 F.3d at 1202; *see also* Mem. Op. 57–58, Dkt. 263 (likewise applying heightened scrutiny); *Doe 2*, 2019 WL 4394842, at *1. Such material is likewise irrelevant to the Court's determination as to the level of deference to be applied. *See* Mem. Op. 58, Dkt. 263 (noting that to determine the level of deference, "the Court must be able to assess the evidence the Panel gathered and the military's evaluation of that evidence"); *see also Doe 2*, 2019 WL 4394842, at *4 (stating that "[a]dditional discovery into the process of the Panel in developing the Mattis Plan is needed before the Court can determine the level of deference owed to the Plan").

Accordingly, because Plaintiffs offer only speculation or misinformed assertions regarding the relevance of the documents that post-date the Panel's work, the Court should find that Plaintiffs have failed to meet their burden and that the *Cipollone* balancing test weighs against disclosure.

4. Plaintiffs Should Not Now Be Permitted to Modify Their Broad Motion to Compel the Few Specific Documents Identified in Their Motion.

Plaintiffs identify a few documents in each of their three broad categories as illustrative examples and argue that they are relevant. *See* Pls.' Supp. Br. 8–16. Plaintiffs have not, however, moved to compel any particular document with their original motion and indeed disclaimed any such intention to the Court. *See* Defs.' Opp. Exh. 4 (Email from Mitchell Kamin to Chambers of Judge Garbis (May 2, 2018)), Dkt. 177-32 (stating that "this is not a dispute about whether particular documents are privileged" but "whether the deliberative process privilege applies as a matter of law").

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appears to have been a mistake, as the documents do not show that the Secretary of Defense will "make a decision regarding TG policy regardless of what any study asserts." *See id.* In any event, because Defendants have waived the deliberative process privilege over those documents and produced them to Plaintiffs, the Court need not consider their relevance in deciding Plaintiffs' motion.

As described above, Defendants urged Plaintiffs on more than one occasion to identify specific documents or discovery responses to which Plaintiffs contest Defendants' privilege assertions. *See* Enlow Decl. ¶ 2, Dkt. 177-28. But Plaintiffs refused to do so and instead filed a motion arguing that the deliberative process privilege does not apply in this case *as a matter of law*. *See* Pls.' Mot. to Compel 2, 10–14, Dkt. 177. And after the District Court granted in pertinent part Defendants' motion for reconsideration and remanded the issue back before this Court, Defendants again urged Plaintiffs to identify specific documents or discrete categories of documents, *see* Exh. B (Enlow email), but, again, Plaintiffs refused to do so. Plaintiffs cannot effectively modify their original motion to compel to now seek *specific* documents. If Plaintiffs wish to seek to compel certain documents, they should file a motion pertaining to those documents. In the meantime, as explained, the motion to compel fails on its own terms and should be denied.

B. Plaintiffs Shortly Will Have Other Available Evidence.

The second *Cipollone* factor, the availability of other evidence, also weighs in Defendants' favor. *See* 812 F.2d at 1400. Although Plaintiffs argue that "[o]nly Defendants have access to the material that was used or considered in the development of the Mattis Plan," Pls.' Supp. Br. 17, this will soon no longer be the case. As stated above, Defendants will produce in November an unredacted Administrative Record, the Panel of Experts' meeting minutes, and deliberative documents to or from voting members of the Panel of Experts from the date of the creation of the Panel to the date of the 2018 Presidential Memorandum. In addition, DoD already produced key documents, such as Secretary Mattis's decision, the Panel of Experts recommendation, and briefings by the Chair of the Panel to the Secretary, Deputy Secretary, and the Vice Chief of the Joint Staff. Easton Decl. ¶¶ 22, 27. Taken together, the availability of other evidence strongly undercuts Plaintiffs' demand for thousands of deliberative documents. *See Utah Med. Prods. v. McClellan*, No. 2:03–cv–525–PGC, 2004 WL 988877, at *5 (D. Utah Mar. 31, 2004) (finding that even though the requested document was

relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff with] a clear explanation" as to why the agency took an enforcement action).

Plaintiffs cite to the *Doe* and *Karnoski* opinions to argue that all of the evidence concerning the military's deliberations is in Defendants' control. But because the unredacted Administrative Record, the Panel meeting minutes, and Panel members' documents had not been produced to any plaintiffs at the time of the *Doe* and *Karnoski* decisions, those courts' analyses of this factor are irrelevant to this Court's consideration of the availability of other evidence. Plaintiffs plainly will have the deliberations of the Panel in a matter of days.

And various documents cited by Plaintiffs in their brief have already been produced to them. One of the documents Plaintiffs cite as having been withheld, the email with the subject line "Re_Statement to press_ _Please call the WH," *see* Pls.' Supp. Brief 9–10, was produced to Plaintiffs in 2018, with only personal identifying information redacted, *see* Easton Decl. ¶ 37. (And, "[c]ontrary to Plaintiffs' contention, this document sheds no light on 'the extent to which the DoD's policy views were considered in the President's original decision that transgender persons should be excluded from military service.'" Easton Decl. ¶ 37 (quoting Pls.' Supp. Br. 9)). In addition, Plaintiffs cite to communications between DoD and Dr. McHugh as documents Defendants previously withheld but that were produced as a result of a third party subpoena issued to Dr. McHugh by the plaintiffs in the related *Karnoski* litigation. *See* Pls.' Supp. Br. 15. But Defendants produced an email chain between the Special Assistant to Secretary Mattis and Dr. McHugh long before the *Karnosski* plaintiffs moved to compel them from Dr. McHugh. *See* Easton Decl. ¶ 23. Finally, Defendants recently produced to Plaintiffs the Army documents identified on page 16 of Plaintiffs' brief. Plaintiffs should be required to review these documents and the Panel's deliberative documents that they will receive in November before pursuing disclosure of any additional deliberative documents. *See Karnoski*, 926 F.3d at 1206

n.22 (encouraging the court to "authorize discovery in stages").

C. The Court Must Give Sufficient Consideration to the Military's Interest in Full and Frank Communication about Policymaking.

The fourth *Cipollone* factor—the chilling effect of disclosure—likewise weighs against disclosure. *See* 812 F.2d at 1400. Plaintiffs provide no serious response to the chilling effect of the disclosure of tens of thousands of deliberative documents, a key factor in the balancing test. *See* Easton Decl. ¶¶ 30–38; *see also* Decl. of Stephanie Miller ¶ 12 (June 29, 2018), Dkt. 186-1 (explaining the chilling effect of the disclosure of just one document) (filed under seal). As the Ninth Circuit instructed, this "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. Instead of giving careful consideration to this factor, Plaintiffs merely argue that any concerns about the chilling effect of disclosure of thousands of deliberative documents can be mitigated by the Protective Order in this case. Pls.' Supp. Br. 19. But DoD's declarant, Robert Easton, made clear that the chilling effect would occur even with the Protective Order "because a motivated party would still second-guess the underlying advice and analysis in depositions and other proceedings which could later influence a decision to abstain or provide less than complete candor during policy development." Easton Decl. ¶ 34.

