IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' OBJECTIONS
TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 72(a) and Local Civil Rule 301(5)(a), Defendants respectfully file these Objections to the Magistrate Judge's Memorandum Opinion, ECF No. 299, and Order, ECF No. 300. On April 9, 2020, the Magistrate Judge reentered the same sweeping ruling requiring the Department of Defense ("DoD") and the Military Services to disclose thousands of privileged documents concerning deliberations about military policies that was previously vacated by this Court. In doing so, the Magistrate Judge conflated the showing of need required to overcome a valid claim of deliberative process privilege with ordinary standards of relevance and proportionality applicable to standard civil discovery disputes. It is not enough that documents "relate" to the challenged policy and that their production is proportional to the needs of the case. *See* Mem. Op. at 6 (Apr. 9, 2020), ECF No. 299. Those are the baseline requirements for obtaining *non*-privileged discovery. *See* Fed. R. Civ. P. 26(b). To overcome the deliberative process privilege, Plaintiffs must further establish a "'need for [deliberative] materials'" and that such "'need for accurate fact-finding override[s] the government's interest in non-disclosure.'" Mem. Op. at 6 (Sept. 3, 2019), ECF No. 267 (quoting *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) and *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

Compounding the error, the Magistrate Judge gave no consideration to the impact of Defendants' disclosures to date on any purported need for deliberative materials, even though Defendants have produced nearly 49,000 documents in discovery. Most significantly, since the Court remanded the matter to the Magistrate Judge, Defendants produced a complete, unredacted Administrative Record of the documents, testimony, and data relied on or considered by the Panel of Experts charged with developing the challenged policy, along with the Panel's deliberations on

those materials, as well as communications to or from members of the Panel relating to their development of the policy. The Magistrate Judge took none of this into account.

Moreover, the Magistrate Judge disregarded this Court's direction to "give due consideration to whether a document or category of documents requires greater deference depending on who is involved." Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267 (citing *Karnoski*, 926 F.3d at 1206). The Magistrate Judge gave no consideration at all to who authored, sent, or received any document that falls within any of the three broad categories sought in Plaintiffs' motion to compel. His Opinion and Order thus treated sensitive deliberative material between the Secretary of Defense and his closest advisors exactly the same as deliberations among lower-level DoD employees that were never shared with any relevant decision-maker.

The Magistrate Judge also summarily dismissed concerns about the chilling effect on future deliberations that may occur as a result of mass disclosure of privileged materials in this litigation. The Opinion and Order do not account for DoD's undisputed evidence of such a chilling effect nor distinguish authorities showing that these concerns are heightened in a case involving military decision-making.

Finally, the Magistrate Judge adopted without modification factual findings made over a year-and-a-half ago, even though many of those findings have now been rendered untenable by the disclosure of thousands of additional documents in discovery. At the least, it was clearly erroneous to find, without any further analysis, that no readiness or deployability-related basis existed in 2018 to revisit the military's policy on service by transgender individuals and individuals diagnosed with gender dysphoria.

For all these reasons and as set forth below, the Opinion and Order should be vacated and set aside as contrary to law and based on clearly erroneous factual findings. *See* Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); Local Civil Rule 301(5)(a).

BACKGROUND

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

Plaintiffs in this case and across the four related cases challenging the military policy at issue here have served DoD with over 218 requests for production. Decl. of Robert E. Easton ¶¶ 13, 18 (Oct. 25, 2019), ECF No. 281-1 (hereinafter, "Oct. 2019 Easton Decl.").[1] In response to this large group of requests for production, Defendants undertook a rigorous effort to collect, review, and produce responsive materials. DoD and the Military Services collected more than 225,200 documents for review, applying an expansive set of search terms to a lengthy list of custodians. *Id.* ¶ 10. The Military Services separately identified key custodians, gathered data, and reviewed such documents. *Id.* Responsive, non-privileged documents were produced to Plaintiffs as they were maintained in the ordinary course of business, that is, by component of DoD and the Military Services and by custodian. *Id.* ¶¶ 13, 18. To date, Defendants have produced nearly 49,000 documents to Plaintiffs in this litigation.

The Department of Defense and the Services have also produced privilege logs reflecting the responsive documents withheld pursuant to privileges. *Id.* ¶ 17. These logs contain information for the documents, like the author of the email or the creator of the document, the recipient of any email, the date of creation or the date the email was sent, the title of the document,

[1] Since the cited declaration was executed, plaintiffs in *Karnoski* served 18 additional requests for production. Plaintiffs here have sought leave to serve 19 additional requests for production, which Defendants have opposed. *See* Defs.' Opp'n to Pls.' Mot. for Leave, ECF No. 293.

a privilege determination, and the basis for the privilege determination. *Id.* This information was provided for every single document that DoD has withheld as privileged in this case. *Id.*

II. Prior Litigation on Plaintiffs' Broad Motion to Compel

Rather than using Defendants' detailed privilege logs to identify documents or discrete categories of documents to seek to compel, on June 15, 2018, Plaintiffs filed a motion to compel three broad categories of deliberative documents. ECF No. 177. On August 14, 2018, the Magistrate Judge granted Plaintiffs' motion to compel, directing DoD and the Military Services to disclose thousands of deliberative documents concerning military policies. *See* Mem. Op., ECF No. 204; Order, ECF No. 205. Specifically, the Magistrate Judge ordered DoD and the Services to disclose, consistent with Plaintiffs' three broad categories:

> (1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the DoD's so-called panel of experts and its working groups (the "Panel") tasked with developing a plan to study and implement the President's decision; and (3) Deliberative materials regarding the DoD's implementation Plan and the President's acceptance of the Plan in his March 23[, 2018] Memorandum, including any participation or interference in that process by anti-transgender [activists] and lobbyists.

Mem. Op. at 3 (Aug. 14, 2018), ECF No. 204.

