

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,  
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,  
Defendants.

Case No. 1:17-cv-02459-MJG

**MOTION TO COMPEL  
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

Pursuant to Federal Rule of Civil Procedure 37(a), Plaintiffs respectfully move the Court for an order as follows:

1. Finding and declaring that the deliberative process privilege does not protect from discovery in this case: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum banning transgender individuals from military service; (2) deliberative materials relating to the activities of the Department of Defense’s so-called “panel of experts” and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to the Department of Defense’s Implementation Plan and the President’s acceptance of that Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyist;

2. Compelling Defendants, no later than May 15, 2018, to: (1) supplement their interrogatory responses and document production to produce all information and documents previously withheld on the ground of deliberative process privilege that are not protected by that privilege under the Court’s finding above, and for which there is no good faith basis for

withholding such documents and information under another privilege or protection; and (2) comply with their obligation under Rule 26(e) to timely supplement their discovery responses to take account of developments since they served their initial responses; and

3. Compelling Defendants, to the extent that they respond to interrogatories by reference to their document production, to adhere to Federal Rule of Civil Procedure 33(d)(1), by specifying documents “in sufficient detail to enable [Plaintiffs] to locate and identify them as readily as [Defendants] could.”

This motion is based on Plaintiffs’ memorandum of law and accompanying declarations and exhibits, filed concurrently with this motion; on the record in this action; and on other oral or written argument that may be offered by the parties at or before any hearing on this motion. A proposed order is attached hereto.

This motion, and all supporting documentation, was served on Defendants pursuant to Local Rule 104.8(a) on April 23, 2018.

Dated: April 23, 2018

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23rd day of April 2018, I served a copy of the foregoing *Motion to Compel Supplemental Interrogatory Answers and Production* and all supporting documents thereto on counsel for Defendants in this action via electronic mail, in accordance with Local Rule 104.8(a) and Federal Rule of Civil Procedure 5(a).

/s/ Marianne F. Kies

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Case No. 1:17-cv-02459-MJG

**PROPOSED ORDER**

Upon consideration of Plaintiffs' motion to compel supplemental interrogatory answers and production and the record in this case, it is ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2018, that Plaintiffs' motion is GRANTED.

Accordingly, IT IS HEREBY ORDERED that this Court hereby finds and declares that the deliberative process privilege does not protect from discovery in this case the following: (1) deliberative materials relating to the President's July 26, 2017 Tweets and August 25, 2017 Memorandum banning transgender individuals from military service; (2) deliberative materials relating to the activities of the Department of Defense's so-called "panel of experts" and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to the Department of Defense's Implementation Plan and the President's acceptance of that Plan in his March 23, 2018 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyist

IT IS FURTHER ORDERED that Defendants shall, not later than May 15, 2018: (1) supplement their interrogatory responses and document production consistent with the above finding, to produce all information and documents previously withheld on the ground of

deliberative process privilege that are not protected by that privilege under the Court's finding above, and for which there is no good faith basis for withholding such documents and information under another privilege or protection; and (2) comply with their obligation under Rule 26(e) to timely supplement their discovery responses to take account of developments since service of their initial responses.

IT IS FURTHER ORDERED that, to the extent that Defendants respond to interrogatories by reference to their document production, they must adhere to Federal Rule of Civil Procedure 33(d)(1), by specifying documents "in sufficient detail to enable [Plaintiffs] to locate and identify them as readily as [Defendants] could."

DATED:

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Hon. Marvin J. Garbis  
U.S. District Judge

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**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL  
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

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## INTRODUCTION

This case is about President Trump’s decision to ban transgender people from serving in the military, and the Department of Defense’s implementation of the President’s directives. As this Court has already recognized in its memorandum opinion granting a preliminary injunction, President Trump’s reasons and motivations for issuing the original ban via Twitter in July 2017 and in a formal memorandum in August 2017 are central issues in this case:

President Trump’s tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President’s announcement and the departure from normal procedure, . . . there is sufficient support for Plaintiffs’ claims that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.

*Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (internal quotation marks omitted).

The process followed by the other Defendants in implementing President Trump’s decision is similarly central. Defendants attempt to portray the Implementation Plan released by the Department of Defense (“DoD”) on March 23, 2018—consisting of an unsigned February 2018 report released by DoD (ECF 120-2, the “Implementation Report”) and the “recommendations” that Secretary of Defense Mattis sent to the President on February 22, 2018 (ECF 120-1, the “Implementation Memo”)—as the result of a putatively independent policy-making process. However, the President’s directives and Secretary Mattis’s own statements make clear that the scope of DoD’s “independent judgment” was limited to determining *how* to implement the Ban, not *whether* to implement it. Indeed, it has already emerged that the White House itself participated in crafting the ostensibly independent “recommendations” that Secretary Mattis sent to the President.



In January 2018, Plaintiffs served interrogatories and requests for production of documents seeking information about the process and the bases (or lack thereof) for President Trump’s decision and the other named Defendants’ implementation of it—information that was then, and remains, central to Plaintiffs’ ability to prove their case. Defendants have refused to answer a broad swath of Plaintiffs’ requests, asserting that numerous categories of information and documents are protected by the deliberative process privilege.<sup>1</sup>

After months of unsuccessful attempts to resolve discovery disputes through meet and confer communications with Defendants, Plaintiffs now bring this motion to compel regarding Defendants’ assertion of the deliberative process privilege. Specifically, Plaintiffs seek a declaration that no deliberative process privilege attaches to three categories of documents:

- (1) Deliberative materials regarding the President’s original July 2017 Tweets and August 2017 Memorandum;
- (2) Deliberative materials regarding the activities of DoD’s so-called “panel of experts” and its working groups (the “Panel”) tasked with developing a plan to study and implement the President’s decision; and
- (3) Deliberative materials regarding DoD’s Implementation Plan and the President’s acceptance of the Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists.

The case law is clear that the deliberative process privilege is inapplicable in a case such as this one where the motive underlying government deliberations is central to the claims at issue, there is evidence of government misconduct (here, unlawful discrimination), or where the government

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<sup>1</sup> Defendants also claimed the protection of other privileges, including the presidential communications privilege, for some information and documents, but they have refused to confer regarding the latter privilege pending a decision on their partial motion for judgment on the pleadings addressing claims against the President. Declaration of Marianne F. Kies (attached hereto) ¶ 32. For that reason, this motion is confined to the dispute regarding the deliberative process privilege.

has engaged in selective waiver by publicly relying on portions of the withheld deliberative material in justifying a challenged policy. The three categories of materials listed above fall within these exceptions to the privilege.

Plaintiffs further request that the Court order Defendants to supplement their prior interrogatory responses and document production, consistent with the above-requested declaration and Rule 26(e), including production of more recent documents related to the Implementation Plan, and President Trump's acceptance of that Plan, released on March 23. Plaintiffs have attempted to resolve or narrow the disputes concerning Defendants' assertion of the deliberative process privilege through a lengthy meet and confer process, but these efforts have been unsuccessful. *See* pp. 27–28, *infra*; Kies Decl. ¶¶ 10–20. An order addressed to the points raised here should help to move this litigation forward, by overruling Defendants' unfounded assertions of the deliberative process privilege and its application to this case, providing guidance for future discovery negotiations and the conduct of depositions, and reducing the need for future motions practice.<sup>2</sup>

### **BACKGROUND**

On June 30, 2016, then-Secretary of Defense Ashton Carter issued a directive to all military departments: “Effective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity,” and “[t]ransgender Service members will be subject to the same standards as any other Service member of the same gender.” ECF 40-4. This announcement

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<sup>2</sup> Plaintiffs reserve all rights to move to compel on other grounds at a later date if other deficiencies in Defendants' discovery responses cannot be corrected without Court intervention.

followed DoD's year-long analysis of the policy and readiness implications of welcoming transgender persons to serve openly. *See, e.g.*, ECF 40-35.

On July 26, 2017, President Trump announced, via Twitter, his decision to ban all individuals who are transgender from serving in the military. ECF 40-22. While the President asserted that he had “consult[ed] with [his] Generals and military experts,” the announcement reportedly came as a surprise to the Secretary of Defense and other military officials. *See, e.g.*, ECF 39 (Am. Compl.) ¶¶ 97, 101, 104. The President formalized his decision in an August 25, 2017 memorandum to the Secretaries of Defense and Homeland Security, which directed Secretary Mattis to “implement” three directives: (1) a prohibition on new enlistment of transgender persons (§ 2(a)); (2) a requirement that transgender persons become automatically subject to discharge because they are transgender (§ 1(b)); and (3) denial of gender transition-related surgical care to currently serving transgender service members (§ 2(b)) (collectively, “the Transgender Service Member Ban” or “the Ban”). ECF 40-21.

The President also directed Defense Secretary Mattis to provide an “implementation plan” by February 21, 2018, which would also address “how to address transgender individuals currently serving in the United States military.” *Id.* As this Court has explained, the instruction to provide an implementation plan “[wa]s not a request for a study but an order to implement the Directives contained therein.” ECF 85 at 50. That is precisely what Secretary Mattis did. On September 14, 2017, Secretary Mattis issued a “Terms of Reference” regarding “Implementation of the Presidential Memorandum on Military Service By Transgender Individuals.” Kies Decl., Ex. 20. In the memorandum, Secretary Mattis “direct[ed] the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead [DoD] in developing an Implementation Plan to effect the policies and directives in [the] Presidential Memorandum.” *Id.* Secretary Mattis

also instructed them to convene a “panel of experts” from within DoD to conduct a study that is “planned and executed to inform the Implementation Plan.” *Id.* at 2.

Plaintiffs filed this lawsuit on August 28, 2017; an amended complaint followed on September 14, 2017. ECF 1, 39. Plaintiffs allege that the Ban violates their rights to equal protection and substantive due process under the Fifth Amendment because it discriminates against transgender persons on the basis of invidious stereotypes, irrational fears, animus, and moral disapproval, which are not permissible bases for differential treatment. ECF 39 ¶ 152. Plaintiffs also allege that Defendants lacked any rational basis for imposing the Ban—much less a basis that would survive the heightened scrutiny applicable to discrimination against members of a quasi-suspect class. *Id.* ¶¶ 150–51. Plaintiffs further allege that the Ban is so arbitrary as to be an abuse of governmental authority. *Id.* ¶ 157. In response, Defendants argued that the President’s decision is entitled to deference as an exercise of “essentially professional military judgment [.]” ECF 52-1 at 24 (*quoting Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

On November 21, 2017, this Court ruled that Plaintiffs have established a likelihood of success on their claim that President Trump’s decision to ban transgender persons from military service violates equal protection, and the Court preliminarily enjoined the Ban. ECF 85 at 41–44. A scheduling order required the parties to serve their written discovery requests by January 9, 2018 and to complete discovery by April 24, 2018. ECF 100.

Plaintiffs served their first set of interrogatories and requests for production of documents (“RFPs”) on January 3, 2018. Kies Decl., Exs. 1, 2. The RFPs and interrogatories seek documents and information relating to President Trump’s grounds for issuing his Twitter announcement and the August 25 Memorandum formalizing the Transgender Service Member Ban; his communications with others relating to development of the Ban; Defendants’ efforts to

implement the Ban; the costs allegedly associated with military service by transgender individuals; and the effects (if any) of military service by transgender persons on unit cohesion and military readiness. *See, e.g., id.*, Ex. 1 at 8–12; Ex. 2 at 10–14. Plaintiffs need this information to prove their claims that the Ban was motivated by animus and lacked a legitimate government rationale, and that steps Defendants have taken to implement the Ban are similarly infected.

On February 9, 2018, Defendants served objections and responses to Plaintiffs’ interrogatories and requests for production of documents. *See, e.g., id.*, Exs. 3, 4.<sup>3</sup> Defendants objected to every single request on privilege grounds, asserting presidential communications privilege, deliberative process privilege, attorney-client privilege, and the attorney work product doctrine for every request. *Id.* President Trump refused to provide any information at all. *Id.*, Exs. 6, 7. The vast majority of the other Defendants’ interrogatory responses state merely that the answer “may be derived” from a review of “certain documents” in Defendants’ document productions, “to the extent” the information is not privileged. But Defendants have not identified those documents, as required by Rule 33(d)(1). *See, e.g., id.*, Ex. 3 at 6–8.<sup>4</sup>

On February 9, 2018, Defendants produced approximately 17,000 documents. Kies Decl. ¶ 11. This production was identical to their January 2018 productions in *Doe, et al. v. Trump, et al.*, No. 17-1597 (D.D.C.), minus information pertinent to the individual *Doe* plaintiffs. *Id.*

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<sup>3</sup> In the interest of not overburdening the Court, Plaintiffs have not included as exhibits the objections and responses served by each and every Defendant. The objections and responses served on behalf of DoD are representative of those served by all Defendants (other than President Trump) for the deliberative process privilege matters here at issue.

<sup>4</sup> Despite promising in March that they would supplement their interrogatory responses in the future to (at a minimum) direct Plaintiffs to particular Bates numbers, Defendants have not done so as of the date of this filing. Kies Decl. ¶ 10.

Defendants made a supplemental production of a similar number of documents on March 9, 2018. *Id.* ¶ 12. Defendants have not yet completed their production of documents and have advised that they are not likely to complete production until sometime in May. *Id.*

On February 13, 2018, Defendants produced twelve privilege logs from the President, DoD, each of the military services, the Chairman of the Joint Chiefs of Staff, and the Defense Health Agency. Kies Decl. ¶ 13. On March 20, 2018, Defendants produced six additional privilege logs. *Id.* ¶ 14. The President’s privilege log presents “categories” of documents within broad date ranges, with boiler plate descriptions and no identification of individual senders or recipients, document titles, or specific dates. *Id.*, Ex. 22. Several of the other logs omit critical information, such as the authors or recipients of withheld documents. *E.g., id.*, Ex. 5. All twelve of the privilege logs feature repetitive, boilerplate justifications for withholding the allegedly privileged materials. *E.g., id.*

Despite the fact that the government’s decision-making is *the* key issue in this case, Defendants have broadly and categorically invoked privilege for *any* information about President Trump’s grounds for imposing the Ban and the other Defendants’ rationale in implementing it—including interrogatories that merely seek the *date* on which President Trump decided to issue the Ban and the *identities* of the “generals and military experts” whom President Trump publicly (via Twitter) claimed to have consulted. Kies Decl., Ex. 6. Plaintiffs have attempted to confer with Defendants over their failure to adequately respond to interrogatories and to identify and produce documents responsive to Plaintiffs’ requests, as well as Defendants’ facially deficient objections and privilege logs, including their broad claims of deliberative process privilege. Kies Decl. ¶¶ 15–20. Despite Plaintiffs’ extensive efforts to engage Defendants on this issue, the parties have been unable to resolve their differences.

On March 23, 2018, Defendants released DoD's Implementation Plan publicly for the first time, and President Trump accepted that Implementation Plan in a further directive. ECF 120-1, -2, -3. That same day, Defendants moved to dissolve the Court's preliminary injunction (ECF 120) and for a protective order (ECF 121), seeking to halt all discovery in this case pending resolution of the motion to dissolve the preliminary injunction—including all interlocutory appeals.

Reports have already emerged that the White House itself participated in crafting the ostensibly independent "recommendations" that Secretary Mattis sent to the President. Chris Johnson, *DoD Appears to Contradict White House on Process for Trans Military Ban*, Washington Blade (Mar. 29, 2018), <http://www.washingtonblade.com/2018/03/29/dod-appears-to-contradict-white-house-on-process-for-trans-military-ban/>. Additional reports have indicated that the Panel's findings were further tainted by the outside influence of anti-transgender lobbyists and activists operating under the aegis of Vice President Mike Pence. *See, e.g., Zack Ford, Pence Secretly Drafted Trump's Latest Transgender Military Ban*, Think Progress (Mar. 25, 2018), <https://thinkprogress.org/pence-responsible-for-trump-transgender-military-ban-f4d3b67bde47/>; Mark Joseph Stern, *Trump's Trans Troops Ban Will Never Take Effect*, Slate (Mar. 24 2018), <https://slate.com/news-and-politics/2018/03/trumps-new-trans-troops-ban-is-still-unconstitutional.html> (reporting that an anti-transgender activist and the head of an anti-LGBTQ lobbying group played leading roles in the creation of the Implementation Plan).

