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Clerk of Court

February 11, 2020

No.:	20-70365
D.C. No.:	2:17-cv-01297-MJP
Short Title:	Donald Trump, et al v. USDC-WAWSE

Dear Petitioners/Counsel

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to FRAP Rule 21(b), no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.

No. 20-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,

Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION;

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY MOTION FOR STAY PENDING CONSIDERATION OF THE PETITION

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the petition, the district court on Friday, February 7, 2020, ordered the government defendants to produce by Friday, February 14, 2020, tens of thousands documents withheld under the deliberative process privilege that would reveal the military's internal deliberations regarding military service by transgender individuals and individuals with gender dysphoria. In so doing, the district court flouted a prior order of this Court that granted a writ of mandamus and vacated a previous discovery order encompassing many of the same documents, and again intruded on the government's decisionmaking process regarding military policies. And the district court has done all of this without even considering the fact that the government has already produced nearly 40,000 documents in discovery, including a complete, unredacted Administrative Record of the documents relied on by the panel of experts charged with developing the challenged policy, as well as all deliberative documents of the panel. The government produced the majority of these deliberative documents pursuant to an order by the U.S. District Court for the District of Columbia, in another challenge to the Mattis policy—even though the

government disagrees with that order—after that court concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the panel of experts in the development of the Mattis policy. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019). In addition, the government has produced the deliberative documents of the sole non-voting member of the panel of experts pursuant to the district court's December 18, 2019 order, despite disagreeing with the court's conclusion.

This Court's immediate correction is required. This Court should grant a stay pending consideration of the petition for a writ of mandamus as expeditiously as possible. The government also requests an administrative stay by the close of business on Wednesday, February 12, 2020 to permit this Court's full consideration of the stay motion or at the very least for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court if necessary.

(3) When and how counsel notified

Government counsel notified plaintiffs' counsel by email on Monday, February 10, 2020 of the government's intent to file this petition and stay motion. Service on plaintiffs will be effected by email. Counsel Jordan M. Heinz, on behalf of plaintiffs and plaintiff-intervenor, has indicated that they take no position on the government's request for an administrative stay but intend to file an opposition to the request for a stay pending disposition of the mandamus petition.

(4) Submissions to the district court

The district court granted plaintiffs' renewed motion to compel discovery of documents withheld under the deliberative process privilege, which the government opposed. Add. 1-6, 46, 78-85, 132-38. The court ordered the government to turn over nearly every document withheld solely under the deliberative process privilege. *Id.* On January 24, 2020, the government moved for a stay in district court. Doc. 405. Additionally, the government orally requested a stay of the court's orders while it considered whether to file this petition. The court denied the stay motions from the bench at a hearing on February 3, 2020 and in its February 7, 2020 order. Add. 5-6; *see* Add. 25:10, 30:11.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Federal Rule of Appellate Procedure 21, the federal government respectfully petitions this Court to issue a writ of mandamus directing the district court to reverse or to vacate its orders of December 18, 2019, February 3, 2020, and February 7, 2020, which conclude that the deliberative process privilege has been overcome as to tens of thousands of deliberative documents related to the military's consideration of policies regarding service by transgender individuals and individuals with gender dysphoria. *See* Add. 1-6, 46, 78-85. The district court has denied a stay of its orders and has required production of documents within just one week—that is, by this Friday, February 14. Add. 5-6, 25:10, 30:11. Accordingly, we ask for a stay pending consideration of this mandamus petition and we also request an immediate administrative stay by the close of business on Wednesday, February 12, 2020, pending this Court's full consideration of the stay motion, or at the very least for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court if necessary. Opposing counsel has indicated that they take no position on the government's request for an administrative stay but intend to file an opposition to the request for a stay.

The district court's orders flout a prior order of this Court that granted a writ of mandamus and vacated a previous discovery order encompassing many of the same documents. *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam). As in its prior ruling, the district court has ordered disclosure of deliberative process privileged

documents for which plaintiffs have demonstrated no material need, and without giving any meaningful weight to the impact of its intrusion on the military's significant confidentiality interests.

1. Plaintiffs challenge the constitutionality of the military's current policy regarding service by transgender individuals and individuals with gender dysphoria. That policy resulted from the recommendations of a panel of experts (Panel) charged with conducting "an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Add. 180 (quotation omitted). The Panel's recommendations were adopted in their entirety by then-Secretary of Defense James Mattis for reasons laid out in a detailed report, and the military implemented the present Mattis policy. *See* Add. 145-59, 160-62.

In 2018, the district court issued a sweeping discovery order overruling all claims of deliberative process privilege as to any aspect of the military's consideration of its policies concerning service by transgender individuals and individuals with gender dysphoria. Doc. 299. This Court blocked that order, however, issuing a writ of mandamus vacating the district court's discovery ruling, and it also vacated on appeal the preliminary injunction the district court had issued against the Mattis policy. *Karnoski*, 926 F.3d at 1187. The Court stressed the district court's error in conducting "a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* at 1206. The Court "direct[ed] the district court to reconsider

discovery by giving careful consideration to executive branch privileges," *id.* at 1187, emphasizing that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests," *id.* at 1206.

2. At the time of this Court's opinion, plaintiffs had obtained no documents revealing the deliberations of the Panel. Since that time, the government has produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel that formulated the Mattis policy. The government produced the deliberative documents of the voting members of the Panel pursuant to an order by the U.S. District Court for the District of Columbia, in another challenge to the Mattis policy. Even though the government disagrees with that order, that court concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the Panel in the development of the Mattis policy. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019). The government also produced the deliberative documents of the sole non-voting member of the Panel pursuant to this district court's December 18, 2019 order, despite disagreeing with the court's conclusion.

Whatever the asserted need for privileged documents may have been in 2018, it has been radically diminished by the disclosure of every aspect of the Panel's deliberations. Under this Court's opinion, which reflects settled law, it was, at a minimum, incumbent on the district court to evaluate the current record and determine whether there is any aspect of it that fails to furnish an adequate basis for

judicial review. Even then, if the record were found deficient in some respect, discovery would be properly tailored to that identified need.

Instead, the district court made no attempt to evaluate the new disclosures, and instead largely reinstated the discovery order vacated by this Court. The extent to which the district court abdicated its responsibilities is illustrated by its order to disclose even deliberative documents "never seen or reviewed by" and never "shared with the Panel," Add. 5-6, as well as the deliberations involved in the development of an Obama administration policy not challenged in this litigation. And the court underscored its disregard of the fundamental protections of the deliberative process privilege by concluding that it had been overcome without any showing of need for the iterative drafts of the Department of Defense's report conveying the Panel's recommendation. The documents already produced demonstrate that the Panel's recommendations were the same policy adopted in the report, in Secretary Mattis's memorandum presenting the policy to the President, and in the Department of Defense's eventual directive implementing the Mattis policy. Accordingly, plaintiffs have no need for the drafts of the report, which would divulge core deliberations without in any way providing plaintiffs with material evidence. The order also necessarily concludes that the privilege has been overcome as to documents from the highest levels of the Department, including Secretary Mattis's personal notes on a draft of the Department's report.

The district court likewise erred in entirely discounting the chilling effect of its order on the ground that "any chilling effect of disclosure can be somewhat assuaged by" a protective order and other limitations on public disclosure. Add. 83 (quotation omitted). But there was a protective order in place at the time of this Court's prior ruling, *see* Doc. 183, and this Court recognized that the district court had relied on the protective order in concluding that the harms could "be mitigated by the existing protective order in this case." *Karnoski*, 926 F.3d at 1197. This Court did not find that sufficient, and the interest in protecting frank exchanges of views is not protected by ordering their disclosure to opposing counsel who may, of course, use the documents in litigation. Assuming that a protective order "assuage[s]" a chilling effect at all, it does not avert the harm that the privilege is designed to prevent.

This Court's review is plainly warranted. This Court should reverse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020, and order that plaintiffs are not entitled to any further deliberative documents from the two requests for production (RFPs) at issue in these orders—RFP 29 and RFP 15—given plaintiffs' inadequate showing of need under the proper standard for overcoming the deliberative process privilege. In the alternative, this Court should vacate the district court's orders and order the district court to conduct a more granular analysis that properly considers plaintiffs' purported need for the deliberative documents and the government's interest in confidentiality.

STATEMENT

The factual and legal background of this litigation is set out in detail in this Court's prior opinion. We summarize that background below as it relates to the district court's December 18, 2019, February 3, 2020, and February 7, 2020 discovery orders.

A. Background

1. At this point in the litigation, plaintiffs challenge the constitutionality of the military's policy regarding military service by transgender individuals and individuals with gender dysphoria adopted by Secretary Mattis in February 2018. *See* Add. 145-59, 160-62. The Secretary issued the current Mattis policy after two prior developments regarding the military's longstanding "categorical ban on retention of transgender service members" and their accession into the military. *Karnoski v. Trump*, 926 F.3d 1180, 1187-88 (9th Cir. 2019) (per curiam).

First, in June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to revise their standards to permit military service by transgender individuals under certain circumstances, depending on whether the individual had been diagnosed with "gender dysphoria," a condition involving "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc. 224-2, at 12-13, 21; *see Doe 2 v. Shanahan*, 917 F.3d 694, 710-11 (D.C. Cir. 2019) (Williams, J., concurring) (describing Carter policy).

Second, in July 2017, the President stated on Twitter that "[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity." *Karnoski*, 926 F.3d at 1188 (quotation omitted). The President then issued a memorandum calling for further study of this issue and directing the military to "return to the longstanding policy" barring service by transgender individuals in the meantime. *Id.* at 1189 (quotation omitted). The President also made clear, however, that the Secretary of Defense could "advise me at any time, in writing, that a change to this policy is warranted." *Id.* at 1189 n.5 (quotation omitted).

2. To determine whether and to what extent policy changes were appropriate, Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Add. 180 (quotation omitted). The Panel consisted of voting members drawn from senior military leadership and one non-voting member, then-Under Secretary of Defense for Personnel and Readiness Robert Wilkie. Add. 143, 181. Through thirteen meetings over ninety days, the Panel met with commanders of transgender servicemembers, military medical professionals, civilian medical professionals, and transgender servicemembers themselves. *See Karnoski*, 926 F.3d at 1191. The Panel reviewed information regarding gender dysphoria and its treatment, as well as data collected after the announcement of the Carter policy. *Id.*

The Panel also received briefings from three "working groups" dedicated to issues involving personnel, medical treatment, and military lethality. Add. 181. The Transgender Service Policy Working Group was comprised of medical and personnel experts from across the Department of Defense. *Id.* The Medical and Personnel Executive Steering Committee was comprised of the Service Surgeons General and Service Personnel Chiefs. *Id.* A third working group focused on the lethality of the armed forces. *Id.*

The Panel provided Secretary Mattis with a recommended new policy, *see* Add. 208-09, which the Secretary adopted in full. *See* Add. 181 (confirming that the Department's "policy [is] consistent with [the Panel's] recommendations"). As this Court observed, the Mattis policy differed from both the Carter policy and the longstanding policy announced in the President's 2017 memorandum. *See Karnoski*, 926 F.3d at 1192, 1199. The Mattis policy does not prohibit transgender persons from serving in the military and permits those accessed under the Carter policy to remain in the military. *See* Add. 182 (providing "[t]ransgender persons should not be disqualified from service solely on account of their transgender status" and "honor[ing] its commitment to current Service members" under the Carter policy"). It differs from the Carter policy in requiring a longer period of "stability" for individuals with a history of gender dysphoria before they may access into the military and in making ineligible for accession individuals who require or have undergone gender transition. *See Doe 2*, 917 F.3d at 711-12 (Williams, J., concurring). The Mattis

policy also "reinstated the prior military practice of requiring that 'all' individuals serve in their 'biological sex,'" with an exception for those "'diagnosed with gender dysphoria' under the Carter policy." *Id.*

Secretary Mattis conveyed his proposed policy to the President in a memorandum accompanied by the Department of Defense's Report and Recommendations on Military Service by Transgender Persons (Report), which detailed the bases for the Department's recommended new policy. *See* Add. 160-62 (memorandum from Secretary Mattis to President conveying Department of Defense's recommendation). The Secretary requested that the President "revoke" his 2017 memorandum to permit the military to adopt the new policy. Add. 162. On March 23, 2018, the President revoked the 2017 memorandum, permitting the military to adopt the Mattis policy, and that policy is now in effect, after the Supreme Court stayed the preliminary injunction entered by the district court. *See Karnoski*, 926 F.3d at 1187; Add. 145-59.

B. Prior Proceedings

1. Plaintiffs filed this action in August 2017 to challenge the July 2017 Twitter announcement and the 2017 presidential memorandum. Doc. 1, 30. The district court preliminarily enjoined the implementation of those directives in December 2017. Doc. 103. In April 2018, the court extended the injunction to the Mattis policy, stating that the Mattis policy "do[es] not substantively rescind or revoke the

Ban [announced in the President's 2017 memorandum], but instead threaten[s] the very same violations." Doc. 233, at 12.

Plaintiffs served broad discovery requests that sought, *inter alia*, "all documents and communications" relating to the military's deliberations on service by transgender individuals. *See* Doc. 246-2, at 1, 4; Doc. 269-2, at 2-3 (capitalization omitted); *see also* Doc. 381-9. The government initially produced approximately 30,000 non-privileged documents and a partially redacted Administrative Record. *See* Doc. 370, at 11 (currently, 38,000 non-privileged documents). It withheld thousands of documents protected by the deliberative process privilege. In May 2018, plaintiffs moved to compel discovery of all documents withheld under the deliberative process privilege. If produced, those documents could have been disclosed under a protective order that limited public access and restricted the use of the documents to litigation. *See* Doc. 183, at 2-3.

On July 27, 2018, without evaluating the applicability of the privilege to any particular document or category of documents, the district court granted plaintiffs' motion to compel and ordered the government to produce all "documents that have been withheld solely under the deliberative process privilege." Doc. 299, at 11. The government appealed from the preliminary injunction enjoining the Mattis policy and sought a writ of mandamus directing the district court to vacate its discovery order.

2. This Court vacated the injunction, holding that the Mattis policy "is significantly different from the" President's 2017 memorandum barring transgender

individuals from serving "in both its creation and its specific provision." *Karnoski*, 926 F.3d at 1199. It also issued a writ of mandamus vacating the district court's discovery order. *Id.* at 1203-08.

The Court directed the district court to "reconsider discovery by giving careful consideration to executive branch privileges as set forth in" *Federal Trade Commission v. Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984) (per curiam). *Karnoski*, 926 F.3d at 1187. The Court explained that in determining whether plaintiffs' need for the deliberative materials overrides the government's interest in non-disclosure, the district court should balance the four *Warner* factors: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussions regarding contemplated policies and decisions." *Id.* at 1206 (quoting *Warner*, 742 F.2d at 1161).

The Court faulted the district court for "conduct[ing] a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Karnoski*, 926 F.3d at 1206. Relatedly, the Court made clear that "in balancing the *Warner* factors, the district should consider classes of documents separately when appropriate." *Id.* For example, the Court explained that "[d]ocuments involving the most senior executive branch officials . . . may require greater deference." *Id.* The Court also emphasized that the potential chilling effect of disclosure "deserves careful consideration, because

the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Id.* The Court recognized that there was a protective order in place. *Id.* at 1197. But the Court nonetheless found "the existing record" inadequate "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.* at 1206.

C. Proceedings on Remand

1. At the time of this Court's decision, plaintiffs had received no discovery regarding the deliberations of the Panel that formulated the Mattis policy. That situation has since altered radically.

In September 2019, the U.S. District Court for the District of Columbia, in another challenge to the Mattis policy, concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the Panel in the development of the Mattis policy. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019). Although the government disagrees with the *Doe* court's order, that order was narrower and more tailored than the sweeping district court orders at issue here, and thus the government complied rather than seek mandamus review. Pursuant to the cross-use agreement among the plaintiffs in the related cases challenging the Mattis policy, *see* Doc. 183, the government informed the district court and plaintiffs here that it would produce an unredacted version of the Administrative Record, unredacted meeting minutes from

the Panel, and deliberative documents and communications to, from, generated by, presented to, or reviewed by voting members of the Panel. Doc. 389, at 1. The government explained that, with the disclosure of these documents, plaintiffs now have "all documents actually considered by these Panel members in the development of the Mattis Plan and their deliberations concerning these documents." *Id.* at 2.

While this production was in progress, the district court, on November 19, 2019, ordered plaintiffs to provide a list of prioritized requests for production (RFPs) for the disclosure of additional deliberative materials. Add. 137-38. Two of plaintiffs' prioritized requests—RFP 29 and RFP 15—comprise nearly all the deliberative documents still withheld in this case. RFP 29 requests:

> All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

Doc. 269-2, at 2. RFP 29 thus encompasses all deliberative documents from September 14, 2017 (the date the Panel was established) to February 22, 2018 (the date of the Department's Report). Add. 143.

RFP 15 does not purport to bear on the deliberations of the Panel at all. Instead it asks for:

> All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

Doc. 246-2, at 3 (referencing the Carter policy).

Given their broad framing, the RFPs encompass privileged, deliberative documents from "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 from two administrations, across numerous ranks, positions, and areas of professional expertise over a period of four years." Doc. 398, at 3-4.

2. On December 18, 2019, the district court granted plaintiffs' motion to compel production of *all* deliberative documents responsive to RFP 29. Add. 84. Although the government had been producing all deliberative materials considered by the Panel in response to the *Doe* order (and was set to complete production on December 20), *see* Add. 139, and although the court noted that it "adopted the reasoning and conclusions" of the *Doe* order, Add. 80, the court did not consider that

production in assessing plaintiffs' purported need for additional deliberative materials. *See* Add. 81-84.

Instead, the district court addressed only two subsets of the roughly 22,000 deliberative documents responsive to RFP 29. Add. 82. First, the court concluded that the privilege had been overcome as to "the work and communications of" Under Secretary Wilkie, the sole non-voting member of the Panel. Add. 82-83. These documents have since been produced and are no longer at issue. *See* Add. 143 (setting production no later than January 31, 2020).

Second, the district court concluded that the privilege had been overcome for "drafts created by officials in the Office of the Under Secretary of Defense, who were tasked with writing the Report and Recommendation after the Panel concluded its work." Add. 82. The court believed that drafts of the Report are "relevant to assessing whether the Ban was implemented in reliance on the independent recommendations of the Panel." Add. 82-83. The court addressed the chilling effect resulting from the disclosure by stating that any risk to "future deliberations" could "be mitigated with a protective order." Add. 83-84.

3. The government initially understood the district court's order to encompass only the Wilkie documents and the drafts of the Report addressed in the court's order, which alone would mark a significant intrusion into the Department of Defense's decisionmaking. But plaintiffs, on January 10 and 17, 2020, indicated that they interpreted the court's order to have overcome the deliberative process privilege as to

over 22,000 documents spanning a period of five months, encompassing all deliberative documents broadly "relating or referring" to the Report—including documents never sent from, received by, generated by, presented to, or considered by any member of the Panel. Add. 144; *see* Doc. 405, at 5.

The government moved for clarification and, in the alternative, a stay of the order as applied to documents other than those related to the Panel's sole non-voting member. *See* Doc. 405. The government further explained that prior discovery demonstrated that the Panel's recommendations were adopted in full under the Mattis policy, that the Report adopted the Panel's recommendations, that Secretary Mattis conveyed those recommendations in the Report to the President, and that the Department of Defense implemented those recommendations. *Id.* at 8-10. Thus, the deliberative drafts of the Report could not be relevant to understanding whether the Mattis policy "was implemented in reliance on the independent recommendations of the Panel." Add. 83.

On February 3, 2020, the district court held a hearing on the government's motion for clarification. *See* Add. 7-77. In that hearing, the court indicated that the government's understanding of the order was incorrect. *See* Add. 20:17-19. The written order that followed requires the government to produce within seven days (by February 14, 2020) "all documents responsive to Request for Production 29," including: "[a]ll responsive working group communications, including communications that were never seen or reviewed by the Panel"; "all responsive data

reviewed by members of the working groups or members of the services, including data that was never seen or reviewed by the Panel"; and "all responsive communications among members of the [military] services, regardless of whether those communications were shared with the Panel." Add. 5-6. The court asserted, without explanation, that plaintiffs had shown a need for deliberative material never seen by the Panel because "understanding the decision-making regarding what information the working groups or anyone within the services chose to withhold from the Panel is relevant to evaluating Defendants' argument that the Panel's decision was based on the 'study of relevant data and information.'" Add. 4; *see* Add. 15:17-16:2. And the district court concluded that "the relevance of these documents outweighs any deference owed to members of the working groups or services, who were not 'the most senior executive branch officials.'" Add. 4 (quoting *Karnoski*, 926 F.3d at 1206).

During the February 3 hearing, the district court also ordered the government to produce thousands of privileged documents responsive to RFP 15, which encompasses all deliberative documents considered or reviewed by the advisory group that developed the Carter policy, along with all communications of the members of that advisory group. Add. 46:3-17. Although the Carter policy is no longer in effect and is not challenged in this litigation, the court declared these documents were "relevant" to permit plaintiffs "to compare and contrast" the decisionmaking processes that led to the Carter policy and the Mattis policy, respectively. Add. 46:1-2, 46:6-7, 46:15-17.

At the February 3 hearing, the district court preemptively denied a stay of its forthcoming order, and it confirmed that denial in its February 7 written order. Add. 5-6; *see* Add. 25:10 ("You're not going to get a stay."); Add. 30:11 ("The motion for the stay is being denied.").

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS MANDAMUS AUTHORITY TO CORRECT ORDERS THAT REQUIRE WHOLESALE DISCLOSURE OF MILITARY DELIBERATIONS.

A. Mandamus Review Is Appropriate.

In 2018, this Court issued a writ of mandamus in this case to vacate the district court's order that had abrogated, *en masse,* the government's deliberative process privilege with respect to tens of thousands of documents—many of the same documents at issue here. The Court explained that relief is warranted in a case of this kind where a petitioner has "no other adequate means to attain the relief desired," where the petitioner shows "that the right to the writ is clear and indisputable," and where "'the writ is appropriate under the circumstances.'" *Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019) (per curiam) (quoting *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004)). In making that determination, the Court considered "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated

error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." *Id.* These factors "serve as guidelines," and "[n]ot every factor need be present at once" or even "point in the same direction." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010).

The government has no alternative means of relief for the same reasons recognized by this Court in granting the government's prior petition for mandamus. As this Court previously recognized, mandamus relief is warranted because the "unique features" of "the deliberative process privilege . . . suggest that there is no other adequate means of relief." *Karnoski*, 926 F.3d at 1203. The damage resulting from the mass disclosure of deliberative materials from the district court's present orders—in particular, the chilling effect on future Department of Defense decisionmaking from that disclosure in litigation—cannot be undone.

Additionally, the district court committed clear and indisputable error by flouting this Court's prior mandamus opinion. The court spurned multiple opportunities to heed this Court's instructions to engage in a careful weighing of the "deliberative process privilege with Plaintiffs' need for certain information." *Karnoski*, 926 F.3d at 1206. There is "no doubt" that the district court had "a 'clear duty' to respond to [this Court's] remand," and it is appropriate "to issue a writ of mandamus to 'prevent the frustration of orders previously issued.'" *In re Core Commc'ns, Inc.*, 531

F.3d 849, 855-56 (D.C. Cir. 2008) (quoting *PEPCO v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983)).

B. The District Court's Orders Requiring Wholesale Disclosure Of Military Documents Subject To The Deliberative Process Privilege Ignore Settled Law And Disregard This Court's Instructions.

1. In 2018, the district court issued a discovery order that required disclosure of virtually all deliberative documents pertaining to the 2018 Mattis policy as well as all deliberative documents related to the already-superseded 2016 Carter policy. *See* Doc. 299. This Court vacated that order and directed the district court to closely consider plaintiffs' asserted need for any class of requested documents and the impact of their disclosure. *Karnoski*, 926 F.3d at 1206.

When this Court issued the writ of mandamus, plaintiffs had obtained no privileged documents relating to the deliberations of the Panel that developed the policy, which was adopted in its entirety by Secretary Mattis. Since then, the government has since produced—pursuant to orders of this district court and the *Doe* district court for which the government has not sought mandamus relief—every deliberative document sent from, received by, generated by, presented to, or considered by the Panel that formulated the Mattis policy. These include:

- An unredacted version of the Administrative Record;
- Unredacted meeting minutes from the Panel;
- All documents, testimony, and data reviewed by voting members of the Panel and the Panel's deliberations about these materials;
- All documents, testimony, and data reviewed by the non-voting member of the Panel and the Panel's deliberations about these materials;
- All documents and communications related to the Panel's work that were sent from, received by, generated by, presented to, or considered by the voting members of the Panel; and
- All documents and communications related to the Panel's work that were sent from, received by, generated by, presented to, or considered by the non-voting member of the Panel.

See Doc. 389, at 2; *see also Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019).

By any calculus, the disclosure of those documents radically alters plaintiffs' purported need for yet more privileged discovery. Plaintiffs do not need more to litigate the lawfulness of the Mattis policy. Federal courts routinely adjudicate the lawfulness of federal policies on far less extensive a record. Before proceeding further, it was incumbent on the district court to review these materials and determine whether there is any sound basis for permitting further discovery into the military's deliberations, and, if so, to tailor any such discovery to the particular identified need.

This Court's prior ruling makes clear that the district court could not properly order sweeping additional discovery without evaluating whether, in light of these disclosures, plaintiffs could demonstrate any specific need for any specific categories

of documents. The Court emphasized that to establish the availability of an "exception" to the deliberative process privilege, plaintiffs must demonstrate that their "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Karnoski*, 926 F.3d at 1206 (quoting *Federal Trade Commission v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam)). The district court had manifestly failed to respect this requirement by conducting "a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* The Court also made clear that the district court had failed to appreciate the strength of the government's interests in confidentiality, and it "direct[ed] the district court to reconsider discovery by giving careful consideration to executive branch privileges," *id.* at 1187, emphasizing that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests," *id.* at 1206; *accord id.* at 1207.

The Court's decision did not suggest that any additional discovery would necessarily be appropriate. To the contrary, this Court observed that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the Supreme Court had "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. It is enough that military policy has been "decided by the appropriate military officials" in an exercise of "their

considered professional judgment." *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). Indeed, for related reasons, the government maintains that the entire premise of discovery in this military case is incorrect. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring). In reviewing military policy, it is "quite wrong" for courts to "undertak[e] an independent evaluation of this evidence, rather than adopting an appropriately deferential examination" of the military's own "evaluation of that evidence." *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981). The Mattis policy is subject to the most deferential review, and as such, courts must assess the lawfulness of that policy on its own terms. *See Winter v. NRDC*, 555 U.S. 7, 24 (2008) (making clear that "great deference" is owed to "the professional judgment of military authorities"); *Hawaii*, 138 S. Ct. at 2419-20 (observing that judicial "inquiry into matters of . . . national security is highly constrained").

But even if discovery were appropriate in the military context, the district court's cavalier abrogation of the government's deliberative process privilege in these circumstances is indefensible. And the court's indiscriminate approach cannot be squared with this Court's prior ruling. *See Karnoski*, 926 F.3d at 1206. At this point, plaintiffs here have received not only the detailed Report setting forth the bases for the Mattis policy but also the full record of the Panel's deliberations. Nothing in this Court's decision suggests that any additional disclosures, much less the vast additional disclosures ordered by the district court, would be permissible.

2. In ordering disclosure of additional deliberative documents, the district court paid no heed to any of this Court's admonitions. It held the privilege had been overcome for tens of thousands of documents without a careful assessment of need and mistakenly believed that its order would have no chilling effect because the documents would be produced under a protective order. The district court seriously erred in both respects.

a. The district court misapprehended the showing of need required to overcome a valid claim of deliberative process privilege, and, instead, conflated the standard of need with the general standard for determining whether a document satisfies minimal standards of relevance. It is not enough that documents merely "relate" to the challenged policy. That is the baseline requirement for requesting *non*-privileged discovery. *See* Fed. R. Civ. P. 26(b) (permitting discovery of "any nonprivileged matter that is relevant to any party's claim or defense"). To overcome the deliberative process privilege, plaintiffs must instead establish a further "need for the materials." *Karnoski*, 926 F.3d at 1206. But the court's limited analysis, which covers only some of the documents at issue, identifies no need *at all* for the documents, much less a need sufficiently great to overcome the important interests protected by the privilege.

First, the district court identified no legitimate need for drafts of the Report and deliberative documents relating to the Mattis memorandum conveying the Report to the President. These are privileged deliberative drafts generated at the highest

levels of the Department of Defense. They include not only iterative drafts of the Report, including Secretary Mattis's handwritten comments on a draft Report, but also his personal notes on a draft letter to the President.

The district court cited nothing in the Report or in the discovery already obtained that would justify an extraordinary order requiring disclosure of such draft documents. The court asserted that the drafts were "relevant to assessing whether the Ban"—the court's intransigent label for the Mattis policy despite this Court's rejection of that characterization, *Karnoski*, 926 F.3d at 1199—"was implemented in reliance on the independent recommendations of the Panel." Add. 83. But as the government explained—and as the court did not question—the documents produced in discovery had already demonstrated that the Panel's recommendations were the same policy adopted in the Report to Secretary Mattis, in Secretary Mattis's memorandum presenting the policy to the President, and in the Department of Defense's eventual directive implementing the policy. *Compare* Add. 224-25 (memorandum to Secretary Mattis with the Panel's Recommendations), *with* Add. 179 (Department of Defense's Report "propos[ing] policy consistent with [the Panel's] recommendations"), Add. 177 (Secretary Mattis's memorandum providing that the new policy is "[b]ased on the work of the Panel"), *and* Add. 161 (Department of Defense's Directive implementing the Panel's recommendation). That the ultimate Mattis policy in fact reflects the Panel's original recommendations is not a point of dispute. *Compare* Add. 224, *with* Add. 161. Accordingly, plaintiffs have no need for drafts of the Report, which are

core deliberative materials, to understand whether the Mattis policy reflects the independent recommendations of the Panel. And if for any reason the district court had questions in this regard, they should have been resolved by consulting the documents already produced.

Second, the district court offered no plausible basis for ordering disclosure of all communications within the working groups and among all members of the armed services "relating or referring" to the Report, "regardless of whether those communications were shared with the Panel." Add. 6. Communications that were not provided to the Panel plainly had no role in its deliberations. And the court's explanation for ordering disclosure again encapsulates its misunderstanding of the standard for overcoming a proper claim of privilege. The court declared that "understanding the decision-making regarding what information the working groups or anyone within the services chose to withhold from the Panel is relevant to evaluating Defendants' argument that the Panel's decision was based on the 'study of relevant data and information.'" Add. 4; *see* Add. 15-16. The apparent premise of this ruling is that a broad conspiracy existed to ensure that the Panel did not receive relevant information. That assumption, which calls into question the integrity of dozens of military professionals, is wholly without basis and turns the presumption of regularity on its head. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). As the *Doe* district court in related litigation explained, the request for deliberative documents without any connection to Panel members amounts to an improper "fishing"

expedition. Doc. 405, at 7; *see Goldman*, 475 U.S. at 509 (holding that studies, experts, and evidence not actually before the military decisionmakers are "quite beside the point"). The court's ruling is particularly anomalous because it fails to appreciate that data collected and reviewed by the working groups and presented to the Panel have already been disclosed.[1]

Third, compounding its errors, the district court compelled the disclosure of thousands of additional deliberative documents responsive to RFP 15, which seeks all documents related to the formation of the Carter policy in 2016. Add. 45-46. The court declared that the deliberations concerning the Carter policy were "relevant" to the plaintiffs' comparison of the decisionmaking process for the Carter policy and that of the Mattis policy. *Id.* Even assuming that they were "relevant," the court identified no respect in which they are needed. The deliberations of the Panel that formulated the Mattis policy have been fully disclosed, and there is no basis for concluding that deliberations from the development of the Carter policy in 2016 that were not reviewed by the Panel would provide insight into the validity of plaintiffs' claim that the Mattis policy was the result of unconstitutional bias. *See Doe 2*, 917 F.3d at 729

[1] The government has represented that the military has "already produced all data, including cost data, that was presented to the Panel of Experts, as well as the underlying data utilized by the Military Services to formulate the data presented to the Panel of Experts," Doc. 408, at 21, and plaintiffs have never identified in the government's privilege logs other responsive and relevant working-group data that had been improperly withheld under the deliberative process privilege.

(Williams, J., concurring) (finding no need existed to obtain development of a previous policy simply for comparison purposes).

b. Just as the district court failed to examine plaintiffs' need for the documents, it similarly failed to consider the impact of the disclosures on the military's interests in protecting the confidentiality of its policy deliberations. As the Supreme Court has explained, disclosure of deliberative documents chills the willingness of government officials to engage in "open, frank discussion between subordinate and chief concerning administrative action." *EPA v. Mink*, 410 U.S. 73, 87 (1973). Indeed, the existence of the privilege rests on "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery." *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). In providing direction to the district court, this Court stressed that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests." *Karnoski*, 926 F.3d at 1206.

The government's declaration therefore explained that "[m]atters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests," and "[o]pinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process." Add. 157. "If [Department of Defense] personnel knew that their thoughts, impressions, and opinions . . . would be open to scrutiny, they may hesitate to provide their true

positions on potential courses of action, not just related to military personnel decisions but as to any politically sensitive decision that [the Department] faces in the future." Add. 159. That is especially so in the context of such controversial topics as military service by transgender individuals that require "delicate and candid communications." Add. 159.

These concerns apply with particular force to drafts of final decisions and reports. Were it otherwise, the threat of disclosure would severely inhibit the process of constructing the final document to be presented to the public. *See, e.g.*, *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 983 (9th Cir. 2009) (draft report was protected by the deliberative process privilege as its release "would expose the agency's internal deliberations in such a way that would discourage candid discussion and effective decisionmaking"); *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1120-22 (9th Cir. 1988) (holding that disclosure of draft documents was "inimical to [the privilege]'s goal of encouraging uninhibited decisionmaking"); *Dudman Commc'ns Corp. v. Department of Air Force*, 815 F.2d 1565, 1568-69 (D.C. Cir. 1987) (explaining that "[t]he danger of 'chilling' arises from disclosure that the Air Force as an institution made changes in a draft at some point").

Despite this Court's instruction that the potential chilling effect of disclosure "deserves careful consideration," *Karnoski*, 926 F.3d at 1206, the district court apparently believed that it need not engage in any analysis because "any chilling effect of disclosure can be 'somewhat assuaged' by" a protective order and other limitations

on public disclosure. Add. 6; *accord* Add. 7 ("[T]hese risks can be mitigated with a protective order."). But there was a protective order in place at the time of this Court's prior mandamus ruling, *see* Doc. 183, at 2-3, and this Court considered the district court's contention that the harms from disclosure could therefore "be mitigated by the existing protective order in this case." *Karnoski*, 926 F.3d at 1197. The district court's assumption, once again, that a protective order is sufficient to defeat the military's confidentiality interests only underscores that the court has repeatedly flouted this Court's guidance.

As this Court explained in granting mandamus in other litigation, moreover, "[a] protective order limiting dissemination" may "ameliorate but cannot eliminate" the chilling effects of disclosure. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009). It is cold comfort to those participating in the deliberative process to know that their candid advice will be disclosed to adversaries in litigation. *See Klamath Water Users*, 532 U.S. at 8-9. As the Department of Defense explained, "entry of a judicial protective order" does not prevent the use of such material in the litigation, and the knowledge that internal deliberations will be aired in litigation may well "influence the decision to abstain or provide less than complete candor during policy development." Add. 159. The district court did not explain why these concerns were unfounded, and, indeed, conflated its belief that a protective order would "somewhat assuage" the impact of disclosure with the clearly mistaken conclusion that a protective order

eliminated a chilling effect. *See* Add. 117:15-16 ("Well, with a protective order, I don't see that there's a chilling effect.").

The district court's passing suggestion in its February 7 order that any chilling effect is minimal because "members of the working groups or services" are "not 'the most senior executive branch officials'" misses the point. Add. 4 (quoting *Karnoski*, 926 F.3d at 1206). The deliberative process suffers profoundly when junior-level officials are chilled in giving candid advice. The court disregarded "the obvious realization" that there is a special concern that those who are not in chief policy roles "will not communicate candidly among themselves if each remark is a potential item of discovery." *Klamath Water Users*, 532 U.S. at 8-9. In any event, the court's orders *do* encompass documents from "senior executive branch officials" covered by RFP 29, including Secretary Mattis himself. *See supra* pp. 24-25.

3. In sum, the district court disregarded this Court's guidance and improperly ordered disclosure of documents protected by the deliberative process privilege for which plaintiffs have demonstrated no need. Mandamus is warranted because there is no imaginable need for documents not before the relevant military decisionmakers for the military policy at issue, let alone a need that could overcome the military's interests in confidentiality. This Court accordingly should reverse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020, and order that plaintiffs are not entitled to any further deliberative documents from the two RFPs at issue in these orders—RFP 29 and RFP 15—given plaintiffs' inadequate showing of need

under the proper standard for overcoming the deliberative process privilege. In the alternative, this Court should vacate those orders and direct the district court to conduct a more granular analysis that properly considers plaintiffs' purported need for the deliberative documents and the government's interest in confidentiality.

II. THIS COURT SHOULD GRANT A STAY PENDING REVIEW OF THE PETITION AND AN IMMEDIATE ADMINISTRATIVE STAY.

This Court should stay the district court's order pending its consideration of this petition and grant an immediate administrative stay pending its consideration of the stay motion, as it did in considering the government's prior stay request and mandamus petition in this case. *See* Order, *In re Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018). The Court commonly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.*, Order, *In re United States of America*, No. 17-72917 (9th Cir. Oct. 24, 2017) (staying discovery and record supplementation); *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1106 (9th Cir. 2005) (similar); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1104 (9th Cir. 1996) (similar).