Plaintiffs also argue that Defendants bear the burden of showing that some documents implicate a higher standard of sensitivity based on the level of the officials involved. Pls.' Supp. Br. 18–19. Defendants have met this burden. Mr. Easton stated that "[v]arious policy documents, including drafts of Secretary Mattis'[s] September 14, 2017 interim guidance, his 2018 memorandum that was circulated for comment and review by all of the Services and the Joint Staff, the Presidential Memorandum, and related documents," "reflect the thoughts and deliberations of the highest government and DoD officials." Easton Decl. ¶ 34. And Mr. Easton provided other specific examples of documents that reflect deliberations "that took place at the highest levels" of the

Department. *Id.* ¶ 26 (citing, as an example, an email chain among the Under Secretary of Defense for Personnel and Readiness, the Principal Director for Military Personnel Policy, and the Director of Accessions Policy); *see also id.* ¶ 25 (citing, as an example, an email exchange between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff). Mr. Easton explained the chilling effect of releasing these types of high-level documents as follows:

> The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DoD personnel knew that their thoughts, impressions, and opinions on various topics, relating both to DoD transgender policy and to other policies, would be open to scrutiny, they may hesitate to provide their true positions on potential courses of action, not just with respect to military personnel decisions but as to any politically sensitive decision that DoD may face, for fear that these discussions could be revealed to wider audiences. . . . The absence of this essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk.

Id. ¶ 34.

In any event, the disclosure of all the deliberative documents plainly would have a substantial and immediate chilling effect across all levels of officials at the Department of Defense in future deliberations. *Id.* ¶ 31. As Mr. Easton explained:

> The DoD decision-making apparatus relies on open and candid conversations among leadership, advisors, and policy analysts to advise and inform DoD policy makers across the Military Services on various courses of action for any decision. Matters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests, and leaders within the Department encourage open and candid discussions about the merits of such actions. Opinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process.
>
> In addition, the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted mean that deliberative and pre-decisional conversations frequently occur via email. Leaders across the Department routinely solicit feedback, thoughts, and opinions on highly sensitive topics, including those with national-security implications, using email so that those who need to review and weigh-in on a decision can do so in real time regardless of their physical location.

Id. ¶¶ 31–32.

Finally, with regard to the policy concerning transgender individuals, DoD assured the members of the Panel of Experts and individuals who presented at the Panel meetings, including transgender service members, commanders of transgender service members, military medical professionals, and civilian medical providers that their input would be confidential and encouraged them to speak candidly about their experiences and opinions. *Id.* ¶¶ 33, 35. "The disclosure of deliberative, pre-decisional input, analysis, and opinions from these individuals would breach DoD's commitment to maintain the confidentiality of participants' honest deliberations regarding the sensitive topic of transgender service." *Id.* ¶ 35. "This would irreparably harm DoD's ability to obtain candid and open input on any subject in the future, not just regarding service by transgender individuals." *Id.*

The Department of Defense's weighty concerns about national security, confidentiality, and candor in future policy-making processes deserve "careful consideration" before determining that the deliberative process privilege has been overcome. *Karnoski*, 926 F.3d at 1207. Although Plaintiffs have given short shrift to these concerns, the Court should not. Instead, the Court should find that the fourth *Cipollone* factor strongly weighs against disclosure and deny Plaintiffs' motion in its entirety.

III. If Plaintiffs Have Not Abandoned Their Request for the Army PowerPoint Presentation that was the Subject of Plaintiffs' Motion for Judicial Determination of Privilege, the Court Should Consider the Request on its Merits.

The District Court "vacate[d] the portion of [this Court's] August 14, 2018 Order dismissing as moot Plaintiffs' Motion for Judicial Determination of Privilege." Mem. Op. 11. Following the District Court's order on reconsideration, this Court directed the parties to "provide supplemental briefing consistent with the issues set forth in the Court's Opinion." Order, Dkt. 271. Plaintiffs provide no additional argument on the merits of the clawback dispute in their supplemental brief.[17]

[17] To the extent that Plaintiffs raise any additional arguments in their reply brief regarding the clawback dispute, the Court should find that Plaintiffs have waived those arguments. *See Belk, Inc. v. Meyer Corp.*,

See generally Pls.' Supp. Br. Therefore, it is unclear whether Plaintiffs have abandoned their Motion for Judicial Determination of Privilege concerning the clawed-back Army PowerPoint presentation. To the extent that Plaintiffs have not abandoned their motion, the Court should conduct the *Cipollone* balancing test to determine whether Plaintiffs have overcome the deliberative process privilege for the Army PowerPoint presentation.

Defendants respectfully refer the Court to Defendants' sealed response to Plaintiffs' Motion, which establishes that the *Cipollone* balancing test weighs against disclosure. *See* Defs.' Resp., Dkt. 186 (filed under seal). As set forth fully in Defendants' response, Plaintiffs fail to establish the relevance of the Army PowerPoint presentation (especially given that the PowerPoint was never presented or provided to the Panel of Experts or decision-makers), there is ample other available evidence (including the Panel's deliberative documents that will shortly be produced to them), and the declaration of Stephanie Miller, Director for Accessions Policy, explains why release of this document would risk chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within DoD and the military. *See id.* at 10–15, Dkt. 186; Miller Decl. ¶ 12, Dkt. 186-1 (filed under seal). Upon considering the merits of the dispute, the Court should conclude that the Army PowerPoint briefing is protected from disclosure under the deliberative process privilege and direct Plaintiffs to comply with Defendants' request for return of the PowerPoint, pursuant to the Court's Federal Rule of Evidence 502(d) Order, Dkt. 110.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion in its entirety. If the Court grants Plaintiffs' motion in full or in part, Defendants respectfully request that the Court reject Plaintiffs' request to direct Defendants to produce all deliberative documents subject to any disclosure

679 F.3d 146, 152 n.4 (4th Cir. 2012), *as amended* (May 9, 2012) (finding that a party had waived an issue by "fail[ing] to develop th[e] argument to any extent in its brief").

order within 14 days and instead stay Defendants' compliance with its order pending review by the District Court.

Date: October 25, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Courtney D. Enlow
COURTNEY D. ENLOW
ANDREW E. CARMICHAEL
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 616-8467
Email: courtney.d.enlow@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically transmitted the foregoing to the parties and the clerk of court for the United States District Court for the District of Maryland using the CM/ECF filing system. I further certify that I have arranged for a paper courtesy copy to be delivered to chambers.

/s/ Courtney D. Enlow

COURTNEY D. ENLOW
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 616-8467
Email: courtney.d.enlow@usdoj.gov

Exhibit A

Declaration of Robert Easton,

dated October 25, 2019

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

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING REMANDED DISCOVERY PROCEEDINGS

DECLARATION OF ROBERT E. EASTON

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

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel ("OGC"). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Response to Plaintiffs' Supplemental Brief Regarding Remanded Discovery Proceedings. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

4. In their Supplemental Brief Regarding Remanded Discovery Proceedings ("Plaintiffs' Brief"), ECF No. 276 (filed under seal), Plaintiffs effectively seek to compel Defendants to disclose all DoD documents and information withheld pursuant to the deliberative process privilege during the entire period commencing prior to the President's July 2017 social media posts through the President's March 2018 acceptance of the policy proposed by DoD. *See* Plaintiffs' Brief at 8–17. In conceding the unbounded breadth of their demands, Plaintiffs have suggested that Defendants' search, collection, and production efforts are to blame for their failure to identify any reasonable, narrower category of documents and information otherwise protected from disclosure by privilege. *See id.* at 20. Accordingly, I will detail DoD's search, collection, and privilege review process.[1]

DoD Search, Collection, and Review Process

5. In response to this and the three other lawsuits challenging DoD's policies regarding military service by transgender individuals and individuals with gender dysphoria, DoD conducted an expansive collection, search, and production of its files that were potentially relevant to the claims and defenses in the four cases. DoD's search and review efforts were focused on material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria.