On April 20, 2018, Defendants produced in this case a collection of documents they characterize as an "administrative record" for the Implementation Plan. ECF 133-1. According to the certification included with the "administrative record," it "comprises all non-privileged material directly or indirectly considered by the Department in preparing these

recommendations. *Privileged documents, including those reflecting internal agency deliberations, are not part of this administrative record.*” *Id.* (emphasis added). Although the “administrative record” contains some documents relating to the three categories of decision making addressed in this motion, such as minutes from some of the meetings of the Panel, many of these documents contain extensive redactions for anything deemed a “deliberative document.” *E.g.*, ECF 133-14 at 458–89. Based on the accompanying certification, it appears likely that Defendants have withheld many more documents in their entirety based on the deliberative process privilege. ECF 133-1. Defendants did not produce a privilege log with the “administrative record.”

Defendants have recently attempted to “claw back” several inadvertently produced documents on the ground that they are allegedly protected by the deliberative process privilege. Kies Decl., Ex. 19. Plaintiffs intend to dispute these claims of privilege for the same reasons set forth here. At a small number of depositions that the *Doe* plaintiffs have been able to schedule to date, Defendants’ counsel has asserted the deliberative process privilege to prevent the witness from responding to a number of questions. *See, e.g., id.*, Ex. 21.

## ARGUMENT

### **I. In The Circumstances Of This Case, The Deliberative Process Privilege Does Not Shield Deliberative Materials Concerning The Issuance Of The Ban, The “Panel of Experts,” Or The Implementation Plan And The President’s Acceptance Of That Plan.**

Litigants are entitled to discovery of any relevant, nonprivileged matter that is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Where a party fails to make a disclosure required by Rule 26, a “party . . . may move for an order compelling” an answer and production. Fed. R. Civ. P. 37(a)(3)(B). “[T]he party or person resisting discovery, not the party



moving to compel discovery, bears the burden of persuasion.” *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010) (collecting cases).

Here, Defendants have refused to produce most information sought by Plaintiffs’ interrogatories—and thousands of responsive documents—largely on the basis of the deliberative process privilege. Given the matters at issue in this case, however, that privilege does not apply to many of the categories of documents for which Defendants have asserted it. For several reasons the deliberative process privilege, as defined by federal courts, does not shield: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum; (2) deliberative materials relating to the activities of the DoD’s so-called “panel of experts” and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to DoD’s Implementation Plan and the President’s acceptance of that Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists. The Court should issue an order (1) declaring that such materials are outside the protection of the deliberative process privilege, (2) requiring Defendants to supplement their prior interrogatory responses and document production to provide such material, and (3) requiring Defendants to update their interrogatory responses and document production through the present, as required by Rule 26(e).

**A. Deliberative Process Privilege Does Not Apply To These Categories Of Deliberative Materials Because Plaintiffs’ Claims Turn On Governmental Intent.**

The deliberative process privilege protects government documents that are both predecisional and deliberative. *City of Va. Beach v. U.S. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993). However, this privilege does not apply at all when “a plaintiff’s cause of action turns on the government’s intent.” *See In re Subpoena Duces Tecum Served on the*

*Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (“[I]f either the Constitution or a statute makes the nature of governmental officials’ deliberations *the* issue, the privilege is a nonsequitur.”), *clarified on rehearing in part*, 156 F.3d 1279 (D.C. Cir. 1998); *see also, e.g., Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (the deliberative process privilege is “simply inapplicable” where government intent is “at the heart of the issue in this case”); *United States v. Lake Cty. Bd. of Comm’rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (“[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant’s intent to discriminate is at issue.”); *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (“It is certainly true that this privilege yields when the lawsuit is directed at the government’s subjective motivation in taking a particular action.”).

Plaintiffs’ claims here turn on Defendants’ intent. Plaintiffs assert that the Ban violates the equal protection guarantee of the United States Constitution, and that the discrimination it effectuates cannot withstand any level of review. ECF 40-2 at 20–21. This Court has already held that discrimination against transgender people is subject to heightened scrutiny. ECF 85 at 43–44. Under that demanding standard, the asserted justifications for the policy must be “genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). As another federal court held in the parallel *Karnoski v. Trump* case, whether President Trump’s Ban and DoD’s implementation of it were “sincerely motivated by compelling state interests, rather than by prejudice or stereotype[,]” *necessarily* “turns on facts related to Defendants’ deliberative process.” *Karnoski v. Trump*, 2018 WL 1784464, at \*13 (W.D. Wash. Apr. 13, 2018).

In addition, even under rational basis review, unequal treatment “motivated by an improper animus or purpose” is unconstitutional. *Windsor v. United States*, 570 U.S. 744, 770 (2013). In

analyzing a challenged policy under rational basis review, “the disadvantage imposed” on a discrete group of individuals may not be “born of animosity toward the class of persons affected.” *Romer v. Evans*, 517 U.S. 620, 634 (1996). As this Court wrote in holding that Plaintiffs were likely to succeed on their equal protection claims, “Plaintiffs must demonstrate that they have been treated differently from others who are similarly situated ***and also show that the unequal treatment was the result of ‘intentional or purposeful discrimination.’***” ECF 85 (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (emphasis added)). Making this showing necessarily requires Plaintiffs to take discovery directed to Defendants’ intent in crafting and implementing the policies here at issue.

Each of the three categories of deliberative materials that are the subject of this motion is likely to contain evidence reflecting Defendants’ intent. The July 2017 Tweets and August 2017 Memorandum were issued without any supporting evidence, to the surprise of senior DoD leadership, and abruptly reversed course on the DoD’s own evaluation of transgender service in 2015 and 2016. *See* ECF 40-13; ECF 40-11. As this Court has already observed, “President Trump’s tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.” ECF 85 at 43. Based on those circumstances “and the departure from normal procedure,” this Court held that there is “sufficient support” for Plaintiffs’ claims that this decision was motivated by something other than “genuine concerns regarding military efficacy.” *Id.* (internal quotation marks omitted). The deliberative materials generated by Defendants in the months leading up to the July 2017 Tweets and August 2017 Memorandum should help reveal exactly what those true motivations were.

The deliberative materials generated by the “panel of experts” will, in turn, demonstrate whether the Panel ever considered—or had authority to consider—retaining the Open Service policy or whether the Panel was intentionally constructed with a presupposed result in mind, in order to add a veneer of legitimacy to support the President’s already-issued policy. Deliberative materials related to the final issuance of the Implementation Plan and the President’s acceptance of that plan will similarly reveal whether DoD’s drafting of the Implementation Memo was a neutral assessment of genuine military interests, or whether DoD simply sought to provide justifications for the directives President Trump had ordered it to implement.

**B. Deliberative Process Privilege Is Inapplicable To The Deliberative Materials Sought By Plaintiffs, Which May Shed Light On Government Misconduct.**

The deliberative process privilege also “disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).<sup>5</sup> Politically and ideologically motivated discrimination of the kind alleged by Plaintiffs here is sufficient reason to suspect that government misconduct has occurred. *See Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 162–63 (D.D.C. 2003) (“it is inconceivable” that Congress intended deliberative process privilege to apply to information bearing on alleged agency discrimination); *see also Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995) (holding that allegations of decision-making based on “illegitimate political motives” raised questions of governmental misconduct sufficient to place deliberative processes

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<sup>5</sup> Where the deliberative materials sought may shed light on government malfeasance, “the privilege is routinely denied. *Texaco P.R., Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). This is because, where there is “any reason” to believe such material “may shed light on” government misconduct, “public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.” *Alexander v. FBI*, 186 F.R.D. 170, 177–78 (D.D.C. 1999).

in issue); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) (finding documents alleged to show unlawful “discrimination against non-liturgical chaplains” implicated misconduct exception and could not be withheld under deliberative process privilege), *rev’d in part, vacated in part on other grounds sub nom., In re England*, 375 F.3d 1169 (D.C. Cir. 2004).

Here, Plaintiffs have alleged that the Ban was driven not by legitimate military considerations, but by political and discriminatory animus. ECF 39 ¶¶ 112-19, 150-52. The “judgment” reflected in President Trump’s decision to issue the Ban reflected nothing more than a desire to cater to “negative attitudes,” “fear,” and “irrational prejudice” for political gain. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985); *cf. Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017) (en banc) (“*IRAP*”) (stated national security interest was provided in bad faith, as pretext for discriminating on the basis of religion). As this Court has held, “The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest.” ECF 85 at 44. The illegitimate motivation animating the July 2017 Tweets and August 2017 Memorandum—a species of “command influence”—inevitably flows down to the work done by the Panel to study how to implement the President’s stated goal, the Implementation Plan that was the end result of that study, and the President’s acceptance of that plan. Deliberative materials related to each of these topics are thus sufficiently likely to “shed light” on governmental malfeasance that no deliberative process privilege is applicable.

**C. If Deliberative Process Privilege Did Apply To The Panel’s Findings, Defendants Have Waived That Privilege By Selectively Disclosing Those Findings Publicly In The Implementation Report.**

Any protection offered by the deliberative process privilege is waived “through voluntary, authorized release of the material to a nongovernmental recipient.” *City of Va. Beach, Va. v. U.S. Dep’t of Commerce*, 995 F.2d at 1253. This protection may also be lost when material is adopted as an official position or “used by the agency in its dealings with the public.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Under Exemption 5 to the Freedom of Information Act, which incorporates the deliberative process privilege, “[w]here an authorized disclosure is voluntarily made to a non-federal party . . . the government waives any claim that the information is exempt from disclosure under the deliberative process privilege.” *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 209 (D. Del. 1991). “If an agency chooses expressly to adopt or incorporate by reference” deliberative material in a public disclosure, no deliberative process privilege should attach to that material. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). It also is fundamentally unfair—and therefore impermissible—for a party to wield his claims of privilege as both a “shield and a sword.” *See, e.g., HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (explaining that the “at issue” doctrine “precludes a party from disclosing only self-serving communications, while barring discovery of other communications that an adversary could use to challenge the truth of the claim” (internal citation and quotation marks omitted)). Impermissible “[s]elective disclosure occurs not only when a party reveals part of one privileged communication, but also when a party reveals one beneficial communication but fails to reveal another, less helpful, communication on the same matter.” *U.S. ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995).

Here, even if deliberative process privilege did attach to any deliberative materials generated by the Panel—and it does not—Defendants have waived that privilege to the extent they have publicly relied on those materials to support the Implementation Plan. The Implementation Memo cites the Implementation Report as its basis for adhering to a policy disqualifying transgender persons from military service (ECF 120-1); President Trump, in adopting the Plan, described its findings as reflecting an “exercise” of Secretary Mattis’s “independent judgment” (ECF 120-3). The Implementation Memo states that it is “[b]ased on the work of the Panel [of Experts] and the Department’s best military judgment.” ECF 120-1 at 2. The Implementation Report itself extensively references certain findings and conclusions made by the Panel, yet it is rife with reference to anecdotal incidents or factual circumstances for which little or no meaningful underlying data are provided. *See, e.g.*, ECF 120-2 at 33–34 (citing reports made to the Panel “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”); *id.* at 37 (citing incidents reported to the Panel concerning transgender access to bathroom facilities as evidence of the threat transgender service poses to unit cohesion); *id.* at 41 (citing Panel data as evidence that “medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria”). The reliability of these findings, the existence of any contradictory findings, the manner in which the findings were developed, and the way in which the Panel of Experts considered and presented them all represent critical evidence bearing on Plaintiffs’ claims that implementation of the Ban merely constitutes a repackaging of the original Ban and reflects the same animus-driven discrimination.

Through this selective citation to Panel findings, Defendants have cherry picked the portions of the Panel's findings they believe support President Trump's chosen policy, while withholding all other (potentially contradictory) findings. This puts the Panel's findings squarely at issue and ripe for discovery. Equity does not permit Defendants to rely upon the published findings of the Panel while frustrating Plaintiffs' attempts to take discovery on other aspects of the Panel's work that may support Plaintiffs' position. This is a classic case of the government disclosing only self-serving communications while blocking discovery of other communications that could be used against it. *See United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (holding "[s]elective disclosure for tactical purposes waives" attorney-client privilege); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) ("A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.").<sup>6</sup>

**D. Even Were Deliberative Process Privilege Applicable, The Operative Balancing Test Still Compels Production Of These Documents.**

Even if the deliberative process privilege were applicable to the three categories of documents sought by this motion, and it is not, operation of the balancing test used to test such privilege claims in this Circuit would still favor their production. Deliberative process privilege is both qualified and narrowly construed, and courts use a balancing test to determine whether protection is warranted in a particular case. *FDIC v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998). The balancing test requires courts to consider: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's

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<sup>6</sup> Plaintiffs' need for access to the full complement of documents considered and developed by the Panel is particularly pressing in light of reports that the White House was directly involved in creating the Implementation Memo (Johnson, *supra*) and that the Panel's findings were further tainted by the outside influences of anti-transgender lobbyists and activists operating under the imprimatur of Vice President Mike Pence (Ford, *supra*; Stern, *supra*).



role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (Table), 1987 WL 36515, at \*2 (4th Cir. 1987) (internal quotation marks omitted). When the key issue in a lawsuit is the process that led to a particular governmental decision, the balancing test heavily favors the party seeking discovery. *See Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) (“Where a plaintiff directly challenges a government agency’s deliberative process, courts routinely find that there is a particularized need for disclosure”—particularly where the issue “*is the deliberative process.*” (internal quotation marks omitted)); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at \*7 (N.D.N.Y. Dec. 10, 2007) (“[W]hen the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery.”); *United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (a party “make[s] a very powerful showing of necessity” where “the decisionmaking process . . . *is the case*”).

Here, as explained above, there is no question that Defendants’ decision-making “*is the case.*” *Bd. of Educ. of the City of Chi.*, 610 F. Supp. at 700. And all four of the balancing factors set forth in *Cipollone* favor disclosure. First, the government’s decision-making processes are critical to determining whether the Ban and the implementation policies stemming from it violate Plaintiffs’ equal protection and substantive due process rights. Second, the requested evidence relevant to Defendants’ intent and rationale is available *only* from Defendants. Third, the government’s role is central to this case; Defendants are government officials sued in their official capacities based on their issuance and implementation of a government policy. Fourth, it is unlikely that disclosure of the evidence Plaintiffs seek concerning the decision-making that went into the initial Ban, the Implementation Plan, and the President’s acceptance of that Plan

would hinder future policy discussions. The decision to ban transgender persons from the military has already been made, and disclosure will not chill that deliberative process.

Prospectively, the specific circumstances of these deliberations are so unique that disclosure should not chill future legitimate policy discussion.

Defendants have recently filed a purported “administrative record” in this case (ECF 133) and have taken the position that additional information about the decision making process leading to the Implementation Plan is not relevant and that review in this case should be confined to this “administrative record.” ECF 121 at 5-6. As discussed above, in view of the extensive redactions and omission of “[p]rivileged documents, including those reflecting internal agency deliberations,” this “administrative record” is far from adequate. This Court should reject any attempt to limit discovery to the administrative record, consistent with recent rulings by the courts in the parallel *Doe* and *Karnoski* cases. *See Doe v. Trump*, No. 1:17-cv-01597-CKK, ECF 114 at 2 (D.D.C. Apr. 18, 2018) (explaining that because “Plaintiffs assert claims under the Fifth Amendment to the United States Constitution,” the APA’s limitations on discovery do not apply); *Karnoski v. Trump*, No. 2:17-cv-01297-MJP, ECF 235 at 2 (W.D. Wa. Apr. 19, 2018) (“[T]here is no reason for discovery to be confined to the administrative record” because Plaintiffs “raise direct constitutional claims.”).

**II. Defendants Have Withheld Deliberative Materials That Bear On Their Challenged Intent, Rationale, And Potential Misconduct.**

As demonstrated below, Defendants have withheld documents responsive to a number of Plaintiffs’ discovery requests, and objected to responding to interrogatories that seek materials and information directly relevant to Defendants’ intent and rationale (or lack thereof) in developing and implementing the Transgender Service Member Ban. Defendants’ objections to

these and other document requests and interrogatories on grounds of deliberative process privilege are inappropriate for the reasons described above. Defendants' privilege logs demonstrate that the documents Defendants have withheld contain information that should be disclosed.