A stay is necessary here to prevent disclosure of thousands of privileged communications regarding the military's deliberative process. Add. 5-6, 45-46, 84. No countervailing harm will result from granting a stay while this Court considers the government's petition. Plaintiffs already have a trove of discovery, and, as discussed,

they have demonstrated no need for the documents at issue here, much less urgent need that would be affected by a stay, let alone an administrative stay.

The government accordingly asks that the Court issue, as expeditiously as possible, a stay of the district court's order pending its consideration of the mandamus petition. The government also requests an administrative stay by the close of business on Wednesday, February 12, 2020 to permit this Court's full consideration of the stay motion, or at the very least for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court if necessary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of mandamus and reverse or vacate the orders of December 18, 2019, February 3, 2020, and February 7, 2020. In addition, the Court should grant a stay pending resolution of this petition, and the Court should also grant an immediate administrative stay—on which opposing counsel has indicated that they take no position—either pending consideration of the stay motion or at the very least for a reasonable period to permit relief from the Supreme Court if necessary.

Respectfully submitted,

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FEBRUARY 2020

STATEMENT OF RELATED CASES

Petitioners are aware of the prior mandamus proceedings in *In re Trump*, No. 18-72159 (9th Cir) *consolidated with Karnoski v. Trump*, No. 18-35347 (9th Cir.). Those proceedings arose from the same district court case as this petition for a writ of mandamus, and this Court's prior ruling is at issue with respect to the discovery orders challenged in this petition. *See Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam).

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 8,059, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, 14-point Garamond font.

s/ Ashley A. Cheung
ASHLEY A. CHEUNG

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via email to the following counsel:

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The district court has been provided with a copy of this petition for writ of mandamus pursuant Federal Rule of Appellate Procedure 21(a).

s/ Ashley A. Cheung
ASHLEY A. CHEUNG

No. 20-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,

Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION;

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

ADDENDUM TO PETITION FOR A WRIT OF MANDAMUS AND EMERGENCY MOTION FOR STAY

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DISTRICT COURT ORDERS AND TRANSCRIPTS

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI et al, Plaintiffs, v. DONALD J TRUMP et al, Defendants.	CASE NO. C17-1297 MJP ORDER GRANTING DEFENDANTS' MOTION FOR CLARIFICAITON; DENYING DEFENDANTS' MOTION FOR STAY

THIS MATTER comes before the Court on Defendants' Motion for Clarification and Motion for Stay In Re Dkt. 401. (Dkt. No. 405.) Having reviewed the Motions, and all related papers, the Court GRANTS Defendants' Motion for Clarification and DENIES Defendants' Motion for a Stay.

Background

The Parties are well-acquainted with the facts and procedural history of this case. Briefly, Defendants argue that their ban on transgender military service (the "Ban") is consistent with the recommendations of a "Panel of Experts" convened by former-Secretary of Defense James Mattis and tasked with "conduct[ing] an independent multi-disciplinary review and study

of relevant data and information pertaining to transgender Service members." (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) The Panel received its information from several working groups that gathered and sorted information before passing it along to the Panel. (Dkt. No. 402, December 10, 2019 Hr'g Tr. ("Hr'g Tr.") at 23:1-8; Dkt. No. 375 at 12, 18.)

On July 27, 2018 this Court granted Plaintiffs' Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299.) Defendants appealed, and on June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court's Order. Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019). The Ninth Circuit found that the record was insufficient to evaluate Defendants' privilege assertions and suggested that on remand this Court should "consider classes of documents separately when appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be proper, [the Court] should undertake it." Id.

On August 22, 2019, Plaintiffs filed a renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege (Dkt. No. 364). Noting that Defendants asserted the privilege as the sole basis for withholding or redacting 35,000 responsive documents, (Dkt. No. 394 at 3) and produced documents by creating and searching lists of terms and custodians, without responding to individual Requests for Production, (Dkt. No. 381, Ex. 1, Declaration of Robert E. Easton ("Easton Decl."), ¶ 5), the Court found that Defendants' production did not permit Plaintiffs or the Court to assess Defendants' privilege claims in the "granular" fashion mandated by the Ninth Circuit. (Dkt. No. 394 at 6-7.) The Court therefore ordered Defendants to begin producing documents responsive to Plaintiffs' Requests for Production and the Parties to periodically appear before the Court to review Defendants' deliberative process privilege assertions, in groupings of five Requests for Production at a time. (Id. at 6.)

On December 18, 2019 the Court issued an Order Granting Plaintiffs' Motion to Compel Documents Withheld Under the Deliberative Process Privilege pursuant to Plaintiffs' Requests for Production Nos. 15, 29, 33, 36, and 44. (Dkt. No. 401.) Relevant here, the Court ordered Defendants to produce:

1) All documents responsive to Request for Production No. 29, including the names, communications, and deliberative documents of non-voting members of the Panel; and

2) Drafts, communications, and documents created or relied upon by officials in the Undersecretary of Defense's Office in drafting the Report and Recommendations.

(Id. at 7.) Further, during the December 10, 2019 Status Conference, the Court directed Defendants to "supply [Plaintiffs] with the working group names, who's on the working group, the dialogue in e-mail or any other communication within those working groups, and the data that they produced. And the communications between those people on each working group." (Hr'g Tr. at 22:1-3.) Defendants now request clarification of the first part of the Court's Order and seek a stay of any part of the Order that requires Defendants to produce more than the "documents of Members of the Panel of Experts." (Dkt. No. 405 at 7, 11.)

Discussion

A. Motion for Clarification

Defendants ask the Court to clarify whether the first part of its December 19, 2019 Order requires Defendants to produce "communications solely between non-Panel members and other non-Panel members, or other documents non-Panel members never shared with Panel members." (Dkt. No. 405 at 7.) It does.

As stated in the Order, Defendants are required to produce "the names, communications, and deliberative documents of non-voting members of the Panel." (Dkt. No. 401 at 7.) This

includes the communications of members of the working groups and the data reviewed by these groups, discussed at length during the December 10, 2019 Status Conference, where the Court ordered Defendants to "supply the dialogue in e-mail or any other communication within those working groups, and the data that they produced."[1] (Hr'g Tr. at 22:1-3.) This also includes responsive communications among members of the services.[2] (Dkt. No. 412, Feb. 3, 2020 Hr'g Tr. at 17:22-18:15.)

The data collected and reviewed by the working groups is not deliberative and understanding the decision-making regarding what information the working groups or anyone within the services chose to withhold from the Panel is relevant to evaluating Defendants' argument that the Panel's decision was based on the "study of relevant data and information." (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Further, as noted by the Court during the December Status Conference, (Hr'g Tr. at 23:16-17), the relevance of these documents outweighs any deference owed to members of the working groups or services, who were not "the most senior executive branch officials." Karnoski, 926 F.3d at 1206. The Court therefore

[1] The Parties are advised that any Order from the Court must be read in the context of the Court's oral rulings during the discovery conferences.

[2] In the February 3, 2020 Status Conference, the Court provided Defendants with the following instruction:

> The other thing I would say is that under the civil rules, a motion to compel is not necessary. It is a motion to protect. If you've got documents out there that you believe are responsive but you're still withholding, you have the burden of bringing on the motion to protect. They don't have to move to compel. So among these thousands of documents, if you think that there is something out there that is responsive to this RFP, you've got to put it in a log and you've got to defend why it is that the deliberative privilege still applies. It's not the other way around. You have the documents. You can see what's there. They can't.
>
> And when you throw out ideas that maybe the services are offering up and saying this is the wrong data, of course that's responsive. If you think it's deliberative, you have to apply the privilege.
>
> So, let's go back and talk again. I'm going to issue an order that covers – we've covered now the first two categories, we're going to get to the third. If you think there's something else out there, because the order says you have to respond, it's your obligation to identify what it is, it's not theirs. Okay?

(Dkt. No. 412, Feb. 3, 2020 Hr'g Tr. at 17:20-18:15.)

GRANTS Defendants' Motion to Clarify the first part of its Order[3] regarding Request for Production No. 29.

B. Motion for Partial Stay

The Government also moves the Court for a stay of its December 19, 2019 Order, which required Defendants to produce all documents responsive to Request for Production No. 29. (Dkt. No. 401 at 7; Dkt. No. 405 at 8-11.) Because Plaintiffs have overcome the deliberative process privilege for these documents (see Section A, supra; Dkt. No. 401 at 5-7) and this dispute has been pending for nearly two years (Dkt. No. 245), the Court will not issue a stay for an unspecified amount of time while Defendants decide whether to appeal. (Dkt. No. 405 at 9.) This is an ongoing process and until the process is complete it is wasteful to appeal one segment at a time. Further, to the extent the Government's Motion is in fact a Motion for Reconsideration of the Court's December Order (see Dkt. No. 405 at 9-11), the Local Rules provide that motions for reconsideration must be filed "within fourteen days." LCR 7(h). The Government has missed its deadline.

Conclusion

Accordingly, the Court GRANTS Defendants' Motion for Clarification. Defendants are required to produce all documents responsive to Request for Production No. 29, this includes, but is not limited to:

(1) All responsive working group communications, including communications that were never seen or reviewed by the Panel;

[3] Defendants have not requested that the Court clarify the second part of its Order regarding drafts from the Undersecretary of Defense's Office and it declines to do so.

(2) all responsive data reviewed by members of the working groups or members of the services, including data that was never seen or reviewed by the Panel; and

(3) all responsive communications among members of the services, regardless of whether those communications were shared with the Panel.

Defendants are ORDERED to produce all documents responsive to Request for Production No. 29, including those documents from the categories above, within seven (7) days of the date of this Order. The Court DENIES Defendants' Motion for a Stay.

The clerk is ordered to provide copies of this order to all counsel.

Dated February 7, 2020.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,	C17-01297-MJP
Plaintiffs, and	SEATTLE, WASHINGTON
STATE OF WASHINGTON;	February 3, 2020
Plaintiff-Intervenor,	9:00 a.m.
v.	Status Hearing
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	
Defendants.	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For the Defendants:	James R. Powers Matthew Skurnik US Department of Justice 1100 L. Street NW Suite 12108 Washington, DC 20530

THE COURT: All right. This is the matter of Ryan Karnoski, State of Washington versus Donald Trump, et al., it's cause number 17-01297-MJP. Could I have everyone please identify themselves?

MR. SIEGFRIED: Dan Siegfried from Kirkland Ellis on behalf of the plaintiffs.

MR. HEINZ: Jordan Heinz for the plaintiffs.

MR. SYKES: Jason Sykes of Newman & DuWors, for the plaintiffs.

MS. ALA'ILIMA: Chalia Stallings-Ala-ilima, with the Attorney General's Office for plaintiff-intervenor, State of Washington.

THE COURT: Would you give me your name one more time?

MS. ALA'ILIMA: Chalia Stallings-Ala'ilima.

THE COURT: Stallings-Ala'ilima?

MS. ALA'ILIMA: Yes.

THE COURT: Thank you.

MS. BORELLI: Tara Borelli of Lambda Legal on behalf of the plaintiffs.

MR. POWERS: Jim Powers on behalf of the United States.

MR. SKURNIK: Matthew Skurnik on behalf of the defendant.

THE COURT: Okay. Where is Mr. Carmichael?

MR. SKURNIK: He's on Navy Reserve duty this week.

THE COURT: Okay. So I'm assuming you are ready to carry on and have read the materials so that you know what he's said previously?

MR. SKURNIK: Yes, Your Honor.

THE COURT: All right. We have a fair amount of work to do today. And I've had the opportunity to read your joint status report. I've also had the opportunity to read the transcript from the judge in Washington, D.C. I went back and reread the transcript from our meeting in December. I also have read the plaintiffs' motion for clarification. And I understand that there was some back-and-forth as to whether or not you wanted a conference call. You canceled the conference call in lieu of coming here today.

I would like to talk about that, because honestly, I believe the government is delaying and stalling. And when they say that they don't understand, they are not timely bringing their motions. If this is a motion for reconsideration, that has a 14-day time limit.

We sat here for two hours and I asked repeatedly if there was anything else. And Mr. Carmichael never, never indicated that he did not understand. The time goes past for production; nothing happens. And then he brings a motion for reconsideration -- or, quote, clarification. So his tactics tell me that he doesn't want to produce and he is using the

rules of civil procedure to delay this.

I have looked at the order and I see that if you do not read the order in conjunction with the transcript, you may be confused. And so I'm prepared to write a clarifying order within the next couple of days so that this can get back on track.

I think the key to understanding the order is going back to the transcript itself. And what I'm going to read from is the exchange I had with Mr. Carmichael that begins on page 22 -- I'm sorry, it begins on page 21:

So, "Court: All right. So here's another category of documents. What the working group did. Who is on the working groups. And the data that they produced and the communications between those people on each working group. What's the problem with that?

"Mr. Carmichael: We have to look at each specific one. So -- and I don't -- these ones, particularly because the *Doe* plaintiffs brought them up and they overlap them a little bit with 44. We're going ahead and doing it. But if there was another specific one, again, we have to figure out a way to identify just those specific documents. Like if there was the head of a particular working group and we have that person as a custodian, we may be able to isolate the documents in the system.

"Court: So just for the record, how many working groups

were there?

"Carmichael: I don't know that off the top of my head. I think it's in the report, the ones that work with -- the primary one is the panel of experts.

"Court: But I'm assuming that if you looked, you would be able to tell me what these various working groups are?

"Carmichael: Yes. And their involvement on the panel.

"Court: And they're a discrete number, four or five?

"Carmichael: Yes.

"Court: So those are people in the working groups who gathered data, put it together, communicated amongst themselves and passed the reports on to those who were voting, correct?

"Carmichael: In some instances; I mean, I think the deployability one didn't do it as much. I think they didn't overlap exactly. But that's information that we can provide as well, like when they started."

Drop down to line 22 on page 23. "Yeah, they wouldn't be" -- the court. I'm sorry, line 16.

"Court: And these folks are so far down the line that they're not deliberating at all. They are simply providing data, offering material up to those who are actually deliberating and making the decision?

"Mr. Carmichael: Yeah. They wouldn't be involved in the actual deliberations. I guess they would deliberate amongst

themselves as to how they're going to provide the data.

"Court: So how does the deliberative privilege apply at all?

"Mr. Carmichael: Our intent is to provide everything -- that is, all the data that they presented and how they got that. So that's our intent as we're going back and making sure that we provided all of that.

"Court: Okay. Well, intent is one thing, production is another. And as you reminded me, you have very little time left to do this. All right. So this is the next grouping that we're going to look at. You're going to supply them with the working group names, who's on the working group, the dialogue in e-mail, or any other communication within those working groups, and the data that they produced. I don't think the privilege applies at all there because these folks aren't deliberating, they are researchers providing information and having discussions amongst themselves, as I understand the way you just described it to me.

"Mr. Carmichael. They addressed other questions as well. And they're all not exactly the same. So I think for -- I mean, certainly it's something we would be willing to consider, but communications, everything besides communications we're already presenting. But if there was some deliberations --

"The Court: Well, we are past willing to consider. I'm

telling you, you are going to produce it."

So, "I'm telling you, you are going to produce it" seems pretty clear. And if you read the order in conjunction with that dialogue, is that what the plaintiffs are after, what I outlined?

MR. SIEGFRIED: Yes, Your Honor.

THE COURT: So what don't you understand?

MR. SKURNIK: So, Your Honor, we have produced all of the working-groups' materials that the working groups provided to the panel, all of the working groups communications with the panel, all presentations they made to the panel, all documents they shared with the panel. The only materials that we have not yet produced -- and we understood that that was what your order required, along with the documents from the non-voting member of the panel, which we've also produced.

So what we have not yet produced are communications between two individuals, whether on a working group or somewhere else, that were never shared with the panel, or documents that the panel members never saw, documents that were not presented to the panel.

And as to that category of materials, which were never shared with the panel, the panel never saw, the *Doe* court recently, the plaintiffs in that case asked for that exact, same material. Judge Kollar-Kotelly called it, quote,

fishing, and she rejected their request for those exact materials.

THE COURT: And how is her ruling precedent to mine?

MR. SKURNIK: It's not precedent. But this court has relied on the *Doe* ruling in both of its last two deliberative-process rulings. So in interpreting -- in trying to determine what the meaning of the court's order was, we certainly relied in part on the conclusions of the *Doe* court.

THE COURT: Well, I don't know -- I understand her arguments that she was presented with, which were not the same arguments that were made here. She also has to be constrained by what the district court -- what the circuit court has told her to do, which is different from what the Ninth Circuit has told me to do. And, honestly, I'm not so sure that what she says can inform what I meant.

So, I'm going to write an order that will encompass what I just quoted. The problem that I see with your argument is it is just as important what you don't produce to experts as what you do produce. It's my position that people who are sorting data, you can leave out studies that you don't think support your position. And that's what they're looking for.

I understand that you turned over the stuff that supports what the working groups gave to the panel members. But when you're looking at facts and you're looking at data, how you

sort it can be just as important. And that was the point of this dialogue.

So I'm going to issue an order. I want to hear from the plaintiffs as to whether they want to continue to write on it or if they want to write in response to the order that I put out.

MR. HEINZ: I think we'll write in response to the order that you put out. And just one other point. Mr. Skurnik spoke quite a bit about the information from the working groups and the information that was presented to the panel. We haven't talked about the set of documents after the panel ended their work and the Department of Defense then drafted the --

THE COURT: I haven't gotten to part two yet.

MR. HEINZ: Okay. I just didn't want that to get lost.

THE COURT: You're good to remind me of it. But I'm trying to clean up this part.

So is there anything that you misunderstand about what I've just said?

MR. SKURNIK: So, yes, Your Honor. So the plaintiff --

THE COURT: Yes, you don't understand; or, yes, you do understand?

MR. SKURNIK: There is something I don't understand,

Your Honor. And what that is, is during the course of meeting and conferring with the plaintiffs about the court's most recent order, the position that they've taken is that the order requires the government to produce all documents referring or relating to the Department of Defense's report and recommendation. That's the language they use in their RFP 29.

As we stated in the declaration of Mr. Easton, that's approximately 22,000 deliberative documents. So I just want to make sure that -- clarify whether it's that entire universe of documents -- essentially, every deliberative document from September 2017 to February 22, 2018 -- or if there's a more narrow universe that the court is ordering us to produce at this time.

THE COURT: Okay. Well, we already went through other categories that I said that the deliberative process is overcome. This is the one where we're talking about the working groups and the data that was collected.

I just told you -- or I told you in December that collecting data and doing research is not a deliberative process. So your privilege doesn't apply at all to the collection of data.

So I'm not understanding these 22,000 deliberative documents that you think you've got that you still haven't turned over. Who produced those documents? I mean, who are

they from?

MR. SKURNIK: It varies, Your Honor. So one group of them would be communications at the working-group level, say someone in a working group says: Hey, what if we tried Idea X, I think that would be a good idea. Someone else says: Oh, maybe that's not such a good idea. And that never makes it up to the panel.

Similarly at the services. Someone, say, in the Army says: Oh, what if we tried Idea X, I think that would be a good idea. Someone else in the Army says: Oh, yeah, that is or maybe that isn't a good idea. But that was never passed up to the panel.

THE COURT: That's exactly what they're looking for.

MR. SKURNIK: And at this time, that encompasses approximately 22,000 documents. And the way we've come up with that number is that plaintiffs have interpreted the order to cover all documents responsive to RFP 29, which is an incredibly broad RFP that encompasses essentially every deliberative document from September 2017 until February 22, 2018.

Now, if that's what the court is ordering, that's fine. I just want to make sure we understand exactly what the court is ordering so we don't have another clarification problem.

THE COURT: Well, then I think in December, I told you what you had to turn over. The working groups are data

gatherers. They are researchers. The conversations between them is part of gathering that data.

I want you to turn over who they are and the communications between them, the data that they reviewed and did not pass on, in addition to the data that they did. I mean, I'll say it again. So I don't know why 22,000 is some magic number. What are you trying to tell me there, that it's too much?

MR. SKURNIK: What I'm trying to do, Your Honor, is clarify exactly what documents we're talking about here. And the reason is is that plaintiffs, their interpretation of the order encompasses not just the working groups, but a much broader universe of deliberative documents, including, for instance, documents at the service level from folks who weren't even on working groups. And I guess as far as the individuals on the working groups, we've already produced all of that to plaintiffs in response to interrogatories. So they know all the individuals on working groups.

THE COURT: Plaintiff want to respond?

MR. SIEGFRIED: Sure. I guess so far all we've heard that this 22,000 encompasses is we've talked about three categories: The working-group documents that Your Honor just ordered them to produce and ordered them to produce back in December; the panel documents, which apparently are not included in the 22,000; and the post-panel documents. I

guess we don't understand what else there is, what else is encompassed in this 22,000.

MR. SKURNIK: So plaintiffs told us during the course of meeting and conferring that they believed the court's order required production of all documents responsive to RFP 29.

THE COURT: Um-hum.

MR. SKURNIK: Now, RFP 29 reads, "All documents or communications relating or referring to the February 2018 Department of Defense report and recommendations on military service by transgender persons." That's much broader than simply just working-group documents. That's essentially all documents within the Department of Defense and the military services across the 156 custodians from which we collected, any of those that we've withheld under the deliberative-process privilege during the relevant period.

THE COURT: But we spent two hours in December going through this. So we have the working group that I just spoke to you about. It's part of the transcript. We have the documents that concern those who are decisionmakers on the panel, including the one non-voting decisionmaker. And then, as we pointed out, we have the documents that after the decision is made, we have the documents that are used to draft the final report. Those are three discrete categories. I've told you that the first category, the working group, I

don't believe falls under the deliberative privilege. I already made a ruling on those who are the panel members. And in my last order, I also included the panel member who was non-voting.

In my December order I also included the post documents, which I'm assuming we're going to talk about in just a minute. What about that don't you understand?

MR. SKURNIK: So that makes sense to me, Your Honor. The issue is the plaintiffs have taken -- have contended that the court's order from December requires -- at least Part 1 of that order, which talked about non-voting members of the panel of experts -- that that requires not just working-group materials, but all deliberative materials during the relevant time period.

If the court's order is just the working-group materials, then we can find a way to identify those materials and that can be the scope of the order. But I just want to make sure we know exactly what the court is ordering so we don't have to -- so that there's no further confusion between the parties about what the order requires, precisely.

THE COURT: All right. Do we have an understanding?

MR. HEINZ: The problem is, Mr. Siegfried just asked, what else is there besides those three categories of documents within the 22,000? What else is there that you're withholding that you believe is not encompassed by her order

but is responsive to RFP 29?

MR. SKURNIK: For instance, any custodians from which we've collected that have deliberative documents that were not members of a working group.

MR. HEINZ: So, for instance, someone at the services flagging the issue that the data being presented to the working group and the panel is incorrect. We'd want to know that. That's very relevant information.

MR. SKURNIK: So my question here, Your Honor, is what -- is whether the court's order extends to, for instance, someone at the services saying -- who is not a member of any of the working groups -- saying: Hey, what if we tried Idea X for transgender policy? And someone else who is not a member of a working group responding: No, I don't think that's a great idea. And then that never makes it up further, never makes it to a working group or a panel, whether the court's order encompasses everything; which is broader than just working groups.

MR. SIEGFRIED: So, Your Honor, our position first of all is, yes, that is responsive and should be produced. And I think the Ninth Circuit addressed this when they placed the burden on the defendants to say, when you're doing the analysis, when the court is doing the analysis for deliberative-process privilege, if the defendants believe the analysis should be more granular, they have the burden to

explain why. And, frankly, I don't understand what these documents are or why the analysis would be meaningfully different.

THE COURT: Okay. Well, we're running into a problem that honestly the government, further down in its joint status report, they make the complaint that the plaintiffs have not brought a motion to compel. And, therefore, certain requests are not ripe. I don't know what you think this whole privilege is about. I mean, we are here to sort out discovery over a motion to produce. So there is a motion to compel. And each side wrote for me in a way that I didn't think was helpful for me to sort this out. So I said, this is the path that we're going to take.

And so I've methodically looked at each request. The government complained that this was too much, they couldn't respond. I say, fine, we're going to do five at a time. For you to come back and tell me that there's no motion to compel on the table and therefore it's not ripe, makes absolutely no sense to me.

The other thing I would say is that under the civil rules, a motion to compel is not necessary. It is a motion to protect. If you've got documents out there that you believe are responsive but you're still withholding, you have the burden of bringing on the motion to protect. They don't have to move to compel. So among these thousands of documents, if

you think that there is something out there that is responsive to this RFP, you've got to put it in a log and you've got to defend why it is that the deliberative privilege still applies. It's not the other way around. You have the documents. You can see what's there. They can't.

And when you throw out ideas that maybe the services are offering up and saying this is the wrong data, of course that's responsive. If you think it's deliberative, you have to apply the privilege.

So, let's go back and talk again. I'm going to issue an order that covers -- we've covered now the first two categories, we're going to get to the third. If you think there's something else out there, because the order says you have to respond, it's your obligation to identify what it is, it's not theirs. Okay?

MR. SKURNIK: Your Honor, just to be clear. We have done so. Every single document that is responsive that we've withheld is listed on a privilege log. So plaintiffs know about every single document.

THE COURT: Okay. Well, we've got some problems with the privilege logs, because they're telling me you've got a whole lot of people on those logs that they can't tell whether they give you cover or not, because they don't know who they are. But let's stop and work through the next portion. And that is post-decision, the write-up portion.

Everybody with me with that definition?

MR. SIEGFRIED: Yes, Your Honor.

MR. SKURNIK: Your Honor, could I just ask one last question about the previous category that we just discussed?

THE COURT: Um-hum.

MR. SKURNIK: So the defendants, in our motion, have requested a stay of the court's order while the Solicitor General considers whether to seek relief in the Court of Appeals. So we'd just like to request that stay.

THE COURT: You're not going to get a stay. But you can certainly -- we have other clawback provisions that if something gets turned over that has to be clawed back, we'll claw it back, if the Ninth Circuit says that's what we're going to do. But we're not going to wait for the Solicitor General on every single ruling that I make.

It seems to me we ought to get through this whole thing and then you decide if you want to take the package up. But I consider it a real tactic of delay that every time I hold one of these hearings, that's the threat. We're going to go to the Ninth Circuit. It's delay, delay, delay. We've been at this for years now. And I'm giving you every opportunity to tell me what you don't understand.

If you disagree with it, there may be a time for you to take it up. But in the middle of an ongoing hearing over what you have to produce, I don't think is the right time.

Let me finish it. Okay? If you don't like it, you have a perfect right to do whatever procedural maneuver you wish. But this is an ongoing process. Okay?

So, let's go forward and talk about the post-decisional documents. Plaintiff, tell me what are you not getting and what do you think you deserve?

MR. SIEGFRIED: Well, Your Honor, we haven't gotten anything. And I think we talked about this, and I think Your Honor analyzed it, in the December 18th order. All of the post-decisional information, the drafts, the communications, post-panel, we think -- we've overcome the privilege for all the reasons Your Honor analyzed. And the defendants' response I think at this point is: Well, we're going to respond to an interrogatory and amend and give you names of people who reviewed, I think reviewed or commented on drafts; is that right?

MR. SKURNIK: Everyone who was involved in drafting the reports, who edited it, had any comments, everyone involved in the drafting process.

MR. SIEGFRIED: Our problem with that, Your Honor, is we're actually just looking for the communications. So we know, for example, that there were folks at the Department of Defense who were out soliciting or having communications with folks who we don't have any reason to believe actually reviewed or commented on a draft. But those communications

that then fed into whatever happened in the report are equally relevant, whether or not they commented on the draft.

So I don't know that this interrogatory response changes anything, although we're happy to have that information.

MR. SKURNIK: So, Your Honor, the plaintiffs' theory this whole time for why they have a need for drafts of the report and recommendation and communications about those drafts, has been that there's some untoward involvement by outside third parties.

Now, by providing plaintiffs with the names of everyone who is involved in the drafting process, and if someone from a third party was communicating with folks at the Department of Defense and that's reflected in any communications, we'll include those names as well, the names of everybody.

But we're facing another situation where the *Doe* court in D.C., Judge Kollar-Kotelly, ordered that defendants in that case did not have to produce these drafts.

THE COURT: For now. Her order -- you represented it as a final order. And I read it as she said "for now" and you can come back. She wasn't satisfied with the arguments that were made. She hasn't issued a written opinion, as I understand it.

MR. SKURNIK: That is correct, Your Honor, this was just during a teleconference call. However, what we've presented to the plaintiffs is we've asked for a stay. And

in the meantime, what we would do is provide plaintiffs with this information of everyone involved in the drafting process and that would allow them to test their theory that there was untoward outside involvement. And it would do so in a way that reconciles the positions of where we are in *Doe* and where we are in this court, and also without sort of undue intrusion into executive branch decisionmaking.

THE COURT: Well, Mr. Carmichael told me that this was simply drafting, that that was one of the arguments he made. And so if it's simply drafting and editing, that wouldn't be deliberative process. And so the privilege wouldn't apply, from what Mr. Carmichael told me the last time.

Now, you only want to give them the names. That means they've got to contact each of those people, find out what they said, get the custodians, get their data of any e-mails that they might have sent -- and interrupt me if I'm wrong with what you'd have to do -- and that's needless if you're sitting on top of that information.

So in December, I told you that you had to turn it over. I asked -- we put out an order. That part of the order I think is very clear. And you don't do anything. You don't move on it. You let the time go by. You don't produce. That's not acceptable.

If you have a motion for reconsideration, I'm telling you

you have to speak up promptly. That's what the rules provide. You don't wait until something else, quote, something may happen and another judge issues not an order but a comment that, as I understood it, that she is not ready to order it at this point. She wasn't satisfied with the arguments that were made. And, quite frankly, the arguments are not the same as the ones that were made here.

So you're late. Turn it over. Okay?

Plaintiff, does that satisfy you?

MR. HEINZ: Yes, Your Honor.

THE COURT: Okay. Now, I will issue an order in the next couple of days. This is what is going to happen. If the plaintiffs are satisfied with the order, fine, you can simply file a -- you know -- we agree. If you believe that there is something else that needs to be put in the record to defend whatever position you believe you need to take, you've already heard the threat of going to the Ninth Circuit, then you build your record.

I will look at it to see if it changes the amended order that I put out. In the meantime, I am not going to slow this process down for some solicitor somewhere to make a decision, I don't know when. One of the things that we did when we first set the trial date is this is a very important case for many, many people. So to keep slowing it down every time doesn't do the public any good.

So that's why I say when we get done, if you want to go to the solicitor and have him make a decision, fine. But you haven't given me any criteria to know when that decision would be made. Is it two days? Two weeks? Two years? We're not going to wait for that.

MR. SKURNIK: So, Your Honor, it would not be two years. It would probably closer to around two weeks. But as I understand the court's order, I just want to make sure I understand correctly that our motion for stay is being denied on the drafts?

THE COURT: The motion for the stay is being denied.

Now, if it turns out that that material should not have been turned over, we can claw it back and the plaintiffs will be in the position that this is for the attorneys to work with at this time, it's not to be passed on or published. Everybody understand that?

MR. SIEGFRIED: Understood, Your Honor.

MR. HEINZ: (Nods head.)

THE COURT: Okay. So that's the way we'll keep moving forward to get this material. I understand between December 10th and today, you've been putting this material together, because you were under an order to do so. So it shouldn't take you very long to produce it, because you haven't had a stay. So I'm telling you that this material has to be turned over in a week.

MR. SKURNIK: Yes, Your Honor.

THE COURT: A week from when my amended order comes out, okay? So that gives you a little more time.

MR. SKURNIK: Your Honor, I'd ask that that week deadline apply to just the drafts and communications about the drafts. As to the first part of the order that we discussed earlier, working groups and documents that are referring or relating to the report and recommendation, that's a much larger universe of documents. And so defendants would need certainly much more than a week in order to produce that material.

THE COURT: I don't understand that, because you should have already been gathering that along the way. And you told me at the beginning, or Mr. Carmichael told me at the beginning, that they had analyzed all this data and put it in categories. It can't possibly be that difficult to call up those various categories if you have organized it appropriately.

MR. SKURNIK: Your Honor, as we stated in the declaration of Mr. Easton, this is approximately 22,000 documents that we withheld on the basis of the deliberative-process privilege that are at issue here. And in order to produce those documents, the Department of Defense and military services would have to re-review those documents to ensure that there is not either personally

identifying information, specifically personally identifying information that would need to be redacted in preparing those documents for production. And that would likely take a significant amount of time.

THE COURT: I've already told you that there are certain categories of documents. Why we are doing this is to identify those that the privilege applies to and those that it does not. I don't know why you would have to re-review if it's already in a category that I've already told you the privilege does not apply. You've already had two years to review this data. And why you wouldn't have started December 10th when you heard what I had to say about it, I don't know.

But 22,000 documents -- you know, this afternoon I'm going to have a conference over lumber producers. The documents that we're talking about in that lawsuit are five times bigger than what you are talking about now. This is not a big-document case, as document cases go. So when you tell me 22,000, I kind of go, really? You're the federal government. You've had two years to do this. If you've organized carefully, it should not be tough. So you produce it. I don't know how many times I have to say it. But I've told you over and over again that that's what you must do.

MR. SKURNIK: Yes, Your Honor.

THE COURT: Okay? All right. That takes care of

that portion.

Now let's start working through what we've got on the rest of the joint status report. I don't know how plaintiff wants to do this, but we -- No. 15, is that the one you want to start with?

MR. SIEGFRIED: Sure, Your Honor.

THE COURT: So as I understand it, your expert was deposed, and during the course of that deposition the government used documents they had previously withheld under the deliberative privilege in that deposition. And if I understand you correctly, you're not asking to open up that set of documents, but you are saying if you're not going to turn it over, you can't use it.

MR. HEINZ: Well, we would want all of the documents responsive to Request for Production No. 15 produced. Because now we've had two full depositions, seven hours long, each of them. And they're almost entirely about what happened with the Carter working group, what the process was like. And the questions asked by the government lawyers are designed to impugn that process. They won't give us the documents about the process.

And then kind of icing on the cake, Your Honor, was when the government decided to selectively cherry-pick one document that they withheld pursuant to the deliberative-process privilege, and it's a communication

among the members of the Carter working group, and then waive privilege, and then use that document against our experts.

So it's not a waiver argument, Your Honor, it's just fairness. We can't respond to these arguments attacking the credibility of the Carter working group that came to the opposite conclusion than the panel did just two years before, unless they give us the documents.

THE COURT: Okay.

MR. SKURNIK: Your Honor, can I be heard on that?

THE COURT: Sure.

MR. SKURNIK: What plaintiffs are leaving out is that they are the ones who put the integrity of the Carter working group at issue. And the way they did it is they have retained expert witnesses who participated in the Carter working-group process. And they've served expert disclosures that discuss that process, that make representations about that process.

Now, certain of those representations defendants believe are either incorrect or are mischaracterizations, and as a result, we've waived the privilege over certain particular documents that impeach those representations or statements by plaintiffs' witnesses. So this is not the government putting it into issue here.

And just to give one example here. During the recent deposition of Mr. Brad Carson, who was the former

Undersecretary of Defense for Personnel and Readiness, who was involved in the Carter policy process, in his expert disclosure he states essentially that the military services were all in agreement about the Carter policy. During his deposition, Mr. Carmichael took that deposition, he introduced a document that we contend shows that, in fact, with regards to accession policy for the Carter policy --

THE COURT: What is a "session policy"?

MR. SKURNIK: So accession is the policy for joining the military.

THE COURT: Oh, accession. Okay.

MR. SKURNIK: The document, we contend, shows that actually the services had varying views about what would be the proper accession policy. So this is certainly not -- this is grounds for the government, sort of based on the way we've approached these depositions, to disclose thousands of Carter policy deliberative documents. And I know plaintiffs say, well, it's not a waiver argument. But that's precisely what they're arguing is that because we've waived the privilege over certain documents, we should have to produce similar documents. And the case law here is crystal clear, there is no subject matter waiver for the deliberative-process privilege.

MR. SIEGFRIED: May I respond, Your Honor?

THE COURT: Yes.

MR. SIEGFRIED: Recall how we got here, which is we put this RFP as one of our top five. When we were here the last time we agreed -- the government said, hey, this isn't as important, what if we just give you a few documents and we can start there. We're not going to get into communications. And we're not going to do the mirror image what we're giving you for the panel.

Our argument had been, look, the analysis is 100 percent the same. So to the extent we have overcome the privilege for the panel documents, which Your Honor held we did, the same would be true here. But as a compromise we said, we will just take these initial documents. But this is not a waiver issue.

The point is, we've overcome the privilege. And it's no longer acceptable, whoever put it at issue, where we are today, to not get all these communications, given that we believe we've clearly overcome the privilege under the *Warner* factors.

MR. SKURNIK: Your Honor, I'd just like to clarify what we did produce. So, separate and apart from this issue of particular documents at depositions, the discussion we had last time we were before the court was that defendants would produce some of the key most important deliberative documents from the Carter policy, then come back and regroup and determine whether plaintiffs at that point had any need for

further documents.

So we produced briefing slides from the RAND Corporation. Remember, the RAND Corporation did this study that supported the Carter policy? We produced all of the RAND Corporation's briefing slides to the Department of Defense explaining. Here are the findings of our study, here are updates on the course of our study. We've produced internal Department of Defense slide presentations and documents that contain potential policy options and courses of action that were considered by the Carter policy.

And most importantly, we've produced an internal draft report called "The Final Report of the Carter Policy Working Group," the group that develop the Carter policy. This report explains the work they did, it explains the considerations that they had, it outlines -- it contains agendas from the different meetings the working group had. It has lists of individuals who presented at those working groups. And it contains, at the end, the different courses of action and policy options that they considered.