[1] As Plaintiffs acknowledge, *see* Plaintiffs' Brief at 20 and n.3, I have previously provided similar detailed information in one of the related cases. *See* Declaration of Robert E. Easton, *Karnoski, et al. v. Trump, et al.*, No. 17-cv-01297 (W.D. Wash. Aug. 29, 2019), ECF No. 371-1.

6. DoD began this process by identifying the key individuals involved in this policy-making process going back to the policy announced by former Secretary of Defense Ashton Carter on June 30, 2016 and delineated in Directive-type Memorandum (DTM) 16-005. DoD OGC identified and searched the accounts of the following key personnel:[2]

Executive Secretariat Officials	**Title**
Bushman, William	Special Assistant to the Secretary of Defense
Walsh, Laurel	Special Assistant to the Chief of Staff
Verga, Peter	Special Assistant to Secretary of Defense
Faller, Craig	Senior Military Assistant to the Secretary of Defense
Carter, Ashton	25th Secretary of Defense
Work, Robert	Deputy Secretary of Defense
Mattis, James	26th Secretary of Defense
Mohler, Hallock	Executive Secretary
Sweeney, Kevin	Chief of Staff to the Secretary of Defense
DeMartino, Tony	Chief of Staff to the Deputy Secretary of Defense
DoD Personnel and Readiness Officials	
Kurta, Anthony	Under Secretary of Defense for Personnel and Readiness
Barna, Stephanie	Acting Assistant Secretary of Defense for Manpower and Readiness
Hebert, Lernes	Acting Deputy Assistant Secretary of Defense for Military Personnel Policy and Principal Director
Miller, Stephanie	Director, Accessions Policy
Gearhart, Lee COL	Assistant Director, Reserve Accessions
Brown, Gary LTC	Assistant Director, Reserve and Medical Manpower
Adirim, Terry Dr.	Principal Deputy Assistant Secretary of Defense for Health Affairs
Findley, Andrew Dr.	Program Manager - Quality, Graduate Medical Education, and Medical Accession and Retention Incentives
Chan, Edmund	Health Affairs - Health Services Policy and Oversight
Ribeiro, Elizabeth	Contractor Employee Supporting the Office of Health Services Policy and Oversight
Arendt, Christopher	Director, Accessions Policy

[2] In addition to the DoD officials listed in the table, other individuals involved in the development of the DoD transgender policy were identified in our Objections, Responses, and Supplemental Responses to Plaintiffs' First Set of Interrogatories to Secretary Mattis Nos. 16 and 20, served on Plaintiffs on May 29, 2018.

DoD OGC	
Koffsky, Paul	Acting General Counsel and Senior Deputy General Counsel, Personnel and Health Policy
Casciotti, John	Senior Associate Deputy General Counsel
Gruber, David	Associate Deputy General Counsel
Easton, Robert	Director, Office of Litigation Counsel
Hatch, Richard	Associate Deputy General Counsel
Hecker, Karen	Associate Deputy General Counsel
Newman, Ryan	Deputy General Counsel, Legal Counsel

7. While the key custodian list was being finalized, DoD OGC attorneys simultaneously developed broad search terms and determined the relevant date range based on the assumption that DoD needed to gather and process all data not only potentially relevant to this case, but to any future cases and Freedom of Information Act requests on this topic. To that end, comprehensive search terms were selected to gather data from DoD Exchange servers on three different DoD networks. The search terms used were:

Term	Date Range
transgend*	June 30, 2016 to March 23, 2018
"trans gender"	June 30, 2016 to March 23, 2018
gender /4 stab*	June 30, 2016 to March 23, 2018
"genital reconstruction" OR "gender transition" OR "gender marker" OR "gender transition plan"	June 30, 2016 to March 23, 2018
"gender dysphoria"	June 30, 2016 to March 23, 2018
"TG" /3 ("service member" OR "care" OR "working group" OR "individual")	June 30, 2016 to March 23, 2018
"transition surgery"	June 30, 2016 to March 23, 2018
("sex change" OR "sex-change") /3 surgery OR "sex change surgery"	June 30, 2016 to March 23, 2018

reassignment AND ("surgery" OR "procedure")	June 30, 2016 to March 23, 2018
"sex reassignment" /2 surgery OR "sex reassignment surgery"	June 30, 2016 to March 23, 2018
("cross sex" OR "cross-sex") AND ("hormone treatment" OR "hormone therapy")	June 30, 2016 to March 23, 2018
gender AND confirm* AND surgery	June 30, 2016 to March 23, 2018
"Join" OR SERV* /3 gender	June 30, 2016 to March 23, 2018
"vaginoplasty"	June 30, 2016 to March 23, 2018
"Penile amputation"	June 30, 2016 to March 23, 2018
Department of Defense Instruction OR DODi /2 "1300.28"	June 30, 2016 to March 23, 2018
("Directive Type Memo" OR "DTM") AND "16-005"	June 30, 2016 to March 23, 2018

8. The DoD search terms and the relevant date range were then transmitted by Microsoft Excel spreadsheet to DoD Information Technology ("IT") personnel to begin the digital search.

9. DoD IT personnel applied the designated search parameters while conducting their digital searches as directed by DoD OGC attorneys. The only parameters applied were date range, search term(s), and custodian email address. No additional filters were applied by DoD IT at the server collection stage, and servers that contained service member medical records were not searched. Once the relevant native data were gathered by DoD IT personnel, they were provided by CD to DoD OGC attorneys who then transferred the data to the Department of Justice ("DOJ") for processing in its eDiscovery software, Relativity.

10. After DOJ processed the native data, DoD was informed that there were more than 138,900 unique DoD documents based on the custodian list, search terms, and date range.

Including the additional data gathered by the Military Services, which separately identified their own key custodians, more than 225,200 documents were collected. Documents were then maintained and organized within the eDiscovery database as they were collected and as they would appear in the ordinary course of business—by DoD or Military Service component and custodian.

11. Supplemental self-collections were also executed with assistance from DoD OGC attorneys for select key custodians as a result of expedited discovery deadlines set in this and the related cases. Military Service attorneys directed similar self-collections from their key personnel. The decision to conduct supplemental self-collections was based on: the need to produce documents quickly, the understanding that a digital search by DoD IT personnel would take time to complete, and the fact that the identified key custodians were the relevant DoD policy makers for both the Secretary Carter and Secretary Mattis transgender policies. To that end, DoD OGC attorneys instructed Stephanie Miller, Anthony Kurta, Lernes Hebert, Dr. Terry Adirim, and Dr. Andrew Findley to create a folder on their computer desktops, copy all potentially relevant documents from organizational shared drives and Outlook accounts using search terms similar to those used for the digital search, and place any results in the newly created desktop folder. Once this was complete, the key custodians were instructed to send that folder to DoD OGC so that it could be transferred to DOJ for processing, review, and production. These additional self-collections were also maintained and organized within the eDiscovery database as they were collected—by DoD or Military Service component and custodian—and as they were kept in the ordinary course of business.

12. Once the data were uploaded to Relativity, duplicate documents were removed from the corpus of documents for review. DOJ then divided the remaining documents into

batches of 250, and DoD OGC counsel for this case assigned a reviewer to each batch. No documents were excluded from batching due to the possibility that a document contained privileged information.