**A. Defendants' Written Discovery Objections Show That They Have Improperly Invoked Deliberative Process Privilege To Withhold Information And Documents Responsive To Plaintiffs' Requests Regarding The Decisions At Issue In This Case.**

Plaintiffs' first set of discovery requests—served on January 3, 2018, nearly four months ago—requested information and documents directly related to the three categories of materials described above. Plaintiffs sought information and documents concerning the “panel of experts,” requesting, *inter alia*:

- “All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts” (Kies Decl., Ex. 2, RFP No. 15);
- “All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018” (Kies Decl., Ex. 2, RFP No. 16); and
- “[Identification of] all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt” (Kies Decl., Ex. 1, Interrog. No. 15).

Plaintiffs also sought information and documents relevant to governmental decision-making relating to the announcement of the Transgender Service Member Ban in the July 2017 Tweets and the August 25, 2017 Presidential Memorandum, and up through the subsequent

deliberations that resulted in the Implementation Plan, and the President's acceptance of the Plan, by requesting:

- “All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets” (Kies Decl., Ex. 2, RFP No. 14);
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Kies Decl., Ex. 1, Interrog. No. 18); and
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Kies Decl., Ex. 1, Interrog. No. 19).

Finally, in addition to the above requests related to the development of the original Ban and the Implementation Plan, which should capture evidence of any outside political or ideological influences on the decision making process, Plaintiffs specifically requested any deliberative materials shared with several of the very outside groups reported to have been involved in the development of the Implementation Plan. Plaintiffs requested:

- “All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and

“Breitbart News,” from January 2017 to the present” (Kies Decl., Ex. 2, RFP No. 13).

All of these requests seek materials directly relevant to Defendants’ intent and rationale underlying the key policy decisions Plaintiffs challenge in this case. Defendants have objected to each and every one of these discovery requests “to the extent” that they seek material protected by the deliberative process privilege. *E.g.*, Kies Decl., Ex. 3. These objections should be overruled as a matter of law in light of the nature of Plaintiffs’ claims in this case. *See In re Subpoena*, 145 F.3d at 1424.

**B. Defendants’ Privilege Log Entries Demonstrate They Have Withheld Documents Not Subject To The Deliberative Process Privilege.**

Review of Defendants’ redactions and privilege logs confirms that Defendants are withholding numerous documents based on their improper assertions of the deliberative process privilege. Rather than analyzing all redactions or providing a line-by-line review of the logs, Plaintiffs provide here a handful of examples to demonstrate the types of documents Defendants are withholding based on the deliberative process privilege. Because Defendants’ intent and rationale underlying the development and implementation of the Transgender Service Member Ban are at the heart of Plaintiffs’ constitutional claims, the privilege should “not enter the picture at all” (*In re Subpoena*, 145 F.3d at 1425) for these documents.

For example, Defendants are withholding numerous documents (or portions of documents) that relate to the work of the Panel, but that are not reflected in the “administrative record” Defendants recently produced. Review of the documents produced to date has only reinforced the need for Defendants to produce the allegedly “privileged” documents “reflecting internal agency deliberations” that they continue to withhold. For example, a redacted document dated December 14, 2017, is a “memorandum for the record” from Acting Under Secretary of

the Navy Thomas Dee, recording his “dissenting opinion” to conclusions of the Panel. Kies Decl., Ex. 12. The few unredacted portions of the document state that the Panel’s recommendations “are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.”

*Id.* The further description of the dissenting opinion is redacted, apparently based on a claim of deliberative process privilege. Kies Decl., Ex. 18. This dissenting opinion is not mentioned in the February 22 Implementation Plan, nor is it included in the “administrative record” recently produced by Defendants.

Several privilege log entries provide other examples of documents Defendants have withheld solely on the basis of deliberative process privilege:

- The Army is withholding documents bearing the Bates range ARMY\_352-383, described as “Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria.” Kies Decl., Ex. 13.
- The Joint Chiefs of Staff privilege log alone contains approximately 65 different entries reflecting documents being withheld that were received by the “Panel of Experts.” *Id.*, Ex. 14.
- The Air Force is withholding documents bearing the Bates range AF\_00000446-448, described as “UPDATE & DECISION: Transgender Working Group Meeting in Prep for Panel of Experts Prep Session (Read: HTML).msg,” and numerous other documents described as “RE: REQUEST -- Support to the Panel of Experts Reviewing DoD Policy on Service by Transgender Persons.msg,” see, e.g., AF\_000010454-10456. *Id.*, Ex. 15.
- The Department of Defense is withholding documents bearing the Bates range SOPER DEP RFP\_21 01268-01271, described as “E-mail re: Transgender Panel of Experts Question (with Attachments).” *Id.*, Ex. 5.
- The Navy is withholding a document bearing the Bates number Navy\_00042147, described as “Request for information for panel of experts,” as well as a document bearing the Bates range Navy\_000004460, described as “Request for Military Medical Providers to Brief Medical Personnel Services (MEDPERS) and the Secretary of Defense (SECDEF) Panel of Experts.” *Id.*, Ex. 16.

Based on the information provided, these documents appear to be deliberative materials related to work done by the Panel to evaluate the fitness of transgender service members and data or reports submitted to the Panel. These materials are likely to contain evidence bearing on Defendants' intent in forming the policies at issue in this case, the process by which Defendants developed their recommendations, and potentially illegitimate political motivations suggesting misconduct. In view of the central role of Defendants' intent and rationale in this case, the deliberative process privilege does not apply at all to such documents. In addition, Defendants have waived privilege to the extent they have disclosed or incorporated these materials by reference into the Implementation Report. Materials of this type should be produced.

Defendants have also withheld numerous documents created during the time period when the original Transgender Service Member Ban was being considered and formulated. For example:

- The Navy is withholding a document bearing the Bates number NAVY\_000003363, described as "Transgender Policy Status Briefing Card" and dated July 26, 2017, the same day the July 2017 tweets were sent. *Id.*, Ex. 16.
- The Defense Health Agency is withholding numerous documents generated between July 24 and 26, 2017 identified as "Intradepartment email concerning implementation of transgender policy." *Id.*, Ex. 17.
- The Army is withholding documents dated August 10, 2017 bearing the Bates range Army\_722-724, and described as "Execution matrix used in preparation for the release of the Presidential Memorandum;" documents dated August 17, 2017 bearing the Bates range ARMY\_1300-04, described as "Presentation discussing the impact of transgender service on readiness;" and documents dated August 17, 2017 bearing the Bates range ARMY\_725-728, described as "Presentation showing timeline of events in preparation for release of the Presidential Memorandum." *Id.*, Ex. 13.

These are but a handful of illustrative examples; there are many more similar log entries. The examples demonstrate that Defendants are withholding materials likely to contain evidence

of their subjective intent and rationale in developing the original policy at issue in this case—the policy Defendants subsequently worked to implement at the President’s direction. Materials of this type are not protected by the deliberative process privilege and should be produced.

Because Defendants last produced a privilege log to Plaintiffs on March 20, Plaintiffs are unable to determine exactly what other materials related to the Implementation Plan and President Trump’s acceptance of the Plan Defendants may be withholding, and it is unclear when Defendants will produce further documents. As discussed above, however, the “administrative record” Defendants produced makes clear that they continue to withhold deliberative materials related to the Panel’s work to develop and support the Implementation Plan. Such deliberative materials bear directly on Defendants’ subjective intent and rationale in formulating the policies challenged in this lawsuit, and the deliberative process privilege therefore does not apply. And having publicly relied on such materials in preparing the Implementation Plan—and by citing liberally to Panel findings and materials throughout the Implementation Report—Defendants have put such material at issue. To the extent any deliberative materials have been disclosed or incorporated by reference into the Implementation Report, whatever privilege may have existed has been waived. Accordingly, the Court should declare that the deliberative process privilege does not protect information and documents relating to the decisions at issue in this case, and order Defendants to make a supplemental production consistent with that declaration.

### **III. Requested Relief**

For the reasons explained in Part I above, the deliberative process privilege does not attach to: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum; (2) deliberative materials relating to the activities of DoD’s so-called “panel of experts” and its working groups tasked with developing a plan to study and



implement the President's decision; and (3) deliberative materials relating to the DoD's February 2018 Implementation Plan and the President's acceptance of that Plan in his March 23, 2018 memorandum, including materials reflecting any participation or interference in that process by anti-transgender activists and lobbyists. Plaintiffs request that the Court make findings and issue a declaration to this effect.

Plaintiffs further request that the Court order Defendants, no later than May 15, 2018, to: (1) supplement their interrogatory responses and document production to include deliberative information and documents relating to these decisions that they have improperly withheld based on the deliberative process privilege; and (2) comply with their obligation under Rule 26(e) to timely supplement their discovery responses to take account of developments since they served their initial responses. Plaintiffs also request that the order state that, to the extent that Defendants respond to interrogatories by reference to their document production, they must adhere to Federal Rule of Civil Procedure 33(d)(1), by specifying documents "in sufficient detail to enable [Plaintiffs] to locate and identify them as readily as [Defendants] could."

### **CONCLUSION**

For the foregoing reasons, the Court should grant Plaintiffs' motion to compel. A proposed order is submitted herewith.

### **CERTIFICATE OF GOOD-FAITH CONFERENCE OF COUNSEL**

Pursuant to Federal Rule of Civil Procedure 37(a)(1) and Local Rule 104.7, Plaintiffs' counsel hereby certify that they have conferred in good faith regarding the subject of this motion, as described in more detail in the accompanying Declaration of Marianne F. Kies.

On February 21, 2018, Plaintiffs' counsel Augustus Golden sent a letter to Defendants' counsel Ryan Parker outlining numerous deficiencies in Defendants' discovery objections and privilege logs. Kies Decl., Ex. 8. In this letter, Plaintiffs explained that the deliberative process privilege does not apply where, as here, "a plaintiff's cause of action turns on the government's intent." *Id.* (quoting *In re Subpoena*, 145 F.3d at 1424). Defendants did not substantively respond to Plaintiffs' letter; instead, they attempted to shift the burden back to Plaintiffs to challenge specific log entries for Defendants' re-consideration—a highly burdensome and in some cases virtually impossible task given the inadequate descriptions in the log entries. Kies Decl. ¶¶ 16–17.

On March 13, 2018, Plaintiffs' counsel visited the offices of Defendants' counsel for a meet and confer session that lasted from approximately 3:00 p.m. to 4:00 p.m. EST. *Id.* ¶ 18. In attendance were Mark Lynch, Marianne Kies, and Mark Neuman-Lee, for Plaintiffs, and Ryan Parker and other Department of Justice attorneys, for Defendants. *Id.* That meeting did not resolve the parties' dispute, and following that conversation, Plaintiffs provided a further written description of the deficiencies in Defendants' production by letter dated March 16, 2018, requesting a response on several issues by no later than March 23, 2018. *Id.*, Ex. 10. No response has been provided. Kies Decl. ¶ 19.

On April 9, 2018, Ms. Kies wrote to Mr. Parker, repeating Plaintiffs' request for a response to the March 16 letter, and further explaining why Defendants' assertions of the

deliberative process privilege fail as to documents related to the decision-making at issue in this case and the Panel study. Kies Decl., Ex. 11. No response has been provided to this letter, either. Kies Decl. ¶ 20.

The matters addressed in this motion thus require resolution by the Court.

Dated: April 23, 2018

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Respectfully submitted,

/s/ Marianne F. Kies

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**DECLARATION OF MARIANNE F. KIES IN SUPPORT OF MOTION TO COMPEL  
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

I, MARIANNE F. KIES, depose and say as follows:

1. I make this declaration in support of the remedies and relief sought by Plaintiffs in this case. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in this action.

3. Attached hereto as "Exhibit 1" is a true and correct copy of Plaintiffs' First Set of Interrogatories to Defendants, served on January 3, 2018.

4. Attached hereto as "Exhibit 2" is a true and correct copy of Plaintiffs' First Set of Requests for Production of Documents, served on January 3, 2018.

5. Attached hereto as “Exhibit 3” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories to Secretary Mattis, served on February 9, 2018.

6. Attached hereto as “Exhibit 4” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to Secretary Mattis, served on February 9, 2018.

7. Attached hereto as “Exhibit 5” is a true and correct copy of an initial, partial privilege log listing Department of Defense documents, served by Defendants on February 13, 2018.

8. Attached hereto as “Exhibit 6” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories to Defendant Donald J. Trump, served by Defendants on February 9, 2018.

9. Attached hereto as “Exhibit 7” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to Defendant Donald J. Trump, served by Defendants on February 9, 2018.

10. During an in-person meeting on March 13, 2018, Defendants’ counsel agreed to supplement Defendants’ responses to Plaintiffs’ interrogatories to, at minimum, direct Plaintiffs to specific Bates numbers of responsive documents. Defendants did not specify a date certain by which this supplementation would be provided, and to date Defendants have not made any such supplementation.

11. Defendants made an initial production in this matter on February 9, 2018, containing approximately 17,000 documents. This production was identical to their initial

production in *Doe, et al. v. Trump, et al.*, No. 17-1597 (D.D.C.), minus information pertinent to the individual *Doe* plaintiffs.

12. Defendants made a supplemental production of a similar number of documents on March 9, 2018. Defendants still have not completed their document production and have advised they are not likely to until sometime in May.

13. On February 13, 2018, Defendants produced twelve privilege logs to Plaintiffs from the President, the Department of Defense, each of the military services, the Chairman of the Joint Chiefs of Staff, and the Defense Health Agency.

14. On March 20, 2018, Defendants produced six additional privilege logs to Plaintiffs.

15. Attached hereto as “Exhibit 8” is a true and correct copy of a letter from my colleague and co-counsel Augustus Golden sent to Defendants’ counsel Ryan Parker on February 21, 2018, outlining numerous deficiencies in Defendants’ discovery objections and privilege logs, including their claims of deliberative process privilege.

16. Defendants did not substantively respond to this letter. Instead, during a March 1, 2018 conference, Defendants requested that Plaintiffs identify particular privilege log entries for re-consideration. Plaintiffs advised that this proposal was likely not feasible given the inadequacy of the information provided in Defendants’ privilege logs.

17. On March 9, 2018, I sent an email to Mr. Parker confirming Plaintiffs’ view that it was not possible to provide a line-by-line identification of deficient entries, and requesting a further meet and confer session to discuss the ongoing deficiencies in Defendants’ discovery responses. Attached hereto as “Exhibit 9” is a true and correct copy of that correspondence.

18. On March 13, 2018, counsel for Plaintiffs and Defendants met and conferred in person at Defendants' counsel's offices. In attendance for Plaintiffs were my colleagues and co-counsel Mark Lynch, Mark Neuman-Lee, and myself. In attendance for Defendants were Mr. Parker and other Department of Justice attorneys. This meet and confer session did not resolve the parties' dispute regarding Defendants' assertion of the deliberative process privilege.

19. Attached hereto as "Exhibit 10" is a true and correct copy of a letter I sent to Mr. Parker on March 16, 2018, further describing the deficiencies in Defendants' document productions and interrogatory responses. Defendants have not, to date, provided any substantive response to this letter.

20. Attached hereto as "Exhibit 11" is a true and correct copy of a letter I sent to Mr. Parker on April 9, 2018, requesting a response to my letter of March 16 and further explaining why Defendants' assertions of the deliberative process privilege were deficient. Defendants have not, to date, provided any substantive response to this letter.

21. Attached hereto as "Exhibit 12" is a true and correct copy of a document produced by Defendants in the parallel *Doe* case bearing the Bates range USDOE00081113-16. This document was produced by Defendants with extensive redactions, and it is identified as a "Memorandum for the Record" on the Subject of "Dissenting Opinion from the Majority Recommendations of the 'Military Service by Transgender Individuals - Panel of Experts.'" It appears to have been written by Deputy Assistant Secretary of the Navy Thomas P. Dee.

22. Attached hereto as "Exhibit 13" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Army documents.

23. Attached hereto as "Exhibit 14" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Joint Chiefs of Staff documents.



24. Attached hereto as “Exhibit 15” is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Air Force documents.

25. Attached hereto as “Exhibit 16” is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Navy documents.

26. Attached hereto as “Exhibit 17” is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Defense Health Agency documents.

27. Attached hereto as “Exhibit 18” is a true and correct excerpt of a redaction log produced by Defendants on March 20, 2018 listing Navy documents.

28. Attached hereto as “Exhibit 19” is a true and correct copy of correspondence I received from Defendants’ counsel Ryan Parker on April 19, 2018, regarding the inadvertent production of certain documents which Defendants claim are privileged.