Now, when you take into account all of that, that we've disclosed, along with the fact that plaintiffs have as expert witnesses individuals who served on the Carter policy working group -- Margaret Wilmoth is one of them, we took her deposition recently -- plaintiffs at this point have no need for any additional materials having to do with the Carter

policy.

MR. HEINZ: Your Honor, if I may briefly respond.

All of what Mr. Skurnik described is 12 documents. That's how many they produced, 12.

And he has not addressed the government's selective waiver, so to speak, of the documents that are good for them. But the documents that perhaps may be good for us, out of fairness, should be produced.

And finally, yeah, we do have two hybrid fact expert witnesses who sat on the Carter working group. And we're able to talk to them, ask them questions, what happened, who presented? But those people don't have the documents. They've left the government or they've moved on to other positions. They don't have the documents. The gentlemen sitting across the table have the documents, and they're the only people that do.

THE COURT: Okay. This actually I think is relatively easy. You're not going to use any document to question a witness that hasn't been produced previously. Okay?

So we're going to handle this as, if you took depositions where there were documents that had not been produced previously, you may not use the responsive answers.

Now, if there's only 12 documents that you've turned over, you only examine on 12 documents. You want to play the

situation where somebody says something wrong and you impeach, you have to give those people the opportunity to refresh their recollections. That's why you have to turn over the documents. But you cannot selectively sort out the ones that are good for you and hide the ones that aren't. You may not use the privilege as a shield and a sword.

Now, I understand that in impeachment, you normally don't have to reveal the document ahead of time. That doesn't answer the question of whether or not you have to produce it for discovery, if it's discoverable.

So the rule that says that you can spring a document on someone is after they've had an opportunity to review what you have already turned over.

So, if these depositions wind up not being able to be used, so be it. But at any trial in front of me, or any summary judgment argument, or any other motion, you can't use the answers that are produced if you didn't turn over the material.

MR. HEINZ: And, Your Honor, they did produce those handful of documents in advance of the deposition. But they're only producing the documents that are good for them. And it's a handful. And then they're using those against our experts. So we did have them. They were produced. But we want the balance of the documents so we get the full story.

THE COURT: So that you can respond?

MR. HEINZ: Exactly. That's the problem. So it's not a production issue.

THE COURT: So it's not a production issue.

MR. HEINZ: It's a completeness issue of, you can't withhold an entire group of documents and then pick the documents that are good for your case and not produce the rest. That's just not how discovery works.

THE COURT: Okay.

MR. SKURNIK: Your Honor, I think the case law on this point is crystal clear, that when it comes to executive privileges, like the deliberative-process privilege, it's not like the attorney-client privilege. It's different. We are allowed to waive the privilege over individual documents without waiving the privilege over related documents. And that does not give the plaintiffs a sufficient need to then overcome the privilege as to all related documents.

THE COURT: Here is the deal: If you are calling witnesses, the whole idea is to seek the truth. Okay? It's not to play gotcha. And if that's what you're going to do with a witness saying: Ah, but we have this document that says something different, if you want the truth out of your witnesses, you give them the full documents that they can prepare with.

MR. SKURNIK: Your Honor, we've produced -- all of these documents that we've used at these depositions, we've

produced in advance.

THE COURT: Okay. And what I understand now is that the problem is is that you have picked certain documents that you think benefit you and have left out documents that would hurt you or that could be used to rehabilitate a witness who has been impeached.

MR. SKURNIK: Your Honor, at least from our position, we are not withholding documents that we think -- we're not saying: This document is bad, let's hold this document back. We are withholding documents that are privileged and subject to the deliberative-process privilege.

THE COURT: How do they know?

MR. SKURNIK: We've listed every single one of these documents on privilege logs that we've produced to the plaintiffs, which we're permitted to do under the federal rules, as a way to identify and justify our privilege to the plaintiff.

MR. SIEGFRIED: Look -- I'm sorry, Your Honor. We're basically back to where we were December 10th. We're back to no compromise on this Request for Production, because it unfortunately didn't work out. We're back. And forget waiver, forget any of that. We're just asking the court to then order production of these communications. And, frankly, we'd be happy, I believe, with less than everything. We want the communications, the reciprocal stuff that you've already

produced for the panel documents.

MR. SKURNIK: And, Your Honor, we've produced the most important key deliberative documents from the Carter policy. Plaintiffs have not articulated any reason why they need additional materials from --

THE COURT: They just did. They just did. You're giving me the same arguments over and over. They need to look at -- their witness needs to know what she or he communicated, to refresh their recollection, to make sure that they don't make statements that are false. Nobody is wanting them to go bigger than what they have. And so you're the only one that has a copy of that, they don't. So in order to prepare a witness, they need those documents.

Now, you can decide that you're not going to question them. You can decide that you're not going to take the deposition. But if you're going to take the deposition and talk to them about what they remember, or say that's not what this document says, you've got to give them a full set of documents so that they can prepare.

MR. SIEGFRIED: Your Honor, to be crystal clear about this, our need for the documents, that was something that we covered in the December joint status report. And I'm happy to go back through why we think that the documents responsive to Request for Production No. 15 are relevant.

So we mentioned, for instance, rebutting claims that this

2018 policy is the product of reasoned, independent military judgment, because the same group considered the same evidence, argument and justifications, two years earlier, and came to the opposite conclusions. We went through all of that. Nothing has changed in terms of the need for it other than this compromise of receiving what the government considered the 12 most important documents wasn't satisfying based on subsequent events.

MR. SKURNIK: And what plaintiffs have not articulated is why those 12 documents are not sufficient, why they need additional documents.

THE COURT: Because apparently you questioned their expert in a way that did not allow them to rehabilitate based on other documents that you're sitting on. That's the articulation. And they've said it at least three times now.

MR. SKURNIK: In that case, Your Honor, I think what would be helpful is whatever order the court issues to delineate specifically that the documents that the government must now produce are limited to documents having to do with deposition testimony of particular witnesses.

MR. SIEGFRIED: Your Honor, respectfully, that is not what we asked for. When we were here on December 10th, we said that we would like the mirror image of the documents you have already produced for the panel of experts under the *Doe* order. Right? That was the communications among panel

members, so communications among these folks, which you have produced, as far as I can tell, two of, which are the ones you used at the depositions of the experts.

MR. SKURNIK: Your Honor, just to be clear, so what plaintiffs are asking for here is approximately 15,000 documents that would be responsive to RFP 15. They do not need 15,000 documents in order to properly rehabilitate their witnesses at depositions. What the government could do and what I think would address the concerns plaintiffs have about document usage at depositions, would be to produce -- when the government plans to use a particular document at a deposition, to produce related documents, or even to produce documents that relate to the particular witness that we are deposing, rather than all 15,000 or so documents that are responsive to RFP 15.

MR. HEINZ: I guess let's step back. Some of the very same people, two of which you have deposed now, sat on both groups, the Carter working group and the panel of experts, yet somehow, two years before the current policy, some of the very same people came to the opposite conclusion. Well, we're interested to know what were they shown? What information were they considering? What discussions were they having, where they came to the opposite conclusion two years before that?

So, it's not just documents surrounding whatever the

government selectively decides to use, it's the entire group of documents that led to that opposite conclusion. It is hard for me to understand a more relevant group of documents than those.

MR. SKURNIK: And, Your Honor, we've produced documents that show precisely that, show what individuals who developed the Carter policy considered, what courses -- potential policy options and courses of action they considered. It lists who came and presented to them. There's also the RAND report, which extensively justifies the Carter policy.

The plaintiffs don't have any further need for further documents and communications in order to do a comparison between the Mattis policy, in which they have everything, they have every single document that the panel reviewed, that was presented to the panel, any e-mail any panel member received, they have all of that. And, for example, for Mr. Kurta, who served on both the panel of experts for the Mattis policy and the Carter transgender working group, they have all of his Mattis policy documents.

So at this point, plaintiffs still haven't articulated any need for any additional documents.

THE COURT: All right. This is what we're going to do: I think I'm getting some more clarity as to what it is that you're trying to do in marshalling your case, is that

obviously you want to compare and contrast these two decisionmaking processes.

So what's going to happen as for the panel members, voting and non-voting, you're going to get -- exactly the same type of documents that you got for Mattis, you're going to get it for Carter. Because in order to do the analysis of what's different, you need both. And that's relevant.

So the government needs to turn over that material. And I suggest that they don't get to take anybody's deposition further until they do turn over the material.

So the material gets turned over. I would expect that your witnesses would have an opportunity to review it. And I'm assuming you don't want your witnesses to go bigger than what you've got in terms of backing up documents.

So let's do this as a truth-seeking process to find out exactly what was done in both of these settings, the Carter and the Mattis setting. Okay?

MR. SKURNIK: Your Honor, if I could just clarify.

THE COURT: All right.

MR. SKURNIK: So you mentioned the panel that developed the Carter policy. It was not a panel of experts, it was a working group. So this is all members of the working group; is that correct?

THE COURT: These two processes label the decisionmakers differently, apparently. So is it enough to

say the "decisionmakers," or is there some other term of art that needs to be used in order to get you what you're looking for?

MR. HEINZ: We would want the documents from the Carter working group. And we don't have enough of those documents, because they've only given us 12 of them, to really fully understand the terminology and whether there were sub-working groups reporting up to the Carter working group. Once we get more documents, maybe we'll know. But we're interested in the documents that the Carter working group generated, how they communicated, and how they came to their decision.

MR. SKURNIK: Just to be clear, Your Honor, does the order then reach not just the members of the working group, but just like we discussed earlier, some person let's say in the services that had a view that was expressed but that view never made it up to the working group itself? Is it the exact, same sort of broad scope of all documents?

THE COURT: Let's start with whatever the nomenclature is for what was generated for the decisionmakers, what they reviewed, how they communicated, how they went about making their decisions. Once they get that, they probably will be able to tell me if there was another label that was applied or other avenues of information. But we're going to start here, okay?

MR. SKURNIK: Yes, Your Honor.

THE COURT: Okay.

Moving right along. Do you want to talk about 26?

MR. SIEGFRIED: Sure. So our position, Your Honor, on 26 is fundamentally, we've asked for -- this is factual information that we have sought. There's no possible deliberative-process objection. And, frankly, in sort of going through this process, it appears that I don't think there is a deliberative-process objection. Although we did learn that the government -- I mean, the government in their response to request 26 very clearly said, "We will produce responsive documents," and we have not gotten any.

And I suppose they're saying it should be limited only to documents the panel saw. But I'm not sure why that would be, since particularly in response they said that they would produce these documents.

MR. SKURNIK: Your Honor, we have produced these documents. We've produced all cost data that was considered by the panel of experts, as well as the underlying data that the services used to compile the cost data that was presented to the panel of experts. We're not aware of any responsive documents that we're withholding under the deliberative-process privilege.

MR. SIEGFRIED: And, Your Honor, this leads to our other sort of overarching problem to all of this is when they

say they're not withholding anything from their collection, it's because apparently they did not go out and collect this information that was responsive to these requests. So I'm limited to some universe of documents that were collected in many cases before we even served the requests.

And I understand this does not appear to be a deliberative-process issue anymore. But I don't understand why the collection would be limited to what the panel considered, when we're asking for factual information just about the amount that the military had spent on hormone therapy, which is relevant I think to our claims.

MR. SKURNIK: Your Honor, we've given them that information.

THE COURT: Well, here's the fundamental problem going back and forth is you say you gave them everything that was before the panel. And they're asking for the entire universe of documents. And so when you keep saying, "We've given them everything that was before the panel," that's not responsive.

MR. SKURNIK: Your Honor, in addition to that, we've also provided them with a URL to a website where the exact information that they are looking for is publicly available. So I don't think there's any dispute about this.

THE COURT: Well, directing them to a website, are you willing to stipulate that the information on the website

is true and accurate and admissible?

MR. SKURNIK: Yes, Your Honor.

THE COURT: All right. Does that answer 26?

MR. HEINZ: It does.

MR. SIEGFRIED: I think so, Your Honor.

THE COURT: All right. Let's talk about 16.

MR. SIEGFRIED: Do you mean Interrogatory 16, Your Honor? I think the next --

THE COURT: You tell me, because we're jumping back and forth.

MR. SIEGFRIED: I believe the next document request -- we skipped 13, but I don't think that there is actually an issue with 13, other than the government for some reason objected on deliberative-process grounds as they have for all 68 requests. Once we actually discussed these with them, all of a sudden we find out nothing is being withheld. We have flagged that. I think in our motion from back last summer, one of the things we requested is for the government to actually just withdraw objections where there are no objections and that would save us all a lot of grief.

THE COURT: You're using the deliberative-process objection for everything and it doesn't cover everything. Why don't you go back and figure out whether there is, in fact, a deliberative-process objection here.

MR. SKURNIK: Your Honor, on 13, we have provided to

the plaintiffs not only -- not only are we not withholding anything responsive to 13 that's deliberative, we have given them everything they're looking for on 13.

THE COURT: So there is no deliberative-process objection there?

MR. SKURNIK: We're not currently withholding anything on the basis of deliberative process.

THE COURT: That doesn't answer my question. You are not asserting the deliberative-process objection to that answer?

MR. SKURNIK: That's correct, Your Honor.

THE COURT: Okay. All right.

Next issue.

MR. SIEGFRIED: The next issue, Your Honor, I think is 43, which relates to identifying transgender service members evacuated from theaters of deployment. This is another one that, again, it seeks purely factual information and there should not be any plausible deliberative-process objection. Again, the government's response relates to information that was sent to the panel, so limited to documents before 2018. We don't exactly understand why that was the case. And I think the government has also suggested that it's not available because they don't keep statistics only for transgender people, which is something else that I don't exactly understand. If you know who the transgender

service members are, you should be able to know whether they were evacuated from a theater of employment.

So, again, I don't know that this is a deliberative-process issue; it shouldn't be because it seeks purely factual information. But I'll let the government speak to that.

MR. SKURNIK: First of all, Your Honor, the Department of Defense does not know who all transgender service members are. We only know of service members who have a diagnosis of gender dysphoria or who have had transition treatment, but those are different things. So to get into 43, I think this is now encompassed by the court's earlier ruling on RFP 29, because we've produced everything responsive to 43 that has been provided to the panel, that the panel considered. And plaintiffs are now asking -- so we want -- let's say somebody else, not part of the panel, had some information about evacuations from theater, they want that information as well. And that is now encompassed within the scope of the court's order as RFP 29.

MR. SIEGFRIED: I think we're talking past each other. We're not looking for what anyone considered. We're just looking for information about whether folks, in 2017, 2018, January of 2020, were evacuated. So whether someone considered it or not, we're purely just seeking this information.

THE COURT: They're not seeking -- you're making this request very narrow as to what the panel considered. They're looking to test whether what the panel considered is accurate given even the entire database out there. That's where you're talking past one another.

So if you know -- I mean, obviously you don't know everyone who is transgender, because the rules basically are having people not disclose. But you do know those who are participating who identified themselves as transgender or have a diagnosis of gender dysphoria, and they're asking, were any of those people pulled from theaters so that they can see whether they were pulled for, they broke their foot; or they were pulled because of being transgender.

MR. SKURNIK: So it sounds like, Your Honor, what plaintiffs' complaint then is, is not one about privilege, but rather one about the scope of our search, whether we've collected this information. And this hearing is focused on privilege. While they have moved to compel on privilege grounds, they have not moved to compel on further collection of this material. So I don't think this issue is properly before the court.

THE COURT: And I think I started out by saying I am sitting here hour-by-hour, line-by-line, to get you through discovery. In December, I told them to identify the next criteria of information. I told you that that's what you

were going to work on next. They don't need a motion to compel in order for you to go out and seek the data. You have to move to protect. You haven't done so. The timeframe for responding is usually 30 days. You're way past that. So they're asking for this data.

Tell me why you haven't gone to get it, because I understand that you are talking past each other. You're trying to restrict it to what the panel members saw. They want the whole universe of information to test whether the panel's conclusions are supported by the data in the field. That's not a hard concept.

MR. SKURNIK: We can produce that information to the plaintiffs.

THE COURT: Okay. All right.

MR. SKURNIK: Now, Your Honor, I just want to clarify. The Department of Defense may not possess all of this information, but we can go and search for whatever information exists on this topic and we will give that to the plaintiffs.

THE COURT: All right.

MR. SIEGFRIED: Thank you.

THE COURT: Next.

MR. SIEGFRIED: Next is -- and all of these, by the way, were document requests that were served, I think after this government collection happened, so I think we're in the

same boat here where, again, this one requests information about waivers, including criteria, department criteria for granting waivers, whether a waiver was granted and the basis for that decision. And this, if Your Honor recalls, is important, because the government has consistently said this is not a ban, because there is this waiver process you can go through.

The government's response was, "We're not aware of anything in our collection being withheld for deliberative-process privilege." But our understanding is they didn't actually collect any documents responsive to this. And waivers were not in place and you couldn't seek a waiver until after the panel finished; is that right?

MR. SKURNIK: Your Honor, what plaintiffs have requested here is information about waivers that postdate the release and implementation of the Mattis policy. So basically what they are wanting to know is after the policy has come out, let's say in the future, give us information about whether particular waivers have been granted or denied. That has nothing to do with the lawfulness of the policy itself. As the Ninth Circuit said, the policy must be reviewed based on the record supporting it. Information postdating the policy about some waiver that may or may not have been granted has nothing to do with whether the policy itself is reasonable.

THE COURT: Well, they're going to argue that it's not reasonable because it's a total ban, that there isn't any particularized way that someone can get around the ban.

You have argued or the government has argued to me that this is not a ban, this is a medical condition. And if you're going to have waivers built into the plan, then whether or not that process is viable is one of the things to be considered.

So you need to produce how many of these waivers have been requested. And if people have asked for waivers, you know, I'm assuming the waiver goes to their being transgender. So if the answer is none, then you've got to say none. If the answer is 10, you say 10, and you give them the documents, redacting who the individual is.

MR. SKURNIK: Your Honor, I ask that we be ordered just to produce information such as how many waivers have been requested and how many waivers have been granted or denied, and not more specific information about the waiver requests themselves, such as the analysis in the waivers, the grounds given or not given for denial of a waiver. And the reason is, I don't think it's relevant in any way to the lawfulness of the policy itself and would better protect personal and private information.

THE COURT: Are there documents that talk about -- in the policy, is the waiver described and said what criteria

are used to grant or deny a waiver?

MR. SKURNIK: Not in the policy, Your Honor. The department has sort of general standards that they apply to waiver requests.

THE COURT: So why would they not be allowed to test whether the government is applying the standards that are out there? Because whether or not this whole thing works as a policy consideration would depend on whether it's being properly interpreted.

MR. SKURNIK: Well, Your Honor, the question before the court is not whether this policy works as a policy matter, the question is whether it was lawfully approved. And the granting or not granting of any particular waiver request afterwards doesn't bear on whether the policy itself was lawful.

Now, we can give the plaintiffs -- we can give them the number of waivers that have been requested, whether they've been granted or denied. Now, if they've all been denied and the plaintiffs want to argue that means the policy is a total ban, then they can do so. They don't need further specific information about individual waiver requests in order to make those arguments.

MR. SIEGFRIED: Your Honor, to be clear, our claims are not about whether it was approved lawfully, it's whether it was discriminatory. And this obviously plays into that.

And we're happy to brief this, if Your Honor would like our position on it. I think it is certainly relevant what the basis for the decision is and what the analysis was. I don't know what the objection is. Is it to relevance? Is it to -- I mean, I don't know why that would not be something that we're entitled to.

MR. SKURNIK: It's a proportionality objection, Your Honor. It would not be relevant to plaintiffs' claims and defenses. And, therefore, under Rule 26, under the proportionality analysis, plaintiffs are not entitled to it.

THE COURT: Wait a second. Proportionality has to do with how much, and how much it costs in relationship to the issues presented. I don't understand what proportionality has to do with it, because I'm assuming that we're not talking about a universe of documents that's huge. I'm betting it's fairly small.

MR. SKURNIK: Your Honor, regardless of the size of the universe, if the documents plaintiffs are seeking are completely irrelevant to their claims and defenses, then defendants aren't obligated --

THE COURT: Well, now you're changing your rationale. You said it was proportionality a minute ago and now you're saying it's relevance.

MR. SKURNIK: They're tied to each other, Your Honor. First of all, these documents are not relevant; second of

all, because they are not relevant, under the proportionality test, plaintiffs aren't entitled to them.

THE COURT: If you're arguing this is a medical condition and not a complete ban, wouldn't the reasons for going through the analysis be relevant?

MR. SKURNIK: It would not be relevant, Your Honor, to whether the policy itself was lawful. And it's our contention that you can look at the policy and just based on the terms of the policy itself determine whether it is a complete ban on transgender service or whether it's a policy that turns on medical conditions and medical treatment.

THE COURT: Well, that's the argument you've made, that it's a medical; why can't they test whether that's correct?

MR. SKURNIK: They can test whether it's correct by looking at the policy itself. The Ninth Circuit instructed that the policy should be evaluated based on the records supporting it.

The waiver requests that were granted or denied in the future after the policy was released and decided have nothing to do with whether the policy itself was lawful on the record supporting it.

THE COURT: Let's go back and talk about what the reason for discovery is. It is to uncover relevant information or potentially relevant information. Okay? So I

don't know why you're fighting this so hard, because it seems it should be, (a), easy to find out; and (b), is this policy being interpreted as a total ban or is it being interpreted as a medical condition? And that's one of the big issues here as to whether gender dysphoria is an ongoing medical condition, and whether the policy is written in such a way that you can make these distinctions of people who have completed their transition, people who are in the middle of their transition, people who have not started their transition, and people who simply have gender dysphoria. So you're going to turn that over.

Now, I'm not interested in exposing any particular servicemen. That's not the point. So you can redact the names and identifying information. But if somebody has asked for a waiver, give them the requests for the waiver. You can number them: One, two, three, four, five. And if all five were turned down, you give them the documents to turn them down. Or if one was granted, you give them the documents of what was granted.

MR. SKURNIK: Yes, Your Honor.

THE COURT: All right. Next issue.

MR. SIEGFRIED: I think the last Request for Production we identified is documents related to the Department of Defense's own data and experience since the Carter policy, which is a reference in the actual report.

THE COURT: Say that to me again.

MR. SIEGFRIED: Okay. Let me talk slowly. Documents related to the Department of Defense's own data and experience under the Carter policy, or since the Carter policy. I think it is fair to say that this is tied up in the larger Request for Production 29 issue.

Is that your position?

MR. SKURNIK: Yes. So, again, we've produced everything responsive to 65 that was considered by the panel, presented to the panel, anything like that we have produced.

Because plaintiffs word RFP 65 to include reflecting or relating to that line, it's possible there's some communication, say, down at the services, that is somehow relating to this line that is deliberative and we're withholding. But I think the court's order on RFP 29 encompasses that.

THE COURT: I'm not getting this.

MR. HEINZ: Let me reset a little bit on this one.

THE COURT: Okay.

MR. HEINZ: In the Mattis report, which is what the Undersecretary of Defense's office drafted after the panel concluded their work, this is the 44-page report from February that was the basis the justification for the ban, in that report one of the justifications that the government is proffering for why they have the ban is, quote, that they

relied on the department's own data and experience obtained since the Carter policy took effect.

So, what is the data and the experience from the Carter policy that led, this time around, for them to reverse course? We just want to know what they meant by that and what they were relying on.

So surely, whomever drafted the Mattis report, which maybe now we'll find out, finally, they know what they were referencing and that's the information that we want. Plain and simple.

MR. SKURNIK: Your Honor, I'm glad Mr. Heinz clarified that, because we have produced all of the data from the Carter policy that was relied on in formulating the Mattis policy. So when it says the department's own data and experience obtained since the Carter policy, that data has been produced to the plaintiffs.

MR. HEINZ: Fine.

THE COURT: Okay.

MR. SYKES: With respect to something the court touched on briefly a few minutes ago, which is part of the reason we're having this back-and-forth, there is this blanket objection to deliberative-process privilege that we only find out after we bring these to you that there are no documents being withheld under that privilege.

Is there a way for the remaining RFPs that you can go

through and say: We're not withholding documents under the deliberative-process privilege on this one, this one, this one, but we are on this one, this one, this one.

THE COURT: I thought I just told them to go back and do that.

MR. SYKES: I did too, I just wanted to make sure that it was clear.

THE COURT: You can't use these boilerplates on every single one. If there is a request that you don't have documents withheld under a certain category, for that matter it's not just deliberative privilege, it's any privilege, don't be throwing out attorney-client privilege if there isn't one. Don't be throwing out privileges that aren't there. At this stage, you can't just respond with every civil procedure word to block production.

So, please, go back through and remove anything that you're not really relying upon.

MR. SKURNIK: Just to be clear, Your Honor. We have our privilege logs which list every single document we've withheld and the basis for withholding those documents. Then we have the 218 requests for productions we've received across all four cases. Now, when we conducted our search in this case, we did not say, all right, conduct 218 separate searches, one for each Request for Production, and then we have a different bucket of documents for each Request for

Production. As we're allowed to do under the Federal Rules of Civil Procedure, we searched for documents and produced them as they are held in the ordinary course of business.

So we did an extraordinarily broad search. We picked 156 custodians. And basically anything those custodians had that related to transgender went into our collection. And any documents that were responsive and that we withheld as privilege, we noted those on a privilege log.

Now, last August, plaintiffs filed a motion on this exact grounds to try to compel us to, I guess, adjust our specific objections and responses in regard to individual interrogatories. Now, we filed an opposition explaining why the approach we had taken was permitted under the local rules and why it was proper. Plaintiffs then withdrew their motion. So I don't really understand how or why they're trying to now bring this back up, after previously withdrawing their motion over this exact issue.

THE COURT: All right. You're re-plowing old ground and you're not listening to what it is that I just told you to do. Right now we've got ten requests on the table. Go back for those ten and tell them that you're not withholding anything on the basis of deliberative privilege, if you're not. Just like we went through these five. That's all I'm asking you to do.

Now, as for collecting your material in the ordinary

course of business, we already went through that. Both sides brought to me what I considered a mishmash of how they were going to categorize things. I started out with this, and I said, no. That's not the way we're going to approach this production. That's why we started in with having them pick the next five, and then the next five, and the next five, because just throwing the haystack across the table wasn't going to do it. So I know that argument. That argument didn't fly. We are beyond that. Okay?

Now, do you understand what you need to do with the ten requests that are currently on the table?

MR. SKURNIK: Yes, Your Honor.

THE COURT: All right.

MR. HEINZ: Your Honor, the ten requests would be helpful, but as we go on to additional RFPs, it would be nice to know beyond the ten requests whether they're withholding documents based on the privilege, because then we don't need to go through those. But starting with the ten is fine.

THE COURT: We're about to pick five more. So we'll make that first on the list that as you start to look at this, first you have to say, is the deliberative privilege involved.

MR. HEINZ: Understood.

THE COURT: Okay. Now, does that take care of what the plaintiff wanted answers on?

MR. HEINZ: For those first five -- for the very first five RFPs, yes. So now we have the next five, which I believe, Your Honor, will be more expeditious.

MR. SKURNIK: Your Honor, we've actually addressed a number of the next five, if not --

THE COURT: Wait a second. You're interrupting counsel. So I'll give you an opportunity to speak after he tells me what the next ones that they want to consider in the, I'll call, the current five.

MS. ALA'ILIMA: Your Honor, before we move on to the next five or current five, I just had one question about the five we've addressed and come to resolution on, and that is whether the government is going to be running a new search for, like for example, the waivers in those requests. And I didn't hear confirmation that they will be doing that. But I may have missed it.

THE COURT: Well, in order to be responsive to the requests, they're going to have to look at not just what they gathered, but where they might find documents that might be responsive.

MS. ALA'ILIMA: Thank you.

MR. SIEGFRIED: Just to be clear on that, Your Honor, I think there are a number of requests that both the State of Washington and the plaintiffs here have served since the collection happened. And so we're going to encounter this

issue again, because the government stopped collecting before discovery closed, is essentially the issue. So, whatever the prediction was of what would be responsive may not have actually borne out with what we actually requested.

In terms of the next five, I think, Your Honor, we just need to confer based on Your Honor's guidance today and can get back to the government with our next five in the next day or so.

THE COURT: Now we're talking about 10 through 15, or are we talking about 5 through 10?

MR. SIEGFRIED: No, 5 through 10 we've actually already gone through today.

THE COURT: Okay.

MR. SIEGFRIED: I think we're good.

MR. HEINZ: So the next five, we will send those over to the government by the end of the week and we'll begin work on those.

THE COURT: Okay.

Now, please, don't be asking for more than you need. We have enough problems. Okay?

What I'm asking of you is to get to work on those, because I'm going to expect that you turn out your next five. They are due in 30 days. And if there are protective orders that need to be put in place, talk about those things. But it's not going to work for you to run out to day 45 and come back

to me and say, "I don't understand." You need to act on it promptly if there's a problem.

MR. SKURNIK: Yes, Your Honor.

THE COURT: Okay. All right.

Now, next issue: Scheduling. What I get from this is that nobody thinks we're going to meet our June trial date.

MR. HEINZ: We think that's aggressive, Your Honor. Right now, as you saw in the joint status report, we're only asking for an extension from the current closure, which occurs in two weeks, until the end of April. But we're still waiting for information.

That being said, three weeks ago, we sent the government a list of kind of our first 11 witnesses that we'd like to depose. And we asked for specific dates for two of those, either at the end of this month or the beginning of March. But it does depend on kind of when we get all of these documents that we've been discussing.

MR. SKURNIK: Just to be clear, Your Honor, they asked for those dates for those two witnesses just this past Friday.

THE COURT: Well, I think in December I said, get your dates reserved now. And apparently you waited on that.

MR. HEINZ: Well, no. We sent the government -- I personally sent the e-mail three weeks ago saying: These are the people we want to depose. Didn't hear anything back.

No, "We're going to try to find dates. Here are the dates they're available." Nothing.

So then on Friday, I e-mailed and said: Okay, let's get -- in this timeframe we want these two witnesses to begin.

So we can quibble over that, but we've asked for two specific dates, given the list of 11 people that we initially want to depose -- I believe there will be more people -- but those 11. And we're going to move forward with those depositions, those two.

MR. SKURNIK: Your Honor, just to be clear about this, plaintiff sent us an e-mail with a list of 13 individuals. And they said something along the lines of, we won't be able to figure out dates or we'll have to work on dates once more documents are produced. So I don't think they necessarily have been following what the court ordered or discussed at least at the last hearing.

THE COURT: All right. Well, guess what? You're all here today and you don't need me to set your schedules for you. Why don't you take the time to do that while you're here.

Honestly, I don't know why you're not talking to each other. I see these letters going back and forth, but you're often missing each other in the night.

MR. SIEGFRIED: Your Honor, could I ask for one piece of guidance that I think would help us get through the

deposition issue, which is, we suspect based on prior experience with the few depositions that have been taken, that there will be a lot of objections on deliberative-process privilege grounds during these depositions.

Then furthermore, we have this issue of documents should or will be coming in the future. So, I guess we sort of seek Your Honor's guidance. We're happy to take all of these depositions now, sort of with the caveat that we imagine the government wouldn't want to put them up twice, but we'd have to keep the deposition open or reopen the deposition, pending the documents we get. And, furthermore, how to handle deliberative-process objections as they come up.

THE COURT: Well, there are very few things that can stop the answer from being given. And what I would suggest is if there is an objection based upon deliberative process, the objection is made, then the question is answered, and you seal the deposition. And if we have to, we will go over line-by-line as to what comes in and what doesn't in terms of public testimony.

But otherwise, you're going to have to keep -- we're going to have to keep going back and re-deposing people in order to do it. So I guess my order is, the question gets answered, the deposition is sealed, and then we sort it out.

Now, you all need to remember that I'm the factfinder

here. So when you make objections, you've got to tell me what the objection is, in order for me to forget it. So you're in a dilemma there.

Talking about scheduling. Originally this was set for a two-day bench trial. That doesn't seem to be the way it is shaping up here. And maybe I should go back and comment. The government originally told me there was only one document that they were going to put in. I saw in the joint status report that they seem to think that that position has changed.

But that's what they entered into this whole dialogue, they said one 44-page order and that was going to be it. So it was going to be a pretty simple case when we started. It's not shaping up that way.

So I think one of the things you need to talk about is just how much of my time do you need? And we should start talking about whether you're going to bring witnesses. Are you going to offer up depositions? And how it is that you want to teach me what it is I need to know to be the factfinder here.

MR. SIEGFRIED: Your Honor, I have a quick question. In this court for bench trials, is direct testimony live if they're live witnesses, or only cross examination?

THE COURT: If you want to bring them live, I'll listen to them live for both direct and cross examination.

This is my philosophy: I am the pupil. You are the teachers. You have to put in front of me what it is that I need to learn in order to render a good decision for you.

If that is live, then it will be live. If it is written, it will be written. Just like teachers do lectures or homework assignments. I'm willing to work at whatever plan you come up with. But you need to think about how you're going to present the material.

One thing, however, that drives me crazy is, don't expect me to sit and listen to a talking head. I can read about five times faster than somebody can talk. So it's painful to sit and watch that talking head speak to me. If it's question and answer, pull the camera back and show me the questioner, if that's the way you need to do it.

The other thing we can do is we have the capacity to beam the witnesses in here. So you don't have to physically bring the person in. We can watch them and do the examination -- I can't remember what it's called, and I hesitate to say Facebook-style. That's not what I mean. All that person needs to be is in another federal courthouse. So we have the capacity to make those presentations.

But if you're going to take a chunk of time, I need to know where to put you. And if we don't hit June, the next time we're going to do it is October. So I'd like to have both sides sit down and come up with what's realistic.

MR. SKURNIK: Your Honor, one point on scheduling is that, sort of however we adjust the schedule, defendants would like to make sure there's sufficient time between summary judgment briefing and any potential trial, to hopefully, if possible, have a ruling on summary judgment before trial. It's our position that we think this case really can be decided on summary judgment, either one way or the other.

THE COURT: We already did a round of summary judgments.

MR. SKURNIK: The current schedule in place, Your Honor, has summary judgment briefing included in there. And there's been significant sort of factual changes since the initial round of summary judgments. The new policy has come out. A lot of the arguments have changed in the case. So I think that the court will be able to reach a decision -- ruling one way or the other, and that there won't be material disputes of fact that require a trial in this case.

MR. HEINZ: We do believe there will be a trial and there will be factual issues that need to be resolved.

THE COURT: What about summary judgments?

MR. HEINZ: Still under consideration. We just don't -- we haven't really started to take depositions yet. I think it's unlikely that the plaintiffs would move for summary judgment. But we may revisit that. But I think it's

unlikely.

THE COURT: All right. If I could request this: I'm not ordering you to do it, but if there are cross motions, would you please consider giving me four briefs and not six? By the time I get to the sixth brief, I'm ready to pull my hair out.

MR. SIEGFRIED: I agree.

THE COURT: Now, next issue.

If there are additional discovery disputes that you believe need writing for, what you need to do is use Local Rule 37. Okay? The benefit to Local Rule 37 is that it doesn't have to take time to percolate. It is ripe the day it hits my desk. And so we don't have to have these delays. And I can get you an answer much faster.

In addition, it's easier for me to follow if I have a single document, where I see you argue one side against the other, rather than page 15 in this brief, page 29 in that brief, and you go back and forth. So that will be the rule from now on.

Now, the next time to come see me. You know there's an additional five. You're going to do that by Friday. You're going to come see me the first week in April. You're going to meet and confer and give me what you believe is your best guess at when this case can actually go to trial, given the production.

I already outlined when the production on the first five is forthcoming. And I think I've outlined that 10 through 15, you know, we're on a 30-day turnaround.

Okay. What have I left out?

MS. ALA'ILIMA: Your Honor, you discussed the date for trial, but will we also be discussing the rest of the case schedule accordingly? For example, discovery cutoff in April, therefore discovery motions --

THE COURT: I'm willing to entertain the whole thing. Now usually what I need is I need three months from the time you file your summary judgment, before trial. Because, remember, summary judgment takes 30 days to ripen. And then under my local rules, I have 30 days to respond. And so before we ever get anyplace, we're past 60 days. I want you to have time to get ready for trial on the issues. So just because you get it off your desk doesn't mean it instantly gets decided on mine. Please build in the time for me to give you a decent answer.

MR. SYKES: And, Your Honor, will the court address, in the order, moving -- formally moving the discovery date?

THE COURT: Not until I see your proposals. Okay? What is it right now?

MR. SYKES: It's February 28th, Your Honor.

THE COURT: We're not going to meet February 28th. So let's push it back a month, the end of March.

MR. HEINZ: So I'm just --

THE COURT: For now.

MR. HEINZ: And, Your Honor, I don't think that we will be able to take all of those depositions by the end of March. I just don't think that that's going to be possible, since we're still awaiting documents. And there's going to be a lot.

So I think the end of April may be more realistic. Or else we're going to try to squeeze them all in before the end of March and it's going to be a tight squeeze.

THE COURT: Well, I'm designing it so it feels tight. Okay? You're going to come back and see me on April the 3rd and you can tell me -- or a date first week in April.

THE CLERK: First week in April?

THE COURT: You're going to come back and see me then and we'll see where we are. But I want you to propose, within ten days, what you think is realistic. But I'm not going to move those dates right now, except the one that I just did, because I want to see what your plan is.

MR. HEINZ: You want to see, within ten days from today, our proposed schedule?

THE COURT: Yeah.

MR. HEINZ: Understood.

THE COURT: All right. Anything else I can help you with?

MR. SIEGFRIED: No, Your Honor.