13. The DoD document review was conducted by a team of DoD OGC staff. Prior to the review, DoD OGC counsel provided the team detailed instructions on the mechanics and criteria for the review. Reviewers were trained how to determine whether a document was responsive, then to review the document for any applicable privileges and code the document appropriately, and finally to provide a description of the privileged information for the privilege log. The review team was also instructed to mark a document as "responsive" if it was remotely related to DoD's transgender policy, past or present, and further instructed to err on the side of finding responsiveness. In light of the 218 separate requests for production of documents ("RFPs") in this and the three related cases challenging DoD's transgender policy, DoD did not further review and categorize documents as responsive to particular RFPs. Instead, documents were categorized and produced as they were maintained and collected in the ordinary course of business—by DoD or Military Service component and custodian. Efforts to reorganize the documents by RFPs in this and the related litigation would have added substantial burdens to DoD's review efforts by requiring DoD attorneys to compare the content of each document to the list of 218 RFPs across the four cases. This task would have been further complicated by the fact that many responsive documents would be responsive to numerous RFPs, especially given the breadth of many of the RFPs.

14. Beyond determining whether a document was responsive, as described above, DoD did not apply non-privilege objections to exclude from production documents that were reviewed.

15. The review team also was instructed on various privileges, including the deliberative process privilege, attorney-client privilege, work product protection, and presidential communications privilege, so that they had a working knowledge of the privileges they were likely to encounter as they reviewed the documents. They were further asked to code a document as "needs further review" if they were unsure about the content, had questions on whether a specific code was warranted, or encountered a document with a close privilege call so that an attorney could later locate and review the document to make the appropriate privilege determination. Finally, at the beginning of the review project DoD OGC hosted daily teleconferences with members of the review team to ensure uniformity across the review and to provide the team an opportunity to discuss any unique documents they faced as they worked through the batches.

16. Privilege determinations were generally made at the same time as responsiveness determinations. A reviewer read the entire document and considered the content, the title, the author, the recipients, and the date of the document's creation while contemplating whether the document was privileged. If the document contained privileged material, it was appropriately coded in Relativity and the reviewer moved to the next document. These privilege determinations were made only after the document was determined to be responsive, and no custodians, documents, or batches were excluded from review because they contained privileged information.

17. Once the documents were coded as privileged, DoD OGC notified DOJ, and DOJ created and provided DoD OGC draft privilege logs for several batches of documents. These logs were generated from Relativity by the eDiscovery software and were sent to my office in Microsoft Excel format. They were created using a combination of the metadata from the

document and the reviewer's coding in Relativity. The logs included the following metadata: the author of the email or creator of the document, the recipient of any email, the date of creation or the date the email was sent, the title of the document, a privilege determination, and the basis for the privilege determination. This information was provided for every document that DoD withheld as privileged in this case. DoD attorneys reviewed the draft privilege logs, edited them as necessary, and sent them back to DOJ to provide to Plaintiffs. Accordingly, Defendants have long since provided Plaintiffs with individualized privilege objections and descriptions of the documents withheld pursuant to those individualized privilege objections.

18. Plaintiffs complain that Defendants did not organize their productions and privilege objections by Plaintiffs' RFPs. *See* Plaintiffs' Brief at 20–21. Unsurprisingly, neither DoD nor the Military Services organize their files by Plaintiffs' RFP. To reorganize Defendants' production and privilege objections from how those documents were kept in the ordinary course of business to conform with Plaintiffs' desired organizational scheme, DoD and the Military Services would need to re-review more than 42,000 privileged documents and simultaneously consult Plaintiffs' RFPs to identify and re-categorize the information per Plaintiffs' specific request. Further, because DoD and the Military Services conducted their own separate reviews of their documents and have differing command structures, reorganizing the data according to Plaintiffs' requests would require a coordinated, months-long re-review to group the privileged documents according to each of Plaintiffs' 28 RFPs (and the 190 RFPs in the related cases).

19. In addition, Plaintiffs' proposed organizational scheme would be unwieldy and virtually unusable because documents from primary custodians involved in the development of these policies could be simultaneously categorized into several of Plaintiffs' 28 RFPs. If required to reorganize the database this way, not only would DoD be providing Plaintiffs with

the same information they currently possess, albeit organized in a manner inconsistent with how it was collected or kept in the ordinary course of business, but the new database would be unmanageable.

20. Further, such reorganization will net Plaintiffs no new information. DoD OGC privilege logs already include the metadata needed to determine when a document was sent, created, or received by any particular custodian. Given that there are three related cases and 218 total RFPs across the four cases, if DoD OGC had to reorganize the entire production and privilege logs six separate times to accommodate each Plaintiffs' (including the intervenor Plaintiffs in two of the cases) organizational preferences, the entire project could take a year to complete, and in each instance the final product would be less manageable than what DoD and the Military Services already have provided.

Documents and Privilege Objections Previously Provided to Plaintiffs

21. Defendants have long since provided Plaintiffs with individualized privilege objections, a description of the documents being withheld pursuant to those individualized privilege objections, and key documents falling within the three broad categories of information they currently seek. For example, in their first broad category, "Deliberative Materials Regarding the President's Original July 2017 Tweets and August 2017 Memorandum," Plaintiffs seek among other things deliberative documents and information pre-dating the President's social media posts "relevant to determining whether military officials believed that the [2016] Open Service Policy should be reevaluated." *See* Plaintiffs' Brief at 8. Yet Plaintiffs have been provided documents clearly showing that senior military and civilian leaders in each of the

Services,[3] as well as the Surgeons General of the Services,[4] had expressed concerns regarding aspects of the 2016 policy weeks before the President's social media posts. For example, a May 31, 2017 memorandum from the Secretary of the Air Force to the Deputy Secretary of Defense reports that "the combination of developing, but still immature, medical information and information received from Combatant Commands (CCMDs) raises significant concerns about the potential availability, readiness, and deployability of potential transgender accessions that warrants more study" and that "currently serving transgender members have had some significant readiness and deployment issues" (USDOE00129760_0001 thru USDOE00129760_0002). Also in Category 1, Plaintiffs seek documents and information regarding "whether the military interpreted the President's Tweets as binding." *See* Plaintiffs' Brief at 8. Again, Defendants have already produced key documents, including documents containing official statements by authorized DoD representatives to the media, responsive to this request.[5] For example, a July 27, 2017 memorandum from the Chairman of the Joint Chiefs of Staff to the Chiefs of the Military Services and other senior uniformed leaders advises that there "will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance" (USDOE00103569).