29. Attached hereto as “Exhibit 20” is a true and correct copy of a document produced by Defendants in the parallel *Doe* case bearing the Bates range USDOE00000442-43. This document appears to be a Memorandum prepared by the Secretary of Defense on the Subject of “Terms of Reference - Implementation of President Memorandum on Military Service by Transgender Individuals.” It is signed by Secretary of Defense James Mattis and has a handwritten date of September 14, 2017.

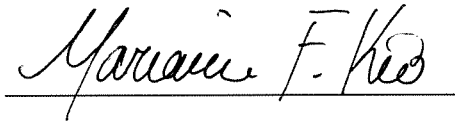
30. Attached hereto as “Exhibit 21” is a true and correct, highlighted excerpt of the transcript from the deposition of Martie Soper taken in the parallel *Doe* case.

31. Attached hereto as “Exhibit 22” is a true and correct copy of an initial, partial privilege log listing categories of documents withheld by the President of the United States, served by Defendants on February 13, 2018.

32. During the parties' meeting of counsel on March 13, 2018, Plaintiffs' counsel also sought to engage Defendants' counsel in a discussion regarding Defendants' various assertions of the presidential communications privilege. Defendants' counsel categorically refused to meet and confer on that topic at that time, and advised they would not do so until after the Court had ruled on Defendants' partial motion for judgment on the pleadings addressing claims against the President.

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

Executed this 23rd day of April, 2018.

A handwritten signature in cursive script, reading "Marianne F. Kies", is written above a horizontal line.

Marianne F. Kies (Bar No. 18606)

# **Exhibit 1**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:17-cv-02459-MJG
	)	
DONALD J. TRUMP, <i>et al.</i> ,	)	
	)	
Defendants. <sup>1</sup>	)	

**PLAINTIFFS’ FIRST SET OF INTERROGATORIES  
TO DEFENDANTS**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and D. Md. Local Rule 104, Plaintiffs hereby request that Defendants answer the following interrogatories separately, fully, and under oath, by serving written responses on the undersigned counsel, to the attention of Marianne F. Kies at the offices of Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956.

**DEFINITIONS**

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and Local Rules.

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<sup>1</sup> Mark T. Esper has been substituted as the Secretary of the Army pursuant to Federal Rule of Civil Procedure 25(d).

1. “Person” means any natural person, firm, proprietorship, partnership, joint venture, group, trust, estate, governmental entity, agency, association, corporation, or any other type of organization or entity.

2. “Communication” means any transmission of information (whether formal or informal) by one or more Persons and/or between two or more Persons by means including, but not limited to, telephone conversations, letters, faxes, electronic mail, text messages, instant messages, other computer linkups, written memoranda, and face-to-face conversations.

3. “Document” has the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a), and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Defendants’ possession, custody, or control. “Documents” include, but are not limited to, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

4. “Identify,” when used with respect to: (a) an individual, shall mean to provide the individual’s full name, job title, and employer during the period referred to, and current or last known address and telephone number and business address and telephone number; (b) any entity other than an individual, shall mean to provide the entity’s full name and current or last-known address (designating which is provided).

5. “Including” or “Includes” means “including, but not limited to” or “including without limitation.”

6. “Relating to,” “Referring to,” or “Concerning,” when referring to any given subject matter, means any information or Document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

7. “Date” means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.

8. “Describe” means to state what is requested to be described, Including all facts and opinions known and held Relating to what is requested to be described, and Identifying (i) each Person involved or having any knowledge of each fact or opinion that Relates to what is so described; (ii) each Document evidencing the answer or response given or Relating to said subject-matter in any way; and (iii) all relevant or material Dates and time periods, specifying the way in which said Dates or time periods Relate to the subject-matter described.

9. “Individual Defendants” means Donald J. Trump, James Mattis, Mark Esper, Richard Spencer, and Heather Wilson.

10. “Military Services” refers to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

11. “You,” “Your,” or “Defendants” refers to the Individual Defendants, their predecessors (where applicable), and their respective agencies and agency components (Including the Executive Office of the President and Military Services) and all others acting or purporting to act on behalf of the Individual Defendants, their predecessors, or their agencies or agency components, Including current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

12. The “Working Group” shall refer to the working group directed by former Secretary of Defense Ashton Carter in his “Memorandum for Secretaries of the Military Departments,” dated July 28, 2015. (Ex. A in ECF No. 13-4, *Doe v. Trump*, No. 17-1597 (D.D.C.).)

13. The “Open Service Directive” shall refer to the directive issued by former Secretary of Defense Ashton Carter titled “Memorandum for Secretaries of the Military Departments,” *et al.*, dated June 30, 2016. (ECF No. 40-4.)<sup>2</sup>

14. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Deputy Secretary of Defense Robert O. Work titled

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<sup>2</sup> Unless otherwise stated, ECF numbers refer to documents filed in this case.

“Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.

15. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff,” dated June 30, 2017. (ECF No. 40-11.)

16. The “Tweets” shall refer to the series of tweets issued by President Trump on Twitter on July 26, 2017 that stated: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.” (ECF No. 40-22.)

17. The “Transgender Service Member Ban” or “Ban” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.” (ECF No. 40-21.)

18. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis with the subject line “Military Service by Transgender Individuals — Interim Guidance,” dated September 14, 2017. (ECF No. 60-5.)



19. “Panel of Experts” means the individuals who collectively comprise the “panel of experts” referred to in the Interim Guidance.

20. The words “and” as well as “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of these requests any information that might otherwise be construed as falling outside the scope of these requests.

21. Words used in the singular shall, when the context permits, be deemed to include the plural, and words used in the plural shall, when the context permits, be deemed to include the singular. The masculine gender shall, when the context permits, be deemed to include the feminine or neuter genders.

## **INSTRUCTIONS**

1. Pursuant to Federal Rule of Civil Procedure 26(e), these interrogatories are continuing and You must revise or supplement Your responses whenever new or additional responsive information becomes known.

2. Each interrogatory solicits all information that is known to You or in Your possession, custody, or control, and all information available to You from Your employees, contractors, agents, representatives, consultants, attorneys, accountants, advisors, or other person(s) directly or indirectly connected with You or subject to your control.

3. Each interrogatory is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular interrogatory.

4. These interrogatories are to be answered in detail. If You cannot answer any interrogatory in full, You should answer it to the extent possible and explain your inability to answer any further.

5. If You claim that the language of any interrogatory is vague or ambiguous, then You must identify the language you believe is ambiguous and describe the different interpretations that You believe may apply to such language. Regardless of any vagueness or ambiguity You claim, You are to answer the interrogatory to the best of your ability.

6. If any of the answers to these interrogatories are derived from Documents in Your possession or under Your control, please attach a copy thereof to Your answers; in the alternative, please describe each of the Documents with specificity and state when and where they will be available to Plaintiffs' counsel for inspection and copying. Each page of every Document You attach or produce must be marked with a unique identifier or "Bates stamp."

7. If You contend that information responsive to any interrogatory is protected from disclosure pursuant to any privilege, then You must comply with Federal Rule of Civil Procedure 26(b)(5) and the operative scheduling order (ECF No. 100) and describe that information to the extent possible and the nature of the privilege claimed.

8. Unless otherwise specified, these Interrogatories cover the period July 13, 2015 through the present.

## INTERROGATORIES

### *TO BE ANSWERED BY DEFENDANT TRUMP*

**Interrogatory No. 1:** State the Date on which President Trump decided that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

**Interrogatory No. 2:** Identify all Documents and Communications reviewed, referenced, relied upon directly or indirectly, or considered by President Trump on or before July 26, 2017 as a basis or impetus for deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

**Interrogatory No. 3:** Identify each one of the “Generals and military experts” referenced in the Tweets.

**Interrogatory No. 4:** For each of the “Generals and military experts” referenced in the Tweets, Identify and Describe all Communications between that individual and President Trump Concerning military service by transgender people, Including the Date of the Communication.

**Interrogatory No. 5:** Identify and Describe the basis for President Trump’s assertion that his Tweets announcing the Ban did the military a “great favor.”

**Interrogatory No. 6:** Identify all Persons with whom President Trump (or others acting or purporting to act on his behalf) has communicated Concerning the Tweets or the Ban, Including any Defendants, informal advisors, members of the United States Congress, and representatives or agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action

for America,” and “Breitbart News,” and Including the Date of any such Communication.

**Interrogatory No. 7:** Describe the basis for President Trump’s assertion in the Tweets that military service by transgender individuals would entail (i) “tremendous medical costs” and (ii) “disruption,” Including Identifying any Documents or Communications that support the basis for those two assertions.

**Interrogatory No. 8:** State whether President Trump received advice from any attorney Concerning the Tweets or the Ban and for each such attorney (a) state the Date the advice was communicated to President Trump; (b) state the subject matter of such advice; (c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

**Interrogatory No. 9:** Describe the “meaningful concerns” referenced in the Ban, and Identify all Persons who expressed those concerns to President Trump, including the specific “meaningful concern[]” articulated by each such Person and the Date on which the concern was expressed.

**Interrogatory No. 10:** Identify all Documents and Communications reviewed, relied upon directly or indirectly, or considered by President Trump in preparing and issuing the Transgender Service Member Ban, indicating which component of the Ban each Document or Communication pertains to (medical care, accessions, discharge).

***TO BE ANSWERED BY DEFENDANT MATTIS***

**Interrogatory No. 11:** Describe the basis for Secretary Mattis’s assertion in the Accessions Deferral Memorandum that “it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018].”

**Interrogatory No. 12:** Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President (Including Vice President Pence), on the other, Concerning the issue of military service by transgender individuals.

***TO BE ANSWERED BY ALL DEFENDANTS***

**Interrogatory No. 13:** Identify the members of the Working Group, Including name, title, contact information, and qualifications.

**Interrogatory No. 14:** Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

**Interrogatory No. 15:** Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

**Interrogatory No. 16:** For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was

discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

**Interrogatory No. 17:** Identify all Persons involved in drafting or publishing:

(i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, Including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person's role in drafting the document; (b) state the Date(s) of that Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

**Interrogatory No. 18:** Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

**Interrogatory No. 19:** Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted,

performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

**Interrogatory No. 20:** Identify all members of the Panel of Experts, including each individual's name, title, contact information, and qualifications.

**Interrogatory No. 21:** Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

**Interrogatory No. 22:** State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

**Interrogatory No. 23:** State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

**Interrogatory No. 24:** State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Dated: January 3, 2018

David M. Zionts\*  
Carolyn F. Corwin\*  
Mark H. Lynch (Bar No. 12560)  
Jaclyn E. Martínez Resly\*  
Jeff Bozman\*  
Marianne F. Kies (Bar No. 18606)  
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\* Admitted *pro hac vice*

† *Pro hac vice* application forthcoming

‡ Admitted to the Bars of Pennsylvania and New Jersey, admission to the District of Columbia pending; and supervised by the principals of the firm.

Respectfully submitted,

/s/ Mitchell A. Kamin  
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David Rocah (Bar No. 27315)  
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*Attorneys for Plaintiffs*



**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of January 2018, a true and correct copy of the foregoing Plaintiffs' First Set of Interrogatories to Defendants was served by e-mail on counsel of record for Defendants.

*/s/ Mitchell A. Kamin*

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Mitchell A. Kamin

# **Exhibit 2**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. ) No. 1:17-cv-02459-MJG  
 )  
 DONALD J. TRUMP, *et al.*, )  
 )  
 Defendants.<sup>1</sup> )

**PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and D.  
Md. Local Rule 104, Plaintiffs hereby serve their First Set of Requests for  
Production of Documents to Defendants.

**DEFINITIONS**

Notwithstanding any definition set forth below, each word, term, or phrase  
used in these Requests is intended to have the broadest meaning permitted under  
the Federal Rules of Civil Procedure and Local Rules.

1. "Person" means any natural person, firm, proprietorship, partnership,  
joint venture, group, trust, estate, governmental entity, agency, association,  
corporation, or any other type of organization or entity.

2. "Communication" means any transmission of information (whether  
formal or informal) by one or more Persons and/or between two or more Persons by  
means including, but not limited to, telephone conversations, letters, faxes,

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<sup>1</sup> Mark T. Esper has been substituted as the Secretary of the Army pursuant to

electronic mail, text messages, instant messages, other computer linkups, written memoranda, and face-to-face conversations.

3. “Document” has the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a), and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Defendants’ possession, custody, or control. “Documents” include, but are not limited to, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

4. “Including” or “Includes” means “including, but not limited to” or “including without limitation.”

5. “Relating to,” “Referring to,” or “Concerning,” when referring to any given subject matter, means any information or Document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions,

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Federal Rule of Civil Procedure 25(d).

alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

6. “Date” means the exact date, month, year, and time if ascertainable, or, if not, the best available approximation.

7. “Social Media” means all forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content, including, but not limited to, Facebook, Twitter, LinkedIn, Google+, YouTube, Pinterest, Instagram, Tumblr, Flickr, Reddit, Snapchat, and WhatsApp.

8. “Individual Defendants” means Donald J. Trump, James Mattis, Mark Esper, Richard Spencer, and Heather Wilson.

9. “Military Services” refers to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

10. “You,” “Your,” or “Defendants” refers to the Individual Defendants, their predecessors (where applicable), and their respective agencies and agency components (Including the Executive Office of the President and Military Services) and all others acting or purporting to act on behalf of the Individual Defendants, their predecessors, or their agencies or agency components, Including current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

11. The “Working Group” shall refer to the working group directed by former Secretary of Defense Ashton Carter in his “Memorandum for Secretaries of the Military Departments,” dated July 28, 2015. (Ex. A in ECF No. 13-4, *Doe v. Trump*, No. 17-1597 (D.D.C.).)

12. The “Open Service Directive” shall refer to the directive issued by former Secretary of Defense Ashton Carter titled “Memorandum for Secretaries of the Military Departments,” *et al.*, dated June 30, 2016. (ECF No. 40-4.)<sup>2</sup>

13. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Deputy Secretary of Defense Robert O. Work titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.

14. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff,” dated June 30, 2017. (ECF No. 40-11.)

15. The “Tweets” shall refer to the series of tweets issued by President Trump on Twitter on July 26, 2017 that stated: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs

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<sup>2</sup> Unless otherwise stated, ECF numbers refer to documents filed in this case.

and disruption that transgender in the military would entail. Thank you.” (ECF No. 40-22.)

16. The “Transgender Service Member Ban” or “Ban” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.” (ECF No. 40-21.)

17. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis with the subject line “Military Service by Transgender Individuals — Interim Guidance,” dated September 14, 2017. (ECF No. 60-5.)

18. “Panel of Experts” means the individuals who collectively comprise the “panel of experts” referred to in the Interim Guidance.

19. The words “and” as well as “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of these requests any information that might otherwise be construed as falling outside the scope of these requests.

20. Words used in the singular shall, when the context permits, be deemed to include the plural, and words used in the plural shall, when the context permits, be deemed to include the singular. The masculine gender shall, when the context permits, be deemed to include the feminine or neuter genders.

## INSTRUCTIONS

1. Unless otherwise agreed in writing, all Documents are to be produced to the attention of Marianne Kies at the offices of Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956.
2. Each page of every Document must be marked with a unique identifier or “Bates stamp.”
3. If Defendants object to any portion of any Request, Defendants shall identify the portion to which Defendants object, state the basis for the objection, and respond to the remainder. Pursuant to Federal Rule of Civil Procedure 34(b)(2)(C), Defendants’ objection must state whether any responsive materials are being withheld on the basis of the objection(s).
4. Produce all Documents within Your possession, custody, or control, including all Documents in the possession, custody, or control of any of Your agency and its components, officials, officers, subordinates, employees, contractors, agents, representatives, consultants, attorneys, accountants, advisors, or other person(s) directly or indirectly connected with You or subject to your control.
5. Documents that are in paper form or that constitute other physical objects from which recorded information may be visually read, as well as audio or video tapes or text messages or Social Media data and similar recordings, including drafts, should be produced in their original form or in copies that are exact duplicates of the originals. Computer files and similar electronic records should be produced in a readable form mutually agreed upon by the parties.



6. Produce all Documents in the order in which they appear in Your files. Documents that, in their original condition, are stapled, clipped, or otherwise fastened together shall be produced in this same condition.