THE COURT: Any further clarification?

MR. SKURNIK: No, Your Honor.

THE COURT: All right, then have a good trip home and I'll see you in April.

(Adjourned.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI et al., Plaintiffs, v. DONALD J TRUMP et al., Defendants.	CASE NO. C17-1297 MJP ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE; REQUEST NOS. 15, 29, 33, 36, AND 44

THIS MATTER comes before the Court on Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege (Dkt. No. 364), and upon the Parties' Joint Status Report (Dkt. No. 398). Having reviewed the Motion, the Joint Status Report, the Response (Dkt. No. 380), the Reply (Dkt. No. 385), and all related papers, and having met with the Parties (Dkt. No. 399), the Court GRANTS Plaintiffs' Motion.

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Background

I. Requested Discovery

The Parties are engaged in a protracted discovery battle regarding the Defendants' assertion of the deliberative process privilege over 35,000 responsive documents. (Dkt. No. 364 at 6.) Plaintiffs seek discovery to substantiate their allegations that Defendants' ban on transgender military service (the "Ban") was not animated by independent military judgment but was instead the product of impermissible discriminatory intent. (See Dkt. No. 347, Second Amended Complaint ("SAC"); Dkt. No. 364 at 6.)

Defendants argue the Ban is consistent with the recommendations of a "Panel of Experts" convened by then-Secretary of Defense James Mattis and tasked with "conduct[ing] an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants contend that in reaching its conclusions, the Panel considered "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" and its analysis was "informed by the [DoD]'s own data obtained since the new policy began to take effect last year." (Dkt. No. 224, Ex. 1 at 3, Ex. 2 at 20.) The Panel's findings are set forth in a 44-page "Report and Recommendations on Military Service by Transgender Persons," which concludes that service by transgender individuals "would impede readiness, limit deployability, and burden the military with additional costs." (Dkt. No. 224, Ex. 2 at 46.)

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II. Procedural History

The Court previously granted in part and denied in part Plaintiffs' Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 364; Dkt. No. 394) Finding that the Defendants failed to respond to Plaintiffs' Requests for Production in a manner that would allow the Court to assess Defendants' privilege claims as required under Federal Rule of Civil Procedure 26(b)(5)(ii) or conduct the type of "granular analysis" mandated by the Ninth Circuit in Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019), the Court ordered the Defendants to respond to Plaintiffs' first five Requests for Production, as provided by Plaintiffs in order of priority. (Dkt. No. 394.) The Court also adopted the reasoning and conclusions of the court in Doe 2 v. Esper, No. CV 17-1597 (CKK), 2019 WL 4394842, at *7 (D.D.C. Sept. 13, 2019), which found that the deliberative process privilege could "not be used to shield discovery into Defendants' decision-making process and intent when the extent and scope of that decision-making process is a central issue in this lawsuit." Id. at *7. The Doe court also found that the plaintiffs' need for the requested documents outweighed the deliberative process privilege. Id. at *8 (citing In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)).

The Parties have now filed a Joint Status Report, which includes Plaintiffs' first five Requests for Production ordered by priority: Request Nos. 15, 29, 33, 36, and 44. (Dkt. No. 398.) On December 10, 2019, the Court met with the Parties to discuss the remaining disputes regarding these five Requests; Defendants informed the Court that they will produce responsive documents on December 20, 2019. (Dkt. No. 399.)

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Discussion

I. Legal Standard

The deliberative process privilege protects documents and materials which would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." N.L.R.B., 421 U.S. at 150. For the privilege to apply, a document must be (1) "predecisional," meaning that it was "generated before the adoption of an agency's policy or decision," and (2) "deliberative," meaning that it contains "opinions, recommendations, or advice about agency policies." FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984).

The deliberative process privilege is not absolute and can be overcome where Plaintiffs' "need for the materials and the need for accurate fact-finding override the government's interest in nondisclosure." Id. In making this determination, the Court weighs: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id. The Ninth Circuit found that the second and third factors—the availability of other evidence and the government's role in the litigation—favor Plaintiffs here. Karnoski, 926 F.3d at 1206.

As with all evidentiary privileges, "the deliberative process privilege is narrowly construed" and Defendants bear the burden of establishing its applicability. Greenpeace v. Nat'l Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000) (citations omitted). In addition to showing that withheld documents are privileged, Defendants must comply with formal procedures necessary to invoke the privilege. Id. "Blanket assertions of the privilege are

insufficient. Rather [Defendants] must provide 'precise and certain' reasons for preserving the confidentiality of designated material." Id.

II. Requests for Production

A. Request No. 29

The Parties primarily dispute two categories of documents responsive to Request for Production No. 29: (1) the work and communications of non-voting members of the Panel and (2) drafts created by officials in the Office of the Under Secretary of Defense, who were tasked with writing the Report and Recommendations after the Panel concluded its work. (Dkt. No. 399.) Request for Production No. 29 seeks:

> All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.
>
> (Dkt. No. 398 at 2-3.)

In response to this Request, Defendants have resisted producing responsive documents created by non-voting members of the Panel, arguing that these documents are not relevant because they involve people with a limited role in the Panel's work. (Dkt. No. 398 at 5.) The Court disagrees. In arguing that the Ban is the product of the reasoned, independent judgment of

the Panel, Defendants have described a broad range of sources and input the Panel relied on in its analysis, including new data that previous reviews of military service by transgender individuals did not consider. (Dkt. No. 224, Ex. 1 at 3, Ex. 2 at 20.) The nature and scope of the input from non-voting members of the Panel is relevant to assessing Defendants' claims.

Further, the Court also finds that any chilling effect of disclosure can be "somewhat assuaged" by the actions discussed in Doe:

> For example, the Court can issue a protective order, Defendants can redact certain information, documents can be restricted to attorneys' eyes only, and the Court can conduct *in camera* review over any particularly sensitive documents.

2019 WL 4394842, at *9.

Plaintiffs also seek drafts, communications, and documents relied upon by officials in the Undersecretary of Defense's Office, who were tasked with drafting the Report and Recommendations after the Panel concluded its work. (Dkt. No. 399.) Defendants argue that these documents are not relevant because the officials were solely engaged in editing the Report for grammatical clarity and exposing this process would hinder future frank discussions between such low-level officials and their superiors. (Id.) But drafts solely focused on grammatical changes do not reflect "opinions, recommendations, or advice about agency policies," Warner, 742 F.2d at 1161, and therefore would not be protected by the deliberative process privilege. Alternatively, if officials in the Undersecretary of Defense's Office made substantive changes to the Report or engaged in additional fact-finding as Plaintiffs contend (Dkt. No. 399), documents created by or relied upon by these officials are relevant to assessing whether the Ban was implemented in reliance on the independent recommendations of the Panel. (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) And while the Court is sensitive to the Defendants' argument

that producing these documents may inhibit future deliberations, these risks can be mitigated with a protective order, as discussed above.

B. Requests for Production No. 15, 33, 36, and 44

There are few disputes regarding the remaining Requests. The Parties agree that Defendants' response to Request for Production No. 29, discussed above, encompasses Request for Production No. 33, which seeks documents reflecting "any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum." (Dkt. No. 398 at 3.) Defendants have also agreed to respond to Request No. 36, which seeks all "complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy." (Id.) Defendants will either produce the complaints or inform the Plaintiffs that there are no remaining complaints to produce. (Dkt. No. 399.) And finally, Defendants informed the Court that responses to Request Nos. 15 and 44 will be included in their upcoming production on December 20, 2019. (Dkt. No. 399.)

Conclusion

Finding that Defendants' assertion of the deliberative process privilege is overcome by Plaintiffs' need for the materials and the need for accurate fact-finding, the Court ORDERS the Defendants to produce:

1) All documents responsive to Request for Production No. 29, including the names, communications, and deliberative documents of non-voting members of the Panel; and
2) Drafts, communications, and documents created or relied upon by officials in the Undersecretary of Defense's Office in drafting the Report and Recommendations.

To mitigate any potential chilling effect upon the future deliberations of government actors, these documents shall be produced for attorneys' eyes only. On February 3, 2020 the Parties will meet with the Court to assess Defendants' privilege claims regarding Plaintiffs' next five prioritized Requests for production.

The clerk is ordered to provide copies of this order to all counsel.

Dated December 18, 2019.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,	C17-01297-MJP
Plaintiffs, and	SEATTLE, WASHINGTON
STATE OF WASHINGTON,	December 10, 2019
Plaintiff-Intervenor,	
v.	Status Hearing
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	
Defendants.	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

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For the Defendants:	Andrew Carmichael Matthew Skurnik US Department of Justice 1100 L. Street NW Suite 12108 Washington, DC 20530

THE CLERK: This is in the matter of Ryan Karnoski versus Donald Trump, C17-1297. Counsel, please make your appearance for the record.

MR. HEINZ: Jordan Heinz for the plaintiffs.

MR. SIEGFRIED: Dan Siegfried for the plaintiffs.

MR. IKARD: Sam Ikard for the plaintiffs.

THE COURT: Can you speak up, please?

MR. IKARD: Sam Ikard for the plaintiffs.

MR. SYKES: This is my colleague, Rachel Horvitz, for the plaintiffs. She is battling a cold and has lost her voice.

THE COURT: So she's way at the other end.

MR. SYKES: And I'm Jason Sykes for the plaintiffs.

MS. ALA'ILIMA: I'm Chalia Stallings Ala'ilima for plaintiff intervenors, Washington State.

MR. SKURNIK: Matthew Skurnik for the defendants.

MR. CARMICHAEL: Drew Carmichael, Department of Justice, for the defendants.

THE COURT: Counsel, thank you very much for the materials you sent me on your joint status report. And I've taken a look at them and gone back through what you told me and tried to review, in my mind, where we were the last time we were here. So what I would like to do is go through each of the items that were identified by the plaintiff as their priority. And I intend this to be an informational session

to help me understand what the problems might be that hold up or where it is you have sticking points.

And so I'd like to start out, please, if we could, I want to start with the Request for Production No. 29. And I think what I need here -- I think what I need is some understanding about how these meetings work. Because there were issues concerning those people who had a vote. That now has been resolved with the materials being turned over. Now, as I understand it, plaintiff wants those people who were at the table but who did not vote.

And so can anybody explain to me how these things work? If the people are at the table but do not vote, do they engage in dialogue? Do they offer their opinion? Do they write documents for others to absorb? Or are they simply there to absorb and report back to their various agencies? Does anybody know?

MR. CARMICHAEL: I do, Your Honor.

THE COURT: Okay.

MR. CARMICHAEL: From the defendants.

And I guess the answer is various, depending on who they are. So there is a few people that presented and we identified them specifically who presented to the panel. A few that -- I think there was one or two that sat in the final deliberations. And that's why we presented the meeting minutes ahead of time, so they could see who was there during

the most important meetings.

So you can see who was there. And if plaintiffs want to know who these individuals are, I'm happy to explain who they are and what their role was. But they have varying roles. That's why we did voting panel members and non-voting panel members, because voting members all have the same role, the same exact one. And it varies depending on whether you showed up or didn't show up.

THE COURT: Well, I'm assuming you can tell from the transcript who spoke or who presented.

MR. CARMICHAEL: Yes. You can tell who presented.

THE COURT: Okay. And presumably, since you've been through all of this data, you know who was communicating by writing back and forth.

MR. CARMICHAEL: We would know the primary people that did, yes.

THE COURT: So if the primary people were writing back and forth offering opinions, why wouldn't this fall into the same category and under the same analysis as the analysis done in *Doe*? In other words, why make this distinction if they were speaking or if they were writing and if they were offering up their counsel, why isn't this the same as those who were voting?

MR. CARMICHAEL: So I think the problem is that it's such a large swath of individuals. Like if they wanted -- I

identified three specific people that I thought could be on that level. And if plaintiffs wanted to narrow it to those three individuals, I think I can probably go back to the client and get them to agree to waive it for those three individuals.

THE COURT: How many people are we talking about?

MR. CARMICHAEL: There's 156 custodians.

THE COURT: I'm not talking about custodians, I'm talking about how many people were at the table?

MR. CARMICHAEL: For the final deliberations? So the final deliberations, there's only one extra person that was there.

THE COURT: Okay. And how about for the non-final negotiations?

MR. CARMICHAEL: It depends on which particular meeting. There's nine meetings. So that's why we need the meeting minutes. So it depends. That's why we gave the meeting minutes so you can see --

THE COURT: If there's nine meetings and there's a finite number of people in the room for each meeting, what are we talking about? Fifty people? Forty people? Thirty people?

MR. CARMICHAEL: This is actually the negotiations we're having in the *Doe* case. I believe it was 41. And then they agreed to narrow down to 13 extra. And then we

presented that to the *Doe* court to say: What did you mean by that? Did you mean that you -- we took it because we only made these Vaughan indexes for voting panel members, if that's all you wanted. However, we're not in the best position to explain to you what your order meant. So, you know, could we have a call in and discuss that? And the court asked us for additional information on November 22nd but hasn't responded yet.

THE COURT: So in the *Doe* court, you've turned over these documents?

MR. CARMICHAEL: No. We've turned over information from the -- all the voting panel members. But we identified it. We narrowed the dispute down to 13 additional custodians.

THE COURT: Okay. We're not communicating here. You're talking custodians, I'm talking people in the room.

MR. CARMICHAEL: But 13 individual people -- 13 new people that they wanted information from.

THE COURT: Okay. So when you say "custodian," you're talking about an individual who may have information who either spoke, wrote about something, or had some form of input into the committee?

MR. CARMICHAEL: Yes. Yes, Your Honor.

THE COURT: So you have not turned that over to the *Doe* court --

MR. CARMICHAEL: No, we haven't.
THE COURT: -- litigants?
MR. CARMICHAEL: No.
THE COURT: Why not?
MR. CARMICHAEL: Because they all have varying different levels of involvement.
THE COURT: And what makes a difference as to what level of involvement you think you should have to turn over?
MR. CARMICHAEL: I think it's a different analysis for each one.
THE COURT: Explain that to me. In other words, explain to me the types of people that were there and why it would make a difference as to whether you turned it over.
MR. CARMICHAEL: I think one they had was -- you know, just an example of two separate ones. One was the sort of the number two person behind the -- so Mr. Curtin (phonetic), who I think we've discussed before, was sort of the lead for the DoD portion of the panel. His documents are in there. His deputy was in there for most of the meetings as well. So he's maybe the very next tier down.
And then the other end of those 13 individuals, I think there was a doctor that presented on endocrinology. And his presentation is on there. But his documents wouldn't have any importance. His deliberative documents on his own wouldn't have the same level of involvement as maybe the

Deputy Undersecretary.

THE COURT: How do you know? I'm assuming he used his documents to make his presentation.

MR. CARMICHAEL: So, we've already turned over all the documents. This would just be communications of things that weren't protected.

THE COURT: All right. So apparently there was some presenters and there was somebody who was a point person for one of the agencies. What distinguishes the other people as to why it is you couldn't turn the material over?

MR. CARMICHAEL: They're just people in the room, you know, other people that they -- so -- and if you're just in the room for one particular meeting, it doesn't have the same level of involvement.

THE COURT: Well, then, why not? If they're just in the room, why don't you satisfy their inquiry and give it to them?

MR. CARMICHAEL: One, I would say that they haven't ever -- they haven't come back and said -- they haven't done what the *Doe* plaintiffs have done and said: Okay, now we're only interested in these people. So that's never come back to us.

THE COURT: Well, guess what? I'm asking you now. Whether or not they ask you, I'm asking you, why don't you just give it to them? Because you're telling me these are

people who are merely observers. Why don't -- if it doesn't hurt you, why don't you turn it over?

MR. CARMICHAEL: You have to tell us who you want, that's the thing.

THE COURT: They can't tell you who they want until they know who's there.

MR. CARMICHAEL: We gave that on November 1st. We gave them, on November 1st, who was there at what meeting. So first, you have to tell us who you want from --

THE COURT: What if they say, "We want it all"?

MR. CARMICHAEL: Then I think it's not a granular analysis. It's very broad. If you want it all, it's about 15,000 documents.

THE COURT: Okay.

MR. CARMICHAEL: Which is different than the 800 or so.

THE COURT: But the people still fall into the same category, don't they? That they were in the room, some of them had roles to play in presenting material. Presumably some of them had roles to play in communicating with people who were voting or amongst each other. And some were there simply as perhaps scribes or people carrying back the information, correct?

MR. CARMICHAEL: Of --

THE COURT: Is there any other category?

MR. CARMICHAEL: There are some people that didn't attend any meetings at all.

THE COURT: Okay. Well, I'm not worried about the ones who didn't attend any meetings, unless they wrote documents that were used at the meetings. But if you look at what the analysis is, is that the only way you're going to get this information is through you. And the other point to analyze is, if that information is turned over, how does it chill the deliberative dialogue? And if you're telling me they're nobodies, it doesn't chill the dialogue. So why not turn it over?

MR. CARMICHAEL: I think it does -- it would chill the dialogue if they are -- I also think it's less relevant if they're nobodies.

THE COURT: Relevance is not something that we're debating now.

MR. CARMICHAEL: Well, when you're looking at the four factors, relevance was one of those.

THE COURT: Right. And the Ninth Circuit has already told me that the relevance is not one of the issues.

MR. CARMICHAEL: Well, they specifically had the line that the relevance would be different depending on the person that was involved.

THE COURT: Okay.

MR. CARMICHAEL: And that it would be more relevant

if it's a senior person, less relevant if it was a non-senior person. But the chilling effect may be higher.

THE COURT: So maybe we ought to start this way. Why don't you tell them if there are 41 people that are in and out of this room, why don't you tell them who they are, what their role is, so that they can then say: We want one, three, five, seven.

MR. CARMICHAEL: I'd be happy to explain the roles of the individuals.

THE COURT: Okay. My question is, why haven't you done that already?

MR. CARMICHAEL: We've been trying. I've been -- I suggested individual people at the last one. I think at the end of the day, they just want everything.

THE COURT: Yeah.

MR. CARMICHAEL: And we're willing to narrow to individual people.

THE COURT: How can they narrow unless they know what the scope of what you've got is? In other words, how can they ask: I want Admiral so-and-so if they don't know that Admiral so-and-so is there. They don't know what role Admiral so-and-so played.

MR. CARMICHAEL: Well, they do, because of the meeting minutes. That's why we made sure we got the meeting minutes.

THE COURT: But they don't know about the non-speakers.

MR. CARMICHAEL: At the end of the meeting minutes, it says who attended each meeting.

THE COURT: Okay. And do they know who attended, by the list of who attended each meeting, what their respective roles are?

MR. CARMICHAEL: It has their title at the end.

THE COURT: I'm assuming that these people have all sorts of alphabet titles. How are they supposed to know what role they played, unless somebody identifies for them: This was an aide to so-and-so who provided documentation and did the research on X, Y and Z?

MR. CARMICHAEL: It does sort of have that. I don't have the meeting minutes with me, but one of them has at the end, looking at the last one, I just remember it, so it would have -- you know, one of them is Special Assistant to the Secretary, Deputy Undersecretary of Personnel and Readiness, documentarian, historian. So I think there was a couple additional people. And that's the last meeting minute. So it does tell you a little bit of what their role was.

THE COURT: Tell me why the obligation on them is to identify. As opposed to the obligation on you to identify? Because if you're at an impasse as to what categories of material here, the only option I have is to order it all.

But if they don't know what you've got, it's your obligation to lay out what it is. So I can see, yes, those people are important and those people aren't. You need to lay that out for me, if not for them.

And I'm wondering why that hasn't been done.

MR. CARMICHAEL: Well, we don't want to lose sight of what actually -- what the Ninth Circuit -- what actually we're looking at is, is the -- was the -- was DoD's determination of the policy reasonable, that it significantly furthers the military goals? So that -- we think we've already identified that with the voting members of the panel. There may be some other voting members.

But they have a theory that there was -- that this whole thing is a sham and that there was really, I think, that there is -- it was written up by some Evangelical counsel. This theory. I can't help them identify those documents because they don't exist.

THE COURT: No, you don't have to identify the documents. But they ask questions and you have to answer questions. And if one of the ways that you answer their question is to give them the information -- you keep saying, "Cut it down," but I don't know how they're supposed to do that unless you lay it out. You told me the same thing the last time when you said, "Oh, we can't give them who all the custodians are." And I found that pretty incredible that you

couldn't do that, because I think you can do that with the press of a button, if you've got the right program.

So let me turn to the other side. And am I understanding what it is you're looking for? Or am I off track here?

MR. HEINZ: I think we're on the right track for sure, Your Honor. I think what we struggle with is, as I look at RFP 29, it asks for documents related to the development of the Mattis plan, of the current policy. All of that falls within Your Honor's order, which adopted the *Doe* holding, that the deliberative-process privilege does not apply to documents that were used or considered in the development of the Mattis plan. That's co-extensive with 29.

So what I'm hesitant to get into with counsel is a debate over which custodians we're kind of picking and choosing, because we don't know who has the most relevant documents here. And I have an example for Your Honor.

A recently produced document was this PowerPoint presentation titled, "Transgender personnel policy working group." So this is a working group. It's not the panel of experts. This is one of the working groups that fed into the panel of experts, I think, based on the limited information that we have. And so this wouldn't be encompassed within the panel documents.

But on here, buried within this document, is an incredibly important piece of information which says that, "Proposed

courses of action, or options to pursue, address POTUS's expressed end-state." Well, we know what the President's expressed end-state was here. And this shows that the assumption here of the panel was to address his expressed end-state. This is a really important document, but it's not a panel of experts' document, it's from one of these working groups.

But this is just an example of what -- we don't know what we don't have. And that's why we believe that we're entitled to all of the documents responsive to 29, because asking us to pick and choose from what we don't have is an unfair game.

THE COURT: Okay. Well, as I understand my role, you're supposed to sort through this concept of granular. We're going to have to pick out a discrete grouping of documents that I can say: These are just like the voting members and that's why you get them. So if I tell them that -- it's a very long Request for Production. Honestly, it's got many, many moving parts. So let's concentrate on what the most important is. Do you want the people in the room for these meetings? Do you want to have whatever presentations they made? Do you want to know what documents they passed out or distributed to the voting members?

MR. HEINZ: Yes.

THE COURT: Okay.

MR. HEINZ: We do want that. But what I'm hesitant

to agree to is limiting this request to, for example, just the panel of experts' material, when we know that after the panel of experts completed their work, that the Department of Defense did additional work in creating the report.

THE COURT: Okay. Let's take this a slice at a time. Okay? Because I have to be able to do that analysis on each grouping, as I understand that the court wants me to do.

Now, have I identified a group that you want and you think the documents would be important to you?

MR. HEINZ: You have.

THE COURT: Okay. So if I'm looking at this and saying: The folks, the non-voting members in the room, their material is very much the same as the voting members who were there, and I order them to give it to you, am I within what you believe is the proper analysis that the *Doe* court did?

MR. HEINZ: Yes. We believe that there is no difference between those two.

THE COURT: Okay.

This is what you have to do. For each person that you identified that you just told me, I think it was 41, of people who attended meetings, you have to identify them, you have to give them what -- any presentations that they made. You have to give them any documents that they generated that were put forward to the voting members of the group.

MR. CARMICHAEL: We've already done that. That's in

the November 22nd production. So anything that was actually presented to the panel should be there. I would assume that that was something that was presented to the panel at some point, and that's why you have it. So we've already given everything that was presented to the panel.

What we haven't given is things that would be communications between non-panel members that a panel member never saw, except for the fact that right now in response to 44, and with negotiations with the *Doe* plaintiffs, we're going back and getting the presentations on the medical data, the employability, limited duty, work-related, so we're going back and getting that.

THE COURT: So did you get everything that I just outlined?

MR. HEINZ: Well, we don't have communications between the non-voting members.

MR. CARMICHAEL: Yes, between non-voting members. If a voting member is not on the communication, they don't have that. It would be voting-member communications.

THE COURT: Okay. But you're looking for non-voting to non-voting communication.

MR. HEINZ: Correct. Because a significant amount of work was done in these working groups that were comprised of non-voting members. Maybe there was a voting member also on the working group, I don't know. But there was a lot of work

done in these working groups.

THE COURT: Are these non-voting people the people who are doing the work group, or you don't know?

MR. HEINZ: We're going off of very limited information here. But from what we can tell, there was a lot of work done in these working groups. And then these working groups, like just in this presentation, reported up to the panel.

THE COURT: So you don't know who was on the working groups?

MR. HEINZ: I think we actually do know who was on the working groups. That's in an interrogatory response.

THE COURT: Okay. But you haven't received what the working groups produced?

MR. HEINZ: Correct. Only their presentations made to the final panel.

THE COURT: Okay. But not the data and not the information that they synthesized in order to make their final recommendation.

MR. HEINZ: Correct. We don't have the work.

THE COURT: Okay. So what's the problem with that grouping of materials?

MR. CARMICHAEL: So, I think that they'd have to -- so, for medical deployability and limited duty, we're actually producing the work. We're working on it right now.

THE COURT: Now, you just laid out multiple categories. You have to explain to me, are those the working groups?

MR. CARMICHAEL: This is when the panel -- they sent out certain data calls. They asked questions for analyzing gender dysphoria, they asked a particular office.

THE COURT: Who is "they" when you say "they" sent out?

MR. CARMICHAEL: The panel members in general. It would be the panel members, in general, requested information.

THE COURT: Okay.

MR. CARMICHAEL: So they requested information from a particular health office regarding costs of -- costs and usage rate of medical services. And that was one particular request. That was presented to the panel on, I think, two of the meetings. So we're actually going back and verifying that we have all of the work done. And we found a few extra things, and we're going to produce that on the 20th.

THE COURT: Have you produced the information when somebody who is on the panel calls for information, have you produced that call that they made?

MR. CARMICHAEL: We have produced what they presented on November 22nd. We're going back and producing the work that they did not present right now. So I've seen that in

the dataset, it's already in there. We're coding it right now for production on December 20th.

THE COURT: So you're intending to turn that over?

MR. CARMICHAEL: Yes.

That's for one category. The other category is deployability and limited duty. And that was a data call they sent out to the military services. And the same thing, like how they came up with that and the work on that.

MR. HEINZ: So I think, Your Honor, you're talking about the data, correct? You're not talking about, you're actually producing the communications within those working groups?

MR. CARMICHAEL: It's the data and how they came up with the data. And there's e-mails that explain the data and presentations that explain the data.

MR. HEINZ: What we'd be interested in are the communications and the work that was actually done. Like, for instance, what if the deployability working group were communicating and saying, you know, well, deployability sure isn't a reason to keep transgender people out of the military. Well, that would be very relevant evidence. And so those communications could be highly relevant and we want to see them.

THE COURT: All right. So here's another category of documents: What the working group did. Who is on the

working group? And the data that they produced. And the communications between those people on each working group. What's the problem with that?

MR. CARMICHAEL: We'd have to look at each specific one. So -- and I don't -- these ones, particularly, because the *Doe* plaintiffs brought them up and they overlapped them a little bit with 44, we're going ahead and doing it. But if there was another specific one, again, we'd have to figure out a way to identify just those specific documents. Like if there was the head of a particular working group and we have that person as a custodian, we may be able to isolate documents in the system.

THE COURT: So just for the record, how many working groups were there?

MR. CARMICHAEL: I don't know that off the top of my head. I think it's in the report, the ones that worked with -- the primary one is the panel of experts.

THE COURT: But I'm assuming that if you looked, you would be able to tell me what these various working groups are.

MR. CARMICHAEL: Yes. And their involvement on the panel.

THE COURT: And they're a discrete number, four or five?

MR. CARMICHAEL: Yes.

THE COURT: So those are people in the working groups who gathered data, put it together, communicated amongst themselves, and passed their reports on to those who were voting, correct?

MR. CARMICHAEL: In some instances; I mean, I think the deployability one didn't do it as much. I think they didn't overlap exactly. But that's information that we can provide as well, like when they started.

THE COURT: Okay. So if you go through the analysis, all of this material is pre-decisional. All right?

MR. CARMICHAEL: Yes.

THE COURT: And it's also something that you have complete control over. They can't get it without you, correct?

MR. CARMICHAEL: Yes.

THE COURT: And these folks are so far down the line that they're not deliberating at all. They are simply providing data, offering material up to those who are actually deliberating and making the decision.

MR. CARMICHAEL: Yeah, they wouldn't be involved in the actual deliberations. I guess they deliberate amongst themselves as to how they're going to provide the data.

THE COURT: So how does the deliberative privilege apply at all?

MR. CARMICHAEL: Our intent is to provide everything

that is -- all the data that they presented and how they got that. So that's our intent as we're going back and making sure that we provided all of that.

THE COURT: Okay. Well, intent is one thing, production is another. And as you reminded me, you have very little time left to do this. All right. So this is the next grouping that we're going to look at. You're going to supply them with the working group names, who's on the working group, the dialogue in e-mail or any other communication within those working groups, and the data that they produced.

I don't think the privilege applies at all there, because these folks aren't deliberating, they are researchers providing information and having discussions amongst themselves, as I understand the way you just described it to me.

MR. CARMICHAEL: They addressed other questions as well. And they're all not exactly the same. So I think for -- I mean, certainly it's something we'd be willing to consider, but communications, everything besides communications we're already presenting. But if there was some deliberations --

THE COURT: Well, we're past "willing to consider," I'm telling you you're going to produce it.

MR. CARMICHAEL: We'd have to identify -- from specific working groups?

THE COURT: Yes. I mean, if you really did organize all this data, you should be able to call it up. And apparently at some point you labeled it having a deliberative privilege. And I'm now identifying a group of things that I don't think fall into that. So you have to turn it over. It's not a matter of, we're considering, it's not a matter of, we'll go back and look. You have to turn it over.

MR. CARMICHAEL: Okay.

THE COURT: Now, what other category can we discretely find within this interrogatory?

MR. HEINZ: I think another category would be the post-panel-of-expert work that went into the report. So the panel of experts did their work and handed that off to, I believe, the Office of the Secretary of Defense. And then his office, from what we can tell, did additional work. They reached out to other researchers, other doctors.

THE COURT: Was this after the vote was taken or before?

MR. HEINZ: This is after the panel of experts had voted and deliberated, or perhaps it was around the same time. And there were two independent work streams. But it's not as if the panel of experts drafted this report that was sent over to the President. It was done by the Department of Defense and I believe the Secretary of Defense's office. So we would want that additional material that went into the

development of the report.

THE COURT: So let me understand the steps of this, so that I get it clear.

Explain to me these two lines that you just referenced.

MR. HEINZ: Drew or Matt could do this better than me. So the panel of experts did their work from October through January. October 2017 through January 2018. And the deliberations of the panel began in December 2017 and went through January of 2018. And then around that time, then they sent over their recommendation to the Office of the Secretary of Defense. And then there was work done there, then, to create and draft the report, the 44-page report that the government points to, as its justification for the policy.

So what we would want, then, are the documents and the communications that went into the drafting of that report.

THE COURT: Okay. And this is post-decision making, or no?

MR. HEINZ: Well, it's post-panel-of-expert decision, but the decision -- it's pre-decision by the Secretary of Defense, I suppose.

THE COURT: Okay.

MR. HEINZ: And, Drew, correct me if I'm misstating how that operated.

MR. CARMICHAEL: Yeah, that's pretty accurate. There

was a meeting -- there were, I think, two meetings of January -- around January 11th, around January 17th, in which they briefed Secretary Mattis. And the briefings we've given over to plaintiffs.

And then he accepted the decision and asked for a report to be made by the Undersecretary of Defense's office. And they wrote the report and presented that to him. And there's drafts and communications from the report, you know, from the making of that report.

THE COURT: Okay. So what's the problem with turning that over?

MR. CARMICHAEL: It's drafts -- generally drafts of reports, particularly something that was made for using to send to the President, and for something that was, you know, -- I think there is a little -- there's an issue there with the report is also used for litigation, too. But I think there's ones that were just deliberative process.

THE COURT: You told me that somehow you don't turn over drafts. Where's the rule that says you don't turn over drafts?

MR. CARMICHAEL: Drafts aren't deliberative process. It's not necessarily even the actual decision. But like, you know, little subparts of the decision, tweaking how you're going to do a particular sentence or how you're going to write a particular paragraph.

THE COURT: Okay.

MR. CARMICHAEL: There's deliberations that go into that. It's just as you're writing something, you want it to read well.

THE COURT: Who are the people who are doing this?

MR. CARMICHAEL: This is the Undersecretary's office for the Secretary of Defense.

THE COURT: Yeah, well, that tells me who the office is. But do you know who the people are?

MR. CARMICHAEL: We know the people that were the staff members, yes. We know the staff members.

THE COURT: So you know who was working on drafting this report?

MR. CARMICHAEL: Yes.

THE COURT: And you're saying that it's a deliberative process. Is it really? Or has a decision been made and all this is doing is memorializing it?

MR. CARMICHAEL: When you're writing versions of a report and you're doing -- the final decision was made. But when you're talking about how you're going to phrase a certain paragraph, one way or another, there's still deliberations there involved.

THE COURT: Okay. And you're the only ones who have that information?

MR. CARMICHAEL: We are the only ones that have that.

THE COURT: They can't get it. And once the decision is made, the people who are exchanging information to write this report wouldn't have a chilling effect because they're not the decision maker or not the debater.

MR. CARMICHAEL: I think it still has a chilling effect. If you, you know, if you write a sentence a certain way or write a paragraph a certain way, then your boss says: I don't like the way that reads, rewrite it. I think that has a chilling effect to have that go out in the public.

MR. SKURNIK: Your Honor, if I could sort of jump off on that a little bit. I think the idea is, and this is the concern that our clients have in this process is, this is clearly, you know, a controversial issue. And what the Department of Defense is concerned about, the next time there's a controversial issue on which they need to develop a policy, whether it's a personnel issue or some other issue, something relating to North Korea or Afghanistan or something else, if internal communications and drafts and comments on drafts, if they're disclosed, people within the Department of Defense and the military services are going to be much less willing to lend their candid views, in light of the fact that the things they say may be turned over in litigation in the future.

And I think that is the core of the chilling effect.

THE COURT: Well, I get that. If we're talking about

world peace, you know, blowing up Korea. But this is a discrete policy concerning one issue. Now, if people are afraid that somebody is going to come after them because they hold certain views about transgender individuals, we can handle that with a protective order. I don't necessarily think, at the level you're talking about, people need to be identified to the public by name.

But what they're after is looking for the process that you went through, and if the document that was produced is consistent with the data that was debated. So when you say that there's a chilling effect, just as the judge in *Doe* says, there are ways to handle that. You can have a protective order.

But at this point, you're talking about four or five people who are pretty far down the line, as I would assume that they are, and they're taking direction of how to write the report. Am I correct?

MR. CARMICHAEL: Yes. Yes. It also shows there's not a lot of relevance to that, too, if they're drafts.

THE COURT: But relevance -- it may lead to -- it doesn't have to have extraordinary relevance. It only has to have some relevance, particularly in discovery, if it leads to another inquiry that may have relevance.

MR. CARMICHAEL: That's for production. But for actually for overcoming the privilege, it has to have enough

relevance to overcome -- you know, the need needs to overcome the chilling effect. And we don't think there's a need for early drafts that weren't accepted.

THE COURT: Well, that's just your opinion. Tell me -- I don't understand --

MR. CARMICHAEL: Of course it is. I'm advocating for my client.

THE COURT: I understand that you have that responsibility. But I'm trying to decide whether -- the Ninth Circuit says that relevance at this point, you know, you hold the documents, and we're looking to try and find how this was produced. So I'm trying to take each stage and say -- did the report, which is key, you told me that that's the only thing you're going to be introducing at trial, if that is the only thing that you've got on the table, then probing whether or not it is consistent with the other data and with the other opinions might seem pretty important.

MR. CARMICHAEL: Well, that's the final, obviously, the final version of it. But these are drafts that we're talking about.

THE COURT: Where do you get that drafts aren't important? People ask, all the time, for the metadata underneath their electronics. That's a given. So isn't this the metadata on what it is that you produced?

MR. CARMICHAEL: But how does the need for drafts

that staffers -- first drafts that staffers wrote to the Secretary that the Secretary ultimately did not accept those drafts, how does that overcome the chilling effect? I think that's the --

THE COURT: Because you don't identify the people who are doing it. They can't be chilled if people don't know who they are, if they only see their work.

MR. CARMICHAEL: I think that would essentially mean that in any case, you could just do a protective order and it would be overcome.

THE COURT: I do them all the time. I might sign five or six a day. It's not unusual.

MR. CARMICHAEL: I understand. I just think that there's still more of a chilling effect in this litigation.

THE COURT: Well, with a protective order, I don't see that there's a chilling effect. So you're going to have to turn over the drafts for attorneys' eyes only, the names of the people who are involved, and identify how many people there are.

MR. HEINZ: And I think we'd be interested in those communications within the Undersecretary's office as to how those reports were created. You know, based on what they have disclosed to us, there was additional fact finding going on by that office, separate and apart from what the panel did. This office, these individuals were reaching out to

scientists, which we will submit have questionable backgrounds, to get articles and data from them. And so --

THE COURT: So these are the folks that are drafting the materials?

MR. HEINZ: Drafting the report.

THE COURT: Well, you'll get the dialogue and what it is that they asked for and any data that they received during the course of their drafting of the materials.

All right. We are -- it's taking longer than I anticipated, but let's -- can we leave this particular category yet, or not?

MR. HEINZ: I was going to say I think that's the hardest one. So the steepest hill is behind us. Anything else on 29 that you wanted to discuss?

The other one should be fairly quick, I think.

THE COURT: Okay. Tell me about 15.

