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Molly C. Dwyer
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September 18, 2020

No.: 20-72793
D.C. No.: 2:17-cv-01297-MJP
Short Title: Donald Trump, et al v. USDC-WAWSE

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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 U.S. DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON AND MOTION FOR STAY
PENDING THIS PETITION AND THE PETITION IN NO. 20-70365**

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INTRODUCTION AND SUMMARY

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 its orders of September 2 and 14, 2020, which require a sitting Cabinet Secretary, a former Cabinet Secretary, and two other former high-ranking military officials to sit for depositions. The individuals are: current Secretary of Veterans Affairs Robert Wilkie Jr.; former Secretary of Defense James Mattis; former Vice Chairman of the Joint Chiefs of Staff General Paul J. Selva; and former Vice Chief of Naval Operations Admiral William F. Moran. As this Court is aware from the pending mandamus petition in *In re Trump*, No. 20-70365 (9th Cir.), in which oral argument is scheduled for October 14, the most recent orders follow a chain of increasingly intrusive and erroneous discovery rulings.

The district court's September 2 and 14 orders warrant this Court's correction in their own right. The Supreme Court and courts of appeals have uniformly rejected depositions of high-ranking federal officials in civil cases, and have long held that such an official should not be "subjected to [an] examination" "regarding the process by which he reached the conclusions of his [decision], including the manner and extent of his study of the record and his consultation with subordinates." *United States v. Morgan*, 313 U.S. 409, 422 (1941); see *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) ("Heads of government agencies are not normally subject to deposition."). Plaintiffs have not demonstrated the extraordinary circumstances that are required

before they may depose two Cabinet Secretaries, among others, and the district court's orders authorizing those depositions are a marked departure from established precedent.

These deposition orders also underscore the continuing, basic errors of the district court in this action. Plaintiffs challenge the military's policy concerning service by transgender individuals and individuals with gender dysphoria. That Mattis policy and its rationales are set out in the Department of Defense's detailed 44-page Report submitted to the President by Secretary Mattis, who himself adopted in full the recommendations of a Panel of Experts charged with conducting "an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Add. 242; *see* Add. 165-209 (Department of Defense's Report and Recommendations on Military Service by Transgender Persons).

The district court has issued an extraordinary series of discovery orders for the purpose of letting plaintiffs hunt for evidence of impermissible discriminatory intent in this military decisionmaking process. In June 2019, this Court issued a writ of mandamus to vacate an order compelling disclosure of all documents subject to the deliberative process privilege and production of a document-by-document privilege log from the President. *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (*per curiam*). Subsequent to that decision, the government produced an unredacted Administrative Record supporting the rationales for the Mattis policy, plus every deliberative

document sent from, received by, generated by, presented to, or considered by the Panel that recommended the policy.

Without evaluating whether there is any need for additional discovery in light of those productions, the district court continued by issuing orders requiring disclosure of tens of thousands of deliberative documents, forcing the government in February 2020 to seek this Court's review once again. That mandamus petition is pending in No. 20-70365. The Court stayed those discovery orders on February 12, and has scheduled oral argument for October 14. As detailed in supplemental filings requested by the Court in those proceedings, the district court has in the meantime issued over a dozen more rulings authorizing intrusive discovery, and has indicated that it is reviewing documents subject to this Court's stay based on plaintiffs' request to have them disclosed prior to this Court's argument. *See* 20-70365 Gov't Suppl. Resp. 4-5. The district court has been straying far outside the bounds of any recognized conception of discovery in a challenge to a military policy, and its continuing actions threaten this Court's ability to grant meaningful relief.

The latest deposition orders thus epitomize the district court's continued refusal to heed this Court's instructions in its 2019 decision. This Court stressed that the Mattis 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. And if there were to be discovery, the Court emphasized that the district court needed to assess what "was sufficient to allow for judicial review." *Id.* at 1206 n.22

(citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018)). Insofar as plaintiffs sought to probe military decisionmaking, this Court further recognized that “the military’s interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests.” *Id.* at 1206. But even with that guidance along with numerous Supreme Court and circuit precedents rejecting depositions of high-ranking officials, the district court failed to identify a meaningful need for the extraordinary depositions here, let alone any aspect of plaintiffs’ claims that requires further discovery to litigate. And even though greater restraint was called for by this Court’s direction that discovery “involving the most senior executive branch officials” in particular “may require greater deference,” *id.*, the district court authorized plaintiffs to interrogate multiple senior officials about military decisionmaking.

We respectfully request that the Court grant two forms of mandamus relief. First and most immediately, we request that the Court direct the district court to reverse its September 2 and 14 orders and grant the government’s motions to quash the depositions. The Court also should stay the depositions pending its disposition of this petition and consider this petition together with the pending mandamus petition and supplemental filings in No. 20-70365. Because plaintiffs have now informally indicated that they no longer plan to notice depositions immediately (despite having scheduled the depositions for May 2020 and litigated these issues to obtain judicial authorization), we do not request immediate emergency relief at this time. But

because plaintiffs could at any time demand that the depositions proceed, including during the pendency of this Court's review, a stay is essential.

Second and more fundamentally, we respectfully urge that the Court instruct the district court to terminate discovery and proceed to the merits of this dispute, and that this Court, at a minimum, issue a stay of further discovery pending the October 14 argument and any forthcoming decision in these proceedings. Plaintiffs have presented increasingly speculative theories for discovery, and the district court has repeatedly accepted those theories in entering increasingly unusual and intrusive discovery orders. Plaintiffs have now made quite clear to this Court that they do not even know "how much, or which, evidence is 'needed to resolve this litigation.'" 20-70365 Pls.' Suppl. Resp. 3. Plaintiffs' hunt for discriminatory intent has turned into a fishing expedition, and it is necessary and appropriate for this Court to direct the district court to adjudicate the merits of the case. Particularly because argument is set for October 14, a stay of discovery pending this Court's disposition of the government's petitions will also result in no meaningful injury to plaintiffs and at least protect this Court's ability to issue meaningful relief.

STATEMENT

A. The background of this litigation is set out in the mandamus petition already pending in this Court. *See* 20-70365 Pet. 6-18. The current depositions represent plaintiffs' latest search for purported evidence of impermissible discriminatory intent in the formulation of the Mattis policy. To assist the Court in assessing plaintiffs'

putative need for depositions of two Cabinet Secretaries and other high-ranking military officials, we recount the administrative process with particular attention to the roles of the four subpoenaed individuals in that process, much of which this Court detailed in its 2019 decision. *See Karnoski v. Trump*, 926 F.3d 1180, 1188-92 (9th Cir. 2019) (per curiam).

As the Court is aware, following the President’s announcements in July and August 2017, Secretary James 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. 242. Secretary Mattis instructed that the “Panel and designated support personnel shall bring a comprehensive, holistic, and objective approach to study” that topic. *Id.*

The Panel consisted of “senior uniformed and civilian Defense Department and U.S. Coast Guard leaders,” Add. 210, who “met 13 times over a period of 90 days” between October 13, 2017 and January 11, 2018, *see Karnoski*, 926 F.3d at 1191. The Panel included several high-ranking military officials, including (as relevant here) former Vice Chief of Naval Operations Admiral William Moran, the second-highest uniformed officer in the Navy. *See* 10 U.S.C. § 8035; Add. 119 (Moran Decl.). “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,” in addition to reviewing information on gender dysphoria and “military effectiveness, unit cohesion, and resources.” Add. 210-11.

Former Deputy Assistant Secretary of Defense for Military Personnel Policy Anthony Kurta chaired and facilitated the first seven meetings (in his role as the Acting Under Secretary of Defense for Personnel and Readiness). *See* Add. 111-12 (Hebert Decl.). Relevant here, former Under Secretary of Defense for Personnel and Readiness Robert Wilkie chaired the remaining six meetings once the Senate confirmed him for that position. Add. 112. Because Under Secretary Wilkie had not attended the first seven meetings, he participated on the Panel as a non-voting member and permitted current Deputy Assistant Secretary of Defense for Military Personnel Policy Lernes Hebert to facilitate these remaining six meetings. *Id.* Under Secretary Wilkie is now the Secretary of Veterans Affairs—the head of the Department of Veterans Affairs. The Panel was to report to then-Deputy Secretary of Defense Patrick Shanahan and (as relevant here) General Paul Selva, then-Vice Chairman of the Joint Chiefs of Staff and the Nation’s second-highest-ranking uniformed officer. Add. 241; *see* 10 U.S.C. § 154; Add. 115-16 (Selva Decl.).

During the Panel process, on December 15, 2017, Deputy Secretary Shanahan and General Selva were briefed on its progress, which is reflected in a draft “Final Report and Recommendations of the Transgender Panel.” *See* Add. 216-39.

According to one Panel member, they allegedly indicated that the Panel should reconvene for the purpose of collecting more data and adding clarity to its

recommendations. 20-70365 SA.395 (December 15, 2017 email from Panel member communicating General Selva's statements). The Panel accordingly held four more meetings, and, at that point, the Panel issued the identical recommendations it had previously provided. *See* Add. 4. Under Secretary Wilkie then sent a memorandum—via Deputy Secretary Shanahan and General Selva—that informed Secretary Mattis of the Panel's recommendations on January 11, 2018. Add. 214.

In provisionally accepting the Panel's recommendations, Secretary Mattis directed Under Secretary Wilkie, Kurta, and Hebert to coordinate the preparation of a formal report describing those recommendations and explaining the rationales for them in detail. Add. 113. The result was the Department's 44-page Report and Recommendations on Military Service by Transgender Persons. *Id.* That Report thus "contain[s] the same recommendations" that the Panel reached. *Id.*; *see* Add. 183 (Department's Report "propos[ing] [a] policy consistent with [the Panel's] recommendations").

Secretary Mattis formally adopted the Panel's recommendations, approved the Report, and conveyed his proposed policy in a memorandum to the President on February 22, 2018. Add. 210. As Secretary Mattis explained, the policy was based on "the Panel's professional military judgment and [his] own professional judgment." Add. 212. The President "revoke[d]" his prior directives and permitted the military to adopt the policy, which is the Mattis policy now in effect. Add. 163.

B. This Court is familiar with the discovery that has occurred since its 2019 decision, which is detailed in the government’s filings in the pending mandamus proceedings. *See* 20-70365 Pet. 6-18; 20-70365 Gov’t Suppl. Br. 2-7; 20-70365 Gov’t Suppl. Resp. 4-5. The premise of the district court’s ongoing proceedings has been that plaintiffs need still more information to litigate whether the Mattis policy was indeed “animated by independent military judgment” or was “instead the product of impermissible discriminatory intent.” Doc. 394, at 2 (Nov. 19, 2019).

Recently, plaintiffs served subpoenas on former Secretary Mattis, Secretary Wilkie, former General Selva, and former Admiral Moran, scheduling four depositions to occur between May 25 and 28, 2020. *See* Add. 145 (Mattis subpoena); Add. 139 (Wilkie subpoena); Add. 151 (Selva subpoena); Add. 157 (Moran subpoena). In seeking the four depositions at issue here, plaintiffs hypothesized that General Selva might have “directed the Panel to attempt to support the President’s [directives] rather than formulate an ‘independent’ policy on transgender service,” No. 20-mc-15 (E.D. Va.), Doc. 18, at 23 (Plaintiffs’ Opposition to Motion to Quash Selva Subpoena), notwithstanding Secretary Mattis’s express instructions to “bring a comprehensive, holistic, and objective approach,” Add. 242. Plaintiffs have speculated that particular members of the Panel such as Under Secretary Wilkie—rather than the Panel itself—were “the driving force” behind its recommendations. Doc. 581, at 2 (Plaintiffs’ Opposition to Motion to Quash Wilkie Subpoena). And plaintiffs have postulated that it is “an alternative reality” that Secretary Mattis

adopted a policy based on the Panel's recommendations and as explained in the Department's Report, and that he must instead have personally injected undisclosed "after-the-fact" "animus and anti-transgender views." Doc. 586, at 19, 27 (Plaintiffs' Opposition to Motion to Quash Mattis Subpoena).

The government moved to quash the four subpoenas in their respective jurisdictions, though each of those district courts transferred its subpoena dispute to the district court in the underlying action. *See Karnoski v. Trump (Mattis)*, No. 20-mc-10 (E.D. Va. July 15, 2020) (Doc. 41), *transferred to* No. 20-mc-61 (W.D. Wash.); *Karnoski v. Trump (Wilkie)*, No. 20-mc-16 (E.D. Va. July 15, 2020) (Doc. 35), *transferred to* No. 20-mc-56 (W.D. Wash.); *Karnoski v. Trump (Selva)*, No. 20-mc-15 (E.D. Va. July 7, 2020) (Doc. 35), *transferred to* No. 20-mc-55 (W.D. Wash.); *Karnoski v. Trump (Moran)*, No. 20-mc-13 (M.D.N.C. Aug. 10, 2020) (Doc. 23), *transferred to* No. 20-mc-69 (W.D. Wash.). Those disputes have since been consolidated with the underlying action. *See* Docs. 555, 564.

On September 2, 2020, the district court issued an order denying the government's motions to quash and permitting the depositions, stating that the "very reason" for all the depositions was "to determine whether the policy has been decided by the appropriate military officials." Add. 22. The court believed such an inquiry was proper even though plaintiffs identified nothing in the Administrative Record, or any of the 60,000 documents already produced, suggesting that the Panel's recommendations were in effect a sham. The court asserted that the depositions were

needed because plaintiffs had “little insight” into the period from the Panel’s initial recommendation briefing on December 15, 2017, to Secretary Mattis’s memorandum to the President on February 22, 2018. Add. 19. The court failed to acknowledge that plaintiffs have already obtained around 14,000 documents from that period alone. Add. 93. Nor did the court explain what additional “insight” might be obtained from these depositions: there is no dispute that the Panel’s final recommendations were “identical” to those found in its initial briefing, Add. 19, and that the Department’s Report also expresses “the same recommendations” as the Panel, Add. 113.

The district court recognized that the Supreme Court and courts of appeals have uniformly rejected depositions of high-ranking government officials under *United States v. Morgan*, 313 U.S. 409 (1941). Add. 20-21. But the court announced that there were “extraordinary circumstances” for every one of the depositions here. Add. 23.

First, the district court declared that Secretary Mattis had proceeded in “bad faith.” Add. 26. The court cited this Court’s statement that the Mattis policy “discriminates on the basis of transgender status on its face.” *Id.* (quoting *Karnoski*, 926 F.3d at 1201 n.18). Of course, even setting aside the government’s disagreement with that characterization, this Court did not suggest that the military had impermissibly adopted that classification or had been motivated by animus. On the contrary, this Court simply set the standard of review and confirmed that, based on the then-existing record, “the [Mattis] Policy appears to have been the product of independent military judgment.” *Karnoski*, 926 F.3d at 1201. The district court’s

additional discussion of “bad faith” noted supposed “evidence that Secretary Mattis’s decision-making process may have been influenced by animus, noting his interest in contacting purported “anti-transgender rights advocates” and his email correspondence with a former colleague that discussed the “‘psychological’ problems of transgender persons.” Add. 26. The court cited no authority whatsoever for its view that a Secretary of Defense’s efforts to make an informed decision regarding the recognized condition of gender dysphoria—including hearing from persons whose viewpoints plaintiffs do not share—constitutes “bad faith.”

Second, the district court found that Secretary Wilkie’s deposition was warranted because of plaintiffs’ speculation—unsupported by any record evidence—that Secretary Wilkie was “the driving force” behind the Panel’s recommendations to Secretary Mattis. Add. 25. The court also believed that a deposition was necessary based on plaintiffs’ assertions that (as Under Secretary of Defense) Secretary Wilkie “collect[ed] additional support for the Panel’s findings” on his own and was one of three Panel members charged with “drafting the [Department’s] Report.” *Id.*

Third, as to General Selva (who heard reports from the Panel), the district court found that he had “first-hand knowledge” about the reasons the Panel engaged in further deliberations following December 2017 and other issues preceding the Mattis policy. Add. 24.

And fourth, as to Admiral Moran (who was a Panel member), the district court ruled that plaintiffs could depose him regarding his views on “the data underlying the

Mattis Policy,” without any explanation for why another deponent could not address that question. Add. 28.

C. On September 10, 2020, the government requested that the district court stay its September 2 order and stay all discovery pending these mandamus proceedings. *See* Doc. 601. The court has not ruled on that stay motion. Plaintiffs may notice the depositions at any time, and although they have stated that they do not intend to notice the depositions in the immediate future, they have not agreed to stay the depositions pending this Court’s review and thus may demand the depositions during the Court’s review of this petition.

On September 14, the district court corrected several ancillary factual or citation errors in its prior order but otherwise reissued the order authorizing plaintiffs to proceed with the depositions. Add. 14 (amending September 2 order); Add. 1 (reissuing September 2 order (Add. 16-28) as amended order (Add. 1-13)).

ARGUMENT

III. THIS COURT SHOULD EXERCISE ITS MANDAMUS AUTHORITY TO QUASH THE DEPOSITIONS OF CABINET SECRETARIES AND OTHER HIGH-RANKING MILITARY OFFICIALS

Mandamus relief is appropriate where a petitioner has “no other adequate means to attain the relief desired,” where “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)). This Court considers

“(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) (quotations omitted).

This Court recognized that these factors warranted mandamus relief in its 2019 decision, and it has subsequently stayed discovery orders pending consideration of the government’s second mandamus petition. *See Order, In re Trump*, No. 20-70365 (Feb. 12, 2020). The district court’s September 2 and 14 deposition orders reflect the same consistent failures to heed this Court’s guidance. And they further disregard the fundamental concerns that arise when a court orders the deposition of high-ranking federal officials at the behest of private litigants—a step the Supreme Court and multiple courts of appeals have repeatedly determined involves an extraordinary intrusion into executive decisionmaking that warrants correction.

A. It is well-settled that, “absent ‘extraordinary circumstances,’ high-level agency officials should not ‘be called to testify regarding their reasons for taking official action.’” *NEC Corp. v. United States*, 151 F.3d 1361, 1375-1376 (Fed. Cir. 1998)

(quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)); accord *In re McCarthy*, 636 F. App'x 142, 143 (4th Cir. 2015) (“It is well established that high-ranking government officials may not be deposed or called to testify about their reasons for taking official actions absent ‘extraordinary circumstances.’” (quoting *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991))). “When such circumstances are not present, mandamus is appropriate to prevent a district court from compelling an official’s appearance.” *In re McCarthy*, 636 F. App'x at 143 (EPA Administrator) (citing *U.S. Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (Parole Board members); *In re United States (Jackson)*, 624 F.3d 1368, 1372-73 (11th Cir. 2010) (EPA Administrator); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (Vice President’s Chief of Staff)); see, e.g., *In re Commodity Futures Trading Comm'n*, 941 F.3d 869, 875 (7th Cir. 2019) (CFTC Chairman, commissioners, and staff); *In re United States (Bernanke)*, 542 F. App'x 944 (Fed. Cir. 2013) (Chairman of the Federal Reserve Board); *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999) (Attorney General and Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (three FDIC Board members); *Franklin Sav. Ass'n*, 922 F.2d at 211 (Director of Office of Thrift Supervision). This Court has recognized, in particular, that “[h]eads of government agencies are not normally subject to deposition.” *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979).

Mandamus has issued even when the proposed deposition is subject to significant limitations. For example, the Eleventh Circuit in *In re United States (Kessler)*,

985 F.2d 510, 512-13 (11th Cir. 1993) (per curiam), issued a writ of mandamus to quash an order directing the Commissioner of the Food and Drug Administration “to be available for thirty minutes” by telephone. That court has thus explained “that compelling the testimony of the Commissioner of the Food and Drug Administration would have [had] ‘serious repercussions for the relationship between two coequal branches of government.’” *In re United States (Jackson)*, 624 F.3d at 1372 (quoting *In re United States (Kessler)*, 985 F.2d at 513); *cf. United States v. U.S. Dist. Court for the N. Mariana Islands*, 694 F.3d 1051, 1059 (9th Cir. 2012) (issuing mandamus to quash an order requiring Assistant Attorney General to appear at a settlement conference).

These well-established limitations on compelling testimony of high-ranking federal officials reflect significant “separation of powers concerns” that are not limited to the burdens placed on sitting officers. *In re United States (Jackson)*, 624 F.3d at 1372; *cf. Lederman v. N.Y.C. Dep’t of Parks & Recreation*, 731 F.3d 199, 203-04 (2d Cir. 2013) (former deputy mayor). As the Supreme Court cautioned in *United States v. Morgan*, the executive and judicial processes represent “collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.” 313 U.S. 409, 422 (1941). The Supreme Court has thus stressed that “judicial inquiry into ‘executive motivation’ represents ‘a substantial intrusion’ into the workings of another branch of Government.” *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)); *see William Jefferson & Co. v. Board of Assessment & Appeals*

No. 3 for Orange Cty., 482 F. App'x 273, 274 (9th Cir. 2012) (agreeing that “[i]nquiry into the deliberative processes of administrators is generally disfavored”). Under *Morgan*, “where there are administrative findings that were made at the same time as the decision . . . , there must be a strong showing of bad faith or improper behavior before” an “inquiry into the mental processes of administrative decisionmakers” is made. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

In *Morgan* itself, which concerned a challenge to an order of the Secretary of Agriculture, the Supreme Court rejected the plaintiffs’ efforts to depose the Secretary “at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates.” 313 U.S. at 422. “Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected,” and “it was not the function of the court to probe the mental processes of the Secretary.” *Id.* (quotation omitted). As the Supreme Court emphasized, “the short of the business is that the Secretary should never have been subjected to this examination.” *Id.* And the concerns animating this principle “hardly become[] inapplicable upon an official’s departure from his office.” *In re United States (Bernanke)*, 542 F. App'x at 948-49; see *Lederman*, 731 F.3d at 203-04.

These separation-of-powers concerns take on an additional dimension when plaintiffs seek to depose high-ranking officials from the military. The Supreme Court has further required “that the judiciary be as scrupulous not to interfere with

legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” *Munaf v. Geren*, 553 U.S. 674, 700 (2008) (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). Courts are fundamentally “ill-equipped” to intrude upon the decisionmaking of “the military authorities [that] have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy.” *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983)). Consistent with those principles, this Court’s previous decision in this case stressed that the policy here “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.

B. The district court’s order is irreconcilable with these precedents and with any recognized conception of proper discovery, especially in a military case. The court has ordered the depositions of former and current Cabinet Secretaries, the former second-highest-ranking uniformed officer in the Nation, and the former second-highest-ranking uniformed officer in the Navy. Any one of those depositions would have been unusual, as “a district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding.” *In re United States (Jackson)*, 624 F.3d at 1376. It was incumbent on plaintiffs to demonstrate the “extraordinary circumstances” that would warrant each of these intrusions, much less all of them at once. They have signally failed to do so, and the district court has authorized what can at best be described as a fishing expedition.

The purported justification for the current deposition orders—and the vast discovery previously ordered—is that plaintiffs need information to litigate whether the Mattis policy was the result of independent military judgment rather than discriminatory intent. But as this Court observed, based on the then-existing record, “the [Mattis] Policy appears to have been the product of independent military judgment.” *Karnoski*, 926 F.3d at 1201. After obtaining a trove of discovery to dispute that premise, plaintiffs have offered no basis to revisit this Court’s conclusion, much less to permit these depositions.

Plaintiffs have in fact received every deliberative document sent from, received by, generated by, presented to, or considered by the Panel that produced the recommendations. They have received the Department’s 44-page Report, and there is no dispute that the Report represents “the same recommendations” that the Panel reached. Add. 113. And those documents represent only a small fraction of the discovery plaintiffs have obtained. The government has made approximately 100 document productions from over 150 custodians across all levels of the military during a five-year period. Plaintiffs have obtained more than 60,000 documents totaling over 400,000 pages.¹

¹ The government in prior filings reported that plaintiffs had received over 500,000 pages of documents. *See* 20-70365 Gov’t Suppl. Br. 2. That number, however, includes slip sheets that were used in place of redacted pages, and the more conservative figure is over 400,000 pages. *See* Add. 92.

Plaintiffs have also taken three depositions and have had access to the transcripts of five depositions taken in related litigation. And the government informed plaintiffs two years ago that if a deposition proved necessary, plaintiffs could depose former Deputy Assistant Secretary Anthony Kurta, who chaired numerous Panel meetings and participated in preparing the Department's Report. Indeed, government counsel explicitly offered such a deposition during the previous oral argument before this Court as an example of discovery that plaintiffs should pursue before demanding further sensitive discovery. Video of Oral Arg. 52:50-53:37, *In re Trump*, No. 18-72159 (9th Cir. Oct. 10, 2018), <https://go.usa.gov/xGNeB>. They have not done so.

C. The discovery plaintiffs have already obtained plainly demonstrates that the Mattis policy was based on the military's professional judgment. There is no reason why plaintiffs cannot now litigate the constitutional merits of that policy. Plaintiffs' argument for further discovery reduces to wholly unsupported speculation—without a trace in the evidentiary record—that this exercise of military judgment might have been manipulated through secret influences or might represent “an alternative reality” (as they put it). Doc. 586, at 19. The district court committed clear and indisputable error in accepting that speculation as a basis for each of the four proposed deponents.

1. The district court justified the deposition of Secretary Mattis on the theory that the Secretary might have harbored personal “animus” and that “the central issue”

in dispute is whether the Mattis policy reflected “orders of his Commander-in-Chief or the military’s exercise of independent judgment.” Add. 11 (quotation omitted).

This accusation of “animus” against a 44-year veteran of the Marine Corps and the former Secretary of Defense is based on emails indicating his interest in hearing out the views of individuals the district court deemed to be “anti-transgender rights advocates,” including a psychiatry professor and a law professor. Add. 11; *see* Add. 213, 240. That the district court regarded this as evidence of “bad faith” indicates how far this case has departed from any recognized analytical framework. An interest in hearing multiple views demonstrates *good* faith—of not having *prejudged* a matter. Indeed, even if Secretary Mattis wished to hear from those who disagreed with plaintiffs’ view because he was inclined to adopt with those perspectives, that would not itself be impermissible. *See Department of Commerce*, 139 S. Ct. at 2574 (“It is hardly improper for an agency head to come into office with policy preference and ideas, discuss them with affected parties, sound out other agencies for support, and work with [subordinates] to substantiate the legal basis for a preferred policy.”). Even more fundamentally, the district court correctly recognized that “Secretary Mattis’s mental processes are irrelevant to Plaintiffs’ claims.” Add. 11. This case is about the policy adopted by the Department of Defense under Secretary Mattis and the justifications for that policy. In no event is probing Secretary Mattis’s personal mental processes a permissible or relevant avenue of discovery, let alone a basis for a deposition of a former Cabinet Secretary.

The district court nonetheless authorized plaintiffs to “ask Secretary Mattis about his role in drafting [his February 22, 2018 memorandum to the President] and the [Department’s] Report, the extent to which he obtained input from the Panel, whether he sought information from sources outside the Panel, and whether he was instructed to obtain particular information that was absent from the Panel’s Final Report.” Add. 11. The district court thus ordered precisely what *Morgan* proscribes. The Supreme Court made clear that it is wholly improper to depose a Cabinet Secretary on “the manner and extent of his study of the record and his consultation with subordinates.” *Morgan*, 313 U.S. at 422.

Apart from those basic errors, there is no factual predicate that could make it appropriate to question Secretary Mattis on these matters. It is undisputed that the Secretary of Defense adopted the Panel’s recommendations. The district court nevertheless believed it appropriate to allow plaintiffs to question Secretary Mattis to determine whether the Panel’s 13 meetings and recommendations were in effect a façade to disguise an outcome ordained by the President through unidentified means. *See* Add. 11 (referencing “orders” by the President). The court did not explain how this could possibly be the case, and it makes particularly little sense given that, as this Court has explained at length, Secretary Mattis ultimately proposed that “a change to [the President’s] policy is warranted.” *Karnoski*, 926 F.3d at 1202 (quotation omitted); *see id.* at 1188-92. Secretary Mattis’s memorandum informed the President that these changes were based on “the Panel’s professional military judgment and [his] own

professional judgment.” Add. 212. Plaintiffs have offered nothing that casts doubt on the Secretary’s statement².

2. The district court’s order is at least equally indefensible with respect to the deposition of Secretary Wilkie, a sitting member of the President’s Cabinet and head of the federal government’s second-largest department. In his prior role in the Defense Department, then-Under Secretary Wilkie chaired the final six meetings of the Panel and was a non-voting Panel member. He informed Secretary Mattis and his superiors of the Panel’s recommendations, and he and two other officials (former and current Deputy Assistant Secretaries Kurta and Hebert) were charged with coordinating the preparation of the Department’s Report. The purported “extraordinary circumstances” justifying his deposition consist of plaintiffs’ unsupported allegations that “political appointees like [Under Secretary] Wilkie” were “the driving force” behind the proposed policy and that he secretly “collect[ed] evidence supporting the policy on his own, without Panel involvement.” Add. 10.

This theory, too, posits that the Panel was a sham to which Secretary Wilkie as well as Secretary Mattis were somehow parties. That is an extraordinary allegation against two Cabinet Secretaries, made particularly extraordinary by the fact that plaintiffs have every document received or generated by the Panel and offer not a shred of evidence to support their assertions.

The district court was quite wrong, moreover, to suggest that “military judgment” does not include the judgment of the Secretary of Defense or an Under

Secretary charged with personnel policy. High-level Senate-confirmed civilian officials at the Pentagon are rightly involved in formulating military policy and their participation does not cast doubt on the fact that the policy here is the product of military judgment. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (holding that “professional military judgments” are “subject *always* to civilian control of the Legislative and Executive Branches” (emphasis in original)). That same error infected the court’s ruling that a deposition would be proper because of indications that Secretary Wilkie was “collect[ing] evidence . . . without Panel involvement” when he assisted in drafting the Department’s Report. Add. 10. The court was citing to instances where Secretary Wilkie received, for exaple, a public news article on the relevant issues. *See* Add. 243 (relaying article from the *Military Times*). That contention does not remotely establish the “extraordinary circumstances” required to justify the deposition of a sitting Cabinet Secretary.

The district court was equally mistaken in justifying the deposition on the theory that Secretary Wilkie could provide testimony regarding a “critical time period” between December 15, 2017 and January 11, 2018. Add. 10. This was not a “critical time period” in any relevant sense, and it is unclear what Secretary Wilkie’s testimony would add to the material plaintiffs have already received, which includes all deliberative and non-deliberative documents received, sent, or created by the Panel in this period. The Panel reported its initial recommendations in December 2017 to Deputy Secretary Shanahan and General Selva, who advised that the Panel should

engage in further study and collect more objective evidence. *See* 20-70365 SA.395 (The court repeatedly and inaccurately refers to this as an “initial rejection” of the Panel’s recommendations. Add. 4, 9, 10.) After four more meetings, the Panel produced a set of recommendations that concededly “were identical to the [prior] recommendations.” Add. 4. Under Secretary Wilkie then communicated those recommendations to Secretary Mattis in January 2018 through Deputy Secretary Shanahan and General Selva. *Id.* Insofar as this sequence of administrative decisionmaking indicates anything of relevance at all, it underscores that the independent Panel was in fact independent, even after December 2017.

Even assuming that there were any basis for pursuing further inquiries into this supposed “critical” period or anything else, moreover, plaintiffs have not demonstrated that “the relevant information could not be obtained elsewhere.” *Lederman*, 731 F.3d at 203; *see In re United States (Jackson)*, 624 F.3d at 1369 (requiring district court to substitute lower-ranking official). Plaintiffs have around 14,000 documents from the period spanning the Panel’s December 2017 briefing to Secretary Mattis’s February 2018 adoption of the policy alone. Add. 93. And the district court completely failed to address the serious ramifications of deposing a sitting Cabinet Secretary, as “the cumulative effect” of such depositions would be that “his time would be monopolized by preparing and testifying in such cases.” *In re United States (Kessler)*, 985 F.2d at 512; *see U.S. Dist. Court for the N. Mariana Islands*, 694 F.3d at 1059 (finding it would be “highly impractical, if not physically impossible,” for Assistant

Attorney General to appear in all settlement conferences). As noted, the government two years ago indicated that it was willing to make former Deputy Assistant Secretary Kurta available for a deposition. Kurta also chaired Panel meetings and participated in the Panel's deliberations in the so-called "critical time period," in addition to assisting in the drafting of the Report. Add. 10.

3. The district court's grounds for permitting the deposition of General Selva, the former Vice Chairman of the Joint Chiefs of Staff, are likewise insubstantial. General Selva was the Nation's second-highest-ranking uniformed officer and a member of the Joint Chiefs of Staff, and Secretary Mattis charged him with receiving periodic reports from the Panel. *See* 10 U.S.C. § 154.

The district court believed that General Selva's deposition was justified because he might have provided undisclosed "guidance and boundaries" to the Panel. Add. 9. Thus, in the court's view, General Selva too had a covert role in superseding Secretary Mattis's own instructions to take "a comprehensive, holistic, and objective approach." Add. 242. As noted, plaintiffs have in their possession every communication sent to the Panel, including privileged deliberative materials, and they have provided no ground for speculating that there may have been undisclosed guidance.

The factual basis for any deposition of General Selva is even more tenuous because plaintiffs' theories would have one believe that he both undermined the objective inquiry of the Panel and promoted it, all at the same time. The district court declared that a deposition was also appropriate on the basis of General Selva's advice

in December 2017 that the Panel should collect additional, objective data. *See* 20-70365 SA.395. A suggestion that an administrative process can be made more robust provides no basis for a deposition of a high-ranking official. And a deposition on that basis is impossible to square with the district court’s acceptance of the unfounded assertion that General Selva was secretly steering the Panel toward “the President’s order[s] and directives.” Add. 9. None of plaintiffs’ contradictory inferences withstands scrutiny, and again, it is undisputed that the Panel in fact issued the same recommendations after further deliberation following the December 2017 briefing.

The district court was equally incorrect to direct that plaintiffs could depose General Selva regarding delays in implementing the prior Carter policy in June 2017, a matter wholly irrelevant to plaintiffs’ challenge to the Mattis policy. Add. 9. And in any case, former Deputy Assistant Secretary Kurta has been available to discuss that topic for over two years without any apparent interest by plaintiffs.

4. Finally, the district court’s authorization of the deposition of Admiral Moran—formerly the second-highest-ranking uniformed officer in the Navy—is inexplicable. Admiral Moran was a Panel member and his participation, like that of all the other members, is documented in the discovery plaintiffs have received. Plaintiffs have offered no reason why his testimony in particular is required with regard to any issue. Instead, the district court simply declared that Admiral Moran had his own “concerns” and “questions” during the Panel process after he “listen[ed] to the presentation of the data and testimony from a variety of sources” and “took part in

the Panel’s deliberations.” Add. 12 (quotation omitted). It may be assumed that every Panel member had questions and concerns. But that has no bearing on whether the Panel’s recommendations were an exercise of military judgment. And Admiral Moran’s potential testimony as to quite irrelevant pre-Carter policy events could not be a serious basis for discovery, let alone the deposition of a high-ranking military official when other officials (as again, former Deputy Assistant Secretary Kurta) have long been available on that topic. *See id.* at 13 (incorrectly stating that Kurta was not involved prior to the Carter policy); *see also* Doc. 602-3.

* * *

In sum, the district court’s September 2 and 14 orders authorizing the four depositions rest on clear and significant legal errors that warrant this Court’s review. We therefore ask that the Court consider this petition together with the pending filings in No. 20-70365, which is scheduled for argument on October 14. We also ask that the Court stay the orders pending its review of the petition. *See In re Department of Commerce*, 139 S. Ct. 16, 16-17 (2018) (staying deposition of Secretary of Commerce pending mandamus petition). Subsequent to our motion for a stay in district court, plaintiffs have informally indicated that they do not plan to notice depositions in the immediate future, and we therefore do not seek emergency relief. A stay is essential, however, to preserve the status quo and to avoid the potential need for emergency litigation during this Court’s review.

IV. THIS COURT SHOULD DIRECT THE DISTRICT COURT TO TERMINATE DISCOVERY AND PROCEED TO THE MERITS, AND, AT A MINIMUM, STAY ALL FURTHER DISCOVERY PENDING THIS COURT'S GUIDANCE

Although the district court's September 2 and 14 orders directly concern the four depositions that are the subject of this petition, those orders reflect continued disregard for this Court's 2019 decision, settled precedent on what discovery is proper, and escalating intrusions into military decisionmaking based on increasingly tenuous theories and erroneous rulings. We thus respectfully ask that the Court instruct the district court to terminate further discovery and proceed with assessing the merits of the case, and ask, at a minimum, that the Court stay all discovery in this case until the district court can have the benefit of this Court's guidance after review of the pending mandamus petition, the supplemental filings in those pending mandamus proceedings, and the instant petition.

In its 2019 decision, this Court instructed the district court to give "thorough consideration" to the "reasonableness" of the Mattis policy, which "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. The Court determined, based "[o]n the current record," that the Mattis policy "appears to have been the product of independent military judgment." *Id.* at 1202. The Court further noted that if discovery were to proceed at all, it should be tailored to what "was sufficient to allow for judicial review." *Id.* at 1206 n.22 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018)).

After this Court's decision, the district court instead sanctioned further discovery for plaintiffs to revisit whether the Mattis policy was "animated by independent military judgment" or was "instead the product of impermissible discriminatory intent." Doc. 394, at 2. But the government has released all deliberative documents to, from, or by the Panel (and more than 60,000 documents in all), and plaintiffs have located nothing that refutes this Court's prior conclusions. As exemplified by the deposition orders, what remains are increasingly speculative theories that the Panel's administrative process was a sham, and increasingly intrusive discovery demands based on those theories.