22. In Category 2, Plaintiffs broadly seek all "Deliberative Materials Regarding the Activities of DoD's Panel of Experts." Plaintiffs' Brief at 10. Yet the key documents regarding the Panel of Experts' activities are contained in the 3,075-page certified Administrative Record,

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[3] USDOE00129760_0001 thru USDOE00129760_0002 (Air Force); USDOE00073649_0001 thru USDOE00073649_0003 (Army); USDOE00083598_0001 thru USDOE00083598_0022 (Navy/Marine Corps).
[4] USDOE00132603_0001.
[5] *E.g.*, USDOE00103569; USDOE00073271 thru USDOE00073272; USDOE00218637 thru USDOE00218638.

filed on the docket in this case on April 20, 2018. ECF No. 133. This includes the Panel's charter from Secretary Mattis;[6] final agendas and approved minutes for the Panel's meetings;[7] briefings, data, and evidence presented to and considered by the Panel (unless that evidence was inextricably intertwined with Panel deliberations);[8] and the Panel of Experts' recommendation.[9] Other materials, such as the Panel of Experts' briefings to the Secretary of Defense and the Deputy Secretary of Defense, have been provided in discovery.[10]

23. In their third broad category, Plaintiffs seek all "Deliberative Materials Regarding the Mattis Policy and the President's Acceptance of the Policy." Plaintiffs' Brief at 13. Again, the key documents, which speak for themselves, were filed on the record in this action in March 2018. These include Secretary Mattis' February 22, 2018 memorandum to the President outlining the proposed DoD policy,[11] DoD's detailed February 2018 Report and Recommendations supporting DoD's recommendations to the President,[12] and the President's March 23, 2018 memorandum accepting DoD's recommendations.[13] In addition, Defendants have already produced in discovery other documents, including communications between senior

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[6] Administrative_Record ("AR")_000330 thru AR_000331.
[7] AR_002821 thru AR_002848; AR_002857; AR_002881 thru AR_002882; AR_002905 thru AR_002906; AR_002943; AR_002965 thru AR_002977; AR_002998; and AR_003043 thru AR_003058.
[8] AR_002849 thru AR_002856; AR_002858 thru AR_002880; AR_002883 thru AR_002904; AR_002907 thru AR_002941; AR_002943 thru AR_002964; AR_002978 thru AR_002997; and AR_002999 thru AR_003055. In support of their claim that Defendants have not produced materials considered by the Panel of Experts, Plaintiffs identify an Army briefing described on the Army privilege log as a "Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria." Plaintiffs' Brief at 12. This briefing is, in fact, part of the Administrative Record at AR_003011 thru AR_003042.
[9] AR_003059 thru AR_003067.
[10] *E.g.*, USDOE00088636_0001 thru USDOE00088636_0002; USDOE00088637_0001 thru USDOE00088637_0019; USDOE00088638_0001 thru USDOE00088638_0024; and USDOE00068585_0001 thru USDOE00068585_0002.
[11] ECF No. 120-1, filed March 23, 2018.
[12] ECF No. 120-2, filed March 23, 2018.
[13] ECF No. 119-1, filed March 23, 2018.

DoD officials and third parties during this period.[14] For example, one email chain shows exchanges between the Special Assistant to Secretary Mattis and Dr. Paul McHugh between February 5 and February 14, 2018 (USDOE00206512). Thus, while Plaintiffs assert a blanket need for privileged information in these three broad categories, the relevant information has been made available by filings on the record or was previously produced in one of the many DoD productions.

DoD Conducted an Individualized Privilege Review

24. DoD's in-depth review and analysis of the relevant data was the result of an individualized privilege review recorded on a privilege log listed on a document-by-document basis. Broadly categorizing these documents, as Plaintiffs suggest, would not lend itself to the analysis necessary to properly review thousands of deliberative process privilege determinations. Each of Plaintiffs' categories comprises thousands of documents and communications generated and transmitted by officials at varying levels in DoD, the Military Services, the Coast Guard, the 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, across numerous ranks, positions, and areas of professional expertise, as they worked to develop and refine DoD's policy. These categories include, for example, communications by lower-level officials who were not a part of the Panel of Experts or the decision-making process; communications among Panel of Experts members; communications that pre-date the formation of the Panel of Experts; communications to and from the ultimate decision-maker, the Secretary of Defense; and communications that post-date the Secretary's decision. And these

[14] *E.g.*, USDOE00134724_0001; USDOE00207706_0001; and USDOE00206512 thru USDOE00206513. I understand that other third-party communications to DoD regarding transgender policy were recently produced to the *Karnoski* Plaintiffs in satellite litigation, *In re Subpoena of Center for Military Readiness*, Misc. No. 18-51013, E.D. Mich.

communications span various topics, including analyses of the 2016 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 under the policy, and discussions about how to address the practical logistics of gender transition when it comes to berthing, showers, bathrooms, and other unit-level issues. Moreover, each of Plaintiffs' broad categories of documents comprises various types of materials including emails, calendars, thousands of pages of draft memoranda, informational briefs, meeting notes, agendas, meeting invitations, spreadsheets, and PowerPoint presentations. Given the breadth of the data set, categorizing the documents broadly as Plaintiffs suggest would encompass virtually all deliberative documents over a year-long process.

25. The first category that Plaintiffs identify involves documents withheld under the deliberative process privilege that relate to the President's July 2017 social media posts and his August 2017 memorandum. Most DoD documents in this category had no bearing on the Panel of Expert's decision-making process. One example in this category is a deliberative e-mail chain among DoD health affairs personnel regarding DoD's assessment of health care costs of transgender care being cited in connection with legislative proposals then under consideration (USDOE00259737). Another example is a draft deliberative talking paper regarding possible responses to media queries concerning transgender policy and its implementation following the President's social media posts (USDOE00072913). A third example is a draft briefing paper with suggested talking points regarding transgender policy for use by senior individuals preparing for Senate confirmation hearings updated to reflect changes resulting from the President's August 2017 memorandum (USDOE00072612). A final example is an e-mail exchange between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff

discussing post-Tweet messaging and information leaks (USDOE00204236). These documents are vastly different in purpose, scope, and audience. While Plaintiffs' first category would treat these documents the same, the purpose, scope, and audience must all factor into an appropriate legal analysis.

26. Plaintiffs' second broad category consists of deliberative documents regarding the activities of the DoD Panel of Experts. One example is an email chain between the Chair of the Panel of Experts and the Principal Director for Military Personnel Policy regarding attendance by specific people at Panel of Experts meetings and who should attend (USDOE00083080). A second email in this category reflects a discussion about draft minutes from the eighth meeting of the Panel and also contains discussion about how the DoD medical community defines terms from various DoD instructions applicable to military personnel policy (USDOE00083180). A third example is an email between senior DoD personnel, including the Under Secretary of Defense for Personnel and Readiness, the Principal Director for Military Personnel Policy, and the Director of Accessions Policy, about a draft communication to the Panel circulated for review and feedback (USDOE00083181). A fourth example is an email sent on December 27, 2017 from the Military Assistant to the Vice Chairman of the Joint Chiefs of Staff to the Chair of the Panel of Experts seeking updates that may have been provided to leadership on the progress of the transgender working groups[15] (USDOE00083056). A fifth example is an email from a member of the Medical Personnel Executive Steering Committee ("MEDPERS") to a co-chair of

[15] The Panel of Experts was supported by several working groups composed of subject-matter experts, including the Medical and Personnel Executive Steering Committee, the Retention and Non-Deployability Working Group, and the Transgender Personnel Policy Working Group. Among other things, these working groups were responsible for developing and analyzing data and information and formulating recommendations and courses of action in their respective areas of focus and expertise for consideration by the Panel of Experts. Most of the working groups' products and communications were not presented to or seen by the Panel of Experts or its members. Additional information about the working groups supporting the Panel of Experts, including their composition and meeting dates, was provided to Plaintiffs in Defendants' Objections, Responses, and Supplemental Responses to Plaintiffs' First Set of Interrogatories to Secretary Mattis No. 16, served on Plaintiffs on May 29, 2018.

that Committee discussing the results of a data pull regarding medical accession waivers for applicants with genital abnormalities (USDOE00132360). This document is representative of the many deliberative documents that reflect the behind-the-scenes efforts of the working groups that were not presented to the Panel of Experts. A final example is an email between the Chair of the Panel of Experts and Secretary Mattis' Chief of Staff capturing the criteria for the selection of individuals on the Panel and leadership's expectations as to how these individuals should approach their work on the Panel (USDOE00083199). These documents are representative of the internal back-and-forth conversations that took place at the highest levels of DoD while the Panel of Experts reviewed and developed policy.