MR. HEINZ: So 15 is another request that the defendants believe is too broad. And for 15, we're just wanting to understand how, under the Carter Defense Department, how they came to the opposite conclusion two years before. So we're not necessarily, at least initially, interested in the back and the forth and the detail that we just went through with the panel of experts and the current policy, but what did the Carter working group consider and how they came to their final conclusion, which was that

transgender individuals could serve.

THE COURT: So would you be satisfied with the same categories of documents that they already turned over to you pursuant to the *Doe* order for the Mattis decision? In other words, assuming that it was a similar process, you know, they've turned over to you the transcripts, they've turned over to you the custodians. So if they did exactly the same thing in exactly the same scope, presumably it would be exactly the same decision concerning the deliberative privilege, because these are the same types of documents. Would that satisfy your inquiry?

MR. SIEGFRIED: Your Honor, I think, yes, without prejudice to, if there's something in there that we think we need to probe further.

THE COURT: Okay. All right. Can you do that?

MR. CARMICHAEL: We can. I don't think there is as much as a need for the actual deliberations. So what we're producing -- right now what we're producing there, after our conversation, we went back and we isolated a few documents that we think would answer the questions for them. And they're going to come in the December 20th production.

So the equivalent of the report, like the final report that actually wasn't public, that the transgender working group did, the meeting minutes which describe what they heard, and the briefing slides from Rand when they briefed

the transgender working group, we're putting all that in the December 20th production.

The only thing that we wouldn't that is the same equivalent is e-mail communications from members on the transgender working group. Because that's in the panel of expert's production. But that's not in the production that we're doing December 20th. We could isolate it. We don't think, again, the need is that high for that level of detail into that one.

THE COURT: Let's do this: They're going to give you this on the 20th. You take a look at it. You don't like it, you want more, you come back and we have another talk about it.

MR. SIEGFRIED: Thank you.

THE COURT: Okay? So you're promising that on the 20th, 15 will be responded to?

MR. CARMICHAEL: As far as -- yes, we're going to -- a lot more information on 15.

MR. SIEGFRIED: Your Honor, can I ask a question?

THE COURT: Sure.

MR. SIEGFRIED: Drew, you mentioned the Rand briefing slides. Is that the only presentation to the working group that you're intending to produce?

MR. CARMICHAEL: There's a full summary of all of the presentations they got in the transgender, it's like a

50-page report with meeting minutes that go after it. I didn't find any other briefing slides in the collection. I'll look again and make sure that we do. But if there are any other briefing slides, we'll put them in.

THE COURT: Okay. What's next?

MR. HEINZ: How about Request for Production 36, which asks for complaints related to the *Carter* policy of open service. And here, I believe that the defendants have agreed to produce the one or two complaints that they're aware of, and that they would look through their production to see if there were any others. And then, wasn't sure if you found any others or what your position was after our meet-and-confer.

MR. CARMICHAEL: Still doing it.

And we did an isolation of the searches, and we -- I think they found one other mention of a complaint, which we can do as well. But it was really just those two.

So there were two complaints that were mentioned in the Mattis report that we're releasing in response to that. If there are any other in the production, we'll look at those.

THE COURT: So two in all of the military -- all those serving, there were only two complaints?

MR. CARMICHAEL: There were two complaints that the panel of experts considered. We didn't go back and look through any other complaints.

THE COURT: Well, that's a different thing, because I'm assuming that if they plucked out two complaints, you probably want to know the full range, don't you; or no? Because if they plucked out two complaints, it seems to me that that might prove your point.

MR. HEINZ: Your Honor, that's why we issued the request, to see how many complaints there really were. Whether people had an issue with transgender people serving.

And so we want the defendants, the government, to agree to produce all complaints. And there may only be the two. And that would sure be helpful to our case. But certainly the deliberative-process privilege doesn't apply to complaints. That's factual information.

MR. CARMICHAEL: In the production, we'll go back and make sure we don't have any.

THE COURT: So if there's two, you give them the two. That's all there is. You won't be arguing that there are 5,000.

MR. CARMICHAEL: Well, I think the Uniformed Service Chiefs testified before Congress that they weren't aware of any other complaints. So I think that probably is enough for them to --

MR. SIEGFRIED: We're just trying to avoid ambush at trial with all of these other complaints that we don't know about.

THE COURT: Well, as far as I'm concerned with this is if they don't give it, they don't use it. That's the rule in federal court. If you don't turn it over, you don't give people notice, and this seems to me fairly significant data, if there are only two, we're not going to find out that there's others because they will have done a complete search and see what they can find. And when will you do that by?

MR. CARMICHAEL: So, we'll search in our database. We're not agreeing to go to, like, the actual ID complaint database, which is really not searchable that way, to go through and see if there's any other complaints filed.

THE COURT: Well, if you're intending to justify what is done, based upon complaints about transgender individuals, we're trying to find out just exactly what you're going to put up.

MR. CARMICHAEL: There really hasn't been a lot of, as the service chiefs have testified, like bullying and harassment. That hasn't been -- that was not one of the major problems. That was not one of the problems with the policy.

THE COURT: Well, then, if you have two, you only have two. But I think the point is, you have to answer that specific interrogatory. Because if they, at trial, they want to read your interrogatory, you say there's only two.

MR. CARMICHAEL: We may be able to agree with the

plaintiffs that we're not aware of any other complaints and leave it at that.

THE COURT: Okay. Moving right along.

MR. HEINZ: Request for Production 33, which asks for documents related to alternatives to the Mattis policy. So other options or courses of action that the Department of Defense was considering an alternative to what they ended up adopting. And here, I believe that the defendants have agreed to go back and look for any other courses of action.

THE COURT: Well, if you get all the other things that I told them to give you, isn't that going to be in there?

MR. HEINZ: I would think so, yeah.

THE COURT: So let's see what that produces. And if you feel that it's not adequate, then you can come back. But it should be there.

MR. HEINZ: I agree. It should be within the panel of experts. And then also the Undersecretary documents, I would think.

THE COURT: Or if they didn't entertain anything else, then that should be obvious by what they produce as well. If there was only one course of action, if that's all that there is, then nobody is going to argue that they entertained other options.

MR. HEINZ: Okay. Then I think there's one last one,

Your Honor. Request for Production 44, which requests data sufficient to show the number of service members non-deployable due to gender dysphoria or transition-related medical care.

And here, the defendants did agree to look for that data and documents. And I'm not quite sure where they ended up with that search.

MR. CARMICHAEL: Yes. We're producing this in the -- anything that was withheld for deliberative process, we're going to produce that in the December 20th. And what this was is, we went back -- this is what I was explaining earlier -- that there was, the services specifically came up with these, searched their records for information about deployability, and presented this to the panel. So we're taking a step back and saying, all the stuff the services did on that. And that's what we're producing.

THE COURT: Okay. So you're agreeing that you're doing the search and that the material will be in the December 20th?

MR. CARMICHAEL: Yes, Your Honor.

THE COURT: Okay. All right. Anything else?

MR. HEINZ: No, Your Honor.

THE COURT: Okay. You're going to come back and see me again. And I believe the only day I probably have is January the 25th, Friday.

THE CLERK: January 24th is a Friday.

THE COURT: January 24th. And you're going to come back and here's the next issue. Are you satisfied with what it is that I've outlined that they have to give you, or do you -- are you intending to ask for your next grouping of interrogatories?

MR. HEINZ: I think that based on what we've discussed today, it would be helpful for us to sit down and chat again with the defendants and look at some other Requests for Production -- we've kind of identified our next five that we would propose -- and see if we can come to an agreement on those. And perhaps with Your Honor's permission, we could submit another joint status report a week before the next hearing.

THE COURT: Okay. Well, this is what you need to do: Five more, okay? Five more interrogatories that you put together in order of priority. Then you examine what you're going to get. And it would seem to me that you can do that relatively quickly, if you've already got that. Give it to them as soon as you can. I'm going to probably issue an order that -- what is today? Today is Tuesday. Give it to them by the end of the week.

Then you're going to look at what you get back. Then you're going to confer to make sure that you've got everything that they promised you, and whether that data

answers some of your next five, and to see if you can get an understanding of which of those five you can dispense with.

Now, one of the things that I did not see that you did, maybe you did -- because I know the State of Washington is at the table -- but I think I asked you, because counsel stood up and said, I've got 200 interrogatories. And I said: No, you don't, you've probably got about 50. Are you coordinating with the other cases around the country?

MR. HEINZ: We are, Your Honor. So three other cases. And we conferred with them about the five RFPs that we prioritized that we just went over, and asked for feedback, received some feedback, to ensure that we were representing kind of what the priorities were across all of the cases. And before we send over the new five Requests for Production, we'll do the same.

THE COURT: Okay. Is there any problem with them, that you just send this out to the other four?

MR. CARMICHAEL: That's what we're doing. If we send it out to one, we send it out to all.

THE COURT: Now, I talked about a protective order. If you decide you're going to do a protective order, you need to decide, if it's going to be attorneys' eyes only, how many of those attorneys are there. I can only control the attorneys that are right here.

MR. HEINZ: And I think we have protective orders

across the cases, yeah, that have an attorneys' eyes only provision.

THE COURT: Okay. All right. So we've got our plan. You have to, by Friday, get your next five. You have to take a look at what they give you on the 20th. After you've had an opportunity to review those materials, you meet and confer to see if those materials that you got you believe are complete, or whether you need to put them back into a joint status report for when you come back to see me again. Then you start working on the next five.

MR. HEINZ: Understood.

MR. SYKES: Your Honor, one housekeeping note. The motions cutoff regarding discovery dispute, the motions due on 1/20, and I just want to make sure that with us coming back on the 24th --

THE COURT: Remind me what your trial date is.

MR. SYKES: What is our trial date?

MS. ALA'ILIMA: June 22nd, Your Honor.

THE COURT: We'll push the deadline back 30 days and see how we do on the 24th, and how many more rounds we have to go through this. Okay? Any questions?

MR. CARMICHAEL: No, Your Honor. I'll wait and see those. I think we've already sort of hit the core on what the Ninth Circuit is asking us to review, so I do think at some point there's a bit of a diminishing returns. And once

you get the core things, then get the side core things, there's sort of a diminishing returns in continuing.

THE COURT: Well, I will meet as many times as necessary to get as minute as necessary. Okay? I think that's what I've been told I have to do. So we'll continue to meet until we reach the point where everybody understands what the background of this is, that we have the evidence that's going to be appropriate, so that both sides can present their case.

Now, yours is easy because you told me you only had one document, or somebody did, I don't know if it was you. So your case will be simple.

MR. HEINZ: Your Honor, I do want to flag just one thing. We haven't taken any depositions in this case yet. So we still have that phase, once we get the documents. I'm just flagging that for scheduling purposes, that this -- that defendants withholding so many documents is delaying the depositions in the case. So just flagging that.

THE COURT: Well, I get that. But if you're not going to note depositions until after you get the documents, then we're kind of stuck. I suggest that you basically set up some dates so that when you get these documents on December 20th, you can start deciding who it is you're going to depose.

I'm assuming you're not going to depose 41 people in the

room. But you're going to be discrete about who it is you're going to depose. But you might as well get your dates set now. And if there are people you know that you want, then set them up. If you don't have the documents you want, you can always cancel it. But be a little proactive on this.

MR. HEINZ: And after today's discussion, I think that we can -- now we have a little bit more certainty to move forward.

THE COURT: Okay. Do you have agreements with the other cases to -- if you're going to coordinate lawyers from four different cases, with four different judges, that's going to take some skill, not necessarily in your wheelhouse, but some judicial assistant -- not judicial assistant, but paralegal or secretary has a lot of work ahead of them. Although I think, you know, Doodle has made things a little easier.

MR. HEINZ: It sure does.

MR. SKURNIK: Your Honor, just to clarify. The government has started taking depositions of plaintiffs' experts and other witnesses. And we've been scheduling those. And the parties from the plaintiffs in all four cases so far have been present at those depositions.

THE COURT: Okay. Well, that's great. Anything else I can help you with?

MR. SIEGFRIED: No, Your Honor.

THE COURT: Are you coming from DC?

MR. HEINZ: Chicago.

MR. SIEGFRIED: Chicago.

MR. CARMICHAEL: We're DC.

MR. SKURNIK: We're DC.

THE COURT: Well, I hope you get out tonight on a good flight. And I'll see you on January the 24th. And you are going to need to file a report for me.

Now, so that you know, I am flying in from South America on the 23rd. So it needs to be here on time. And it needs to be here in a format that I can read it to get ready to talk with you. Okay?

MR. HEINZ: Understood.

THE COURT: Okay. Have a nice holiday.

(Recess.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI et al., Plaintiffs, and STATE OF WASHINGTON, Plaintiff-Intervenor, v. DONALD J TRUMP et al., Defendants.	CASE NO. C17-1297 MJP ORDER ON PLAINTIFF'S MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

THIS MATTER comes before the Court on Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege. (Dkt. No. 364.) Having reviewed the Motion, the Response (Dkt. No. 380), the Reply (Dkt. No. 385), and all related papers, the Court GRANTS in part and DENIES in part Plaintiffs' Motion.

Background

I. Requested Discovery

Plaintiffs allege that the creation and implementation of Defendants' ban on transgender military service (the "Ban") is unconstitutional. (See Dkt. No. 347, Second Amended Complaint ("SAC").) The Ban began with the July 26, 2017 Twitter announcement by President Donald J. Trump of a prohibition against military service by openly transgender people, which reversed the (former) Secretary of Defense Ashton Carter's Directive-type Memorandum 16-005 (the "Carter Policy") providing that transgender people would be allowed to accede into the military not later than July 1, 2017. (Dkt. No. 144, Ex. C at 5; Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) The announcement of the Ban was followed by the "Mattis Plan"—then-Secretary of Defense James Mattis's strategy for implementing the President's new policy—and the President's March 23, 2018 Presidential Memorandum directing the Department of Defense ("DoD") to implement the Ban. (Dkt. No. 224, Ex. 3.)

Plaintiffs seek discovery to substantiate their allegations that the Ban was not animated by independent military judgment but was instead the product of impermissible discriminatory intent. (Dkt. No. 364 at 6.) To this end, Plaintiffs have served 68 Requests for Production, which seek, among other things, documents related to the Government's justifications for the Ban; communications and materials considered by the "Panel of Experts" (the "Panel"), and statistics and data regarding transgender military service. (Dkt. No. 364.) Defendants have produced documents without responding to individual Requests for Production, producing documents as stored in the ordinary course of business by creating and searching lists of terms and custodians—without input from Plaintiffs—and then reviewing the collections for privilege. (Dkt. No. 381, Ex. 1, Declaration of Robert E. Easton ("Easton Decl."), ¶ 5.)

II. Procedural History

On July 27, 2019, this Court granted Plaintiffs' previous Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299). In reaching its conclusion, the Court found that Plaintiffs' interest in the documents prevailed under the balancing test set forth in FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), which weighs: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id.

Defendants appealed, and on June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court's Order. Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit approved of the Court's reliance on Warner, 742 F.2d at 1161, and found that the second and third Warner factors—the availability of other evidence and the government's role in the litigation—favor Plaintiffs. Karnoski, 926 F.3d at 1206. Regarding the first and fourth Warner factors, however, the Ninth Circuit concluded that "the current record is insufficient to establish relevance" and the fourth factor in particular "deserves careful consideration, because the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." Id. The Ninth Circuit suggested that on remand this Court should "consider classes of documents separately when appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be proper, [the Court] should undertake it." Id.

To date, Defendants have asserted the deliberative process privilege as a basis for withholding or redacting more than 50,000 responsive documents, and as the sole basis for withholding or redacting approximately 35,000 responsive documents. (Dkt. No. 364 at 6.) In

the instant motion, Plaintiffs again seek to compel documents withheld under the deliberative process privilege, suggesting nine broad categories, meant to encompass the 68 Requests for Production, through which the Court can evaluate the withheld documents. (Dkt. No. 364 at 10-12; Dkt. No. 365, Exs. 1-3.)

III. Doe Opinion

On September 13, 2019, in a related case, Doe 2 v. Esper, No. CV 17-1597 (CKK), 2019 WL 4394842, at *8 (D.D.C. Sept. 13, 2019), the United States District Court for the District of Columbia concluded that the deliberative process privilege does not apply to documents that were used or considered in the development of the Mattis Plan. The Doe court found that "the deliberative process privilege should not be used to shield discovery into Defendants' decision-making process and intent when the extent and scope of that decision-making process is a central issue in this lawsuit." Id. at *7. The court further found that the plaintiffs' need for the requested documents outweighed the deliberative process privilege, using a balancing test not unlike the one described in Warner, 742 F.2d at 1161. Id. at *8 (citing In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)). Pursuant to the Doe court's ruling, Defendants will produce documents from three of the categories Plaintiffs seek to compel in this case: Panel Communications; Testimony, Documents, and Data the Panel Received; and Panel Deliberations and Decisions. (Dkt. No. 389 at 2 (citing Dkt. No. 364 at 7).)

Discussion

I. Legal Standards

The Federal Rules of Civil Procedure authorize parties to conduct discovery into "any nonprivileged matter that is relevant to any party's claim or defense." FRCP 26(b)(1). The Rules authorize parties to discover material which is likely to be inadmissible at trial, so long as

the requested information "appears reasonably calculated to lead to the discovery of admissible evidence." Id. "[V]irtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation . . . ." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The party resisting discovery has a heavy burden of showing why discovery should be denied. Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir.1975).

The deliberative process privilege protects documents and materials which would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." N.L.R.B., 421 U.S. at 150. For the privilege to apply, a document must be (1) "predecisional," meaning that it was "generated before the adoption of an agency's policy or decision," and (2) "deliberative," meaning that it contains "opinions, recommendations, or advice about agency policies." Warner, 742 F.2d at 1161. "Purely factual material that does not reflect deliberative processes is not protected." Id.

II. Privilege Assessment

On the current record, the Court finds no avenue for evaluating Defendants' privilege assertions within the framework of the Ninth Circuit's guidance. Defendants have asserted the deliberative process privilege over 35,000 responsive documents, a volume that prevents the Court from evaluating documents on an individual basis. (Dkt. No. 364 at 6.) Further, the Court cannot evaluate Defendants' privilege assertions by individual Requests for Production because Defendants produced documents as kept in the ordinary course of business, without responding to individual Requests. (Easton Decl., ¶ 5.) Finally, Plaintiffs suggest the Court should evaluate privilege assertions based on nine overarching categories of documents meant to encompass all 68 Requests for Production, but, as Defendants note, these proposed categories are too broad to be meaningful. (Dkt. No. 364 at 10-12; Dkt. No. 380 at 6-7.)

Defendants' current production is therefore insufficient, as it does not allow Plaintiffs or the Court to assess Defendants' privilege claims, FRCP 26(b)(5)(ii), or conduct the type of "granular analysis" suggested by the Ninth Circuit, Karnoski, 926 F.3d at 1206. Thus, the Parties must take several actions before the Court can review Defendants' privilege assertions:

1) Defendants must produce their complete list of custodians and search terms within seven (7) days of the date of this Order;
2) Plaintiffs shall provide Defendants with a list of Requests for Production, sorted by order of priority, within ten (10) days of the date of this Order. Plaintiffs may also provide Defendants with a list of additional custodians and search terms. Plaintiffs are encouraged to coordinate with counsel in the other active cases concerning the Ban, in order to consolidate and prioritize the Requests for Production;
3) Once the Plaintiffs have provided their list of Requests for Production by order of priority, the Government must begin responding to each Request, consulting with Plaintiff to apply additional search terms or search additional custodians.

This Court will adopt the reasoning and conclusions of the Doe court concerning documents related to the Mattis plan. Doe, 2019 WL 4394842, at *5-10. Whether Defendants may assert the privilege over documents related to the Carter Policy remains an open question that the Court will address upon a motion by the Plaintiffs. In December, the Parties and the Court will begin reviewing Defendants' privilege assertions by individual Requests for Production, beginning with the first five prioritized Requests.

Conclusion

Because the Defendants' current production does not permit Plaintiffs or the Court to assess Defendants' privilege claims, after Plaintiffs have provided Defendants with a list of

Requests for Production ordered by priority, Defendants are ORDERED to begin responding to each Request. On December 10, 2019 at 4 p.m., the Parties will meet with the Court to begin assessing Defendants' privilege claims by individual Requests for Production.

The clerk is ordered to provide copies of this order to all counsel.

Dated November 19, 2019.

Marsha J. Pechman
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

No. 17-cv-01297 (MJP)

SECOND DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' MOTION FOR CLARIFICATION AND MOTION FOR STAY

DECLARATION OF ROBERT E. EASTON

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

1. I was notified on January 27, 2020 by Department of Justice (DOJ) litigation counsel that an inadvertent error by counsel led to an inaccurate statement in my declaration filed January 24, 2020.

2. Specifically, Paragraph 6 of my declaration stated that Defendants' productions pursuant to the *Doe* order occurred on October 31, November 22, and December 19, 2019. In fact, two of these productions occurred a day later, on November 1 and December 20, 2019.

3. I have been advised that the two erroneous dates resulted from a mistake by Defendants' counsel interpreting certain data exported from Defendants' e-discovery platform. Defendants' e-discovery platform utilizes the term "produced" for any production that has been finalized within the program. The data exported from the platform indicated that these two productions were "produced" on October 31 and December 19, 2019. The e-discovery contractor has since clarified that these are in fact the dates that these productions were completed in Defendants' document review platform. But additional processing was required to prepare these documents for export; thus, DOJ counsel did not transmit these two productions to Plaintiffs' counsel until November 1 and December 20, 2019.

4. I was not aware of this discrepancy at the time I executed my declaration on January 24, 2020.

5. DOJ counsel has since provided me with the transmittal correspondence associated with these productions, which confirms the accuracy of the corrected dates.

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

EXECUTED this 30th day of January 2020, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

No. 17-cv-01297 (MJP)

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' MOTION FOR CLARIFICATION AND MOTION FOR STAY

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' Motion for Clarification and Motion for Stay. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

DoD Production in Response to *Doe* Order

4. Following the September 13, 2019 decision in *Doe v. Esper*, No. 17-cv-1597 (CKK) (D.D.C.), Dkt. 237, DoD has produced or committed to producing, under protective order as appropriate, the following categories of documents: (i) an unredacted version of the Administrative Record; (ii) unredacted meeting minutes of the Panel of Experts; (iii) all documents, testimony, and data reviewed by voting members of the Panel along with the deliberations on those materials; and (iv) all documents and communications that related to the work of the Panel and that were sent to or from voting members of the Panel dated from September 14, 2017, to March 23, 2018. In accord with the *Doe* order, DoD is no longer withholding documents within these categories under the deliberative process privilege. DoD continues to withhold certain materials on the basis of other privileges or because they contain personally identifying information.

5. In response to the *Doe* order, DoD has endeavored to produce any document or communication falling within the categories described in paragraph 4 even where generated by or sent to a person who is not a voting member of the Panel of Experts. Thus, for the date range of September 14, 2017 to March 23, 2018, DoD is only withholding documents under the

deliberative process privilege where the document is unrelated to the work of the Panel or was not provided to any voting member of the Panel of Experts.

6. DoD's and the Military Services' productions in response to the *Doe* order occurred on October 31, 2019; November 22, 2019; and December 19, 2019. Collectively, these productions consisted of 1,257 documents, comprising 9,584 pages.[1]

Compliance with and Interpretation of this Court's December 18, 2019 Order

7. Pursuant to this Court's Order of December 18, 2019, DoD is currently processing for release the documents of Secretary of Veterans Affairs (and former Under Secretary of Defense for Personnel and Readiness) Robert Wilkie. Mr. Wilkie was the only non-voting member of the Panel of Experts. A small number of documents fall within the date range of September 14, 2017, to February 22, 2018, and will be produced before January 31, 2020. In processing Mr. Wilkie's documents, DoD is determining whether they should be redacted or withheld pursuant to a privilege other than the deliberative process privilege, or whether they should be redacted or withheld as deliberative because they are not subject to the Court's Order.

8. If the Court's Order encompasses all documents responsive to RFP No. 29, DoD believes the only practicable method of compliance would be to re-review all documents previously withheld under the deliberative process and/or other privileges for the date range of September 14, 2017, to February 22, 2018. This would be necessary to determine whether documents should be released in full, whether they should be redacted or withheld pursuant to a privilege other than the deliberative process privilege, or whether they should be redacted or withheld as deliberative because they are not subject to the Court's Order.

[1]These totals also include certain documents unrelated to the deliberative process dispute in *Doe* that were reviewed and produced in the same productions.

9. Preliminary estimates indicate that approximately 10,869 DoD documents and approximately 5,256 Army documents generated between September 14, 2017, and February 22, 2018, were withheld as privileged under the deliberative process privilege. The Navy and Air Force withheld privileged documents as well, which will require re-review by those Services. At this time, I have been advised that the Navy estimates 4,209 documents will need to be re-reviewed, and the Air Force estimates it will need to re-review an additional 2,114 documents.

10. Accordingly, if the Court's Order is construed to require release of all deliberative documents responsive to RFP No. 29, this will require the re-review and potential release of at least 22,000 documents.

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

EXECUTED this 24th day of January 2020, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, *et al.*, Plaintiffs, and STATE OF WASHINGTON, Plaintiff-Intervenor, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	No. 17-cv-01297 (MJP) **DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO COMPEL (ECF 364) DOCUMENTS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE**

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' Opposition to Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

DoD Search and Review Process

4. In their Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege, ECF No. 364, Plaintiffs seek to compel Defendants to disclose all documents and information withheld pursuant to the deliberative process privilege.

5. As explained in detail in my previous declaration,[1] DoD conducted a thorough and in-depth search and collection of files and documents potentially relevant to the claims and defenses in response to this and the three other lawsuits challenging DoD's policies regarding military service by transgender individuals and individuals with gender dysphoria. This process involved identifying custodians likely to have relevant information and working with them and the DoD Information Technology ("IT") personnel to gather these records. Once the responsive information was gathered, both through digital collections at the server level and with supplemental self-collections, it was sent to DOJ attorneys for processing in their eDiscovery software, Relativity. This information was then organized within these databases as it was collected and as it would appear in the ordinary course of business—by DoD or Military Service

[1] Declaration of Robert E. Easton, *Karnoski, et al. v. Trump, et al.*, No. 17-cv-01297 (W.D. Wash. Aug. 29, 2019), ECF 371-1.

component and custodian. The data were de-duplicated and batched, and then DoD's responsiveness and privilege review began.

6. The DoD document review process was similarly comprehensive. *See id.* at 6-9. Reviewers were trained on the mechanics and criteria for review, how to determine whether documents were responsive and privileged, and how to code documents in Relativity. Reviewers were further informed that responsiveness and privilege determinations should be made in succession while reviewing a document and completed before moving to the next document unless there were questions. Importantly, beyond determining whether a document was responsive, DoD did not apply blanket non-privilege or privilege objections to exclude reviewed documents from production. Privilege determinations were made only after a document was determined to be responsive, and as I stated in my earlier declaration, no custodians, documents, or batches were excluded from review because they contained privileged information. *Id.* at 8.

7. In each instance where DoD claimed privilege over a particular document or portion of a document, that claim of privilege was expressly made on one of the 53 privilege logs produced by DoD in these cases. The logs included the following metadata: author of the email or creator of the document, recipient of any email, date of creation or date the email was sent, title of the document, a privilege determination, and basis for the privilege determination. Again, this information was provided for every document that DoD withheld as privileged in this case.

Documents and Privilege Objections Previously Provided to Plaintiffs

8. Defendants have long since provided Plaintiffs with individualized privilege objections, a description of the documents being withheld pursuant to those individualized privilege objections, and many of the documents they claim to seek through this motion. For example, Secretary Mattis' decision and the Panel of Experts' recommendations, documents

Plaintiffs claim to seek in their sixth of nine categories identified in their motion, *see* Pls.' Mot. at 7, were either provided to Plaintiffs and filed on the docket in related cases[2] or appear unredacted in the administrative record.[3] Documents from Plaintiffs' fifth category—"testimony, documents, and data the Panel received[]," *see id.*—were also included in the Administrative Record provided to Plaintiffs in the spring of 2018.[4] And other materials such as the Panel of Experts briefings to the Secretary of Defense and the Deputy Secretary of Defense (recently provided in *Doe v. Esper, et al.*), which would presumably fall into several of Plaintiffs' categories, have been provided in discovery.[5]

9. In other categories such as the Carter policy implementation, relevant documents have been provided and in many cases posted in the public domain for years. For example, the policy and implementation guidebooks for DoD and the military services are all online.[6] Likewise, DoD has posted official implementing guidelines for DoD's new policy online or will provide that official guidance to Plaintiffs in a forthcoming production as indicated on its responses to requests for production of documents.[7]

10. Similarly, DoD has produced documents that correspond to each of the other categories identified by the Plaintiffs. For example, DoD produced DoD Instruction 1300.28, "In Service Transition for Transgender Service Members," which is an operative military policy and

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[2] *See* Dkt. 216-1; Administrative_Record_003059-60.
[3] Administrative_Record_003059.
[4] *See, e.g.*, Administrative_Record_000357; Administrative_Record_002858; Administrative_Record_000093; Administrative_Record_002883; Administrative_Record_002999; Administrative_Record_003044.
[5] USDOE00283143 to USDOE00284620.
[6] TRANSGENDER SERVICE IN THE U.S. MILITARY, AN IMPLEMENTATION HANDBOOK (Sept. 30, 2016), https://dod.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf.
[7] Directive-type Memorandum (DTM)-19-004 – Military Service by Transgender Persons and Persons with Gender Dysphoria (Mar. 12, 2019), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-19-004.pdf?ver=2019-03-13-103259-670.pdf.

procedure.[8] DoD also produced several documents related to waiver applications and to discharge proceedings. A document representative of this type of information is a presentation produced to Plaintiffs on April 30, 2019 in *Doe* Production 27. It contained information related to waiver requests, statistical information related to costs of medical treatment, and factual information about individuals identified by International Classification of Disease codes related to gender dysphoria.[9] DoD additionally produced or informed the Plaintiffs that the information they were seeking was available in the Administrative Record or in subsequent productions, including documents that provide statistical and factual information on military healthcare generally.[10] Therefore, while Plaintiff's assert that factual information or other information about non-policy matters was withheld, much of what they appear to seek through their motion is either publicly available or was previously produced in one of the many DoD productions.

DoD Conducted an Individualized Privilege Review

11. 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, Defense Health Agency, the National Guard Bureau, and the Office of the Chairman of the Joint Chiefs of Staff, both uniformed and civilian career employees and political appointees from two administrations, across numerous ranks, positions, and areas of professional expertise as they

[8] *See, e.g.*, USDOE00268619-USDOE00268636.
[9] *See, e.g.*, USDOE00284622-USDOE00284631.
[10] *See, e.g.*, Administrative_Record_002982; Administrative_Record_002999; Administrative_Record_003011.

worked to develop and refine DoD's policy over a four-year period. 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, in some cases by years; communications to and from the ultimate decision-maker, the Secretary of Defense; and communications that post-date the Secretary's decision by over a year. And these communications span various topics, including analyses of the policy's effectiveness, development of key aspects of the policy such as the months of stability requirement, the personal experiences of commanders and transgender individuals regarding challenges faced under the policy, and discussions about how to address the practical logistics of gender transition when it comes to berthing, showers, bathrooms, and other ground-level issues. Moreover, each category 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 and the fact that this policy was in development for more than three years and spanned two administrations, categorizing the documents as Plaintiffs suggest would encompass virtually all deliberative documents.

12. The first category Plaintiffs identify contains documents and communications regarding the formulation of Secretary of Defense Ashton Carter's policy on military service by transgender individuals. One example of documents in this category is an email between senior DoD personnel discussing a "transgender information paper" that addressed a specific cohort of service members and includes further information on the topic based on questions from leadership. (USDOE00083941). Another example is a draft information paper on various aspects of DoD transgender accessions and retention policies. (USDOE00084011). A third example is a draft

PowerPoint presentation for the Senior Military Medical Action Counsel on military service by transgender individuals dated September 14, 2016. (USDOE00240404). And USDOE00274420 and USDOE00276750 are documents that discuss the Transgender Service Review Working Group's proposed courses of action as well as a presentation reflecting input from active duty Service members. Although Secretary Carter's policy is no longer in effect, the genesis of the policy and the internal deliberations of many of the policy makers who were part of the current policy are captured in these documents. Moreover, these documents are representative of internal back-and-forth conversations and dialogue and include deliberations at various levels within DoD and the Military Services, including the highest levels of DoD, while the Carter policy was being developed by DoD personnel, some of whom later worked on the Mattis policy. These documents do not lend themselves to a one-size-fits-all analysis because they span different administrations and therefore reflect different individuals filling the same role, personnel serving in an "acting" capacity, and personnel who have since retired from government service. These nuances must be accounted for when reviewing these documents.

13. Another category of documents that Plaintiffs identify contains documents and communications regarding the implementation of Secretary Carter's policy on military service by transgender individuals. An example of documents in this category is a draft presentation for a Transgender Senior Implementation Group meeting that contains questions from the Services about implementation of the Carter policy, as well as Service inputs for the implementation plan. (USDOE00273728). A November 3, 2016 informational update for leadership on the implementation status of medical care for transgender personnel in the Military Services and TRICARE beneficiaries, which included the status of implementation guidance, training materials, and medical care for transgender personnel. (USDOE00240400). Another example is an email

and a reply sent on December 19, 2017 between DoD personnel regarding clarifying guidance to the field on transgender applicant processing at the military entrance processing stations given the ongoing deliberations. (USDOE00083070). A final example is an email sent on December 27, 2017 from the Military Assistant to the Vice Chairman of the Joint Chiefs of Staff to a senior DoD executive. (USDOE00083056). This document seeks updates that may have been provided to leadership on the progress of the transgender working groups. Like the formulation documents identified above, many of the career DoD personnel who developed the Carter policy were part of the Mattis policy development and their mental impressions, opinions, and deliberations are captured throughout these documents.

14. The third category involves documents withheld under the Deliberative Process privilege that were sent, received, or created between January 20, 2017 and July 27, 2017. A review of Relativity revealed that more than 5,000 documents in the DoD data set alone would fall within this broad category. One example of these documents is an information paper for the Deputy Secretary of Defense providing a background on the DoD transgender policy. (USDOE00073666). Another example is a draft version of DoDI 6130.03, the regulation that sets forth the medical standards for military accessions. This version includes redline edits and comments by editors in the margins. (USDOE00129756). A third example is an email between senior DoD personnel regarding draft language for DoD leadership's Congressional testimony. (USDOE00136085). And a final example is an email between DoD personnel and Coast Guard personnel regarding Coast Guard participation in the Transgender Senior Implementation Group. (USDOE00087789). These documents are vastly different in purpose, scope, and audience. One was drafted for the second most senior individual in DoD, the next was a working copy of a regulation, and the third represents concerns raised before DoD personnel testified before

Congress. While Plaintiffs' categories would treat these documents the same, the purpose, scope, and audience all factor into the appropriate legal analysis.

15. The next three categories consist of documents that concern the DoD Panel of Experts. One example is an email chain between senior DoD personnel regarding attendance by specific people at Panel of Experts meetings and who should attend. (USDOE00083080-USDOE00083082). 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 is defining terms from various DoD instructions applicable to military personnel policy. (USDOE00083180). A third example is an email between senior DoD personnel about a draft communication to the Panel that was 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 a senior DoD executive. This document seeks updates that may have been provided to leadership on the progress of the transgender working groups. (USDOE00083056). A final example is an email between senior DoD personnel 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 examples 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.

16. As I have previously stated, *supra* ¶ 8, DoD produced Secretary Mattis' decision, 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), and the evidence the Panel reviewed (unless that evidence was inextricably intertwined with Panel deliberations).

Accordingly, the documents withheld pursuant to the deliberative process privilege from these categories generally include documents that 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.[11] A categorical approach therefore would necessarily encompass a myriad of these varying types of documents that had no bearing on the Panel of Expert's decision-making process.

17. The seventh category consists of withheld documents related to the February 2018 Report and to Secretary of Defense James Mattis' February 23, 2018 Memorandum. USDOE00069244 is a draft version of the February 2018 Report. USDOE00194076 is an email communication regarding edits to a draft version of the February 2018 Report that was received by the US Army. Another 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. Another example is a document containing draft talking points for leadership as DoD prepared to issue Secretary Mattis' February 23, 2018 Memorandum. (USDOE00267770). These are representative samples of the various types of documents that were drafted for different purposes and for differing audiences that require consideration on a case-by-case basis.

18. The eighth category of documents concerns President Trump's March 2018 Memorandum. An example from this category protected solely by the deliberative process privilege would be communications and draft talking points for DoD public affairs officials regarding the President's decision. (USDOE00261306).

[11] *See, e.g.*, USDOE00272054; USDOE00272056.

19. The final category of documents withheld relates to implementation of the current DoD policy on military service by transgender individuals. This type of communication contains underlying reasoning used by DoD personnel in the development and eventual publication of guidance to US Military Entrance Processing Command. .An example is an email conversation between DoD personnel regarding physicals for transgender applicants at an officer basic course. (USDOE00263935). A second example is an executive summary of a waiver issued by the Air Force for non-covered benefit of male-to-female sex reassignment surgery in the treatment of gender dysphoria. (USDOE00252751). A one-size-fits-all analysis of documents in this category is not practicable because these documents discuss topics that differ greatly in substance, from training to medical procedures. Thus, a more tailored review is necessary.

20. Based on the foregoing categories, a single analysis as to any of Plaintiffs' identified categories is not an effective way to review these privilege determinations. These documents were drafted and reviewed at varying levels, involve deliberations by different administrations and different officials both uniformed and civilian on widely-varying topics, concern any number of Plaintiffs' categories at the same time, and represent just a sample of documents from a much larger pool of deliberative materials.