Although this Court initially denied Defendants' objections to the Magistrate Judge's order, the Court stayed compliance with the Magistrate Judge's opinion and order pending the Ninth Circuit's resolution of the Government's mandamus petition in the related *Karnoski* litigation, where there was a "significant overlap between the documents the *Karnoski* plaintiffs seek and the deliberative documents Plaintiffs seek in this case." Order at 21 (Nov. 30, 2018), ECF No. 227. The Ninth Circuit thereafter granted Defendants' petition for a writ of mandamus and vacated a district court order granting a motion to compel similar to the motion Plaintiffs filed in this case. There, the district court had ordered the Department of Defense to disclose

"documents that have been withheld solely under the deliberative process privilege." *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1163 (W.D. Wash. 2018), *mandamus granted, order vacated*, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit vacated the district court's discovery order "so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Karnoski*, 926 F.3d at 1207. The Ninth Circuit cautioned that the "deliberative process privilege[,] although not absolute, require[s] careful consideration by the judiciary." *Id.*

The Ninth Circuit held that "the existing record is not adequate to evaluate the relevance of all of the requested information, at least in terms of balancing production of materials against the military's countervailing confidentiality interest," per the test outlined in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984). *Id.* Noting that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the 12-page Proclamation "was sufficient to allow for judicial review," *Karnoski*, 926 F.3d at 1206 n.22, the Ninth Circuit directed the district court to reassess whether information concerning the basis of the August 2017 Presidential Memorandum was still relevant now that the 2018 DoD policy has been adopted, *id.* at 1206. Along this line, the Ninth Circuit rejected the district court's "single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* And in conducting its analysis, the Ninth Circuit further directed the district court to give "careful consideration" to the "military's interest in full and frank communication about policymaking" because it "raises serious—although not insurmountable—national defense interests." *Id.*

This Court subsequently vacated the Magistrate Judge's order granting Plaintiffs' motion to compel three broad categories of deliberative documents. This Court directed the Magistrate

Judge to apply the factors set forth in *Cipollone v. Liggett Group, Inc.*, 812 F.2d 1400 (table), 1987 WL 36515 (4th Cir. 1987) (per curiam), to each category of documents. *See* Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267. In so doing, the Court recognized that because the balancing test set forth in *Warner* is identical to and provided the basis for the balancing test set forth in *Cipollone*, the Ninth Circuit's application of the *Warner* factors in *Karnoski* informs this Court's application of the *Cipollone* factors in this case. *See id.* at 6; *see also Cipollone*, 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). Noting that the Ninth Circuit in *Karnoski* found that the balancing test must be applied to "'classes of documents separately when appropriate,'" Mem. Op. at 10 (Sept. 3, 2019), ECF No. 267 (quoting *Karnoski*, 926 F.3d at 1206), the Court determined that the Magistrate Judge's "appli[cation] [of the *Cipollone*] factors to discovery in this case as a whole" was in error, *id.* Therefore, this Court directed the Magistrate Judge to "apply the *Cipollone* factors to the categories of documents Plaintiffs seek in their Motion to Compel and permit Defendants to argue that Plaintiffs should more narrowly define the categories of documents." *Id.* (citing *Karnoski*, 926 F.3d at 1206). The Court further directed that "due consideration" be given "to whether a document or category of documents requires greater deference depending on who is involved." *Id.* at 10–11 (citing *Karnoski*, 926 F.3d at 1206).

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

The parties subsequently conferred about further proceedings in this case. In an attempt to narrow the dispute, defense counsel requested that rather than continuing to seek their three broad categories of documents, Plaintiffs identify specific documents or, at the very least, discrete categories of documents, over which they would like Defendants to consider waiving the deliberative process privilege. *See* Email from Courtney Enlow to Nicholas Lampros (Sept. 26, 2019), ECF No. 281-2. Defense counsel explained that this is the process that occurred in the

related *Doe 2 v. Esper* litigation, where plaintiffs' counsel identified four discrete categories of documents withheld under the deliberative process privilege and requested that Defendants waive their assertions of the privilege over those documents. *See id.* In response to that request and in an effort to narrow the remaining discovery disputes in *Doe*, Defendants agreed to waive the deliberative process privilege over three discrete categories of documents: (1) the official recommendations from the Military Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017; (2) emails between then-Secretary Mattis and non-governmental third parties; and (3) the final versions of the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of Defense.[2] *See id.*

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

The *Doe* Court subsequently granted the *Doe* plaintiffs' motion to compel these documents and ordered Defendants to disclose documents withheld under the deliberative process privilege that were "used or considered in the Panel of Experts for the Transgender Policy Review's (the 'Panel') development of the Mattis Plan." *Doe 2 v. Esper*, No. CV 17-1597 (CKK), 2019 WL

[2] These documents were produced to Plaintiffs in this case pursuant to the cross-use agreement entered by the Court. ECF No. 111.

4394842, at *1 (D.D.C. Sept. 13, 2019). In response to this order, Defendants produced to Plaintiffs in this case: (1) an unredacted version of the Administrative Record; (2) unredacted meeting minutes of the Panel of Experts; (3) documents, testimony, and data reviewed by members of the Panel along with the deliberations on those materials; and (4) communications to or from members of the Panel pertaining to the Panel's work previously withheld pursuant to the deliberative process privilege.[3] *See* Defs.' Notice of Production, ECF No. 294.

Defendants encouraged Plaintiffs to engage in a process similar to the *Doe* process to both narrow the dispute before the Court and to present discrete categories of documents that would allow the Court to conduct a proper analysis under *Cipollone*. *See* Enlow Email, ECF No. 281-2. Plaintiffs refused to narrow their request in any way and continue to seek to compel the same three broad categories of documents withheld under the deliberative process privilege.