7. Produce password-protected Documents with any applicable passwords.

8. Pursuant to Federal Rule of Civil Procedure 26(b)(5) and the operative scheduling order (ECF No. 100), if You contend that any responsive Document is protected from disclosure pursuant to any privilege, please specify the nature of the privilege that is being claimed. In addition: for (A) oral Communications, please specify (i) the name of the Person making the communication and the names of Persons present while the communication was made, and, where not apparent, the relationship of the Persons present to the Person making the communication, (ii) the Date and place of the Communication, and (iii) the general subject matter of the Communication; and for (B) Documents, please specify: (i) the type of document, (ii) the general subject matter of the Document; (iii) the Date of the Document, and (iv) such other information as is sufficient to identify the Document, Including, where appropriate, the author, addressee, custodian, and any other recipient of the Document, and, when not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

9. If no Documents responsive to a particular Request exist, or if such Documents exist but are not in Your possession, custody, or control, then Your response to that Request shall so state.

10. If any of the requested Documents was previously, but is no longer, in Defendants' possession or subject to Defendants' control, state what disposition was made of the Document and when, including the Date it left Defendants' possession or control, identify the Person to whom Defendants transferred it if applicable, and explain the reasons for such disposition.

11. If a Request asks for a Document which no longer exists, then in response to such a Request, Defendants shall identify each such Document; identify all information that was contained in each such Document; state the Date on which each such Document ceased to exist; state what happened to cause each such Document to cease to exist; state why each such Document was caused to or happened to cease to exist; state the time periods during which such types of Documents were maintained; identify each Person having knowledge of the circumstances under which each such Document ceased to exist; and identify each Person having knowledge of each such Document and state the substance of said knowledge.

12. Each paragraph is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular Request.

13. Pursuant to Federal Rule of Civil Procedure 26(e), these Requests are continuing and You must revise or supplement Your responses and production whenever new or additional responsive information becomes known.

14. Unless otherwise specified, these Requests cover the period July 13, 2015 through the present.

## **REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1:** All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

**REQUEST FOR PRODUCTION NO. 2:** All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

**REQUEST FOR PRODUCTION NO. 3:** All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation ("CAPE").

**REQUEST FOR PRODUCTION NO. 4:** All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

**REQUEST FOR PRODUCTION NO. 5:** All Documents and

Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

**REQUEST FOR PRODUCTION NO. 6:** All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

**REQUEST FOR PRODUCTION NO. 7:** All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

**REQUEST FOR PRODUCTION NO. 8:** All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

**REQUEST FOR PRODUCTION NO. 9:** All Documents and

Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

**REQUEST FOR PRODUCTION NO. 10:** All Documents and

Communications that embody, comprise, or constitute the “appropriate evidence and information” referenced in the Interim Guidance.

**REQUEST FOR PRODUCTION NO. 11:** All Documents and

Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

**REQUEST FOR PRODUCTION NO. 12:** All Documents and

Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

**REQUEST FOR PRODUCTION NO. 13:** All Documents and

Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017

to the present.

**REQUEST FOR PRODUCTION NO. 14:** All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

**REQUEST FOR PRODUCTION NO. 15:** All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

**REQUEST FOR PRODUCTION NO. 16:** All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

**REQUEST FOR PRODUCTION NO. 17:** All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

**REQUEST FOR PRODUCTION NO. 18:** All Documents and Communications that You contend support the Tweets' assertion regarding the

“disruptive” effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

**REQUEST FOR PRODUCTION NO. 19:** All Documents and Communications Concerning the Department of Defense’s implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

**REQUEST FOR PRODUCTION NO. 20:** All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs’ First Amended Complaint.

**REQUEST FOR PRODUCTION NO. 21:** All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs’ First Set of Interrogatories.



Dated: January 3, 2018

David M. Zions\*  
Carolyn F. Corwin\*  
Mark H. Lynch (Bar No. 12560)  
Jaclyn E. Martínez Resly\*  
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Respectfully submitted,

/s/ Mitchell A. Kamin  
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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of January 2018, a true and correct copy of the foregoing Plaintiffs' First Set of Requests for Production of Documents was served by e-mail on counsel of record for Defendants.

*/s/ Mitchell A. Kamin*

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Mitchell A. Kamin

# **Exhibit 3**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

*Plaintiffs,*

v.

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

*Defendants.*

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF  
INTERROGATORIES TO SECRETARY MATTIS**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to James N. Mattis, in his official capacity as Secretary of Defense, served January 3, 2017.<sup>1</sup> In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

**Objections to Definitions**

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

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<sup>1</sup> These objections and responses are limited to Secretary Mattis. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories 11, 16, 17, and 21, includes both (1) information about the subject matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D.Nev.1997).).

**Specific Objections and Responses to Interrogatories to be Answered by Defendant Mattis**

Interrogatory No. 11: Describe the basis for Secretary Mattis's assertion in the Accessions Deferral Memorandum that "it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018]."

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks information related to "each Person involved or having any knowledge or each fact or opinion," "each Document evidencing the answer or response given or Relating to said subject-matter in any way," and "all relevant or material Dates and time periods." Thus, this interrogatory contains at least three distinct subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Response:

Considering the responses from the Secretaries of the Military Departments and Chiefs of the Military Services to the Deputy Secretary of Defense's May 8, 2017 directive to assess their readiness to begin accessing transgender applicants into military service on July 1, 2017, and after consulting with the Service Chiefs and Secretaries, Secretary Mattis concluded it was necessary to defer the July 1, 2017 accessions date for six months in order to evaluate more carefully the impact of transgender accessions on readiness and lethality and to ensure that he personally had the benefit of the views of the military leadership and senior civilian officials who were then arriving in the Department of Defense.

Interrogatory No. 12: Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President (Including Vice President Pence), on the other, Concerning the issue of military service by transgender individuals.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege; (b) communications or information protected by the deliberative process privilege; or (c) communications or information protected by the presidential communications privilege.

**Specific Objections and Responses to Interrogatories to be Answered by All Defendants**

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The Working Group held formal meetings on the following dates:

- August 19, 2015
- September 3, 2015
- September 16, 2015
- October 1, 2015
- October 14, 2015
- November 2, 2015
- November 18, 2015
- November 24, 2015
- December 8, 2015
- December 15, 2015
- January 12, 2016
- January 19, 2016
- March 11, 2016



- April 27, 2016
- May 23, 2016

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all Documents and Communications” purports to require Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that

is relevant. Additionally, the phrase “considered [ ] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1).

Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs' definition of "Describe"). *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Finally, Secretary Mattis objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "every meeting" purports to require the Defendants to identify all meetings in this time period of over one year, despite how briefly or informally military service by transgender individuals was discussed at the meeting. Further, the references to "all Documents" purport to require the Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person's role in drafting the document; (b) state the Date(s) of that Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about people involved in drafting (1) the Accessions Readiness Memorandum, (2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent

questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86).). The seventh subpart is a separate request for actual documents. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”). Together, these represent seven distinct interrogatories.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of

discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).)

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 19 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).)

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The Panel of Experts is composed of the following individuals who held or hold the following positions:

Chair

- Anthony M. Kurta – Performing the Duties of Under Secretary of Defense (Personnel & Readiness)
- Robert Wilkie – Under Secretary of Defense for Personnel and Readiness

Members

- Thomas Kelly III – Performing the Duties of the Under Secretary of the Army
- Thomas Dee – Performing the Duties of the Under Secretary of the Navy
- Matthew Donovan – Under Secretary of the Air Force
- Charles D. Michel – Vice Commandant of the Coast Guard
- James McConville – Vice Chief of Staff of the Army
- William Moran – Vice Chief of Naval Operations
- Stephen Wilson – Vice Chief of Staff of the Air Force
- Glenn Walters – Assistant Commandant of the Marine Corps
- Daniel Hokanson – Vice Chief of Staff National Guard Bureau
- John Wayne Troxell – Senior Enlisted Advisor to the Vice Chairman of the Joint Chiefs of Staff



- Daniel Daily – Sergeant Major of the Army
- Steven S. Giordano – Master Chief Petty Officer of the Navy
- Kaleth O. Wright – Chief Master Sergeant of the Air Force
- Ronald L. Green – Sergeant Major of the Marine Corps
- Steven W. Cantrell – Master Chief Petty Officer of the Coast Guard
- Christopher Kepner – Senior Enlisted Advisor National Guard Bureau

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs’ Definition 8 of “Describe” seeks both (1) information about the subject-matter being described, and (2) “each Document evidencing the answer or response given or

Relating to said subject-matter in any way.” Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Response:

The Panel of Experts held formal meetings on the following dates:

- October 13, 2017
- October 19, 2017
- October 26, 2017
- November 2, 2017
- November 9, 2017
- November 16, 2017
- November 21, 2017
- November 30, 2017
- December 7, 2017
- December 13, 2017
- December 22, 2017
- January 4, 2018
- January 11, 2018

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs

in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

	Current	Former
AIR FORCE	225	44
ARMY	342	85
COAST GUARD	25	2
MARINE CORPS	62	17
NAVY	279	67
OTHER	4	0
<b>TOTAL</b>	<b>937</b>	<b>215</b>

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

	Procedure	Date (Month-Year)	
		Current	Former
AIR FORCE	MASTECTOMY	Nov-17	
		Jan-18	
	ORCHIECTOMY	Oct-17	
ARMY	HYSTERECTOMY	Apr-17	
		May-17	
		Jun-17	
		Sep-17	
		Oct-17	
		Nov-17	
	MASTECTOMY	May-17	
		Jun-17	
		Aug-17	
		Aug-17	
		Sep-17	
		Nov-17	
		Dec-17	
		Dec-17	
	ORCHIECTOMY	Feb-17	
			Apr-17

		Oct-17		
		Dec-17		
		Dec-17		
MARINE CORPS	HYSTERECTOMY		Jun-17	
		Jul-17		
	MASTECTOMY	May-17		
		Jun-17		
		Jun-17		
		Aug-17		
		Sep-17		
		Sep-17		
		Nov-17		
		Dec-17		
		Aug-17		
		NAVY	HYSTERECTOMY	Nov-16
	Dec-16			
	Mar-17			
May-17				
Sep-17				
Nov-17				
Nov-17				
Nov-17				
	MASTECTOMY	Jun-17		

		Aug-17		
		Sep-17		
		Sep-17		
		Oct-17		
		Oct-17		
			Oct-17	
		Oct-17		
		Oct-17		
		Nov-17		
		Nov-17		
		Nov-17		
		Nov-17		
		Dec-17		
		Dec-17		
		Jan-18		
		ORCHIECTOMY		Jul-17
			Jul-17	
			Jan-18	

Secretary Mattis cannot provide the cost for each of the foregoing procedures. Expenses are based on costs stepped down from work centers and assigned based on weighted workload and intermediate products. The Department of Defense does not have a Patient Level Cost Accounting system that can track individual costs to a unique patient.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General  
Civil Division

BRETT A. SHUMATE  
Deputy Assistant Attorney General

JOHN R. GRIFFITHS  
Branch Director

ANTHONY J. COPPOLINO  
Deputy Director

/s/ Ryan Parker

RYAN B. PARKER  
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United States Department of Justice  
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*Counsel for Defendants*



ATTACHMENT A

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: Feb. 9, 2018

Signature: Stephanie P. Miller  
STEPHANIE P. MILLER

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

Mitchell A. Kamin  
COVINGTON & BURLING LLP  
1999 Avenue of the Stars, Suite 3500  
Los Angeles, California 90067  
Telephone: (424) 332-4800  
Facsimile: (424) 332-4749  
[mkamin@cov.com](mailto:mkamin@cov.com)

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[mkies@cov.com](mailto:mkies@cov.com)

/s/ Ryan Parker  
RYAN B. PARKER  
Senior Trial Counsel  
U.S. Department of Justice

# **Exhibit 4**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

*Plaintiffs,*

v.

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

*Defendants.*

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF  
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY MATTIS**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to James Mattis, in his official capacity as Secretary of Defense, served January 3, 2017.<sup>1</sup> In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

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<sup>1</sup> These objections and responses are limited to Secretary Mattis. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

### **Objection to Definitions**

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

### **Specific Objections to Requests for Production**

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

#### **Specific Objections:**

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential



communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the “appropriate evidence and information” referenced in the Interim Guidance.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the "Alliance Defending Freedom," "Focus on the Family," the "Family Research Council," "Heritage Action for America," and "Breitbart News," from January 2017 to the present.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.



RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General  
Civil Division

BRETT A. SHUMATE  
Deputy Assistant Attorney General

JOHN R. GRIFFITHS  
Branch Director

ANTHONY J. COPPOLINO  
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/s/ Ryan B. Parker  
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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker  
RYAN B. PARKER  
Senior Trial Counsel  
U.S. Department of Justice

# **Exhibit 5**



*Stone v. Trump*,

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_8 00001-00005	3	15-Sep-17	E-mail re: TG Interim Guidance (with attachments)	N/A	N/A
SOPER DEP RFP_8 00006-00010	5	15-Sep-17	E-mail re: Terms of Reference - Implementation of Presidential Memo on Military Service by Transgender Individuals	N/A	N/A
SOPER DEP RFP_8 000011-00013	3	15-Sep-17	E-mail re: Mil Svc by Transgender Individuals - Interim Guidance	N/A	N/A
SOPER DEP RFP_8 00014-00015	2	31-May-17	Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00016-00042	27	Oct-16	AFMS Transgender Training - Draft	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00043-00069	26	3-Oct-16	AFMS Transgender Training	N/A	N/A
SOPER DEP RFP_10 00070-00090	20	13-Apr-17	E-mail re: AFRC Transgender Training for Medics (with attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00091-00094	4	12-Oct-16	E-mail re: Routine/Info/Transgender Policy Update	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_10 00095-00166	71	30-Sep-16	Transgender Service in the U.S. Military	N/A	N/A
SOPER DEP RFP_10 00167-00182	15	6-Oct-16	Air Force Policy Memo for In-Service Transition of Airmen Identifying as Transgender	N/A	N/A
SOPER DEP RFP_10 00183-00187	5	16-Oct	USAF PA Guidance re: Transgender Policy Implementation - Draft	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00188-00209		14-Apr-17	Updated Training Slides for AFRC Medics	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00210	1	31-Jul-17	SHARED SERVICE EDUCATION & TRAINING LIBRARY - Transgender Course	N/A	N/A
SOPER DEP RFP_11 00211-00225	14	Jan-18	DoD Inst 1300.XX - Military Service by Transgender Service Members	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_11 00226-00228	3	UNK	Transgender: In-Service Transition and Accession Policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_11 00229-00248	19		Draft Memo - Interim Procedures - Guidance for Medical Care of Transgender Servicemembers with a Diagnosis of Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_13 00249	1	19-Oct-17	E-mail re: Panel of Experts Meeting	N/A	N/A
SOPER DEP RFP_14 00250-00252	3 - Possible Dup see 00226-00228	UNK	In-Service Transition and Accession Policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_14 00253-00272	19 -Possible Dup see 00229-00248	UNK	Draft Memo - Interim Procedures - Guidance for Medical Care of Transgender Servicemembers with a Diagnosis of Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00273-00285	12	15-Dec-17	Transgender Policy - Recommendations from the Transgender Panel	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00286-00304	18	12-Dec-17	Transgender Processing for Recruiters	N/A	N/A
SOPER DEP RFP_15 00305-00306	2	30-Jun-17	SecDef Memo re: Accession of Transgender Individuals Into the Military Services	N/A	N/A

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_15 00307-00321	14 - Possible Dup for 00211-00225	Jan-18	DoDI 1300.XX - Military Service by Transgender Service Members	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00322-00323	2	8-Dec-17	SecDef Memo re: Med Standards for Appointment, Enlistment, Induction of Transgender Applicants into Military Service	N/A	N/A
SOPER DEP RFP_15 00324-00335	12	29-Dec-17	FW: 6130.03 DoDI for Coordination	Deliberative Process Privilege - W/H in part	Predecisional and deliberative internal agency email created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00340-00342	2	14-Sep-17	SecDef Memo re: Military Service by Transgender Individuals	N/A	N/A
SOPER DEP RFP_15 00343-00344	2	14-Jul-17	Email: FW: 6130.03 DoDI for Coordination	Deliberative Process Privilege - W/H in part	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00345-00393	48	UNK	Draft DoDI	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00394-00396	3	30-Jun-17	TG Guidance from SecDef	N/A	N/A
SOPER DEP RFP_15 00397	1	27-Jul-17	E-mail re: No SCCC Meeting This Week	N/A	N/A