Even after over two years of discovery, plaintiffs are unwilling to represent to this Court "how much, or which, evidence is 'needed to resolve this litigation.'" 20-70365 Pls.' Suppl. Resp. 3. And though they state that any and all additional discovery is "indispensable" to "the searching judicial inquiry heightened scrutiny requires," *id.*, those statements are impossible to square with this Court's instruction that, even under the relevant standard of review, the district court as factfinder has no proper role in "substitut[ing] its 'own evaluation of evidence for a reasonable evaluation' by the military." *Karnoski*, 926 F.3d at 1202 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)).

Without attempting to evaluate the reasonableness of the Mattis policy in light of the unredacted Administrative Record and the voluminous materials already produced, the district court has accepted plaintiffs' demands in authorizing ever-

expanding discovery, even aside from the current deposition orders. On July 23, the court declared that it would set no “discovery cutoff deadline” at all, preferring instead to proceed with indefinite discovery in this matter. Add. 79. On August 24, the court opined that plaintiffs “don’t have to justify why they should get” further discovery into privileged deliberative documents “at this point.” Add. 39:25-40:1. Indeed, the court has refused to even inquire into what further information plaintiffs “believe they need . . . to advance their case.” Doc. 560, at 5.

Those statements reflect the district court’s consistent disregard for the proper bounds of discovery in this case. The pending mandamus proceedings address orders of the district court that once again required *en masse* disclosure of tens of thousands of deliberative documents. Although this Court has stayed those orders, the district court—as detailed in our supplemental filings—has continued to authorize yet more discovery, issuing no fewer than a dozen intrusive and erroneous discovery orders since our pending petition. *See* 20-70365 Gov’t Suppl. Br. 2-7; 20-70365 Gov’t Suppl. Resp. 4-5. Any number of the district court’s orders might have justified a searching judicial inquiry into whether the court exceeded its bounds, but together they demonstrate a persistent failure to address what more plaintiffs need for their claims. The court has instead remained singularly focused on potentially disclosing an “enormous number of relevant documents that remain contested”—that is, protected under recognized privileges—“in this matter.” Add. 78.

Significantly, and as this Court knows, on July 15, the district court declared that it would set aside the deliberative process privilege as to effectively all remaining documents not subject to this Court's order. Add. 80. The court announced that it would do so by defining two narrow timeframes during which, in its view, the Department formulated the Carter policy (July 2015 to June 2016) and Mattis policy (September 2017 to January 2018). Add. 86-88. The court held that all policy deliberations outside of these timeframes were not pre-decisional for purposes of the privilege, because they did not pertain to the two "specific policies at issue in this litigation." Add. 84. The manifest error of that analysis is reflected in the court's conclusion that Secretary's Mattis's handwritten notes on a 2017 "Recommended Transgender Way Ahead" memorandum, for instance, would not be privileged based on those artificial timeframes. Doc. 547, at 7.

The district court at present is engaging in *in camera* review of those remaining deliberative documents based on that erroneous understanding of the privilege, regardless of the documents' relationship to plaintiffs' claims. Most recently, the court has demanded review of hundreds of deliberative documents that are before this Court and subject to the Court's stay, including documents that post-dated the Panel's recommendations (January 11, 2018) but pre-dated Secretary Mattis's proposal of that policy to the President (February 22, 2018)—such as the Secretary's personal notes and drafts of the Department's Report. Add. 64. And for numerous deliberative documents subject to the Court's stay order, the district court has

announced its intention to “give [plaintiffs] the documents” in advance of the Court’s oral argument on October 14, Add. 47:5-6, based on plaintiffs’ view that they “need” the documents “for the Ninth Circuit argument,” Add. 42:5; *see* Add. 46:24-25 (alleging that longer timeframe “means we won’t have those in time for the—for the argument at the Ninth Circuit”).

The latest orders thus exemplify the problems that have characterized this litigation for over two years, and manifest the district court’s “oft repeated error[s].” *Karnoski*, 926 F.3d at 1203. As these orders illustrate, there is no end in sight for the discovery process that has strayed so far from this Court’s guidance. And plaintiffs have indicated their intention, for example, to depose current or former White House officials, demand White House documents, and notice depositions of numerous other military officials. Add. 98; *see* Add. 104-05 (noting numerous instances where plaintiffs have noticed depositions of military officials and then cancelled them); *see also Karnoski*, 926 F.3d at 1204-06 (granting mandamus relief as to presidential communications privilege).

The government has been ready to defend the merits of the Mattis policy based on the Department’s rationales stated in its Report and the Administrative Record supporting those rationales, ever since the President permitted its adoption over two years ago. *See* Add. 135 (May 2020 joint status report indicating that the government was prepared to proceed to summary judgment); Doc. 225, at 6 (March 2018 motion indicating that the government was ready to defend Mattis policy based on

Administrative Record). This Court should thus direct the district court to resolve those merits, rather than accept plaintiffs' baseless theories as reasons for continued intrusive discovery orders. It is time to require plaintiffs to demonstrate that they have any viable theory at all on which they could prevail, rather than engage in their ongoing endless and intrusive fishing expedition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of mandamus and reverse the district court's September 2 and 14 orders that deny the government's motions to quash the four depositions, and should stay those depositions pending this petition. The Court should also instruct that the district court terminate discovery and proceed to the merits, and should, at a minimum, stay all discovery pending review of this petition and the government's pending petition and supplemental filings in No. 20-70365, so that further discovery, if any, can conform to the Court's guidance.

Respectfully submitted,

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² The Acting Assistant Attorney General is recused from this matter.

STATEMENT OF RELATED CASES

The federal government is aware of the pending mandamus proceedings, *In re Trump*, No. 20-70365 (9th Cir.), and the prior mandamus proceedings, *In re Trump*, No. 18-35347 (9th Cir), that arose from the same district court action as this mandamus petition and implicate related discovery issues. The government respectfully requests that the Court consider this petition along with the petition in No. 20-70365, in which this Court has scheduled argument for October 14, 2020.

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 8,400 words, 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/ Dennis Fan

DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, I electronically filed the foregoing petition 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 petition pursuant Federal Rule of Appellate Procedure 21(a).

s/ Dennis Fan

DENNIS FAN

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
MOTION FOR STAY PENDING THIS PETITION AND
THE PETITION IN NO. 20-70365**

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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 DENYING MOTION TO
QUASH THIRD-PARTY
SUBPOENAS ISSUED TO
GENERAL PAUL J. SELVA (DKT.
NO. 556)

SECRETARY ROBERT WILKIE
JR. (DKT. NO. 557);

SECRETARY JAMES N. MATTIS
(DKT. NO. 558);

ADMIRAL WILLIAM F. MORAN
(DKT. NO. 591)

THIS MATTER comes before the Court on Defendants’ motions to quash third-party subpoenas issued to General Paul J. Selva (Dkt. No. 556), Secretary Robert Wilkie Jr. (Dkt. No. 557), Secretary James N. Mattis (Dkt. No. 558), and Admiral William F. Moran (Dkt. No. 591). Having reviewed the Motions, the Responses (Dkt. Nos. 577, 582, 587, 594), the Replies (Dkt. Nos. 578, 584, 589, 595), and the related record, the Court DENIES the Motions.

Add. 1

Background

1
2 Plaintiffs filed this action on August 28, 2017, following President Trump’s July 2017
3 tweet announcing that transgender individuals would not be allowed to serve in the military and
4 the President’s August 2017 Memorandum implementing that announcement. The President’s
5 announcement reversed the year-old policy announced by then-Secretary of Defense Ashton
6 Carter allowing transgender individuals to serve openly in the military.

7 In their initial complaint, Plaintiffs alleged that President Trump made his announcement
8 without engaging in “any meaningful study, deliberation, or consultation with key military
9 officials,” providing then-Secretary of Defense James N. Mattis with only one day’s notice of the
10 decision and making his announcement while the Secretary was on vacation. (Dkt. No. 1
11 (“Compl.”) ¶ 102.) Pointing to several statements from the President’s political advisors,
12 Plaintiffs also alleged that the President’s announcement was meant to bolster his political
13 standing and was divorced from any consideration of military needs. (*Id.* ¶¶ 103-06, 110-11.)

14 After this lawsuit and four related suits were filed, the DoD began developing a “plan to
15 implement the policy and directives in the Presidential Memorandum.” (Dkt. No. 587, Ex. 9
16 (“Mattis Memorandum”); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017); *Stone v.*
17 *Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017); *Stockman v. Trump*, No. EDCV 17-1799 JGB
18 (KKx), 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017). One of the central questions the
19 Court must evaluate is whether the resultant policy was “dictated” by the President and therefore
20 “preordained,” or whether it is the product of independent military judgment, separate and apart
21 from the President’s Tweet. *Karnoski v. Trump*, 926 F.3d 1180, 1201-02 (9th Cir. 2019); (*See,*
22 *e.g.*, Dkt. No. 575 at 10, Ex. E at 17; Dkt. No. 587 at 12-36.)

23
24
Add. 2

1 On September 14, 2017, the same day Plaintiffs filed their Motion for a Preliminary
2 Injunction, Secretary Mattis promised to “present the President with a plan to implement the
3 policy and directives in the Presidential Memorandum” no later than February 21, 2018 and
4 issued “Interim Guidance” providing that the pre-2016 policies prohibiting the accession of
5 transgender individuals into the military would remain in effect. Secretary Mattis directed
6 General Paul Selva, then the Vice Chair of the Joint Chiefs of Staff (“VCJCS”) and the Deputy
7 Secretary of Defense Patrick Shanahan “to lead the Department of Defense (DoD) in developing
8 an Implementation Plan on military service by transgender individuals, to effect the policy and
9 directives in Presidential Memorandum[.]” (Dkt. No. 587, Ex. 11 at 1.) General Selva and
10 Deputy Secretary Shanahan would be supported by a panel of experts comprised of the “Military
11 Department Under Secretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors,” who
12 reported directly to them. (Id.) The Panel held its first meeting on October 13, 2017.

13 On December 15, 2017 the Panel presented its Final Report to General Selva and Deputy
14 Secretary Shanahan. (Dkt. No. 577 at 16.) One observer to the briefing later wrote to the
15 Secretary of the Navy:

16 General Selva doesn’t believe SECDEF can defend the recommendations on the Hill or
17 before the press. [Deputy Secretary Shanahan] believes that given the competitive
18 economy we need to compete for all people who can do the job and we need to be clear
19 on the standards we expect – if you can meet them, regardless of what class of person you
20 identify with, then you should be acceptable for military service.

21 (Id. (citing id., Ex. No. 2 at 1.)) The Panel’s recommendation was rejected. Due to decisions
22 made by the four subpoenaed witnesses and the Parties’ long-standing discovery dispute, the
23 process that followed is particularly opaque.

24 After the Panel’s recommendations were rejected, the Panel met four more times without
recording any meeting minutes. (Dkt. No. 576, Ex. 14.) Then on January 11, 2018, the

1 Undersecretary of Defense for Personnel and Readiness, Robert Wilkie, conveyed a one-and-a-
2 half-page memorandum to Secretary Mattis that once again included the Panel's
3 recommendations, which were identical to the recommendations that were previously rejected.
4 (See, e.g., Dkt. No. 576, Ex. 20 at 1.) A month later, on February 22, 2018, the DoD issued a
5 44-page anonymous Report and Recommendation. In response to a discovery request,
6 Defendants have now provided Plaintiffs with a list of the 53 individuals who took part in
7 drafting the Report. (Dkt. No. 576, Ex. 13 at 11-13.) This list includes 25 Department of Justice
8 lawyers, two of whom have entered appearances in this case. (Id.; Dkt. No. 96)

9 Other than the basic framework described above, Plaintiffs have little insight into the
10 decision to delay implementation of the Carter policy, the initial rejection of the Panel's
11 recommendations, the Panel's final four meetings, the decision-making process about what data
12 was provided to the Panel, or the process used in drafting the Report and Recommendation.
13 (See, e.g., Dkt. No. 594 at 13-17.) In large part, this is due to the Parties' years-long discovery
14 dispute and Defendants' pending mandamus petition that seeks relief from the Court's Order
15 requiring production of documents or communications relating to "Secretary of Defense Ash
16 Carter's Directive Type Memo 16-005," and "Documents or Communications relating or
17 referring to the February 2018 Department of Defense Report and Recommendations." (Dkt.
18 No. 398 at 2-3; Dkt. No. 402 at 34:19-20.) Plaintiffs therefore seek to depose General Paul J.
19 Selva, Secretary Robert Wilkie Jr., Secretary James N. Mattis, and Admiral William F. Moran,
20 third-party witnesses who were personally involved in the decision to delay implementation of
21 the Carter Policy, oversaw or served on the Panel, or worked on the DoD's Report and
22 Recommendation. Defendants have moved to quash the subpoenas of these witnesses based on
23 the apex doctrine.

24
Add. 4

Discussion

Under the judicially created apex doctrine “[h]eads of government agencies are not normally subject to deposition,” especially where the information sought can be obtained through another witness or method. Kyle Eng’g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); See also Jay E. Grenig, Jeffrey S. Kinsler Handbk. Fed. Civ. Disc. & Disclosure, § 1:70.50 (4th ed.).

The need for controlling the use of subpoenas against high-ranking government officials was first recognized by the Supreme Court in United States v. Morgan, 313 U.S. 409, 421-22 (1941), where the Court held that allowing the Secretary of Agriculture’s deposition interfered with the independence of the administrative process. Since Morgan, the apex doctrine has been applied widely to protect the time and decision-making processes of high-ranking government officials. See, e.g., In re U.S., 197 F.3d 310, 314 (8th Cir. 1999); In re United States (Kessler), 985 F.2d 510, 512 (11th Cir.1993) (per curiam); In Re Office of Inspector General, 933 F.2d 276, 278 (5th Cir.1991); Simplex Time Recorder Co. v.. Secretary of Labor, 766 F.2d 575, 586 (D.C.Cir.1985).

Further, “the general rule prohibiting depositions of high-ranking government officials also applies to former high-ranking officials.” Thomas v. Cate, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010), order clarified, No. 1:05CV01198LJOJMDHC, 2010 WL 797019 (E.D. Cal. Mar. 5, 2010). “Subjecting former officials decision-making processes to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a significant deterrent to qualified candidates for public service.” United States v. Wal-Mart Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002) (“If the

1 immunity Morgan affords is to have any meaning, the protections must continue upon the
2 official's departure from public service.”).

3 In sum, “Morgan has come to stand for the notion that as for high-ranking government
4 officials, their thought processes and discretionary acts will not be subject to later inspection
5 under the spotlight of deposition. Decision-makers enjoy a mental process privilege.” United
6 States v. Wal-Mart Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301, at *1 (D. Md. Mar.
7 29, 2002). “But this limitation is not absolute.” Bogan v. City of Bos., 489 F.3d 417, 423 (1st
8 Cir. 2007). The courts will require the high-ranking official to submit to deposition in litigation
9 not specifically directed at his conduct if: 1) extraordinary circumstances are shown; or 2) the
10 official is personally involved with the matter in a material way. United States v. Wal-Mart
11 Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002).

12 In each of their four motions, Defendants argue that: (1) depositions are especially
13 inappropriate in this case given the deference owed to military judgments, (2) the information
14 Plaintiffs seek is privileged, and (3) Plaintiffs cannot establish exceptional circumstances justify
15 taking the depositions. (See Dkt. Nos. 575, 580, 585, 592.) The Court addresses each argument
16 in turn.

17 **A. Military Deference**

18 Defendants argue that the rationale for the apex doctrine applies with particular force in
19 the military setting, where “[t]he Supreme Court has recognized that ‘[o]rderly government
20 requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the
21 Army must be scrupulous not to intervene in judicial matters.’” (See, e.g., Dkt. No. 575 at 21
22 (quoting Rostker v. Goldberg, 453 U.S. 57, 71 (1981)). According to Defendants, “even
23 testimony that ‘contradict[s]’ the reasons behind a military policy would be ‘quite beside the
24

1 point,' so long as the policy had been 'decided by the appropriate military officials' in 'their
2 considered professional judgment.'" Goldman v. Weinberger, 475 U.S. 503, 509. But
3 Defendants' argument highlights the very reason Plaintiffs are seeking to depose these four
4 witnesses: to determine whether the policy has been decided by the appropriate military officials.
5 (See, e.g., Dkt. No. 582 at 7.)

6 Additionally, while the Court is required to apply "appropriate military deference to its
7 evaluation of the 2018 Policy," "deference does not mean abdication" and "Defendants bear the
8 burden of establishing that they reasonably determined the policy 'significantly furthers' the
9 government's important interests, and that is not a trivial burden." Karnoski v. Trump, 926 F.3d
10 1180, 1202 (9th Cir. 2019) (quoting Witt, 527 F.3d at 821). Further, Plaintiffs are permitted to
11 "present evidence to support their theory that 'the 2018 Policy was nothing more than an
12 implementation of the 2017 Memorandum, or that the review that produced the 2018 Policy was
13 limited to this purpose.'" Id. Thus, even where Defendants are entitled to deference, Plaintiffs
14 must be permitted to obtain evidence in support of their theory through the discovery process,
15 including through the depositions of relevant witnesses.

16 **B. Privileged Information**

17 Defendants next argue that the subpoenas should be quashed because any information
18 that Plaintiffs seek regarding deliberations outside of the Panel's development of the policy are
19 protected by the deliberative process privilege and questions about communications with the
20 President are subject to the presidential communications privilege. (See, e.g., Dkt. No. 585 at
21 27-29.) As Plaintiffs note, Defendants cite no authority allowing a court to quash a deposition
22 because some yet-unasked questions may draw a privilege objection. (See Dkt. No. 594 at 8.)
23 The Court therefore finds Defendants privilege concerns are premature.

24 **Add. 7**

C. Extraordinary Circumstances

Finally, Defendants argue that Plaintiffs have failed to demonstrate that extraordinary circumstances justify the depositions of high-ranking government officials in this matter. (See, e.g. Dkt. No. 585 at 23-27.) To demonstrate that exceptional circumstances justify deposing a current or former high-ranking government official, a party must demonstrate “the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means.” Lederman v. New York City Dep’t of Parks & Recreation, 731 F.3d 199, 203 (2d Cir. 2013). “Generally, the depositions of former government officials are granted where the official has been personally involved in the events at issue in the case.” Toussie v. County of Suffolk, No. 05–1814, 2006 WL 1982687, at *2 (E.D.N.Y. July 13, 2006) (citing Gibson v. New York Police Officer Carmody, 1991 WL 161087, at *1 (S.D.N.Y. Aug. 14, 1991)). For the reasons discussed below, the Court finds that Plaintiffs have demonstrated that each witness has been personally involved in the events at issue in this case and that the necessary information cannot be obtained through other means.

1. General Selva

General Selva is the only current or former member of the Joint Chiefs that Plaintiffs plan to depose. He was personally involved in the decision to delay implementation of the Carter Policy and was responsible for overseeing the Panel of Experts. Plaintiffs intend to question General Selva about his alleged recommendation that the Carter Policy be delayed and why he later raised an unspecified “Question/Concern” about the delay in a meeting with military leadership. (Dkt. No. 577 at 25, Ex. 37.) The reasons for the delay are material to assessing Defendants’ assertion that prior to the President’s Tweet, Secretary Mattis found it “necessary to defer” the Carter accession standards “so that the military could ‘evaluate more carefully’ the

1 effect of accessions by transgender individuals ‘on readiness and lethality.’” (Dkt. No. 575 at
2 10.)

3 Plaintiffs also seek to understand the guidance and boundaries General Selva provided to
4 the Panel, which reported directly to him. (Dkt. No. 18 at 27; citing id. Ex. 40 at 3 (email
5 explaining that General Selva expects “all members of the panel to be knowledgeable on the
6 President’s TG guidance memo.”) General Selva also has first-hand knowledge about the
7 reasons the Panel’s recommendations were initially rejected, and the subsequent decision to not
8 document the Panel’s reconvened meetings. (Dkt. No. 19 at 29.)

9 Defendants contend that Plaintiffs can obtain this information from the materials
10 Defendants have already produced in discovery or by taking the depositions of Anthony Kurta,
11 the former Deputy Assistant Secretary of Defense for Military Personnel Policy, or Lernes
12 Hebert, who followed Mr. Kurta as Deputy Assistant. (Dkt. No. 575 at 27-30.) First, as
13 discussed infra, Defendants have not produced materials that answer Plaintiffs questions.
14 Defendants have produced no minutes for the last four meetings and Plaintiffs have provided
15 evidence that at least one member of the Panel complained that the minutes that do exist are
16 incomplete and inaccurate. (See Dkt. No. 577 at 14-15, Ex. 15 at 2-3 (Panel member Thomas
17 Dee writing “for this panel to be credible, the minutes need to reflect the objectivity of our
18 analysis. Current version of the minutes doesn’t seem to do that”). Neither Mr. Kurta nor Mr.
19 Hebert can address General Selva’s role in delaying the Carter Policy or the role the President’s
20 order and directives played in General Selva’s decision to reject the Panel’s “Final Report.”

21 2. Secretary Wilkie

22 As the Under Secretary of Defense for Personnel and Readiness, Secretary Wilkie
23 chaired the final six meetings of the Panel, “signed the transmittal memorandum of the Panel’s
24

1 recommendations to the Secretary of Defense, and briefed then-Secretary Mattis on the Panel’s
2 findings.” (Dkt. No. 580 at 29.) After General Selva’s and Mr. Shanahan’s rejection of the
3 Panel’s initial recommendations, Mr. Wilkie created a schedule with due dates for
4 “deliverables,” that appear to address General Selva’s and Mr. Shanahan’s concerns. (Id., Ex.
5 Nos. 2, 21.) Secretary Wilkie was also one of three former members or chairs of the Panel who
6 assisted in drafting the DoD Report. (Dkt. No. 580, Ex. 13 at 10-12.)

7 Plaintiffs intend to question Mr. Wilkie about circumstances outside the Panel’s official
8 documented meetings, “most importantly during the critical time period between General Selva
9 and Mr. Shanahan’s rejection of the Panel’s Final Report on December 15, 2017, the preparation
10 of the Wilkie Memorandum on January 11, 2018, and the development of the February 2018
11 DoD Report and Mattis Memorandum.” (Dkt. No. 582 at 25.) Plaintiffs will also question Mr.
12 Wilkie about his role controlling the flow of information to and from the Panel and his efforts to
13 collect evidence supporting the policy on his own, without Panel involvement. (Id. at 26, 28; Ex.
14 Nos. 38-39, 42.) Through this questioning, Plaintiffs seek to rebut “Defendants’ claim that the
15 Panel—and not political appointees like Mr. Wilkie—was the driving force behind the Mattis
16 Policy.” (Id.)

17 Defendants contend that Mr. Kurta, Mr. Wilkie’s predecessor would provide
18 “substantially similar or superior expertise and information regarding the development of the
19 challenged policy.” (Dkt. No. 580 at 30.) Defendants also suggest that Plaintiffs can obtain
20 similar information from Lernes J. Hebert, who facilitated the Panel’s deliberations at each of the
21 meetings Mr. Wilkie chaired. (Id. at 31.) But neither Mr. Kurta nor Mr. Hebert can address Mr.
22 Wilkie’s actions in re-convening the Panel to address Mr. Selva’s and Mr. Shanahan’s concerns,
23 collecting additional support for the Panel’s findings, and drafting the DoD Report.

1 3. Secretary Mattis

2 Plaintiffs seek to depose Secretary Mattis about the central issue in this case: whether the
3 “Mattis Policy” was the result of Secretary Mattis following the orders of his
4 Commander-in-Chief or the military’s exercise of “independent judgment.” (Dkt. No. 587 at
5 25.) Plaintiffs will ask Secretary Mattis about his role in drafting the Mattis Memorandum and
6 the DoD Report, the extent to which he obtained input from the Panel, whether he sought
7 information from sources outside the Panel, and whether he was instructed to obtain particular
8 information that was absent from the Panel’s Final Report. (Id. at 29.) Secretary Mattis played a
9 central role in each of the key events in this case and his testimony is necessary for completing
10 the record and evaluating the Parties’ arguments.

11 Defendants argue that Plaintiffs have failed to make a clear showing of “bad faith or
12 improper behavior,” which is required before they may probe Secretary Mattis’s mental
13 processes. (Dkt. No. 585 at 24.) First, Plaintiffs’ proposed questions concern the facts
14 surrounding the creation of the Mattis Policy, and as Plaintiffs note, Secretary Mattis’s mental
15 processes are irrelevant to Plaintiffs’ claims.

16 Second, Plaintiffs have made the prerequisite showing of bad faith. The Ninth Circuit
17 has already determined that the Mattis Policy “discriminates on the basis of transgender status on
18 its face.” Karnoski, 926 F.3d at 1201 n.18. Further, Plaintiffs point to evidence that Secretary
19 Mattis’s decision-making process may have been influenced by animus, noting his interest in
20 contacting anti-transgender rights advocates, and his email correspondence with a former
21 colleague, discussing the “psychological” problems of transgender persons. (Dkt. No. 585 at 32,
22 Ex. 25 at 5.) In a note to himself, Secretary Mattis listed several anti-transgender advocates he
23 was interested in speaking with, writing that they are “[a]uthoritative people, who defy PC
24

1 doctrine,” while acknowledging that speaking with them would appear inappropriate: “[I] can’t
2 talk to them, but perhaps someone trustworthy can.” (Dkt. No. 587, Ex. 40.) Indeed, Secretary
3 Mattis’s special assistant contacted these advocates to solicit their input after the Panel
4 completed its work. (Id. at 32.)

5 4. Admiral Moran

6 Retired Admiral William Moran is one of only two voting members of that 17-member
7 Panel that Plaintiffs seek to depose. Plaintiffs allege that Admiral Moran was the only voting
8 member who also served on the prior Working Group appointed by Secretary Carter, which only
9 a year before had recommended transgender persons be permitted to serve openly. (Dkt. No. 14
10 at 7; Dkt. No. 2, Ex. E, Declaration of William F. Moran (“Moran Decl.”), ¶ 6.) He attended
11 seven of the thirteen Panel Meetings, where he “listen[ed] to the presentation of data and
12 testimony from a variety of sources” and “took part in the Panel’s deliberations and voted on a
13 number of recommendations concerning the military’s policy regarding service by transgender
14 individuals.” (Moran Decl., ¶¶ 7-8.)

15 Further, Admiral Moran expressed concerns that the ban on transgender persons serving
16 in the military was not supported by evidence, writing that “[t]he panel is unanimous in the
17 opinion that the data” presented to it was “so poor that it is nearly impossible to take a purely
18 analytic approach.” (Dkt. No. 594, Ex. 30.) To this end, in a December 18, 2017 email to Panel
19 members, Admiral Moran proposed several questions seeking data that might show whether the
20 ban on transgender persons serving in the military was supported by military interests. (Id.)
21 Plaintiffs intend to ask Admiral Moran whether this data was gathered, and if it was, why it was
22 not cited in the DoD Report. (Id. at 24.)
23
24

1 While Defendants assert that Admiral Moran’s testimony is unnecessary because
2 Defendants have agreed to allow depositions of another voting Panel member, Thomas Dee, and
3 the Panel chair, Anthony Kurta, these witnesses were not on the Carter working group and
4 therefore cannot compare the development of the Carter and Mattis Policies. Further, Mr. Dee
5 and Mr. Kurta cannot speak to Admiral Moran’s concerns about the data underlying the Mattis
6 Policy. The Court finds that Admiral Moran “has unique first-hand knowledge related to the
7 litigated claims” which cannot be obtained from other sources. Lederman, 731 F.3d at 203.

8 **Conclusion**

9 In conclusion, the Court finds that Plaintiffs have demonstrated that extraordinary
10 circumstances justify the depositions of third-party witnesses General Paul J. Selva, Secretary
11 Robert Wilkie Jr., Secretary James N. Mattis, and Admiral William F. Moran. The Court
12 therefore DENIES Defendants’ motions to quash.

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

15 Dated September 14, 2020.

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17 Marsha J. Pechman
18 United States Senior District Judge

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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 AMENDING SEPTEMBER
2, 2020 ORDER (DKT. NO. 596)

THIS MATTER comes before the Court upon the Government’s Motion to Stay Pending
Disposition of Mandamus Petitions (Dkt. No. 601) and the Court’s determination that its
September 2, 2020 Order contains an error (Dkt. No. 596). As noted in the Government’s
Motion, the Order incorrectly includes former Secretary of Defense James Mattis in a list of
attendees at a December meeting. (See Dkt. No. 601 at 8 n.4.) The Court has corrected the error
and two other citation errors on page three of its Order. A corrected Order is attached as Exhibit

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

Dated September 14, 2020.



Marsha J. Pechman
United States Senior District Judge

Add. 15

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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 DENYING MOTION TO
QUASH THIRD-PARTY
SUBPOENAS ISSUED TO
GENERAL PAUL J. SELVA (DKT.
NO. 556)

SECRETARY ROBERT WILKIE
JR. (DKT. NO. 557);

SECRETARY JAMES N. MATTIS
(DKT. NO. 558);

ADMIRAL WILLIAM F. MORAN
(DKT. NO. 591)

THIS MATTER comes before the Court on Defendants’ motions to quash third-party subpoenas issued to General Paul J. Selva (Dkt. No. 556), Secretary Robert Wilkie Jr. (Dkt. No. 557), Secretary James N. Mattis (Dkt. No. 558), and Admiral William F. Moran (Dkt. No. 591). Having reviewed the Motions, the Responses (Dkt. Nos. 577, 582, 587, 594), the Replies (Dkt. Nos. 578, 584, 589, 595), and the related record, the Court DENIES the Motions.

Background

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2 Plaintiffs filed this action on August 28, 2017, following President Trump’s July 2017
3 tweet announcing that transgender individuals would not be allowed to serve in the military and
4 the President’s August 2017 Memorandum implementing that announcement. The President’s
5 announcement reversed the year-old policy announced by then-Secretary of Defense Ashton
6 Carter allowing transgender individuals to serve openly in the military.

7 In their initial complaint, Plaintiffs alleged that President Trump made his announcement
8 without engaging in “any meaningful study, deliberation, or consultation with key military
9 officials,” providing then-Secretary of Defense James N. Mattis with only one day’s notice of the
10 decision and making his announcement while the Secretary was on vacation. (Dkt. No. 1
11 (“Compl.”) ¶ 102.) Pointing to several statements from the President’s political advisors,
12 Plaintiffs also alleged that the President’s announcement was meant to bolster his political
13 standing and was divorced from any consideration of military needs. (*Id.* ¶¶ 103-06, 110-11.)

14 After this lawsuit and four related suits were filed, the DoD began developing a “plan to
15 implement the policy and directives in the Presidential Memorandum.” (Dkt. No. 587, Ex. 9
16 (“Mattis Memorandum”); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017); *Stone v.*
17 *Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017); *Stockman v. Trump*, No. EDCV 17-1799 JGB
18 (KKx), 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017). One of the central questions the
19 Court must evaluate is whether the resultant policy was “dictated” by the President and therefore
20 “preordained,” or whether it is the product of independent military judgment, separate and apart
21 from the President’s Tweet. *Karnoski v. Trump*, 926 F.3d 1180, 1201-02 (9th Cir. 2019); (*See,*
22 *e.g.*, Dkt. No. 575 at 10, Ex. E at 17; Dkt. No. 587 at 12-36.)

1 On September 14, 2017, the same day Plaintiffs filed their Motion for a Preliminary
2 Injunction, Secretary Mattis promised to “present the President with a plan to implement the
3 policy and directives in the Presidential Memorandum” no later than February 21, 2018 and
4 issued “Interim Guidance” providing that the pre-2016 policies prohibiting the accession of
5 transgender individuals into the military would remain in effect. Secretary Mattis directed
6 General Paul Selva, then the Vice Chair of the Joint Chiefs of Staff (“VCJCS”) and the Deputy
7 Secretary of Defense Patrick Shanahan “to lead the Department of Defense (DoD) in developing
8 an Implementation Plan on military service by transgender individuals, to effect the policy and
9 directives in Presidential Memorandum[.]” (Dkt. No. 587, Ex. 11 at 1.) General Selva and
10 Deputy Secretary Shanahan would be supported by a panel of experts comprised of the “Military
11 Department Under Secretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors,” who
12 reported directly to them. (Id.) The Panel held its first meeting on October 13, 2017.

13 On December 13, 2017 the Panel presented its Final Report to General Selva, Deputy
14 Secretary Shanahan, and Secretary Mattis. (Dkt. No. 19 at 2.) One observer to the briefing later
15 wrote to the Secretary of the Navy:

16 General Selva doesn’t believe SECDEF can defend the recommendations on the Hill or
17 before the press. [Deputy Secretary Shanahan] believes that given the competitive
18 economy we need to compete for all people who can do the job and we need to be clear
19 on the standards we expect – if you can meet them, regardless of what class of person you
20 identify with, then you should be acceptable for military service.

19 (Dkt. No. 19 at 2.) The Panel’s recommendation was rejected. Due to decisions made by the
20 four subpoenaed witnesses and the Parties’ long-standing discovery dispute, the process that
21 followed is particularly opaque.

22 After the Panel’s recommendations were rejected, the Panel met four more times without
23 recording any meeting minutes. (Dkt. No. 18, Ex. 14.) Then on January 11, 2018, the
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1 Undersecretary of Defense for Personnel and Readiness, Robert Wilkie, conveyed a one-and-a-
2 half-page memorandum to Secretary Mattis that once again included the Panel's
3 recommendations, which were identical to the recommendations that were previously rejected.
4 (See, e.g., Dkt. No. 576, Ex. 20 at 1.) A month later, on February 22, 2018, the DoD issued a 44-
5 page anonymous Report and Recommendation. In response to a discovery request, Defendants
6 have now provided Plaintiffs with a list of the 53 individuals who took part in drafting the
7 Report. (Dkt. No. 576, Ex. 13 at 11-13.) This list includes 25 Department of Justice lawyers,
8 two of whom have entered appearances in this case. (Id.; Dkt. No. 96)

9 Other than the basic framework described above, Plaintiffs have little insight into the
10 decision to delay implementation of the Carter policy, the initial rejection of the Panel's
11 recommendations, the Panel's final four meetings, the decision-making process about what data
12 was provided to the Panel, or the process used in drafting the Report and Recommendation.
13 (See, e.g., Dkt. No. 594 at 13-17.) In large part, this is due to the Parties' years-long discovery
14 dispute and Defendants' pending mandamus petition that seeks relief from the Court's Order
15 requiring production of "Documents or Communications relating to Secretary of Defense Ash
16 Carter's Directive Type Memo 16-005," and "Documents or Communications relating or
17 referring to the February 2018 Department of Defense Report and Recommendations." (Dkt.
18 No. 398 at 2-3; Dkt. No. 402 at 34:19-20.) Plaintiffs therefore seek to depose General Paul J.
19 Selva, Secretary Robert Wilkie Jr., Secretary James N. Mattis, and Admiral William F. Moran,
20 third-party witnesses who were personally involved in the decision to delay implementation of
21 the Carter Policy, oversaw or served on the Panel, or worked on the DoD's Report and
22 Recommendation. Defendants have moved to quash the subpoenas of these witnesses based on
23 the apex doctrine.

Discussion

Under the judicially created apex doctrine “[h]eads of government agencies are not normally subject to deposition,” especially where the information sought can be obtained through another witness or method. Kyle Eng’g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979); See also Jay E. Grenig, Jeffrey S. Kinsler Handbk. Fed. Civ. Disc. & Disclosure, § 1:70.50 (4th ed.).

The need for controlling the use of subpoenas against high-ranking government officials was first recognized by the Supreme Court in United States v. Morgan, 313 U.S. 409, 421-22 (1941), where the Court held that allowing the Secretary of Agriculture’s deposition interfered with the independence of the administrative process. Since Morgan, the apex doctrine has been applied widely to protect the time and decision-making processes of high-ranking government officials. See, e.g., In re U.S., 197 F.3d 310, 314 (8th Cir. 1999); In re United States (Kessler), 985 F.2d 510, 512 (11th Cir.1993) (per curiam); In Re Office of Inspector General, 933 F.2d 276, 278 (5th Cir.1991); Simplex Time Recorder Co. v.. Secretary of Labor, 766 F.2d 575, 586 (D.C.Cir.1985).

Further, “the general rule prohibiting depositions of high-ranking government officials also applies to former high-ranking officials.” Thomas v. Cate, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010), order clarified, No. 1:05CV01198LJOJMDHC, 2010 WL 797019 (E.D. Cal. Mar. 5, 2010). “Subjecting former officials decision-making processes to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a significant deterrent to qualified candidates for public service.” United States v. Wal-Mart Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002) (“If the

1 immunity Morgan affords is to have any meaning, the protections must continue upon the
2 official's departure from public service.”).

3 In sum, “Morgan has come to stand for the notion that as for high-ranking government
4 officials, their thought processes and discretionary acts will not be subject to later inspection
5 under the spotlight of deposition. Decision-makers enjoy a mental process privilege.” United
6 States v. Wal-Mart Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301, at *1 (D. Md. Mar.
7 29, 2002). “But this limitation is not absolute.” Bogan v. City of Bos., 489 F.3d 417, 423 (1st
8 Cir. 2007). The courts will require the high-ranking official to submit to deposition in litigation
9 not specifically directed at his conduct if: 1) extraordinary circumstances are shown; or 2) the
10 official is personally involved with the matter in a material way. United States v. Wal-Mart
11 Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002).