IV. The Magistrate Judge's Opinion and Order

Following supplemental briefing and subsequent filings that fully conveyed the foregoing background, *see* Defs.' Response to Pls.' Suppl. Br., ECF No. 281; Defs.' Notice of Production, ECF No. 294, the Magistrate Judge once again granted Plaintiffs' Motion to Compel, ordering Defendants to produce *all* deliberative documents responsive to the same three categories. *See* Mem. Op. (Apr. 9, 2020), ECF No. 299. The Magistrate Judge "g[ave] no weight to Defendants' argument that the three categories of documents are overly broad" and did not consider whether different deliberative process analyses should apply based on the level of the employees and officials involved. *See id.* at 2. The Magistrate Judge also adopted in full the findings of fact from

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

his prior opinion issued August 2018. *Id.* at 5. He then applied the *Cipollone* factors to Plaintiffs' broad categories of documents, concluding that each of the four factors weighed in favor of disclosure as to all documents in all three categories of documents. *Id.* at 6–11. Notably, the Magistrate Judge dismissed Defendants' arguments regarding the chilling effect of broad based disclosure of deliberative materials, deeming it "far-fetched" and not based on "particularized" evidence. *Id.* at 10–11. The Magistrate Judge did not even cite or attempt to address the declaration submitted by Defendants concerning this chilling effect. Nor did the Magistrate Judge evaluate whether Defendants' disclosure of all Panel deliberations diminished Plaintiffs' purported need for additional deliberations.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 72(a), the district court "must . . . modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A); Local Civil Rule 301(5)(a). The Court "review[s] the factual portions of the Magistrate Judge's order under the clearly erroneous standard, but . . . review[s] legal conclusions to determine if they are contrary to law." *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014) (citations omitted).

"A court's 'finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 593–94 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) and citing *Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985)).

"The standard of review for 'contrary to law,' however, is different." *Perez v. Figi's Companies, Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at *2 (S.D.W. Va. Feb. 26, 2016) (citation omitted). "For questions of law, there is no practical difference between review under

Rule 72(a)'s 'contrary to law' standard and a *de novo* standard." *Id.* (citation omitted); *see also Bruce*, 21 F. Supp. 3d at 594. "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 74 (N.D.N.Y. 2000)).

ARGUMENT

I. The Memorandum Opinion and Order Are Contrary to Law.

The Magistrate Judge's Memorandum Opinion and Order granting Plaintiffs' Motion to Compel—which directed disclosure of thousands of documents protected by the deliberative process privilege—are contrary to law.

A. Plaintiffs Have Not Established Any Need For Additional Deliberative Materials.

The Magistrate Judge's application of the four *Cipollone* factors misapprehended the showing of need required to overcome a valid claim of deliberative process privilege and erroneously conflated the deliberative process analysis with the general standard for determining whether a Plaintiff is entitled to civil discovery. *See* Mem. Op. at 6–7 (Apr. 9, 2020), ECF No. 299 (holding that Defendants had not established the information sought is not relevant or proportional to the needs of this case, citing "the factors set forth in Rule 26(b)(1)"). For present purposes, it is not enough that documents merely "relate" to the challenged policy or that discovery is proportional to the needs of the case. Those are the baseline requirements 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" that overcomes the Government's interest in non-disclosure. *Karnoski*, 926 F.3d at 1206. The Magistrate Judge's

opinion identifies no need *at* all for the documents, much less a need sufficiently great to overcome the important interests protected by the privilege.

1. The *Cipollone* factors require consideration of Plaintiffs' need for additional disclosures, and it is Plaintiffs' burden to show need.

The four factor balancing test outlined in *Cipollone* requires weighing "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161).

As the Fourth Circuit explained in *Cipollone*, these factors ultimately assist courts to balance an articulated need for specific deliberative documents or information being sought against the Government's interests in non-disclosure to determine whether the deliberative process privilege can be overcome. *See id.* (affirming the district court's decision to override the privilege after finding that the corporation "demonstrated a compelling need for the materials"). Disclosure of documents subject to the deliberative process privilege, therefore, can only occur on a showing of a "compelling need" for such disclosures. *See Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a "compelling need" to overcome the privilege); *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a "particularized need" for specific documents to overcome the privilege). As the Ninth Circuit explained in *Karnoski*, a plaintiff "may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." 926 F.3d at 1206 (quoting *Warner*, 742 F.2d at 1161).

"The burden of showing an overriding need" for information subject to the deliberative process privilege "rests with the party seeking it"—*i.e.*, Plaintiffs here. *Heyer v. U.S. Bureau of*

Prisons, No. 5:11-CT-03118-D, 2014 WL 4545946, at *3 (E.D.N.C. Sept. 12, 2014) (citing *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 853 (3d Cir. 1995) ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest.")). The Magistrate Judge erroneously concluded, to the contrary, that Defendants bear the sole burden as the party resisting discovery, applying the general rule applicable to civil discovery disputes. Mem. Op. at 6 (Apr. 9, 2020), ECF No. 299. Although it is true that the Government bears the burden of establishing that the privilege *applies* in the first instance, the burden of establishing a *need* for privileged documents in order to overcome the privilege rests with the party seeking them. *See Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1016 (N.D. Ill. 2016) (once a prima facie case for application of the privilege is made, "the burden shifts to the party seeking disclosure to establish a particularized need for the documents" (citation omitted)). And the Magistrate Judge did not conclude, nor could he have, that Defendants have failed to make a prima facie case for application of the privilege.

Thus, it was *Plaintiffs'* burden to show a compelling need for additional deliberative documents. As set forth below, they have failed to do so.

2. Defendants' productions to date show there is no need for still more disclosures.

When this Court vacated the Magistrate Judge's previous deliberative process ruling, Plaintiffs had obtained no privileged documents relating to the deliberations of the Panel that developed the policy later adopted by Secretary Mattis. Since then, the government has produced—pursuant to orders of district courts in *Karnoski* and *Doe*—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 Defs.' Notice of Production, ECF No. 294.

This Court's prior ruling makes clear that the Magistrate Judge could not properly order sweeping additional discovery without evaluating whether, in light of disclosures already made in these cases, Plaintiffs could demonstrate any specific need for any specific categories of documents. In vacating the Magistrate Judge's previous order regarding deliberative documents, the Court cited as "persuasive" the Ninth Circuit's analysis in *Karnoski*—Mem. Op. at 10 (Sept. 3, 2019), ECF No. 267—which 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 *Warner*, 742 F.2d at 1161). By any calculus, the disclosure of the documents described above radically alters Plaintiffs' purported need for yet more privileged discovery. Plaintiffs do not need more to litigate the lawfulness of the Mattis policy and, indeed, federal courts routinely adjudicate the lawfulness of federal policies on far less extensive a record. Yet the Magistrate Judge entirely failed to consider what impact prior disclosures made to date have had on Plaintiffs' need for additional materials.