27. As I previously stated, *supra* ¶ 22, DoD produced the Panel of Experts recommendation (including briefings by the Chair of the Panel to the Secretary, Deputy Secretary, and the Vice Chief of the Joint Staff), final agendas and minutes for Panel meetings, and the evidence the Panel reviewed (unless that evidence was inextricably intertwined with Panel deliberations). Accordingly, documents withheld pursuant to the deliberative process privilege from these categories generally relate to communications about the specifics of Panel meetings, discussions about draft communications to the Panel, drafts of presentations given to or reviewed by the Panel, the work of the Panel and progress it was making, and attendance at Panel meetings.[16] Plaintiffs' categorical approach therefore would encompass a myriad of these varying types of documents that had no bearing on the Panel of Experts' decision-making process.

28. Plaintiffs' third broad category consists of withheld deliberative documents related to DoD's February 2018 Report and Recommendations, Secretary of Defense James

[16] *See, e.g.*, USDOE00091770; USDOE00134909.

Mattis' February 22, 2018 Memorandum to the President, and President Trump's March 2018 Memorandum. One example is a draft version of the February 2018 Report (USDOE00069244). Another is an email communication regarding edits to a draft version of the February 2018 Report that was received by the US Army (USDOE00194076). A third example is a draft executive summary of the recommendations made by the Panel of Experts (USDOE00083031). This document contains high-level summaries of the Panel's analysis, summarizes the data the Panel received, and captures the Panel's recommendations. A fourth example is a document containing draft talking points for senior leadership as DoD prepared to issue Secretary Mattis' February 22, 2018 Memorandum (USDOE00267770). A final example from this category protected solely by the deliberative process privilege consists of communications and draft talking points for DoD public affairs officials regarding the President's decision (USDOE00261306). These are representative of the various types of documents in this category that were drafted for different purposes and for differing audiences that require consideration on a case-by-case basis.

29. Based on the foregoing, a one-size-fits-all analysis as to any of Plaintiffs' identified categories is not an effective way to review these privilege determinations. These documents were drafted for different audiences and reviewed at varying levels, involve deliberations by different officials both uniformed and civilian on widely-varying topics, and represent just a sample of documents from a much larger pool of deliberative materials.

Release of These Documents Would Have an Immediate Chilling Effect

30. The documents over which DoD has asserted the deliberative process privilege reflect the real-time thoughts and deliberations of personnel from the Department of Defense, Department of Homeland Security, Army, Navy, Air Force, Coast Guard, Defense Health

Agency, National Guard Bureau, and Office of the Chairman of the Joint Chiefs of Staff, both uniformed and civilian, career employees and political appointees, across numerous ranks, positions, and areas of professional expertise, as they worked to develop and refine the Department's policy. Moreover, the decision-making process for any major policy decision, such as a recommended policy on military service by transgender individuals, includes numerous ancillary considerations about how and when the policy would be implemented, and those additional decisions and accompanying processes are also deliberative in nature and protected by the deliberative process privilege.

31. The release of these documents would have an immediate chilling effect on future deliberations across the Department. The DoD decision-making apparatus relies on open and candid conversations among leadership, advisors, and policy analysts to advise and inform DoD policy makers across the Military Services on various courses of action for any decision. Matters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests, and leaders within the Department encourage open and candid discussions about the merits of such actions. Opinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process.

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

33. Here, with respect to the DoD Transgender Service Policy, the decision-making process was robust and highly deliberative. Both the 2016 and 2018 policies on military service by transgender individuals were developed by working groups, consultants, and military experts, all of whom generated documents to communicate ideas, debate courses of action, and propose updates to DoD policy. The Panel of Experts was established by Secretary Mattis and comprised the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services Vice Chiefs (including the Vice Commandant of the U.S. Coast Guard), and the Armed Services Senior Enlisted Advisors, and it was chaired by the Under Secretary of Defense for Personnel and Readiness (or an official performing those duties). The Panel of Experts received input from transgender service members, commanders of transgender service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria. Those appearing before this Panel were encouraged to speak candidly and openly about their experiences and opinions. This input was understood to be confidential.

34. Various policy documents, including drafts of Secretary Mattis' September 14, 2017 interim guidance, his 2018 memorandum that was circulated for comment and review by all of the Services and the Joint Staff, the Presidential Memorandum, and related documents, were also withheld under the deliberative process privilege. These documents reflect the thoughts and deliberations of the highest government and DoD officials. The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DoD personnel knew that their thoughts, impressions, and opinions on various topics, relating both to DoD transgender policy and to other policies, would be open to scrutiny, they may hesitate to provide their true

positions on potential courses of action, not just with respect to military personnel decisions but as to any politically sensitive decision that DoD may face, for fear that these discussions could be revealed to wider audiences. This would be the case regardless of the entry of a judicial protective order because a motivated party would still second-guess the underlying advice and analysis in depositions and other proceedings which could later influence a decision to abstain or provide less than complete candor during policy development. The absence of this essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk.

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

36. Finally, I note that Plaintiffs have identified a handful of specific documents, including third-party documents, which they claim show why their categorical approach is justified. *See* Plaintiffs' Brief at 8–16. Most of these simply do not shed light on any of the issues Plaintiffs contend are relevant at this stage of the litigation, and disclosure of those few that are relevant heighten the risk to future decision-making. As one example, Plaintiffs cite to an Army document (USDOE00120394) dated August 10, 2017, denoted an "Execution matrix used in preparation for the release of the Presidential Memorandum." *Id.* at 9. Plaintiffs contend this and other documents will "show the Army's reaction to the Tweets, its evaluation of the new Ban compared to the prior Open Service Directive, and its understanding of the degree of autonomy it would have in implementing actions to effectuate the President's policy." *Id.* The

draft Army document does none of that. Rather, it merely proposes a timeline for the first 30 days following the expected Presidential announcement during which specific Army staff elements would accomplish specified tasks. For example, on "D Day," the day of the announcement, the Army's Office of the Chief Legislative Liaison ("OCLL") would notify House and Senate Oversight Committees, and on "D+30 days" OCLL would provide face-to-face updates to congressional staffers. Rather than informing any relevant issue in the litigation, this document merely illustrates the process by which the Army plans and synchronizes policy execution.