12 In each of their four motions, Defendants argue that: (1) depositions are especially
13 inappropriate in this case given the deference owed to military judgments, (2) the information
14 Plaintiffs seek is privileged, and (3) Plaintiffs cannot establish exceptional circumstances justify
15 taking the depositions. (See Dkt. Nos. 575, 580, 585, 592.) The Court addresses each argument
16 in turn.

17 **A. Military Deference**

18 Defendants argue that the rationale for the apex doctrine applies with particular force in
19 the military setting, where “[t]he Supreme Court has recognized that ‘[o]rderly government
20 requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the
21 Army must be scrupulous not to intervene in judicial matters.’” (See, e.g., Dkt. No. 575 at 21
22 (quoting Rostker v. Goldberg, 453 U.S. 57, 71 (1981)). According to Defendants, “even
23 testimony that ‘contradict[s]’ the reasons behind a military policy would be ‘quite beside the
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1 point,' so long as the policy had been 'decided by the appropriate military officials' in 'their
2 considered professional judgment.'" Goldman v. Weinberger, 475 U.S. 503, 509. But
3 Defendants' argument highlights the very reason Plaintiffs are seeking to depose these four
4 witnesses: to determine whether the policy has been decided by the appropriate military officials.
5 (See, e.g., Dkt. No. 582 at 7.)

6 Additionally, while the Court is required to apply "appropriate military deference to its
7 evaluation of the 2018 Policy," "deference does not mean abdication" and "Defendants bear the
8 burden of establishing that they reasonably determined the policy 'significantly furthers' the
9 government's important interests, and that is not a trivial burden." Karnoski v. Trump, 926 F.3d
10 1180, 1202 (9th Cir. 2019) (quoting Witt, 527 F.3d at 821). Further, Plaintiffs are permitted to
11 "present evidence to support their theory that 'the 2018 Policy was nothing more than an
12 implementation of the 2017 Memorandum, or that the review that produced the 2018 Policy was
13 limited to this purpose.'" Id. Thus, even where Defendants are entitled to deference, Plaintiffs
14 must be permitted to obtain evidence in support of their theory through the discovery process,
15 including through the depositions of relevant witnesses.

16 **B. Privileged Information**

17 Defendants next argue that the subpoenas should be quashed because any information
18 that Plaintiffs seek regarding deliberations outside of the Panel's development of the policy are
19 protected by the deliberative process privilege and questions about communications with the
20 President are subject to the presidential communications privilege. (See, e.g., Dkt. No. 585 at
21 27-29.) As Plaintiffs note, Defendants cite no authority allowing a court to quash a deposition
22 because some yet-unasked questions may draw a privilege objection. (See Dkt. No. 594 at 8.)
23 The Court therefore finds Defendants privilege concerns are premature.

1 C. Extraordinary Circumstances

2 Finally, Defendants argue that Plaintiffs have failed to demonstrate that extraordinary
3 circumstances justify the depositions of high-ranking government officials in this matter. (See,
4 e.g. Dkt. No. 585 at 23-27.) To demonstrate that exceptional circumstances justify deposing a
5 current or former high-ranking government official, a party must demonstrate “the official has
6 unique first-hand knowledge related to the litigated claims or that the necessary information
7 cannot be obtained through other, less burdensome or intrusive means.” Lederman v. New York
8 City Dep’t of Parks & Recreation, 731 F.3d 199, 203 (2d Cir. 2013). “Generally, the depositions
9 of former government officials are granted where the official has been personally involved in the
10 events at issue in the case.” Toussie v. County of Suffolk, No. 05–1814, 2006 WL 1982687, at
11 *2 (E.D.N.Y. July 13, 2006) (citing Gibson v. New York Police Officer Carmody, 1991 WL
12 161087, at *1 (S.D.N.Y. Aug. 14, 1991)). For the reasons discussed below, the Court finds that
13 Plaintiffs have demonstrated that each witness has been personally involved in the events at issue
14 in this case and that the necessary information cannot be obtained through other means.

15 1. General Selva

16 General Selva is the only current or former member of the Joint Chiefs that Plaintiffs plan
17 to depose. He was personally involved in the decision to delay implementation of the Carter
18 Policy and was responsible for overseeing the Panel of Experts. Plaintiffs intend to question
19 General Selva about his alleged recommendation that the Carter Policy be delayed and why he
20 later raised an unspecified “Question/Concern” about the delay in a meeting with military
21 leadership. (Dkt. No. 577 at 25, Ex. 37.) The reasons for the delay are material to assessing
22 Defendants’ assertion that prior to the President’s Tweet, Secretary Mattis found it “necessary to
23 defer” the Carter accession standards “so that the military could ‘evaluate more carefully’ the
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1 effect of accessions by transgender individuals ‘on readiness and lethality.’” (Dkt. No. 575 at
2 10.)

3 Plaintiffs also seek to understand the guidance and boundaries General Selva provided to
4 the Panel, which reported directly to him. (Dkt. No. 18 at 27; citing id. Ex. 40 at 3 (email
5 explaining that General Selva expects “all members of the panel to be knowledgeable on the
6 President’s TG guidance memo.”) General Selva also has first-hand knowledge about the
7 reasons the Panel’s recommendations were initially rejected, and the subsequent decision to not
8 document the Panel’s reconvened meetings. (Dkt. No. 19 at 29.)

9 Defendants contend that Plaintiffs can obtain this information from the materials
10 Defendants have already produced in discovery or by taking the depositions of Anthony Kurta,
11 the former Deputy Assistant Secretary of Defense for Military Personnel Policy, or Lernes
12 Hebert, who followed Mr. Kurta as Deputy Assistant. (Dkt. No. 575 at 27-30.) First, as
13 discussed infra, Defendants have not produced materials that answer Plaintiffs questions.
14 Defendants have produced no minutes for the last four meetings and Plaintiffs have provided
15 evidence that at least one member of the Panel complained that the minutes that do exist are
16 incomplete and inaccurate. (See Dkt. No. 577 at 14-15, Ex. 15 at 2-3 (Panel member Thomas
17 Dee writing “for this panel to be credible, the minutes need to reflect the objectivity of our
18 analysis. Current version of the minutes doesn’t seem to do that”). Neither Mr. Kurta nor Mr.
19 Hebert can address General Selva’s role in delaying the Carter Policy or the role the President’s
20 order and directives played in General Selva’s decision to reject the Panel’s “Final Report.”

21 2. Secretary Wilkie

22 As the Under Secretary of Defense for Personnel and Readiness, Secretary Wilkie
23 chaired the final six meetings of the Panel, “signed the transmittal memorandum of the Panel’s
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1 recommendations to the Secretary of Defense, and briefed then-Secretary Mattis on the Panel’s
2 findings.” (Dkt. No. 580 at 29.) After General Selva’s and Mr. Shanahan’s rejection of the
3 Panel’s initial recommendations, Mr. Wilkie created a schedule with due dates for
4 “deliverables,” that appear to address General Selva’s and Mr. Shanahan’s concerns. (Id., Ex.
5 Nos. 2, 21.) Secretary Wilkie was also one of three former members or chairs of the Panel who
6 assisted in drafting the DoD Report. (Dkt. No. 580, Ex. 13 at 10-12.)

7 Plaintiffs intend to question Mr. Wilkie about circumstances outside the Panel’s official
8 documented meetings, “most importantly during the critical time period between General Selva
9 and Mr. Shanahan’s rejection of the Panel’s Final Report on December 15, 2017, the preparation
10 of the Wilkie Memorandum on January 11, 2018, and the development of the February 2018
11 DoD Report and Mattis Memorandum.” (Dkt. No. 582 at 25.) Plaintiffs will also question Mr.
12 Wilkie about his role controlling the flow of information to and from the Panel and his efforts to
13 collect evidence supporting the policy on his own, without Panel involvement. (Id. at 26, 28; Ex.
14 Nos. 38-39, 42.) Through this questioning, Plaintiffs seek to rebut “Defendants’ claim that the
15 Panel—and not political appointees like Mr. Wilkie—was the driving force behind the Mattis
16 Policy.” (Id.)

17 Defendants contend that Mr. Kurta, Mr. Wilkie’s predecessor would provide
18 “substantially similar or superior expertise and information regarding the development of the
19 challenged policy.” (Dkt. No. 580 at 30.) Defendants also suggest that Plaintiffs can obtain
20 similar information from Lernes J. Hebert, who facilitated the Panel’s deliberations at each of the
21 meetings Mr. Wilkie chaired. (Id. at 31.) But neither Mr. Kurta nor Mr. Hebert can address Mr.
22 Wilkie’s actions in re-convening the Panel to address Mr. Selva’s and Mr. Shanahan’s concerns,
23 collecting additional support for the Panel’s findings, and drafting the DoD Report.

1 3. Secretary Mattis

2 Plaintiffs seek to depose Secretary Mattis about the central issue in this case: whether the
3 “Mattis Policy” was the result of Secretary Mattis following the orders of his
4 Commander-in-Chief or the military’s exercise of “independent judgment.” (Dkt. No. 587 at
5 25.) Plaintiffs will ask Secretary Mattis about his role in drafting the Mattis Memorandum and
6 the DoD Report, the extent to which he obtained input from the Panel, whether he sought
7 information from sources outside the Panel, and whether he was instructed to obtain particular
8 information that was absent from the Panel’s Final Report. (Id. at 29.) Secretary Mattis played a
9 central role in each of the key events in this case and his testimony is necessary for completing
10 the record and evaluating the Parties’ arguments.

11 Defendants argue that Plaintiffs have failed to make a clear showing of “bad faith or
12 improper behavior,” which is required before they may probe Secretary Mattis’s mental
13 processes. (Dkt. No. 585 at 24.) First, Plaintiffs’ proposed questions concern the facts
14 surrounding the creation of the Mattis Policy, and as Plaintiffs note, Secretary Mattis’s mental
15 processes are irrelevant to Plaintiffs’ claims.

16 Second, Plaintiffs have made the prerequisite showing of bad faith. The Ninth Circuit
17 has already determined that the Mattis Policy “discriminates on the basis of transgender status on
18 its face.” Karnoski, 926 F.3d at 1201 n.18. Further, Plaintiffs point to evidence that Secretary
19 Mattis’s decision-making process may have been influenced by animus, noting his interest in
20 contacting anti-transgender rights advocates, and his email correspondence with a former
21 colleague, discussing the “psychological” problems of transgender persons. (Dkt. No. 585 at 32,
22 Ex. 25 at 5.) In a note to himself, Secretary Mattis listed several anti-transgender advocates he
23 was interested in speaking with, writing that they are “[a]uthoritative people, who defy PC
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1 doctrine,” while acknowledging that speaking with them would appear inappropriate: “[I] can’t
2 talk to them, but perhaps someone trustworthy can.” (Dkt. No. 587, Ex. 40.) Indeed, Secretary
3 Mattis’s special assistant contacted these advocates to solicit their input after the Panel
4 completed its work. (Id. at 32.)

5 4. Admiral Moran

6 Retired Admiral William Moran is one of only two voting members of that 17-member
7 Panel that Plaintiffs seek to depose. Plaintiffs allege that Admiral Moran was the only voting
8 member who also served on the prior Working Group appointed by Secretary Carter, which only
9 a year before had recommended transgender persons be permitted to serve openly. (Dkt. No. 14
10 at 7; Dkt. No. 2, Ex. E, Declaration of William F. Moran (“Moran Decl.”), ¶ 6.) He attended
11 seven of the thirteen Panel Meetings, where he “listen[ed] to the presentation of data and
12 testimony from a variety of sources” and “took part in the Panel’s deliberations and voted on a
13 number of recommendations concerning the military’s policy regarding service by transgender
14 individuals.” (Moran Decl., ¶¶ 7-8.)

15 Further, Admiral Moran expressed concerns that the ban on transgender persons serving
16 in the military was not supported by evidence, writing that “[t]he panel is unanimous in the
17 opinion that the data” presented to it was “so poor that it is nearly impossible to take a purely
18 analytic approach.” (Dkt. No. 594, Ex. 30.) To this end, in a December 18, 2017 email to Panel
19 members, Admiral Moran proposed several questions seeking data that might show whether the
20 ban on transgender persons serving in the military was supported by military interests. (Id.)
21 Plaintiffs intend to ask Admiral Moran whether this data was gathered, and if it was, why it was
22 not cited in the DoD Report. (Id. at 24.)
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1 While Defendants assert that Admiral Moran’s testimony is unnecessary because
2 Defendants have agreed to allow depositions of another voting Panel member, Thomas Dee, and
3 the Panel chair, Anthony Kurta, these witnesses were not on the Carter working group and
4 therefore cannot compare the development of the Carter and Mattis Policies. Further, Mr. Dee
5 and Mr. Kurta cannot speak to Admiral Moran’s concerns about the data underlying the Mattis
6 Policy. The Court finds that Admiral Moran “has unique first-hand knowledge related to the
7 litigated claims” which cannot be obtained from other sources. Lederman, 731 F.3d at 203.

8 **Conclusion**

9 In conclusion, the Court finds that Plaintiffs have demonstrated that extraordinary
10 circumstances justify the depositions of third-party witnesses General Paul J. Selva, Secretary
11 Robert Wilkie Jr., Secretary James N. Mattis, and Admiral William F. Moran. The Court
12 therefore DENIES Defendants’ motions to quash.

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

15 Dated September 2, 2020.

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17 Marsha J. Pechman
18 United States Senior District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RYAN KARNOSKI, et al.,)
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Plaintiffs, and)
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STATE OF WASHINGTON,)
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Plaintiff-Intervenor,) No. 2:17-cv-01297-MJP
)
vs.) Seattle, WA
)
DONALD J. TRUMP, in his)
)
official capacity as)
)
President of the United)
)
States, et al.,)
)
) Status Conference (via Zoom)
Defendants.) August 24, 2020
) 9:00 a.m.

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

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Reported by stenotype, transcribed by computer

Karnoski, et al. v. Trump, et al., 8/24/2020

1 THE CLERK: United States District Court for the
2 Western District of Washington is now in session, the Honorable
3 Marsha Pechman presiding.

4 This is the matter of Karnoski, et al. vs. Trump, et al.,
5 Cause Number C17-1297, assigned to this court.

6 Counsel, please make their appearances for the record.

7 MR. HEINZ: This is Jordan Heinz, on behalf of the
8 plaintiffs.

9 MR. SIEGFRIED: Dan Siegfried, on behalf of the
10 plaintiffs.

11 MS. HORVITZ: This is Rachel Horvitz, on behalf of
12 the plaintiffs.

13 MS. BUCHERT: This is Sasha Buchert, on behalf of the
14 plaintiffs.

15 MS. STALLINGS-ALA'ILIMA: Good morning. Chalia
16 Stallings-Ala'ilima, on behalf of the State of Washington.

17 MR. CARMICHAEL: Andrew Carmichael, on behalf of the
18 federal government.

19 THE COURT: Good morning.

20 Go ahead, Mr. Powers.

21 MR. POWERS: Excuse me, Your Honor. Jim Powers, on
22 behalf of the United States as well.

23 THE COURT: Thank you, Mr. Powers.

24 JUDGE DONOHUE: James Donohue, special master, is
25 present.

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1 THE COURT: Counsel, I've had an opportunity to read
2 your joint status report, and so I suggest that we begin to go
3 through the issues that you've identified there for me.

4 So, Mr. Heinz, I'm wondering if you can give me -- you
5 gave me an update of what's still outstanding with the Court
6 right now, and those are the four motions to quash the
7 subpoena. And so I want to tell you that the Court is working
8 on those. I'm hoping that we're going to have some answers for
9 you perhaps in the next week.

10 So can you give me an update as to where this case is on
11 the trial track with the other cases around the country? In
12 other words, what stage are each of them currently at?

13 MR. HEINZ: Sure. And I will also invite counsel for
14 the defendants to correct me, if I'm wrong, as they may be more
15 up to date on all of those cases than me.

16 But so there are three other cases. The *Stockman* case,
17 which is pending in federal court in California, that case has
18 been stayed for quite some time, pending the resolution of the
19 current mandamus petition before the Ninth Circuit. So that
20 case has been on ice for quite some time.

21 The *Stone* case has had a motion pending for many months on
22 the magistrate's decision to order the production of certain
23 deliberative materials, similar to Your Honor's orders. That
24 order was objected to by the federal government, and that still
25 has been pending for some time.

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1 And, finally, the *Doe* case, pending in the District of
2 Columbia, that case has been working through discovery.
3 They've been trying to schedule depositions in that case, and
4 we're trying to coordinate with them. And I believe they've
5 asked for a couple deposition dates in September, although we
6 have informed the *Doe* team that we would prefer waiting on
7 those depositions until the government completes its production
8 pursuant to Your Honor's July 15 order. So we've just told
9 them the same thing that we told you; that we'd rather have the
10 documents before we start depositions. So the *Doe* team has
11 been waiting to take those depositions until we can get those
12 documents in this case.

13 THE COURT: Does the *Doe* case have a trial date?

14 MR. HEINZ: No. To my knowledge, none of the cases
15 have a trial date. And also, none of the cases have a fact
16 discovery close date.

17 THE COURT: All right. Thank you.

18 Mr. Carmichael, is that a correct recitation, from what
19 you understand?

20 MR. CARMICHAEL: Yes, Your Honor, that's correct. I
21 don't -- yeah, there's nothing there that I disagree with.
22 It's all correct.

23 THE COURT: All right. So let's talk a bit about the
24 August 17 letter, Mr. Heinz, that you sent to the defense, and
25 the categories of documents that you are asking for at this

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1 time.

2 What would you like to tell me about that?

3 MR. HEINZ: Your Honor, we sent that letter a week
4 ago, because at the time, we were under the impression that the
5 government was likely to seek a stay of Your Honor's July 15
6 order, at the Ninth Circuit. And so we were pressing forward
7 with three kind of discrete categories of documents, where we
8 felt like there was just no basis to assert the deliberative
9 process privilege.

10 So those categories were, in the two weeks following
11 President Trump's tweet, there are about 250 privilege log
12 entries that appear to just be reacting to the tweets. It's
13 about media coverage, how the government -- or how the
14 Department of Defense is going to respond, all of that, but
15 certainly not deliberative, and definitely not pre-decisional,
16 of course, either. So on both scores, we didn't feel like
17 there was a basis to withhold those.

18 And then the other two categories relate to working groups
19 at the Department of Defense that were discussing how to
20 implement the Carter policy. And so we requested documents
21 regarding those implementation communications, because those do
22 not appear to be pre-decisional or deliberative either.

23 And then in response, the government has told us, in both
24 the joint status report and then also one of the filings at the
25 Ninth Circuit, on Friday, that they are going to comply with

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1 the July 15 order. All of the documents in our letter would
2 fall outside of the presumptive deliberative time frames. So
3 under Your Honor's order, those documents would be produced to
4 plaintiffs this Friday. So I think that moots the letter; all
5 of that assuming that the government is actually going to
6 produce those documents.

7 But as Your Honor knows, the government also has the
8 option of submitting documents in camera for the Court to
9 review. So we don't know whether the government is planning to
10 actually produce anything on Friday, or if instead they intend
11 to provide a mountain of documents to the Court for review.

12 THE COURT: Okay. Mr. Carmichael?

13 MR. CARMICHAEL: Your Honor, we're going through
14 those documents now, and we agree that the current order
15 requires us either to produce them to the plaintiffs and/or
16 produce them to the --

17 THE COURT REPORTER: I'm sorry. Excuse me, Your
18 Honor. I'm sorry.

19 Mr. Carmichael, I'm having a little bit of trouble with
20 what you were saying. There was some interruption. What I
21 have is: Your Honor, we're going through those documents now,
22 and we agree that the current order requires...

23 MR. CARMICHAEL: Okay. I'll take it from there.

24 The current order requires the government either to
25 produce those documents to plaintiffs or to produce them in

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1 camera to the Court, and we're doing that right now. We're
2 sort of sifting through which ones will be produced to
3 plaintiffs and which ones will be produced to the Court.

4 THE COURT: So you've changed your mind about going
5 to the Ninth Circuit at this time.

6 MR. CARMICHAEL: Yes, Your Honor. Yes. Because now
7 that there's an in-process -- or in camera review and the
8 documents are not going to necessarily get released, we're --
9 we don't plan on going to the Ninth Circuit on that order.

10 THE COURT: All right. So tell me about the volume
11 of these documents.

12 MR. CARMICHAEL: We're still trying to go through
13 them right now, but it will be a -- it will be a large volume
14 of documents that we will produce in camera, because we have a
15 large privilege log that covers a lot of them.

16 THE COURT: Okay. When you say "large," are we
17 talking hundreds of documents? Are we talking thousands of
18 documents?

19 MR. CARMICHAEL: Thousands of documents, Your Honor.

20 THE COURT: Okay. And are you producing new
21 privilege logs for each of these?

22 MR. CARMICHAEL: Not for -- well, we're -- we're
23 reviewing our privilege log to make sure. Our privilege log
24 already covered everything, but we're just reviewing it, making
25 sure that there's -- there's no blanks, things are -- are, you

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1 know, properly explained. So there will be a privilege log
2 for -- that covers every document that we produce in camera.

3 THE COURT: Well, as you know, I've looked at your
4 privilege logs before and found them lacking in being able to
5 tell why you are asking for the privilege. So I'm hoping that
6 the logs that you're producing are more robust than the ones
7 that you produced in the past.

8 There's also an issue of every time you've delivered
9 documents in camera, we've had to send them back to have
10 them -- have them reidentified or remarked. And I'm hoping
11 that you will take care of that, so we don't have to be delayed
12 any further, taking up time to get those things corrected.

13 Finally, I'm going to ask that when you submit something
14 in camera, that the lawyer who's signing off on these documents
15 is certifying to me that you have actually reviewed them,
16 personally. And I think that's been problematic in the past,
17 that you have large volume of documents that it doesn't appear
18 to me that any lawyer really looked at carefully. So I'm going
19 to ask for that kind of declaration, that the people who are
20 reviewing it -- presumably the people who have entered notices
21 of appearance -- will be certifying that they have actually
22 looked at that, and that they believe that the objection is
23 taken in good faith.

24 MR. CARMICHAEL: Your Honor, I would say that that's
25 not required by the federal rules, and there is about a million

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1 pages of documents. So I -- you had -- you had made a
2 statement in -- in your order, and I think it is important to
3 sort of clarify that point.

4 The trial attorneys on the team did not -- did not review
5 every single document, nor is it required to review every
6 single document. The DOD attorneys -- DOJ attorneys did
7 provide guidance, and they did review many of the documents.
8 We had scores of attorneys from the agency assisting us in the
9 review. So in addition to DOJ attorneys, attorneys from the
10 Department of Defense, the Army, the Navy, the Marine Corps,
11 the Air Force, the Coast Guard, the Defense Health Agency,
12 Office of the Chairman of the Joint Chiefs, and the Department
13 of Homeland Security all reviewed a portion of the documents,
14 and collectively this adds up to government attorneys reviewing
15 all documents. But no one attorney can or did review a million
16 pages of documents.

17 THE COURT: Well, then, perhaps, before you start
18 producing documents in camera, which is a separate,
19 time-consuming exercise for the Court, if you expect me to look
20 at them, I expect you to look at them. And I know that that is
21 not a requirement, generally, but it is my requirement.
22 Because I think you need to be more circumspect in what it is
23 you're taking the Court's time to do. And if you have to do
24 that on a rolling basis, let's do it on a rolling basis.

25 But it's not acceptable to the Court for you to have

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1 dozens and dozens of lawyers, who I have no idea what
2 instructions they were given when they did their review, and
3 it's obvious that you have overwithheld. Witness the fact
4 that, even when you've been asked to produce certain numbers of
5 documents, you, on your own, decided to remove the privilege.
6 Plaintiffs have come multiple times saying that you have
7 overextended the privilege.

8 So if you're going to practice in this court, I expect you
9 to be responsible for what gets filed. Just like you would put
10 your name on a brief, I expect you to put your name on the
11 documents that you are asking us to review.

12 MR. CARMICHAEL: Your Honor, I would say that the
13 first step of this, instead of going through the "how" of how
14 we would produce this, should have been to answer the Ninth
15 Circuit's question as to why we are actually providing these
16 documents. The Ninth Circuit gave us an explicit question
17 about the relevance of documents pertaining to the presidential
18 memo, and that question has never been answered. We've just
19 been asked to provide all of these documents, without ever
20 answering and having the plaintiffs have to explain why
21 documents from a year before that are relevant, and why we must
22 submit them or -- or lose the privilege.

23 THE COURT: Mr. Carmichael, you have the burden of
24 exercising the privilege. They do not. So you have to justify
25 why they are withheld. They don't have to justify why they

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1 should get it at this point. So that's your burden.

2 Also, I've told you before that you haven't redacted
3 anything; that there are documents that may be protected, and
4 there are some portions of the documents that aren't. You
5 haven't done anything with redaction. That is also your
6 obligation. So, you know, I doubt that the Ninth Circuit is
7 going to change whose obligation it is. When you assert a
8 privilege, you have to show the Court that the privilege is
9 deserving of being considered.

10 So you're going to have to -- you're going to have to
11 decide who's going to review these documents. But it is not
12 appropriate for you to dump a million documents on the Court
13 and -- without looking at them yourself. So that's the way
14 it's going to be.

15 All right --

16 MR. CARMICHAEL: It will be impossible for one person
17 to do that. We'd have to have many, many declarations.

18 THE COURT: I'm not suggesting that one person would
19 do it. You've had multiple lawyers who have signed off and
20 entered appearances on this case. And I'm expecting that
21 those -- you can divide up the work. But I'm expecting that
22 you put your name on it, not you, personally, but you and
23 others, that tells me that some lawyer that is responsible in
24 this proceeding is asking the Court to review them.

25 MR. CARMICHAEL: It's likely going to have to -- just

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1 practicality, we're going to probably have to do an emergency
2 stay and probably have to go up to the Ninth Circuit for
3 another emergency stay, so documents about the Secretary of
4 Defense's deliberations don't go out the door. This -- this is
5 just something that we cannot meet in this matter.

6 THE COURT: Well, Mr. Carmichael, this is your case,
7 and you have exerted this privilege. All I'm asking you to do
8 is have lawyers who are responsible tell me that they are
9 wishing to assert the privilege and they have a good-faith
10 basis to do it. I can't control the cadre of, I don't know,
11 paralegals in various departments. But what I can do is say,
12 just like any brief that you sign off on, I would expect that
13 you would have read it.

14 Is that fair?

15 MR. CARMICHAEL: Yes, Your Honor.

16 THE COURT: All right. Then it's fair, I think, when
17 you want to assert a privilege, that you tell me, or your team
18 tells me, that they have reviewed it, and they believe it's
19 taken in good faith.

20 MR. CARMICHAEL: Can we have agency counsel sign the
21 declarations?

22 THE COURT: I'm not asking -- I'm asking for people
23 who make appearances to tell me that this is what they have
24 done. You're expecting me to do it. I don't see why I
25 shouldn't expect you to do it as well.

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1 So, Mr. Heinz, any comments that you would like to make?

2 MR. HEINZ: Two related but somewhat separate points.

3 The first would be, it seems like the government is
4 planning to submit a good volume of documents to the Court.
5 And as we prepare for the Ninth Circuit argument on October 14,
6 to the extent that the Court and special master are
7 prioritizing certain batches of documents, the documents during
8 that time frame, between July [sic] 11 and February 22, 2018,
9 those documents are the most relevant for the current mandamus
10 petition.

11 THE COURT: Mr. Heinz, I'm sorry. I had a blip
12 there, and I didn't hear the dates that you're talking about.
13 Give those to me again, please.

14 MR. HEINZ: Sure. January 11, 2018, through
15 February 22, 2018. You'll recall that that window of time,
16 you, in your amended order, asked that all of those
17 deliberative documents be produced, or all documents withheld
18 pursuant to the privilege. And so I -- I suspect that the
19 government will comply with that and produce those documents to
20 Your Honor on Friday.

21 And just in terms of prioritizing the documents that the
22 Court reviews, that batch of documents is most relevant for the
23 current mandamus petition. And in that -- one of those RFPs,
24 RFP 29, that is the subject of that petition, relates to those
25 documents in some respect. So to the extent that the Court is

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1 prioritizing documents, that batch of documents would be
2 important for our preparation for that mandamus argument in
3 October.

4 And then secondly, Your Honor, on Friday, the parties
5 submitted some further filings with the Ninth Circuit. The
6 Ninth Circuit asked the parties to each submit a supplemental
7 letter brief with any new facts or legal arguments since the
8 parties finished their briefing on the mandamus petition in the
9 early part of this year. The parties filed those letter briefs
10 on Friday, and then the parties also finished briefing
11 plaintiffs' motion to clarify the administrative stay. And so
12 the government has now filed an opposition. And on Friday, the
13 plaintiffs filed our reply in support of that motion.

14 So I would just ask if the Court would find it helpful for
15 us to file those as a courtesy copy, on the District Court
16 docket, or perhaps that's unnecessary. So I just wanted to ask
17 the Court.

18 THE COURT: Well, it's helpful for -- for me to have
19 it. I can also get it off of the Ninth Circuit. But it's --
20 it's part of this case, so I think it should be part of the
21 record that you informed your trial court exactly what you're
22 arguing elsewhere.

23 Now, let's talk a little bit more about Mr. Carmichael's
24 distress that he has to turn over these volumes of material and
25 actually have to certify that his team has reviewed it.

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1 If that's the -- you just identified to me the most
2 important grouping of those documents. What's next? In other
3 words, what's the next group that is important to you?

4 MR. HEINZ: The -- so I think apart from -- from that
5 early 2018 period, I think that the next category would be in
6 the summer of 2017 and right around the tweets and -- and
7 reactions thereto.

8 The government, in its briefing, has tried to distance
9 itself from the surprise of the President's tweet, and instead
10 characterized that tweet and the ban as a continuum of the
11 Department of Defense analyzing the policy on transgender
12 military service. And we think that those documents, in the
13 summer of 2017, after the President's tweet, will demonstrate
14 that that wasn't the case at all; that the Department of
15 Defense had no idea that the -- that that tweet was coming;
16 that they weren't consulted.

17 And one of the most recent depositions, Your Honor, was of
18 a -- a psychiatrist who testified before the so-called panel of
19 experts. And during her deposition, she testified that she was
20 at the Pentagon the two days prior to the tweet, for one of
21 these implementation groups that were discussing how to
22 implement the Carter policy. And they were discussing things
23 like how to provide hormone treatments to soldiers in deployed
24 environments, so something very relevant. And they were
25 discussing how to work through that issue. And that was the

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1 day before the tweet. And so we asked her, you know: Was
2 there any discussion, during that working group at the
3 Pentagon, about the fact that the President, the next day, was
4 going to ban transgender military service? And she said:
5 Absolutely not.

6 So -- so we feel that -- that those documents, in that
7 summer 2017 time frame, are going to be very instructive and
8 very relevant.

9 THE COURT: And I take it that -- that the defense
10 has never answered the question as to who the President
11 consulted, when he put out his tweet saying that he had
12 consulted others?

13 MR. HEINZ: No. That -- that was certainly one of
14 our interrogatories, but the President has -- has refused to
15 participate in any of the civil discovery.

16 THE COURT: Okay. So it's -- if there's no response
17 to that question, isn't -- is the assumption that you're
18 drawing is that he consulted with nobody, and he lied in the
19 tweet?

20 MR. HEINZ: That's certainly a very plausible
21 explanation. So far, we have found no one that he consulted
22 with.

23 THE COURT: All right. And the third set of -- of
24 documents, you say the next grouping is not as important to
25 you?

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1 MR. HEINZ: So really it -- in terms of priority,
2 it's just that early 2018 time frame. So after the panel
3 issued its -- its decision, on January 11, 2018, and then
4 through the date that the -- that the February 2018 report was
5 issued, on the 22nd of February, that's a very critical time
6 frame, and then also that summer of 2017 time frame. I think
7 those are the two priority areas.

8 THE COURT: Okay. Mr. Carmichael, is there a problem
9 with prioritizing in that order?

10 MR. CARMICHAEL: There's not, Your Honor. And so if
11 we want to actually lay out a plan for that, I don't -- I don't
12 have a problem with that. For -- for -- we could -- we could
13 get through the 250 documents, our team, and certify that we've
14 all reviewed them, by this Friday. So that would not be a
15 problem. That's a reasonable request.

16 The other one, the -- it's about 2,000, I think, in the
17 other group. I think we would probably need three weeks to get
18 through that, and then we could do that. So if we wanted to do
19 those two things, I think we could accomplish both of those and
20 provide them in -- you know, in camera, with the certification
21 that we reviewed them all.

22 THE COURT: Okay. Mr. Heinz?

23 MR. HEINZ: Your Honor, the -- a three-week delay on
24 the early 2018 documents means we won't have those in time for
25 the -- for the argument at the Ninth Circuit. And so that's

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1 just not -- that's not going to work, from our perspective.

2 THE COURT: Mr. Carmichael, that's not a time frame
3 that's going to work. So you turn over the first set that
4 we're talking about by this Friday, and you turn over the
5 second set in ten days after that. So that -- that should give
6 you the documents by early September? Wait. We have to have
7 the review. We have to have -- we have to have me review it.

8 So -- all right. We're going to back that up. The first
9 batch is -- comes in on Friday. The second batch comes in on
10 the Friday after. And we'll try and turn it around.

11 Mr. Heinz?

12 MR. HEINZ: Sure, Your Honor.

13 And in terms of which batch, the early 2018 documents are
14 really the most important. So we would ask that those be the
15 first batch, and then the mid-2017 documents being the second
16 batch.

17 THE COURT: That was -- that is what I understood.
18 So to be clear, it's the documents of January 11, 2018, to
19 February 22, 2018.

20 MR. HEINZ: Correct.

21 THE COURT: And then following that would be the
22 summer of 2017, the period after the President's first tweet.

23 MR. CARMICHAEL: Your Honor, I would just -- because
24 the letter came first, we -- we wouldn't be able to meet that
25 one, because we started on the letter already, and we're mostly

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1 through with the letter, and we can immediately start on the
2 other documents. So it's just because we had already -- we
3 thought the priority was based off what was in the letter, so
4 that's why we -- we can't do that one. But, I mean, we'll try
5 our best. We may be able to meet the other deadline, if it is
6 the tweets by this Friday and it is the other one by the next
7 Friday.

8 THE COURT: Mr. Heinz?

9 MR. HEINZ: Well, all of these documents should have
10 been ready to go this Friday, not only these, but all of the
11 other ones. So this is just -- it's just -- it's just more
12 delay. It's just more excuses. You know, I don't understand
13 why, for the 2,000 documents --

14 THE COURT REPORTER: I'm sorry. Excuse me. I'm
15 sorry, Your Honor. Excuse me?

16 THE COURT: Mr. Heinz? Mr. Heinz? Mr. Heinz? I
17 can't get a record on you. You're breaking up.

18 MR. HEINZ: Oh, I'm sorry.

19 THE COURT: All right. The court reporter -- the
20 court reporter is telling me there's some distress here in
21 getting a record on you. So let's go for the period of time as
22 they should have had them ready for this Friday.

23 MR. HEINZ: And perhaps it's good that the court
24 reporter didn't get that last statement, because I was getting
25 a little emotional, Your Honor. It's just frustrating when all

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1 of these documents should have been ready to be produced on
2 Friday. And they should have been ready to be produced a year
3 and a half ago. So I don't understand why it takes the
4 government another two weeks to pick through 2,000 documents
5 and determine whether or not there's a good-faith basis to
6 assert the privilege, particularly during this early 2018 time
7 frame when, you know, these are some of the most important
8 documents in the case. I'm shocked that the attorneys who
9 haven't -- who have appeared in this matter haven't already
10 looked at each of these documents. So it just seems
11 implausible to me that it would take the government that long
12 to look at those.

13 THE COURT: Well, Mr. Heinz, I'm exerting a little
14 self-preservation here, because even if they were to dump them
15 all on me, I can't -- I can't get through them without --
16 without staging them. So --

17 MR. HEINZ: I understand.

18 THE COURT: -- think of it as me trying to manage the
19 volume at the same time I'm trying to push them to get through.
20 Because I agree with you that this should have been looked at
21 long ago.

22 MR. HEINZ: Then, Your Honor, what we would request
23 would be, rather than start with the 2017 documents -- well,
24 scratch that. From what Mr. Carmichael said, it sounds like
25 that they're almost done with looking at those 2017 documents

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1 and the other documents in the letter that we sent them last
2 week. So, you know, let's start with those, and then let's
3 move on to the 2018 documents next.

4 THE COURT: Okay. So you're flipping what it is that
5 you asked previously.

6 MR. HEINZ: Well, it sounds like from -- that the
7 government can't produce the 2018 documents first. It sounds
8 like that they've already started with 2017 documents, and
9 those are almost ready to go.

10 THE COURT: Okay. Mr. Carmichael, would that make it
11 easier for you, to produce the 2017 documents first?

12 MR. CARMICHAEL: Yes, Your Honor, it would.

13 THE COURT: All right. Then let's do that.
14 Okay. Any other clarification that's needed there?

15 Okay. All right. Now, let's move on to the next topic,
16 and that concerns the issue of the special master.

17 And, Mr. Carmichael, I understand that you have taken a
18 different position on this now.

19 MR. CARMICHAEL: Well, yes, Your Honor, from the --
20 from the initial 350. We would -- because the -- it looks like
21 the special master has been issuing recommendations as -- in
22 the form of the spreadsheets, we'd like to -- to actually get
23 the time to look at those spreadsheets, and to comment and have
24 an opportunity to be heard, before they're adopted by the
25 Court.