The Magistrate Judge's wide-ranging approach to the deliberative process privilege cannot be squared with this Court's prior ruling or the law more generally. At this point, Plaintiffs have received not only the detailed Report setting forth the bases for DoD's policy but also the full record of the Panel's deliberations. Plaintiffs have not shown any need for any additional disclosures, let alone a need that could overcome the military's interest in confidentiality.

3. The Opinion and Order did not correctly apply the *Cipollone* factors in ordering additional disclosures pursuant to Plaintiffs' three categories.

The Magistrate Judge's application of the *Cipollone* factors to Plaintiffs' three overly broad categories also was contrary to law. He required additional disclosures, despite the fact that the relevance of remaining privileged documents in each category is highly attenuated at best, and despite the availability of other evidence already produced.

Category One: First, Plaintiffs have no need for Category One documents, which relate to the President's social media posts in July 2017 and the August 2017 Presidential Memorandum. This Court dissolved the prior preliminary injunction relating to those actions, holding that there was a "significant change in the factual circumstances" between the August 2017 Memorandum and the current DoD policy. Mem. Op. at 14 (Aug. 20, 2019), ECF No. 263. The Court also held that the record established that DoD's policy was a "product of military judgment" and that its issuance was pursuant to different procedures from the August 2017 Memorandum. *Id.* at 13–14. The President's August 2017 Memorandum has been revoked; Plaintiffs do not need additional disclosures to challenge a policy no longer in existence.

The Magistrate Judge nonetheless found these documents relevant based on Plaintiffs' allegation that the President "acted *sua sponte*" in issuing the August 2017 Memorandum and the Government's response that, in fact, deliberations regarding the Carter Policy were ongoing during the summer of 2017. *See* Mem. Op. at 7 (Apr. 9, 2020), ECF No. 299. While the Magistrate Judge

may have accurately described the parties' dispute as of fall 2017 when this lawsuit was filed, circumstances have materially changed in the interim, as set forth above. Plaintiffs have no need for deliberations regarding the since-revoked August 2017 Memorandum, as the *Doe* court explained in response to a similar request. *See Doe 2*, 2019 WL 4394842 at *1 ("[T]he Court concludes that the relevant time-period for discovery is the development of the Mattis Plan. On the current record, Plaintiffs have not established a sufficient connection between the development of the Mattis Plan and the earlier delay of the Carter Policy, the President's 2017 tweet, and the 2017 Presidential Memorandum to justify further discovery into those earlier events.") The Ninth Circuit has similarly expressed doubt about the relevance of evidence concerning these years-old actions, concluding that the "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Karnoski*, 926 F.3d at 1207 (questioning whether "information concerning the basis for the 2017 Memorandum [is] still relevant now that the 2018 Policy has been adopted"). Plaintiffs cannot demonstrate any need for these documents related to a now-revoked policy, let alone a compelling need sufficient to overcome the Government's interest in nondisclosure of privileged information. The Magistrate Judge's analysis of Category One was contrary to law.

Category Two: Second, the Magistrate Judge offered no plausible basis for ordering additional disclosures under Category Two, namely all "deliberative materials relating to the activities" of the working groups supporting the Panel of Experts. *See* Mem. Op. at 2 (Apr. 9, 2020), ECF No. 299. Defendants have already produced all deliberative material received or considered by the Panel of Experts that recommended the Policy challenged in this litigation, regardless of whether the document was authored by, sent from, or sent to a person that was not on the Panel. *See* Defs.' Notice of Production, ECF No. 294. Thus, any deliberations reflecting

the contributions of the working groups to the Panel have already been disclosed.

What has not been disclosed are deliberative materials of working groups that no member of the Panel of Experts ever received or considered. As the *Doe* district court explained, the request for deliberative documents without any connection to Panel members is an improper "fishing" expedition. Tr. of Telephone Conference, *Doe 2 v. Esper*, at 20:1–13 (D.D.C. Jan. 14, 2020), ECF No. 293-5. That is consistent with this Court's holding that its role in reviewing the Mattis policy is to "assess *the evidence the Panel gathered* and the military's evaluation of that evidence." Mem. Op. at 58 (Aug. 20, 2019), ECF No. 263 (emphasis added); *see also Goldman v. Weinberger*, 475 U.S. 508, 509 (1986) (holding that studies, experts, and evidence not actually before the military decisionmakers are "quite beside the point"). Documents never seen by the Panel of Experts necessarily do not meet that standard and are wholly irrelevant to these proceedings.

In any event, Plaintiffs have ample alternative evidence available to them within Category Two, namely the deliberations of the actual Panel of Experts itself. As a result of these disclosures and Defendants' other productions totaling nearly 49,000 documents, Plaintiffs have already received all of the data collected and reviewed by the working groups that were presented to the Panel. Plaintiffs have no need for still more privileged disclosures and the Magistrate Judge's analysis of Category Two was thus contrary to law.

Category Three: Third, the Magistrate Judge identified no legitimate need for deliberations responsive to Category Three—regarding DoD's Report and Recommendation, the Mattis memorandum conveying the Report to the President, and the President's March 2018 Memorandum. These are privileged documents generated at the highest levels of the Department of Defense. They include iterative drafts of the Report and Recommendation and Mattis memorandum, even reflecting the Secretary's handwritten notes on a draft letter to the President.

Decl. of Robert E. Easton ¶ 11 (Nov. 5, 2018), ECF No. 225-1 ("Nov. 2018 Easton Decl.").