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_15 00398-00448	50	UNK	Transgender Service Q&As	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00449-00540	91	30-Nov-17	E-mail re: RHA POE Meeting (with attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_15 00541-00543	4	20-Dec-17	E-mail re: Service Central Coordination Cells (with attachment)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00544-00547	4	8-Dec-17	DoD Complying with Court Orders	N/A	N/A
SOPER DEP RFP_15 00545-00547	3	Unk	RTQ Questions & Answers	N/A	N/A
SOPER DEP RFP_15 00548-00549	2	19-Dec-17	Clarifying Guidance to USMEPCOM Policy Memorandum 2-5, Transgender Applicant Processing	N/A	N/A
SOPER DEP RFP_15 00550-00556	7	8-Dec-17	USMEPCOM Policy Memorandum 2-5, Transgender Applicant Processing	N/A	N/A
SOPER DEP RFP_15 00557-00558	2	2-Jul-17	E-mail re: TG Guidance from SecDef (with attachments)	N/A	N/A

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_15 00559-00561	2 - Possible Dup see 00226-00228	UNK	Transgender: In-Service Transition and Accession Policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00562-00566	5	UNK	Transgender Review Panel Policy Recommendation Worksheet	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_15 00567-00586	Possible Dup see 00229-00248	UNK	Draft Memo - Interim Procedures - Guidance for Medical Care of Transgender Servicemembers with a Diagnosis of Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_16 00587	1	UNK	Action Memo for USD, P&R re: Medical Standards for Appointment, Enlistment or Induction of Transgender Applicants into the Military Service	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_16 00588-00607	20	UNK	Action Memo forDepSecDef re: Medical Standards for Appointment, Enlistment or Induction of Transgender Applicants into the Military Service	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_18 00608-00661	20	1-Nov-17	Health Data for Members with Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_18 00662-00685	23	2-Nov-17	E-mail re: RAH for Pre-Brief	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_20 00686-00688	3	3-Nov-17	E-mail re: Civilian Exec Session and Transgender Panel	N/A	N/A
SOPER DEP RFP_21 00689-00690	2	UNK	Memo re: Military Service by Transgender Individuals - Panel of Experts	N/A	N/A
SOPER DEP RFP_21 00691-00764	73	UNK	PPT slides: "Health Data on Active Duty Service Members with Gender Dysphoria"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00765-00820	55	UNK	PPT slides: "Health Data on Active Duty Service Members with Gender Dysphoria"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00821-00839	18	25-Oct-17	E-mail re: RAH for PoE Meeting 3	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00840-00850	10	21-Nov-17	E-mail re: FW: RAH for PoE Meeting Today, 21 Nov 17	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_21 00851-00856	6	11-Oct-17	E-mail re: Slides (with attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00857-00919	62	8-Nov-17	E-mail re: PoE Documents (with attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00920-00922	3	21-Dec-17	E-mail re: PoE Meeting of 22 Dec 2017	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00923-01184	261	15-Nov-17	E-mail re: PoE RAHs (with attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_21 01185-01214	29	11-Oct-17	E-mail re: Transgender - Interim Guidance and Terms of Reference (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 01215-01231	16	11-Oct-17	E-mail re: Updated Transgender Policy for Sr Leader Review (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.



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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_21 01232-01267	35	21-Nov-17	E-mail re: RHA for PoE Meeting Today, 21 Nov 17 (with Attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_21 01268-01271	4	16-Nov-17	E-mail re: Transgender Panel of Experts Question (with Attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_21 01272-01320	48	13-Nov-17	E-mail re: MedPers Meeting 14 Nov (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 01321-01440	119	16-Oct-17	E-mail re: Oct 2017 Accession Medical Standards Working Group (AMWSG) Meeting (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 01441-01486	45	6-Nov-17	E-mail re: MEDPERs Meeting 6 Nov (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_24 01487-01502	15	20-Dec-17	E-mail re: Service Central Coordination Cells (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01503-01539	36	20-Sep-17	E-mail re: No SCC Meeting Tomorrow21 Sept 2017 (with Attachments)	N/A	N/A
SOPER DEP RFP_24 01540	1	20-Sep-17	E-mail re: No SCC Meeting Tomorrow21 Sept 2017 (with Attachments)	N/A	N/A
SOPER DEP RFP_24 01541-01542	2	2-Aug-17	E-mail re: No SCC Meeting This Week - 03 Aug 17	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01543	1	25-Jul-17	E-mail re: No SCC Meeting This Week - 27 July 2017	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01544-01545	2	11-Oct-17	E-mail re: SCCC Update for 12 Oct 2017. No In-Person Meeting	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01546	1	UNK	Memo for MAJCOM - Exception to Policy (ETP) Request	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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## Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_24 01547-01548	2	18-Oct-17	E-mail re: SCCC Update for 19 Oct 2017. No Meeting Tomorrow	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01549	1	9-Aug-17	E-mail re: No SCCC Meeting This Week - 10 Aug 2017	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01550	1	20-Dec-17	E-mail re: SCCC Meeting for Thursday, 21 Dec 2017	N/A	N/A
SOPER DEP RFP_25 01551-01566	15	20-Dec-17	E-mail re: Service Central Coordination Cells	N/A	N/A

# **Exhibit 6**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

*Plaintiffs,*

v.

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

*Defendants.*

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF  
INTERROGATORIES TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served January 3, 2017.<sup>1</sup> In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

**Objections to Definitions**

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

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<sup>1</sup> These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories Nos. 5, 7, 9, 16, 17, and 21 includes both (1) information about the subject-matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D. Nev. 1997).).

### **General Objection to All Interrogatories**

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties."

*Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction

to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other



senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387–88 (“The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could

narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public

interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

**Specific Objections to Interrogatories to be Answered by Defendant Trump**

Interrogatory No. 1: State the Date on which President Trump decided that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

**Specific Objections:**

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege, or (b) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that “decided” is vague and ambiguous, as well as undefined by Plaintiffs.

Interrogatory No. 2: Identify all Documents and Communications reviewed, referenced, relied upon directly or indirectly, or considered by President Trump on or before July 26, 2017 as a basis or impetus for deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

**Specific Objections:**

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 3: Identify each one of the “Generals and military experts” referenced in the Tweets.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 4: For each of the “Generals and military experts” referenced in the Tweets, Identify and Describe all Communications between that individual and President Trump Concerning military service by transgender people, Including the Date of the Communication.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 5: Identify and Describe the basis for President Trump’s assertion that his Tweets announcing the Ban did the military a “great favor.”

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the grounds that the basis for the President’s assertion is set forth in the August 25, 2017 Presidential Memorandum.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs’ Definition 8 of “Describe” seeks both (1) information about the subject-matter being described, and (2) “each Document evidencing the answer or response given or Relating to said subject-matter in any way.” Thus, Interrogatory No. 5 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 6: Identify all Persons with whom President Trump (or others acting or purporting to act on his behalf) has communicated Concerning the Tweets or the Ban, Including any Defendants, informal advisors, members of the United States Congress, and representatives or agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” and Including the Date of any such Communication.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The foregoing objections do not foreclose the possibility that, to the extent any responsive communications exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Interrogatory No. 7: Describe the basis for President Trump’s assertion in the Tweets that military service by transgender individuals would entail (i) “tremendous medical costs” and (ii) “disruption,” Including Identifying any Documents or Communications that support the basis for those two assertions.



Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the grounds that the basis for the President's assertion is set forth in the August 25, 2017 Presidential Memorandum.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Interrogatory No. 7 contains at least four discrete subparts: (1) a request for information about the basis for President Trump's assertion regarding "tremendous medical costs," (2) a separate request for documents supporting that basis, (3) a request for information about the basis for President Trump's assertion regarding "disruption," and (4) a separate request for documents supporting that basis. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 8:

State whether President Trump received advice from any attorney Concerning the Tweets or the Ban and for each such attorney (a) state the Date the advice was communicated to President Trump; (b) state the subject matter of such advice; (c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Interrogatory No. 8 contains at least two discrete subparts: (1) a request for information about communications with any attorney, and (2) a separate request for information about all persons to whom the substance of any advice has ever been disclosed. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 9: Describe the “meaningful concerns” referenced in the Ban, and Identify all Persons who expressed those concerns to President Trump, including the specific “meaningful concern[]” articulated by each such Person and the Date on which the concern was expressed.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 9 contains at least two discrete subparts: (1) a request to identify the “meaningful concerns,” (2) a separate request to identify people and the “meaningful concerns” they articulated. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 10: Identify all Documents and Communications reviewed, relied upon directly or indirectly, or considered by President Trump in preparing and issuing the Transgender

Service Member Ban, indicating which component of the Ban each Document or Communication pertains to (medical care, accessions, discharge)

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

**President Trump's Specific Objections to Interrogatories  
to be Answered by All Defendants**

Interrogatory No. 13: Identify the members of the Working Group, including name, title, contact information, and qualifications.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c)

material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all Documents and Communications” purports to require the President to search for and identify documents in any and all locations, regardless of whether (a) the documents are in his possession, (b) he has personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant. Additionally, the phrase “considered [ ] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “every meeting” purports to require the President to identify all meetings in this time period of over one year, despite how briefly or informally military service by transgender individuals was discussed at the meeting. Further, the references to “all Documents” purport to require the President to search for and identify documents in any and all locations, regardless of whether (a) the documents are in his possession, (b) he has personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

The President also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1).

Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs’ definition of “Describe”). *See Smith*, 256 F.R.D. at 254 (explaining

that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person’s role in drafting the document; (b) state the Date(s) of that Person’s participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about



people involved in drafting (1) the Accessions Readiness Memorandum, (2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86).). The seventh subpart is a separate request for actual documents. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"). Together, these represent seven distinct interrogatories.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in

the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks both (1) information about the subject-matter being

described, and (2) “each Document evidencing the answer or response given or Relating to said subject-matter in any way.” Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Date: February 9, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker  
RYAN B. PARKER  
Senior Trial Counsel  
U.S. Department of Justice

# **Exhibit 7**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

*Plaintiffs,*

v.

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

*Defendants.*

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Production of Documents to Defendant Donald J. Trump, served January 3, 2017.<sup>1</sup> In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

**Objection to Definitions**

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are

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<sup>1</sup> These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

### **General Objection to All Requests for Production**

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has “no jurisdiction of a bill to enjoin the President in the performance of his official duties.” *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique

office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g., Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform

the conduct of the entire proceeding, including the timing and scope of discovery.” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387–88 (“The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to

the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418

U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).



Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); see also *Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); cf. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in

particular object to the discovery sought that is subject to the presidential communications privilege. Based on the foregoing objections, the President will not produce privileged or non-privileged documents and information that have been identified as potentially responsive.

**Specific Objections to Requests for Production**

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or

impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.



The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the "appropriate evidence and information" referenced in the Interim Guidance.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017 to the present.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of

its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.



The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

Date: February 9, 2018

Respectfully submitted,

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Acting Assistant Attorney General  
Civil Division

BRETT A. SHUMATE  
Deputy Assistant Attorney General

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/s/ Ryan B. Parker  
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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker  
RYAN B. PARKER  
Senior Trial Counsel  
U.S. Department of Justice

# **Exhibit 8**

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**Via Email**

February 21, 2018

Ryan B. Parker  
United States Department of Justice  
Civil Division, Federal Programs Branch  
T: (202) 514-4336  
*ryan.parker@usdoj.gov*

**Re: *Stone, et al. v. Trump, et al.*,  
Case No. 1:17-cv-02459-MJG (D. Md.)**

Dear Mr. Parker:

We write regarding Defendants' responses to Plaintiffs' interrogatories and requests for production in the above-captioned litigation.

Defendants have objected to Plaintiffs' interrogatories as seeking privileged information, including information purportedly covered by the deliberative process privilege and the presidential communication privilege, and have withheld information on the basis of such objections. Defendants have similarly withheld allegedly privileged documents that are relevant to this matter and responsive to Plaintiffs' requests for production, including documents Defendants claim are protected by the deliberative process privilege and the presidential communication privilege. As discussed below, neither the deliberative process privilege nor the presidential communications privilege appear to be applicable in this litigation. Plaintiffs request that you promptly withdraw these privilege claims and provide the requested information and documents, or, in the alternate, provide adequate justifications for your claims of privilege.

### I. The Deliberative Process Privilege

#### A. Defendants' Assertion of the Deliberative Process Privilege Is Inappropriate.

Plaintiffs' lawsuit asserts, in part, that Defendants have violated the equal protection and substantive components of the Due Process Clause of the Fifth Amendment through their promulgation and attempted implementation of President Trump's August 25, 2017 Memorandum titled "Military Service by Transgender Individuals" (the "Transgender Service Member Ban"). Plaintiffs assert that President Trump's actions in promulgating the ban are improperly motivated by discriminatory intent and animus against transgender individuals; that the discriminatory intent underlying the ban tainted Defendant's implementation plans; that the implementation study conducted by the "panel of experts" was engineered to reach a pre-determined outcome; and that such actions cannot satisfy examination under a heightened scrutiny standard, which requires a court to examine the actual purpose motivating a policy. To



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litigate this issue, Plaintiffs must obtain evidence regarding the intent underlying the Transgender Service Member Ban.

Defendants' intent in promulgating and attempting to implement the Transgender Service Member Ban is directly at issue in this litigation. The deliberative process privilege "is not appropriately asserted . . . when a plaintiff's cause of action turns on the government's intent." *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). For example, when a plaintiff has alleged government misconduct – including the promulgation of unconstitutionally discriminatory policies on the basis of animus – the government may not assert deliberative process privilege, and the plaintiff is not obligated to make any further showing of need for the requested discovery. *See Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005) ("Under the government misconduct exception, there is no need to engage in a balancing test because the privilege does not apply at all."); *Alexander v. F.B.I.*, 186 F.R.D. 154, 163–65 (D.D.C. 1999) (rejecting the government's contention that misconduct is merely a factor to be weighed in connection with the privilege claim); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) ("Moreover, the privilege disappears altogether when there is any reason to believe government misconduct occurred.").

Defendants' invocation of the deliberative process privilege is therefore inappropriate in connection with the present lawsuit. We request that you promptly withdraw all objections on the basis of deliberative process privilege, and promptly produce all documents that you have withheld based on that privilege. In the alternative, and at a minimum, defendants must properly justify their claims of privilege which, as discussed below, are inadequate.

### B. Defendants' Privilege Logs are Insufficient.

Even if the deliberative process privilege could be invoked with respect to some documents in this litigation, Defendants fail to assert the privilege in an appropriate manner. Defendants' privilege logs are insufficient in several respects, and fail to meet the standard required to establish that Defendants are entitled to assert the deliberative process privilege.<sup>1</sup>

Under Federal Rule of Civil Procedure 26(b)(5) a party withholding documents on the basis of privilege must provide information that will enable other parties to assess the claim. Defendants have the burden to provide the requisite information to establish that each withheld or redacted document should be shielded by the deliberative process privilege. *See City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253-54 (4th Cir. 1993) ("the burden is on the agency to correlate, with reasonable specificity, materials within a document with applicable exemptions"). A privilege log should provide more than vague, boilerplate descriptions that merely identify a broad policy topic and generally allege the document was related to some deliberative activity. *See Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (the description of a document in a privilege log "should be specific enough to permit the court or opposing counsel to determine whether the privilege asserted applies to that document"). A privilege log should "mirror" the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir.

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<sup>1</sup> As explained below, Defendants' logs also fail to meet the standards required to support their other privilege claims.

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1973), which holds that a party asserting a privilege must provide sufficient detail to allow the assertions to be fully assessed. *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980). Those requirements are set forth in cases such as *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 368-69 (4th Cir. 2009) (an index that only supplies information on authors, recipients, dates, and “a brief description” is “patently inadequate” to permit a court or opposing counsel to assess whether deliberative process privilege applies to that document); *Coastal States Gas Corp. v. D.O.E.*, 617 F.2d 854, 868 (D.C. Cir. 1980) (the agency claiming deliberative process privilege “has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process”); and *Morley v. C.I.A.*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (“minimal information” in a privilege log is inadequate for a court to make a privilege determination, the log must enable the court or opposing counsel “to pinpoint an agency decision or policy to which these documents contributed”).