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1 THE COURT: And why would you agree to a certain
2 process -- and Mr. Powers was the one who was there and agreed
3 to it -- and now tell me that I can't use the special master as
4 I described?

5 MR. CARMICHAEL: It's really the -- it's the volume
6 of it. It is there, but, you know, this is -- if things are --
7 I'm not as -- I don't think we're as concerned about the -- the
8 first set, for the first set of the tweet. I think we're
9 particularly concerned about the mandamus petition, on making
10 sure that doesn't get mooted out. So, you know, for the second
11 set, if the special master is going to issue a -- issue a
12 recommendation, a spreadsheet, we would want to, you know, have
13 a -- have notice of it and opportunity to be heard on that
14 spreadsheet.

15 THE COURT: Well, Mr. Carmichael, spreadsheets are
16 not orders. They're a means of organizing material that then
17 becomes a way that people in chambers can look at the material.
18 So I don't know of any -- any time that you would be allowed to
19 see the work of the Court, in progress, as we went through
20 this.

21 You do -- go ahead.

22 MR. CARMICHAEL: The special master is more like a
23 magistrate, where -- where it is. Like, he issues some sort of
24 a report or recommendations, and we have the opportunity to --
25 to object and provide some comments, and then the Court accepts

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1 it or not. So that's -- that's sort of how we're thinking the
2 special master would be.

3 THE COURT: Mr. Carmichael, that's not the scope that
4 I set up, and that's not how Judge Donohue is being used. I
5 told you, I'm using him the same way I would use my staff. And
6 that means that it's a collaborative effort to help organize,
7 to help review, to make suggestions, to do research on the
8 topic, to debate with the Court over issues, and then I issue
9 an order. But I don't know that there's any obligation for me
10 to basically have you make objections on a product that is not
11 even a product. It's just a work in progress.

12 You do realize that I could simply strike the word
13 "special master" and continue to use Judge Donohue as I see
14 fit.

15 MR. CARMICHAEL: Yes, I mean, you obviously could
16 hire him as law clerk, you know, and use him how you see fit.
17 So it's a -- but because he's a special master -- I think the
18 concern is just particularly the -- mooted out the -- any sort
19 of petition to the -- to the Ninth Circuit, and having --
20 having those particular documents, the January 11, 2018,
21 documents to February 22nd.

22 THE COURT: Well, how would you be mooted out, in the
23 sense that -- that you can appeal -- you can appeal me? You
24 don't have to have another layer of appeal, which I -- which
25 strikes me as simply just slowing things down.

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1 And I want to correct you, is that you do understand that
2 you complained -- or I think that Mr. Powers may have
3 complained -- that you didn't want to pay for a special master.
4 So Judge Donohue is a volunteer to the Court. Now, if you want
5 me to go out and hire a special master, you can pay the \$700 an
6 hour that that special master would be charging you. But you
7 asked for one that wasn't going to cost you. So I think you
8 should thank your lucky stars that you've got an experienced
9 judge who is willing to spend their time contributing to the
10 Court. Otherwise, you're going to pay for it.

11 MR. CARMICHAEL: Your Honor, is it possible for -- to
12 just have -- if the Court is going to order release of the
13 documents at issue in the mandamus petition, to give us more
14 time? So have the timeline for -- for production of those, you
15 know, be a longer -- maybe 14 days, or 21 days, or something
16 like that, rather -- because sometimes it's been seven or ten,
17 and that -- you know, that -- that is difficult for our
18 appellate folks and all, if we're going to bring it to the
19 Ninth Circuit.

20 THE COURT: Well, Mr. Carmichael, the answer to that
21 is no. I just gave you ten days. And you -- this has been a
22 continual process of delay. So, you know, I don't -- I don't
23 know that you can appeal the special master order. It seems to
24 me that that would be quite -- quite frivolous. Because as I
25 just told you, I can just convert the special master into a

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1 working chambers staff. And I don't know where that gets you.
2 Or, you know, we can hire somebody.

3 Do you want to pay the bill?

4 MR. CARMICHAEL: No, Your Honor, we -- we don't want
5 to -- we don't want to pay -- pay the bill.

6 THE COURT: Okay.

7 MR. CARMICHAEL: I mean, we just -- we want a little
8 bit more time, if we have to go to the appellate court, I think
9 is the --

10 THE COURT: Well, the answer to that is no. If
11 you've got enough people to work on these cases, in the Justice
12 Department, you've got enough people to make that kind of
13 decision. You make a decision that you're going to go, then
14 you retract it. You know, if you're going to go, you know how
15 to get there.

16 All right. Let's talk about the next issue.

17 Mr. Carmichael, I have some questions for you. It's my
18 understanding that you contacted the court reporter without
19 notifying the Court that you were going to do so.

20 Is that correct?

21 MR. CARMICHAEL: I asked for the audio transcript,
22 Your Honor.

23 THE COURT: Okay. So you did, in fact, contact the
24 court reporter without asking the Court for what it is you
25 wanted.

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1 MR. CARMICHAEL: For the -- I mean, like we do with
2 other transcripts, yes. We -- we frequently contact the court
3 reporter about transcripts, yes, Your Honor.

4 THE COURT: And you didn't notify Mr. Heinz that the
5 purpose of your contact was to speak with the court reporter
6 about what you considered an error in a transcript.

7 MR. CARMICHAEL: The -- the purpose of it was to
8 obtain the audio, just like we obtain a transcript. I -- the
9 court reporter told me that she's not allowed to give the
10 audio, and said: Well, is there a part that you want me to
11 check? And then I asked her to check that. I did not ask for
12 a correction.

13 THE COURT: Well, didn't you say to her, "On the
14 transcript, on the bottom of Page 27, it records me as saying
15 'Drafts aren't deliberative process.' But that does not really
16 make sense, because I was arguing the exact opposite in that
17 paragraph, as well as immediately before and after that
18 paragraph"? So, in fact, you were telling her that there had
19 been a mistake, and she should look at the context of what you
20 were arguing, and you were attempting to persuade her to change
21 the transcript.

22 MR. CARMICHAEL: I'm happy with just the audio, Your
23 Honor. It just seems to be an issue with the -- with the --
24 that plaintiffs have raised with the Ninth Circuit. So if --
25 I'm happy with just the audio.

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1 THE COURT: Mr. Carmichael, let's answer my question.
2 Is that a direct quote from your e-mail?

3 MR. CARMICHAEL: Yes, I believe that that is a --
4 that is a direct quote from my e-mail.

5 THE COURT: Okay. And you didn't turn over this
6 exchange to Mr. Heinz.

7 MR. CARMICHAEL: I have turned over the exchange to
8 Mr. Heinz. They asked for it on Friday, and I gave it to them.

9 THE COURT: All right. Now, Mr. Carmichael, this is
10 a transcript from December 10; correct?

11 MR. CARMICHAEL: Yes, Your Honor.

12 THE COURT: And this portion of the transcript has
13 been cited in briefings to the Ninth Circuit previously.

14 Isn't that also correct?

15 MR. CARMICHAEL: I -- I don't know. I think it
16 was -- it was recently cited, I believe --

17 THE COURT: Well --

18 MR. CARMICHAEL: -- and I think the motion for
19 clarification that they -- they -- I don't remember if it was
20 cited in the past.

21 THE COURT: Well, I believe it certainly was -- was
22 referenced in the open -- in your responsive brief to the Ninth
23 Circuit, in February. And Mr. Heinz can correct me if I'm
24 wrong. And then I cited it again, in my response to the Court
25 in March.

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1 You did not seek clarification in February; did you?

2 MR. CARMICHAEL: I did not, no.

3 THE COURT: You did not seek clarification in March;
4 did you?

5 MR. CARMICHAEL: I did not, no.

6 THE COURT: So how is it that eight-and-a-half months
7 later, you now decide that there's an error?

8 MR. CARMICHAEL: I -- it's -- I wanted to know
9 whether or not it was an error in me speaking, you know, a
10 flub, or if it was an error in the transcript. I -- I don't
11 know. I haven't listened to the audio. And, you know, I'm a
12 human being, and people make mistakes.

13 I can -- I can tell you that before that and after that,
14 and in every briefing, we have argued that draft documents are
15 protected by the deliberative process, so certainly that's what
16 I meant. But I don't know if it's a misspoke [sic], or if it
17 is an error in the transcript, because I'd have to listen to
18 the audio to know. And I just -- I just wanted to listen to
19 the audio to know whether or not it was, because it keeps
20 coming up.

21 THE COURT: Okay. But, well, my question is, how is
22 it that this slips by you, for eight-and-a-half months, and you
23 don't bring it to the Court's attention in a timely manner?

24 MR. CARMICHAEL: It's not that it slipped by me.
25 It's that it just -- it -- it really seemed, like, so minor.

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1 And -- and -- and I couldn't -- it's one of those things that I
2 couldn't imagine ever addressing with more than a footnote.
3 Because it is clearly just either a flub or a --
4 mis-transcribed. But because it keeps coming up, I wanted to
5 know the difference.

6 THE COURT: Okay. Mr. Heinz, what would you like to
7 say?

8 MR. HEINZ: From the context, Your Honor, it's --
9 Mr. Carmichael, in the subsequent and -- and preceding portions
10 of the transcript, explained how, you know, the Department of
11 Defense was making wordsmithing changes and was changing, you
12 know, the way sentences read. And so from the context, it
13 seems like that those wouldn't be deliberative documents.
14 Those aren't deliberations about a policy. And his explanation
15 are that these are, you know, inconsequential documents. So it
16 seems strange to us that there would be this change.

17 But I guess kind of two primary responses, Your Honor.
18 One, the parties have extensively relied on or opposed various
19 motions, including at the Ninth Circuit, based on that
20 language. And so it -- we haven't had time to research the
21 issue, but it seems like there's an element of estoppel here,
22 or at least waiver, that we can't now go back and re-litigate
23 those -- those issues, based on a corrected transcript. If
24 there was a concern about whether that was accurately
25 transcribed, that should have been brought up when the

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1 transcript was released, or at the very least shortly after we
2 cited it in opposition to their mandamus proceeding.

3 And then, secondly, Your Honor, we haven't heard the audio
4 either, so we can't comment on that, one way or the other.

5 MR. CARMICHAEL: I would just say, as far as that
6 particular point of -- when I'm arguing that wordsmithing -- or
7 saying that I'm wordsmithing, and corrections, that's all part
8 of the working draft. That is an argument that it is
9 deliberative process. And that's -- that's the binding case
10 law. It is -- a working draft is -- is protected by the
11 deliberative process. And even -- and wordsmithing and
12 changing and correcting, that stuff, all of that is protected
13 by the deliberative process privilege. Whether or not it
14 overcomes the need on the *Warner* factors, that's a different
15 question. But it is protected by the deliberative process.

16 THE COURT: Well, Mr. Carmichael, you know, I was at
17 the conference, obviously. And I obviously thought that you
18 said that it -- they were not deliberative. That's what my law
19 clerk thought you said. That's what the court reporter thought
20 you said. And I have listened to the tape. And honestly, I
21 can't tell. It is -- the -- if you listen to the tape, you
22 know, five, ten, fifteen times, it's not going to clarify
23 anything. It simply is not capable of being sorted out at this
24 point.

25 So I don't know where we go from here, but this is what I

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1 will say to you: Don't you ever, ever, contact one of my
2 employees in an attempt to convince them that they have made an
3 error that accrues to your advantage. Asking somebody to
4 change something from a "yes" to a "no," without having brought
5 this to the Court's attention or even to your opposition's
6 side, is underhanded and inappropriate. So I don't know where
7 you want to go from here, but the recording isn't going to
8 change anything.

9 MR. CARMICHAEL: If it's unclear, then it's unclear.
10 So -- and I was -- I will say, again, I was -- I was just -- I
11 just wanted to check it out. I -- I don't know. It very well
12 could have been -- I could have said it. I'm not -- I'm not
13 saying I didn't. It could have been a flub. I just wanted to
14 know. And I asked for the audio, and then I asked her to
15 check. And that's it.

16 THE COURT: And I don't know, Mr. Carmichael, whether
17 you misspoke or whether we misheard. But the time to correct
18 it was early on. And the way to correct it is to bring it to
19 the Court's attention, not the way you did it.

20 MR. CARMICHAEL: Understood.

21 THE COURT: All right. Other issues for today?

22 MR. HEINZ: None from the plaintiffs, Your Honor.

23 THE COURT: Okay. Mr. Carmichael, anything further?

24 MR. CARMICHAEL: No, Your Honor.

25 THE COURT: Okay. I'll put out an order that

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1 memorializes the decisions that were made today.

2 And let me just check. Judge Donohue, is there -- are
3 there any other issues that you wish to bring to my attention
4 at this time?

5 JUDGE DONOHUE: None, Your Honor.

6 THE COURT: Okay. All right. Thank you. Have a
7 good day.

8 Oh, before you go -- before you go, we need another date
9 that I'll have you work with Mr. Cogswell, who's the Court's
10 scheduling deputy for this, and we'll put you on in another
11 month.

12 Okay. Thank you.

13 (Adjourned)

14

15 C E R T I F I C A T E

16

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

19 /s/ *Andrea Ramirez*

20 ANDREA RAMIREZ
21 COURT REPORTER

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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 DENYING MOTION TO
STAY THE COURT’S JULY 15,
2020 ORDER (DKT. NO. 545)

THIS MATTER comes before the Court on Defendants’ Motion to Stay Compliance with the Court’s Discovery Order. (Dkt. No. 547.) Having reviewed the Motion, the Response (Dkt. No. 553), the Reply (Dkt. No. 560), and the related record, the Court DENIES the Motion.

Background

Once again the Court is required to discuss the Government’s assertion of the Deliberative Process Privilege (“DPP”) over tens of thousands of documents. This particular discovery dispute is now more than two years old and has been the subject of dozens of previous motions, Orders, and the Government’s two petitions for writs of mandamus with the Ninth Circuit. To date, the Government continues to withhold 25,000 documents solely on the basis of

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1 the DPP and over 40,000 documents based on the DPP in combination with other privileges.

2 (See Dkt. No. 547 at 2 n. 1.)

3 1. Procedural Background

4 The Court first addressed Defendants' DPP claims on July 27, 2018, when it granted
5 Plaintiffs' first Motion to Compel Discovery Withheld Under the Deliberative Process Privilege.
6 (Dkt. No. 245; Dkt. No. 299). In its Order, the Court noted that while several other courts have
7 recognized that the privilege does not apply to cases involving claims of governmental
8 misconduct or where the government's intent is at issue, the application of the privilege in cases
9 involving these claims "appears to be an open question in the Ninth Circuit." Vietnam Veterans
10 of Am. v. CIA, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011). The Court therefore
11 evaluated Defendants' DPP claims under the balancing test set forth in FTC v. Warner
12 Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), which determines whether Plaintiffs are
13 able to overcome a properly asserted DPP claim. The Court ordered Defendants to produce the
14 requested documents.

15 In response, the Government filed a Petition for a Writ of Mandamus with the Ninth
16 Circuit. (See Dkt. No. 302.) Almost eleven months later, the Ninth Circuit issued a Writ of
17 Mandamus, concluding, in part, that the record was insufficient to establish the relevance of the
18 documents as balanced against the possible "chilling effect" of disclosure. Karnoski v. Trump,
19 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit suggested that on remand, when evaluating
20 Defendants' DPP claims, this Court should "consider classes of documents separately when
21 appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be
22 proper, [the Court] should undertake it." Id.

1 On remand, Plaintiffs filed a second Motion to Compel Documents Withheld Under the
2 Deliberative Process Privilege. (Dkt. No. 364.) After evaluating groupings of contested
3 documents organized by individual Requests for Production, the Court ordered Defendants to
4 produce documents responsive to Plaintiffs’ Request for Production No. 15, which seeks “[a]ll
5 documents or communications relating to Secretary of Defense Ash Carter’s Directive Type
6 Memo 16-005,” and Request No. 29, which seeks “Documents or Communications relating or
7 referring to the February 2018 Department of Defense Report and Recommendations on Military
8 Service by Transgender Persons.” (Dkt. No. 398 at 2-3; Dkt. No. 402 at 34:19-20.)

9 Following the Court’s ruling, Defendants filed their second Petition for a Writ of
10 Mandamus, asking that the Ninth Circuit:

11 [R]everse the district court’s orders of December 18, 2019, February 3, 2020, and
12 February 7, 2020, and order that plaintiffs are not entitled to any further
13 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.

14 (Dkt. No. 414, Ex. 1 at 11.) On February 12, 2020, the Ninth Circuit granted Defendants’
15 request for a temporary administrative stay of the Court’s December 18, 2019, February 3, 2020,
16 and February 7, 2020 orders challenged in Defendants’ petition. (Dkt. No. 415.) That temporary
17 stay remains in effect today—six months after its entry—although Plaintiffs recently asked for
18 clarification of the scope of the stay, noting that it was entered before any briefing had been
19 submitted and can no longer be considered temporary. (Dkt. No. 561, Ex. 1.)

20 Following the Government’s Petition, the Circuit took the unusual step of inviting the
21 Court to address the Petition; the Court filed its response on March 5, 2020. (Dkt. No. 416.)
22 Oral argument on Defendants’ Petition was recently set for October 14, 2020. (Dkt. No. 559.)

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1 2. Problems with the Government’s Privilege Assertions

2 Until March 2020, the Court’s process for analyzing Defendants’ privilege claims was
3 based on the assumption that the Government properly asserted the DPP over each of the 35,000
4 withheld documents (now reduced to 25,000) and that the relevant question was therefore
5 whether the Plaintiffs were able to overcome the privilege under the balancing test set forth in
6 Warner.

7 But in March, upon two motions to compel brought by Plaintiffs, the Court ordered the
8 Government to submit documents for *in camera* review for the first time and these submissions
9 raised serious concerns about the Government’s review process and privilege assertions. First,
10 Plaintiffs moved to compel the Government’s withheld communications with third parties,
11 asking the Court to conduct an *in camera* review of the Government’s DPP and attorney-client
12 privilege claims over communications with 487 third party custodians from the Government’s
13 privilege logs. (Dkt. No. 440.) The Government objected on the grounds that its
14 communications with those third parties are shielded by the “consultant corollary” doctrine. (Id.
15 at 20-22.) But when the Court ordered the Government to submit the privilege-claimed
16 documents for *in camera* review, the Government produced communications from only 14 of the
17 487 persons identified by Plaintiffs, conceding that there was no colorable privilege claim for the
18 remaining 473 custodians. (See Dkt. Nos. 461, 509.) Further, of the 1,500 pages of documents
19 the Government did submit to the Court, only one document was arguably privileged. (Dkt. No.
20 509 at 9.) One particularly egregious example of the Government’s over-assertion was a copy of
21 the publicly available RAND Report indicating it could be purchased for \$22.50, but which the
22 Government had marked as subject to the DPP. (Id. at 4.)

1 Plaintiffs’ second motion to compel in March sought documents that are part of an
2 otherwise responsive “family group” of produced material but were withheld on the grounds of
3 “non-responsiveness”; as an example, the Government withheld attachments to emails as
4 “non-responsive” where the email itself was produced. (Dkt. No. 449.) After the Court granted
5 Plaintiffs’ Motion, the Government informed the Court that while the Government had not
6 asserted any privilege over these documents or listed them on a privilege log, the Government
7 was now claiming the documents were protected from disclosure by the attorney-client privilege,
8 the attorney work product privilege, the DPP, and the executive privilege. (Dkt. No. 463 at 2.)
9 The Court ordered Defendants to submit the subset of documents that Defendants believed to be
10 privileged to the Court for *in camera* review along with a privilege log. (Dkt. No. 464.) After
11 reviewing the approximately 1,700 pages the Government submitted, the Court found that for
12 most of these documents—which included summaries of press accounts prepared by foreign
13 governments, responses to Congressional questions, and non-privileged communications that
14 were simply sent to attorneys—the Government’s privilege assertions strayed far outside the
15 bounds of the claimed privileges. (Dkt. No. 522 at 5.)

16 Following these rulings, on May 4, 2020 Plaintiffs brought a motion to compel the
17 Government to submit a random sample of 350 documents for *in camera* review, one percent of
18 the total documents the Government was still withholding solely on the basis of the deliberative
19 process privilege. (Dkt. No. 497.) It seemed evident that before the Court could apply the
20 balancing test set out in the Ninth Circuit’s decision, as directed by Warner, 742 F.2d at 1161, it
21 first had to determine if the documents at issue even qualified as being subject to the DPP, rather
22 than simply accepting the Government’s privilege assertions. To qualify for the DPP, “a
23 document ‘must be *both* (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and
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1 (2) ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are
2 formulated.’” National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th Cir.
3 1988) (citation omitted, emphasis in original). In its *in camera* review of the Government’s DPP
4 claims, the Court found that many documents were neither predecisional nor deliberative.

5 The Court granted Plaintiffs’ motion and after reviewing the Government’s submission of
6 350 randomly selected documents withheld as privileged under the DPP, the Court ordered the
7 Government to submit an additional 500 randomly selected documents to the Court for *in*
8 *camera* review in order to further determine the scope of the Government’s privilege claims.
9 (Dkt. No. 545.) Yet before submitting the set of 500 documents, the Government itself
10 determined that 90 of those documents (or 18% of the total) were not subject to a proper DPP
11 claim. (Dkt. No. 542 n. 1.)

12 After reviewing each of the 850 documents individually and applying the two-step test
13 set out in National Wildlife Federation, the Court concluded that nearly 90% were not privileged.
14 (Dkt. No. 545 at 5.) The Court also noted that the Government failed to segregate portions of
15 documents which may be partially protected by the DPP from those that are not, despite its
16 obligation to do so. See Karnoski, 926 F.3d at 1204 (quoting Army Times Publ’g Co. v. Dep’t
17 of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)) (“Unlike the presidential communications
18 privilege, the deliberative process privilege does not protect documents in their entirety; if the
19 government can segregate disclosed non-privileged factual information within a document, it
20 must.”).

21 In sum, in its four submissions for *in camera* review, the Government has displayed
22 largescale and pervasive failures in its discovery process, leaving the Court with little, if any
23 confidence that the Government is properly asserting the DPP privilege over the remaining
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1 withheld documents. Further, the Government’s lawyers recently admitted that although they
2 have been strenuously arguing against the disclosure of these documents for years, they have not
3 personally reviewed the withheld documents, making the Court’s “granular” review all the more
4 difficult where arguments about the documents are often made in general, hypothetical terms.
5 (Dkt. No. 548.)

6 3. July 15, 2020 Order

7 Based on the Court’s growing concerns that the Government has been haphazardly and
8 mistakenly labelling documents as privileged without proper review, the age of this particular
9 discovery dispute, and in light of the enormous task remaining of reviewing the 25,000 to 40,000
10 withheld documents over which the Government has claimed the DPP, on July 15, 2020 the
11 Court outlined a discovery management tool that would speed the Court’s review going forward.
12 (Dkt. No. 545.) Defendants were ordered to review their list of documents withheld solely on
13 the basis of the DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 and
14 September 14, 2017 through January 11, 2018, the timeframes that the Carter and Mattis Policies
15 were being considered, respectively. (Id. at 2.) This timeframe was based on the Court’s review
16 of the relevant record, the Ninth Circuit’s discussion in Karnoski, 926 at 1188-98, and the
17 Parties’ answers to questions posed by the Court about the two Policies. (Dkt. Nos. 536,
18 540-42).

19 The Court concluded that going forward, documents outside this timeframe are
20 presumptively not privileged under the DPP because they are not predecisional, “but if it turns
21 out that some documents falling outside the predecisional and post-decisional date ranges are
22 properly the subject of DPP, specific documents can be brought to the Court’s attention on
23 subsequent motion.” (Dkt. No. 545 at 6-7.) Defendants were also ordered to produce documents
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1 from their 850-document submission that were reviewed *in camera* and determined not to be
2 privileged. (Dkt. No. 545 at 11.) The Order specifically exempted documents subject to the stay
3 in the pending Mandamus Petition.

4 On July 20, 2020 the Government brought the current Motion to Stay the Court's Jul 15,
5 2020 Order. (Dkt. No. 547.) In response, Plaintiffs propose that the Court make two
6 modifications to its Order that would allow the Government to submit privileged documents that
7 fall outside the timeframes the Court has adopted for *in camera* review without motion practice.
8 (Dkt. No. 553 at 11.) For the reasons discussed below, the Court DENIES the Government's
9 Motion and adopts Plaintiffs' proposed modifications to the Court's July 15, 2020 Order.

10 Discussion

11 A stay pending appeal "is an intrusion into the ordinary processes of administration and
12 judicial review." Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and
13 citation omitted). As such, it is "not a matter of right, even if irreparable injury might otherwise
14 result." Id. at 433 (citation omitted). "It is instead an exercise of judicial discretion, and the
15 propriety of its issue is dependent upon the circumstances of the particular case." Id. (internal
16 quotation marks and citation omitted). "The party requesting a stay bears the burden of showing
17 that the circumstances justify an exercise of that discretion." Id. at 433-34.

18 In determining whether to grant a stay, the Court considers: (1) whether Defendants have
19 made a strong showing that they are likely to succeed on the merits of their Mandamus Petition;
20 (2) whether Defendants will be irreparably injured absent a stay; (3) whether a stay will
21 substantially injure Plaintiffs; and (4) whether the public interest supports a stay. Id. at 434.

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1 **A. Likelihood of Success on the Merits**

2 The Government first argues that the Court’s July 15 Order is likely to be contrary to the
3 Ninth Circuit’s ruling on the Governments’ pending mandamus petition because: (1) the Order
4 would require the production of a large trove of documents, and is therefore not a “granular”
5 discovery order; (2) the Order misapplies the predecisional requirement; and (3) the Court has
6 selected timeframes that “are not congruent with the facts of this case.” (Dkt. No. 547 at 7-8.)

7 As to the first objection, the Order challenged by the Government specifically carves out
8 the documents subject to the pending Mandamus Petition. Moreover, the pending Mandamus
9 Petition is unrelated to the Court’s July 15, 2020 Order. The Government’s pending mandamus
10 petition requests that the Ninth Circuit “reverse the district court’s orders of December 18, 2019,
11 February 3, 2020, and February 7, 2020 . . . given [P]laintiffs’ inadequate showing of need under
12 the proper standard for overcoming the deliberative process privilege.” (Dkt. No. 414, Ex. 1 at
13 11 (emphasis added).) The challenged Orders did not evaluate whether the Government properly
14 asserted the DPP in the first place, but assumed the withheld documents met the threshold of
15 being predecisional and deliberative. (Dkt. No. 545 at 11.) Subsequent *in camera* review
16 showed the error of the Court’s assumption. Finally, the Government fails to explain why the
17 Court’s *in camera* document-by-document review of the Government’s 850-document
18 submission was not “granular,” yet the Government resists producing these documents as well.

19 The Government’s second and third objections relate to the time frame chosen as a
20 discovery management tool to deal with the “predecisional requirement.” As noted in the
21 Court’s Order, one DPP requirement is that it be “predecisional,” so that the privilege applies
22 “prior to the time the decision is made” and not to “communications made after the decision and
23 designed to explain it.” (Dkt. No. 545 at 4 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S.
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1 132, 151-52 (1975)). In an attempt to get the Parties' views on the issues, the Court submitted
2 written questions to the Parties and received responses. From the Government's perspective, the
3 time frame at issue began in March 2014, when certain individuals began to consider transgender
4 policies, and continues through today. (Dkt. No. 545 at 5.) Although this is in keeping with the
5 way it has handled its DPP designations, this approach reads out of existence the requirement
6 that documents be predecisional.

7 The Government's objections that the Court's focus on the Carter and Mattis Policies
8 could lead to mass disclosure of deliberative documents relating to other policies, is misplaced.
9 (Dkt. No. 547.) To begin, the policies at issue here are the Carter and Mattis policies and the
10 withheld documents are responsive to Plaintiffs' discovery requests, which were focused on the
11 current litigation over these Policies. (Dkt. No. 547 at 8.) The Government does not explain
12 why thousands of documents related to other policies would be responsive to discovery requests
13 seeking "[a]ll Documents and Communications related to the [Mattis] Policy," for example.
14 (Dkt. No. 365, Ex. 1 at 3.)

15 More importantly, the Court's timeframes are a discovery management tool, meant to
16 counteract the Government's troubling and apparently prevalent practice of mislabeling
17 documents as privileged, while also aiding the Court's review of the 25,000 to 40,000 documents
18 the Government continues to withhold under the DPP. Should the Government determine that
19 certain deliberative documents fall outside of the Court's proposed timeframes for presumptively
20 privileged documents, the Court's Order makes clear that the Government can bring those
21 individual documents to the Court's attention for an *in camera* review. (Dkt. No. 545 at 11.)
22 This procedure also allows the Government another opportunity to review its privilege claims
23 and to redact documents in accordance with its obligations, as outlined by the Ninth Circuit.

1 Finally, the Government’s concerns about the timeframes chosen by the Court do not
2 warrant a stay, especially when mitigated by Plaintiffs’ proposals. The Government is
3 particularly concerned with producing drafts created by officials in the Office of the
4 Undersecretary of Defense, who were tasked with writing the Report and Recommendations
5 after the Panel concluded its work on January 11, 2018. The Government has taken
6 contradictory positions on these documents. On December 10, 2019, the Government’s lead
7 attorney, Andrew Carmichael, told the Court that these “[d]rafts aren’t deliberative process.
8 [These documents are] little subparts of the decision, tweaking how you’re going to do a
9 particular sentence or how you’re going to write a particular paragraph,” and the documents were
10 created after “the final decision was made.” (Dkt. No. 402 at 27:24-25, 28:19, 30:18-19.) But
11 the Government now argues that these drafts are not only predecisional but “some of the most
12 sensitive documents in this case.” (Dkt. No. 547 at 9.) The Government’s inconsistent position
13 on these documents notwithstanding, the Court finds that the Government’s concerns can be
14 addressed by Plaintiffs’ proposed modifications to the review process.

15 Plaintiffs suggest that the Court make clear in its order that the Government can submit
16 any documents it claims are privileged but outside the proposed timeframe for *in camera* review
17 without separate motion practice. (Dkt. No. 553 at 11.) Second, Plaintiffs suggest the
18 Government immediately submit for *in camera* review the documents dated January 11, 2018 to
19 February 22, 2018—representing the period between the Panel of Expert’s recommendations and
20 the date the Department of Defense published the 44-page Report and Recommendation—so the
21 Court can assess whether these documents are predecisional and deliberative, as the Government
22 now argues. (*Id.*) The Court adopts both proposals. The Government will be permitted to bring
23 any privileged document to the Court’s attention for *in camera* review, without motion practice,
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1 and shall submit any privileged documents from the timeframe January 11, 2018 to February 22,
2 2018 for the Court’s *in camera* review by **August 28, 2020**.

3 **B. Likelihood of Irreparable Harm**

4 The Government has also failed to demonstrate a likelihood of irreparable harm. The
5 Government’s assertion that the Court’s July 15, 2020 Order “will result in the irretrievable
6 disclosure of thousands of privileged documents relating to multiple military policies” ignores
7 explicit protections in the Order, which allow specific documents to be brought to the Court’s
8 attention upon subsequent motion. (Dkt. No. 545 at 6-7; Dkt. No. 547 at 4.) Further, as
9 discussed above, the Court adopts Plaintiffs’ proposal that in lieu of production, the Government
10 may submit any privileged document falling outside the Court’s proposed timeframes for *in*
11 *camera* review without motion practice. This procedure allows the Government an additional
12 level of protection while acknowledging that the Government’s troubling practice of
13 over-asserting privileges means it is no longer entitled to the benefit of the doubt.

14 **C. Injury to Plaintiffs and Impact on the Public Interest**

15 Finally, the Court finds that a stay would harm Plaintiffs and the public interest. While
16 the Government guesses that the Ninth Circuit will issue its ruling on the second petition for a
17 writ of mandamus “in short order,” the Circuit recently set oral argument for October 14, 2020,
18 eight months after the Government filed its petition. (Dkt. Nos. 547 at 5; 559.) Given this
19 timing and the 11 months it took the Circuit to adjudicate the Government’s first petition, the
20 Court finds it unlikely that the Ninth Circuit will issue a ruling shortly. And as the Plaintiffs
21 recently noted, under the current policy, “hundreds if not thousands of lives [] are directly
22 affected every single day,” preventing countless potential servicemembers from “fulfilling a
23 dream they have had their entire lives.” (Dkt. No. 565 at 24:14-16, 24:22-23.) “It is

1 heartbreaking to our plaintiffs every time we have to tell them there is a further delay in the
2 case.” (Id. at 25:7-9.)

3 Because this discovery dispute is years old and has caused numerous delays to the
4 Court’s case schedule, and because Plaintiffs and the public have a strong interest in the timely
5 determination of the issues of national and constitutional importance involved in this matter, the
6 Court finds that further delays would cause substantial injury to the Plaintiffs and negatively
7 impact the public interest. (See, e.g., Dkt. No. 347 (Second Amended Complaint), ¶¶ 69, 79, 90;
8 Dkt. No. 130, Declaration of Ryan Karnoski, ¶¶ 22-23.)

9 **Conclusion**

10 The Government has failed to demonstrate a likelihood of success on the merits or that
11 irreparable injury will result in the absence of a stay. The Court therefore DENIES the
12 Government’s motion. Further, the Court adopts Plaintiffs’ proposals, modifying the July 15,
13 2020 Order as follows:

14 (1) The Government may bring any privileged documents outside the timeframe of July
15 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018 to
16 the Court for an *in camera* review without motion practice;

17 (2) The Government must submit all privileged documents from the time period January
18 11, 2018 to February 22, 2018 to the Court for *in camera* review by **August 28, 2020**.

19 The Government is ORDERED to comply with the Court’s July 15, 2020 Order (Dkt. No. 545)
20 with these additional modifications by **August 28, 2020**.

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

Dated August 17, 2020.



Marsha J. Pechman
United States Senior District Judge

Add. 75

1 1. Defendants’ Motion to Stay

2 On July 15, 2020 the Court issued an Order requiring the Government to review its
3 deliberative process privilege (“DPP”) claims and produce those documents that are not
4 predecisional or deliberative. See National Wildlife Federation v. U.S. Forest Service, 861 F. 2d
5 1114, 1117 (9th Cir. 1988) (requiring a document to be “*both* (1) ‘predecisional’ or ‘antecedent
6 to the adoption of agency policy’ and (2) ‘deliberative,’ meaning ‘it must actually be related to
7 the process by which policies are formulated.’”) (citation omitted, emphasis in original). The
8 Order followed the Court’s assessment of the 850 documents the Government submitted for *in*
9 *camera* review and its finding that the Government had erroneously asserted the privilege over
10 many of these documents. Indeed, for hundreds of the submitted documents, the Court could
11 find no plausible basis for the Government’s privilege claims at all.

12 Noting the enormous task remaining before the Parties and the Court of evaluating the
13 Government’s assertion of the DPP over approximately 48,000¹ documents, as a discovery
14 management tool the Court outlined a timeframe for documents that are presumptively not
15 entitled to DPP protection because they do not fall within the decision period for the Carter and
16 Mattis policies. Defendants were ordered to produce documents that were reviewed *in camera*
17 and not entitled to DPP protection by July 22, 2020 and to produce all documents that fall
18 outside the date ranges of July 13, 2015 to June 30, 2016 (Carter policy) and September 14, 2017
19 to January 11, 2018 (Mattis policy) and all documents or portions of documents that are purely
20 factual by July 29, 2020. The Court explicitly excepted from this production any documents

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22 _____
23 ¹ The Government claims this figure is now approximately 40,000 documents and the number of documents
24 withheld solely on the basis of the DPP is now 25,000, down from the original 35,000 documents the Government
withheld. (Dkt. No. 547 at 2 n.1.) The Government provides no explanation for why it has disclosed 10,000
documents it vigorously defended as privileged for nearly three years, documents that were the subject of two
petitions for writs of mandamus to the Ninth Circuit.

1 implicated by the Government’s pending Petition for a Writ of Mandamus with the Ninth
2 Circuit. (See Dkt. Nos. 414-16.)

3 On the evening of July 20, 2020, Defendants filed a motion to stay the Court’s July 15,
4 2020 Order until the pending mandamus petition is resolved. (Dkt. No. 545.) Defendants
5 informed the Court that if it did not grant Defendants’ motion for a stay within 24 hours,
6 Defendants would file an emergency motion in the Ninth Circuit requesting a stay of this Court’s
7 July 15, 2020 Order. (Dkt. No. 547 at 3.) Because the 24-hour timeline Defendants propose
8 does not allow for a response from Plaintiffs, and because the Court will not issue a ruling on
9 Defendants’ Motion to Stay until it is fully briefed, the Court HOLDS IN ABEYANCE the
10 production deadlines in its July 15, 2020 Order (Dkt. No. 545) until it issues a ruling on
11 Defendants’ Motion to Stay (Dkt. No. 547).

12 2. Trial Date and Discovery Deadline

13 In the Parties’ July 17, 2020 Joint Status Report, Plaintiffs requested that the Court
14 postpone setting a new discovery cutoff and noted that this will likely delay trial beyond the
15 current, October 22, 2020 trial date. (Dkt. No. 546 at 6.) Among other things, Plaintiffs noted
16 Defendants’ pending mandamus petition and stalled productions have impacted Plaintiffs’ ability
17 to depose witnesses. (Id. at 4.) While Defendants objected to Plaintiffs’ request to vacate the
18 trial date “and indefinitely extend discovery” in the Joint Status report, two days later they filed
19 their Motion to Stay, threatening to file another petition for a writ of mandamus with the Ninth
20 Circuit if the Court did not stay Defendants’ current production deadlines. (Dkt. No. 547.)
21 Given the enormous number of relevant documents that remain contested in this matter, the
22 Court will postpone setting a new discovery cutoff and will set a new trial date of April 26, 2021.