The Magistrate Judge cited nothing in the record that would justify an extraordinary order requiring disclosure of such draft documents responsive to Category Three. The Magistrate Judge's only basis for disclosure was to allow Plaintiffs to test their baseless theory that "outside special interest groups may have unduly influenced the decision-making process resulting in the transgender ban." *See* Mem. Op. at 8, 11 (Apr. 9, 2020), ECF No. 299. But as the Government has explained—and as the Magistrate Judge did not question—the documents produced in discovery have already demonstrated that the Panel's recommendations were the same policy adopted in the Report to Secretary Mattis and in Secretary Mattis's memorandum presenting the policy to the President. *Compare* Administrative_Record_003059–60, Action Memo from the Under Secretary of Defense for Personnel and Readiness to the Secretary of Defense, ECF No. 133-15 (describing "[r]ecommendations by the Transgender Review Panel of Experts"), *with* Mattis Mem., ECF No. 120-1, *and* DoD Report & Recommendation, ECF No. 120-2. That the ultimate DoD policy in fact reflects the Panel's original recommendations cannot be seriously disputed. Accordingly, Plaintiffs have no need for deliberations regarding these memoranda and reports, which are core deliberative materials, to understand whether the Mattis policy reflects the independent recommendations of the Panel. The same is true for the President's March 2018 Memorandum, which did not alter or modify the policy recommended by DoD. *See* March 2018 Presidential Memorandum, ECF No. 120-3.

The conclusion that Plaintiffs have no need for deliberations in Category Three is further supported by subsequent developments in the related *Karnoski* litigation, which foreclose any notion that discovery is warranted into alleged activities of third parties. Defendants have now disclosed in interrogatory responses in *Karnoski* the names and institutional affiliations of the

principal authors of DoD's Report and Recommendation and the Mattis memorandum, as well as all persons that reviewed, revised, or commented on drafts of those documents. *See* Ex. B. No one outside of the Departments of Defense, Homeland Security, or Justice is listed in those sworn responses. *See id.* at 5–7, 9–12. Moreover, Defendants recently completed productions pursuant to an order from the *Karnoski* district court to disclose all documents shared with any third party identified by the *Karnoski* plaintiffs. *See* Order at 2, *Karnoski v. Trump*, No. C17-1297 (W.D. Wash. Mar. 4, 2020), ECF No. 454.[4] These disclosures further show that Plaintiffs cannot demonstrate any need for the privileged materials in Category Three. For these reasons, the Magistrate Judge's analysis of Category Three was contrary to law.

* * *

Plaintiffs' failure to establish a need for further deliberative materials is perhaps best demonstrated by their prior representations in opposing summary judgment. Plaintiffs previously declared under Rule 56(d) that they needed additional discovery to adequately oppose Defendants' motion. The Court agreed with Plaintiffs, stating as follows:

> [Plaintiffs' counsel] details, with sufficient specificity, information Plaintiffs would seek in discovery that would create genuine disputes of material fact. This information includes: 'all documents and communications' the Panel received; 'the identity of all persons' involved in developing the Implementation Plan; 'all documents and communications within Defendants' possession that were received from outside parties opposed to military service by transgender individuals'; 'all documents and communications' related to the functioning of the Panel, including but not limited to, research, analysis, and recommendations underlying the Implementation Plan; 'directives underlying the Implementation Plan'; and 'potential alternatives' to the Implementation Plan the Panel considered and 'dissenting opinions voiced within' the Panel.

[4] Defendants withheld under the consultant corollary documents to which two DoD contractors (RAND Corporation and Kennell & Associates, Inc.) and one Department of Justice contractor (Leidos Innovations Corporation) were party. *See* Notice of Filing Documents for *In Camera* Review, *Karnoski*, ECF No. 460.

Mem. Op. at 50–51 (Aug. 20, 2019), ECF No. 263. Plaintiffs now possess *all* of this information, namely all deliberations and communications of the Panel of Experts relating to their work—including all data they relied on and all alternatives they considered—as well as the identity of every person that authored, reviewed, or commented on DoD's Report and the Mattis memorandum. Consistent with Plaintiffs' prior Rule 56(d) declaration and the Court's statement regarding scope, the Court should conclude that Plaintiffs do not need more.

B. The Magistrate Judge's Decision Failed to Adequately Consider the Potential Chilling Effect of Disclosures.

The Opinion and Order were also contrary to law because the Magistrate Judge failed to adequately consider the chilling effect associated with mass disclosure of deliberative documents and the Government's strong interest in confidentiality.

The Supreme Court has explained that 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." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001). Accordingly, the Ninth Circuit in *Karnoski* stressed that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests." 926 F.3d at 1206.

Defendants' declaration submitted to the Magistrate Judge 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." Oct. 2019 Easton Decl. ¶ 31. "If DoD 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 with respect to military personnel decisions but as to any politically sensitive decision that DoD may face, for fear that these discussions could be revealed to wider audiences." *Id.* ¶ 34. That is especially so in the context of such controversial topics as military service by transgender individuals that require "delicate and candid communications." *Id.*

Even though the potential chilling effect of disclosure "deserves careful consideration," *Karnoski*, 926 F.3d at 1206, the Magistrate Judge dismissed concerns about a chilling effect on future deliberations. The Magistrate Judge concluded that Defendants had not made a "particularized" showing that a chilling effect would result from disclosure under Plaintiffs' three broad categories, failing to distinguish or even acknowledge the declaration from DoD attesting precisely to that fact. *See* Mem. Op. at 10–11 (Apr. 9, 2020), ECF No. 299. Nor did the Magistrate Judge consider how his decision could be squared with the foregoing authorities demonstrating the substantial concerns underlying the deliberative process privilege, particularly in the military context. And following his finding that it was "far-fetched" to believe "exposure of any one [document] will result in the catastrophic disruption of the deliberative process"—which does not represent Defendants' position—the Magistrate Judge ordered disclosure of *all* documents responsive to Plaintiffs' categories. *See id.* at 9–10. It does not follow that thousands of deliberative documents should be disclosed because disclosure of one would hypothetically not be harmful.