21. Likewise, designating "categories" aligned with Plaintiffs' requests for production of documents, as they apparently propose at 11-12 of their motion, is not practical. As explained above and in the *Doe* declaration, neither searches nor responsiveness and privilege determinations were aligned with Plaintiffs' requests for production. Rather, DoD searched for all information even remotely related to the DoD transgender policy and made privilege determinations on a document-by-document basis only after responsiveness was determined. However, even if categorized by Plaintiffs' production requests, some documents responsive to these requests would

still be protected by the deliberative process privilege because they would include DoD deliberations on "military policies," "waivers," "data related to costs," "statistical and factual information about military service by transgender individuals," and "statistical and factual information related to military healthcare." For example, materials from the Carter Transgender Working Group,[12] materials relating to the decision to delay accessions of transgender individuals into the military services,[13] and materials from the DoD Panel of Experts[14] all include pre-decisional deliberations.

22. Further, Plaintiffs claim that the deliberative process privilege cannot be applied to any documents regarding "implementation" of the Carter policy or DoD's current policy, "rescission" of the Carter policy, or any document that post-dates the final vote of the Panel of Experts. This again sweeps too broadly because some of the documents responsive to these requests still contain pre-decisional information. For example, one document is an email and a reply sent on December 19, 2017 between DoD personnel regarding clarifying guidance to the field on transgender applicant processing at military entrance processing stations in light of the ongoing deliberations. (USDOE00083070 to USDOE00083071). This communication contains underlying reasoning used by DoD personnel in the development and eventual publication of guidance to US Military Entrance Processing Command. Another example is an email sent on December 27, 2017 from the Military Assistant to the Vice Chairman of the Joint Chiefs of Staff to a senior DoD executive. (USDOE00083056). This document seeks updates that may have been provided to leadership on the progress of the transgender working groups.

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[12] *See, e.g.*, USDOE00075288; USDOE00074680; ¶12, *supra*.
[13] *See, e.g.*, USDOE00092178; USDOE00083737; USDOE00129731; USDOE00073671.
[14] *See* ¶14, *supra*.

Release of These Documents Would Have an Immediate Chilling Effect

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

24. The release of these documents would have an immediate chilling effect on future deliberations. 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.

25. In addition, the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted mean that

deliberative and pre-decisional conversations frequently occur via email. Leaders across the Department routinely solicit feedback, thoughts, and opinions on highly sensitive topics, including those concerning national-security implications, using email so that those who need to review and weigh-in on a decision can do so in real time regardless of their physical location.

26. Here, with respect to the DoD Transgender Service Policy, the decision-making process, which spanned two administrations, was robust and highly deliberative. The Secretary Ashton Carter-era policy on military service by transgender individuals was developed by working groups, consultants, and military experts who all generated documents to communicate ideas, debate courses of action, and propose updates to DoD policy. Once the administration changed, a similar process was undertaken and a similar volume of documents was generated. The Panel of Experts was established by the Secretary 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.

27. Various policy documents, to include Secretary Mattis' 2018 memorandum that was circulated for comment and review by all of the Services and the Joint Staff, the Presidential Memorandum, and other implementation documents were also withheld under the deliberative process privilege. These documents reflect the thoughts and deliberations of the highest

government and DoD officials over a period of more than three years. The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DoD personnel knew that their thoughts, impressions, and opinions on various topics, related both to DoD transgender policy and other policies, would be open to scrutiny, they may hesitate to provide their true positions on potential courses of action, not just related to military personnel decisions but as to any politically sensitive decision that DoD faces in the future, for fear that these discussions could be revealed to wider audiences. This would be the case regardless of the entry of a judicial protective order because a motivated party would still second-guess the underlying advice and analysis in depositions and other proceedings which could later influence the 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.

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

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

EXECUTED this 13th day of September 2019, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

OFFICE OF THE DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON DC 20301-1010

March 12, 2019

MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM)-19-004 - Military Service by Transgender Persons and Persons with Gender Dysphoria

References: See Attachment 1.

Purpose. This DTM:

- Implements the policy in the February 22, 2018 Secretary of Defense Memorandum and the February 2018 DoD Report and Recommendations on Military Service by Transgender Persons, assigns responsibilities, and prescribes procedures regarding the standards for accession, retention, separation, in-service transition, and medical care for Service members and applicants with gender dysphoria, as applicable.

- Approves updates to the separation processing guidance in DoD Instructions (DoDIs) 1332.14 and 1332.30. These DoDIs will be administratively changed in accordance with Attachment 4 of this DTM; the changes will be effective 30 days after publication of this DTM.

- Is effective April 12, 2019. This DTM will be incorporated into DoDIs 1300.28, 1332.14, 1332.30, and 6130.03, and supersedes any contradictory

guidance in those publications. This DTM will expire effective March 12, 2020.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

Definitions. See Glossary.

Policy. It is DoD policy that:

- Service in the Military Services is open to all persons who can meet the high standards for military service and readiness without special accommodations.

- All Service members and applicants for accession to the Military Services must be treated with dignity and respect. No person, solely on the basis of his or her gender identity, will be:

    - Denied accession into the Military Services;

    - Involuntarily separated or discharged from the Military Services;

    - Denied reenlistment or continuation of service in the Military Services; or

    - Subjected to adverse action or mistreatment.

- Except where a provision of policy has granted an exception, transgender Service members or applicants for accession to the Military Services must be subject to the same standards as all other persons.

    - When a standard, requirement, or policy depends on whether the individual is a male or a female (e.g., medical fitness for duty; physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards), all persons will be subject to the standard, requirement, or policy associated with their biological sex.

    - Transgender persons may seek waivers or exceptions to these or any other standards, requirements, or policies on the same terms as any other person.

- Service members who access in their preferred gender or received a diagnosis of gender dysphoria from, or had such diagnosis confirmed by, a military

medical provider before the effective date of this DTM will be allowed to continue serving in the military pursuant to the policies and procedures in effect before the effective date of this DTM.

- Accession and retention standards for gender dysphoria and the treatment of gender dysphoria will be aligned with analogous conditions and treatments, including stability periods and surgical procedures.

Responsibilities. See Attachment 2.

Procedures. See Attachment 3.

Information Collections. The requests for medical reports and history referred to in Paragraph 2.b. of Attachment 3 do not require licensing with a report control symbol in accordance with Paragraph 1.b.(13) in Enclosure 3 of Volume 1 of DoD Manual 8910.01.

Releasability. **Cleared for public release**. Available on the DoD Issuances Website at https://www.esd.whs.mil/DD/.

David L. Norquist
Performing the Duties of the
Deputy Secretary of Defense

Attachments:
As stated

cc:
Secretary of Homeland Security
Commandant, U.S. Coast Guard

ATTACHMENT 1

REFERENCES

Assistant Secretary of Defense for Health Affairs Memorandum, "Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members," July 29, 2016
Commandant Instruction M1850.2 (series), "Physical Disability Evaluation System," May 19, 2006
Department of Defense, "Department of Defense Report and Recommendations on Military Service by Transgender Persons," February 2018
Department of Defense, "Transgender Service in the U.S. Military Implementation Handbook," September 30, 2016
Directive-type Memorandum 16-005, "Military Service of Transgender Service Members," June 30, 2016
DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003
DoD Instruction 5400.11, "DoD Privacy and Civil Liberties Programs," January 29, 2019
DoD Instruction 1300.28, "In-Service Transition for Transgender Service Members," June 30, 2016
DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended
DoD Instruction 1332.18, "Disability Evaluation System (DES)," August 5, 2014, as amended
DoD Instruction 1332.30, "Commissioned Officer Administrative Separations," May 11, 2018
DoD Instruction 1332.45, "Retention Determinations For Non-Deployable Service Members," July 30, 2018
DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," May 6, 2018
DoD Instruction 6490.10, "Continuity of Behavioral Health Care for Transferring and Transitioning Service Members," March 26, 2012, as amended
DoD Manual 8910.01, Volume 1, "DoD Information Collections Manual: Procedures for DoD Internal Information Collections," June 30, 2014, as amended
Secretary of Defense Memorandum, "Military Service by Transgender Individuals," February 22, 2018
United States Code, Title 10, Section 1074
United States Department of Defense, "Transgender Service in the U.S. Military Implementation Handbook," September 30, 2016

ATTACHMENT 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R):

a. Will revise DoDIs 1300.28, 1332.14, 1332.30, and 6130.03, consistent with this DTM. Unless otherwise specified in this DTM, if these issuances are inconsistent with this DTM, this DTM will govern.

b. Will revise the U.S. DoD Transgender Service in the U.S. Military Implementation Handbook, consistent with this DTM.

c. Will disseminate the revised handbook to all Military Departments and the United States Coast Guard (USCG).

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS. Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Health Affairs will issue medical guidance as appropriate.

3. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

a. As necessary and appropriate, will develop implementing guidance for their respective Departments and Services consistent with the policies and procedures in this DTM.

b. May grant waivers in accordance with Paragraph 3 in Attachment 3 of this DTM, in whole or in part, in individual cases. Waiver authority permitting an applicant or Service member, who is not exempt pursuant to this policy, to serve in his or her preferred gender may be delegated, in writing, no lower than the Military Service Personnel Chiefs. All other waiver authority remains with the Service-designated waiver authority.

4. COMMANDANT, USCG. The Commandant, USCG:

a. As necessary and appropriate, will develop implementing guidance for the USCG consistent with the policies and procedures in this DTM.

b. May grant waivers in accordance with Paragraph 3 in Attachment 3 of this DTM, in whole or in part, in individual cases. Waiver authority permitting an applicant or Service member, who is not exempt pursuant to this policy, to serve in his or her preferred gender may

not be delegated lower than the Assistant Commandant for Human Resources. All other waiver authority remains with the Service-designated waiver authority.

ATTACHMENT 3

PROCEDURES

1. SECTION I: EXEMPT INDIVIDUALS.

a. Applicability. Individuals are exempt from Paragraph 2 of this attachment if they, before the effective date of this DTM:

(1) Entered into a contract for enlistment into the Military Services using DD Form 4, "Enlistment/Reenlistment Document Armed Forces of the United States," available on the DoD Forms Management Program website at https://www.esd.whs.mil/Directives/forms/, or an equivalent, or were selected for entrance into an officer commissioning program through a selection board or similar process; and

(2) Either:

(a) Were medically qualified for Military Service or selected for entrance into an officer commissioning program in their preferred gender in accordance with DTM-16-005; or

(b) As a Service member, received a diagnosis of gender dysphoria from, or had such diagnosis confirmed, by a military medical provider.

b. Appointment, Enlistment, or Induction into the Military Services. Individuals who are exempt will be accessed or commissioned based on the following medical standards, provided they are medically qualified in all other respects in accordance with DoDI 6130.03:

(1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed mental health provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:

(a) The applicant has completed all medical treatment associated with the applicant's gender transition; and

(b) The applicant has been stable in the preferred gender for 18 months; and

(c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:

(a) A period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) No functional limitations or complications persist and any additional surgery is not required.

c. In-Service Transition. Service members who are exempt may continue to receive all medically necessary treatment, as defined in DoDI 1300.28, to protect the health of the individual, obtain a gender marker change in the Defense Enrollment Eligibility Reporting System (DEERS) in accordance with DoDI 1300.28; and serve in their preferred gender.

d. Separation And Retention. Service members who are exempt:

(1) May not be separated, discharged, or denied reenlistment or continuation of service solely on the basis of gender identity.

(2) May be retained without a waiver pursuant to this DTM. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to his or her gender identity or gender transition should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

2. SECTION II: NONEXEMPT INDIVIDUALS.

a. Applicability. Individuals are not exempt if they do not meet the criteria in Paragraph 1.a. of this attachment.

b. Appointment, Enlistment, or Induction into the Military Services. Individuals who are not exempt will be accessed or commissioned based on the following medical standards, provided they are medically qualified in all other respects in accordance with DoDI 6130.03:

(1) A history or diagnosis of gender dysphoria is disqualifying unless:

(a) As certified by a licensed mental health provider, the applicant demonstrates 36 consecutive months of stability in the applicant's biological sex immediately preceding submission of the application without clinically significant distress or impairment in social, occupational, or other important areas of functioning; and

(b) The applicant demonstrates that the applicant has not transitioned to his or her preferred gender and a licensed medical provider has determined that gender transition is not medically necessary to protect the health of the individual; and

(c) The applicant is willing and able to adhere to all applicable standards, including the standards associated with the applicant's biological sex.

(2) A history of cross-sex hormone therapy or a history of sex reassignment or genital reconstruction surgery is disqualifying.

(3) The accession standards will be reviewed no later than 24 months from the effective date of this DTM, and every 24 months thereafter, and may be maintained or changed, as appropriate, to ensure:

(a) Consistency with applicable medical standards and clinical practices; and

(b) The readiness and combat effectiveness of the Military Services.

c. In-Service Transition. Individuals who are not exempt must adhere, like all other Service members, to the standards associated with their biological sex. These nonexempt Service members may consult with a military medical provider, receive a diagnosis of gender dysphoria, and receive mental health counseling, but may not obtain a gender marker change in DEERS or serve in their preferred gender.

d. Retention. Service members who are not exempt may be retained without a waiver if they receive a diagnosis of gender dysphoria on or after the effective date of this DTM, provided that:

(1) A military medical provider has determined that gender transition is not medically necessary to protect the health of the individual; and,

(2) The Service member is willing and able to adhere to all applicable standards, including the standards associated with his or her biological sex.

e. Separation. Service members who are not exempt:

(1) May not be separated, discharged, or denied reenlistment or continuation of service solely based on gender identity.

(2) May not be separated solely based on a diagnosis of gender dysphoria without first being medically evaluated for possible referral to the Disability Evaluation System (DES) pursuant to DoDI 1332.18 or the USCG Physical Disability Evaluation System (PDES), pursuant to Commandant Instruction (COMDTINST) M1850.2 (series).

(3) If referral to the DES is not appropriate in accordance with DoDI 1332.18 or the USCG PDES, in accordance with COMDTINST M1850.2 (series), may be subject to processing for administration separation in accordance with Attachment 4 and the following guidance:

(a) The Secretary of the Military Department concerned or the Commandant, USCG, may authorize separation based on conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty.

1. Service members are ineligible for referral to the DES or USCG PDES when they have a condition not constituting a physical disability as described in DoDI 1332.18 or COMDTINST M1850.2 (series).

2. Service members may be referred to the DES or USCG PDES if they have a diagnosis of gender dysphoria and of co-morbidities that are appropriate for disability evaluation processing in accordance with DoDI 1332.18 or COMDTINST M1850.2 (series), before processing for administrative separation.

(b) Service members with a diagnosis of gender dysphoria may be subject to the initiation of administrative separation processing in accordance with Paragraph 2.e. of this attachment if they are unable or unwilling to adhere to all applicable standards, including the standards associated with their biological sex.

(c) Nothing in this guidance precludes appropriate disciplinary action for Service members who refuse orders from lawful authority to comply with applicable standards.

3. SECTION III. ADDITIONAL POLICY GUIDANCE.

a. Waivers.

(1) The Military Departments and the USCG may grant waivers, in whole or in part, to the requirements in this attachment in individual cases.

(2) If a waiver is granted permitting an applicant or Service member, who is not exempt under Paragraph 1 of this attachment, to serve in his or her preferred gender, such an individual will be considered from that point forward to be exempt in accordance with Paragraph 1.

(3) The provisions concerning who may qualify as exempt under Paragraph 1.a. of this attachment may not be waived; a person who is exempt under Paragraph 1.a. may not have his or her exempt status revoked.

b. Medical Policy.

(1) For Service members who have been diagnosed with gender dysphoria and are exempt, the Military Departments and Services will handle requests for medical care and treatment in accordance with DoDI 1300.28 and the July 29, 2016 Assistant Secretary of Defense for Health Affairs Memorandum.

(2) For Service members who have been diagnosed with gender dysphoria and are not exempt, the Military Departments and the USCG:

(a) Will provide necessary care consistent with Section 1074 of Title 10, United States Code and the July 29, 2016 Assistant Secretary of Defense for Health Affairs Memorandum for as long as the individual remains a Service member as set forth in a medical treatment plan developed with the military medical provider and provided to the commander.

(b) Will take appropriate action to facilitate the continuity of health care consistent with DoDI 6490.10 if the Service member is to be separated from military service.

c. Equal Opportunity. The DoD and the USCG provide equal opportunity to all Service members, in an environment free from harassment and discrimination on the basis of race, color, national origin, religion, sex, gender identity, or sexual orientation.

d. Protection of Personally Identifiable Information (PII) and Protected Health Information.

(1) The Military Departments and the USCG will:

(a) In accordance with DoDI 5400.11, in cases where there is a need to collect, use, maintain, or disseminate PII in accordance with this issuance or Military Department and Service regulations, policies, or guidance, protect against unwarranted invasions of personal privacy and the unauthorized disclosure of such PII.

(b) Maintain such PII so as to protect the individual's rights, consistent with federal law and policy.

(2) Disclosure of protected health information will be consistent with DoD 6025.18-R.

e. Education And Training. Revised training will occur at the Military Department's and USCG's discretion.

f. Other. The Military Departments and Military Services recognize a Service member's status as male or female by the member's gender marker in the DEERS.

(1) The Military Services apply all standards that involve consideration of the Service member's status as male or female on the basis of the member's gender marker in DEERS such as:

(a) Uniforms and grooming.

(b) Body composition assessment.

(c) Physical readiness testing.

(d) Military Personnel Drug Abuse Testing Program participation.

(2) As to facilities subject to regulation by the Military Departments and the USCG, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

ATTACHMENT 4

PROCESSING CHANGES TO DoDIs 1332.14 AND 1332.30

1. The following will be added to DoD Instruction 1332.14, Enclosure 3, Paragraph 3.a.(8):

"(h) The Secretary concerned may authorize separation on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty based on a diagnosis of gender dysphoria where the Service member is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender.

1. Separation processing will not be initiated until the enlisted Service member has been formally counseled on his or her failure to adhere to such standards and has been given an opportunity to correct those deficiencies, or has been formally counseled that his or her indication that he or she is unable or unwilling to adhere to such standards may lead to processing for administrative separation and has been given an opportunity to correct those deficiencies.

2. Separation processing will not be initiated until the enlisted Service member has been counseled in writing that the condition does not qualify as a disability."

2. The following will be added to DoD Instruction 1332.30, Paragraph 9.2.d.:

"d. The Secretary concerned may authorize separation of a commissioned officer on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty based on a diagnosis of gender dysphoria where the commissioned officer is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender.

(1) Separation processing will not be initiated until the commissioned officer has been formally counseled on his or her failure to adhere to such standards and has been given an opportunity to correct those deficiencies, or has been formally counseled that his or her indication that he or she is unable or unwilling to adhere to such standards may lead to processing for administrative separation and has been given an opportunity to correct those deficiencies.

(2) Separation processing will not be initiated until the commissioned officer has been counseled in writing that the condition does not qualify as a disability."

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DEERS	Defense Enrollment Eligibility Reporting System
DES	Disability Evaluation System
DoDI	DoD instruction
DTM	directive-type memorandum
PDES	Physical Disability Evaluation System
PII	personally identifiable information
USCG	United States Coast Guard
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

PART II. DEFINITIONS

These terms and their definitions are for the purpose of this issuance.

biological sex. A person's biological status as male or female based on chromosomes, gonads, hormones, and genitals.

cross-sex hormone therapy. The use of feminizing hormones in an individual with a biological sex of male or the use of masculinizing hormones in an individual with a biological sex of female.

gender identity. An individual's internal or personal sense of gender, which may or may not match the individual's biological sex.

gender marker. Data element in DEERS that identifies a Service member's status as male or female.

gender transition. A form of treatment for the medical condition of gender dysphoria may involve:

Social transition, also known as "real life experience," to allow the patient to live and work in his or her preferred gender without any cross-sex hormone treatment or surgery and may also include a legal change of gender, including changing gender on a passport, birth certificate, or through a court order; or

Medical transition to align secondary sex characteristics with the patient's preferred gender using any combination of cross sex hormone therapy or surgical and cosmetic procedures; or

Surgical transition, also known as sex reassignment surgery, to make the physical body, both primary and secondary sex characteristics, resemble as closely as possible the patient's preferred gender.

PII. Information used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information. PII includes any information that is linked or linkable to a specified individual, alone, or when combined with other personal or identifying information.

preferred gender. The gender with which an individual identifies.

stable or stability. The absence of clinically significant distress or impairment in social, occupational, or other important areas of functioning associated with a marked incongruence between an individual's experienced or expressed gender and the individual's biological sex.

transgender. Individuals who identify with a gender that differs from their biological sex.

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SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

FEB 22 2018

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Military Service by Transgender Individuals

"Transgender" is a term describing those persons whose gender identity differs from their biological sex. A subset of transgender persons diagnosed with gender dysphoria experience discomfort with their biological sex, resulting in significant distress or difficulty functioning. Persons diagnosed with gender dysphoria often seek to transition their gender through prescribed medical treatments intended to relieve the distress and impaired functioning associated with their diagnosis.

Prior to your election, the previous administration adopted a policy that allowed for the accession and retention in the Armed Forces of transgender persons who had a history or diagnosis of gender dysphoria. The policy also created a procedure by which such Service members could change their gender. This policy was a departure from decades-long military personnel policy. On June 30, 2017, before the new accession standards were set to take effect, I approved the recommendation of the Services to delay for an additional six months the implementation of these standards to evaluate more carefully their impact on readiness and lethality. To that end, I established a study group that included the representatives of the Service Secretaries and senior military officers, many with combat experience, to conduct the review.

While this review was ongoing, on August 25, 2017, you sent me and the Secretary of Homeland Security a memorandum expressing your concern that the previous administration's new policy "failed to identify a sufficient basis" for changing longstanding policy and that "further study is needed to ensure that continued implementation of last year's policy change would not have ... negative effects." You then directed the Department of Defense and the Department of Homeland Security to reinstate the preexisting policy concerning accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." You made clear that we could advise you "at any time, in writing, that a change to this policy is warranted."

I created a Panel of Experts comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders and directed them to consider this issue and develop policy proposals based on data, as well as their professional military judgment, that would enhance the readiness, lethality, and effectiveness of our military. This Panel included combat veterans to ensure that our military purpose remained the foremost consideration. I charged the Panel to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, without regard to any external factors.

The Panel met with and 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. The Panel also reviewed available information on gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike previous reviews on military service by transgender individuals, the Panel's analysis was informed by the Department's own data obtained since the new policy began to take effect last year.

Based on the work of the Panel and the Department's best military judgment, the Department of Defense concludes that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender. Furthermore, the Department also finds that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.

The prior administration largely based its policy on a study prepared by the RAND National Defense Research Institute; however, that study contained significant shortcomings. It referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own. In short, this policy issue has proven more complex than the prior administration or RAND assumed.

I firmly believe that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations. Preservation of unit cohesion, absolutely essential to military effectiveness and lethality, also reaffirms this conclusion.

Therefore, in light of the Panel's professional military judgment and my own professional judgment, the Department should adopt the following policies:

- Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.

- Transgender persons who require or have undergone gender transition are disqualified from military service.

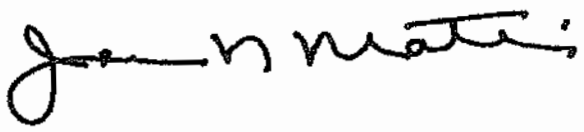
- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

I have consulted with the Secretary of Homeland Security, and she agrees with these proposed policies.

By its very nature, military service requires sacrifice. The men and women who serve voluntarily accept limitations on their personal liberties – freedom of speech, political activity, freedom of movement - in order to provide the military lethality and readiness necessary to ensure American citizens enjoy their personal freedoms to the fullest extent. Further, personal characteristics, including age, mental acuity, and physical fitness – among others – matter to field a lethal and ready force.

In my professional judgment, these policies will place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world. The attached report provided by the Under Secretary of Defense for Personnel and Readiness includes a detailed analysis of the factors and considerations forming the basis of the Department's policy proposals.

I therefore respectfully recommend you revoke your memorandum of August 25, 2017, regarding Military Service by Transgender Individuals, thus allowing me and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to implement appropriate policies concerning military service by transgender persons.



Attachment:
As stated

cc:
Secretary of Homeland Security

DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS

FEBRUARY 2018

Table of Contents

Executive Summary

It is a bedrock principle of the Department of Defense that any eligible individual[1] who can meet the high standards for military service without special accommodations should be permitted to serve. This is no less true for transgender persons than for any other eligible individual. This report, and the recommendations contained herein, proceed from this fundamental premise.

The starting point for determining a person's qualifications for military duty is whether the person can meet the standards that govern the Armed Forces. Federal law requires that anyone entering into military service be "qualified, effective, and able-bodied."[2] Military standards are designed not only to ensure that this statutory requirement is satisfied but to ensure the overall military effectiveness and lethality of the Armed Forces.

The purpose of the Armed Forces is to fight and win the Nation's wars. No human endeavor is more physically, mentally, and emotionally demanding than the life and death struggle of battle. Because the stakes in war can be so high—both for the success and survival of individual units in the field and for the success and survival of the Nation—it is imperative that all Service members are physically and mentally able to execute their duties and responsibilities without fail, even while exposed to extreme danger, emotional stress, and harsh environments.

Although not all Service members will experience direct combat, standards that are applied universally across the Armed Forces must nevertheless account for the possibility that any Service member could be thrust into the crucible of battle at any time. As the Department has made clear to Congress, "[c]ore to maintaining a ready and capable military force is the understanding that each Service member is required to be available and qualified to perform assigned missions, including roles and functions outside of their occupation, in any setting."[3] Indeed, there are no occupations in the military that are exempt from deployment.[4] Moreover, while non-combat positions are vital to success in war, the physical and mental requirements for those positions should not be the barometer by which the physical and mental requirements for all positions, especially combat positions, are defined. Fitness for combat must be the metric against which all standards and requirements are judged. To give all Service members the best chance of success and survival in war, the Department must maintain the highest possible standards of physical and mental health and readiness across the force.

While individual health and readiness are critical to success in war, they are not the only measures of military effectiveness and lethality. A fighting unit is not a mere collection of individuals; it is a unique social organism that, when forged properly, can be far more powerful than the sum of its parts. Human experience over millennia—from the Spartans at Thermopylae to the band of brothers of the 101st Airborne Division in World War II, to Marine squads fighting building-to-building in Fallujah—teaches us this. Military effectiveness requires

[1] 10 U.S.C. §§ 504, 505(a), 12102(b).
[2] 10 U.S.C. § 505(a).
[3] Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces," pp. 8-9 (Apr. 2016).
[4] Id.

transforming a collection of individuals into a single fighting organism—merging multiple individual identities into one. This transformation requires many ingredients, including strong leadership, training, good order and discipline, and that most intangible, but vital, of ingredients—unit cohesion or, put another way, human bonding.

Because unit cohesion cannot be easily quantified, it is too often dismissed, especially by those who do not know what Justice Oliver Wendell Holmes called the "incommunicable experience of war."[5] But the experience of those who, as Holmes described, have been "touched with fire" in battle and the experience of those who have spent their lives studying it attest to the enduring, if indescribable, importance of this intangible ingredient. As Dr. Jonathan Shay articulated it in his study of combat trauma in Vietnam, "[s]urvival and success in combat often require soldiers to virtually read one another's minds, reflexively covering each other with as much care as they cover themselves, and going to one another's aid with little thought for safety."[6] Not only is unit cohesion essential to the health of the unit, Dr. Shay found that it was essential to the health of the individual soldier as well. "Destruction of unit cohesion," Dr. Shay concluded, "cannot be overemphasized as a reason why so many psychological injuries that might have healed spontaneously instead became chronic."[7]

Properly understood, therefore, military effectiveness and lethality are achieved through a combination of inputs that include individual health and readiness, strong leadership, effective training, good order and discipline, and unit cohesion. To achieve military effectiveness and lethality, properly designed military standards must foster these inputs. And, for the sake of efficiency, they should do so at the least possible cost to the taxpayer.

To the greatest extent possible, military standards—especially those relating to mental and physical health—should be based on scientifically valid and reliable evidence. Given the life-and-death consequences of warfare, the Department has historically taken a conservative and cautious approach in setting the mental and pbysical standards for the accession and retention of Service members.

Not all standards, however, are capable of scientific validation or quantification. Instead, they are the product of professional military judgment acquired from hard-earned experience leading Service members in peace and war or otherwise arising from expertise in military affairs. Although necessarily subjective, this judgment is the best, if not only, way to assess the impact of any given military standard on the intangible ingredients of military effectiveness mentioned above—leadership, training, good order and discipline, and unit cohesion.

For decades, military standards relating to mental health, physical health, and the physiological differences between men and women operated to preclude from military service transgender persons who desired to live and work as the opposite gender.

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[5] *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, p. 93 (Richard Posner, ed., University of Chicago Press 1992).
[6] Jonathan Shay, *Achilles in Vietnam*, p. 61 (Atheneum 1994).
[7] Id. at 198.

Relying on a report by an outside consultant, the RAND National Defense Research Institute, the Department, at the direction of Secretary Ashton Carter, reversed that longstanding policy in 2016. Although the new policy—the "Carter policy"—did not permit all transgender Service members to change their gender to align with their preferred gender identity, it did establish a process to do so for transgender Service members who were diagnosed with gender dysphoria—that is, the distress or impairment of functioning that is associated with incongruity between one's biological sex and gender identity. It also set in motion a new accession policy that would allow applicants who had a history of gender dysphoria, including those who had already transitioned genders, to enter into military service, provided that certain conditions were met. Once a change of gender is authorized, the person must be treated in all respects in accordance with the person's preferred gender, whether or not the person undergoes any hormone therapy or surgery, so long as a treatment plan has been approved by a military physician.

The new accession policy had not taken effect when the current administration came into office. Secretary James Mattis exercised his discretion and approved the recommendation of the Services to delay the Carter accession policy for an additional six months so that the Department could assess its impact on military effectiveness and lethality. While that review was ongoing, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security with respect to the U.S. Coast Guard expressing that further study was needed to examine the effects of the prior administration's policy change. The memorandum directed the Secretaries to reinstate the longstanding preexisting accession policy until such time that enough evidence existed to conclude that the Carter policy would not have negative effects on military effectiveness, lethality, unit cohesion, and military resources. The President also authorized the Secretary of Defense, in consultation with the Secretary of Homeland Security, to address the disposition of transgender individuals who were already serving in the military.

Secretary Mattis established a Panel of Experts that included senior uniformed and civilian leaders of the Department and U.S. Coast Guard, many with experience leading Service members in peace and war. The Panel made recommendations based on each Panel member's independent military judgment. Consistent with those recommendations, the Department, in consultation with the Department of Homeland Security, recommends the following policy to the President:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex. Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service, provided that they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which transgender persons without a history or diagnosis of gender dysphoria must serve, like everyone else, in their biological sex.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified. Except for those who are exempt under this policy, as described below, and except where waivers or exceptions to policy are otherwise authorized, transgender persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be ineligible for service. For reasons discussed at length in this report, the Department concludes that accommodating gender transition could impair unit readiness; undermine unit cohesion, as well as good order and discipline, by blurring the clear lines that demarcate male and female standards and policies where they exist; and lead to disproportionate costs. Underlying these conclusions is the considerable scientific uncertainty and overall lack of high quality scientific evidence demonstrating the extent to which transition-related treatments, such as cross-sex hormone therapy and sex reassignment surgery—interventions which are unique in psychiatry and medicine—remedy the multifaceted mental health problems associated with gender dysphoria.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances. Transgender persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver or exception to policy as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Consistent with the Department's general approach of applying less stringent standards to retention than to accession in order to preserve the Department's substantial investment in trained personnel, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).[8]

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* Transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary care,

[8] Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the Carter policy procedures and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its solemn promise to these Service members, and the investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.

Although the precise number is unknown, the Department recognizes that many transgender persons who desire to serve in the military experience gender dysphoria and, as a result, could be disqualified under the recommended policy set forth in this report. Many transgender persons may also be unwilling to adhere to the standards associated with their biological sex as required by longstanding military policy. But others have served, and are serving, with distinction under the standards for their biological sex, like all other Service members. Nothing in this policy precludes service by transgender persons who do not have a history or diagnosis of gender dysphoria and are willing and able to meet all standards that apply to their biological sex.

Moreover, nothing in this policy should be viewed as reflecting poorly on transgender persons who suffer from gender dysphoria, or have had a history of gender dysphoria, and are accordingly disqualified from service. The vast majority of Americans from ages 17 to 24—that is, 71%—are ineligible to join the military without a waiver for mental, medical, or behavioral reasons.[9] Transgender persons with gender dysphoria are no less valued members of our Nation than all other categories of persons who are disqualified from military service. The Department honors all citizens who wish to dedicate, and perhaps even lay down, their lives in defense of the Nation, even when the Department, in the best interests of the military, must decline to grant their wish.

Military standards are high for a reason—the trauma of war, which all Service members must be prepared to face, demands physical, mental, and moral standards that will give all Service members the greatest chance to survive the ordeal with their bodies, minds, and moral character intact. The Department would be negligent to sacrifice those standards for any cause. There are serious differences of opinion on this issue, even among military professionals, but in the final analysis, given the uncertainty associated with the study and treatment of gender dysphoria, the competing interests involved, and the vital interests at stake—our Nation's defense and the success and survival of our Service members in war—the Department must proceed with caution.

[9] The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report," p. 26 (Sept. 2016).

History of Policies Concerning Transgender Persons

For decades, military standards have precluded the accession and retention of certain transgender persons.[10] Accession standards—i.e., standards that govern induction into the Armed Forces—have historically disqualified persons with a history of "transsexualism." Also disqualified were persons who had undergone genital surgery or who had a history of major abnormalities or defects of the genitalia. These standards prevented transgender persons, especially those who had undergone a medical or surgical gender transition, from accessing into the military, unless a waiver was granted.

Although retention standards—i.e., standards that govern the retention and separation of persons already serving in the Armed Forces—did not require the mandatory processing for separation of transgender persons, it was a permissible basis for separation processing as a physical or mental condition not amounting to a disability. More typically, however, such Service members were processed for separation because they suffered from other associated medical conditions or comorbidities, such as depression, which were also a basis for separation processing.

At the direction of Secretary Carter, the Department made significant changes to these standards. These changes—i.e., the "Carter policy"—prohibit the separation of Service members on the basis of their gender identity and allow Service members who are diagnosed with gender dysphoria to transition to their preferred gender.

Transition-related treatment is highly individualized and could involve what is known as a "medical transition," which includes cross-sex hormone therapy, or a "surgical transition,"

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[10] For purposes of this report, the Department uses the broad definition of "transgender" adopted by the RAND National Defense Institute in its study of transgender service: "an umbrella term used for individuals who have sexual identity or gender expression that differs from their assigned sex at birth." RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, p.75 (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf ("RAND Study"). According to the Human Rights Campaign, "[t]he transgender community is incredibly diverse. Some transgender people identify as male or female, and some identify as genderqueer, nonbinary, agender, or somewhere else on or outside of the spectrum of what we understand gender to be." Human Rights Campaign, "Understanding the Transgender Community," https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018). A subset of transgender persons are those who have been diagnosed with gender dysphoria. According to the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, "gender dysphoria" is a "marked incongruence between one's experienced/expressed gender and assigned gender" that "is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 452-53 (5th ed. 2013). Based on these definitions, a person can be transgender without necessarily having gender dysphoria (i.e., the transgender person does not suffer "clinically significant distress or impairment" on account of gender incongruity). A 2016 survey of active duty Service members estimated that approximately 1% of the force—8,980 Service members—identify as transgender. Office of People Analytics, Department of Defense, "2016 Workplace and Gender Relations Survey of Active Duty Members, Transgender Service Members," pp. 1-2. Currently, there are 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016. In addition, when using the term "biological sex" or "sex," this report is referring to the definition of "sex" in the RAND study: "a person's biological status as male or female based on chromosomes, gonads, hormones, and genitals (intersex is a rare exception)." RAND Study at 75.

which includes sex reassignment surgery. Service members could also forego medical transition treatment altogether, retain all of their biological anatomy, and live as the opposite gender—this is called a "social transition."

Once the Service member's transition is complete, as determined by the member's military physician and commander in accordance with his or her individualized treatment plan, and the Service member provides legal documentation of gender change, the Carter policy allows for the Service member's gender marker to be changed in the DEERS. Thereafter, the Service member must be treated in every respect—including with respect to physical fitness standards; berthing, bathroom, and shower facilities; and uniform and grooming standards—in accordance with the Service member's preferred gender. The Carter policy, however, still requires transgender Service members who have not changed their gender marker in DEERS, including persons who identify as other than male or female, to meet the standards associated with their biological sex.

The Carter policy also allows accession of persons with gender dysphoria who can demonstrate stability in their preferred gender for at least 18 months. The accession policy did not take effect until required by court order, effective January 1, 2018.

The following discussion describes in greater detail the evolution of accession and retention standards pertaining to transgender persons.

Transgender Policy Prior to the Carter Policy

A. Accession Medical Standards

DoD Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, establishes baseline accession medical standards used to determine an applicant's medical qualifications to enter military service. This instruction is reviewed every three to four years by the Accession Medical Standards Working Group (AMSWG), which includes medical and personnel subject matter experts from across the Department, its Military Services, and the U.S. Coast Guard. The AMSWG thoroughly reviews over 30 bodily systems and medical focus areas while carefully considering evidence-based clinical information, peer-reviewed scientific studies, scientific expert consensus, and the performance of existing standards in light of empirical data on attrition, deployment readiness, waivers, and disability rates. The AMSWG also considers inputs from non-government sources and evaluates the applicability of those inputs against the military's mission and operational environment, so that the Department and the Military Services can formally coordinate updates to these standards.