Even a cursory look at Defendants’ privilege logs reveals multiple entries that fail to meet the required standard. For example:

- *Stone v. Trump – Air Force Privilege Log* (13 Feb 2018): 16 separate entries, including the entry on row 14 (AF\_00000061 - AF\_00000064), claim deliberative process privilege based on the justification “Predecisional and deliberative internal Air Force document created for the purpose of preparing for and responding to the President’s announcement of the transgender service policy.” On the face of it, neither preparing for nor responding to a Presidential announcement is an action related to deliberation about a future policy decision. This entry fails to identify with sufficient specificity any agency policy-making decision it was related to or the deliberative nature of the document, and thus fails to provide sufficient detail.
- *Stone v. Trump – Army Privilege Log* (13 Feb 2018): 74 separate entries, including the entry on row 3 (ARMY\_15-75, 79), claim deliberative process privilege with a description of “Predecisional and deliberative internal agency document created as part of the agency’s process of developing courses of action for implementing DoD’s policy on the service and accessions of military personnel and the continuous process of assessing the policy’s impact on military readiness.” While this description asserts that the document is “Predecisional and deliberative,” the rest of the entry reveals that this document relates to implementation of an existing policy and assessment of that policy’s impact. There is insufficient information to tie this document to any policy-making deliberative process eligible for deliberative process privilege, and thus these entries fail to provide sufficient detail.
- *Stone v. Trump - Navy Production 1 Privilege Log* (13 Feb 2018): the entry on row 2 (Navy\_00000026) claims deliberative process privilege with a description of “Draft DoD Instruction 6130.03 ‘Medical Standards for Appointment, Enlistment, or Induction in the Military Services.’” This description fails to provide any information regarding any policy-making decision the document relates to and what deliberative elements it may contain. Thus this entry fails to provide sufficient detail.

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- *Stone v. Trump - Navy Production 3 Privilege Log* (13 Feb 2018): dozens of documents are claimed to be protected by the deliberative process privilege for reasons such as “No signature, so it’s a draft document” (rows 25 and 26), “This is not signed so it is a draft document” (row 27), “This is marked draft” (row 155), “This is a draft document” (rows 14, 45, 46, and 136), “Appears to be a draft letter” (row 695), “Much of this is non responsive –” (row 1152), and “Draft; not final” (row 1897). None of these entries provide sufficient detail.
- *Stone v. Trump – DoD Privilege Log for Soper Depo Docs* (13 Feb 2018) and *Stone v. Trump – DHA – Privilege Log* (13 Feb 2018): the 85 separate entries for which Defendants claim privilege in these two logs state the same boilerplate justification for the deliberative process privilege claim: “Predecisional and deliberative internal agency document created as part of the agency’s process of developing courses of action for implementing DoD’s policy on the service and accessions of military personnel and the continuous process of assessing the policy’s impact on military readiness.” Neither implementing an existing policy nor assessing its impact involves a pre-decisional deliberation, and thus these entries fail to provide sufficient detail. As noted below, on the face of the entries some of these documents do not appear to be deliberative or pre-decisional.

Defendants have thus failed to adequately assert the deliberative process privilege under Federal Rule of Civil Procedure 26(b)(5). We request that Defendants promptly provide privilege logs that meet the required standard, or withdraw the privilege claims and produce all withheld documents.

### C. Plaintiffs’ Need Overcomes Any Deliberative Process Privilege Claims.

Even if the deliberative process privilege could apply here and Defendants had met the standards required to claim the privilege, Plaintiffs’ need for the requested discovery would overcome the deliberative process privilege claims. The requested materials are highly relevant to Plaintiffs’ lawsuit, are available only from Defendants, are directly tied to Defendants’ defenses, and production of the discovery Plaintiffs seek would not hamper future policy discussions.

When a party correctly asserts a claim of deliberative process privilege, courts apply a balancing test to determine if the privilege can be overcome: “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government’s role (if any) in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Cipollone v. Liggett Grp., Inc.*, 812 F.2d 1400, 1987 WL 36515, at \*2 (4th Cir. 1987) (per curiam) (unpublished); *F.T.C. v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Had Defendants correctly presented their deliberative process privilege claims, this balancing test would weigh heavily in favor of requiring production of the evidence Plaintiffs seek.

When the underlying issue in a lawsuit is the process behind a decision, the balancing test weighs heavily in favor of the party seeking discovery. *See United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (holding a party would “probably be able to make a very powerful showing of necessity” in a case where “the decisionmaking process . . . is the

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case.”); *see also* *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) (same); *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 639 (S.D. Cal. 2001) (same); *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) (same). In this litigation, the decisionmaking process relating to the Transgender Service Member Ban is a core issue. Plaintiffs allege that the Transgender Service Member Ban was improperly motivated, and the decisionmaking process by which Defendants developed the Transgender Service Member Ban is thus a central issue. Because the evidence Plaintiffs seek is highly relevant to the present lawsuit, the balancing test would weigh in Plaintiffs’ favor.

The other elements of the balancing test also weigh in Plaintiffs’ favor: the requested evidence is available only from Defendants and there is no alternative source, the government is defending the policy at issue, and it is unlikely that disclosure of this evidence subject to a protective order (where appropriate) would hinder future policy discussions. Even if Defendants had properly asserted deliberative process privilege claims, the balancing test would weigh in favor of requiring production of the requested discovery.

### D. Defendants Assert the Privilege for Ineligible Materials.

The deliberative process privilege protects only material that is pre-decisional and deliberative. *See Virginia Beach*, at 1253; *Coastal States*, 617 F.2d at 866. However, many of Defendants’ privilege claims are for post-decisional, non-deliberative, or factual materials that are not eligible for protection under the deliberative process privilege.

#### 1. Post-Decisional Materials

Defendants improperly claim deliberative process privilege for post-decisional material. In *Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.), Defendants contended that while President Trump’s July 26, 2017 Tweets constituted a decision, “that decision had sort of a ripple effect and required the defendants to make a series of additional decisions based on the tweets and that those decisions themselves can give rise to privileged deliberative material.” (Telephone Conf. Tr. at 33:10-15 (Feb 13, 2017)). However, the discussion of how to apply a policy, once promulgated, is not entitled to deliberative process privilege protection. *See Coastal States*, 617 F.2d at 866 (to be “pre-decisional,” a document must be “generated before the adoption of an agency policy”); *Petroleum Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (pre-decisional documents are “prepared in order to assist an agency decisionmaker in arriving at [a] decision, rather than to support a decision already made.”) (internal quotations omitted); *see also Safeway, Inc. v. I.R.S.*, No. C 05-3182 SBA, 2006 WL 3041079, at \*9 (N.D. Cal. Oct. 24, 2006) (“discussion of how to apply established policy and law to [] particular facts” not entitled to deliberative process privilege); *Ford Motor Co. v. U.S. Customs & Border Prot.*, No. 06-13346, 2008 WL 4899402, at \*17 (E.D. Mich. Aug. 1, 2008) (magistrate’s report and recommendation), adopted in part and rejected in part on other grounds, 2008 WL 4899401 (E.D. Mich. Nov. 12, 2008) (“discussions of how agency policies and decisions are to be enforced are by nature post-decisional”).

To the extent that material is being withheld because it relates to “additional decisions,” it is Defendants’ burden to identify any such decisions and to justify withholding discovery with reference to those decisions. To satisfy Rule 26(b)(5), Defendants must specify what pre-

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decisional role a withheld or redacted document played in a particular policy-forming process; they cannot merely allege generally that a document relates to some vague category of policy decisions. *See Animal Legal Def. Fund, Inc. v. Dep't of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (rejecting privilege claim because agency “utterly failed to specify the role played by each withheld document” in policy-formulation process).

For all materials that post-date President Trump’s July 26, 2017 decision to enact the Transgender Military Service Ban, Defendants must withdraw any claims of deliberative process privilege for documents and information that relate to the implementation or assessment of the Transgender Military Service Ban.<sup>2</sup> Please confirm that you will withdraw these claims or, in the alternative, provide updated privilege logs and objections that provide sufficient specificity so that Plaintiffs may fully evaluate such claims, including whether each allegedly privileged document or interrogatory response relates to any policy decisionmaking process.

### 2. *Non-Deliberative Materials*

Deliberative process privilege “does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment.” *Ethyl Corp. v. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994) (“When material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.”). To be protected under deliberative process privilege, a document must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Defendants repeatedly claim deliberative process privilege protection for documents that appear on their face to be, at most, peripheral to a deliberative process. For example:

- *Stone v. Trump – Air Force Privilege Log* (13 Feb 2018): documents such as row 708 (AF\_00009948 – 967; AFRC Transgender Training for Medics.pptx) relate to training regarding the implementation for current policy, which would not reflect any deliberation about a policy decision.
- *Stone v. Trump – Army Privilege Log* (13 Feb 2018): documents such as row 7 (ARMY\_212-217; Presentation used during SCCC discussions, outlining the Army’s readiness to begin accessions) relate to capabilities to implement current policy, which would not reflect any deliberation about a policy decision. Documents such as row 17 (ARMY\_322-323; Memorandum from ASD-HA to ASA-M&RA requesting data on transgender Soldiers) and row 21 (ARMY\_330-331; Memorandum from DASD-HSP&O to Army DSG requesting data on transgender Soldiers) relate to peripheral information-gathering activities, and do not reflect any deliberation about a policy decision.

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<sup>2</sup> To the extent this implementation process required additional policy decisions, please identify those decisions.

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- Stone v. Trump - Navy Production 1 Privilege Log (13 Feb 2018): documents such as row 62 (Navy\_00002897; Definitions for Medical Accessions.) and row 126 (Navy\_00004419; Criteria for Sex Reassignment Surgery Waiver) relate to peripheral activities not related to making recommendations or expressing opinions on legal or policy matters, and are not entitled to deliberative process privilege.
- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018): documents such as row 13 (SOPER DEP RFP\_10 00188-00209; Updated Training Slides for AFRC Medics) relate to training for implemented policies, and would not reflect any deliberation about a policy decision. Documents such as row 68 (SOPER DEP RFP\_24 01543; E-mail re: No SCC Meeting This Week - 27 July 2017) are one-page emails stating that a meeting will not be held; it is highly unlikely that these short emails contain any deliberative content.

Non-deliberative materials are not entitled to deliberative process privilege just because they are alleged to be peripheral to a deliberative process. We request that Defendants immediately confirm they will withdraw any claim of deliberative process privilege for non-deliberative documents and information.

### 3. *Factual Materials*

“[P]urely factual material” does not fall within the deliberative process privilege. See *Virginia Beach*, 995 F.2d at 1253; see also *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (“it is beyond dispute” that factual documents such as reports or summaries are not covered by deliberative process privilege, and to be covered a document “must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters”). The deliberative process privilege does not cover factual material simply because it is used in a deliberative context. *Id.*

Defendants repeatedly claim deliberative process privilege protection for factual information. For example:

- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018): the entry on row 45 (SOPER DEP RFP\_18 00608-00661) describes the withheld document as “Health Data for Members with Gender Dysphoria,” and the entry on row 50 (SOPER DEP RFP\_21 00765-00820) describes the withheld document as “PPT slides: ‘Health Data on Active Duty Service Members with Gender Dysphoria.’” Health data is factual material.
- Stone v. Trump – Army Privilege Log (13 Feb 2018): the entry on row 28 (ARMY\_341) describes the withheld document as “Presentation slide showing TG surgical procedures performed at MTFs,” and the entry on row 32 (ARMY\_352-383) describes the withheld document as “Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender

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dysphoria.” Surgery statistics and “health and readiness data” are factual materials.

- *Stone v. Trump - Navy Production 3 Privilege Log (13 Feb 2018)*: there are several entries showing the document title “Transgender Information\_27 Dec 17” or a variant thereof. Information is factual material. Additionally, 21 documents withheld solely on deliberative process privilege grounds are identified as “Information supporting draft internal agency document which consists of predecisional and deliberative process information.” Information used to support a deliberative process is factual material, and not itself privileged.

Factual material cannot be protected under the deliberative process privilege. At a minimum, documents containing factual material should be redacted and the factual portions produced to Plaintiffs. We request that Defendants immediately confirm they will withdraw any claim of deliberative process privilege for factual documents and information, including when factual material is found within deliberative documents.

## II. The Presidential Communications Privilege

The presidential communications privilege is a qualified privilege that can be overcome by a showing of sufficient need. *See In re Sealed Case*, 121 F.3d at 749. This privilege should be construed narrowly, and it applies only to “communications authored or solicited and received by those . . . [with] broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *Id.* at 752. For advisers with dual responsibilities, the government bears the burden to show that the communication was “in conjunction with the process of advising the President” on official government matters. *Id.*

Defendants have asserted the presidential communications privilege for 3,664 documents in “*Stone v. Trump – POTUS Privilege Log* served on 2.13.18”. The documents are not individually identified, but instead are grouped into 51<sup>3</sup> categories, some of which cover hundreds of documents within a date range. The privilege log fails to identify any specific individual who authored or received such communications.

By refusing to identify the other parties involved in the communications, Defendants have forced Plaintiffs to seek discovery directly from the President. Information about the President’s decisionmaking process (including his motivation for acting and the basis for his decision) is critical to multiple issues in this litigation and cannot be obtained from other sources when the identities of such sources are purposefully withheld. Additionally, the presidential communications privilege may not be claimed where communications are unrelated to decisionmaking by the President. And regardless of Defendants’ position on the applicability of the presidential communications privilege and whether Plaintiffs’ need for the requested

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<sup>3</sup> Only a single entry on the privilege log – row 35 – identifies documents that are not claimed to be protected by the presidential communications privilege.

## COVINGTON

Ryan B. Parker  
February 21, 2018  
Page 9

discovery would outweigh the privilege, Defendants must submit a proper privilege log that complies with their obligations under the Federal Rules of Civil Procedure.

### A. Presidential Communications Are at the Heart of this Litigation.

The core issues in this litigation are why President Trump decided to promulgate the Transgender Service Member Ban and the basis for such an action. In his July 26, 2017 tweets, President Trump publicly asserted that he decided to promulgate the Transgender Service Member Ban based on communications with others, thereby putting at issue communications he now seeks to withhold. *See* Dkt. No. 40-22 (Sept. 14, 2017) (“After consultation with my Generals and military experts”). Indeed, the President’s references to his personal involvement in relevant communications in the tweets strongly evidences Plaintiffs’ need for discovery into materials where Defendants have claimed the presidential communications privilege. *See, e.g., Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (denying motion for protective order claiming presidential communications privilege over documents providing advice to President on a particular decision where President publicly admitted to personally making that decision and decision was alleged to be based on impermissible extraneous or political reasons).

Because President Trump’s decisions and actions are at the heart of this case and because he has relied on presidential communications to support his decisions, we request that Defendants promptly either withdraw their claims of presidential communications privilege and provide all withheld information and documents or provide adequate justification for their assertions.

### B. The Withheld Information is Critical, and there are No Alternative Sources.

The presidential communications privilege may be overcome where “the evidence sought [is] directly relevant to issues that are expected to be central to the trial,” and “this evidence is not available with due diligence elsewhere.” *In re Sealed Case*, 121 F.3d at 754. Evidence of unique information possessed only by the President, or top presidential advisors, establishes a strong need for discovery directly from the President. *See Dellums v. Powell*, 561 F.2d 242, 248-49 (D.C. Cir. 1977) (“the substantial violations of constitutional rights” at issue, the evidence “that the Department of Justice played a leading role” in the activity at issue, and “the attendance of a White House aide and briefing of [the] attorney general on these matters” all demonstrated a substantial need for White House recordings “to establish [the attorney general’s] responsibility for the violations.”).

As explained above, the evidence Plaintiffs seek is critical to both Plaintiffs’ claims and Defendants’ defenses in this litigation, and is directly relevant to issues that will be central at trial, including whether the Transgender Military Service Ban violates the Fifth Amendment because it was motivated by discriminatory intent and animus. So long as Defendants decline to name the “Generals and military experts” and any other parties who allegedly were involved in developing the Transgender Military Service Ban, the evidence at issue is available only from a single source: the White House. In these circumstances, Defendants must withdraw their claims of presidential communications privilege and provide all withheld information and documents.



## COVINGTON

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February 21, 2018  
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### C. Defendants Fail to Identify Any Presidential Decisionmaking After July 26, 2017.

As the party asserting the presidential communications privilege, it is Defendants' burden to identify the individuals involved in the communications, that these individuals are responsible for advising the President on the subject at issue, and that the communication was "in conjunction with the process of advising the President" on official government matters, as opposed to "information regarding governmental operations that do not call ultimately for direct decision making by the President." *In re Sealed Case*, 121 F.3d at 752.

