

1 Defendants respectfully give notice to the Court of their compliance with the Court's
2 August 24, 2020 order concerning the 245 documents on Defendants' privilege log identified in
3 Plaintiffs' August 17, 2020 letter. *See* Order of Aug. 24, 2020, Dkt. 569 at 1. In an attempt to
4 narrow the dispute before the Court, and in light of this Court's instruction that Defendants'
5 submissions should be more limited and "more circumspect," 8/24/2020 Hr'g Tr. 10:22,
6 Defendants have focused their assertion of the deliberative process privilege over only the most
7 sensitive documents at the highest levels of the Department of Defense and the Department of
8 the Army. Accordingly, the Department of Defense asserts the deliberative process privilege
9 over 52 documents identified in Plaintiffs' August 17, 2020 letter and the Department of the
10 Army separately asserts the deliberative process privilege over 1 document identified in
11 Plaintiffs' letter. These documents are being produced for *in camera* review pursuant to the
12 Court's August 24, 2020 Order. *See id.*

13 The Court's recent order required that the *in camera* submission "be accompanied by a
14 certification" by one of Defendants' counsel of record that they have "personally reviewed the
15 documents" submitted. Order of Aug. 24, 2020. Insofar as this Order is intended to require a
16 formal assertion of the deliberative process privilege, Defendants are submitting declarations
17 from the Department of Defense and the Department of the Army formally asserting the
18 privilege, consistent with the rule that litigation counsel do not make formal assertions of the
19 privilege on behalf of an agency. Declaration of Robert Easton, Ex 1 of Carmichael Decl.;
20 Declaration of Colonel Jacqueline Emanuel, USA, Ex 2 of Carmichael Decl.; *see Landry v.*
21 *FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (requiring that a formal assertion of the privilege
22 be made by a sufficiently high official at the agency). These DoD and Army declarations
23 specifically address each document submitted to the Court and provide information necessary for
24 the Court's review. Because the formal assertion of privilege in these declarations supersedes
25 any prior privilege log, Defendants have not submitted a further log today. Documents in the
26 declarations appear in the order they have been submitted for review. As required by the Court's
27 order, Defendants are also submitting a separate declaration from undersigned counsel certifying
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1 that he has reviewed the documents submitted. *See* Declaration of Andrew E Carmichael; Order
2 of Aug. 24, 2020.¹

3 In light of Defendants’ efforts to narrow the dispute at issue discussed above, Defendants
4 will not formally assert the deliberative process privilege over the remaining documents
5 referenced in Plaintiffs’ August 17, 2020 letter. Accordingly, these documents have been
6 separately produced to Plaintiffs.² This disclosure of documents is consistent with the approach
7 Defendants have routinely applied in this case and others, insofar as Defendants have attempted
8 to focus their assertions of the deliberative process privilege when limited categories of
9 documents are at issue. *See, e.g.*, 7/21/2020 Hr’g Tr. 16:5–6 (explaining that in the related *Doe*
10 case, the plaintiffs sought narrow categories of documents, and the Government “waive[d] the
11 privilege” over certain deliberative documents “in order to narrow the scope of the dispute”).
12 Rather than consider sweeping categories of deliberative documents wholesale, Defendants have
13 repeatedly urged that the parties should negotiate and litigate over individual documents (or
14 narrow categories) for which Plaintiffs have identified a particular need related to their claims.
15 Those documents should be the focus of any privilege disputes.

16 Although Defendants make further disclosures today as discussed above, they
17 nonetheless maintain their continued objection that Plaintiffs have not established the relevance
18 of the documents at issue—let alone that those documents would further their claims—which
19 should be a basic requirement before Defendants are required to formally invoke the deliberative
20 process privilege or otherwise disclose documents, particularly where the Ninth Circuit has
21 specifically questioned the relevance of documents pre-dating the Panel of Experts. *Karnoski v.*
22 *Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (“For example, is information concerning the basis
23 for the 2017 Memorandum still relevant now that the 2018 Policy has been adopted?”).

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25 ¹ The document with the Service Bates number DoD00026991 produced *in camera* to the Court
26 contains redactions to preserve the attorney client privilege and Defendants’ ability to formally
assert the presidential communications privilege. *See* Easton Decl. ¶ 8.

27 ² Of the 189 documents produced to Plaintiffs, 15 have been produced with redactions to
28 preserve the attorney client privilege and Defendants’ ability to formally assert the presidential
communications privilege.

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Respectfully submitted,

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