1 Plaintiffs may wait to take depositions until after Defendants have produced documents in line
2 with the Court's rulings and relevant to the particular witness being deposed.

3 **Conclusion**

4 In summary, the production deadlines in the Court's July 15, 2020 Order (Dkt. No. 545)
5 are HELD IN ABEYANCE until the Court issues a written order on Defendants' Motion to Stay
6 (Dkt. No. 547). Further, the Court sets a new trial date of April 26, 2021 and will not set a new
7 discovery cutoff deadline at this time.

8 Dated July 23, 2020.

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11 Marsha J. Pechman
12 United States Senior District Judge
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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 RE (DKT. NOS. 497, 514,
536, 540-42);

ESTABLISHING A TIMEFRAME
FOR ASSERTION OF THE
DELIBERATIVE PROCESS
PRIVILEGE;

REQUIRING DEFENDANTS TO
REVIEW THEIR DELIBERATIVE
PROCESS PRIVILEGE CLAIMS
AND PRODUCE THOSE THAT
ARE NOT PREDECISIONAL OR
DELIBERATIVE

This matter comes before the Court upon the Parties' Joint Submission Regarding Defendants' Deliberative Process Privilege Claims (Dkt. No. 497). Having reviewed the 850 documents submitted pursuant to the Court's Orders on the Joint Submission (Dkt. No. 514, 536), the Parties' responses to the questions posed by the Court (Dkt. Nos. 540-42), and two earlier *in camera* document reviews, the Court finds and ORDERS:

- 1 (1) Defendants must produce all documents where the privilege category is designated
2 with “N” in the spreadsheets attached to this Order by **July 22, 2020**. As to those
3 documents where the privilege category is marked “Y”, the Court is satisfied that a
4 *prima facie* case of deliberative process privilege (“DPP”) privilege has been
5 established, subject to a possible further review under the balancing test set out in
6 FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984);
- 7 (2) Defendants will review their list of approximately 35,000 documents withheld solely
8 on the basis of DPP and apply the temporal filter of July 13, 2015 through June 30,
9 2016 (Carter policy) and September 14, 2017 through January 11, 2018 (Mattis
10 policy). All documents falling outside of these two timeframes and withheld solely
11 pursuant to the a DPP claim will be produced by **July 29, 2020**. The only exception
12 shall be any documents specifically subject to the pending appeal to the Ninth Circuit.
13 The temporal time filter will also apply to the documents withheld on the basis of
14 other privileges in addition to a DPP claim, and the Defendants shall delete DPP as a
15 claim for withholding the documents that fall outside of this time frame.
- 16 (3) Not later than **July 29, 2020**, the Defendants will filter the remaining documents
17 withheld solely under a DPP claim, and file a privilege log of documents relating to
18 those documents that fall within the designated time frames.
- 19 (4) Not later than **July 22, 2020**, the Defendants will produce paper copies of 500
20 documents submitted for *in camera* review that are not considered privileged as
21 indicated in Attachment 2 to this Order, so the Court can review these documents to
22 satisfy the “deliberative” test. The documents will each bear the “PrivWithhold”
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1 number on the bottom of the document corresponding to the “PrivWithhold”
2 designation in the privilege log submitted to the Court.

3 **Background**

4 In this ongoing discovery dispute, the Government has withheld approximately 50,000
5 documents from production claiming they are exempt from disclosure, at least in part, pursuant
6 to the deliberative process privilege (“DPP”). Within these 50,000 documents, a subset of
7 approximately 35,000 has been withheld *solely* on the basis of a DPP claim. To test whether the
8 Government has been properly asserting the DPP privilege, the Parties and the Court devised a
9 process where 1% (350) of the documents withheld solely on a DPP claim were randomly
10 selected and sent to the Court for an *in camera* review. (See Dkt. Nos. 497, 514.) After
11 reviewing the first submission of 350 documents, and due to a problem of overreach in the claim
12 of DPP privilege, the Court ordered the Government to submit another batch of 500 randomly
13 selected documents for *in camera* review, in order to test the extent of Defendants’ assertion of
14 the privilege. (Dkt. No. 536.)

15 The Court has had difficulty with the Government’s over-assertion of the DPP in the past.
16 On two prior occasions, the Court has reviewed, with the assistance of the Special Master, more
17 than 3,500 pages of documents, withheld for privilege claims, including the DPP. In very few
18 instances was the Government’s assertion of the DPP sustained.

19 In light of the enormous task remaining before the Parties and the Court on this issue of
20 privilege, the Court is setting out discovery standards to be followed relating to the remaining
21 approximately 48,000 documents to which a DPP claim has been asserted. This Order will
22 describe the boundaries for documents that are presumptively not entitled to DPP protection.
23 The Order will deal specifically with the 850 random DPP-claimed documents submitted for *in*
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1 camera review. Finally, the Government will be directed to review its DPP claims for the
2 remaining approximately 48,000 documents, and remove its claim of DPP protection from those
3 documents that do not reach the *prima facie* threshold described in this Order, and to produce the
4 documents not reaching this threshold to the Plaintiffs.

5 Discussion

6 The DPP applies to protect the decision-making process. To qualify, “a document ‘must
7 be *both* (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and (2)
8 ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are
9 formulated.’” National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th
10 Cir. 1988) (citation omitted, emphasis in original). For the reasons that follow, the Court finds
11 that the Government has asserted the DPP over many documents that do not meet this definition.

12 A. Predecisional

13 Before a document can be withheld pursuant to the DPP, it must be predecisional. See
14 NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 (1975) (explaining the privilege applies
15 “prior to the time the decision is made” and not to “communications made after the decision and
16 designed to explain it”); Lahr v. NTSB, 569 F.3d 964, 981 (9th Cir. 2009) (noting “we have
17 rejected the argument that a continuing process of agency self-examination is enough to render a
18 document ‘predecisional,’” instead, “[t]he documents must be prepared to assist an agency
19 decision-maker in arriving at a future particular decision”) (internal quotations and citations
20 omitted); Fishermen’s Finest, Inc. v. Gutierrez, No. C07-1574MJP, 2008 WL 2782909, at *2
21 (W.D. Wash. July 15, 2008) (“A document that was prepared to support a decision already made
22 is not predecisional.”). But, what, then, is predecisional in this case?
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1 The Government appears to make the claim that because certain individuals began to
2 consider transgender policies in March 2014, and because policies continue to change even
3 today, the predecisional date begins in March of 2014, and everything since that date to the
4 present remains predecisional. The Court rejects this reasoning, because the analysis fails to
5 focus on the specific policies at issue in this litigation. The Government's position reads the
6 DPP "predecisional" requirement out of existence.

7 There are two policies at issue in this case: (1) The Carter policy which permitted
8 transgender service members to enlist and serve in the U.S. Military; and (2) the Mattis policy
9 which reversed the Carter policy. While these two decisions resulted in a number of spin-off
10 plans designed to execute and implement the two underlying policies, the fundamental issue
11 being challenged by Plaintiffs is the reversal of the Carter policy in favor of the Mattis policy.
12 The implementation and execution plans are simply secondary to the policy switch. As a result,
13 for purposes of determining the "predecisional" and "post-decisional" timeframes for *prima facie*
14 applicability of DPP, the timeframe around these two policy decisions is paramount.

15 For discovery purposes, documents outside the predecisional timeframe for these
16 decisions are presumptively not subject to the DPP. In National Wildlife, *supra*, the court
17 recognized that there may be instances in which production of documents after the policy might
18 provide a roadmap as to the actual decision-making process, which could otherwise protect those
19 documents. This is because the focus of the DPP is to protect the decision-making process. In
20 reviewing the 850 documents submitted for DPP examination, the Court could identify but a
21 handful of documents as to which this could be seriously asserted. However, as explained
22 below, the handful of these documents will continue to be protected under protective order with
23 claw back provisions in the process described.

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Add. 84

1 The Court is exercising its discretion to manage discovery in this manner, for several
2 reasons. First, this is consistent with the pleadings in this case, and as analyzed by the Ninth
3 Circuit in the previous appeal. Second, based upon the Court's examination of four batches of
4 documents submitted for *in camera* review (approximately 8,813 pages of documents), the Court
5 finds that the Government has consistently been overbroad in asserting the DPP.

6 Third, the Government fails to segregate portions of documents which may be partially
7 protected by the DPP from those that are not, despite its obligation to do so. See Karnoski v.
8 Trump, 926 F.3d 1180, 1204 (9th Cir. 2019) (quoting Army Times Publ'g Co. v. Dep't of Air
9 Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)) ("Unlike the presidential communications
10 privilege, the deliberative process privilege does not protect documents in their entirety; if the
11 government can segregate disclosed non-privileged factual information within a document, it
12 must."). Thus far, the Government has not performed any segregation, instead simply tossing
13 this responsibility to the Court.

14 Fourth, the Government claims that 50,000 documents are covered by the DPP and other
15 privileges, and of that quantity, 35,000 are subject to the DPP and no other privilege. Yet after
16 making a random selection of 500 documents for *in camera* inspection, the Government
17 acknowledged that 90 of the randomly selected documents (or 18% of the total) were not subject
18 to a proper DPP claim. (Dkt. No. 542 n. 1.) The Government produced these 90 documents to
19 Plaintiffs and then chose an additional 90 documents to submit to the Court for review. This
20 does not give the Court much, if any, confidence that the Government is properly asserting the
21 DPP privilege, a concern that is amplified by the earlier poor showing on its DPP claims.

22 Finally, the Court opts for this arrangement because all documents produced will still be
23 subject to the protective order in place, and if it turns out that some documents falling outside the
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1 predecisional and post-decisional date ranges are properly the subject of the DPP, specific
2 documents can be brought to the Court’s attention on subsequent motion. The Order includes a
3 claw-back provision for documents produced erroneously. This decision is made for discovery
4 rather than for trial purposes. Accordingly, as a discovery management tool, the Court sets the
5 following pre and post-decisional dates to establish a framework for evaluating the
6 Government’s DPP assertions.

7 1. Carter Policy

8 As to the Carter policy, on July 13, 2015, then-Secretary Carter announced the military
9 would begin to study the implications of allowing transgender troops to serve in the military.
10 (Dkt. No. 540, Ex. 14). A working group was formed on July 28, 2015 to formulate a policy
11 decision on use of transgender troops. (Dkt. No. 540, Ex. 15.) The work of the committee was
12 completed and on June 30, 2016, Secretary of Defense Carter formally announced the new
13 policy. (Dkt. No. 540, Ex. 12; Dkt. No. 542 at 7; Dkt. No. 505 at 7.) This Court previously
14 ordered production of certain earlier Carter-policy documents on the grounds that it appeared
15 that the Department of Defense (“DOD”) and RAND contemplated that the underlying RAND
16 studies would be published contemporaneously with the announcement of the Carter policy.
17 (Dkt. No. 540, Ex. 12; Dkt. No. 542 at 7; Dkt. No. 505 at 7.) The Court found that the policy
18 was in effect before the public announcement, based on emails from February of that year
19 between the lead contact for RAND and her DoD counterpart discussing the public
20 announcement of the new policy. (Dkt. No. 509 at 4 (citing PrivWithhold 1106).) The practical
21 effect of this is to back up the post-decisional date of the Carter policy to February 6, 2016.
22 However, for purposes of this discovery management tool, the Court will use the announcement
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1 date of the Carter policy – June 30, 2016 – to define the end of the predecisional time frame
2 relating to the Carter policy.

3 Thus, only documents within the date range July 13, 2015 through June 30, 2016 are
4 presumptively predecisional, and therefore subject to a proper DPP claim regarding the Carter
5 policy. As a result, documents created prior to July 13, 2015 are presumptively not considered
6 pre-decisional regarding the Carter policy. Documents created after June 30, 2016 are
7 presumptively considered post-decisional. Just as the Court previously concluded, the end date
8 of the “predecisional” time frame may ultimately be backed up by applying the fourth factor of
9 the Warner test – an issue to be resolved at a later point.

10 2. Mattis Policy

11 Secretary Mattis formed his working panel to consider the issues surrounding use of
12 transgender troops on September 14, 2017. (Dkt. No. 542 at 8.) And the Government has long
13 taken the position that the Panel’s recommendations, issued on January 11, 2018, “were adopted
14 in their entirety by then-Secretary of Defense James Mattis.” (Dkt. No. 414-1, Pet. for
15 Mandamus at 8.) When the Court asked the Government whether “the decision had been made”
16 once the Panel sent over its recommendations to the Office of the Secretary of Defense, the
17 Government responded that yes, at that point, “the final decision was made.” (Dkt. No. 402, Tr.
18 28:16-17, 19.) As a result, documents created before September 14, 2017 are presumptively not
19 predecisional, and documents created after January 11, 2018 are presumptively post-decisional.

20 Although Plaintiffs have argued that the Government adopted the challenged policy no
21 later than August 25, 2017, when the President issued a memorandum that formalized his July
22 26, 2017 Tweets banning transgender military service and ordered the military to implement that
23 policy (Dkt. No. 540 at 6), because the President’s March 23, 2018 Presidential Memorandum
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1 revoked his 2017 Memorandum and because the Ninth Circuit determined that “the 2018 Policy
2 is a significant change from the 2017 Memorandum” Karnoski v. Trump, 926 F.3d 1180,
3 1189-92, 1202 (9th Cir. 2019), the Court’s focus here is on the adoption of the Mattis policy.

4 Therefore, in the Government’s privilege log, only documents that fall within the date
5 ranges of July 13, 2015 to June 30, 2016 (Carter policy) and September 14, 2017 to January 11,
6 2018 (Mattis policy) are presumptively predecisional and entitled to possible DPP protection.

7 **B. Deliberative**

8 In the Ninth Circuit, the DPP applies “whenever the unveiling of factual materials would
9 be tantamount to the ‘publication of the evaluation and analysis of the multitudinous facts’
10 conducted by the agency.” Nat’l Wildlife, 861 F.2d at 1119 (citations omitted). In National
11 Wildlife, the court confronted the issue of whether a document was deliberative or merely
12 factual. The plaintiff argued that because certain information in an Environmental Impact
13 Statement (“EIS”) was factual, rather than opinion, the document was not subject to a proper
14 DPP claim. The Ninth Circuit held this distinction was too narrow. Instead, the court held that
15 the analysis of whether a document was protected or not from disclosure should focus on the
16 “*deliberative process*.” Id. at 1118 (emphasis in original). Under this approach, nonbinding
17 recommendations on law or policy would be exempt from disclosure. Factual material would be
18 exempt from disclosure to the extent that it revealed the mental processes of decisionmakers.
19 Ultimately, the court held that draft Environmental Impact Statements and “previews” were
20 subject to the DPP and concluded they were “predecisional” because they were drafts, subject to
21 change, and that disclosure would reveal the deliberative process of the Forest Service.

22 In this case, many of the documents submitted by the Government for *in camera* review
23 contain no deliberative process thoughts or opinions. Instead, many fall into the “factual” arena.

1 Moreover, these “factual” documents do not amount to “previews” of the policies or otherwise
2 reveal the deliberative thought process of the Department of Defense. Even if the documents
3 could be at least partially so classified, the Government has not sought to segregate any portions
4 of the documents which express an opinion (potentially protectible) from the facts portion of the
5 documents (generally not protectible, unless revealing thought processes), as required. In the
6 attached analysis of DPP-claimed documents, those which fall into this “factual” arena, or which
7 are not otherwise substantive and thus not subject to DPP protection, are labelled “not
8 deliberative,” and the privilege category is marked with “N” in the attachment to this Order.¹

9 In the second batch of 500 documents submitted to the Court for *in camera* review, the
10 paper documents sent to the Court lacked corresponding identifying Bates numbers
11 corresponding to the privilege log. The Special Master spent several hours attempting to use or
12 find certain identifying characteristics on the documents to match up with the privilege log.
13 Ultimately, the Special Master concluded that the second batch should simply be filtered on the
14 basis of disqualifying dates as set forth above. For documents falling outside the date range as
15 described on the privilege log, the document was denied DPP status as being “Not
16 predecisional.” The Special Master could not conduct a “deliberative” process review. For all
17 documents that fell within the time frame that defines the DPP in this case, no determination of
18 privilege could be made. This does not require that all documents be sent to the Court with
19 appropriate PrivWithhold Bates numbers. It does, however, require that the Government submit

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22 ¹ The Court began its work by declaring some of the documents “not predecisional” and “not deliberative.” As the
23 review continued, the Court stopped undertaking a dual analysis. The Court only examined whether a document
24 was “deliberative” or “Not deliberative” after a predecisional determination had been made. The Parties should not
assume that because a document was determined to be “predecisional” that the absence of comment that the
document is “not deliberative” is a determination that the document was, in fact “deliberative.” To qualify for DPP
protection, a document must be both predecisional and deliberative.

1 properly labelled copies of the documents with appropriate Bates labels for those documents as
2 to which no ruling is reflected on Attachment 2.

3 **Conclusion**

4 After conducting an *in camera* review of the randomly selected sample of documents the
5 Government has withheld solely on the basis of the DPP, the Court finds that Defendants have
6 broadly over-asserted the privilege. The Court therefore ORDERS Defendants to produce
7 documents, as indicated in the attachment to this Order. As to those documents where the
8 privilege category is designated with “N”, the Government is required to produce these
9 documents not later than **July 22, 2020**. As to those documents where the privilege category is
10 marked “Y”, the Court is satisfied that a *prima facie* case of DPP privilege has been established.
11 Further, Defendants must produce all documents that fall outside the date ranges of July 13, 2015
12 to June 30, 2016 (Carter policy) and September 14, 2017 to January 11, 2018 (Mattis policy) and
13 all documents or portions of documents that are purely factual by **July 29, 2020**.

14 This Order does not reach the issue of whether Plaintiffs can overcome Defendants’
15 privilege assertions under the factors described in Warner, 742 F.2d at 1161, but the Court will
16 entertain future briefing from the Parties as to specific documents the Government continues to
17 withhold after complying with this Order. The Court will also review additional documents *in*
18 *camera* if necessary to determine the accuracy of the Government’s privilege claims.

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

21 Dated July 15, 2020.

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24 Marsha J. Pechman
United States Senior District Judge

Add. 90

The Honorable Marsha J. Pechman

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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

10 RYAN KARNOSKI, et al.,

11 Plaintiffs,

12 v.

13 DONALD J. TRUMP, et al.,

14 Defendants.

No. 2:17-cv-1297-MJP

**DECLARATION OF ANDREW E.
CARMICHAEL**

1 I, Andrew E. Carmichael, swear under penalty of perjury under the laws of the United
2 States to the following:

3 1. I am a Senior Trial Counsel at the United States Department of Justice and counsel
4 of record for Defendants in this action. I submit this declaration in support of Defendants'
5 Motion to Stay Discovery Pending Disposition of Mandamus Petitions.

6 2. Plaintiffs in this action have served and the Department of Defense ("DoD") has
7 responded to 86 Requests for Production and 25 Interrogatories.

8 3. Plaintiff-Intervenor Washington in this action has served and DoD has responded
9 to 21 Requests for Production and 18 Interrogatories.

10 4. In the related cases *Doe v. Esper*, No. 1:17-cv-1597 (D.D.C.), *Stone v. Trump*,
11 No. 1:17-cv-2459 (D. Md.), and *Stockman v. Esper*, No. 5:17-cv-1799 (C.D. Cal.), Plaintiffs and
12 Plaintiff-Intervenor California have served and the Department of Defense has responded to 129
13 Requests for Production and 49 Interrogatories.

14 5. Due to the parties' Cross-Use Agreement, *see, e.g.*, Dkt. 183, except for
15 information specific to individual Plaintiffs, discovery provided in one set of Plaintiffs in the four
16 related cases has been provided to all Plaintiffs and Plaintiff-Intervenors.

17 6. On September 8, 2020, I asked the Department of Justice, Civil Division, E-
18 discovery contractors to provide a summary of the document discovery produced to date in this
19 litigation. I was informed that to date, Defendants have provided 112 document productions
20 (including 13 *in camera* productions) amounting to 99,592 documents, totaling 612,160
21 pages. When excluding slip sheets to mark where a document was withheld for privilege, I was
22 informed that Defendants have produced 61,018 documents totaling 413,041 pages to Plaintiffs
23 and Plaintiff-Intervenor Washington to date in this litigation.

24 7. On September 10, 2020, I asked the Department of Justice, Civil Division, E-
25 discovery contractors to provide a summary of the documents produced to Plaintiffs and Plaintiff-
26 Intervenor Washington between the time period of December 13, 2017 and February 22, 2018. I
27 was informed that the number of documents produced to Plaintiffs and Plaintiff-Intervenor
28 Washington where meta-data from the document indicates the last modified date for the file or

1 sent date for an email was between December 13, 2017 and February 22, 2018 is 14,233, totaling
2 79,226 pages.

3 8. Attached to this declaration as Exhibit A is a true and correct copy of DoD's Third
4 Supplemental Response to Plaintiffs' Interrogatories 16, 17, and 18 served on Plaintiffs and
5 Plaintiff-Intervenor State of Washington on March 23, 2020 in response to the Court's Order of
6 March 5, 2020. Dkt. 458.

7 8. Attached to this declaration as Exhibit B is a true and correct copy of DoD's Third
8 Supplemental Response to Plaintiff-Intervenor State of Washington's Interrogatories served on
9 Plaintiffs and Plaintiff-Intervenor State of Washington on June 3, 2020 in response to the Court's
10 Order of April 20, 2020. Dkt. 486.

11 9. Attached to this declaration as Exhibit C is a true and correct copy of the
12 declaration of Lernes J. Hebert, Deputy Assistant Secretary of Defense for Military Personnel
13 Policy, with exhibits, filed in *Doe v. Esper*, 1:20-cv-10530 (D. Mass.). This declaration was
14 previously filed on the docket in this action without exhibits. *See* Dkt. 542-5.

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

17 EXECUTED this 10th day of September, 2020.

19 */s/ Andrew E. Carmichael*
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22 United States Department of Justice
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28 *Counsel for Defendants*

The Honorable Marsha J. Pechman

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

Defendants.

Case No. 2:17-cv-01297-MJP

**JOINT STATUS REPORT FOR JULY 21,
2020 STATUS CONFERENCE**

1 In advance of the July 21, 2020 status hearing, the parties respectfully submit the following
2 Joint Status Report.

3 **PLAINTIFF’S AND PLAINTIFF-INTERVENOR’S STATEMENT**

4 In this Joint Status Report, Plaintiffs provide the Court an update regarding the following
5 issues:

- 6 1. Status of the Government’s motions to quash depositions of military officials and
7 Plaintiffs’ motions to transfer those proceedings to this Court; and
- 8 2. Updates on depositions and the case schedule.

9 **A. Motions to Quash Depositions of Military Officials**

10 Plaintiffs provide the below updates on each of the four pending motions to quash and
11 motions to transfer, all of which are fully briefed:

- 12 1. *Karnoski, et al. v. Trump, et al.*, No. 2:20-mc-00010-RAJ-RJK, Dkt. No. 14 (E.D.
13 Va.) (Re: Subpoena of former Secretary of Defense James N. Mattis)
 - 14 • Magistrate Judge Krask granted Plaintiffs’ motion to transfer on July 16
 - 15 • Case awaits official transfer to W.D. Wash.
 - 16 2. *Karnoski, et al. v. Trump, et al.*, No. 1:20-mc-0015-LO-TCP, Dkt. No. 12 (E.D. Va.)
17 (Re: Subpoena of former Vice Chairman of the Joint Chiefs of Staff General Paul J.
18 Selva)
 - 19 • Motion to transfer granted
 - 20 • Motion to quash transferred to this Court on July 13 and assigned Case
21 No. 2:20-mc-00055-MJP
 - 22 3. *Karnoski, et al. v. Trump, et al.*, No. 1:20-mc-00013-UA-JEP, Dkt. No. 8 (M.D.N.C.)
23 (Re: Subpoena of former Vice Chief of Naval Operations Admiral William F. Moran)
 - 24 • Both motions assigned to Magistrate Judge Peake for resolution
 - 25 4. *Karnoski, et al. v. Trump, et al.*, No. 1:20-mc-00016-LO-IDD, Dkt. No. 15 (E.D.
26 Va.) (Re: Subpoena of Secretary of Veterans Affairs Robert Wilkie Jr.)
 - 27 • Motion to transfer granted
- 28

- Motion to quash transferred to this Court on July 13 and assigned Case No. 2:20-mc-00056-MJP

B. Deposition and Case Schedule Update

Plaintiffs' most important consideration in terms of scheduling is developing the fullest and most complete evidentiary record that is reasonably possible for trial, including the documents and the testimony of current and former government officials that will disclose what occurred in the development of what the Government labels the "Mattis Policy," including the role of the President's July 26, 2017 tweets and August 25, 2017 Memorandum and "directives" to the Department of Defense ("DoD"). Therefore, Plaintiffs require time within the case schedule that allows for Plaintiffs to continue pursuing production of the thousands of key documents withheld by the Government on grounds of deliberative process and other privilege claims and the unobstructed testimony of key participants, most of whom are former government employees and/or non-managing agents outside the Court's subpoena range who cannot be compelled to appear at trial and who the Government has made clear it does not intend to call at trial, and whose deposition testimony, therefore, is Plaintiffs' — and the Court's — one and only opportunity to obtain their testimony.

Obtaining this evidence is important not only for trial and this Court's findings and conclusions, but also for resolution of this case on its potential appeal before the Ninth Circuit and, possibly, the Supreme Court. The Government has made clear that its defense that the "Mattis Policy" was developed solely by the military, completely independent from and unrelated to the President's tweets and directives, is based on the "administrative record" that its lawyers subsequently prepared and limited to information presented to the so-called "Panel of Experts" (hereinafter, the "Panel"), and the articles and other materials cited in the *post hoc* February 2018 Report ("DoD Report") Defendants rely upon in the support of that policy, as well as the testimony of former acting Under Secretary for Personnel and Readiness ("P&R") Tony Kurta, who was responsible for leading the Panel. Challenging the Government's defense, and establishing the full and accurate facts of what really occurred, requires obtaining the

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1 contemporaneous documents and the testimony of participants beyond that which the
2 Government relies on affirmatively.

3 To date, however, the Government has opposed discovery beyond the “administrative
4 record” and the *post hoc* DoD Report, principally through expansive claims of deliberative
5 process privilege, and when those claims were rejected, seeking mandamus. This has prevented
6 the completion of discovery, at least until (1) the Government’s current petition for mandamus is
7 decided, (2) this Court’s current *in camera* and any follow-up document reviews or other
8 proceedings are completed, (3) all documents determined not to be privileged or as to which the
9 privilege has been overcome are produced, and (4) depositions of key witnesses can be
10 conducted with the benefit of those documents and without instructions not to answer with
11 respect to key subject matters on the ground they call for privileged information or violate the
12 current administrative stay. This includes the Government’s withholding of documents and
13 testimony concerning the subject matters that are the focus of the pending petition for
14 mandamus: (1) communications and other information concerning the “Mattis Policy” and
15 transgender issues outside of the Panel’s formal meetings, including the various working groups
16 that “supported” the Panel and determined what information it would — and would not —
17 receive; (2) anything related to the development and preparation of the *post hoc* DoD Report,
18 which Defendants have represented is the principal, if not exclusive, statement of the reasons and
19 justifications for the Ban; and (3) communications and other information concerning the Carter
20 Working Group, which considered the exact same issues and governmental interests the
21 Government relies upon here, but reached the exact opposite conclusions — that open
22 transgender service promotes, rather than detracts from, unit cohesion and military readiness —
23 less than two years before.

24 Notwithstanding the foregoing limitations and concerns, Plaintiffs have taken, and will
25 continue to take, the depositions of witnesses for whom such limitations are less important,
26 remotely. Plaintiffs have deposed the Government’s “hybrid” fact and expert witnesses,
27 Christopher Meyering and Kevin Cron. Plaintiffs had scheduled remote Rule 30(b)(6)
28 depositions on those subject matters that are not unduly impacted by the pending mandamus

1 petition and administrative stay, though recently took those depositions off calendar pending the
2 Government's document productions in response to the Court's July 15 Order. Additionally,
3 Plaintiffs are deposing Dr. Jillian Shipherd, a third party witness who testified before the Panel
4 and who is now a Clinical Research Psychologist with the Department of Veterans Affairs,
5 remotely. However, in view of the Government's insistence that it should only produce
6 government witnesses for deposition once, Plaintiffs believe that the depositions of remaining
7 witnesses should be deferred until this Court's and the Special Master's current and any further
8 *in camera* reviews, and any document productions in response to those reviews, are completed.

9 Depending on future developments with respect to the current coronavirus pandemic, the
10 temporary deferral of these depositions may also have the added benefit of allowing some or all
11 of these depositions to be taken in person, instead of remotely. While Plaintiffs do not intend to
12 rely on this consideration as an independent or additional basis for delaying these depositions
13 after this Court's *in camera* review process is completed, the remote depositions taken to date
14 have demonstrated that remote depositions are not an adequate substitute for in-person
15 depositions, at least in the unique circumstances of this case. These unique circumstances include
16 the fact that (1) these depositions are not simply discovery depositions, but effectively *de bene*
17 *esse* depositions to record this testimony for use at trial, and (2) due to the Government's refusal
18 to produce these witnesses more than once, their depositions are being taken simultaneously in
19 four separate cases and, therefore, require the participation and coordination and consultation
20 with four separate groups of plaintiffs' lawyers, which is difficult to do remotely. As to (1), and
21 as discussed previously, almost all of these depositions are of current or former officials who
22 cannot be compelled to testify live at trial and the Government has made clear they do not intend
23 to call at trial. This means that these depositions are the one and only chance for Plaintiffs — and
24 the Court — to obtain the testimony of these important witnesses. And, the importance and
25 adversity of these witnesses require the kind of searching examination and follow up that is most
26 likely to reveal the facts, but is more difficult and less effective when conducted remotely.
27 Plaintiffs also expect these depositions to involve a large number of often-lengthy and complex
28 exhibits, with references to specific pages and provisions that the depositions to date show is far

1 more time-consuming and challenging to do remotely, where the examiner cannot confirm the
2 witness is looking at the correct page and/or provision and/or physically point to or hand the
3 witness the relevant excerpt. As to (2), the remote depositions taken to date have also
4 demonstrated the practical difficulties of coordinating with other Plaintiffs’ counsel remotely
5 during questioning.

6 Finally, Plaintiffs anticipate that, after the document discovery and depositions of DoD
7 witnesses have been completed or are nearing completion, they will seek limited, targeted
8 discovery of witnesses from the Executive Office of the President and/or White House, including
9 the production of documents and, possibly, the depositions of one or more current or former
10 officials or Rule 30(b)(6) witnesses. At this point, Plaintiffs believe this discovery would include
11 determining (1) what, if any, role the military played in recommending or approving the Ban
12 announced by the President via tweet on July 26, 2017 and formalized in the President’s August
13 25, 2017 Memorandum, and (2) what, if any, role the Executive Office of the President and
14 White House played in the subsequent development of the “Mattis Policy” and the DoD Report
15 Defendants rely on in support of that policy. The need for this discovery will depend on the
16 extent to which DoD witnesses are able and allowed to provide this information. Pursuant to the
17 Ninth Circuit’s June 2019 Opinion, Plaintiffs are deferring seeking this discovery until after
18 discovery of the DoD is substantially completed and they are able to make a determination of —
19 and demonstrate to the Court — their need for this information and that it is not available from
20 other, alternative sources.

21 For all of these reasons, Plaintiffs respectfully request that the Court postpone setting a
22 new discovery cutoff at this point. Plaintiffs recognize that this will likely delay trial beyond the
23 current, October 22, 2020 trial. But given the importance of these further documents and
24 testimony, we do not believe it would be in our clients’ interests to proceed without them.
25 Plaintiffs also recognize that the Government’s anticipated motion for summary judgment will
26 require the current trial date’s extension in order for briefing to be completed and this Court to
27 consider the motion in advance of trial. At bottom, Plaintiffs believe it is more important to try
28 this case on a full and complete record than to try this case before it is ready, while the disputes

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1 over the Government’s massive privilege claims are unresolved and Plaintiffs lack the benefit of
2 key documents and the testimony of key participants concerning the myriad subject matters the
3 Government currently claims are privileged.

4 DEFENDANTS’ STATEMENT

5 I. Motions To Quash Depositions Of High-Level Officials

6 As Plaintiffs note, three of the four motions to quash the depositions of high-level
7 Government officials—relating to Secretary Wilkie, former-Secretary Mattis, and General
8 Selva—have been transferred, or are in the process of being transferred, to this district. In order
9 to expedite resolution of these disputes and avoid further delay, Defendants propose that this
10 Court decide these motions to quash (1) based on the briefing already submitted by the parties to
11 the transferor courts; and (2) without awaiting a decision on transfer of the fourth motion to
12 quash (concerning Admiral Moran). Defendants propose noting the Secretary Wilkie, Secretary
13 Mattis, and General Selva motions for July 24, 2020, the Friday following the upcoming status
14 conference.

15 II. Plaintiffs’ Refusal To Proceed With Certain Depositions Remotely

16 During the teleconference on April 2, 2020, this Court addressed how the parties should
17 approach depositions in light of the COVID-19 pandemic. The Court explained that, despite
18 social distancing measures necessary during the pandemic, it saw “no reason why [the parties]
19 can’t move forward using teleconferencing and get your depositions done.” (4/2/2020 Hr’g Tr.
20 30:7–8) The Court further instructed the parties “to move forward on [depositions] right away
21 and start using [their] teleconferencing materials and platforms.” (4/2/2020 Hr’g Tr. 30:12–13)

22 Despite the Court’s oral rulings, at the later teleconference on June 23, 2020, Defendants
23 explained to the Court that the Plaintiffs in this and the related cases had expressed a desire to
24 take depositions in-person, and that, as a result, certain previously scheduled depositions did not
25 occur. (6/23/2020 Hr’g Tr. 9:15–18) Defendants further stated that, contrary to Plaintiffs’
26 position, if depositions “can’t happen in person due to the health environment,” then they should
27 proceed remotely. (6/23/2020 Hr’g Tr. 9:20–22)
28

1 Since then, the Plaintiffs have continued their refusal to move forward with certain
2 depositions remotely, except where witnesses or their families possess unique health concerns.
3 For example, the parties found mutually agreeable dates for the depositions of Thomas Dee on
4 July 7 and Dr. Terry Adirim on July 17, but the Plaintiffs in this and the related *Doe* case refused
5 to proceed with those depositions unless they took place in person. Similarly, the Plaintiffs here
6 were scheduled to take the deposition of Col. Steven Pflanz on June 24, but the Plaintiffs
7 postponed that deposition because it could not proceed in person. To date, none of these three
8 witnesses have been deposed.

9 While Defendants understand that planned depositions must sometimes be moved to
10 accommodate scheduling conflicts or unforeseen circumstances, Defendants do not believe that a
11 desire to take a particular deposition in-person, rather than by videoconference, is a legitimate
12 ground on which to cancel or postpone a deposition. Defendants thus respectfully request that the
13 Court order that the parties may not cancel or postpone a deposition simply because it can
14 proceed only remotely.

15 Such an order is warranted for several reasons. As an initial matter, it is consistent with the
16 Court's oral rulings during the April 2, 2020 status conference that the parties should move
17 forward with depositions "right away" and using teleconferencing platforms if necessary.
18 (4/2/2020 Hr'g Tr. 30:7-13)

19 In addition, Government counsel currently are not permitted to participate in in-person
20 depositions. The Civil Division of the Department of Justice ("DOJ") entered Phase 1 for the
21 National Capital Region on July 13, 2020. Under Phase 1, DOJ encourages extensive telework
22 for its employees, with individual decisions left up to its components. The directors of the
23 Federal Programs Branch (the DOJ component representing Defendants in this action) have
24 determined that its attorneys are not permitted to participate in in-person depositions to protect
25 the health of the attorneys and their families. At this time, Government counsel are unable to
26 estimate when they would be permitted to participate again in in-person depositions.

27 Even if Government counsel were permitted to participate in in-person depositions, it
28 would not be sensible to do so. The current pandemic appears to be only getting worse, with

1 numerous serious ongoing outbreaks across the country. Although Plaintiffs have suggested
2 mitigation measures such as the use of masks during depositions and limiting participants to two
3 attorneys, the witness, and the court reporter, it appears from public health guidance that
4 extended contact in a confined indoor space (such as a deposition room) is one of the activities
5 most likely to foster spread of COVID-19. Plaintiffs in this and the related cases have also
6 represented that at least some of their attorneys would have to travel from out of state to attend
7 in-person depositions, which simply increases the risk to those present in the deposition room.

8 On the other hand, the parties have already engaged in several remote depositions, which
9 have worked well, and, more importantly, ensured that the attorneys, witnesses, and court
10 reporters were not needlessly exposed to COVID-19. Plaintiffs contend that proceeding with
11 these remote depositions has made it difficult for counsel for the related cases to coordinate
12 during depositions. But this concern would not be alleviated by, as Plaintiffs have suggested,
13 taking depositions in person but having only one attorney for Plaintiffs in the deposition room
14 and attorneys for related cases participating remotely. In any event, Defendants have offered that,
15 if counsel in this and the related cases all wish to be in the same room during depositions, they
16 could assemble together in one room at one of their law offices and remotely join depositions
17 together. This would permit them to coordinate in real time during a remote deposition without
18 potentially exposing the witness, Government counsel, or the court reporter to increased
19 risk. Alternatively, Defendants have proposed other ways to alleviate Plaintiffs' expressed
20 concern about coordination, such as by taking longer breaks during the deposition or splitting
21 depositions over two days.