The Magistrate Judge also found that the Government's interest in confidentiality was diminished by the various disclosures made in this and related litigation. *Id.* at 9–11. That is wrong. It makes little sense that the risks of a chilling effect are diminished by the partial forced

disclosure under court order of deliberative materials; otherwise, an erroneous order to produce privileged documents would make valid any subsequent orders to produce still more privileged documents. Nor should this Court adopt a rule that would seem to discourage the Government from making voluntary disclosures to narrow disputes over the privilege in litigation. The Magistrate Judge's approach is also inconsistent with case law holding that the concept of subject matter waiver has no application to the deliberative process privilege. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) ("courts have said that release of a document only waives [executive] privileges for the document or information specifically released, and not for related materials"); *Agility Public Warehousing Co. K.S.C. v. Dep't of Defense*, 110 F. Supp. 3d 215, 222 n.4 (D.D.C. 2015) (holding "there is no authority for applying the broad, subject-matter waiver rule to [the deliberative process] privilege; indeed, the cases suggest that the rule does *not* apply in this context."); *cf. Mobil Oil Corp. v. U.S. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) (disclosure of certain documents does not waive Government's ability to assert FOIA exemption 5—which covers documents protected by the deliberative process privilege—as to "related documents").

At the end of his opinion, the Magistrate Judge did hold open the possibility that he would consider a motion for protective order as to particular documents. Mem. Op. at 11–12 (Apr. 9, 2020), ECF No. 299. But "[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 a senior official from the Department of Defense attested, "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 a decision to abstain or provide less

than complete candor during policy development." Oct. 2019 Easton Decl. ¶ 34. The Magistrate Judge did not explain why these concerns were unfounded.

The Magistrate Judge's Opinion and Order thus failed to adequately consider the potential chilling effect of mass disclosure of military decision-making. It is therefore contrary to law and should be vacated.[5]

C. The Magistrate Judge Failed to Comply with this Court's Direction in Applying the *Cipollone* Factors.

This Court vacated the Magistrate Judge's prior order that required disclosure of all deliberative documents in the three categories at issue. In so doing, the Court directed the Magistrate Judge to consider whether narrower categories were necessary. Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267. The Court also directed that the Magistrate Judge "shall give due consideration to whether a document or category of documents require greater deference depending on who is involved." *Id.* The Magistrate Judge's Opinion and Order failed to comply with this Court's instructions because it did not consider whether "greater deference" was required based on who was party to the document. Moreover, the Magistrate Judge applied the *Cipollone* test to overly broad categories to which the test cannot be adequately applied. For these reasons too, the Opinion and Order are contrary to law.

1. The Opinion and Order contain no analysis at all of whether "greater deference" is warranted as to particular documents because of "who is involved," in clear contravention of this Court's instructions. *See* Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267. That alone warrants vacatur of the Opinion and Order. Indeed, it is not possible to conduct an appropriate deliberative

[5] Insofar as the Magistrate Judge's holding rested on a factual finding that a chilling effect from mass disclosure would not occur, the finding was clearly erroneous in light of the undisputed evidence discussed above. The Opinion and Order should be vacated for this reason as well.

process analysis without considering, among other things, the different categories of individuals that may be party to a withheld document. As the Ninth Circuit explained, for example, "[d]ocuments involving the most senior executive branch officials . . . may require greater deference." *Id.* at 7 (quoting *Karnoski*, 926 F.3d at 1206)).

Plaintiffs' categories comprise thousands of documents and communications generated and transmitted by officials at varying levels in the Department of Defense, Department of Homeland Security, Army, Navy, Air Force, Coast Guard, Defense Health Agency, the National Guard Bureau, and the Office of the Chairman of the Joint Chiefs of Staff, both uniformed and civilian, career employees and political appointees, across numerous ranks, positions, and areas of professional expertise as they worked to develop and refine DoD's policy over several years. Oct. 2019 Easton Decl. ¶¶ 24, 30. On one end of the spectrum, these categories include communications that were never seen by the Panel of Experts and thus played no role in their decision-making. *Id.* ¶ 24. On the other, the categories encompass documents reflecting the deliberations of the Secretary of Defense himself, such as Secretary Mattis's own handwritten notes on a draft letter to the President. Nov. 2018 Easton Decl. ¶ 11; *see also* Oct. 2019 Easton Decl. ¶ 24 (categories include "communications to and from the ultimate decision-maker, the Secretary of Defense"). Under all relevant authorities as well as this Court's instructions, it was incumbent on the Magistrate Judge to evaluate whether Plaintiffs were entitled to disclosure of documents involving officials and employees with such varying levels of involvement in crafting the challenged policy and with such varying positions and authority in the organizational structure.

The only point at which the Magistrate Judge addressed the wide gulf between the levels of employees and officials party to these documents was his statement that he might consider a motion for protective order if Defendants "have specific and well-defined objections based upon

the *level* at which the documents were issued." Mem. Op. at 11 (Apr. 9, 2020), ECF No. 299. This certainly does not accord with this Court's express instruction to consider whether different categories of documents should receive greater deference before ordering disclosure. And it is altogether unclear how this procedure is intended to work where Defendants have already submitted extensive evidence that the documents to be disclosed involve persons at all levels of DoD and the Services, including the Secretary of Defense himself. In any event, as discussed, protective orders limiting disclosure to the parties in litigation do not resolve the confidentiality concerns associated with breaching the privilege. *See supra* (citing *Perry*, 591 F.3d at 1164).

2. The foregoing errors are symptomatic of the Magistrate Judge's broader erroneous conclusion that Plaintiffs' three categories were sufficiently specific to permit an adequate *Cipollone* analysis.

Plaintiffs' three categories of deliberative materials still in dispute—documents "relating to" (1) the President's social media posts and August 2017 Memorandum; (2) the activities of the Panel of Experts' working groups; and (3) the Report and Recommendation, Mattis memorandum, and March 2018 Presidential Memorandum—are far too broadly defined for the Court to properly apply the *Cipollone* balancing test. Defendants submitted extensive evidence and briefing to the Magistrate Judge demonstrating that Plaintiffs' categories encompass thousands of documents by employees at varying levels of the Department of Defense and on subjects of varying relevance to these proceedings. Oct. 2019 Easton Decl. ¶¶ 24–30; *see also supra* Argument Part I.C.1.