37. One of the documents Plaintiffs cite as having been withheld, email "Re_Statement to press_ _Please call the WH," *see* Plaintiffs' Brief at 9–10, was in fact produced to Plaintiffs, with only personal identifying information redacted (USDOE00283118). Contrary to Plaintiffs' contention, this document sheds no light on "the extent to which the DoD's policy views were considered in the President's original decision that transgender persons should be excluded from military service." *Id.* at 9.[17]

38. Other documents specifically cited by Plaintiffs highlight the significant concerns that candor and openness will suffer in future DoD decision-making on sensitive policy questions if the views of specific individuals, who have been assured of confidentiality, are attributed to them by name when litigation ensues regarding a controversial issue. For example, Plaintiffs cite to a partially-withheld "dissenting opinion" authored by a member of the Panel of Experts. *See* Plaintiffs' Brief at 12, citing ECF No. 177-3. Particularly since Defendants have produced in discovery a document that presents both the Panel's majority and minority

[17] Plaintiffs have flagged two Army documents authored by Mary Krueger (Plaintiffs' Brief at 16). These two documents, Army_10031103 and Army_10031105, were recently provided to Plaintiffs. The entries on the Army privilege log regarding these documents appear to have been a mistake, as the documents do not show that the Secretary of Defense will "make a decision regarding TG policy regardless of what any study asserts."

recommendations on two specific questions put to the Panel, without attribution to any particular Panel member or members, *see* USDOE00088636_0002, the risk of harm to future DoD decision-making described above far outweighs any potential litigation need or benefit from attributing specific comments to a specific Panel member.[18]

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

EXECUTED this 25th day of October 2019, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

[18] Plaintiffs also accuse Defendants of presenting an "incomplete" record of the activities of the Panel of Experts and support that assertion by referencing "approximately 65 entries on the Joint Chiefs of Staff privilege log [that] identify documents that were received by the Panel of Experts." Plaintiffs' Brief at 12. Yet examination of the descriptions of these documents discloses that virtually all are documents referenced in ¶ 22 and notes 6–10, above, or are drafts of the same that are properly withheld.

Exhibit B

Email from Courtney Enlow to Nicholas Lampros,

dated September 26, 2019

From:	Enlow, Courtney D. (CIV)
To:	Lampros, Nicholas M.; Kies, Marianne; Carmichael, Andrew E. (CIV); Skurnik, Matthew (CIV); Powers, James R. (CIV); Norway, Robert M. (CIV); Cheung, Ashley (CIV)
Cc:	Corwin, Carolyn; Kamin, Mitchell A
Subject:	RE: Stone v. Trump
Date:	Thursday, September 26, 2019 4:13:00 PM

Hi Nik,

We write in response to your September 17 email following up on our September 16 phone call. In your email, you state that your "understanding is that Defendants refuse to provide any more narrow definition of those categories, and instead take the position that they still need not produce any documents subject to the three categories of documents sought by Plaintiffs' motion to compel." Your description mischaracterizes Defendants' position, as explained during the September 16 phone call. As we explained, Defendants' position is that Plaintiffs' argument that it is *Defendants'* burden to identify categories of privileged documents that Plaintiffs should move to compel misconstrues the Ninth Circuit's opinion in *Karnoski v. Trump*, 926 F.3d 1180, 1207–08 (9th Cir. 2019), and this Court's September 3 Opinion, Dkt. 267. The Ninth Circuit in *Karnoski* and this Court's September 3 Opinion merely permit Defendants to "argue that Plaintiffs should more narrowly define the categories of documents," Dkt. 267 at 10, and to explain why the balancing test "should apply differently to certain categories." *Karnoski*, 926 F.3d at 1206. Defendants have done so. As we explained in detail during the September 16 call, a more granular approach than Plaintiffs' broad categories is warranted here because each of Plaintiffs' three broad categories comprises various types of document (e.g., emails, presentations, drafts, etc.) from officials at various levels in the Government. More fundamentally, it is *Plaintiffs'* motion to compel, and thus Plaintiffs bear the burden of identifying any specific documents or discrete categories of documents they seek to compel. Further, because the Court "vacate[d] the part of the USMJ's Order granting Plaintiffs' Motion to Compel," Defendants are under no obligation to "produce documents they contend are covered by the deliberative process privilege" at this time. Dkt. 267 at 15.

As we discussed during the September 16 call, Defendants believe that the most efficient path forward in this case would be for the parties to engage in narrowing the dispute before Court similar to the way the parties proceeded in the related *Doe* litigation. In *Doe*, Defendants requested that Plaintiffs identify specific documents or, at the very least, discrete categories of documents, for which they believed they have a strong need and over which they would like Defendants to consider waiving the deliberative process privilege. The *Doe* Plaintiffs then identified four discrete categories of documents withheld under the deliberative process privilege and requested that Defendants waive their assertions of the privilege over those documents. In response to that request and in an effort to narrow the remaining discovery disputes in *Doe*, Defendants agreed to waive the deliberative process privilege over three discrete categories of documents: (1) the official recommendations from the Military Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017; (2) emails between then-Secretary Mattis and non-governmental third parties; and (3) the final versions of the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of Defense. In *Doe*, Defendants declined to waive the deliberative process privilege over certain additional categories requested by the *Doe* plaintiffs, which included documents considered or generated by the Panel of Experts, as well as communications to or from

members of the Panel regarding their work, and communications that followed the submission of the Panel's report but predated the publication of the implementation plan. Nevertheless, although Defendants declined to waive the deliberative process privilege over these documents, Defendants produced "*Vaughn* Indexes" to the *Doe* plaintiffs encompassing these remaining documents in dispute so that the plaintiffs could review the indexes to determine which of those documents to move to compel. Accordingly, as we previously explained, this process of narrowing the dispute in *Doe* resulted in Defendants waiving the privilege and producing certain deliberative documents and the parties presenting a narrowed discovery dispute to the *Doe* Court.

From our September 16 call, our understanding is that Plaintiffs are unwilling to engage in this process in order to narrow the dispute before the Court. If Plaintiffs are interested in engaging in this process, please let us know. For example, if Plaintiffs are requesting that Defendants waive the deliberative process privilege over the documents that you cited in your motion to compel as illustrative examples in lieu of seeking to compel all the documents in Plaintiffs' three broad categories, we will take that proposal back to our clients. Defendants are unwilling, however, to consider waiving the privilege over the documents you identified in your motion as illustrative examples if Plaintiffs intend to continue to seek disclosure of all deliberative documents falling within Plaintiffs' three broad categories.

If our understanding is correct that Plaintiffs are unwilling to engage in such narrowing, Defendants believe that the remainder of Plaintiffs' September 17 email is overcome by the Magistrate Judge's Order directing the parties to file supplemental briefs.

Best regards,
Courtney

Courtney Enlow
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W., Room 12102
Washington, D.C. 20005
(202) 616-8467
courtney.d.enlow@usdoj.gov

From: Lampros, Nicholas M. <nlampros@cov.com>
Sent: Tuesday, September 17, 2019 3:08 PM
To: Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Kies, Marianne <MKies@cov.com>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>

Subject: RE: Stone v. Trump

Courtney,

We write following from yesterday's phone call, during which we conferred regarding the appropriate next steps following from the Court's Order of September 3. As discussed, it is Plaintiffs' position that the categories of documents defined in Plaintiffs' motion to compel are appropriately tailored under the *Cipollone* factors, and that the Court's Order places the burden on Defendants to argue before the Magistrate Judge "that Plaintiffs should more narrowly define the categories of documents" subject to Plaintiffs' motion to compel. *See* ECF 267 at 10. Based on our conversation, our understanding is that Defendants refuse to provide any more narrow definition of those categories, and instead take the position that they still need not produce any documents subject to the three categories of documents sought by Plaintiffs' motion to compel. Given the dispute on this point, we reiterate our proposal that the parties provide supplemental briefing to the Magistrate Judge to assist with resolving these issues, and request that Defendants agree to the following briefing schedule:

- Plaintiffs' opening brief to be filed no later than October 11;
- Defendants' response brief to be filed no later than November 1; and
- Plaintiffs' reply brief to be filed no later than November 22.