22 Although Plaintiffs now state that they "do not intend to rely" on their desire for in-person
23 depositions as an independent basis for delaying depositions "after this Court's *in camera* review
24 process is completed," *supra* at 4, that statement does not address how Plaintiffs will approach
25 depositions *now*. Nor does it address the multiple depositions that Plaintiffs previously
26 represented they would be willing to take in person (such as depositions of Mr. Dee, Dr. Adirim,
27 and Col. Pflanz), but have thus far refused to take remotely.

28

1 The Government is sensitive to the fact that the current pandemic presents unique
2 challenges to litigants and their counsel, and that, in normal circumstances, in-person depositions
3 may be preferable to proceeding remotely. However, the pandemic should not be used as an
4 excuse for Plaintiffs to delay depositions in this case, when proceeding remotely is an available
5 alternative and the Court already has ordered the parties to utilize that option. (4/2/2020 Hr’g Tr.
6 30:12–13)

7 Accordingly, Defendants respectfully request that the Court order that the parties may not
8 cancel or postpone depositions simply because such depositions can proceed only remotely.

9 **III. Case Schedule**

10 Plaintiffs’ request to vacate the trial date and indefinitely extend discovery should be
11 rejected. Instead, the Court should maintain the current trial date and set a close of discovery
12 deadline for September 1, 2020.

13 As an initial matter, Plaintiffs’ apparent argument that the Government is to blame for
14 delays in this case should not be credited. If permitted, Defendants are prepared now to have this
15 case proceed to summary judgment so that their policy may be “evaluated on the record
16 supporting that decision and with the appropriate deference due to a proffered military decision.”
17 *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019). Discovery is only still proceeding due
18 to Plaintiffs’ strategic decisions to delay taking depositions and their refusal to grapple with the
19 Ninth Circuit’s prior holdings in this case.

20 For more than two and a half years, Plaintiffs and Washington steadfastly refused to take
21 even a single deposition until the deliberative process privilege was set aside as to all documents
22 in the Government’s production. This position had no merit to begin with, and certainly has not
23 had merit for the more than a year since the Ninth Circuit granted the Government’s initial
24 petition for a writ of mandamus. In the face of that ruling, it was misguided for Plaintiffs again to
25 insist on an order overruling all of Defendants’ deliberative process privilege assertions *en*
26 *masse*, *see* Dkt. 365 at 5, or an order overruling the deliberative process privilege as to all
27 documents “related” to the formation of DoD’s 2018 policy and the Carter policy. *See* Dkt 408 at
28 2-6. Yet Plaintiffs sought just that, and the Government, accordingly, was forced to file a second

1 petition for writ of mandamus. Dkt. 414-1. Thereafter, the Ninth Circuit recognized that the
2 Government’s second petition “raises issues that warrant an answer[,]” *see* Dkt. 416, and granted
3 the Government’s request for a “temporary administrative stay[,]” Dkt. 415, which is still in
4 place. Plaintiffs’ actual grievance is with the Ninth Circuit—both for granting the original writ of
5 mandamus and for issuing the current administrative stay. But both Defendants and Plaintiffs are
6 bound by these decisions even if Plaintiffs find them incompatible with their chosen case
7 strategy.

8 Plaintiffs have likewise stretched this case out by choosing to pursue the extraordinary
9 depositions of, among others, a sitting Cabinet Secretary and a former Secretary of Defense
10 about their mental processes, and waiting until more than two years into this case to do so. The
11 fact that these proposed depositions of high-level officials have resulted in motions practice
12 should be unsurprising, and Plaintiffs plainly should have pursued them much earlier.

13 With respect to depositions of other senior officials, Plaintiffs have delayed this case
14 significantly by repeatedly scheduling and, often at the last minute, re-scheduling or cancelling,
15 such depositions. As just a few examples, Plaintiffs recently scheduled Rule 30(b)(6) depositions
16 of DoD Officials Lernes Hebert and Stephanie Miller to take place on separate days in July, but a
17 week before Mr. Hebert’s deposition, decided to take both depositions “off calendar.” This is
18 after Ms. Miller’s scheduled individual-capacity deposition had already been canceled by the
19 *Doe* plaintiffs—with whom the Plaintiffs here coordinate. The Plaintiffs here similarly
20 scheduled, and inexplicably canceled, the individual-capacity depositions of Mr. Hebert and
21 Anthony Kurta. *See* Joint Status Report 9, Dkt 500. As mentioned above, the Plaintiffs canceled
22 the deposition of Col. Steven Pflanz—just three business days before its scheduled date in June.
23 And, as noted, the Plaintiffs here and in the related cases refused to proceed with the depositions
24 of Thomas Dee and Dr. Terry Adirim, despite concurring on mutually agreeable dates. Thus,
25 notwithstanding this Court’s instruction to proceed with depositions “right away” (4/2/2020 Hr’g
26 Tr. 30:12–13.), many of the Government’s witnesses have had to provide dates and block out
27 their schedules multiple times as Plaintiffs repeatedly schedule, and then reschedule or cancel,
28 depositions.

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1 Engendering likely further delay, Plaintiffs now inform the Court that they intend again to
2 pursue discovery of the Executive Office of the President and/or the White House, and suggest
3 that such discovery may even take the form of a Rule 30(b)(6) deposition. Such discovery is not
4 proper here,¹ and indeed the Ninth Circuit specifically questioned whether the President’s
5 memorandum in 2017 is still relevant now that the Mattis policy has been adopted. *Karnoski*,
6 926 F.3d at 1206. What is more, this Court itself recently concluded that documents from the
7 timeframe of the 2017 presidential memorandum are not “pre-decisional” to the 2018 policy.
8 Dkt. 545. While Defendants respectfully disagree with that ruling as it relates to the application
9 of the deliberative process privilege, the Court is correct that “because the President’s March 23,
10 2018 Presidential Memorandum revoked his 2017 Memorandum and because the Ninth Circuit
11 determined that ‘the 2018 Policy is a significant change from the 2017 Memorandum,’” the
12 “focus” of this case is the Mattis policy, not the President’s 2017 memorandum. *Id.* at 8–9
13 (quoting *Karnoski*, 926 F.3d at 1189–92). Accordingly, any attempt to seek discovery of the
14 Executive Office of the President and/or the White House is not relevant and simply sets the
15 stage for more litigation in this district and circuit and continued delay of this case.

16 Plaintiffs respond that Defendants have stonewalled discovery, noting that Defendants
17 opposed discovery beyond the administrative record and DoD’s Report and Recommendation.
18 *Supra* at 3. Yet Plaintiffs fail to mention that, in addition to the 3,070-page administrative record,
19 Defendants have produced approximately 50,000 documents in discovery—including thousands
20 of pages of documents previously withheld pursuant to the deliberative process privilege—and
21 have offered numerous DoD and military officials for deposition.

22 Perhaps most fundamentally, Plaintiffs have delayed this case because they refuse to
23 accept that the role of this Court is not to “substitute its ‘own evaluation of evidence for a
24 reasonable evaluation’ by the military,” but to test whether the decision the military made, in
25

26 ¹ Defendants note that Plaintiffs’ description of the applicable standard for seeking such discovery—that they “need”
27 the information and that it “is not available from other, alternative sources,” *supra* at 5—does not describe in full the
28 Supreme Court’s or Ninth Circuit’s requirements for seeking civil discovery from the Office of the President or Vice
President. See *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004); *Karnoski v. Trump*,
926 F.3d at 1204–06.

light of the evidence that it actually considered, is justifiable. *Karnoski*, 926 F.3d at 1202 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). Instead, Plaintiffs have repeatedly insisted on overbroad and intrusive discovery that has no precedent in a case involving the military, and little, if any, relation to the core questions before the Court.

Because the delays in this case have been of Plaintiffs’ own making, the Court should retain the October 22, 2020 trial date, and set a close of discovery date for September 1, 2020.

Dated: July 17, 2020

Respectfully submitted,

NEWMAN DU WORS LLP

**UNITED STATES
DEPARTMENT OF JUSTICE**

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1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the United States of
3 America and the laws of the State of Washington that all participants in the case are registered
4 CM/ECF users and that service of the foregoing documents will be accomplished by the
5 CM/ECF system on July 17, 2020.

6
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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.,

Defendants.

Misc. Action No. _____

**Underlying Action: Civil Action No.
2:17-cv-01297-MJP**

DECLARATION OF LERNES J. HEBERT

I, Lernes J. Hebert, do hereby declare as follows:

1. I am currently the Deputy Assistant Secretary of Defense for Military Personnel Policy, in the Office of the Under Secretary of Defense for Personnel and Readiness. I was selected for this position in November 2019, after having served in an acting capacity since January 2017.

2. Between September 2012 and January 2017, I served as the Principal Director for Military Personnel Policy in the Office of the Deputy Assistant Secretary of Defense for Military Personnel Policy and have served in Military Personnel Policy since August 2003. During that time, I led the Department of Defense (“Department” or “DoD”) through a number of major personnel initiatives and policy changes.

3. Prior to my retirement from the United States Air Force in the rank of Colonel after

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24 years of active service, I served at every level of the field of personnel management including key assignments in the Office of the Secretary of Defense, the Air Staff, at the Air Force Personnel Center, and with Air Combat Command. I hold a Master of Science degree in National Security Strategy from the National War College, a Master of Arts degree in Management and Computer Resource Management from Webster University, and a Bachelor of Science degree in Management from the University of Louisiana.

4. In the exercise of my official duties, I have been made aware of the above-captioned lawsuit, as well as four additional suits pending in other jurisdictions that all challenge DoD's policy on military service by transgender individuals and individuals with gender dysphoria. I submit this declaration in support of Defendants' Motion to Quash the third-party subpoena issued in the above-captioned case to Robert Wilkie Jr., the Secretary of Veterans Affairs.

5. Before becoming the Secretary of Veterans Affairs, Mr. Wilkie served briefly as the Under Secretary of Defense for Personnel and Readiness from November 2017 to March 2018. The purpose of this declaration is to provide the Court with general information regarding Secretary Wilkie's duties when he was at DoD and, in particular, his involvement in formulating the policy that is at issue in this case and in the four other related lawsuits. The statements made herein are based on my personal knowledge and information available to me in the course of my official duties.

6. Section 136 of Title 10 of the United States Code creates the position of Under Secretary of Defense for Personnel and Readiness. By statute, the Under Secretary of Defense for Personnel and Readiness is appointed by the President with the advice and consent of the Senate. Mr. Wilkie was confirmed by the Senate as the Under Secretary on November 16, 2017 and assumed his duties at the Pentagon shortly thereafter.

7. As the Under Secretary of Defense for Personnel and Readiness, Mr. Wilkie served as the senior policy advisor to the Secretary of Defense on all aspects of Total Force Management, including recruitment, career development, and pay and benefits for over two million uniformed personnel and nearly 750,000 DoD civilians. In that capacity, he represented the Secretary of Defense on manpower and personnel matters outside the Department.

8. The Under Secretary is also responsible for overseeing the overall state of military readiness, National Guard and Reserve component affairs, health affairs, training, and other personnel requirements and management, including equal opportunity, morale, welfare, recreation, and quality of life for military families. This includes overseeing the administration of the \$15 billion Defense Health Program, the Defense Commissaries and Exchanges, and the Defense Education Activity.

9. Prior to Mr. Wilkie's appointment and confirmation, then-Secretary of Defense James Mattis directed the creation of a Panel of Experts ("Panel") on September 14, 2017, to propose DoD policy, standards, and procedures for military service by transgender individuals and individuals with gender dysphoria that was consistent with military effectiveness and lethality, budget constraints, and applicable law. At that time, I was the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy. In that capacity, I co-chaired DoD's Medical and Personnel Executive Steering Committee, which supported the work of the Panel, and I attended all Panel meetings.

10. Secretary Mattis designated the Under Secretary of Defense for Personnel and Readiness to chair the work of the Panel. Because Mr. Anthony Kurta was performing the duties of the Under Secretary of Defense for Personnel and Readiness when the Panel was created, he chaired the Panel's first seven meetings held between October 13 and November 21,

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2017. After Mr. Wilkie assumed his duties as the Under Secretary in late November 2017, he took over the role of chairing the Panel for the remaining six meetings. Mr. Kurta then became Special Assistant to Mr. Wilkie and assumed an advisory role to the Panel and I assumed his former role as facilitator for the remaining meetings.

11. At his first Panel meeting on November 30, 2017, Mr. Wilkie announced that he would not be a voting member of the Panel because he had not attended the first seven meetings, and turned the balance of the meeting over to me to facilitate a discussion of the process the Panel would follow in deliberating and voting on the various policy alternatives. Thereafter, discussions, deliberations, and voting began. While Mr. Wilkie expressed great interest in getting “up to speed” quickly on the issues, he played a limited role during the Panel’s discussions and deliberations. Aside from opening each meeting and giving introductory and concluding remarks, he turned over the balance of each of the six meetings he attended to me to facilitate the Panel’s discussions and deliberations.

12. During the ninth Panel meeting on December 7, 2017, for example, Mr. Wilkie opened the meeting, reiterated that he would not be voting on any of the proposals, reminded the Panel that Secretary Mattis was seeking their best military assessment and advice, and turned the balance of the meeting over to me to provide additional data to the Panel and to facilitate continued discussion, deliberation, and voting.

13. During the tenth Panel meeting on December 13, 2017, I led the Panel in reviewing the briefing to be given to the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff regarding the Panel’s recommendations. On December 15, 2017, Mr. Wilkie participated, with Mr. Kurta and me, in making that presentation.

14. At the final three Panel meetings on December 22, 2017, January 11 and January

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18, 2018, Mr. Wilkie opened the meetings as the Chair, made introductory remarks, and turned the balance of the meetings over to me. As I recall, at the December 22, 2017 meeting, I facilitated a Panel discussion regarding an alternative proposal by one of the Services and questions for future research that had been offered during the Panel process. The January 4 and January 11, 2018 meetings consisted largely in me facilitating the Panel's final discussions of policy proposals and reviewing the upcoming brief to Secretary Mattis.

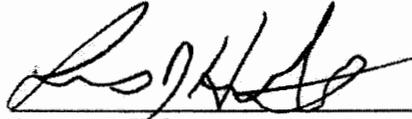
15. On January 11, 2018, Mr. Wilkie signed the formal memo to Secretary Mattis, which memorialized the Panel's agreed-upon recommendations regarding military service by transgender individuals and individuals with gender dysphoria. And, on January 17, 2017, Mr. Wilkie, Mr. Kurta and I, along with others, briefed then-Secretary Mattis on the Panel's recommendations.

16. At the conclusion of the Panel process, Mr. Wilkie, Mr. Kurta, and I formed the Personnel and Readiness team that was given primary responsibility for preparing the Department's Report and Recommendations on Military Service by Transgender Persons. This Report contained the same recommendations that were in the January 11, 2018 memo from Mr. Wilkie to the Secretary. The Report was approved by Secretary Mattis in February 2018 and was presented to the President in March 2018.

17. On March 28, 2018, shortly after the President approved DoD's policy recommendations, Mr. Wilkie was named Acting Secretary of Veterans Affairs. On March 30, 2018, he left the Department of Defense after serving as Under Secretary for Personnel and Readiness for approximately four and a half months. I am not aware of Mr. Wilkie having any further involvement in formulating or implementing DoD's policy regarding military service by transgender individuals or individuals with gender dysphoria after March 30, 2018.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 20 day of May 2020, in Arlington, Virginia.



Lernes J. Hebert
Deputy Assistant Secretary of Defense for Military
Personnel Policy
Office of the Under Secretary of Defense for Personnel
and Readiness

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

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.

Misc. No. _____

Underlying Action: Case No. 2:17-cv-
01297-MJP (W.D. Wash.)

DECLARATION OF GENERAL PAUL J. SELVA, USAF (RET.)

Pursuant to 28 U.S.C. § 1746, I, General Paul J. Selva, United States Air Force (Ret.), hereby declare under penalty of perjury that the following is true and correct:

1. I served as the 10th Vice Chairman of the Joint Chiefs of Staff from August 1, 2015 until the date of my retirement on July 31, 2019. In total, I served 39 years in the United States Air Force. In accordance with provisions set forth by statute, I was nominated for this position by the President and confirmed by the Senate in 2015. I was re-nominated by the President and re-confirmed by the Senate for a second term in 2017, serving a total of four years as the Vice Chairman.

2. The Joint Chiefs of Staff ("JCS") is a statutorily established body of senior uniformed officers within the Department of Defense. The JCS consists of the Chairman, the Vice Chairman, the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of

the Air Force, the Commandant of the Marine Corps and the Chief of the National Guard Bureau. While the Chairman serves as the principal military adviser to the President, Secretary of Defense and National Security Council, all members of the JCS, including the Vice Chairman, are statutorily responsible for providing military advice to these leaders either in coordination with or independently, of the Chairman.

3. As the Vice Chairman, I was the nation's second highest-ranking military officer and primarily responsible for overseeing joint military requirements, representing the military in National Security Council deputies' meetings and performing other duties as directed by the Chairman. My other statutory responsibilities included serving as the co-chair for both the Council on Oversight of the Department of Defense ("DoD") Positioning, Navigation and Timing Enterprise and the Council on Oversight of the National Leadership Command, Control and Communication Systems, as well as a member of the Nuclear Weapons Council.

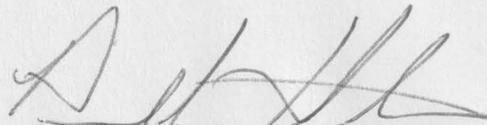
4. On September 14, 2017, the Secretary of Defense directed that a Panel of Experts be established to recommend changes to the Department's policies regarding the service of transgender individuals. The Panel was composed of the Under Secretaries of the Military Departments, the Uniformed Services' Vice Chiefs of Staff, and the Senior Enlisted Advisors and was chaired by the Under Secretary of Defense for Personnel and Readiness. The Senior Enlisted Advisor to the Chairman served as the Joint Staff Representative on the Panel of Experts with the Director for Manpower and Personnel (J1) in a supporting role, frequently attending meetings.

5. In my role as the Vice Chairman, I had only limited direct involvement with the Panel of Experts. I was not a member of the Panel of Experts and attended only two meetings. I attended the first meeting on October 13, 2017. I did not participate and stayed for only ten minutes. I

attended another meeting on October 26, 2017, and only in the capacity of an observer. Mr. Tony Kurta, the Acting Under Secretary of Defense for Personnel and Readiness, chaired the meeting I attended, and Mr. Lernes Hebert, the Co-Chair of the Medical and Personnel Executive Steering Committee, was also present during that meeting. On approximately six occasions, Mr. Kurta provided me with updates on the Panel's efforts. Upon the conclusion of the Panel's work, I was briefed on the findings of the Panel along with the Deputy Secretary of Defense by Mr. Kurta and Mr. Hebert, but I did not provide a transmittal memorandum or written endorsement of any kind to the Panel's final report or offer any opinion about the Panel's findings. I do not possess any unique knowledge regarding the Panel's deliberations, findings, or report that others who directly participated in the Panel hold. I did not have any involvement with this issue either before I was appointed to my role as Vice Chairman or after I retired from that position.

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

Executed this 12th day of May 2020, in Woodbridge, Virginia.



GENERAL PAUL J. SELVA
United States Air Force (Ret.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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.

Misc. Action No. _____

Underlying Action: No. 2:17-cv-
01297 (W.D. Wa)

DECLARATION OF ADMIRAL WILLIAM F. MORAN, U.S. NAVY (RET.)

I, Admiral William F. Moran, do hereby declare as follows:

1. I am a retired four-star Admiral in the U.S. Navy. The last position I held before retirement was the 39th Vice Chief of Naval Operations (VCNO). I held this position from May 30, 2016 to June 10, 2019. The President nominated me, and the Senate confirmed me for this position.
2. Before becoming the VCNO, I held a number of senior leadership positions within the Navy, including: 57th Chief of Naval Personnel, Director of Air Warfare, Commander of Patrol and Reconnaissance Group, Commander of Patrol Squadron (VP) 46, Commander of Patrol and Reconnaissance Wing 2, and a staff member for Commander, Carrier Group 6.
3. The Department of the Navy comprises the United States Navy and the United States Marine Corps. It is led by a civilian, the Secretary of the Navy. The Chief of Naval Operations

(CNO) and Commandant of the Marine Corps are the two senior commissioned officers within the Department of the Navy, who both report to the Secretary. As the senior uniformed Naval officer, the CNO's primary duty is to maintain, train, and equip combat-ready Naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. This includes general oversight of all Navy assets, including over 400,000 military and civilian personnel and nearly 300 deployable battle force ships. The following offices report directly to the Office of the CNO: the Bureau of Naval Personnel, the Bureau of Medicine and Surgery, Naval Sea Systems Command, Naval Air Systems Command, Naval Facilities Engineering Command, Naval Supply Systems Command, Naval Information Warfare Systems Command, Strategic Systems Programs, the United States Naval Academy, Naval Education and Training Command, the Office of Naval Intelligence, Naval Security Group, Naval Legal Service Command, Naval Meteorology and Oceanography Command, Naval Strike and Air Warfare Center, Naval Safety Center, and the United States Naval Observatory.

4. As the VCNO, I was the principal deputy of the CNO. Pursuant to 10 U.S.C. § 8035, the CNO may delegate or prescribe, with the approval of the Secretary, authority and duties to the VCNO, and orders issued by the VCNO in performing those duties have the same effect as those issued by the CNO. Accordingly, my principal duties included those the CNO delegated to me with the complete authority to represent and act in his stead. For example, as the VCNO, I represented the CNO at various Joint Staff "Tank" sessions, where representatives of all the military services discussed and initiated action on matters of military operations. As the VCNO, I also represented the CNO at frequent Office of the Secretary of Defense (OSD) Deputies meetings to discuss broad topics of interest, from new technologies to service budgets and

administrative issues. Often, my policy recommendations from these meetings were ultimately presented to the Secretary of Defense as official Navy positions.

5. On September 14, 2017, then-Secretary of Defense James Mattis directed that a Panel of Experts (“the Panel”) be established to propose Department of Defense (“DoD”) policy, standards, and procedures for military service by transgender individuals and individuals with gender dysphoria that were consistent with military effectiveness and lethality, budget constraints, and applicable law. The Panel was composed of the Under Secretaries of the Military Departments, the Uniformed Services’ Vice Chiefs of Staff, and the Senior Enlisted Advisors and was chaired by the Under Secretary of Defense for Personnel and Readiness.

6. From October 2017 to January 2018, I participated as a voting member on the Panel in my role as the VCNO. I did not have any specialized involvement with this issue before serving as a member on the Panel, aside from supporting the Navy’s implementation of the previous policy under Secretary Ash Carter.

7. As a voting member on the Panel, I attended Panel meetings when able to do so. If I was unavailable, an authorized substitute attended in my stead. In total, I recall personally attending seven of the thirteen Panel Meetings.

8. My role as a voting member primarily consisted of listening to presentations of data and testimony from a variety of sources regarding gender dysphoria, its treatment, and effects on military effectiveness, unit cohesion, and resources. I also took part in the Panel’s deliberations and voted on a number of recommendations concerning the military’s policy regarding service by transgender individuals and individuals with gender dysphoria. As one of 17 voting members on the Panel, and one of five Department of the Navy officials who attended Panel meetings, I do not believe that I possess any specialized knowledge of the Panel’s deliberations.

9. I also did not have any leadership role on the Panel, which was chaired, first by Mr. Anthony Kurta, the former Deputy Assistant Secretary of Defense for Military Personnel Policy, and later, by then-Under Secretary of Defense for Personnel and Readiness Robert Wilkie. Nor did I chair any of the working groups supporting the Panel.

10. I understand that the plaintiffs in the underlying case have scheduled the deposition of other individuals who attended Panel meetings, such as Mr. Thomas Dee. At the time, Mr. Dee was Performing the Duties of the Under Secretary of the Navy and was a voting member of the Panel. I also understand that the plaintiffs have informed defense counsel that they intend to depose other individuals who attended Panel meetings, such as Mr. Kurta. From my review of the meeting minutes of the Panel and from my recollection, Mr. Kurta and/or Mr. Dee were present for all of the Panel meetings that I attended.

11. Finally, I do not recall any significant involvement with drafting the recommendations presented to Secretary Mattis. At the conclusion of the Panel process, Mr. Wilkie, Mr. Kurta, and Mr. Lernes Hebert, the current Deputy Assistant Secretary of Defense for Military Personnel Policy, were tasked with the primary responsibility for preparing the DoD's Report and Recommendations on Military Service by Transgender Persons.

12. In preparing this declaration, I have reviewed the meeting minutes of the Panel, which generally reflect my recollection of those meetings.

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

EXECUTED on this 13th day of May, 2020 at Raleigh, North Carolina.



ADMIRAL WILLIAM F. MORAN
United States Navy (Ret.)

The Honorable Marsha J. Pechman

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

Defendants.

Case No. 2:17-cv-01297-MJP

**JOINT STATUS REPORT FOR MAY 13,
2020 STATUS CONFERENCE**

1 In advance of the May 13, 2020 status hearing, the parties respectfully submit the
2 following Joint Status Report.

3 **PLAINTIFFS AND PLAINTIFF-INTERVENOR'S STATEMENT**

4 In this Joint Status Report, Plaintiffs provide the Court an update regarding the following
5 issues:

- 6 1. Proposed adjustments to the current May 29 fact discovery cutoff necessitated by
7 delays in completing fact discovery;
- 8 2. Deposition scheduling;
- 9 3. Scheduling issues arising from the depositions of Plaintiffs' hybrid fact and expert
10 witnesses, former Secretary of the Air Force, Deborah James, and former Secretary of
11 the Navy, Ray Mabus; and
- 12 4. Overview of pending discovery motions.

13 **A. Fact Discovery Deadline and Case Schedule**

14 Plaintiffs continue to face roadblocks in completing fact discovery by the current May 29,
15 2020 deadline. Most of those roadblocks are of the Government's making—filing a mandamus
16 petition and refusing to produce tens of thousands of documents on grounds of deliberative
17 process privilege; extensive objections to Plaintiffs' Rule 30(b)(6) Notice; threatened motions to
18 quash subpoenas directed to military decision-makers at the center of this dispute; and
19 preemptively stating it will refuse to permit witnesses to answer questions at depositions over
20 deliberative process privilege objections. Other roadblocks and delays have resulted from the
21 COVID-19 pandemic. Plaintiffs respectfully request that the Court lift the May 29 fact discovery
22 deadline and order the parties to report on the progress of discovery at the next status conference
23 in June. The reasons for this request are as follows.

24 **First**, the Government continues to withhold tens of thousands of documents concerning
25 the decision to impose the Ban, and the circumstances that led to that decision, pursuant to the
26 deliberative process privilege. While the parties await a ruling by the Ninth Circuit on the
27 Government's mandamus petition and motion to stay, Plaintiffs recently filed a LCR 37 motion
28 proposing a framework by which the Special Master would review a random sample of

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1 documents withheld by the Government pursuant to the deliberative process privilege in order to
2 determine whether the Government has been properly invoking the privilege in the first place,
3 and if not, recommend guidance to the Government as to the types and/or categories of
4 documents to which the privilege does not apply. (*See* Dkt. 497.) The Plaintiffs proposed that the
5 Court would then review the documents and the Special Master's recommendations and, as to
6 any documents it deems the privilege was properly invoked, determine whether the privilege has
7 been overcome, applying the *Warner* factors. If this review confirms that the Government has
8 been improperly invoking the privilege as to documents to which the privilege does not apply,
9 the Court's orders could provide a basis for a further motion (and order) that the Government
10 promptly review its privilege claims as to the remaining documents withheld on the grounds of
11 deliberative process privilege in light of the Court's rulings and, on a rolling basis, produce any
12 documents as to which the privilege is no longer claimed, with the Special Master to conduct an
13 *in camera* review, again on a rolling basis, of any documents as to which the Government
14 continues to claim the privilege. Should the Court decide this process is beneficial in resolving
15 the parties' long-standing dispute over the Government's deliberative process privilege
16 assertions, such further reviews and rolling productions will take time to complete. However,
17 Plaintiffs believe that such a review is likely to result in the production of documents that are
18 highly relevant to their constitutional challenge to the Ban, including the Government's claims
19 that the Ban was unrelated to the ban announced by the President via Twitter on July 27, 2017
20 and formalized in the August 25, 2017 Presidential Memorandum.

21 ***Second***, the Government recently informed Plaintiffs that it intends to move to quash
22 Plaintiffs' deposition subpoenas directed to four critical witnesses: former Secretary of Defense
23 James Mattis; former Vice Chairman of the Joint Chiefs of Staff Paul Selva; former Under
24 Secretary of Defense for Personnel and Readiness Robert Wilkie; and former Admiral William
25 Moran. These witnesses are critically important to Plaintiffs' case. The proposed Ban was sent to
26 President Trump under Secretary Mattis' signature, and Defendants maintain that Mattis was
27 personally involved in and responsible for the Ban (which they call the "Mattis policy"), and that
28 it represents his personal and independent military judgment. (*See, e.g.*, Defs.' Pet. to S. Ct. for

1 Cert. Before Judgment, *Trump v. Karnoski*, No. 18-676, 2018 WL 6169245, at *8–9 (Nov. 23,
2 2018) (Ban “reflected ‘the exercise of Secretary Mattis’s independent judgment”); *18 (seeking
3 “a prompt resolution of the validity of Secretary Mattis’s proposed policy”); *24–25 (Ban
4 “reflects the exercise of Secretary Mattis’s ‘independent judgment”).) Former Vice Chairman of
5 the Joint Chiefs of Staff, Paul Selva, in turn was one of two senior DoD officials that Mattis
6 directed “to lead” DoD “in developing an Implementation Plan on military service by
7 transgender individuals, to effect the policy and directives” in the President’s August 25, 2017
8 Memorandum, and, supported by the “Panel of Experts,” to recommend to Mattis the policy that
9 would effect the President’s directives (what Defendants call the “Mattis policy”). (*See*
10 9/14/2017 Terms of Reference, Ex. 1.) Wilkie was one of two military officials who chaired the
11 Panel, and according to Defendants, one of the lead authors of the February 2018 Report. And,
12 Moran was a very senior and active member of the Panel who was an author or recipient of a
13 number of the more relevant communications concerning the Panel produced by Defendants.
14 Although Plaintiffs informed the Government on March 2, 2020 that they intended to depose
15 Mattis, Selva, and Wilkie, and on March 27, 2020 requested the deposition of Moran, the
16 Government did not inform Plaintiffs until April 10, 2020 that it will move to quash the
17 subpoenas directed to these four witnesses, all of whom are former Department of Defense
18 officials. Since that time, Plaintiffs determined where these witnesses currently live and work in
19 order to ascertain where the depositions can take place, and identified locations near those
20 localities at which the depositions can be taken. Plaintiffs recently served these subpoenas, but
21 do not expect motion practice concerning the subpoenas to conclude until July at the earliest,
22 given that motion practice will necessarily occur in at least two different jurisdictions (E.D. Va.
23 and M.D.N.C.).

24 **Third**, the Government has lodged extensive objections to Plaintiffs’ Rule 30(b)(6) Notice,
25 causing delay in scheduling this deposition, which Plaintiffs had noticed as their first deposition
26 in order to obtain information concerning a number of key subject matters that would help them
27 develop and focus their examination of subsequent deponents. While Plaintiffs served the
28 Government with their Rule 30(b)(6) Notice on March 9, 2020, it was not until nearly six weeks

1 later, on April 17, 2020, that the Government served a 22-page letter of objections, which are
2 now the subject of Defendants’ forthcoming LCR 37 motion for protective order. One common
3 objection across many of the Rule 30(b)(6) topics, which is raised by Defendants’ motion, is the
4 Government’s intention to instruct witnesses not to answer questions that it believes call for
5 information subject to the deliberative process privilege. This is notwithstanding that the Court
6 already ruled at the February 3, 2020 status conference that “if there is an objection based upon
7 deliberative process, the objection is made, then the question is answered, and you seal the
8 deposition. And if we have to, we will go over line-by-line as to what comes in and what doesn’t
9 in terms of public testimony.” (2/3/2020 Hr’g Tr., Dkt. No. 412, at 64:14–24.) The Government
10 contends this Order was somehow stayed by the Ninth Circuit’s subsequent administrative stay,
11 despite the fact that the Order is nowhere referenced in the Government’s mandamus petition.
12 The Government has also asserted numerous other objections that likewise have no basis in
13 law—such as the bizarre proposition that a party cannot take a Rule 30(b)(6) deposition on issues
14 that are also the subject of interrogatories and document requests—all of which must be resolved
15 by this Court and have delayed the Rule 30(b)(6) deposition.

16 *Finally*, the COVID-19 pandemic has caused certain depositions of Government witnesses
17 to be delayed into the summer. Plaintiffs had at least five depositions scheduled in March and
18 April that had to be canceled due to the pandemic. Even after the Court urged the parties to use
19 teleconferencing resources to conduct depositions, scheduling depositions in April and May
20 became untenable, in part because of the witnesses’ own duties to respond to COVID-19. The
21 parties have confirmed dates for depositions to take place in June should the Court approve
22 extension of the discovery deadline, but some key witnesses may be unavailable for longer than
23 that. For example, the Government has notified Plaintiffs that Colonel Mary Krueger is the
24 Hospital Commander of the Tripler Army Medical Center, which is tasked with leading the
25 military medicine response to COVID-19 in Hawaii. Due to these responsibilities, the
26 Government has advised that it is unable to provide dates for her deposition until the pandemic
27 has stabilized. At the same time, Plaintiff-Intervenor’s state agencies are overloaded with
28 requirements in response to the pandemic while other programs are closed or significantly

1 inaccessible at this time.

2 In sum, due to the above delays in completing discovery, Plaintiffs request the May 29,
3 2020 fact discovery deadline be lifted, and that the parties be ordered to update the Court on the
4 status of discovery at another status conference in early June. Plaintiffs believe these issues are
5 so integral to this case that a further delay of fact discovery is worth the likely impact to the
6 October 2020 trial setting. Plaintiffs are committed to ensuring ensuring that the Court and any
7 reviewing court have the benefit of a full record at trial, even if it requires a later trial date.

8 **B. Deposition Scheduling**

9 The parties have confirmed the following depositions:

- 10 • **June 3: Dr. Terry Adirim**, former Principal Deputy Assistant Secretary of
11 Defense Health Affairs
- 12 • **June 4: Stephanie Miller**, Director of Military Accession Policy
- 13 • **June 10: Kevin Cron**, Defendants' hybrid fact/expert witness, Preventive
14 Medicine Officer for United States Central Command
- 15 • **June 11: Thomas Dee**, Panel member and Undersecretary of the Navy
- 16 • **June 12: Martha Soper**, Assistant Deputy for Health Policy Office of the
17 Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness
- 18 • **June 17: Christopher Meyering**, Defendants' hybrid fact/expert witness,
19 Command Surgeon and the Waiver Surgeon, U.S. Army Recruiting Command
- 20 • **June 23: Dr. George Brown**, Plaintiffs' expert witness
- 21 • **June 24: Stephen Pflanz**, Defendants' hybrid fact/expert witness, Director of
22 Psychological Health, Air Force Medical Support Agency

23 Plaintiffs have also requested the depositions of former Secretary of Defense James Mattis,
24 former Vice Chair of the Joint Chiefs Paul Selva, former Undersecretary Robert Wilkie, Admiral
25 William Moran, former Undersecretary Anthony Kurta, Commander Mary Krueger, William
26 Bushman, and Assistant Secretary Lernes Hebert. As described above, the Government is
27 moving to quash the subpoenas issued to Mattis, Selva, Wilkie, and Moran, and is deferring
28 setting a date for Krueger given her pandemic response duties. The parties had previously set

1 dates for Kurta and Hebert, but given the above delays, Plaintiffs wish to defer those depositions
 2 until later in the summer, along with the Bushman deposition, to permit the Ninth Circuit
 3 additional time to rule on the pending mandamus petition and the Special Master to review
 4 withheld documents, if so ordered.

5 **C. Depositions of Plaintiffs' Expert Witnesses Mabus AND James**

6 In their Joint Status Report and during the February 3, 2020 hearing, Plaintiffs flagged that
 7 one issue resulting from the Government's refusal to produce Carter Working Group documents
 8 was the Government's attempt to impugn the conclusions of, and the process used by, the Carter
 9 Working Group during the depositions of Plaintiffs' experts General Margaret Wilmoth and
 10 former Acting Under Secretary of Defense Brad Carson, without having first provided all
 11 relevant Carter Working Group documents. (*See, e.g.*, Dkt. No. 408 at 4–5; 2/3/2020 Hr'g Tr.,
 12 Dkt. No. 412, at 27:2–41:25.) Plaintiffs expressed concern that the Government would again
 13 attempt to undermine the Carter Working Group during the depositions of former Secretary of
 14 the U.S. Navy Raymond Mabus and former Secretary of the U.S. Air Force Deborah James, both
 15 of whom have submitted expert reports on behalf of Plaintiffs. (2/3/2020 Hr'g Tr., Dkt. No. 412,
 16 at 28:3–7 (“Your Honor, it’s just fairness. We can’t respond to these arguments attacking the
 17 credibility of the Carter working group that came to the opposite conclusion than the panel did
 18 just two years before, unless they give us the documents.”).) After hearing the parties’ arguments
 19 regarding whether these depositions may proceed before all ordered Carter Working Group
 20 documents are produced, the Court stated:

21 [Defendants] can decide that you’re not going to take the deposition. But if
 22 you’re going to take the deposition and talk to them about what they
 23 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.