In addition to the evidence discussed above regarding the individuals that were party to the various withheld documents, Defendants have submitted evidence regarding the disparate topics covered by Plaintiffs' categories. *See* Oct. 2019 Easton Decl. ¶¶ 25, 26, 28 (citing examples in each category by Bates number and description). For example, Category One encompasses "an e-

mail exchange between the Secretary of Defense and the Chairman of the Joint Chiefs of Staff discussing post-Tweet messaging and information leaks," as well as "a deliberative e-mail chain among DoD health affairs personnel regarding DoD's assessment of health care costs of transgender care being cited in connection with legislative proposals then under consideration." Oct. 2019 Easton Decl. ¶ 25. An analysis of Plaintiffs' purported need for deliberations about health care costs is plainly different from the analysis of Plaintiffs' purported need for deliberations about media queries concerning the President's social media posts. As for Category Two, Plaintiffs' purported need for communications among members of working groups which "were not presented to or seen by the Panel of Experts or its members" is far different from Plaintiffs' need for documents reflecting the actual deliberations of the Panel of Experts—all of which Plaintiffs have now received. Oct. 2019 Easton Decl. ¶ 26 & n.15. And Category Three encompasses, for example, drafts of DoD's Report and Recommendation, as well as "draft talking points for senior leadership as DoD prepared to issue Secretary Mattis' February 22, 2018 Memorandum." *Id.* ¶ 28. One cannot simultaneously evaluate Plaintiffs' need for evidence as disparate as drafts of the Report and Recommendation itself and draft talking points reflecting DoD communications strategy about that document. Yet that is effectively what the Magistrate Judge did by issuing the sweeping disclosure order.

In sum, because these documents are not susceptible to a one-size-fits-all analysis, Plaintiffs' categories are simply too broadly defined to properly conduct the *Cipollone* analysis. *See Karnoski*, 926 F.3d at 1206; *see also In re United States*, 678 F. App'x 981, 987 (Fed. Cir. 2017) (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been overcome); *Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *3 (E.D. Va. Sept. 22, 2014) (finding that the court must analyze whether the deliberative

process privilege applies "on a case-by-case basis by balancing the damage to the executive department or the public interest and the potential harm to the plaintiffs from nondisclosure"). The Magistrate Judge's opinion and order should be vacated for this reason as well.

II. The Memorandum Opinion and Order Are Predicated Upon Clearly Erroneous Factual Findings.

Along with the legal errors set forth above, the Magistrate Judge made several clearly erroneous factual findings, which go to the need for discovery on the military policy challenged in this case and on prior policies. The Magistrate Judge expressly adopted the findings of fact set forth in his Memorandum Opinion of August 14, 2018. Mem. Op. at 5 (Apr. 9, 2020), ECF No. 299. However, after more than two years of discovery in this and the related litigation, those initial findings are irreconcilable with the facts of the case.

Although many of these findings have previously been upheld by this Court, subsequent developments in this litigation and in discovery warrant revisiting at least one of those initial findings now. Specifically, the Magistrate Judge's prior finding that "circumstances regarding readiness and deployability [could not] have changed so dramatically" between 2016 and 2018 to warrant the creation of a new policy must be set aside as clearly erroneous. Mem. Op. at 6 (Aug. 14, 2018), ECF No. 204.

First, the Magistrate Judge did not consider a declaration from a senior DoD official citing and describing documents showing that then-Secretary Mattis delayed the Carter accessions standards on June 30, 2017, following the recommendations of the Military Services and the Surgeons General of all three military departments. *See* Oct. 2019 Decl. ¶ 21 (citing documents by Bates number and description); *see also* Enlow Email, ECF No. 281-2 (referencing the production of "the official recommendations from the Military Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017" in

discovery). These recommendations were provided to Secretary Mattis before the President's statements on Twitter in July 2017 and the August 25, 2017 Presidential Memorandum. *See Doe 2 v. Shanahan*, 917 F.3d 694, 729 (D.C. Cir. 2019) (Williams, J., concurring) ("President Trump's July-August 2017 directives came a month after, and were consistent with, Secretary Mattis's prior memorandum.").

Defendants have attached to this brief the documents underlying the prior declaration submitted to the Magistrate. Those documents further support the lack of basis for the Magistrate's finding. Specifically, the Army requested "a delay in implementing the draft accessions policy until July 1, 2019, to allow for a meaningful analysis and determination regarding the impact of transgender accessions on the Army's readiness," noting that "[s]ome transgender Soldiers experience extensive medical non-deployability both before and after transition[.]"[6] The Air Force similarly recommended a 12–36 month delay of the Carter accessions policy, noting that "information received from Combatant Commands (CCMDs) raises significant concerns about the potential availability, readiness, and deployability of potential transgender accessions that warrants more study."[7] The Marine Corps "recommend[ed] the effective date for new accessions be delayed" one year and also recommended modification of the Carter Policy to lengthen the required stability period for new accessions to 24 months.[8] And although the Navy stated that it was ready to proceed with new accessions, it also confirmed that it was willing to support the delay

[6] Ex. C, Action Memo from Acting Sec'y of the Army to Dep. Sec'y of Defense at USDOE00073649_0001 (May 25, 2017).

[7] Ex. D, Mem. from Sec'y of the Air Force to Dep. Sec'y of Defense at USDOE00129760_0001 (May 31, 2017).

[8] Ex. E, Mem. from Commandant of Marine Corps to Dep. Sec'y of Defense at USDOE00083598_0004–05 (May 30, 2017).

requested by the other Services.[9] The recommendations followed a directive, issued May 8, 2017, from then-Deputy Secretary of Defense Work to the Military Services "to assess the Department's readiness to begin accessing transgender applicants into military service on July 1, 2017."[10] Health experts also expressed concerns about the Carter Policy before the President's actions. On June 23, 2017, the Surgeons General for the three military departments recommended extending the accessions stability period "from 18 months to at least 24 months" as "currently accepted clinical practice guidelines and our experience in DoD demonstrate that successful gender transition is a protracted process, often requiring several years to reach clinical stability."[11]

Second, as then-Secretary Mattis explained in his February 2018 memorandum, the "Department's own data obtained since the new policy began to take effect last year" indicated in favor of a modification of the Carter Policy. Mattis Mem. at 2, ECF No. 120-1. That data showed that service members diagnosed with gender dysphoria received medical treatment for suicidal ideations at a rate 8 times that of service members without that condition and at a rate 80% higher than service members with major depressive disorder, anxiety, or adjustment disorder (medical conditions the military also presumptively disqualifies for accessions). *See* Administrative_Record_003019, ECF No. 133-15 (page 106 of 162). The readiness and deployability concerns associated with that data are dispositively shown by the situation of United States Central Command ("USCENTCOM"), the military Combatant Command exercising command and control in the Middle East and Afghanistan (among other areas). USCENTCOM

[9] Ex. E, Mem. from Chief of Naval Ops. to Sec'y of the Navy at USDOE00083598_0003 (May 22, 2017).