Accession medical standards are based on the operational needs of the Department and are designed to ensure that individuals are physically and psychologically "qualified, effective, and able-bodied persons"[1] capable of performing military duties. Military effectiveness requires that the Armed Forces manage an integrated set of unique medical standards and qualifications because all military personnel must be available for worldwide duty 24 hours a day without

[1] 10 U.S.C. § 505(a).

restriction or delay. Such duty may involve a wide range of demands, including exposure to danger or harsh environments, emotional stress, and the operation of dangerous, sensitive, or classified equipment. These duties are often in remote areas lacking immediate and comprehensive medical support. Such demands are not normally found in civilian occupations, and the military would be negligent in its responsibility if its military standards permitted admission of applicants with physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have.

In sum, these standards exist to ensure that persons who are under consideration for induction into military service are:

- free of contagious diseases that probably will endanger the health of other personnel;
- free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from service for medical unfitness;
- medically capable of satisfactorily completing required training;
- medically adaptable to the military environment without the necessity of geographical area limitations; and
- medically capable of performing duties without aggravation of existing physical defects or medical conditions.[12]

Establishing or modifying an accession standard is a risk management process by which a health condition is evaluated in terms of the probability and effect on the five listed outcomes above. These standards protect the applicant from harm that could result from the rigors of military duty and help ensure unit readiness by minimizing the risk that an applicant, once inducted into military service, will be unavailable for duty because of illness, injury, disease, or bad health.

Unless otherwise expressly provided, a current diagnosis or verified past medical history of a condition listed in DoDI 6130.03 is presumptively disqualifying.[13] Accession standards reflect the considered opinion of the Department's medical and personnel experts that an applicant with an identified condition should only be able to serve if they can qualify for a waiver. Waivers are generally only granted when the condition will not impact the individual's assigned specialty or when the skills of the individual are unique enough to warrant the additional risk. Waivers are not generally granted when the conditions of military service may aggravate the existing condition. For some conditions, applicants with a past medical history may nevertheless be eligible for accession if they meet the requirements for a certain period of "stability"—that is, they can demonstrate that the condition has been absent for a defined period

[12] Department of Defense Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), incorporating Change 1, p. 2 (Sept. 13, 2011) ("DoDI 6130.03").
[13] Id. at 10.

of time prior to accession.[14] With one exception,[15] each accession standard may be waived in the discretion of the accessing Service based on that Service's policies and practices, which are driven by the unique requirements of different Service missions, different Service occupations, different Service cultures, and at times, different Service recruiting missions.

Historically, mental health conditions have been a great concern because of the unique mental and emotional stresses of military service. Mental health conditions frequently result in attrition during initial entry training and the first term of service and are routinely considered by in-service medical boards as a basis for separation. Department mental health accession standards have typically aligned with the conditions identified in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), which is published by the American Psychiatric Association (APA). The DSM sets forth the descriptions, symptoms, and other criteria for diagnosing mental disorders. Health care professionals in the United States and much of the world use the DSM as the authoritative guide to the diagnosis of mental disorders.

Prior to implementation of the Carter policy, the Department's accession standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."[16] These standards were consistent with DSM-III, which in 1980, introduced the diagnosis of transsexualism.[17] In 1987, DSM-III-R added gender identity disorder, non-transsexual type.[18] DSM-IV, which was published in 1994, combined these two diagnoses and called the resulting condition "gender identity disorder."[19] Due to challenges associated with updating and publishing a new iteration of DoDI 6130.03, the DoDI's terminology has not changed to reflect the changes in the DSM, including further changes that will be discussed later.

DoDI 6130.03 also contains other disqualifying conditions that are associated with, but not unique to, transgender persons, especially those who have undertaken a medical or surgical transition to the opposite gender. These include:

- a history of chest surgery, including but not limited to the surgical removal of the breasts,[20] and genital surgery, including but not limited to the surgical removal of the testicles;[21]

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[14] See, e.g., id. at 47.
[15] The accession standards for applicants with HIV are not waivable absent a waiver from both the accessing Service and the Under Secretary of Defense for Personnel and Readiness. See Department of Defense Instruction 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (Jun. 7, 2013).
[16] DoDI 6130.03 at 48.
[17] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, pp. 261-264 (3rd ed. 1980).
[18] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, pp. 76-77 (3rd ed. revised 1987).
[19] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, pp. 532-538 (4th ed. 1994).
[20] DoDI 6130.03 at 18.
[21] Id. at 25-27.

- a history of major abnormalities or defects of the genitalia, including but not limited to change of sex, hermaphroditism, penis amputation, and pseudohermaphroditism;[22]
- mental health conditions such as suicidal ideation, depression, and anxiety disorder;[23] and
- the use of certain medications, or conditions requiring the use of medications, such as hormone therapies and anti-depressants.[24]

Together with a diagnosis of transsexualism, these conditions, which were repeatedly validated by the AMSWG, provided multiple grounds for the disqualification of transgender persons.

B. Retention Standards

The standards that govern the retention of Service members who are already serving in the military are generally less restrictive than the corresponding accession standards due to the investment the Department has made in the individual and their increased capability to contribute to mission accomplishment.

Also unlike the Department's accession standards, each Service develops and applies its own retention standards. With respect to the retention of transgender Service members, these Service-specific standards may have led to inconsistent outcomes across the Services, but as a practical matter, before the Carter policy, the Services generally separated Service members who desired to transition to another gender. During that time, there were no express policies allowing individuals to serve in their preferred gender rather than their biological sex.

Previous Department policy concerning the retention (administrative separation) of transgender persons was not clear or rigidly enforced. DoDI 1332.38, *Physical Disability Evaluation*, now cancelled, characterized "sexual gender and identity disorders" as a basis for allowing administrative separation for a condition not constituting a disability; it did not require mandatory processing for separation. A newer issuance, DoDI 1332.18, *Disability Evaluation System (DES)*, August 5, 2014, does not reference these disorders but instead reflects changes in how such medical conditions are characterized in contemporary medical practice.

Earlier versions of DoDI 1332.14, *Enlisted Administrative Separations*, contained a cross reference to the list of conditions not constituting a disability in former DoDI 1332.38. This was how "transsexualism," the older terminology, was used as a basis for administrative separation. Separation on this basis required formal counseling and an opportunity to address the issue, as well as a finding that the condition was interfering with the performance of duty. In practice, transgender persons were not usually processed for administrative separation on account of gender dysphoria or gender identity itself, but rather on account of medical comorbidities (e.g., depression or suicidal ideation) or misconduct due to cross dressing and related behavior.

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[22] Id.
[23] Id. at 47-48.
[24] Id. at 48.

The Carter Policy

At the direction of Secretary Carter, the Department began formally reconsidering its accession and retention standards as they applied to transgender persons with gender dysphoria in 2015. This reevaluation, which culminated with the release of the Carter policy in 2016, was prompted in part by amendments to the DSM that appeared to change the diagnosis for gender identity disorder from a disorder to a treatable condition called gender dysphoria. Starting from the assumption that transgender persons are qualified for military service, the Department sought to identify and remove the obstacles to such service. This effort resulted in substantial changes to the Department's accession and retention standards to accommodate transgender persons with gender dysphoria who require treatment for transitioning to their preferred gender.

A. Changes to the DSM

When the APA published the fifth edition of the DSM in May 2013, it changed "gender identity disorder" to "gender dysphoria" and designated it as a "condition"—a new diagnostic class applicable only to gender dysphoria—rather than a "disorder."[25] This change was intended to reflect the APA's conclusion that gender nonconformity alone—without accompanying distress or impairment of functioning—was not a mental disorder.[26] DSM-5 also decoupled the diagnosis for gender dysphoria from diagnoses for "sexual dysfunction and parphilic disorders, recognizing fundamental differences between these diagnoses."[27]

According to DSM-5, gender dysphoria in adolescents and adults is "[a] marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following":

- A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
- A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

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[25] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 451-459 (5th ed. 2013) ("DSM-5").

[26] RAND Study at 77; see also Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (May 15, 2014), p. 1 ("This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it was previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed."); Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, pp. 1182-83 (2016) ("In the DSM-5, [gender dysphoria] has replaced the diagnosis of 'gender identity disorder' in order to place the focus on the dysphoria and to diminish the pathology associated with identity incongruence.").

[27] Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1183 (2016).

- A strong desire for the primary and/or secondary sex characteristics of the other gender.
- A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
- A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
- A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

Importantly, DSM-5 observed that gender dysphoria "is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[28]

B. The Department Begins Review of Transgender Policy

On July 28, 2015, then Secretary Carter issued a memorandum announcing that no Service members would be involuntarily separated or denied reenlistment or continuation of service based on gender identity or a diagnosis of gender dysphoria without the personal approval of the Under Secretary of Defense for Personnel and Readiness.[29] The memorandum also created the Transgender Service Review Working Group (TSRWG) "to study the policy and readiness implications of welcoming transgender persons to serve openly."[30] The memorandum specifically directed the working group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified."[31]

As part of this review, the Department commissioned the RAND National Defense Research Institute to conduct a study to "(1) identify the health care needs of the transgender population, transgender Service members' potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess the potential readiness impacts of allowing transgender Service members to serve openly; and (3) review the experiences of foreign militaries that permit transgender Service members to serve openly."[32] The resulting report, entitled *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, reached several conclusions. First, the report estimated that there are between 1,320 and 6,630 transgender Service members already serving in the active component of the Armed Forces and 830 to 4,160 in the Selected Reserve.[33] Second, the report predicted "annual gender transition-related health care to be an extremely small part of the overall health care provided to the [active component] population."[34] Third, the report estimated that active component "health care costs will increase by between $2.4 million and $8.4 million annually—an amount that will have little impact on and represents an exceedingly small proportion of

[28] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, p. 453 (5th ed. 2013).
[29] Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015).
[30] Id.
[31] Id.
[32] RAND Study at 1.
[33] Id. at x-xi.
[34] Id. at xi.

[active component] health care expenditures (approximately $6 billion in FY 2014)."[35] Fourth, the report "found that less than 0.0015 percent of the total available labor-years would be affected, based on estimated gender transition-related health care utilization rates."[36] Finally, the report concluded that "[e]xisting data suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly."[37] "Overall," according to RAND, "our study found that the number of U.S. transgender Service members who are likely to seek transition-related care is so small that a change in policy will likely have a marginal impact on health care costs and the readiness of the force."[38]

The RAND report thus acknowledged that there will be an adverse impact on health care utilization and costs, readiness, and unit cohesion, but concluded nonetheless that the impact will be "negligible" and "marginal" because of the small estimated number of transgender Service members relative to the size of the active component of the Armed Forces. Because of the RAND report's macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, as discussed in more detail later, the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.

C. New Standards for Transgender Persons

Based on the RAND report, the work of the TSRWG, and the advice of the Service Secretaries, Secretary Carter approved the publication of DoDI 1300.28, *In-service Transition for Service Members Identifying as Transgender*, and Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members," on June 30, 2016. Although the new retention standards were effective immediately upon publication of the above memoranda, the accession standards were delayed until July 1, 2017, to allow time for training all Service members across the Armed Forces, including recruiters, Military Entrance Processing Station (MEPS) personnel, and basic training cadre, and to allow time for modifying facilities as necessary.

1. *Retention Standards*. DoDI 1300.28 establishes the procedures by which Service members who are diagnosed with gender dysphoria may administratively change their gender. Once a Service member receives a gender dysphoria diagnosis from a military physician, the physician, in consultation with the Service member, must establish a treatment plan. The treatment plan is highly individualized and may include cross-sex hormone therapy (i.e., medical transition), sex reassignment surgery (i.e., surgical transition), or simply living as the opposite gender but without any cross-sex hormone or surgical treatment (i.e., social

[35] Id. at xi-xii.
[36] Id. at xii.
[37] Id.
[38] Id. at 69.

transition). The nature of the treatment is left to the professional medical judgment of the treating physician and the individual situation of the transgender Service member. The Department does not require a Service member with gender dysphoria to undergo cross-sex hormone therapy, sex reassignment surgery, or any other physical changes to effectuate an administrative change of gender. During the course of treatment, commanders are authorized to grant exceptions from physical fitness, uniform and grooming, and other standards, as necessary and appropriate, to transitioning Service members. Once the treating physician determines that the treatment plan is complete, the Service member's commander approves, and the Service member produces legal documentation indicating change of gender (e.g., certified birth certificate, court order, or U.S. passport), the Service member may request a change of gender marker in DEERS. Once the DEERS gender marker is changed, the Service member is held to all standards associated with the member's transitioned gender, including uniform and grooming standards, body composition assessment, physical readiness testing, Military Personnel Drug Abuse Testing Program participation, and other military standards congruent to the member's gender. Indeed, the Service member must be treated in all respects in accordance with the member's transitioned gender, including with respect to berthing, bathroom, and shower facilities. Transgender Service members who do not meet the clinical criteria for gender dysphoria, by contrast, remain subject to the standards and requirements applicable to their biological sex.

2. *Accession Standards*. DTM 16-005 directed that the following medical standards for accession into the Military Services take effect on July 1, 2017:

(1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:

(a) the applicant has completed all medical treatment associated with the applicant's gender transition; and
(b) the applicant has been stable in the preferred gender for 18 months; and
(c) if the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:

(a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) no functional limitations or complications persist, nor is any additional surgery required.[39]

[39] Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members,'" Attachment, pp. 1-2 (June 30, 2016).

Panel of Experts Recommendation

The Carter policy's accession standards for persons with a history of gender dysphoria were set to take effect on July 1, 2017, but on June 30, after consultation with the Secretaries and Chiefs of Staff of each Service, Secretary Mattis postponed the new standards for an additional six months "to evaluate more carefully the impact of such accessions on readiness and lethality."[40] Secretary Mattis specifically directed that the review would "include all relevant considerations" and would last for five months, with a due date of December 1, 2017.[41] The Secretary also expressed his desire to have "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department."[42]

While Secretary Mattis's review was ongoing, President Trump issued a memorandum, on August 25, 2017, directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to reinstate longstanding policy generally barring the accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."[43] The President found that "further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."[44] Accordingly, the President directed both Secretaries to maintain the prohibition on accession of transgender individuals "until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary" that is convincing.[45] The President made clear that the Secretaries may advise him "at any time, in writing, that a change to this policy is warranted."[46] In addition, the President gave both Secretaries discretion to "determine how to address transgender individuals currently serving" in the military and made clear that no action be taken against them until a determination was made.[47]

On September 14, 2017, Secretary Mattis established a Panel of Experts to study, in a "comprehensive, holistic, and objective" manner, "military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law."[48] He directed the Panel to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members."[49]

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[40] Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017).
[41] Id.
[42] Id.
[43] Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017).
[44] Id. at 1.
[45] Id. at 2.
[46] Id.
[47] Id.
[48] Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals," pp. 1-2 (Sept. 14, 2017).
[49] Id. at 2.

The Panel consisted of 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 Senior Enlisted Advisors, and was chaired by the Under Secretary of Defense for Personnel and Readiness or an official performing those duties. The Secretary of Defense selected these senior leaders because of their experience leading warfighters in war and peace or their expertise in military operational effectiveness. These senior leaders also have the statutory responsibility to organize, train, and equip military forces and are uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force. The Panel met 13 times over a span of 90 days.

The Panel received support from medical and personnel experts from across the Departments of Defense and Homeland Security. The Transgender Service Policy Working Group, comprised of medical and personnel experts from across the Department, developed policy recommendations and a proposed implementation plan for the Panel's consideration. The Medical and Personnel Executive Steering Committee, a standing group of the Surgeons General and Service Personnel Chiefs, led by Personnel and Readiness, provided the Panel with an analysis of accession standards, a multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition-related medical care. These groups reported regularly to the Panel and responded to numerous queries for additional information and analysis to support the Panel's review and deliberations. A separate working group tasked with enhancing the lethality of our Armed Forces also provided a briefing to the Panel on their work relating to retention standards.

The Panel met with and 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. The Panel also reviewed information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike past reviews, the Panel's analysis was informed by the Department's own data and experience obtained since the Carter policy took effect.

To fulfill its mandate, the Panel addressed three questions:

- Should the Department of Defense access transgender individuals?
- Should the Department allow transgender individuals to transition gender while serving, and if so, what treatment should be authorized?
- How should the Department address transgender individuals who are currently serving?

After extensive review and deliberation, which included evidence in support of and against the Panel's recommendations, the Panel exercised its professional military judgment and made recommendations. The Department considered those recommendations and the information underlying them, as well as additional information within the Department, and now proposes the following policy consistent with those recommendations.

Recommended Policy

To maximize military effectiveness and lethality, the Department, after consultation with and the concurrence of the Department of Homeland Security, recommends cancelling the Carter policy and, as explained below, adopting a new policy with respect to the accession and retention of transgender persons.

The Carter policy assumed that transgender persons were generally qualified for service and that their accession and retention would not negatively impact military effectiveness. As noted earlier, Secretary Carter directed the TSRWG, the group charged with evaluating, and making recommendations on, transgender service, to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified."[50] Where necessary, standards were adjusted or relaxed to accommodate service by transgender persons. The following analysis makes no assumptions but instead applies the relevant standards applicable to everyone to determine the extent to which transgender persons are qualified for military duty.

For the following reasons, the Department concludes that transgender persons should not be disqualified from service solely on account of their transgender status, provided that they, like all other Service members, are willing and able to adhere to all standards, including the standards associated with their biological sex. With respect to the subset of transgender persons who have been diagnosed with gender dysphoria, however, those persons are generally disqualified unless, depending on whether they are accessing or seeking retention, they can demonstrate stability for the prescribed period of time; they do not require, and have not undergone, a change of gender; and they are otherwise willing and able to meet all military standards, including those associated with their biological sex. In order to honor its commitment to current Service members diagnosed with gender dysphoria, those Service members who were diagnosed after the effective date of the Carter policy and before any new policy takes effect will not be subject to the policy recommended here.

Discussion of Standards

The standards most relevant to the issue of service by transgender persons fall into three categories: mental health standards, physical health standards, and sex-based standards. Based on these standards, the Department can assess the extent to which transgender persons are qualified for military service and, in light of that assessment, recommend appropriate policies.

A. Mental Health Standards

Given the extreme rigors of military service and combat, maintaining high standards of mental health is essential to military effectiveness and lethality. The immense toll that the burden and experience of combat can have on the human psyche cannot be overstated. Therefore, putting individuals into battle, who might be at increased risk of psychological injury, would be reckless, not only for those individuals, but for the Service members who serve beside them as well.

[50] Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015).

The Department's experience with the mental health issues arising from our wars in Afghanistan and Iraq, including post-traumatic stress disorder (PTSD), only underscores the importance of maintaining high levels of mental health across the force. PTSD has reached as high as 2.8% of all active duty Service members, and in 2016, the number of active duty Service members with PTSD stood at 1.5%.[51] Of all Service members in the active component, 7.5% have been diagnosed with a mental health condition of some type.[52] The Department is mindful of these existing challenges and must exercise caution when considering changes to its mental health standards.

Most mental health conditions and disorders are automatically disqualifying for accession absent a waiver. For example, persons with a history of bipolar disorder, personality disorder, obsessive-compulsive disorder, suicidal behavior, and even body dysmorphic disorder (to name a few) are barred from entering into military service, unless a waiver is granted.[53] For a few conditions, however, persons may enter into service without a waiver if they can demonstrate stability for 24 to 36 continuous months preceding accession. Historically, a person is deemed stable if they are without treatment, symptoms, or behavior of a repeated nature that impaired social, school, or work efficiency for an extended period of several months. Such conditions include depressive disorder (stable for 36 continuous months) and anxiety disorder (stable for 24 continuous months).[54] Requiring a period of stability reduces, but does not eliminate, the likelihood that the individual's depression or anxiety will return.

Historically, conditions associated with transgender individuals have been automatically disqualifying absent a waiver. Before the changes directed by Secretary Carter, military mental health standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."[55] These standards, however, did not evolve with changing understanding of transgender mental health. Today, transsexualism is no longer considered by most mental health practitioners as a mental health condition. According to the APA, it is not a medical condition for persons to identify with a gender that is different from their biological sex.[56] Put simply, transgender status alone is not a condition.

Gender dysphoria, by contrast, is a mental health condition that can require substantial medical treatment. Many individuals who identify as transgender are diagnosed with gender dysphoria, but "[n]ot all transgender people suffer from gender dysphoria and that distinction," according to the APA, "is important to keep in mind."[57] The DSM-5 defines gender dysphoria as

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[51] Deployment Health Clinical Center, "Mental Health Disorder Prevalence among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017).
[52] Id.
[53] DoDI 6130.03 at 47-48.
[54] Id.
[55] Id. at 48.
[56] DSM-5 at 452-53.
[57] American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018). Conversely, not all persons with gender dysphoria are transgender. "For example, some men who are disabled in combat, especially if their injury includes genital wounds, may feel that they are no longer men because their bodies do not conform to their concept of manliness. Similarly, a woman who opposes plastic surgery, but who must undergo mastectomy because of breast

a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration," that is manifested in various specified ways.[58] According to the APA, the "condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[59]

Transgender persons with gender dysphoria suffer from high rates of mental health conditions such as anxiety, depression, and substance use disorders.[60] High rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature, with lifetime rates of suicide attempts reported to be as high as 41% (compared to 4.6% for the general population).[61] According to a 2015 survey, the rate skyrockets to 57% for transgender individuals without a supportive family.[62] The Department is concerned that the stresses of military life, including basic training, frequent moves, deployment to war zones and austere environments, and the relentless physical demands, will be additional contributors to suicide behavior in people with gender dysphoria. In fact, there is recent evidence that military service can be a contributor to suicidal thoughts.[63]

Preliminary data of Service members with gender dysphoria reflect similar trends. A review of the administrative data indicates that Service members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%).[64]

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cancer, may find that she requires reconstructive breast surgery in order to resolve gender dysphoria arising from the incongruence between her body without breasts and her sense of herself as a woman." M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service," *Armed Forces & Society*, p. 5 n.22 (Mar. 2014).

[58] DSM-5 at 452.

[59] DSM-5 at 453.

[60] Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," *International Review of Psychiatry*, Vol. 28, pp. 44-57 (2016); George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," *LGBT Health*, Vol. 3, p. 128 (Apr. 2016).

[61] Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, p. 2 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf; H.G. Virupaksha, Daliboyina Muralidhar & Jayashree Ramakrishna, "Suicide and Suicide Behavior among Transgender Persons," *Indian Journal of Psychological Medicine*, Vol.38, pp. 505-09 (2016); Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," *Suicide and Life Threatening Behavior*, Vol. 47, pp. 475-482 (Aug. 2017).

[62] Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, pp. 2, 12 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf.

[63] Raymond P. Tucker, Rylan J. Testa, Mark A.Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," *Suicide and Life Threatening Behavior* DOI: 10.1111/sltb.12432 (epub ahead of print), pp. 1-10 (2018); Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," *Comprehensive Psychiatry*, Vol. 55, pp. 534-541 (2014).

[64] Data retrieved from Military Health System data repository (Oct. 2017).

Service members with gender dysphoria are also nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member).[65] From October 1, 2015 to October 3, 2017, the 994 active duty Service members diagnosed with gender dysphoria accounted for 30,000 mental health visits.[66]

It is widely believed by mental health practitioners that gender dysphoria can be treated. Under commonly accepted standards of care, treatment for gender dysphoria can include: psychotherapy; social transition—also known as "real life experience"—to allow patients to live and work in their preferred gender without any hormone treatment or surgery; medical transition to align secondary sex characteristics with patients' preferred gender using cross-sex hormone therapy and hair removal; and surgical transition—also known as sex reassignment surgery—to make the physical body—both primary and secondary sex characteristics—resemble as closely as possible patients' preferred gender.[67] The purpose of these treatment options is to alleviate the distress and impairment of gender dysphoria by seeking to bring patients' physical characteristics into alignment with their gender identity—that is, one's inner sense of one's own gender.[68]

Cross-sex hormone therapy is a common medical treatment associated with gender transition that may be commenced following a diagnosis of gender dysphoria.[69] Treatment for women transitioning to men involves the administration of testosterone, whereas treatment for men transitioning to women requires the blocking of testosterone and the administration of estrogens.[70] The Endocrine Society's clinical guidelines recommend laboratory bloodwork every 90 days for the first year of treatment to monitor hormone levels.[71]

As a treatment for gender dysphoria, sex reassignment surgery is "a unique intervention not only in psychiatry but in all of medicine."[72] Under existing Department guidelines

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[65] Data retrieved from Military Health System data repository (Oct. 2017). Study period was Oct. 1, 2015 to July 26, 2017.

[66] Data retrieved from Military Health System data repository (Oct. 2017).

[67] RAND Study at 5-7, Appendices A & C; see also Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 1 (May 15, 2014) ("The full therapeutic approach to [gender dysphoria] consists of 3 elements or phases, typically in the following order: (1) hormones of the desired gender; (2) real-life experience for 12 months in the desired role; and (3) surgery to change the genitalia and other sex characteristics (e.g., breast reconstruction or mastectomy). However, not everyone with [gender dysphoria] needs or wants all elements of this triadic approach."); Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1183 (Oct. 2016) ("The Endocrine Society proposes a sequential approach in transsexual care to optimize mental health and physical outcomes. Generally, they recommend initiation of psychotherapy, followed by cross-sex hormone treatments, then [sex reassignment surgery].").

[68] RAND Study at 73.

[69] Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

[70] Id. at 3885-3888.

[71] Id.

[72] Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011); see also Hayes Directory, "Sex Reassignment Surgery for the Treatment of

implementing the Carter policy, men transitioning to women may obtain an orchiectomy (surgical removal of the testicles), a penectomy (surgical removal of the penis), a vaginoplasty (surgical creation of a vagina), a clitoroplasty (surgical creation of a clitoris), and a labiaplasty (surgical creation of the labia). Women transitioning to men may obtain a hysterectomy (surgical removal of the uterus), a mastectomy (surgical removal of the breasts), a metoidioplasty (surgical enlargement of the clitoris), a phalloplasty (surgical creation of a penis), a scrotoplasty (surgical creation of a scrotum) and placement of testicular prostheses, a urethroplasty (surgical enlargement of the urethra), and a vaginectomy (surgical removal of the vagina). In addition, the following cosmetic procedures may be provided at military treatment facilities as well: abdominoplasty, breast augmentation, blepharoplasty (eyelid lift), hair removal, face lift, facial bone reduction, hair transplantation, liposuction, reduction thyroid chondroplasty, rhinoplasty, and voice modification surgery.[73]

The estimated recovery time for each of the surgical procedures, even assuming no complications, can be substantial. For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to eight weeks; an orchiectomy is up to six weeks; and a vaginoplasty is up to three months.[74] When combined with 12 continuous months of hormone therapy, which is required prior to genital surgery,[75] the total time necessary for surgical transition can exceed a year.

Although relatively few people who are transgender undergo genital reassignment surgeries (2% of transgender men and 10% of transgender women), we have to consider that the rate of complications for these surgeries is significant, which could increase a transitioning Service member's unavailability.[76] Even according to the RAND study, 6% to 20% of those receiving vaginoplasty surgery experience complications, meaning that "between three and 11 Service members per year would experience a long-term disability from gender reassignment

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Gender Dysphoria," p. 2 (May 15, 2014) (noting that gender dysphoria "does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with [gender dysphoria]"); Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017).

[73] Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017); see also RAND Study at Appendix C.

[74] University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018); Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

[75] RAND Study at 80; see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

[76] Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

surgery."[77] The RAND study further notes that of those receiving phalloplasty surgery, as many as 25%—one in four—will have complications.[78]

The prevailing judgment of mental health practitioners is that gender dysphoria can be treated with the transition-related care described above. While there are numerous studies of varying quality showing that this treatment can improve health outcomes for individuals with gender dysphoria, the available scientific evidence on the extent to which such treatments fully remedy all of the issues associated with gender dysphoria is unclear. Nor do any of these studies account for the added stress of military life, deployments, and combat.

As recently as August 2016, the Centers for Medicare and Medicaid Services (CMS) conducted a comprehensive review of the relevant literature, over 500 articles, studies, and reports, to determine if there was "sufficient evidence to conclude that gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria."[79] After reviewing the universe of literature regarding sex reassignment surgery, CMS identified 33 studies sufficiently rigorous to merit further review, and of those, "some were positive; others were negative."[80] "Overall," according to CMS, "the quality and strength of evidence were low due to mostly observational study designs with no comparison groups, subjective endpoints, potential confounding . . . , small sample sizes, lack of validated assessment tools, and considerable [number of study subjects] lost to follow-up."[81] With respect to whether sex reassignment surgery was "reasonable and necessary" for the treatment of gender dysphoria, CMS concluded that there was "not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively."[82]

Importantly, CMS identified only six studies as potentially providing "useful information" on the effectiveness of sex reassignment surgery. According to CRS, "the four best designed and conducted studies that assessed the quality of life before and after surgery using validated (albeit, non-specific) psychometric studies did not demonstrate clinically significant changes or differences in psychometric test results after [sex reassignment surgery]."[83]

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[77] RAND Study at 40-41.
[78] Id. at 41.
[79] Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services, p. 9 (Aug. 30, 2016) ("CMS Report").
[80] Id. at 62.
[81] Id.
[82] Id. at 65. CMS did not conclude that gender reassignment surgery can never be necessary and reasonable to treat gender dysphoria. To the contrary, it made clear that Medicare insurers could make their own "determination of whether or not to cover gender reassignment surgery based on whether gender reassignment surgery is reasonable and necessary for the individual beneficiary after considering the individual's specific circumstances." Id. at 66. Nevertheless, CMS did decline to require all Medicare insurers to cover sex reassignment surgeries because it found insufficient scientific evidence to conclude that such surgeries improve health outcomes for persons with gender dysphoria.
[83] Id. at 62.

Additional studies found that the "cumulative rates of requests for surgical reassignment reversal or change in legal status" were between 2.2% and 3.3%.[84]

A sixth study, which came out of Sweden, is one of the most robust because it is a "nationwide population-based, long-term follow-up of sex-reassigned transsexual persons."[85] The study found increased mortality and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group.[86] As described by CMS: "The mortality was primarily due to completed suicides (19.1-fold greater than in [the control group]), but death due to neoplasm and cardiovascular disease was increased 2 to 2.5 times as well. We note, mortality from this patient population did not become apparent until after 10 years. The risk for psychiatric hospitalization was 2.8 times greater than in controls even after adjustment for prior psychiatric disease (18%). The risk for attempted suicide was greater in male-to-female patients regardless of the gender of the control."[87]

According to the Hayes Directory, which conducted a review of 19 peer-reviewed studies on sex reassignment surgery, the "evidence suggests positive benefits," including "decreased [gender dysphoria], depression and anxiety, and increased [quality of life]," but "because of serious limitations," these findings "permit only weak conclusions."[88] It rated the quality of evidence as "very low" due to the numerous limitations in the studies and concluded that there is

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[84] Id.

[85] Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, p. 6 (Feb. 2011); see also id. ("Strengths of this study include nationwide representativity over more than 30 years, extensive follow-up time, and minimal loss to follow-up. . . . Finally, whereas previous studies either lack a control group or use standardised mortality rates or standarised incidence rates as comparisons, we selected random population controls matched by birth year, and either birth or final sex.").

[86] Id. at 7; see also at 6 ("Mortality from suicide was strikingly high among sex-reassigned persons, also after adjustment for prior psychiatric morbidity. In line with this, sex-reassigned persons were at increased risk for suicide attempts. Previous reports suggest that transsexualism is a strong risk factor for suicide, also after sex reassignment, and our long-term findings support the need for continued psychiatric follow-up for persons at risk to prevent this. Inpatient care for psychiatric disorders was significantly more common among sex-reassigned persons than among matched controls, both before and after sex reassignment. It is generally accepted that transsexuals have more psychiatric ill-health than the general population prior to the sex reassignment. It should therefore come as no surprise that studies have found high rates of depression, and low quality of life, also after sex reassignment. Notably, however, in this study the increased risk for psychiatric hospitalization persisted even after adjusting for psychiatric hospitalization prior to sex reassignment. This suggests that even though sex reassignment alleviates gender dysphoria, there is a need to identify and treat co-occurring psychiatric morbidity in transsexual persons not only before but also after sex reassignment.").

[87] CMS Report at 62. It bears noting that the outcomes for mortality and suicide attempts differed "depending on when sex reassignment was performed: during the period 1973-1988 or 1989-2003." Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, p. 5 (Feb. 2011). Even though both mortality and suicide attempts were greater for transsexual persons than the healthy control group across both time periods, this did not reach statistical significance during the 1989-2003 period. One possible explanation is that mortality rates for transsexual persons did not begin to diverge from the healthy control group until after 10 years of follow-up, in which case the expected increase in mortality would not have been observed for most of the persons receiving sex reassignment surgeries from 1989-2003. Another possible explanation is that treatment was of a higher quality from 1989-2003 than from 1973-1988.

[88] Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 4 (May 15, 2014).

not sufficient "evidence to establish patient selection criteria for [sex reassignment surgery] to treat [gender dysphoria]."[89]

With respect to hormone therapy, the Hayes Directory examined 10 peer-reviewed studies and concluded that a "substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy."[90] Yet again, it rated the quality of evidence as "very low" and found that the "evidence is insufficient to support patient selection criteria for hormone therapy to treat [gender dysphoria]."[91] Importantly, the Hayes Directory also found: "Hormone therapy and subsequent [sex reassignment surgery] failed to bring overall mortality, suicide rates, or death from illicit drug use in [male-to-female] patients close to rates observed in the general male population. It is possible that mortality is nevertheless reduced by these treatments, but tbat cannot be determined from the available evidence."[92]

In 2010, Mayo Clinic researchers conducted a comprehensive review of 28 studies on the use of cross-sex hormone therapy in sex reassignment and concluded that there was "very low quality evidence" showing that such therapy "likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life."[93] Not all of the studies showed positive results, but overall, after pooling the data from all of the studies, the researchers showed that 80% of patients reported improvement in gender dysphoria, 78% reported improvement in psychological symptoms, and 80% reported improvement in quality of life, after receiving hormone therapy.[94] Importantly, however, "[s]uicide attempt rates decreased after sex reassignment but stayed higher than the normal population rate."[95]

The authors of the Swedish study discussed above reached similar conclusions: "This study found substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and psychiatric hospitali[z]ations in sex-reassigned transsexual individuals compared to a healthy control population. This highlights that post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up. Even though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons."[96]

Even the RAND study, which the Carter policy is based upon, confirmed that "[t]here have been no randomized controlled trials of the effectiveness of various forms of treatment, and

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[89] Id. at 3.
[90] Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," pp. 2, 4 (May 19, 2014).
[91] Id. at 4.
[92] Id. at 3.
[93] Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of qualify of life and psychosocial outcomes," *Clinical Endocrinology*, Vol. 72, p. 214 (2010).
[94] Id. at 216.
[95] Id.
[96] Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011).

most evidence comes from retrospective studies."[97] Although noting that "[m]ultiple observational studies have suggested significant and sometimes dramatic reductions in suicidality, suicide attempts, and suicides among transgender patients after receiving transition-related treatment," RAND made clear that "none of these studies were randomized controlled trials (the gold standard for determining treatment efficacy)."[98] "In the absence of quality randomized trial evidence," RAND concluded, "it is difficult to fully assess the outcomes of treatment for [gender dysphoria]."[99]

Given the scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria, it is imperative that the Department proceed cautiously in setting accession and retention standards for persons with a diagnosis or history of gender dysphoria.

B. Physical Health Standards

Not only is maintaining high standards of mental health critical to military effectiveness and lethality, maintaining high standards of physical health is as well. Although technology has done much to ease the physical demands of combat in some military specialties, war very much remains a physically demanding endeavor. Service members must therefore be physically prepared to endure the rigors and hardships of military service, including potentially combat. They must be able to carry heavy equipment sometimes over long distances; they must be able to handle heavy machinery; they must be able to traverse harsh terrain or survive in ocean waters; they must be able to withstand oppressive heat, bitter cold, rain, sleet, and snow; they must be able to endure in unsanitary conditions, coupled with lack of privacy for basic bodily functions, sometimes with little sleep and sustenance; they must be able to carry their wounded comrades to safety; and they must be able to defend themselves against those who wisb to kill them.

Above all, whether they serve on the frontlines or in relative safety in non-combat positions, every Service member is important to mission accomplishment and must be available to perform their duties globally whenever called upon. The loss of personnel due to illness, disease, injury, or bad health diminishes military effectiveness and lethality. The Department's physical health standards are therefore designed to minimize the odds that any given Service member will be unable to perform his or her duties in the future because of illness, disease, or injury. As noted earlier, those who seek to enter military service must be free of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions.[100] To access recruits with higher rates of anticipated unavailability for deployment thrusts a heavier burden on those who would deploy more often.

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[97] RAND Study at 7.
[98] Id. at 10 (citing only to a California Department of Insurance report).
[99] Id.
[100] DoDI 6130.03 at 2.

Historically, absent a waiver, the Department has barred from accessing into the military anyone who had undergone chest or genital surgery (e.g., removal of the testicles or uterus) and anyone with a history of major abnormalities or defects of the chest or genitalia, including hermaphroditism and pseudohermaphroditism.[101] Persons with conditions requiring medications, such as anti-depressants and hormone treatment, were also disqualified from service, unless a waiver was granted.[102]

These standards have long applied uniformly to all persons, regardless of transgender status. The Carter policy, however, deviates from these uniform standards by exempting, under certain conditions, treatments associated with gender transition, such as sex reassignment surgery and cross-sex hormone therapy. For example, under the Carter policy, an applicant who has received genital reconstruction surgery may access without a waiver if a period of 18 months has elapsed since the date of the most recent surgery, no functional limitations or complications persist, and no additional surgery is required. In contrast, an applicant who received similar surgery following a traumatic injury is disqualified from military service without a waiver.[103] Similarly, under the Carter policy, an applicant who is presently receiving cross-sex hormone therapy post-gender transition may access without a waiver if the applicant has been stable on such hormones for 18 months. In contrast, an applicant taking synthetic hormones for the treatment of hypothyroidism is disqualified from military service without a waiver.[104]

C. Sex-Based Standards

Women have made invaluable contributions to the defense of the Nation throughout our history. These contributions have only grown more significant as the number of women in the Armed Forces has increased and as their roles have expanded. Today, women account for 17.6% of the force,[105] and now every position, including combat arms positions, is open to them.