24 (*Id.* at 36:15–19.) On February 5, 2020, counsel for the Government sent an email memorializing
 25 the Government’s understanding of the Court’s order:

26 During a hearing this past Monday in Karnoski, the court stated that
 27 Defendants would not be permitted to take further depositions of Plaintiffs’
 28 witnesses in that case until Defendants had produced certain additional
 deliberative materials related to the development of the Carter policy. As a
 result, and to avoid having to depose Mr. Mabus more than once, we will need

Add. 129

1 to reschedule his deposition

2 Thereafter, the Government sought mandamus review by the Ninth Circuit of this Court’s orders
3 to produce Carter Working Group documents, and also requested an administrative stay of the
4 Court’s Order, which the Ninth Circuit granted. By requesting a stay of the production of Carter
5 Working Group documents, and in turn having its request for an administrative stay granted, the
6 Government necessarily delayed its ability to take the depositions of Secretaries Mabus and
7 James until the Ninth Circuit has ruled, and, if the Government’s mandamus petition is denied,
8 the Carter Working Group documents are produced.

9 Undeterred, on April 20, 2020, counsel for the Government requested that Plaintiffs make
10 Secretaries Mabus and James available for a deposition prior to the Ninth Circuit’s decision on
11 the mandamus petition:

12 [P]lease let us know Plaintiffs’ position on whether Defendants can take the
13 depositions of Secretary Mabus and Secretary James without disclosing the
14 Carter policy documents that are currently subject to the mandamus petition
15 pending with the Ninth Circuit. Defendants’ position is that the Ninth Circuit
16 has stayed the district court’s February 3, 2020 Order in its entirety, including
17 the order that Defendants may not take further depositions prior to production
18 of additional Carter policy deliberative documents. *See* ECF No. 415. If
19 Plaintiffs disagree, please let us know so we can raise this issue with the
20 district court and then possibly with the Ninth Circuit.

21 The Government therefore appears to be arguing that although its mandamus petition and
22 motion to stay only requested relief with respect to the Court’s Orders to produce certain
23 documents (RFP Nos. 15 and 29), the Ninth Circuit administratively stayed *all* orders and
24 directives made by this Court at the February 3, 2020 status conference, including the Order
25 regarding the depositions of Plaintiffs’ experts Mabus and James. Plaintiffs respectfully disagree,
26 and contend that the depositions of Secretaries Mabus and James should be deferred until the
27 Ninth Circuit decides Defendants’ mandamus petition, and if that petition is denied, the
28 Government produces the Carter Working Group documents.

26 **D. Pending Discovery Motions**

27 For the Court’s convenience, Plaintiffs provide the following summary of pending
28 discovery motions:

- 1 a. the Government’s motion to extend time to respond to this Court’s Order
- 2 regarding Plaintiffs’ RFP 44 (Dkt. No. 485);
- 3 b. Plaintiffs and Plaintiff-Intervenor’s LCR 37 motion to extend the deadline to file
- 4 discovery-related motions (Dkt. No. 490);
- 5 c. Plaintiffs’ LCR 37 motion requesting review of the Government’s deliberative
- 6 process privilege claims (Dkt. No. 497); and
- 7 d. the Government’s forthcoming LCR 37 motion for protective order regarding
- 8 Plaintiffs’ 30(b)(6) Notice.

9 DEFENDANTS’ STATEMENT

10 I. Discovery Motions

11 As Plaintiffs point out, there are several discovery motions currently pending before the
12 Court. *See* Dkts. 485, 490, 497. Defendants also anticipate filing this week an LCR 37 motion for
13 protective order related to Plaintiffs’ proposed Rule 30(b)(6) deposition of the Department of
14 Defense. Defendants respectfully refer the Court to Defendants’ briefing on these motions for
15 statements of Defendants’ positions and arguments.

16 In addition, Defendants anticipate filing motions to quash the depositions of current
17 Secretary of Veterans Affairs Robert Wilkie,¹ former Secretary of Defense James Mattis, former
18 Vice Chief of Naval Operations William Moran, and former Vice Chairman of the Joint Chiefs
19 of Staff Paul Selva. Defendants disagree with Plaintiffs’ assertion that these individuals are
20 “critical witnesses” or that it is proper to depose such high-ranking current and former
21 government officials. However, because these witnesses are not located in the Western District
22 of Washington, Defendants anticipate filing motions to quash in other districts and this Court
23 need not address these issues. *See* Fed. R. Civ. P. 45 (d)(3)(A) (authorizing “the court for the
24 district where compliance is required” to “quash or modify a subpoena”).

25 II. Currently Scheduled Depositions

26 Many of Plaintiffs’ and Defendants’ witnesses in this case are also witnesses in the related
27

28 ¹ Plaintiffs describe Mr. Wilkie as the “former Under Secretary of Defense for Personnel and Readiness,” Pls.’
Statement 2, but that is not his current position. He is now a Cabinet Secretary.

1 cases around the country. Accordingly, in an effort to prevent witnesses from unnecessarily
2 facing multiple depositions, Defendants have coordinated with the Plaintiffs across all four
3 related cases in scheduling depositions.² Using this process, Defendants have scheduled the
4 following depositions.

- 5 • **June 3: Dr. Terry Adirim**, former Principal Deputy Assistant Secretary of
6 Defense Health Affairs
- 7 • **June 4: Stephanie Miller**, Director of Military Accession Policy
- 8 • **June 10: Kevin Cron**, Defendants' hybrid fact/expert witness
- 9 • **June 11: Thomas Dee**, Panel member and Undersecretary of the Navy
- 10 • **June 12: Martha Soper**, Assistant Deputy for Health Policy Office of the
11 Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness
- 12 • **June 17: Christopher Meyering**, Defendants' hybrid fact/expert witness,
- 13 • **June 23: Dr. George Brown**, Plaintiffs' expert witness
- 14 • **June 24: Stephen Pflanz**, Defendants' hybrid fact/expert witness

15 In addition, within the past few weeks the parties in the various cases scheduled depositions
16 of Anthony Kurta, formerly performing the duties of Deputy Under Secretary of Defense
17 (Personnel & Readiness), and Lernes Hebert, Deputy Assistant Secretary of Defense for Military
18 Personnel Policy, to take place on June 5 and June 8, respectively. However, Plaintiffs now state
19 that they do not intend to proceed with these scheduled depositions. It is unclear what has
20 changed. Plaintiffs state that they would like to first see whether they can obtain further
21 deliberative documents in light of the mandamus petition and the special master's appointment.
22 But Plaintiffs were aware of both the mandamus petition and the special master when they
23 scheduled these depositions just a few weeks ago. Moreover, Plaintiffs have already received
24 every deliberative document in the possession of Panel of Experts members that relate to the
25 Panel's deliberations, including Mr. Kurta's documents. It is unclear why Plaintiffs now think
26 they cannot proceed with Mr. Kurta's deposition at least.

27
28 ² Defendants have not coordinated depositions with the Plaintiff in the newly filed case in the District of
Massachusetts, *Doe v. Esper*, No. 20-cv-10530 (D. Mass.), because that case is not in discovery.

1 Finally, as Defendants stated during the April 2, 2020 hearing, Colonel Mary Krueger is
2 unable to provide dates for a deposition during the current COVID-19 crisis. (4/2/2020 Hr’g Tr.
3 31:5–13.) Colonel Krueger is Hospital Commander of the Tripler Army Medical Center, and is
4 tasked with leading the military medicine response to COVID-19 in the state of Hawaii. Colonel
5 Krueger has in fact already been deposed in these cases, in April 2018. However, Defendants
6 have agreed that she may sit for an additional deposition, once she is available.

7 **III. Depositions of Plaintiffs’ Witnesses**

8 During the February 3, 2020 status conference, the Court issued an oral ruling that
9 Defendants were required to produce certain deliberative material responsive to Plaintiffs’ RFP
10 15 related to the development of the Carter policy. (2/3/2020 Hr’g Tr. 40:8–11.) The Court then
11 ruled further: “And I suggest that they [Defendants] don’t get to take anybody’s deposition
12 further until they do turn over the material.” (*Id.* at 40:8–10.)

13 Defendants subsequently filed a petition for a writ of mandamus with the Ninth Circuit,
14 and the Ninth Circuit issued an order staying the “[t]he district court’s December 18, 2019,
15 February 3, 2020, and February 7, 2020 orders challenged in this petition.” Order, Dkt. 415.
16 Plaintiffs now split hairs by arguing that the mandamus petition challenged only the Court’s
17 February 3 order to produce Carter-era deliberative documents, and not the February 3 order to
18 refrain from further depositions until those documents are produced. But those oral rulings are
19 inextricably linked: a ruling to refrain from taking depositions until Defendants complete a
20 production makes little sense unless Defendants are also required to complete the production.
21 Moreover, under Plaintiffs’ interpretation, Defendants would not be permitted to take *any*
22 depositions until the mandamus petition is resolved—seemingly at odds with the Court’s recent
23 instruction to proceed with depositions “right away” and by videoconference if necessary.
24 (4/2/2020 Hr’g Tr. 30:12–13.)

25 As a way forward, Defendants propose the following: If Plaintiffs wish to defer
26 depositions of certain witnesses who served as government officials during the development of
27 the Carter policy—such as the depositions of former Secretaries Mabus and James—until after
28 the Ninth Circuit rules on the mandamus petition, Plaintiffs should be permitted to do so. In the

1 meantime, however, Defendants should be permitted to move forward with depositions of other
2 witnesses who were not involved in the development of the Carter policy, such as Plaintiffs’
3 experts Dr. George Brown and Dr. Jody Herman. Dr. Brown’s deposition is already scheduled
4 for June 24. And on April 10, 2020, Defendants requested that Washington provide dates when
5 Dr. Herman is available for deposition, but Washington has not done so.³

6 **IV. Case Schedule**

7 Plaintiffs’ request for an indefinite extension of all fact discovery should be rejected. While
8 Defendants would consent to a limited extension of time to complete currently scheduled
9 depositions (including motion practice related to those depositions), Plaintiffs provide no
10 compelling reason why additional time to serve written discovery is required, nor have they
11 identified any further written discovery they intend to propound.

12 Since Plaintiffs filed their complaint in August 2017, Plaintiffs and Washington have
13 served over 100 requests for production and dozens of interrogatories. Defendants have produced
14 tens of thousands of documents and timely served detailed interrogatory objections and
15 responses.⁴ Plaintiffs have not explained why these many written discovery requests are
16 insufficient, nor have they identified what additional discovery requests they contend they still
17 need to serve.

18 Plaintiffs also fail to explain why they could not have served any additional written
19 discovery requests during the more than two and a half years this lawsuit has been pending. The
20 individual Plaintiffs sporadically served discovery requests during these years, and Washington
21 did not serve any discovery at all until July 2019, nearly two years after this case was filed. *See*

22 _____
23 ³ It is possible that, due to case schedules in the related cases, Defendants may have to move forward with
24 depositions of former Secretaries Mabus and James in the related cases prior to the Ninth Circuit’s ruling on the
25 mandamus petition. In that circumstance, Defendants would notice the depositions in the related cases, but not in
26 this case, and may subsequently have to notice additional depositions of Secretaries Mabus and James in this case
27 once the Ninth Circuit has ruled.

28 ⁴ In addition, because of the cross-use agreement, Defendants have produced to Plaintiffs and Washington
documents responsive to the numerous discovery requests that have been served by plaintiffs in the related cases, as
well as documents responsive to court orders issued in other cases. See Dkt. 183. Most notably, in response to an
order issued by the court in the related *Doe v. Esper* case in the District of Columbia, Defendants produced to all of
the plaintiffs in the related cases 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. See Decl. of Robert Easton ¶¶ 4–6 (Jan. 24, 2020), Dkt. 405-2.

1 ECF Nos. 483-1, 483-2. Notably, when Plaintiffs moved for summary judgment in February
2 2018, and Defendants requested an opportunity to take discovery pursuant to Rule 56(d), Dkt.
3 178, Plaintiffs opposed Defendants' request, arguing that Defendants "have failed to exercise
4 reasonable diligence to pursue any of the discovery they suddenly claim they need." Dkt. 185 at
5 1. The Court agreed and denied Defendants' request to take discovery, noting that "[t]his case
6 has been pending for nearly six months," and finding that Defendants "have failed to show that
7 they were diligent in seeking the discovery they now claim to need." Dkt. 189 at 4. More than
8 two years after the Court found the Defendants "failed to show that they were diligent," Plaintiffs
9 are now moving for more time, the very position they opposed initially. Plaintiffs cannot have it
10 both ways.

11 Moreover, Plaintiffs' argument that the Government is to blame for delays in this case is
12 unpersuasive. If permitted, Defendants are prepared now to have this case proceed to summary
13 judgment so that their policy may be "evaluated on the record supporting that decision and with
14 the appropriate deference due to a proffered military decision." *Karnoski v. Trump*, 926 F.3d
15 1180, 1207 (9th Cir. 2019). Discovery is only still proceeding due to Plaintiffs' strategic
16 decisions to delay for years taking any depositions and their refusal to grapple with the Ninth
17 Circuit's prior holdings in this case.

18 For more than two and a half years, Plaintiffs and Washington steadfastly refused to take
19 even a single deposition until the deliberative process privilege was set aside as to all documents
20 in the Government's production. This position had no merit to begin with, and certainly has not
21 had merit for the nearly one year since the Ninth Circuit granted the Government's initial
22 petition for a writ of mandamus. In the face of that ruling, it was misguided for Plaintiffs again to
23 insist on an order overruling all of Defendants' deliberative process privilege assertions *en*
24 *masse*, *see* Dkt. 365 at 5, or an order overruling the deliberative process privilege as to all
25 documents "related" to the formation of DoD's 2018 policy and the Carter policy. *See* Dkt 408 at
26 2-6. Yet Plaintiffs sought just that, and the Government, accordingly, was forced to file a second
27 petition for writ of mandamus. Dkt. 414-1. Thereafter, the Ninth Circuit recognized that the
28 Government's second petition "raises issues that warrant an answer[.]" *see* Dkt. 416, and granted

1 the Government’s request for a “temporary administrative stay[.]” Dkt. 415, which is still in
2 place. Plaintiffs’ actual grievance is with the Ninth Circuit—both for granting the original writ of
3 mandamus and for issuing the current administrative stay. But both Defendants and Plaintiffs are
4 bound by these decisions even if Plaintiffs find them incompatible with their chosen case
5 strategy.

6 Similarly, Plaintiffs cannot seriously hold Defendants responsible for not acquiescing to
7 their attempt to circumvent the Ninth Circuit’s review of Defendants’ mandamus petition, as well
8 as the Ninth Circuit’s administrative stay, through a Rule 30(b)(6) deposition seeking the same
9 privileged information through testimony that is currently at issue before the Ninth Circuit. The
10 weakness of Plaintiffs’ position is highlighted by their request to have the district court—rather
11 than the Ninth Circuit—adjudicate the bounds of the Ninth Circuit’s own stay order.

12 Perhaps most fundamentally, Plaintiffs have delayed this case because they refuse to
13 accept that the role of this Court is not to “substitute its ‘own evaluation of evidence for a
14 reasonable evaluation’ by the military,” but to test whether the decision the military made, in
15 light of the evidence that it actually considered, is justifiable, *Karnoski*, 926 F.3d at 1202
16 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). Instead, Plaintiffs have repeatedly
17 insisted on overbroad and intrusive discovery that has no precedent in a case involving the
18 military, and little, if any, relation to the core questions before the Court. Indeed, discovery
19 recently has been sidetracked into such far-flung topics as outlook “delivery notifications” and
20 “journaling reports,” Dkt. 455, and confidential service member medical information that was
21 never even considered by Government decisionmakers, Dkt. 485. And Plaintiffs now insist that
22 even the October 2020 trial date may have to be moved in service of their improper approach to
23 discovery, even though that trial date was set just a few months ago. These are delays of
24 Plaintiffs’ making, not Defendants’.

25 In short, while Defendants would consent to a limited extension of time to conduct
26 currently scheduled depositions (including motions related to those depositions), Plaintiffs’
27 request for an indefinite extension of all discovery should be rejected.
28

1 Respectfully submitted, May 6, 2020

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Add. 137

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 6, 2020.

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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, in his official capacity
as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

Honorable Marsha J. Pechman

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, will serve, on or after May 6, 2020, subpoena on Secretary Robert L. Wilkie, in the form attached hereto, for a deposition to take place at Bogorad & Richards PLLC, 209 Madison Street, Alexandria VA 22314 on May 27, 2020.

Dated: May 6, 2020

/s/ Jordan M. Heinz

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EDUCATION FUND, INC.**

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on May 6, 2020, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Andrew E. Carmichael
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
andrew.e.carmichael@usdoj.gov

Counsel for Defendants

/s/ Jordan M. Heinz _____

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Washington

RYAN KARNOSKI, et al.,

Plaintiff

v.

DONALD J. TRUMP, et al.,

Defendant

Civil Action No. C17-1297-MJP

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Robert L. Wilkie

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Bogorad & Richards PLLC, 209 Madison Street, Alexandria VA 22314) and Date and Time (05/27/2020 9:30 am)

The deposition will be recorded by this method: Court reporter and video recording

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 05/06/2020

CLERK OF COURT

OR

/s/ Jordan M. Heinz

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs Ryan Karnoski, et al.

Jordan M. Heinz, 300 North LaSalle, Chicago, IL 60654, jordan.heinz@kirkland.com, 312.862.7027

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. C17-1297-MJP

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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

Defendants.

Case No. 2:17-cv-01297-MJP

Honorable Marsha J. Pechman

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, will serve, on or after April 30, 2020, subpoena on James N. Mattis, in the form attached hereto, for a deposition to take place at Kaufman & Canoles, P.C., 150 W. Main Street, Norfolk, VA 23510 on May 25, 2020.

Dated: April 30, 2020

/s/ Jordan M. Heinz

**LAMDBA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

Tara Borelli, WSBA No. 36759

tborelli@lambdalegal.org

Camilla B. Taylor (admitted pro hac vice)

Peter C. Renn (admitted pro hac vice)

Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

Carl Charles (admitted pro hac vice)

Paul D. Castillo (admitted pro hac vice)

**OUTSERVE-SLDN, INC. N/K/A MODERN
MILITARY ASSOCIATION OF AMERICA**

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

Add. 145

James F. Hurst, P.C. (admitted pro hac vice)
Steve Patton (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Sam Ikard (admitted pro hac vice)

NEWMAN DU WORS LLP

Derek A. Newman, WSBA No. 26967

dn@newmanlaw.com

Jason B. Sykes, WSBA No. 44369

jason@newmanlaw.com

Rachel Horvitz, WSBA No. 52987

rachel@newmanlaw.com

2101 Fourth Ave., Ste. 1500

Seattle, WA 98121

(206) 274-2800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on April 30, 2020, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Andrew E. Carmichael
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
andrew.e.carmichael@usdoj.gov

Counsel for Defendants

/s/ Jordan M. Heinz _____

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Washington

RYAN KARNOSKI, et al.,

Plaintiff

v.

DONALD J. TRUMP, et al.,

Defendant

Civil Action No. C17-1297-MJP

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: James N. Mattis

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: Kaufman & Canoles, P.C. 150 W. Main Street, Suite 2100 Norfolk, VA 23510-1665	Date and Time: 05/25/2020 9:30 am
--	--------------------------------------

The deposition will be recorded by this method: Court reporter and video recording

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/30/2020

CLERK OF COURT

OR

/s/ Jordan M. Heinz

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs Ryan Karnoski, et al.

Jordan M. Heinz, 300 North LaSalle, Chicago, IL 60654, jordan.heinz@kirkland.com, 312.862.7027

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. C17-1297-MJP

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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, in his official capacity
as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

Honorable Marsha J. Pechman

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, will serve, on or after April 30, 2020, subpoena on Paul J. Selva, in the form attached hereto, for a deposition to take place at Bogorad & Richards PLLC, 209 Madison Street, Alexandria VA 22314 on May 26, 2020.

Dated: April 30, 2020

/s/ Jordan M. Heinz

**LAMDBA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

Tara Borelli, WSBA No. 36759

tborelli@lambdalegal.org

Camilla B. Taylor (admitted pro hac vice)

Peter C. Renn (admitted pro hac vice)

Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

Carl Charles (admitted pro hac vice)

Paul D. Castillo (admitted pro hac vice)

**OUTSERVE-SLDN, INC. N/K/A MODERN
MILITARY ASSOCIATION OF AMERICA**

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

Add. 151

James F. Hurst, P.C. (admitted pro hac vice)
Steve Patton (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
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NEWMAN DU WORS LLP

Derek A. Newman, WSBA No. 26967

dn@newmanlaw.com

Jason B. Sykes, WSBA No. 44369

jason@newmanlaw.com

Rachel Horvitz, WSBA No. 52987

rachel@newmanlaw.com

2101 Fourth Ave., Ste. 1500

Seattle, WA 98121

(206) 274-2800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on April 30, 2020, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Andrew E. Carmichael
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
andrew.e.carmichael@usdoj.gov

Counsel for Defendants

/s/ Jordan M. Heinz

UNITED STATES DISTRICT COURT

for the

Western District of Washington

RYAN KARNOSKI, et al.,

Plaintiff

v.

DONALD J. TRUMP, et al.,

Defendant

Civil Action No. C17-1297-MJP

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Paul J. Selva

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Bogorad & Richards PLLC, 209 Madison Street, Alexandria VA 22314) and Date and Time (05/26/2020 9:30 am)

The deposition will be recorded by this method: Court reporter and video recording

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/30/2020

CLERK OF COURT

OR

/s/ Jordan M. Heinz

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs Ryan Karnoski, et al., who issues or requests this subpoena, are: Jordan M. Heinz, 300 North LaSalle, Chicago, IL 60654, jordan.heinz@kirkland.com, 312.862.7027

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. C17-1297-MJP

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____
_____ *Server's signature*

_____ *Printed name and title*

_____ *Server's address*

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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, in his official capacity
as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

Honorable Marsha J. Pechman

NOTICE OF SUBPOENA

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, will serve, on or after April 30, 2020, subpoena on William F. Moran, in the form attached hereto, for a deposition to take place at Brooks Pierce McLendon Humphrey & Leonard LLP, 230 North Elm Street, 2000 Renaissance Plaza, Greensboro, NC 27401 on May 28, 2020.

Dated: April 30, 2020

/s/ Jordan M. Heinz

**LAMDBA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

Tara Borelli, WSBA No. 36759

tborelli@lambdalegal.org

Camilla B. Taylor (admitted pro hac vice)

Peter C. Renn (admitted pro hac vice)

Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

Carl Charles (admitted pro hac vice)

Paul D. Castillo (admitted pro hac vice)

**OUTSERVE-SLDN, INC. N/K/A MODERN
MILITARY ASSOCIATION OF AMERICA**

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)
Steve Patton (admitted pro hac vice)
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NEWMAN DU WORS LLP

Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on April 30, 2020, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Andrew E. Carmichael
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
andrew.e.carmichael@usdoj.gov
Counsel for Defendants

/s/ Jordan M. Heinz

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Washington

RYAN KARNOSKI, et al.,

Plaintiff

v.

DONALD J. TRUMP, et al.,

Defendant

Civil Action No. C17-1297-MJP

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: William F. Moran

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Brooks Pierce McLendon Humphrey & Leonard LLP, 230 North Elm Street, 2000 Renaissance Plaza, Greensboro, NC 27401) and Date and Time (05/28/2020 9:30 am)

The deposition will be recorded by this method: Court reporter and video recording

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 04/30/2020

CLERK OF COURT

OR

/s/ Jordan M. Heinz

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiffs Ryan Karnoski, et al., who issues or requests this subpoena, are: Jordan M. Heinz, 300 North LaSalle, Chicago, IL 60654, jordan.heinz@kirkland.com, 312.862.7027

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4). Add: 160

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. C17-1297-MJP

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
 - (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
 - (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
 - (iv) subjects a person to undue burden.
- (B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) *Contempt.*

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

THE WHITE HOUSE

WASHINGTON

March 23, 2018

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

Pursuant to my memorandum of August 25, 2017, "Military Service by Transgender Individuals," the Secretary of Defense, in consultation with the Secretary of Homeland Security, submitted to me a memorandum and report concerning military service by transgender individuals.

These documents set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted by the Department of Defense. The Secretary of Homeland Security concurs with these policies with respect to the U.S. Coast Guard.

Among other things, the policies set forth by the Secretary of Defense state that transgender persons with a history or diagnosis of gender dysphoria -- individuals who the policies state may require substantial medical treatment, including medications and surgery -- are disqualified from military service except under certain limited circumstances.

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. I hereby revoke my memorandum of August 25, 2017, "Military Service by Transgender Individuals," and any other directive I may have made with respect to military service by transgender individuals.

Sec. 2. The Secretary of Defense, and the Secretary of Homeland Security, with respect to the U.S. Coast Guard, may exercise their authority to implement any appropriate policies concerning military service by transgender individuals.

Sec. 3. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

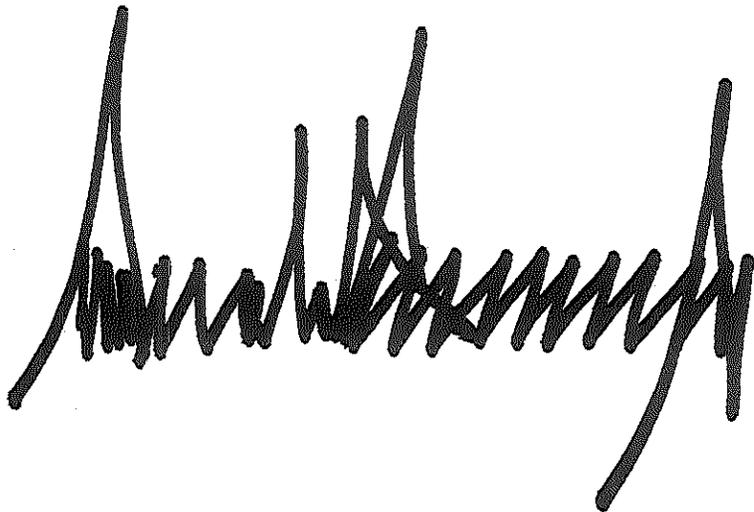
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.

A large, dark, handwritten signature in black ink, appearing to be a stylized name, possibly "Andrew M. Ross", written across the lower half of the page.

**DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS
ON
MILITARY SERVICE BY TRANSGENDER PERSONS**



FEBRUARY 2018

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Executive Summary

It is a bedrock principle of the Department of Defense that any eligible individual¹ 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 physical 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.

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,”

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”¹¹ 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

¹¹ 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

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.

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 paraphilic 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).

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).

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- 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.

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[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

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

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

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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

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 Couard, “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

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

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 Palaron & 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

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

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 standardised 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 that 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 hospitaliz[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

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 quality of life and psychosocial outcomes,” *Clinical Endocrinology*, Vol. 72, p. 214 (2010).

⁹⁴ Id. at 216.

⁹⁵ Id.

⁹⁶ Cecilija 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 wish 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.

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.

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.

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.ausea.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 Hyperandrogenism (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-

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.

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

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 the 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 with 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

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

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 Hyperandrogenism (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

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

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

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

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.

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SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

FEB 22 2019

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

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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.

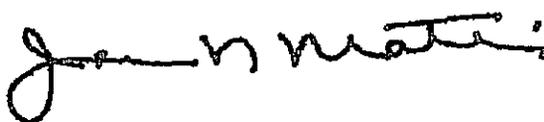
- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

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

From: SecDef26
Sent: Monday, January 29, 2018 5:34 PM
To: 'Greg Newbold'
Subject: RE: Information

Many thanks!

From: Greg Newbold [REDACTED]
Sent: Monday, January 29, 2018 5:03 PM
To: SecDef26 <[REDACTED]>
Subject: Information

One additional thought in amplifying the hypocrisy -- for good reason, we don't accept enlistments from people who need extensive dental work or have a knee that needs surgery, but the medical obligations of this are beyond the pale. Then add the suicide rates and other psychological issues that disrupt cohesion and consume time (and make one non-deployable). Then check out the real letter attached.

- Dr. Paul McHugh:

https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html?utm_term=.d7ec937610d6

Former Chief Psychiatrist Johns Hopkins University. Among other facts avoided on transgender issues, he points out that the suicide rate among those who have had a sex change operation is 20 times that of non-transgenders.

- Ret COL/Professor Woody Woodruff:

<https://news.campbell.edu/articles/campbell-law-professor-woodruff-retire-may/>

<https://directory.campbell.edu/people/william-woody-a-woodruff/>

- Walt Hyer (a transgender who made a mistake and now studies the issue):

<http://www.thepublicdiscourse.com/2017/04/19080/>



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

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]

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- 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 accession¹ and in-service transition² 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.

Final Report and Recommendations of the Transgender Panel

October 13 – December 13 2017



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Executive Summary

The Secretary of Defense directed a Panel of Experts be established to recommend changes to the Department's policies regarding the service of Transgender individuals pursuant to direction from the Commander in Chief dated August 25, 2017. The Panel consisted of the Under Secretaries of the Military Departments, the Uniformed Services Vice Chiefs, and the Senior Enlisted Advisors and was chaired by the Under Secretary of Defense for Personnel. The Panel met 10 times over 60 days.

The Panel was supported by Medical and Personnel experts from across the Department of Defense and Department of Homeland Security. The Transgender Service Policy working group with medical and personnel experts from across the Department developed policy recommendations and a proposed implementation plan. The MEDPERS Committee, a standing group of the Surgeon Generals and Chiefs of Personnel led by Personnel and Readiness provided information and analysis of accession standards, a multi-disciplinary review of relevant data, as well as medical treatment for Gender Dysphoria and transition related care. The Lethality Working Group's Military Personnel Policy sub-working group made up of Personnel subject matter experts developed a universal retention standard that would apply equally to everyone in the force to include transgender service members. These groups reported regularly to the Panel and answered numerous queries for additional information and analysis to support their deliberations.

The Panel was charged with providing their best professional judgement regarding policy recommendations:

“The Panel and designated support personnel shall bring a comprehensive, holistic, and objective approach to study military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law.”

The Panel focused its efforts on three primary policy questions:

1. Should the Department of Defense access transgender individuals?
2. Should the Department allow transgender individuals to transition gender while serving and if so, what treatment should be authorized?
3. Should the Department grandfather individuals who are currently serving?

After hearing testimony from Transgender Service members, Commanders, military medical professionals, and civilian medical professionals with expertise treating transgender individuals and reviewing all available information and analysis regarding the service of transgender individuals, the Panel made the following recommendations:

1. Transgender individuals desiring to serve should be allowed to enter the military in their birth gender, subject to their ability to meet all applicable standards.
2. Transgender Service members should be permitted to serve openly, but only in their birth gender and without cross-sex hormones or surgical transition support.
3. Currently serving transgender Service members, who receive a diagnosis of gender dysphoria prior to the implementation of a revised policy in 2018 should be authorized all medically necessary treatment even if that treatment is received after the current policy is no longer in force.

After evaluating all the testimony and information provided along with their individual research on the topic, the best professional judgement of the majority of the Panel is that the above policy recommendations meet the standard established by the Secretary of Defense regarding military readiness, lethality, and unit cohesion.

Background:

Until July 1, 2016, open transgender service or gender transitions in the Department of Defense were not allowed. The publication of DoDI 1300.28 on 1 October 2016 allowed open transgender service and provided transgender Service members with procedures that allowed for them to transition their gender while serving. While the Department of Defense has never permitted the accession of transgender individuals, the Department was prepared to begin allowing accessions on 1 July 2017 until Secretary Mattis delayed implementation of that plan for six months while additional analysis was conducted.

On July 26, 2017, President Trump signaled his intention to ban transgender individuals from serving in the military. On August 25, the Department of Defense received his Presidential Memorandum on Military Service by Transgender Individuals where he mandated that the Secretary of Defense must submit a plan to implement the policy laid out in the Presidential Memorandum no later than February 21, 2018. The Secretary of Defense is also authorized to provide the President recommended changes to the plan in the Presidential Memorandum.

Transgender Panel

Chartered on September 14, 2017, the Transgender Panel was created to provide an officially sanctioned deliberative body to receive information and make policy recommendations on Transgender Service, consistent with their instructions. The first Panel meeting met on 13 October 2017 and met on a weekly basis for the next ten weeks. In his memorandum dated September 14, 2017, the Secretary of Defense dictated that the Panel of military experts consist of the Service Undersecretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors. By agreement with the Acting Secretary of Homeland Security, the U.S. Coast Guard's equivalents were included in the Panel's composition.

Objective:

In his two memorandums dated September 14, 2017, Secretary Mattis directed the Panel to make recommendations concerning the following areas (at a minimum):

1. Should the Department of Defense access transgender individuals?
2. Should the Department allow transgender individuals to transition gender while serving and if so, what treatment should be authorized?
3. Should the Department grandfather individuals who are currently serving?

Methodology:

During the period of October 13 to December 13, 2017, the Transgender Panel met on a weekly basis to receive testimony from various sources on the effects or potential effects of open transgender service. Starting with the first meeting, Panelists received information from:

1. Commanders of transgender Service members
2. Transgender Service members
3. Military medical professionals with experience providing medical support to transgender Service members
4. Civilian medical professionals with significant experience providing medical support to transgender individuals

Additionally, the Deputy Assistant Secretary of Defense – Health Affairs provided a great deal of information about the currently serving transgender population and any trends that could be identified through the first 15 months of open transgender service. Panelists were also encouraged to conduct their own research and consult with their own experts to form a knowledge base that could be used to render their personal, professional, military opinions on the matter.

Standards:

The Secretary of Defense provided the standards by which the Panel should base their personal, professional opinions.

In his September 14, 2017 memorandum, *Military Service by Transgender Individuals – Interim Guidance*, Secretary Mattis charged the panel to base their opinions on “[DoD goals for] military effectiveness and lethality, budgetary constraints, and applicable law...”

The Secretary's *Terms of Reference – Implementation of Presidential memorandum on Military Service by Transgender Individuals*, also dated September 14, 2017, added that the Panel should focus on “military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and [be] consistent with applicable law.”

Recommendations:

The Transgender Panel makes three policy recommendations:

1. Transgender individuals desiring to serve should be allowed to access into the military in their birth gender, subject to their ability to meet all applicable Service standards.
2. Transgender Service members be permitted to serve openly, but only in their birth gender and without cross-sex hormones or surgical transition support.
3. Currently serving transgender Service members who receive a diagnosis of gender dysphoria prior to the implementation of a revised policy in 2018 should be authorized all medically necessary treatment even if that treatment is received after the current policy is no longer in force. DoD should develop a comprehensive way to medically treat TG Service members in a more standardized manner.

Universal Retention & Deployability Standard

Developed independently to promote the lethality of the Force, Transgender Policy Panelists were afforded the opportunity to receive a briefing on the draft Universal Retention and Deployability Standard that the Secretary of Defense mandated. The new policy, if approved, will mandate that Service members with 12 months or more of continual non-deployability due to injury, illness, or administrative reason will be automatically considered for separation from the military. The Panel unanimously agreed that applying the final Universal Retention and Deployability Standard to transgender Service members was consistent with their desire to have standards that are universally applied to all Service members.

Accessions:

The Panel's recommendation not to allow the accession of individuals in other than their birth gender was supported by several points. The individualized nature and variability of treatment requirements for Gender Dysphoria, as well as the fact that significant mental health diagnoses and the surgeries associated with transition are disqualifying for non-transgender individuals contributed to the recommendation. The Panel also found that the possibility that an individual may be considered transition complete and medically stable, thereby meeting proposed medical accession standards, yet after entry into military service require additional medical care impacting their ability to deploy was an additional concern. Privacy concerns of both transgender and non-transgender personnel was also cited as a detractor from a more expansive policy. Testimony provided by at least half of the Commanders with transitioning Service members indicated unit cohesion was impacted and they were devoting significant time to adjudicating complaints regarding communal living spaces.

A small minority of the Panel supported accession after transition and stability for an extended period, but only for those individuals who could meet all other accession standards. They would support a more restrictive policy than what was previously prescribed in the Secretary Carter memorandum to mitigate the majority of the aforementioned detractors and have the added benefit communicating to future recruits that DoD welcomed anyone that could meet the high standards for military service.

The Panel also considered whether a history of gender dysphoria was in and of itself disqualifying for military accessions. The Panel concluded that any serious mental health condition should receive additional scrutiny through the medical accession standard waiver process. Additionally, such a condition should be subject to the same 36-month stability standard that other serious mental health conditions are held to in order to ensure a consistent policy.

Future in-service policy

The Panel, citing the previously described detractors, recommends that DoD policy allow open transgender service, but disallow in-service transitions. The Panel also determined that a diagnosis of gender dysphoria should not be disqualifying for continued service as long as it can be resolved with mental health services. Several panel members cited the need for a standards based approach to service. The Panel found that allowing a gender dysphoric individual to continue to serve while receiving mental health counseling was consistent with policies established for non-transgender individuals.