[10] Ex. E, Mem. from Dep. Sec'y of Defense to Sec'ys of the Military Dep'ts and Chiefs of the Military Servs. at USDOE00083598_0002 (May 8, 2017).

[11] Ex. F, Mem. from Surgeons General to the Under Sec'y of Defense for Personnel and Readiness at USDOE00083428_0001.

restricts deployment to its area of responsibility for anyone who has expressed suicidal ideations within the past 12 months. *See* Administrative_Record_002606, 002613, ECF No. 133-14 (pages 243 and 250 of 550). Accordingly, Secretary Mattis and the military's panel of senior leaders determined that these "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." Mattis Mem. at 2, ECF No. 120-1.

The Magistrate Judge may disagree with the policy recommendations of all of these senior military officials, but to "regard the entire decisionmaking record as a Potemkin village, designed to pull the wool over the eyes of simple-minded observers (including reviewing courts)[,]" *Doe 2*, 917 F.3d at 731–32 (Williams, J., concurring), is untenable. *See also Karnoski*, 926 F.3d at 1202 (noting that even the preliminary injunction "record does not bear out the contention that the 2018 Policy was nothing more than an implementation of the 2017 Memorandum, or that the review that produced the 2018 Policy was limited to this purpose"); *Doe 2 v. Shanahan*, 755 F. App'x 19, 23 (D.C. Cir. 2019) (per curiam) (observing that even at the preliminary-injunction stage, "it was error for the district court to conclude that the Mattis Plan was foreordained"). Accordingly, the Magistrate Judge's finding that "the circumstances surrounding military readiness and deployability could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy[,]" must be set aside.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court vacate and set aside the Magistrate Judge's Memorandum Opinion and Order, ECF Nos. 299, 300.

Date: April 23, 2020

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2020, I served the foregoing Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 23, 2020

/s/ Courtney D. Enlow
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Exhibit A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. George Levi Russell, III

DECLARATION OF JAMES R. POWERS

I, James R. Powers, declare as follows:

1. I am a trial attorney within the Federal Programs Branch of the Civil Division of the United States Department of Justice. I make this declaration based on my personal knowledge in connection with Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order.

2. Attached as Exhibit B to the Objections is a true and correct copy of an excerpt of Defendants' Objections, Responses, and Supplemental Responses to Plaintiffs' Interrogatories 16, 17, and 18 to Secretary Esper and the United States Department of Defense, in response to interrogatories served in *Karnoski v. Trump*, No. 17-1297 (W.D. Wash.). Exhibit B omits pages 14 to 31 of this document, which contain objections and responses to *Karnoski* interrogatory 18. That interrogatory response is not cited in the Objections and contains highly sensitive personally identifying information subject to protection at the level of Attorneys' Eyes Only.

3. Attached as Exhibit C to the Objections is a true and correct copy of a document produced in this litigation with Bates label range USDOE00073649_0001–03.

4. Attached as Exhibit D to the Objections is a true and correct copy of a document produced in this litigation with Bates label range USDOE00129760_0001–02.

5. Attached as Exhibit E to the Objections is a true and correct copy of a document produced in this litigation with Bates label range USDOE00083598_0001–22.

6. Attached as Exhibit F to the Objections is a true and correct copy of a document produced in this litigation with Bates label USDOE00083428_0001.

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

Executed in Washington, D.C. on April 23, 2020.

/s/ James R. Powers
James R. Powers

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al. *
Plaintiff, *
v. **Case No.** 17-cv-2459
Donald J. Trump, et al. *
Defendant. *

NOTICE OF FILING OF DOCUMENT UNDER SEAL

Check one.

☒ Exhibit B which is an attachment to Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order

will be electronically filed under seal within 24 hours of the filing of this Notice.

☐ _____

(title of document)

will be electronically filed under seal within 24 hours of the filing of this Notice.

I certify that at the same time I am filing this Notice, I will serve copies of the document identified above by e-mail (per counsel's written consent).

4/23/2020
Date

/s/ Courtney D. Enlow
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al. *
Plaintiff, *
v. **Case No.** 17-cv-2459
Donald J. Trump, et al. *
Defendant. *

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4/23/2020
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al. *
Plaintiff, *
v. **Case No.** 17-cv-2459
Donald J. Trump, et al. *
Defendant. *

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4/23/2020
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al. *
Plaintiff, *
v. **Case No.** 17-cv-2459
Donald J. Trump, et al. *
Defendant. *

NOTICE OF FILING OF DOCUMENT UNDER SEAL

Check one.

☒ Exhibit E which is an attachment to Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order

will be electronically filed under seal within 24 hours of the filing of this Notice.

☐ _____

(title of document)

will be electronically filed under seal within 24 hours of the filing of this Notice.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al. *
Plaintiff, *
v. **Case No.** 17-cv-2459
Donald J. Trump, et al. *
Defendant. *

NOTICE OF FILING OF DOCUMENT UNDER SEAL

Check one.

☒ Exhibit F which is an attachment to Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order will be electronically filed under seal within 24 hours of the filing of this Notice.

☐ _____ (title of document) will be electronically filed under seal within 24 hours of the filing of this Notice.

I certify that at the same time I am filing this Notice, I will serve copies of the document identified above by e-mail (per counsel's written consent).

4/23/2020
Date

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

[PROPOSED] ORDER SUSTAINING DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER

Upon consideration of Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order, it is ORDERED that Defendants' Objections are SUSTAINED and the Magistrate Judge's Memorandum Opinion and Order, ECF Nos. 299 and 300, are VACATED and SET ASIDE.

DATED this _____ day of _____, 2020

_____
Hon. George L. Russell, III
United States District Judge