The vast majority of military standards make no distinctions between men and women. Where biological differences between males and females are relevant, however, military standards do differentiate between them. The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes.[106] These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality.

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[101] Id. at 25-27.
[102] Id. at 46-48.
[103] Id. at 26-27.
[104] Id. at 41.
[105] Defense Manpower Data Center, Active and Reserve Master Files (Dec. 2017).
[106] For example, in *United States v. Virginia*, the Court noted approvingly that "[a]dmitting women to [the Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." 518 U.S. 515, 550-51 n.19 (1996) (citing the statute that requires the same standards for women admitted to the service academies as for the men, "except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals").

For example, anatomical differences between males and females, and the reasonable expectations of privacy that flow from those differences, at least partly account for the laws and regulations that require separate berthing, bathroom, and shower facilities and different drug testing procedures for males and females.[107] To maintain good order and discipline, Congress has even required by statute that the sleeping and latrine areas provided for "male" recruits be physically separated from the sleeping and latrine areas provided for "female" recruits during basic training and that access by drill sergeants and training personnel "after the end of the training day" be limited to persons of the "same sex as the recruits" to ensure "after-hours privacy for recruits during basic training."[108]

In addition, physiological differences between males and females account for the different physical fitness and body fat standards that apply to men and women.[109] This ensures equity and fairness. Likewise, those same physiological differences also account for the policies that regulate competition between men and women in military training and sports, such as boxing and combatives.[110] This ensures protection from injury.

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[107] See, e.g., Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration," p. 56 (Mar. 20, 2017); Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management," p. 35 (Jan 29., 2016); Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012) ("Observers must . . . [b]e the same gender as the Soldier being observed.").

[108] See 10 U.S.C. § 4319 (Army), 10 U.S.C. § 6931 (Navy), and 10 U.S.C. § 9319 (Air Force) (requiring the sleeping and latrine areas provided for "male" recruits to be physically separated from the sleeping and latrine areas provided for "female" recruits during basic training); 10 U.S.C. § 4320 (Army), 10 U.S.C. § 6932 (Navy), and 10 U.S.C. § 9320 (Air Force) (requiring that access by drill sergeants and training personnel "after the end of the training day" be limited to persons of the "same sex as the recruits").

[109] See, e.g., Department of the Army, Army Regulation 600-9, "The Army Body Composition Program," pp. 21-31 (June 28, 2013); Department of the Navy, Office of the Chief of Naval Operations Instruction 6110.1J, "Physical Readiness Program," p. 7 (July 11, 2011); Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program," pp. 86-95, 106-146 (Aug. 27, 2015); Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program," (Aug. 1, 2008); Department of the Navy, Marine Corps Order 6110.3A, "Marine Corps Body Composition and Military Appearance Program," (Dec. 15, 2016); see also United States Military Academy, Office of the Commandant of Cadets, "Physical Program Whitebook AY 16-17," p. 13 (specifying that, to graduate, cadets must meet the minimum performance standard of 3:30 for men and 5:29 for women on the Indoor Obstacle Course Test); Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration," p. 56 (Mar. 20, 2017) ("Performance requirement differences, such as [Army Physical Fitness Test] scoring are based on physiological differences, and apply to the entire Army.").

[110] See, e.g., Headquarters, Department of the Army, TC 3-25.150, "Combatives," p. A-15 (Feb. 2017) ("Due to the physiological difference between the sexes and in order to treat all Soldiers fairly and conduct gender-neutral competitions, female competitors will be given a 15 percent overage at weigh-in."); id. ("In championships at battalion-level and above, competitors are divided into eight weight class brackets. . . . These classes take into account weight and gender."); Major Alex Bedard, Major Robert Peterson & Ray Barone, "Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," *Association of the United States Army* (Nov. 16, 2017), https://www.ausa.org/articles/punching-through-barriers-female-cadets-boxing-west-point (noting that "[m]atching men and women according to weight may not adequately account for gender differences regarding striking force" and that "[w]hile conducting free sparring, cadets must box someone of the same gender"); RAND Study at 57 (noting that, under British military policy, transgender persons "can be excluded from sports that organize around gender to ensure the safety of the individual or other participants"); see also International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_

Uniform and grooming standards, to a certain extent, are also based on anatomical differences between males and females. Even those uniform and grooming standards that are not, strictly speaking, based on physical biology nevertheless flow from longstanding societal expectations regarding differences in attire and grooming for men and women.[111]

Because these sex-based standards are based on legitimate biological differences between males and females, it follows that a person's physical biology should dictate which standards apply. Standards designed for biological males logically apply to biological males, not biological females, and vice versa. When relevant, military practice has long adhered to this straightforward and logical demarcation.

By contrast, the Carter policy deviates from this longstanding practice by making military sex-based standards contingent, not necessarily on the person's biological sex, but on the person's gender marker in DEERS, which can be changed to reflect the person's gender identity.[112] Thus, under the Carter policy, a biological male who identifies as a female (and changes his gender marker to reflect that gender) must be held to the standards and regulations for females, even though those standards and regulations are based on female physical biology, not female gender identity. The same goes for females who identify as males. Gender identity alone, however, is irrelevant to standards that are designed on the basis of biological differences.

Rather than apply only to those transgender individuals who have altered their external biological characteristics to fully match that of their preferred gender, under the Carter policy, persons need not undergo sex reassignment surgery, or even cross-sex hormone therapy, in order to be recognized as, and thus subject to the standards associated with, their preferred gender. A male who identifies as female could remain a biological male in every respect and still must be treated in all respects as a female, including with respect to physical fitness, facilities, and uniform and grooming. This scenario is not farfetched. According to the APA, not "all individuals with gender dysphoria desire a complete gender reassignment. . . . Some are satisfied with no medical or surgical treatment but prefer to dress as the felt gender in public."[113] Currently, of the 424 approved Service member treatment plans, at least 36 do not include cross-

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consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; NCAA Office of Inclusion; NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

[111] "The difference between men's and women's grooming policies recognizes the difference between the sexes; sideburns for men, different hairstyles and cosmetics for women. Establishing identical grooming and personal appearance standards for men and women would not be in the Navy's best interest and is not a factor in the assurance of equal opportunity." Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 156651, "Uniform Regulations," Art. 2101.1 (July 7, 2017); see also Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia," pp. 4-16 (Mar. 31, 2014); Department of the Air Force, Air Force Instruction 26-2903, "Dress and Personal Appearance of Air Force Personnel," pp. 17-27 (Feb. 9, 2017); Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations," pp. 1-9 (Mar. 31, 2003).

[112] Department of Defense Instruction 1300.28, *In-service Transition for Service Members Identifying as Transgender*, pp. 3-4 (June 30, 2016).

[113] American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018).

sex hormone therapy or sex reassignment surgery.[114] And it is questionable how many Service members will obtain any type of sex reassignment surgery. According to a survey of transgender persons, only 25% reported having had some form of transition-related surgery.[115]

The variability and fluidity of gender transition undermine the legitimate purposes that justify different biologically-based, male-female standards. For example, by allowing a biological male who retains male anatomy to use female berthing, bathroom, and shower facilities, it undermines the reasonable expectations of privacy and dignity of female Service members. By allowing a biological male to meet the female physical fitness and body fat standards and to compete against females in gender-specific physical training and athletic competition, it undermines fairness (or perceptions of fairness) because males competing as females will likely score higher on the female test than on the male test and possibly compromise safety. By allowing a biological male to adhere to female uniform and grooming standards, it creates unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.

These problems could perhaps be alleviated if a person's preferred gender were recognized only after the person underwent a biological transition. The concept of gender transition is so nebulous, however, that drawing any line—except perhaps at a full sex reassignment surgery—would be arbitrary, not to mention at odds with current medical practice, which allows for a wide range of individualized treatment. In any event, rates for genital surgery are exceedingly low—2% of transgender men and 10% of transgender women.[116] Only up to 25% of surveyed transgender persons report having had some form of transition-related surgery.[117] The RAND study estimated that such rates "are typically only around 20 percent, with the exception of chest surgery among female-to-male transgender individuals."[118] Moreover, of the 424 approved Service member treatment plans available for study, 388 included cross-sex hormone treatment, but only 34 non-genital sex reassignment surgeries and one genital surgery have been completed thus far. Only 22 Service members have requested a waiver for a genital sex reassignment surgery.[119]

Low rates of full sex reassignment surgery and the otherwise wide variation of transition-related treatment, with all the challenges that entails for privacy, fairness, and safety, weigh in favor of maintaining a bright line based on biological sex—not gender identity or some variation thereof—in determining which sex-based standards apply to a given Service member. After all, a person's biological sex is generally ascertainable through objective means. Moreover, this approach will ensure that biologically-based standards will be applied uniformly to all Service members of the same biological sex. Standards that are clear, coherent, objective, consistent, predictable, and uniformly applied enhance good order, discipline, steady leadership, and unit cohesion, which in turn, ensure military effectiveness and lethality.

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[114] Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).
[115] Id.
[116] Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.
[117] Id. at 100.
[118] RAND Study at 21.
[119] Defense Health Agency, Supplemental Health Care Program Data (Feb. 2018).

New Transgender Policy

In light of the forgoing standards, all of which are necessary for military effectiveness and lethality, as well as the recommendations of the Panel of Experts, the Department, in consultation with the Department of Homeland Security, recommends the following policy:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex.

Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are eligible for service, provided that they, like all other persons, satisfy all mental and physical health standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which a transgender person's gender identity is recognized only if the person has a diagnosis or history of gender dysphoria.

Although the precise number is unknown, the Department recognizes that many transgender persons could be disqualified under this policy. And many transgender persons who would not be disqualified may nevertheless be unwilling to adhere to the standards associated with their biological sex. But many have served, and are serving, with great dedication under the standards for their biological sex. As noted earlier, 8,980 Service members reportedly identify as transgender, and yet there are currently only 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified.

Except for those who are exempt under this policy, as described below in C.3, and except where waivers or exceptions to policy are otherwise authorized, persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be disqualified from service. In the Department's military judgment, this is a necessary departure from the Carter policy for the following reasons:

1. *Undermines Readiness.* While transition-related treatments, including real life experience, cross-sex hormone therapy, and sex reassignment surgery, are widely accepted forms of treatment, there is considerable scientific uncertainty concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria. Despite whatever improvements in condition may result from these treatments, there is evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment, as compared to persons without gender dysphoria.[120] The persistence of these problems is a risk for readiness.

[120] See *supra* at pp. 24-26.

Another readiness risk is the time required for transition-related treatment and the impact on deployability. Although limited and incomplete because many transitioning Service members either began treatment before the Carter policy took effect or did not require sex reassignment surgery, currently available in-service data already show that, cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period.[121]

Transition-related treatment that involves cross-sex hormone therapy or sex reassignment surgery could render Service members with gender dysphoria non-deployable for a significant period of time—perhaps even a year—if the theater of operations cannot support the treatment. For example, Endocrine Society guidelines for cross-sex hormone therapy recommend quarterly bloodwork and laboratory monitoring of hormone levels during the first year of treatment.[122] Of the 424 approved Service member treatment plans available for study, almost all of them—91.5%—include the prescription of cross-sex hormones.[123] The period of potential non-deployability increases for those who undergo sex reassignment surgery. As described earlier, the recovery time for the various sex reassignment procedures is substantial. For non-genital surgeries (assuming no complications), the range of recovery is between two and eight weeks depending on the type of surgery, and for genital surgeries (again assuming no complications), the range is between three and six months before the individual is able to return to full duty.[124] When combined with 12 continuous months of hormone therapy, which is recommended prior to genital surgery,[125] the total time necessary for sex reassignment surgery could exceed a year. If the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment. Either outcome carries risks for readiness.

Given the limited data, however, it is difficult to predict with any precision the impact on readiness of allowing gender transition. Moreover, the input received by the Panel of Experts varied considerably. On one hand, some commanders with transgender Service members

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[121] Data reported by the Departments of the Army and Air Force (Oct. 2017).

[122] Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

[123] Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017). Although the RAND study observed that British troops who are undergoing hormone therapy are generally able to deploy if the "hormone dose is steady and there are no major side effects," it nevertheless acknowledged that "deployment to all areas may not be possible, depending on the needs associated with any medication (e.g., refrigeration)." RAND Study at 59.

[124] For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to 8 weeks; an orchiectomy is up to 6 weeks; and a vaginoplasty is up to three months. See University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018); see also Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

[125] RAND Study at 80; see also id. at 7; Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

reported that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years.[126] On the other band, some commanders, as well as transgender Service members themselves, reported that transition-related treatment is not a burden on unit readiness and could be managed to avoid interfering with deployments, with one commander even reporting that a transgender Service member with gender dysphoria under his command elected to postpone surgery in order to deploy.[127] This conclusion was echoed by some experts in endocrinology who found no harm in stopping or adjusting hormone therapy treatment to accommodate deployment during the first year of hormone use.[128] Of course, postponing treatment, especially during a combat deployment, has risks of its own insofar as the treatment is necessary to mitigate the clinically significant distress and impairment of functioning caused by gender dysphoria. After all, "when Service members deploy and then do not meet medical deployment fitness standards, there is risk for inadequate treatment within tbe operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower."[129] In short, the periods of transition-related non-availability and the risks of deploying untreated Service members with gender dysphoria are uncertain, and that alone merits caution.

Moreover, most mental health conditions, as well as the medication used to treat them, limit Service members' ability to deploy. Any DSM-5 psychiatric disorder witb residual symptoms, or medication side effects, which impair social or occupational performance, require a waiver for the Service member to deploy.[130] The same is true for mental health conditions that pose a substantial risk for deterioration or recurrence in the deployed environment.[131] In managing mental health conditions while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria.[132]

The RAND study acknowledges that the inclusion of individuals with gender dysphoria in the force will have a negative impact on readiness. According to RAND, foreign militaries that allow service by personnel with gender dysphoria have found that it is sometimes necessary to restrict the deployment of transitioning individuals, including those receiving hormone therapy and surgery, to austere environments where their healthcare needs cannot be met.[133] Nevertheless, RAND concluded that the impact on readiness would be minimal—e.g., 0.0015% of available deployable labor-years across the active and reserve components—because of the

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[126] Minutes, Transgender Review Panel (Oct. 13, 2017).
[127] Id.
[128] Minutes, Transgender Review Panel (Nov. 9, 2017).
[129] Institute for Defense Analyses, "Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment," pp. 60-61 (Apr. 2016).
[130] Modification Thirteen to U.S. Central Command Individual Protection and Individual, Unit Deployment Policy, Tab A, p. 8 (Mar. 2017).
[131] Id.
[132] See generally Memorandum from the Assistant Secretary of Defense for Health Affairs, "Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications," pp. 2-4 (Oct. 7, 2013).
[133] RAND Study at 40.

exceedingly small number of transgender Service members who would seek transition-related treatment.[134] Even then, RAND admitted that the information it cited "must be interpreted with caution" because "much of the current research on transgender prevalence and medical treatment rates relies on self-reported, nonrepresentative samples."[135] Nevertheless, by RAND's standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers.[136] And yet that is no reason to allow persons with those conditions to serve.

The issue is not whether the military can absorb periods of non-deployability in a small population; rather, it is whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible. As the Department has noted before: "[W]here the operational requirements are growing faster than available resources," it is imperative that the force "be manned with Service members capable of meeting all mission demands. The Services require that every Service member contribute to full mission readiness, regardless of occupation. In other words, the Services require all Service members to be able to engage in core military tasks, including the ability to deploy rapidly, without impediment or encumbrance."[137] Moreover, the Department must be mindful that "an increase in the number of non-deployable military personnel places undue risk and personal burden on Service members qualified and eligible to deploy, and negatively impacts mission readiness."[138] Further, the Department must be attuned to the impact that high numbers of non-deployable military personnel places on families whose Service members deploy more often to backfill or compensate for non-deployable persons.

In sum, the available information indicates that there is inconclusive scientific evidence that the serious problems associated with gender dysphoria can be fully remedied through transition-related treatment and that, even if it could, most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time. By this metric, Service members with gender dysphoria who need transition-related care present a significant challenge for unit readiness.

2. *Incompatible with Sex-Based Standards.* As discussed in detail earlier, military personnel policy and practice has long maintained a clear line between men and women where their biological differences are relevant with respect to physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards. This line promotes good order and discipline, steady leadership, unit cohesion, and ultimately military

[134] Id. at 42.
[135] Id. at 39.
[136] According to the National Institute of Mental Health, 2.8% of U.S. adults experienced bipolar disorder in the past year, and 4.4% have experienced the condition at some time in their lives. National Institute of Mental Health, "Bipolar Disorder" (Nov. 2017) https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml. The prevalence of schizophrenia is less than 1%. National Institute of Mental Health, "Schizophrenia" (Nov. 2017) https://www.nimh.nih.gov/health/statistics/schizophrenia.shtml.
[137] Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces," p. 9 (Apr. 2016).
[138] Id. at 10.

effectiveness and lethality because it ensures fairness, equity, and safety; satisfies reasonable expectations of privacy; reflects common practice in the society from which we recruit; and promotes core military values of dignity and respect between men and women. To exempt Service members from the uniform, biologically-based standards applicable to their biological sex on account of their gender identity would be incompatible with this line and undermine the objectives such standards are designed to serve.

First, a policy that permits a change of gender without requiring any biological changes risks creating unfairness, or perceptions thereof, that could adversely affect unit cohesion and good order and discipline. It could be perceived as discriminatory to apply different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards grounded in physical biology. For example, it unfairly discriminates against biological males who identify as male and are held to male standards to allow biological males who identify as female to be held to female standards, especially where the transgender female retains many of the biological characteristics and capabilities of a male. It is important to note here that the Carter policy does not require a transgender person to undergo any biological transition in order to be treated in all respects in accordance with the person's preferred gender. Therefore, a biological male who identifies as female could remain a biological male in every respect and still be governed by female standards. Not only would this result in perceived unfairness by biological males who identify as male, it would also result in perceived unfairness by biological females who identify as female. Biological females who may be required to compete against such transgender females in training and athletic competition would potentially be disadvantaged.[139] Even more importantly, in physically violent training and competition, such as boxing and combatives, pitting biological females against biological males who identify as female, and vice versa, could present a serious safety risk as well.[140]

This concern may seem trivial to those unfamiliar with military culture. But vigorous competition, especially physical competition, is central to the military life and is indispensable to the training and preparation of warriors. Nothing encapsulates this more poignantly than the words of General Douglas MacArthur when he was superintendent of the U.S. Military Academy and which are now engraved above the gymnasium at West Point: "Upon the fields of friendly

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[139] See *supra* note 109. Both the International Olympic Committee (IOC) and the National Collegiate Athletic Association (NCAA) have attempted to mitigate this problem in their policies regarding transgender athletes. For example, the IOC requires athletes who transition from male to female to demonstrate certain suppressed levels of testosterone to minimize any advantage in women's competition. Similarly, the NCAA prohibits an athlete who has transitioned from male to female from competing on a women's team without changing the team status to a mixed gender team. While similar policies could be employed by the Department, it is unrealistic to expect the Department to subject transgender Service members to routine hormone testing prior to biannual fitness testing, athletic competition, or training simply to mitigate real and perceived unfairness or potential safety concerns. See, e.g., International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

[140] See *supra* note 109.

strife are sown the seeds that, upon other fields, on other days will bear the fruits of victory."[141] Especially in combat units and in training, including the Service academies, ROTC, and other commissioning sources, Service members are graded and judged in significant measure based upon their physical aptitude, which is only fitting given that combat remains a physical endeavor.

Second, a policy that accommodates gender transition without requiring full sex reassignment surgery could also erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline. Given the unique nature of military service, Service members of the same biological sex are often required to live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom. Because of reasonable expectations of privacy, the military has long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison. In the context of recruit training, this separation is even mandated by Congress.[142]

Allowing transgender persons who have not undergone a full sex reassignment, and thus retain at least some of the anatomy of their biological sex, to use the facilities of their identified gender would invade the expectations of privacy that the strict male-female demarcation in berthing, bathroom, and shower facilities is meant to serve. At the same time, requiring transgender persons who have developed, even if only partially, the anatomy of their identified gender to use the facilities of their biological sex could invade the privacy of the transgender person. Without separate facilities for transgender persons or other mitigating accommodations, which may be unpalatable to transgender individuals and logistically impracticable for the Department, the privacy interests of biological males and females and transgender persons could be anticipated to result in irreconcilable situations. Lieutenants, Sergeants, and Petty Officers charged with carrying out their units' assigned combat missions should not be burdened by a change in eligibility requirements disconnected from military life under austere conditions.

The best illustration of this irreconcilability is the report of one commander who was confronted with dueling equal opportunity complaints—one from a transgender female (i.e., a biological male with male genitalia who identified as female) and the other from biological females. The transgender female Service member was granted an exception to policy that allowed the Service member to live as a female, which included giving the Service member access to female shower facilities. This led to an equal opportunity complaint from biological females in the unit who believed that granting a biological male, even one who identified as a female, access to their showers violated their privacy. The transgender Service member responded with an equal opportunity complaint claiming that the command was not sufficiently supportive of the rights of transgender persons.[143]

The collision of interests discussed above are a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions. Leaders at all levels

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[141] Douglas MacArthur, *Respectfully Quoted: A Dictionary of Quotations* (1989), available at http://www.bartleby.com/73/1874.html.

[142] See *supra* note 108.

[143] Minutes, Transgender Review Panel (Oct. 13, 2017). Limited data exists regarding the performance of transgender Service members due to policy restrictions in Department of Defense 1300.28, *In-Service Transition for Transgender Service Members* (Oct. 1, 2016), that prevent the Department from tracking individuals who may identify as transgender as a potentially unwarranted invasion of personal privacy.

already face immense challenges in building cohesive military units. Blurring the line that differentiates the standards and policies applicable to men and women will only exacerbate those challenges and divert valuable time and energy from military tasks.

The unique leadership challenges arising from gender transition are evident in the Department's handbook implementing the Carter policy. The handbook provides guidance on various scenarios that commanders may face. One such scenario concerns the use of shower facilities: "A transgender Service member has expressed privacy concerns regarding the open bay shower configuration. Similarly, several other non-transgender Service members have expressed discomfort when showering in these facilities with individuals who have different genitalia." As possible solutions, the handbook offers that the commander could modify the shower facility to provide privacy or, if that is not feasible, adjust the timing of showers. Another scenario involves proper attire during a swim test: "It is the semi-annual swim test and a female to male transgender Service member who has fully transitioned, but did not undergo surgical change, would like to wear a male swimsuit for the test with no shirt or other top coverage." The extent of the handbook's guidance is to advise commanders that "[i]t is within [their] discretion to take measures ensuring good order and discipline," that they should "counsel the individual and address the unit, if additional options (e.g., requiring all personnel to wear shirts) are being considered," and that they should consult the Service Central Coordination Cell, a help line for commanders in need of advice.

These vignettes illustrate the significant effort required of commanders to solve challenging problems posed by the implementation of the current transgender service policies. The potential for discord in the unit during the routine execution of daily activities is substantial and highlights the fundamental incompatibility of the Department's legitimate military interest in uniformity, the privacy interests of all Service members, and the interest of transgender individuals in an appropriate accommodation. Faced with these conflicting interests, commanders are often forced to devote time and resources to resolve issues not present outside of military service. A failure to act quickly can degrade an otherwise highly functioning team, as will failing to seek appropriate counsel and implementing a faulty solution. The appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline.

The RAND study does not meaningfully address how accommodations for gender transition would impact perceptions of fairness and equity, expectations of privacy, and safety during training and athletic competition and how these factors in turn affect unit cohesion. Instead, the RAND study largely dismisses concerns about the impact on unit cohesion by pointing to the experience of four countries that allow transgender service—Australia, Canada, Israel, and the United Kingdom.[144] Although the vast majority of armed forces around the world do not permit or have policies on transgender service, RAND noted that 18 militaries do, but only four have well-developed and publicly available policies.[145] RAND concluded that "the available research revealed no significant effect on cohesion, operational effectiveness, or

[144] RAND Study at 45.
[145] Id. at 50.

readiness."[146] It reached this conclusion, however, despite noting reports of resistance in the ranks, which is a strong indication of an adverse effect on unit cohesion.[147] Nevertheless, RAND acknowledged that the available data was "limited" and that the small number of transgender personnel may account for "the limited effect on operational readiness and cohesion."[148]

Perhaps more importantly, however, the RAND study mischaracterizes or overstates the reports upon which it rests its conclusions. For example, the RAND study cites *Gays in Foreign Militaries 2010: A Global Primer* by Nathaniel Frank as support for the conclusions that there is no evidence that transgender service has had an adverse effect on cohesion, operational effectiveness, or readiness in the militaries of Australia and the United Kingdom and that diversity has actually led to increases in readiness and performance.[149] But that particular study has nothing to do with examining the service of transgender persons; rather, it is about the integration of homosexual persons into the military.[150]

With respect to transgender service in the Israeli military, the RAND study points to an unpublished paper by Anne Speckhard and Reuven Paz entitled *Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service*. The RAND study cites this paper for the proposition that "there has been no reported effect on cohesion or readiness" in the Israeli military and "there is no evidence of any impact on operational effectiveness."[151] These sweeping and categorical claims, however, are based only on "six in-depth interviews of experts on the subject both inside and outside the [Israeli Defense Forces (IDF)]: two in the IDF leadership—including the spokesman's office; two transgender individuals who served in the IDF, and two professionals who serve transgender clientele—before, during and after their IDF service."[152] As the RAND report observed, however: "There do appear to be some limitations on the assignment of transgender personnel, particularly in combat units. Because of the austere living conditions in these types of units, necessary accommodations may not be available for Service members in the midst of a gender transition. As a result, transitioning individuals are typically not assigned to combat units."[153] In addition, as the RAND study notes, under the Israeli policy at the time, "assignment of housing, restrooms, and showers is typically linked to the birth gender, which does not change in the military system until after gender reassignment surgery."[154] Therefore, insofar as a Service member's change of gender is not recognized until after sex reassignment

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[146] Id. at 45.
[147] Id.
[148] Id.
[149] Id.
[150] Nathaniel Frank, "Gays in Foreign Militaries 2010: A Global Primer," p. 6 *The Palm Center* (Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf ("This study seeks to answer some of the questions that have been, and will continue to be, raised surrounding the instructive lessons from other nations that have lifted their bans on openly gay service.").
[151] Rand Study at 45.
[152] Anne Speckhard & Reuven Paz, "Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service," p. 3 (2014), http://www.researchgate.net/publication/280093066.
[153] RAND Study at 56.
[154] Id. at 55.

surgery, the Israeli policy—and whatever claims about its impact on cohesion, readiness, and operational effectiveness—are distinguishable from the Carter policy.

Finally, the RAND study cites to a journal article on the Canadian military experience entitled *Gender Identity in the Canadian Forces: A Review of Possible Impacts on Operational Effectiveness* by Alan Okros and Denise Scott. According to RAND, the authors of this article "found no evidence of any effect on unit or overall cohesion."[155] But the article not only fails to support the RAND study's conclusions (not to mention the article's own conclusions), but it confirms the concerns that animate the Department's recommendations. The article acknowledges, for example, the difficulty commanders face in managing the competing interests at play:

> Commanders told us that the new policy fails to provide sufficient guidance as to how to weigh priorities among competing objectives during their subordinates' transition processes. Although they endorsed the need to consult transitioning Service members, they recognized that as commanding officers, they would be called on to balance competing requirements. They saw the primary challenge to involve meeting trans individual's expectations for reasonable accommodation and individual privacy while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness. To do so, they said that they require additional guidance on a range of issues including clothing, communal showers, and shipboard bunking and messing arrangements.[156]

Notwithstanding its optimistic conclusions, the article also documents serious problems with unit cohesion. The authors observe, for instance, that the chain of command "has not fully earned the trust of the transgender personnel," and that even though some transgender Service members do trust the chain of command, others "expressed little confidence in the system," including one who said, "I just don't think it works that well."[157]

In sum, although the foregoing considerations are not susceptible to quantification, undermining the clear sex-differentiated lines with respect to physical fitness; berthing, bathroom, and shower facilities; and uniform and grooming standards, which have served all branches of Service well to date, risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline. The Department acknowledges that there are serious differences of opinion on this subject, even among military professionals, including among some who provided input to the Panel of Experts,[158] but given the vital interests at stake—the survivability of Service members, including

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[155] Id. at 45.
[156] Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," *Armed Forces and Society* Vol. 41, p. 8 (2014).
[157] Id. at 9.
[158] While differences of opinion do exist, it bears noting that, according to a Military Times/Syracuse University's Institute for Veterans and Military Families poll, 41% of active duty Service members polled thought that allowing gender transition would hurt their unit's readiness, and only 12% thought it would be beneficial. Overall, 57% had a negative opinion of the Carter policy. Leo Shane III, "Poll: Active-duty troops worry about military's transgender

transgender persons, in combat and the military effectiveness and lethality of our forces—it is prudent to proceed with caution, especially in light of the inconclusive scientific evidence that transition-related treatment restores persons with gender dysphoria to full mental health.

3. *Imposes Disproportionate Costs.* Transition-related treatment is also proving to be disproportionately costly on a per capita basis, especially in light of the absence of solid scientific support for the efficacy of such treatment. Since implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria.[159] And this increase is despite the low number of costly sex reassignment surgeries that have been performed so far.[160] As noted earlier, only 34 non-genital sex reassignment surgeries and one genital surgery have been completed,[161] with an additional 22 Service members requesting a waiver for genital surgery.[162] We can expect the cost disparity to grow as more Service members diagnosed with gender dysphoria avail themselves of surgical treatment. As many as 77% of the 424 Service member treatment plans available for review include requests for transition-related surgery, although it remains to be seen how many will ultimately obtain surgeries.[163] In addition, several commanders reported to the Panel of Experts that transition-related treatment for Service members with gender dysphoria in their units had a negative budgetary impact because they had to use operations and maintenance funds to pay for the Service members' extensive travel throughout the United States to obtain specialized medical care.[164]

Taken together, the foregoing concerns demonstrate why recognizing and making accommodations for gender transition are not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality. Therefore, it is the Department's professional military judgment that persons who have been diagnosed with, or have a history of, gender dysphoria and require, or have already undergone, a gender transition generally should not be eligible for accession or retention in the Armed Forces absent a waiver.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances.

policies," *Military Times* (July 27, 2017) available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/.

[159] Minutes, Transgender Review Panel (Nov. 21, 2017).

[160] Minutes, Transgender Review Panel (Nov. 2, 2017).

[161] Data retrieved from Military Health System Data Repository (Nov. 2017).

[162] Defense Health Agency Data (as of Feb. 2018).

[163] Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).

[164] Minutes, Transgender Review Panel (Oct. 13, 2017); see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1185 (Oct. 2016) ("As previously discussed, a new diagnosis of gender dysphoria and the decision to proceed with gender transition requires frequent evaluations by the [mental health professional] and endocrinologist. However, most [military treatment facilities] lack one or both of these specialty services. Members who are not in proximity to [military treatment facilities] may have significant commutes to reach their required specialty care. Members stationed in more remote locations face even greater challenges of gaining access to military or civilian specialists within a reasonable distance from their duty stations.").

As explained earlier in greater detail, persons with gender dysphoria experience significant distress and impairment in social, occupational, or other important areas of functioning. Gender dysphoria is also accompanied by extremely high rates of suicidal ideation and other comorbidities. Therefore, to ensure unit safety and mission readiness, which is essential to military effectiveness and lethality, persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Given the documented fluctuations in gender identity among children, a history of gender dysphoria should not alone disqualify an applicant seeking to access into the Armed Forces. According to the DSM-5, the persistence of gender dysphoria in biological male children "has ranged from 2.2% to 30%," and the persistence of gender dysphoria in biological female children "has ranged from 12% to 50%."[165] Accordingly, persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability—i.e., absence of gender dysphoria—immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex. The 36-month stability period is the same standard the Department currently applies to persons with a history of depressive disorder. The Carter policy's 18-month stability period for gender dysphoria, by contrast, has no analog with respect to any other mental condition listed in DoDI 6130.03.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Retention standards are typically less stringent than accession standards due to training provided and on-the-job performance data. While accession standards endeavor to predict whether a given applicant will require treatment, hospitalization, or eventual separation from service for medical unfitness, and thus tend to be more cautious, retention standards focus squarely on whether the Service member, despite his or her condition, can continue to do the job. This reflects the Department's desire to retain, as far as possible, the Service members in which it has made substantial investments and to avoid the cost of finding and training a replacement. To use an example outside of the mental health context, high blood pressure does not meet accession standards, even if it can be managed with medication, but it can meet retention standards so long as it can be managed with medication. Regardless, however, once they have completed treatment, Service members must continue to meet the standards that apply to them in order to be retained. Therefore, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).[166]

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[165] DSM-5 at 455.

[166] Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* The Department is mindful of the transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy and the court orders requiring transgender accession and retention. The reasonable expectation of these Service members that the Department would honor their service on the terms that then existed cannot be dismissed. Therefore, transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment, to change their gender marker in DEERS, and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the procedures set forth in DoDI 1300.28, and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy.

Conclusion

In making these recommendations, the Department is well aware that military leadership from the prior administration, along with RAND, reached a different judgment on these issues. But as the forgoing analysis demonstrates, the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed. In fact, the RAND study itself repeatedly emphasized the lack of quality data on these issues and qualified its conclusions accordingly. In addition, that study concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs. In its view, however, such harms were negligible in light of the small size of the transgender population. But especially in light of the various sources of uncertainty in this area, and informed by the data collected since the Carter policy took effect, the Department is not convinced that these risks could be responsibly dismissed or that even negligible harms should be incurred given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability of our most precious assets—our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen.

Accordingly, the Department weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring in developing these recommendations. It is the Department's view that the various balances struck by the recommendations above provide the best solution currently available, especially in light of the significant uncertainty in this area. Although military leadership from the prior administration reached a different conclusion, the Department's professional military judgment is that the risks associated with maintaining the Carter policy—risks that are continuing to be better understood as new data become available—counsel in favor of the recommended approach.

UNDER SECRETARY OF DEFENSE
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PERSONNEL AND READINESS

ACTION MEMO

JAN 11 2018

TO: SECRETARY OF DEFENSE

THROUGH: DEPUTY SECRETARY OF DEFENSE
VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

FROM: Robert Wilkie, Under Secretary of Defense for Personnel and Readiness

SUBJECT: Recommendations by the Transgender Review Panel of Experts

- On September 14, 2017, you directed the establishment of a Panel of Experts to review and recommend changes to Department of Defense policies regarding the service of transgender individuals (Tab A), in accordance with direction from the President on August 25, 2017 (Tab B).
- The Panel, which I chaired, comprised the officials performing the duties of the Under Secretaries of the Military Departments, the Uniformed Services' Vice Chiefs, and Senior Enlisted Advisors.
- You directed the Panel to conduct its review and render recommendations consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law.
- The Panel was informed by testimony from commanders with transgender troops, currently-serving transgender Service members, military physicians, and other health experts.
- The Panel considered available DoD data and information on currently-serving transgender personnel and relevant external research and studies.
- Based on the individual and collective experience leading warfighters and their expertise in military operational and institutional effectiveness, the Panel makes the following recommendations:
    - Transgender individuals should be allowed to enter the military in their biological sex, subject to meeting all applicable accession standards. A diagnosis of gender dysphoria is disqualifying for accessions unless medical documentation establishes stability in his/her biological sex for no less than 36 consecutive months—as determined by a qualified Department of Defense medical provider—at the time of application. [*Gender Dysphoria*: a medical diagnosis involving significant distress or problems functioning resulting from a difference between the gender with which an individual identifies and the individual's biological sex]

- Transgender Service members should be permitted to serve openly, but only in their biological sex and without receiving cross-sex hormone therapy or surgical transition support.
- In order to keep faith with those transgender Service members who receive a diagnosis of gender dysphoria from a qualified military medical provider prior to the implementation of a revised DoD policy in 2018, they should be authorized all medically necessary and appropriate care and treatment, including cross-sex hormone therapy and medically necessary surgery. Such care and treatment should be authorized and provided at government expense even if it is determined to be necessary and appropriate only after the implementation of a revised policy in 2018.
- Transgender Service members should be subject to the same retention standards applicable to all other Service members.

- To ensure consistent application of the policies, procedures, and guidance currently in effect with regard to the accession[1] and in-service transition[2] of transgender individuals, I intend to issue a memorandum clarifying existing guidance regarding privacy concerns that may arise.

RECOMMENDATION: As discussed, based on your review of these recommendations, and other information and input you elect to consider, we will develop a writing by which you would advise the President of your conclusions and recommendations in this matter.

COORDINATION: TAB C

Attachments:
As stated

[1] As required by court order.
[2] As authorized by DoDI 1300.28, *In-Service, Transition for Transgender Service members*, dated July 1, 2016.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I electronically filed the foregoing addendum with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

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The district court has been provided with a copy of this addendum pursuant Federal Rule of Appellate Procedure 21(a).

s/ Ashley A. Cheung
ASHLEY A. CHEUNG