Given that the use of cross-sex hormones supports a treatment plan leading to transition, which the Panel does not support, the panel nearly unanimously recommended against their use. Those in the majority opinion cited readiness and lethality concerns and based upon the Endocrine Society guidelines requiring monitoring of hormone levels for one year after initiation of treatment. Testimony by civilian and military medical practitioners on this element of treatment and impact on non-deployability was highly variable and contributed to the Panel's reluctance to accept that a policy recommendation allowing such treatment would meet the Secretary of Defense's standard as it relates to military effectiveness. Those in the majority also remarked that an individual would have difficulty receiving medically necessary care in austere environments like Syria or Africa. A single Panel member supported transition and treatment to include cross sex hormone therapy as long as it would not adversely impact an individual's ability to deploy.

The Panel similarly does not support transition-related surgeries, which were divided into two categories – the first is sex reassignment surgeries excluding genital surgeries and the second category is genital surgeries. When asked if the Panel would recommend that the DoD adopt a policy that allows transgender Service members to continue to serve if they required sex-reassignment surgery to resolve their gender

dysphoria, an overwhelming majority of the Panel did not support that recommendation. The negative impact on readiness by virtue of the periods of non-deployability is the Panel's chief concern with allowing sex-reassignment surgeries. Having not recommended sex-reassignment surgeries, the Panel did not further discuss genital surgeries.

Another aspect of gender transition is changing an individual's gender marker in the Defense Enrollment Eligibility Reporting System, which would officially recognize the Service member's new gender and allow them to function on-duty in their new gender. By nearly a two-thirds majority, the Panelists rejected recommending that gender marker changes be allowed in the future transgender policy for individuals only requiring mental health counseling. The Panelists cited the negative effects on unit cohesion as their primary concern, finding that the unit commander who received opposing equal opportunity complaints from his unit and his transgender Service member to be credible and indicative of future issues. Panelists opposing gender marker changes also believed that placing the needs of an individual over that of a military organization was ill-advised and incompatible with military service. The minority that supported allowing gender-marker changes based their opinion on equality; the military cannot unequivocally say no to an entire cohort of people, the decisions should be made based on the individual merits of the situation. Panelists in the minority also found the unit cohesion argument to not be persuasive, as several of the commanders during the Panel cited minimal leadership distractions or unit disruptions from their transgender Service member.

Policies on currently serving transgender Service Members:

Since the Panel's recommendations are different than the current policy, the Panel was then asked to make recommendations as to what policies should be applied to the currently serving transgender population. The Panel unanimously agreed that currently serving transgender Service members with an approved medical treatment plan should be 'grandfathered' into a different policy than the proposed policy. The Panel subsequently determined that grandfathering should be extended to all who have a diagnosis of gender dysphoria prior to a change in policy being implemented.

The Panel then was asked if the medical treatment plans that transgender Service members have currently approved should be honored and the Panel overwhelmingly favored that recommendation, citing a need to not break faith with the Service members and upholding the integrity of the Department of Defense. Panel members commented that the Service members showed trust and faith in the DoD by coming forward in good faith and to break that promise would erode the trust in our institution.

Those that opposed allowing currently approved medical treatment plans to be executed cited testimony indicating the routine changes to the plans based on individual desires, calling into question the earlier medical necessity determination by the medical providers. This contributed significantly to the Panel's assessment that a policy allowing

transition would put the Commander in an untenable position, unable to make a fully informed decision regarding whether or not to approve a transition plan. One of the Panelists in the minority cited deployability and readiness concerns associated with the surgeries currently in medical treatment plans.

When asked if the currently serving transgender population should be subject to the future Universal deployability and retention standard under consideration by the Department of Defense, the Panel unanimously favored that recommendation, choosing to enforce the philosophy of a single standard for all Service members.

The Panel recommends that the population eligible to transition under the current policy be limited to any transgender Service member with a diagnosis of gender dysphoria prior to implementation of a new policy.

Implementation Plan:

Should the President and Secretary of Defense accept the Panel's recommendations, the plan would be implemented as follows:

A+0 Policy is announced, which includes public and legislative affairs plans

A+90 The Department of Defense will implement the policy and publish:

- Medical Interim Procedures memorandum
- Revised Department of Defense Instructions
- Military Entrance Command Procedures
- Revise OSD Transgender Service Handbook

A+180 Military Services will publish their respective transgender policies

The Services will develop their own individual policies consistent with the DoD policy and the traditions of their respective Service. During the period A+90-180, each Service Secretary may approve new transitions on an individual basis.

Enclosed with this report is a depiction of the range of options considered and a summary of the information provided to the Panel to inform deliberations.

Summary of Information Presented To the Panel



PERSONNEL AND READINESS ^{Add. 224}

ADMIN DATA PRESENTED DURING PANEL MEETINGS

Guidance

SECDEF guidance: "Consistent with [DoD goals for] military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military."

P&R Guidance: Using the SecDef's criterion of consistency with DoD goals for military effectiveness and lethality, while mindful of budgetary constraints and applicable law, the Panel must provide recommended answers to several questions.

1. Will the Panel recommend that the DoD begin accessing transgender individuals?
2. Will the Panel allow for in-service transition in the future? If so, what will be allowed and what will not be?
3. If the Panel recommends that future transitions be disallowed, what does the Panel recommend concerning the currently serving transgender population?

The Transgender Working Group, chaired by the Director, Accession Policy will incorporate the Panel's recommendations into a revision of the current DoDI that sets forth the standards and processes that will apply to transgender Service members. This working group will also develop the implementation plan to support that DoDI revision.

Dignity & Respect "First and foremost, we will continue to treat every Service Member with dignity and respect." - SecDef Interim Guidance, September 14, 2017

Medically necessary care: "Service members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition. As directed by the Memorandum, no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." – SecDef Interim Guidance, 14 September 2017.

Accessions policy: "The procedures set forth in DoDI 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, dated April 28, 2010 (Change 1), which generally prohibit the accession of transgender individuals into the Military Services, remain in effect because current or history of gender dysphoria or gender transition does not meet medical standards, subject to the normal waiver process." - SecDef Interim Guidance, September 14, 2017.

Retention policy: "An otherwise qualified transgender Service member whose term of service expires while [the] Interim Guidance remains in effect, may, at the Service member's request, be re-enlisted in service under existing procedures." - SecDef Interim Guidance, September 14, 2017.

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Definitions

Gender Dysphoria (Diagnostic and Statistical Manual of Mental Disorders version 5 which is the basis for the classification code used for documenting military medical diagnoses): In adolescents and adults, gender dysphoria diagnosis involves a difference between one's experienced/expressed gender and assigned gender, and significant distress or problems functioning. It lasts at least six months and is shown by at least two of the following:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics
2. A strong desire to be rid of one's primary and/or secondary sex characteristics
3. A strong desire for the primary and/or secondary sex characteristics of the other gender
4. A strong desire to be of the other gender
5. A strong desire to be treated as the other gender
6. A strong conviction that one has the typical feelings and reactions of the other gender

Medically necessary: Those health-care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms, and that meet accepted standards of medicine. (Transgender Work Group)

Medical Treatment Plan: The plan, developed between the patient and health care provider, that outlines the steps anticipated for the patient's transition to the opposite sex. (Transgender Work Group)

Sex Reassignment Surgery or gender affirmation surgery: All surgical procedures related to transition from the birth sex to the preferred gender. (DHA Memorandum of November 13, 2017).

Stable in the preferred gender. No functional limitations or complications persist, and the individual is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning. (Transgender Work Group)

Transgender Service member: A Service member who identifies with a gender different from what is typically associated with their sex designated at birth. Not all transgender individuals seek treatment or receive a diagnosis of gender dysphoria. (Transgender Work Group)

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Estimates on the size of the Transgender Population in the Military:

Number of GD diagnoses:	994, from June 1 2016 – July 26, 2017; 1,076 as of October 3, 2017
OPA survey estimate:	8,227 – 9,732 on active duty
Rand estimate:	2,150 – 10,790 across all components

Gender Dysphoria treatment regime

Diagnosis requirements: Under current policy, receiving a diagnosis of gender dysphoria requires 6 months of counseling (Panel III minutes) and according to the Diagnostic and Statistical Manual of Mental Disorders version 5, at least two of the following criterion must be met:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics
2. A strong desire to be rid of one's primary and/or secondary sex characteristics
3. A strong desire for the primary and/or secondary sex characteristics of the other gender
4. A strong desire to be of the other gender
5. A strong desire to be treated as the other gender
6. A strong conviction that one has the typical feelings and reactions of the other gender

Behavioral Health Counseling: The initial step in identifying the severity of an individual's mental health condition(s) that may or may not exist. If a mental health condition exists, the person/Service member is treated or further referred to a psychotherapist depending on the identified condition.

Cross-sex Hormone Therapy: A common medical treatment associated with gender transition and can be started upon receipt of a diagnosis for gender dysphoria. (Draft DoDI 1300.XX, *Military Service by Transgender Service members*) "During the first year, the Clinical Guidelines from the Endocrine Society recommends laboratory work every 90 days to monitor hormone levels. (Panel VI slides) Opinions vary on the Service member's deployability during this period – a military endocrinologist stated that TG SMs should be able to deploy after 180 days of beginning the hormone regimen. (Panel II minutes) The civilian endocrinologist stated that hormone initiation can be paused or discontinued safely to accommodate deployments. (Panel V minutes), Commanders report that TG Service members are non-deployable for this entire period (Panel I minutes).

Real Life Experience (RLE): The phase in the gender transition process during which the individual commences living in the gender role consistent with their preferred gender. RLE generally encompasses dressing in the new gender, as well as using preferred gender berthing, bathroom, and shower facilities. (Transgender Working Group)

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Surgeries: Note1: The 2015 U.S. Transgender Survey cited by Dr. Adirim showed that 20% of MtF and 2% FtM TG individuals initially wanting **genital** surgery actually have the surgery. **This was originally reported as all surgeries, not specifically genital surgeries.** (Panel IV slides) Note2: the following table only depicts currently authorized procedures.

Compiled data based on presentations from Panel IV and Panel VI

Procedure	Estimated Recovery Time (assumes no complications)	Estimate on how many may desire*	Notes
Hysterectomy (laproscopic approach, recommended)	4 weeks desk job 6-8 weeks unrestricted	128/313	(data for all indications) Major complication = 9.5% Minor complication = 28%
Hysterectomy (abdominal approach) with or w/o Oophorectomy	6-8 weeks unrestricted		(data for all indications) Major complication = 6% Minor complication = 27%
Chest masculinization (Mastectomy)	2-4 weeks (desk job) 4-6 weeks (physically demanding job)	151/313	Low complications
Phalloplasty (can be 2 stages, 2 nd surgery 9-12 months later)	6 weeks desk job 8-12 weeks return to activity 3 months unrestricted	151/313	Recommends stay in area of hospital where procedure performed for up to 2 weeks
<u>Metoidioplasty</u> (can be done in 2 stages, 2 nd stage performed >=3 months later)	3 weeks desk job 6 weeks return to activity 8 weeks unrestricted	151/313	<ul style="list-style-type: none"> Recommends stay in area of hospital where procedure performed for up to 3 weeks <5% complication rate
Orchiectomy	3 weeks desk job 6 weeks return to activity 8 weeks unrestricted	75/313	Very low complications
Vaginoplasty	6 weeks desk jobs (some restrictions) 6-8 weeks resume physical activity 3 months for unrestricted activity	151/313	<ul style="list-style-type: none"> Recommends stay in area of hospital where procedure performed for up to 2 weeks Major complications rare Minor complications ~25%, most soon after surgery

* - Data provided did not differentiate between genders, so all data shown is based on all 313 treatment plans that were examined.

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Current Gender Marker Change Policy

A Service member on active duty, who receives a diagnosis from a military medical provider for which gender transition is medically necessary may, in consultation with the military medical provider and at the appropriate time, request that the commander approve:

- The timing of medical treatment associated with gender transition;
- An ETP associated with gender transition, consistent with Paragraph 3.2.d, and/or
- A change to the Service member's gender marker in DEERS.

(DoDI 1300.28 – *In-Service Transition for Transgender Service Members*)

The Commander will respond promptly to any request for medical care and ETPs associated with gender transition no later than 90 days from the date of the request. The commander approves, in writing, the gender marker change in DEERS.

Current Transgender Service member Data

Administrative Note 1: The information presented to the Panel demonstrated a great deal of variability. As was discussed in various Panel meetings, this can be attributed to two observations: the first is that transgender medical care is an immature field of medicine with the majority of progress coming in the last 20 years with much more to do. The second factor is that transgenderism/gender dysphoria are spectrum issues, so the medical treatment plans would also span the breadth of available care. Two examples are provided:

- The wide range of times estimated for nondeployability for transition. Commanders in Panel I were adamant that their experience showed them that their transitioning Service members were non-deployable for up to 2.5 years whereas transgender Service members stated that, if scheduled correctly, their nondeployable periods were minimal. Medical experts provided information that most surgeries (assuming no complications) only required up to 8 weeks of recovery until the individual was fully prepared to return to duty. Currently available in-service data showed that cumulatively, transitioning Service members in the Army and Air Force averaged 167.4 and 159 days of limited duty, respectively. (Panel IV slides)
- Reported suicidal ideation rate for transgender individuals varied from 25% higher than cisgender individuals to 50% higher, depending on the source.

Administrative Note 2: When presenting data, Dr. Terry Adirim stated that while a great deal of data would be presented, it may be insufficient to draw actionable conclusions. Instead, it is helpful to show trends. With such a small population to examine, and barely a year of open transgender service, using the data to predict long-term issues would not be advised. With only 15 months of transgender service, very few of the transgender Service members would have progressed sufficiently to surgeries - unless they started their transition prior to the enactment of the policy. (Panel II minutes)

- Estimates vary on the size of the military's transgender population. The Office of People Analytics estimates that between 8,227 and 9,732 Active Duty Service members are transgender. Rand estimates the population to be 2,150 to 10,790 across all components. (Panel I, Panel IV Slides)

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- As of July 26, 2017, there were 994 Active Duty Service members with a diagnoses of Gender Dysphoria (GD). [Update: as of October 3, 2017, the number of diagnoses rose to 1,076]. (Panel IV)
- Between October 1, 2015 to July 26, 2017, there were 994 Active duty Service members with a diagnosis of GD - (Panel IV slides)
- Between October 1, 2015 and October 3, 2017, the 994 active duty Service members with diagnosis of GD accounted for 30K mental health visits. (Panel IV slides)
- Rates of Suicidal ideation:
 - The 2015 U.S Transgender Survey concluded that a transgender individual with a solid support structure (e.g. family, friends) has a 37% higher rate of suicidal ideations than a cisgender individual. Without that support structure, the rate increase to a 54% higher rate. (2015 U.S. Transgender Survey, Panel VI minutes)
 - Individuals with untreated gender dysphoria have roughly a 25% higher risk of suicide than cisgender individuals, (Maguen and Shipherd, 2010) but others report that is largely due to an inability to transition or treat gender dysphoria. With treatment, suicidal ideation can significantly decrease. (Panel III minutes). Both Military and Civilian medical experts agreed with that statistic, when asked. (Panel III, V minutes).
- Medical costs for treating GD have risen from ~ \$660K in FY16 to ~ \$2.2M in FY17. (Panel IV slides)
- Since policy implementation, the medical costs for SMs with GD has increased nearly 3 times compared to a non-GD Service member. (Panel IV slides)
- Between 67% and 77% of Service members have surgeries included in their treatment plans; this percentage may be high due to DoD transition policy requiring all medically necessary care to be included in a treatment plan in advance of treatment. (Panel IV slides)
- Currently available in-service data showed that cumulatively, transitioning Service members in the Army and Air Force averaged 167.4 and 159 days of limited duty, respectively. (Panel IV slides)
- According to the 2015 U.S. Transgender survey, only 2% of completed Female-to-Male (FtM) transitions included genital reassignment surgeries. In Male-to-female (MtF) completed transitions, approximately 10% had genital reassignment surgery. The most common transition-related surgeries that can be performed in military treatment facilities are mastectomy (21% of FtM), hysterectomy (8% of FtM) and breast augmentation (8% of MtF). (Panel VI slides)
- The 2015 U.S. Transgender Survey reports that the military seems to have a higher prevalence of transgenderism than the greater American public. (Panel VI slides)

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- The DASD-HA study cohort of 691 transgender Service members revealed: (Panel VII slides)
 - The transgender population in the military is mostly under 40 years old (97%) and in the rank of E1-E4 (51%).
 - Higher rates of mental health and psychotherapy encounters per individual (29.6) when compared to the control group that consisted of active duty service members with a mental health diagnosis (21.1)
 - A higher rate of suicidal ideation than the control group that consisted of active duty service members with a mental health diagnosis (10.7 vs 6.2%).
 - 69 Service members deployed following a primary diagnosis of gender dysphoria after July 1, 2016.

Readiness, Lethality, and Military effectiveness

- The vast majority of commanders agreed that from time of diagnosis to the completion of a transition plan, the SM would be non-deployable for 2-2.5 years (up to a year of hormones to achieve stability, then surgeries). (Panel I minutes) Transgender Service members maintained that most complex surgery (gender reassignment surgery) required six weeks of Convalescent Leave followed by an unspecified period of light duty. (Panel II minutes)
- The three genital reconstruction surgeries (vaginoplasty, phalloplasty, metoidioplasty), have as-yet unknown impacts on individual military readiness and that the deployability of individuals who had the surgeries would be an issue. Example: one Service member recently had a vaginoplasty and her medical treatment plan forecasted 6 months of non-deployability after the surgery. (Draft Panel VI minutes) *(note: 10.5 months was originally reported but corrected to 6 months during 7 December Panel meeting)*
- One military physician stated that the surgical portion of a complete gender reassignment, would generally be scheduled as five or six surgeries over a 15-month period. (Panel III minutes)
- When asked about the percentages of transgender individuals that opted for medical procedures, the civilian medical experts provided the following information, based on their personal experience:

	Male to Female (MtF) transitions	Female-to-Male (FtM) transitions
% that desire medical intervention	50	50
% (of above) that desire surgery	33	33
Desire cross-sex hormones	Majority	Majority
Remarks	Majority of surgical procedures are chest augmentation surgery	Majority of surgical procedures are mastectomies

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- One commander remarked about how it would be extremely difficult for a TG Service member to operate in a SOCOM world with austere living conditions and non-emergency medical support not readily available. He also raised the issue that some military specialties, like air traffic controllers, have their standards set by another agency – in that case the FAA. The FAA does not allow an individual to control air traffic until they have been hormonally stable for 5 years, effectively closing that specialty to TG SMs. (Panel I minutes)
- When asked what happens if an individual on cross-sex hormones was unable to take them for a period of time, a military physician stated that the answer depended on the specific situation. In short, side effects of cross-sex hormone withdrawal include increased fatigue, mood swings and decreased libido – and these symptoms are similar to those of a cisgender individual that stopped taking hormone supplements. The longer an individual was on cross-sex hormones when they had to stop, the more intense those symptoms would be. The same panelist remarked that there would likely be a decrease in combat ability for an individual who stopped taking their cross-sex hormones. (Panel III minutes) Transgender Service members who appeared before the panel had a different perspective. One of the Service members has been off of hormones for more than 2 years with little effect and another compared the side effects of skipping a week of hormones to a bad case of pre-menstrual syndrome. One of the Service members sometimes skips hormone injections and this leads to oily skin, and mood swings, both of which are manageable. (Panel III minutes) Civilian medical experts maintained that if a Service member was deployed and lost their cross-sex hormones, the most likely effect would just be an angry Service member. As a matter of routine in civilian care, the use of cross-sex hormones are halted before and after surgeries for a period of time without any issues. (Panel V minutes) However, cross sex hormones can be provided in multiple ways – topical creams, injections or pills – so it is unlikely that an individual would be unable to take cross-sex hormones anywhere in the world. (Panel III minutes) There are risks associated with cross-sex hormones, but they are small. Birth control pills contain more hormones than cross-sex hormones do. (Panel III minutes)
- Providing adequate mental health support to a deployed transgender Service member could be problematic - there are few deployed psychotherapists that could provide the required treatment for a transgender Service member prior to surgeries – and none in the most austere environments (e.g., Syria, Somalia). Mature theaters (Korea, Afghanistan) would likely be able to support transgender Service members with mental health and medical support. (Draft Panel VI minutes)
- Receiving a diagnosis of gender dysphoria takes approximately 6 months of counseling. (Panel III minutes)
- The civilian endocrinologist stated that it is safe to pause initiation/titration of dose of hormone treatments and/or stop hormones (may need to wean off) in order to accommodate deployments. It will just freeze the progress of the individual's transition. (Panel V minutes)

Budgetary constraints

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- Several commanders indicated a budgetary impact as they received no additional monies to pay for the numerous TDY trips throughout CONUS for specialized medical care and had to pay out of O&M Funds. (Panel I minutes)
- Medical costs for treating GD have risen from ~ \$660K in FY16 to ~ \$2.2M in FY17. (Panel IV slides)
- Since policy implementation, the medical costs for SMs with GD has increased nearly 3 times compared to a non-GD Service member. (Panel IV slides)

Unit cohesion

- One commander spoke of his 'dueling' EO issues; his TG SM (a female with male genitalia), has an approved ETP for full-time real life experience and is authorized to use female shower facilities. This led to an EO complaint by the females assigned to the unit who believed their privacy was invaded by this. That led to an EO complaint by the TG SM claiming that the command was not supporting her rights. **(Panel I minutes)**
- Under the current policy, a transgender female recruit (with male genitalia) will be assigned to a female platoon and likely violate the privacy rights of the other recruits due to their exposure to opposite sex genitalia (even if unintentional). The same considerations apply to transgender males (with female genitalia) in male recruit platoons. The current policy suggests that privacy is manageable by hanging shower curtains or requiring recruits to wear undergarments at all times, however these accommodations are not practical in application of our squadbay based training model and detract from the mission of transforming young Americans into members of a single, cohesive unit.
- A Male-to-Female transgender Sailor was serving as a Missile Technician (MT) onboard a submarine. This position requires participation in the Personnel Reliability Program. Because the Sailor was receiving hormone therapy, the Sailor was required to be disqualified as a MT and had to be removed from the position. As a result, a replacement Sailor had to be assigned to the submarine and the future career of the transgender Sailor as a MT is uncertain.
- Exception to Policy (ETP) was granted for Sailor who was diagnosed with Gender Dysphoria in July 2016 and had been undergoing Cross Sex Hormone Therapy since September 2016. Because the Sailor was honest, worked with his command and waited over a year to submit an ETP, the chain of command was able to fully support and endorse the Sailor's request to wear female uniforms once body composition and appearance began to drastically change.
- Female-to-male transitioning Sailor submitted ETP to adhere to male uniform and grooming standards. Sailor had an approved transition plan and medical treatment plan, and worked with the command throughout the transition process. The Commanding Officer fully supported the ETP request, and wrote the following endorsement: "I fully support [her] request for ETP. If approved, the transition from female to male grooming, uniform, and appearance standards will be seamless having no impact on morale or good order and discipline. [She] is an extremely productive member of the command, highly regarded as a technical expert and hard worker. Other Sailors are aware of [her] transgender status and

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will continue to support [her] throughout the process. Based on [her] professional conduct and the high regard in which [she] is held, I anticipate no problems with [her] remaining in female berthing, heads, and shower facilities."

Applicable laws, standards, and guidelines

- Statutorily, TRICARE is forbidden from paying for gender reassignment surgery. All transition-related surgeries must be processed through the Supplemental Health Care Program. In any case, if an individual does not meet required guidelines, the Department can refuse to perform the procedure until the individual meets all criteria contained in the guidelines. (Panel II minutes)
- The Military Health System follows the 2017 Endocrine Society guidelines for the treatment of gender dysphoria. (Panel VI slides) The recovery estimates contained within those guidelines are based on an assumption that the individual will return to their civilian life, which does not directly translate onto the military population and their unique requirements. The DoD will most likely have to develop its own military-specific recovery estimates that would likely be higher than the civilian estimates (Draft Panel VI minutes).
- The prevailing Endocrine Society guidelines are also the reason why an individual is non-deployable for the first 12 months of taking cross-sex hormones. (Panel III minutes). Both the military endocrinologist (Panel III) and the civilian endocrinologist (Panel IV) believed that an individual may be able to achieve hormonal stability after only six months of cross-sex hormones.

Deployability

Department of Defense Instruction (DoDI) 6490.07, *Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees*, February 5, 2010 provides the following information:

Deployment: The relocation of forces and materiel to desired operational areas. Deployment encompasses all activities from origin or home station through destination, specifically including intra-continental United States, inter-theater, and intra-theater movement legs, staging, and holding areas.

Contingency Deployment: A deployment that is limited to outside the continental United States, over 30 days in duration, and in a location with medical support from only non-fixed (temporary) military medical treatment facilities. It is a deployment in which the relocation of forces and materiel is to an operational area in which a contingency is or may be occurring.

DoD Policy states that DoD personnel may deploy if:

"Any required, ongoing health care or medications anticipated to be needed for the duration of the deployment are available in theater within the Military Health System. Medication must have no special handling, storage, or other requirements (e.g., refrigeration, cold chain, or electrical power requirements). Medication must be well tolerated within harsh environmental conditions (e.g. heat or cold stress, sunlight) and

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should not cause significant side effects in the setting of moderate dehydration.”
(Paragraph 4.3.b)

The DoDI also adds that

“Deploying commanders may add additional medical requirements to the standards in this Instruction based upon the demands of a specific deployment. Commanders may apply these medical standards to other deployments based on the health risk, physical demands, and medical capabilities of the deployment...” (Paragraph 4.e)

Enclosure 3 to the DoDI is entitled “*Medical conditions usually precluding contingency deployment*” and within it, the enclosure states:

“Any chronic medical condition that requires frequent clinical visits, fails to respond to adequate conservative treatment, or necessitates significant limitation of physical activity.” (Paragraph b.1.)

“Any unresolved acute or chronic illness or injury that would impair duty performance in a deployed environment during the duration of the deployment.” (Paragraph b.5.)

The DoDI also charges the Joint Staff and COCOMs to develop their own medical standards for deployment into their area of operations. Using CENTCOM as an example, their medical deployment standards, contained in Modification 13 to *USCENTCOM Individual protection and individual – Unit deployment Policy* (March 23, 2017) states:

“Deployed Health Service Support infrastructure is designed and prioritized to provide acute and emergency support to the Expeditionary mission. All personnel... travelling to the CENTCOM AOR must be medically, dentally and psychologically fit.” (Paragraph 15.C)

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Questions and Answers

1. What does "... consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law" really mean? Is the standard that policy on TG service must "enhance" readiness, lethality, and deployability - or simply not detract from?

Answer: The standard is that any policy recommended by the panel should support the Department's goals as the policy relates to military readiness, lethality and deployability, as well as being prudent given budgetary constraints and not violate applicable law. The policy does not need to "enhance" these elements.

2. What does "to the extent practicable, policies regarding the accession and retention of transgender persons should align with policies applied to similarly situated persons..." mean?

Answer: The reference to "similarly situated persons" implies a requirement to analyze the policy with an eye towards parity. As an example, a policy recommendation that limits the medical care of a transgender Service member would meet this criteria if a sys-gender individual with a comparable medical condition are similarly limited.

3. Can you separate a transgender person for the medical or psychiatric conditions on which everyone else is judged. ie, for the purpose of deciding upon their worthiness to serve in the military, can we judge them as individuals or must we judge them as a class of people?

Answer: We must evaluate their ability to serve as individuals, since Service in the U.S. Military is standards based.

4. Does being transgender (having gender incongruence?) necessarily mean that you have a medical or psychiatric condition? In the Transgender Accession Medical Standards Policy Review briefing that we received in Oct, DSM-V suggested that the disorders were "gender dysphoria" and "paraphilic disorders" - not transgenderism.

Answer: No, identifying as transgender does not necessarily mean that you have a medical or psychiatric condition.

5. Can you have (or have a history of) a certain medical or psychiatric condition disorder and serve in the military?

Answer: Yes. The medical accession standards clearly state for example that an individual with a history of depression or anxiety can access if he or she has not carried the diagnosis or been treated for at least the past 36 months.

6. If you can serve as "transgender" but develop a disorder/condition while serving, does the provision of medical care differ from that provided to other persons that require medical or psychiatric care? If so, what disorders/conditions are treated differently?

Answer: No. Someone who is transgender who develops a disorder during military service should be treated like anyone else with a physical or mental health condition.

7. a) Assuming the condition that would be treated differently is gender dysphoria, to what extent does the law allow us to limit treatment?

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Answer: By statute, TRICARE cannot pay for gender transition surgeries, however the law does allow for an exception, which is why we can only provide those surgeries through a waiver process.

b) If the law doesn't allow us to limit treatment, could such a diagnosis lead to a PEB/MEB and discharge with/without disability?

Answer: Gender dysphoria is not a condition listed in the Veteran Affairs Schedule for Rating Disabilities (VASRD) and therefore is not a compensable medical condition, which would typically preclude a service member from being entered into a process for evaluation for a VA disability rating for this condition. The Services vary slightly, but each has administrative separation processes in place to allow for individuals who have conditions that are not a disability to be processed for separation.

8. Does identifying as transgender necessarily lead to a need to transition to your preferred gender?

Answer: No. Some people who are transgender do not choose to transition and are fully capable to perform their duties and responsibilities.

9. If you can serve as transgender and transition, we need to address the logistics of doing so (berthing, heads, showers, etc.). Same question if you serve as transgender but don't transition.

Answer: Logistics of Service can be considered when making your recommendations. Extensive information is available in the Question and Answer package that was compiled for the Military Departments earlier this year. This information is being provided as part of your read ahead package for the Panel meeting on 11/30/2018.

Range of Options Considered



PERSONNEL AND READINESS ^{Add. 238}

Panel of Experts – Policy Recommendations

Accessions

Does the Panel recommend...

...that a transgender individual (who did not desire gender transition) who desired to join the military be allowed to access?	No Yes
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...in other than their birth gender?	No Yes
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Finding: There is limited impact to military effectiveness, lethality, or budgetary concerns associated with accessing an individual that identifies as transgender.

The Panel recommends:

Majority: Transgender individuals who meet all accession standards be allowed to access in their birth gender, subject to their ability to meet all applicable Service standards

Minority: Transgender individuals who meet all accession standards be allowed to access in other than their birth gender. This assumes that the individual achieved gender stability for 36 months and meets all other accession standards in order to mitigate the majority of the detractors.

Future In-service

Does the Panel recommend...

...allowing continued service for transgender Service members that do not desire to transition?	No Yes
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...allowing continued service for transgender Service members with a diagnosis of gender dysphoria that was resolved with only limited treatment?	No Yes
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...allowing transgender Service members with a history of gender dysphoria that was resolved with limited treatment to change their gender marker to other than their birth gender (Gender marker change and real life experience)?	No Yes
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And Cross Sex Hormones? (12 months monitoring; deployment impact)	No Yes
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And sex reassignment surgeries? (excluding genital surgeries)	No Yes
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And genital reassignment surgeries?	No Yes
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Finding: An individual that identifies as Transgender should be able to serve if otherwise qualified. Gender dysphoria resolved through mental health counseling and no transition can be compatible with continued military service. Cross-sex hormone and surgical medical treatments associated with gender transition are not compatible with maintaining a Service member's deployability and therefore negatively effects military effectiveness and individual readiness. Gender transitions disrupt unit cohesion and reduce military readiness.

The Panel recommends:

Majority: Transgender Service members be permitted to serve openly, but only in their birth gender and without cross-sex hormones or surgical transition support.

Minority: Transgender Service members be permitted to transition while serving to other than their birth gender if the transition does not require cross-sex hormones or surgical transition support. One Panel member supported limited surgical transition support.

Currently Serving

Does the Panel recommend...

...that currently serving transgender individuals with an approved medical treatment plan will be 'grandfathered' into a different policy than the proposed policy?	No Yes
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that all treatment options contained in currently approved medical treatment plans be honored?	No Yes
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...the Universal deployability and retention standard that is currently being staffed should apply to the 'grandfathered' transgender population?	No Yes
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And sex reassignment surgeries? (excluding genital reassignment surgeries)	No Yes
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And genital reassignment surgeries?	No Yes
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Finding: The Department should honor its commitment to the currently serving transgender Service members by authorizing their continued transition related treatment and service in other than their birth gender.

The Panel recommends:

- Currently serving transgender Service members should be authorized all medically necessary gender transition related care.
- This policy applies to Service members who receive a diagnosis of gender dysphoria prior to the implementation of a change in policy limiting transition while serving.
- That DoD develop a comprehensive way to medically treat TG Service members in a more standardized manner.

(Unanimous Opinion)

Implementation Plan

Upon approval of policy by POTUS:

Announcement Day
Policy is announced, which includes public and legislative affairs plans

+90 days
Implement the policy and publish:

- Medical Interim Procedures memorandum
- Revised Department of Defense Instructions
- Military Entrance Command Procedures
- Revise OSD Transgender Service Handbook

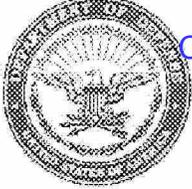
90-180 days

- Military Department Secretaries may approve transition on an individual basis
- Military Services will publish their respective transgender policies

Indicates the opinion of majority of the Panel	Indicates the opinion of minority of the Panel
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From: Jim Mattis [REDACTED]
Sent: Saturday, September 30, 2017 7:25 PM
To: SecDef26
Subject: FW: Draft article and more
Attachments: How not to deter a war.docx

- Authoritative people who defy PC doctrine: You can't talk to them, but perhaps someone trustworthy can. Perhaps DSD.
 - Professor of Law William Woodruff. Former Army infantry; former SJA. <https://directory.campbell.edu/people/william-woody-a-woodruff/>
 - Dr. Paul McHugh. Former Chief Psychiatrist Johns Hopkins University. Among other facts avoided on transgender issues, he points out that the suicide rate among those who have had a sex change operation is 20 times that of non-transgenders. <https://www.cnsnews.com/news/article/michael-w-chapman/johns-hopkins-psychiatrist-transgender-mental-disorder-sex-change>



9/14/17

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
 CHAIRMAN OF THE JOINT CHIEFS OF STAFF
 UNDER SECRETARIES OF DEFENSE
 COMMANDANT, U.S. COAST GUARD
 DEPUTY CHIEF MANAGEMENT OFFICER
 CHIEF, 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 OF 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 OF NET ASSESSMENT
 DIRECTOR, STRATEGIC CAPABILITIES OFFICE
 DIRECTORS OF DEFENSE AGENCIES
 DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Terms of Reference - Implementation of Presidential Memorandum on Military Service by Transgender Individuals

Reference: Military Service by Transgender Individuals -- Interim Guidance

I direct the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the Department of Defense (DoD) in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum, *Military Service by Transgender Individuals*, dated August 25, 2017 ("Presidential Memorandum"). The implementation plan will establish the policy, standards and procedures for service by transgender individuals in the military, consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law.

The Deputy Secretary and the Vice Chairman, supported by a panel of experts drawn from DoD and the Department of Homeland Security (DHS) ("Panel"), shall propose for my consideration recommendations supported by appropriate evidence and information, not later than January 15, 2018. The Deputy Secretary and the Vice Chairman will be supported by the Panel, which will be comprised of the Military Department Under Secretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors. The Deputy Secretary and Vice Chairman shall



designate personnel to support the Panel's work to ensure Panel recommendations reflect senior civilian experience, combat experience, and expertise in military operational effectiveness. The Panel and designated support personnel shall bring a comprehensive, holistic, and objective approach to study military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law. The Panel will be chaired by the Under Secretary of Defense for Personnel and Readiness and will report to the Deputy Secretary and the Vice Chairman at least every 30 days and address, at a minimum, the following three areas:

Accessions: The Presidential Memorandum directs DoD to maintain the policy currently in effect, which generally prohibits accession of transgender individuals into military service. The Panel will recommend updated accession policy guidelines to reflect currently accepted medical terminology.

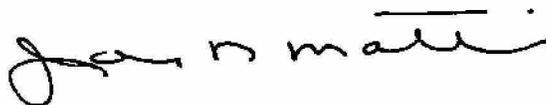
Medical Care: The Presidential Memorandum halts the use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, effective March 23, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex. The implementation plan will enumerate the specific surgical procedures associated with sex reassignment treatment that shall be prohibited from DoD or DHS resourcing unless necessary to protect the health of the Service member.

Transgender Members Serving in the Armed Forces: The Presidential Memorandum directs that the Department return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016. The Presidential Memorandum also allows the Secretary to determine how to address transgender individuals currently serving in the Armed Forces. The Panel will set forth, in a single policy document, the standards and procedures applicable to military service by transgender persons, with specific attention to addressing transgender persons currently serving. The Panel will develop a universal retention standard that promotes military readiness, lethality, deployability, and unit cohesion.

To support its efforts, the Panel will conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members. The study will be planned and executed to inform the Implementation Plan. The independent multi-disciplinary review and study will address aspects of medical care and treatment, personnel management, general policies and practices, and other matters, including the effects of the service of transgender persons on military readiness, lethality, deployability, and unit cohesion.

The Panel may obtain advice from outside experts on an individual basis. The recommendations of the Deputy Secretary and the Vice Chairman will be coordinated with senior civilian officials, the Military Departments, and the Joint Staff.

All DoD Components will cooperate fully in, and will support the Deputy Secretary and the Vice Chairman in their efforts, by making personnel and resources available upon request in support of their efforts.



cc:
Secretary of Homeland Security

Add. 242

**Email to Robert Wilkie (Jan. 23, 2018)
(No. 20-mc-16 (E.D. Va.), Doc. 22-12)**

Filed with Notice of Intent to File
Document Publicly

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 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/ Dennis Fan

DENNIS FAN