We see no reason to delay briefing here based on the September 13 order issued by the court in the related *Doe* litigation. If Defendants agree to produce documents subject to the *Doe* order that are also subject to Plaintiffs' motion to compel, the parties can report to the Magistrate Judge that their dispute as to such documents is moot. If Defendants refuse to produce such documents, the dispute will remain ripe for resolution. In either event, the court in *Doe* did not consider all of the categories of documents subject to Plaintiffs' motion to compel, so some dispute will remain.

As we also discussed, Plaintiffs request in the interim that Defendants produce all of the specific documents that Plaintiffs have already identified by bates number or other specific identifier in the briefing on Plaintiffs' motion to compel (and related objection and stay proceedings) and Defendants' motion for reconsideration. Given that these documents already have been identified with highly-specific detail, there is no reason why Defendants should not produce such documents now while the parties continue to resolve their larger disputes regarding the categories for which these documents represent illustrative examples.

Best,

Nicholas Lampros

Covington & Burling LLP
1999 Avenue of the Stars
Los Angeles, CA 90067-4643
T +1 424 332 4755 | nlampros@cov.com
www.cov.com

COVINGTON

From: Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>
Sent: Wednesday, September 11, 2019 11:14 AM
To: Kies, Marianne <MKies@cov.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Cheung, Ashley (CIV) <Ashley.Cheung@usdoj.gov>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>; Lampros, Nicholas M. <nlampros@cov.com>
Subject: RE: Stone v. Trump

[EXTERNAL]
Thanks, Marianne. We look forward to talking with you on Monday.

From: Kies, Marianne <MKies@cov.com>
Sent: Tuesday, September 10, 2019 9:06 PM
To: Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>; Lampros, Nicholas M. <nlampros@cov.com>
Subject: RE: Stone v. Trump

Hi Courtney,

Yes, I just sent around a dial-in.

Regards,
Marianne

Marianne Kies

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5005 | mkies@cov.com
www.cov.com

COVINGTON

From: Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>
Sent: Monday, September 09, 2019 2:39 PM
To: Kies, Marianne <MKies@cov.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Cheung, Ashley (CIV) <Ashley.Cheung@usdoj.gov>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>; Lampros,

Nicholas M. <nlampros@cov.com>
Subject: RE: Stone v. Trump

[EXTERNAL]
Marianne,

We are available from 1-4 on Monday, September 16. If that works for folks on your end, can you please circulate a dial-in?

Best regards,
Courtney

Courtney Enlow
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W., Room 12102
Washington, D.C. 20005
(202) 616-8467
courtney.d.enlow@usdoj.gov

From: Kies, Marianne <MKies@cov.com>
Sent: Monday, September 09, 2019 2:25 PM
To: Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>; Lampros, Nicholas M. <nlampros@cov.com>
Subject: RE: Stone v. Trump

Courtney,

Can you please let us know your availability to confer on Monday, September 16?

Best,
Marianne

Marianne Kies

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5005 | mkies@cov.com
www.cov.com

COVINGTON

From: Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>
Sent: Monday, September 09, 2019 10:06 AM
To: Kies, Marianne <MKies@cov.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Cheung, Ashley (CIV) <Ashley.Cheung@usdoj.gov>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>; Lampros, Nicholas M. <nlampros@cov.com>
Subject: RE: Stone v. Trump

[EXTERNAL]
Good morning Marianne,

I am not in the office on Friday, but I am available to confer tomorrow before 3:00 or Wednesday before 4:00. If you are not available either day, I am available next week to discuss. At the same time, we would like to discuss extending the deposition deadline.

Best regards,
Courtney

Courtney Enlow
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W., Room 12102
Washington, D.C. 20005
(202) 616-8467
courtney.d.enlow@usdoj.gov

From: Kies, Marianne <MKies@cov.com>
Sent: Sunday, September 08, 2019 6:28 PM
To: Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>
Cc: Corwin, Carolyn <ccorwin@cov.com>; Kamin, Mitchell A <MKamin@cov.com>; Lampros, Nicholas M. <nlampros@cov.com>
Subject: Stone v. Trump

Courtney,

As you know, last week the District Court vacated in part the Magistrate Judge's August 14, 2018 Order and remanded to the Magistrate to "apply the Cipollone factors to the categories of documents Plaintiffs seek in their Motion to Compel and permit Defendants to argue that Plaintiffs should more narrowly define the categories of documents." ECF 267 at 10. We would like to confer with you. Are you available on Friday?

Thanks,
Marianne

Marianne Kies

Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5005 | mkies@cov.com
www.cov.com

COVINGTON

Exhibit C

Email from Margaret Wilmoth to Karen Guice,

dated October 15, 2015

From: Krueger, Mary V COL USARMY HQDA ASA MRA (US)
To: Biggerstaff, William C (Casey) MAJ USARMY 3 ID (USA)
Subject: FW: JHU Psychiatrist (UNCLASSIFIED)
Date:

CLASSIFICATION: UNCLASSIFIED

Casey,

v/r
MVK

-----Original Message-----
From: Guice, Karen S SES (US)
Sent: Friday, October 16, 2015 10:23 AM
To: Wilmoth, Margaret C MG USARMY (US) <margaret.c.wilmoth.mil@mail.mil>; Allen, Roosevelt Jr Maj Gen USAF AF-SG (US) <roosevelt.allen4.mil@mail.mil>; Iverson, Kenneth J RDML USN BUMED FCH VA (US) <kenneth.j.iverson.mil@mail.mil>
Cc: Krueger, Mary V COL USARMY HQDA ASA MRA (US) <mary.v.krueger.mil@mail.mil>
Subject: RE: JHU Psychiatrist (UNCLASSIFIED)

Peggy:

Thank you for the reference. I do not believe the prior experts were advocates; rather they were experienced specialists who provide care to this population. Sec. Carson has asked me to vet each expert prior to inviting them to the WG. I have identified some behavioral health experts and will put your referred individual in the mix for my interview.

-----Original Message-----
From: Wilmoth, Margaret C MG USARMY (US)
Sent: Thursday, October 15, 2015 7:58 PM
To: Guice, Karen S SES (US); Allen, Roosevelt Jr Maj Gen USAF AF-SG (US); Iverson, Kenneth J RDML USN BUMED FCH VA (US)
Cc: Krueger, Mary V COL USARMY HQDA ASA MRA (US)
Subject: JHU Psychiatrist (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Dr. Guice and colleagues,

I understand that a BH expert will be coming to one of the TG Work group meetings. All of the speakers we have had speak come from an advocacy perspective.

I have learned of a Johns Hopkins psychiatrist, Dr. Paul R. McHugh, who might view the BH aspects of TG from the opposite perspective which I believe might help us in providing the Senior leader group with the opportunity to have hear from all sides of the issue. Using the "Abilene" analogy, I would rather we get to a decision knowing how we got there by hearing from all sides of this important decision rather than just hearing from advocates.

He is an Emeritus professor at Hopkins; his contact info can be found at:
www.hopkinsmedicine.org/profiles/results/directory/profile/0003340/paul-mchugh
I am happy to contact him on behalf of the group.
Thoughts?

v/r
Peggy

Margaret C. Wilmoth, PhD, MSS, RN, FAAN
Major General
Deputy Surgeon General for Mobilization, Readiness and
Army Reserve Affairs
Office of the Surgeon General

Cell: [redacted]
Office: 703-681-8151/6298
Email: Margaret.C.Wilmoth.mil@mail.mil

Classification: UNCLASSIFIED
Caveats: FOUO

CLASSIFICATION: UNCLASSIFIED