Defendants have admitted that President Trump's July 26, 2017 tweets were a decision. *See Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.) (Telephone Conf. Tr. at 33:10-15 (Feb 13, 2017)). They also appear to take the position that the August 25 memorandum was a decision, but that document merely implemented the July 26 decision. Defendants have taken the position in this litigation that there will not be any *further* Presidential decision until February 21, 2018. *See* Order re: Rule 26(a) Compliance, Dkt. No. 107 (Feb. 6, 2018); *see also* Defendants' Amendment Initial Disclosures (Feb. 16, 2018) (indicating that no materials requiring ultimate Presidential decisionmaking will be presented to the President until February 21, 2018). In the absence of a presidential decision, the presidential communications privilege does not apply. Thus, unless Defendants can show that documents related to the Transgender Service Member Ban between July 26, 2017 and February 21, 2018 are related to advising the President on an issue that calls for direct presidential decisionmaking, such documents are presumptively not eligible for protection under the presidential communications privilege, and Defendants must demonstrate that some other privilege provides grounds to withhold such documents.

### D. Defendants Claim Privilege for Non-Privileged Material.

Rows 49-52 of the POTUS privilege log claim presidential communications privilege for communications with "outside third parties." Such communications are not protected by the presidential communications privilege, because such communications have not been maintained as confidential. *See In re Sealed Case*, 121 F.3d at 744 (privilege applies only to documents "that the President believes should remain confidential"); *see also id.* at 741-42 (determining that the President's sharing of a communication with counsel for a cabinet secretary waived any privilege claim). All claims of presidential communications privilege related to such documents should be withdrawn.

### E. Defendants Must Serve a Proper Privilege Log.

The POTUS privilege log fails to meet the standards set forth in the Federal Rules of Civil Procedure. The log identifies only broad categories of documents and communications, does not describe the individual nature of withheld documents and communications, and fails to provide information sufficient to enable Plaintiffs to assess Defendants' privilege claims.

Unless Defendants are prepared to abandon their claims of presidential communications privilege, we request that they promptly produce a privilege log that meets the requirements of the Federal Rules of Civil Procedure, setting forth individual entries for each document withheld with enough detailed information to enable Plaintiffs to assess Defendants' claims.

## COVINGTON

Ryan B. Parker  
February 21, 2018  
Page 11

### III. Other Privilege Issues

While the focus of this letter is the flaws in Defendants' claims of deliberative process privilege and presidential communications privilege, we note that Defendants' privilege logs are deficient in other respects as well. Plaintiffs reserve the right to identify further issues in future correspondence. However, we make the following points to identify some of the numerous errors we have seen.

#### A. Failure to Identify Attorneys in Some Logs

The privilege logs provided by the President, the U.S. Air Force, the U.S. Navy, and the Department of Defense fail to indicate who, if anyone, is the attorney that received or sent a particular document for which Defendants claim the attorney-client communications privilege.<sup>4</sup> Please promptly serve new logs that provide this information, so that Plaintiffs can assess Defendants' privilege claims.

#### B. Failure to Correctly Assert Attorney-Client Privilege

"A party asserting privilege has the burden of demonstrating its applicability." *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011) (citing *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam)). To claim attorney-client privilege, a party must, among other things, show that the document or communication was provided for the purpose of obtaining or providing legal advice, and that the advice was maintained in confidence. *Id.* at 501-02; see also *id.* at 502 ("[T]he attorney-client privilege does not apply simply because documents were sent to an attorney.") (citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987)). Defendants' logs fail to provide this required level of detail. For example, the "Stone v. Trump – Navy Production 3 Privilege Log (13 Feb 2018)" state the basis for withholding 61 documents solely on the grounds of "Attorney-Client Privilege" as "Communication between client and attorney" or some variant thereof. This description fails to state whether such documents were obtaining or providing legal advice on any issue, and fail to show that the document was maintained in confidence.

#### C. Failure to Identify Individuals on Many Logs

Many of Defendants' privilege logs fail to identify the individuals who authored, sent, or received the withheld documents. For example, the Department of Defense and the POTUS privilege logs do not include specific author, sender, or recipient information; and the privilege log for the Chairman of the Joint Chiefs of Staff frequently identifies groups as authors, senders,

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<sup>4</sup> Defendants presumably are aware of the requirement to identify attorneys. The privilege logs for the U.S. Army and the Chairman of the Joint Chiefs of Staff identified the names of attorneys with asterisks.

**COVINGTON**

Ryan B. Parker  
February 21, 2018  
Page 12

and recipients, often using an acronym, without specifying which individuals were involved.<sup>5</sup> Please promptly serve new logs that provide this information, so that Plaintiffs can assess Defendants' privilege claims.

**D. Asserting Privilege over Non-Confidential Communications**

An examination of Defendants' privilege logs shows that several withheld documents have not been maintained as confidential documents, and thus are not entitled to privilege. For example, rows 18, 25, 26, and 38 of the DHA's privilege log claim privilege for documents that were shared with external addresses (dodmerb1@gmail.com and thebohreffect@gmail.com).

**E. Deficient Descriptions**

Defendants' failure to meet the standards established by the Federal Rules are not limited to the deliberative process and presidential communications privileges. Their entries for other privileges are similarly deficient. For example, the privilege log for the U.S. Air Force states the basis for withholding 31 documents as attorney-client communications as "Attorney Client privileged confidential communications," and the privilege log for the Chairman of the Joint Chiefs of Staff states the basis for withholding 18 documents as attorney-client communications – alongside other privileges – as "Predecisional and deliverative [sic] document created for the purpose [sic] of analyzing proposed regulatory changes." These descriptions fail to provide sufficient information for Plaintiffs to test Defendants' claims.

\* \* \* \* \*

With respect to Defendants' privilege logs, it would be unduly burdensome for Plaintiffs to identify every flaw in the thousands of entries, particularly in light of the number of systematic errors that pervade the logs. If Defendants continue to claim privilege in the face of the arguments presented in this letter, we request that they promptly serve corrected privilege logs.

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<sup>5</sup> See *Stone v. Trump* – CJCS Privilege and Redaction Log (13 Feb 2018) rows 25-85 (recipient is "Panel of Experts"), 92 (author is "DOJ"), 95-97 (one recipient is "Transgender Senior Implementation Working Group"), 161 (author is "U.S. Department of Defense"), and 168 (same).

**COVINGTON**

Ryan B. Parker  
February 21, 2018  
Page 13

We are available to further discuss the above issues. Please either confirm that Defendants will take the steps we have requested or explain your reasons for failing to do so by Friday, February 23, 2018. If we cannot resolve these matters promptly, we may be forced to seek the assistance of the Court. We look forward to hearing from you soon.

Sincerely,

/s/ Augustus Golden

Augustus Golden

# **Exhibit 9**

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**From:** Kies, Marianne  
**Sent:** Friday, March 09, 2018 4:14 PM  
**To:** Parker, Ryan (CIV)  
**Cc:** Kamin, Mitchell A; Carmichael, Andrew E. (CIV)  
**Subject:** RE: Discovery issues in Stone v. Trump

Ryan,

I'm following up on our March 1 meet-and-confer, particularly with respect to issues relating to Plaintiffs' forthcoming motion to compel on privilege issues. As you recall, Plaintiffs served a deficiency letter on February 21, 2018. Defendants have not responded to that letter; instead, you requested during the parties' March 1 call that Plaintiffs identify particular log entries for Defendants' re-consideration. As Mitch and I anticipated on the call, this is an impossible task in light of the lack of information in Defendants' logs. Plaintiffs have nevertheless attempted to narrow the scope of the privilege dispute, and we would like to further confer with you over our proposals. Are you available on Monday afternoon to discuss?

In addition, since February 9, you have advised on several occasions that Defendants would be making "rolling" productions over the course of the next several weeks. Plaintiffs in *Stone* have not received a production from Defendants since February 9, although you stated during our March 1 call that Defendants would be sending us another production on March 5 (this past Monday). You further indicated during the March 1 call that Defendants have simply been producing documents that they already produced in *Doe*, minus individual-plaintiff-specific information. This email confirms that Defendants need not cull individual-plaintiff-specific information before producing documents to Plaintiffs in *Stone*. Do you still estimate that document production will be complete by early April?

As for the ESI protocol: You stated that the March 5 production (which did not occur) would be "more consistent" with Plaintiffs' proposed ESI protocol, which Plaintiffs have been attempting to discuss with Defendants since January 2018. We would like to resolve these issues as soon as possible. Since there is no new production to use as a frame of reference, we request that you redline Plaintiffs' proposed order.

I look forward to hearing from you about a time for a meet-and-confer session on Monday afternoon.

Sincerely,  
Marianne

**Marianne Kies**

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

**COVINGTON**

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**From:** Kies, Marianne  
**Sent:** Thursday, March 01, 2018 3:49 PM  
**To:** 'Parker, Ryan (CIV)' <Ryan.Parker@usdoj.gov>  
**Cc:** Kamin, Mitchell A <MKamin@cov.com>; 'Carmichael, Andrew E. (CIV)' <Andrew.E.Carmichael@usdoj.gov>  
**Subject:** RE: Discovery issues in Stone v. Trump

Ryan, following up on our conference this morning. Will Defendants agree to lift the expert report deadline?

As discussed in Plaintiffs' February 21 letter, the parties disagree over the proper scope of the presidential communications and deliberative process privileges. We would like to get a legal ruling on these discrete legal questions, which are a predicate to resolving whether Defendants have properly asserted the privileges in response to Plaintiffs' discovery requests and in Defendants' logs. To that end, we propose the following briefing schedule on Defendants' Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction, in addition to Plaintiffs' forthcoming Motion to Compel:

**March 9:** Plaintiffs move to compel and oppose Defendants' motion.

**March 16:** Defendants oppose Plaintiffs' motion and reply in support of their motion.

**March 21:** Plaintiffs reply in support of their motion.

Sincerely,  
Marianne

**Marianne Kies**

Covington & Burling LLP  
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**From:** Kies, Marianne

**Sent:** Tuesday, February 27, 2018 12:36 PM

**To:** 'Parker, Ryan (CIV)' <[Ryan.Parker@usdoj.gov](mailto:Ryan.Parker@usdoj.gov)>

**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>; Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>

**Subject:** RE: Discovery issues in Stone v. Trump

Thank you, Ryan. We can use the following dial-in:

1.866.798.7071  
14306328

**Marianne Kies**

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[www.cov.com](http://www.cov.com)

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**From:** Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]

**Sent:** Tuesday, February 27, 2018 12:28 PM

**To:** Kies, Marianne <[MKies@cov.com](mailto:MKies@cov.com)>

**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>; Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>

**Subject:** RE: Discovery issues in Stone v. Trump

Marianne,

11:00 ET on Thursday works for me.

Best,

**Ryan B. Parker**

Senior Trial Counsel  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Tel: 202-514-4336 | [ryan.parker@usdoj.gov](mailto:ryan.parker@usdoj.gov)

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**From:** Kies, Marianne [<mailto:MKies@cov.com>]  
**Sent:** Tuesday, February 27, 2018 12:25 PM  
**To:** Parker, Ryan (CIV) <[ryparker@CIV.USDOJ.GOV](mailto:ryparker@CIV.USDOJ.GOV)>  
**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>  
**Subject:** RE: Discovery issues in Stone v. Trump

How about 11:00 a.m. ET on Thursday?

Best,  
Marianne

**Marianne Kies**

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**From:** Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]  
**Sent:** Tuesday, February 27, 2018 12:12 PM  
**To:** Kies, Marianne <[MKies@cov.com](mailto:MKies@cov.com)>  
**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>  
**Subject:** RE: Discovery issues in Stone v. Trump

Marianne,

I have a brief due in another matter on Wednesday, and a 5:30 call could be difficult. Are you and Mitch available on Thursday morning?

Best,

**Ryan B. Parker**

Senior Trial Counsel  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Tel: 202-514-4336 | [ryan.parker@usdoj.gov](mailto:ryan.parker@usdoj.gov)

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**From:** Kies, Marianne [<mailto:MKies@cov.com>]  
**Sent:** Monday, February 26, 2018 9:20 PM  
**To:** Parker, Ryan (CIV) <[ryparker@CIV.USDOJ.GOV](mailto:ryparker@CIV.USDOJ.GOV)>  
**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>  
**Subject:** RE: Discovery issues in Stone v. Trump



Ryan,

Could we please set up a call to discuss the pending discovery issues, before our Thursday conference with the Court? Are you available at 5:30 p.m. on Wednesday?

Sincerely,  
Marianne

**Marianne Kies**

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[www.cov.com](http://www.cov.com)

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**From:** Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]  
**Sent:** Friday, February 23, 2018 1:40 PM  
**To:** Kies, Marianne <[MKies@cov.com](mailto:MKies@cov.com)>  
**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>  
**Subject:** RE: Discovery issues in Stone v. Trump

Marianne,

I received your email and letter. We plan to respond early next week.

Best,

**Ryan B. Parker**  
Senior Trial Counsel  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Tel: 202-514-4336 | [ryan.parker@usdoj.gov](mailto:ryan.parker@usdoj.gov)

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**From:** Kies, Marianne [<mailto:MKies@cov.com>]  
**Sent:** Wednesday, February 21, 2018 5:30 PM  
**To:** Parker, Ryan (CIV) <[ryparker@CIV.USDOJ.GOV](mailto:ryparker@CIV.USDOJ.GOV)>  
**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>  
**Subject:** Discovery issues in Stone v. Trump

Ryan:

I write in regard to several discovery issues in *Stone v. Trump* (D. Md.):

1. Attached is a deficiency letter that regards Defendants' privilege claims. We look forward to conferring with you about the issues raised therein.
2. During our February 9, 2018 telephone conference about the draft ESI protocol, you committed to send us Defendants' redlines by the end of last week (February 16). We have not received them. As you know, the parties agreed to negotiate an ESI protocol several weeks ago (DE 102). As discovery is well underway, can you please send us your redlines to the draft so we can get the protocol on file?

3. During our February 9, 2018 telephone conference, you also indicated that Defendants would be making rolling productions over the course of the next several weeks. When should we expect Defendants' next production, and what will it contain?

4. In accordance with Judge Garbis's February 6, 2018 order (DE 107), Plaintiffs will contact the Court tomorrow to arrange a case-planning conference. Can you please let us know your availability for the conference?

5. Defendants' amended initial disclosures state: *"The Department of Defense is currently undertaking a comprehensive study of policies concerning transgender service members, which will culminate in an implementation plan currently due to be presented to the President on February 21, 2018. Defendants intend to rely upon and defend both the policies within the implementation plan and the support given for those policies."* As today is February 21, please confirm that you will send us the implementation plan, the policies within the implementation plan, and the support given for those policies to us, by the end of the day.

Thank you,  
Marianne

**Marianne Kies**

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# **Exhibit 10**

## COVINGTON

BEIJING BRUSSELS DUBAI JOHANNESBURG LONDON  
LOS ANGELES NEW YORK SAN FRANCISCO SEOUL  
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Marianne F. Kies

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**By Electronic Mail**

March 16, 2018

Ryan B. Parker  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW,  
Washington, DC 20530  
T: (202) 514-4336  
*ryan.parker@usdoj.gov*

**Re: Meet-and-Confer in *Stone, et al. v. Trump, et al.*, Case No.  
1:17-cv-02459-MJG (D. Md.)**

Dear Ryan:

I write to summarize and follow up on our March 13, 2018 meet-and-confer session at your office, during which we discussed Defendants' privilege claims.

### **I. Discovery Directed to President Trump**

Defendants have, in conclusory and categorical terms, asserted privilege in response to all of Plaintiffs' requests that are directed to the President and/or that involve presidential or White House communications. In an attempt to narrow the dispute, Plaintiffs began our meeting by proposing that Defendants answer Interrogatories Nos. 1–10 (directed to President Trump), which seek information regarding President Trump's reasons for issuing the Transgender Service Member Ban. On their face, the interrogatories seek information central to the case. Plaintiffs' need for the information presumptively overcomes the qualified presidential-communications privilege and the qualified deliberative-process privilege, where neither of these privileges has been adequately supported or justified.<sup>1</sup> You responded that Defendants are unwilling even to discuss any discovery directed to the President until Defendants' pending motion to dismiss (ECF No. 115) is decided. You even refused to tell us whether the 3,672 documents covered by the POTUS log have been de-duplicated or whether that number is an exaggerated tally of the White House documents at issue. As I stated during our meeting, we believe that Defendants' position lacks merit, and that Defendants' refusal to meaningfully meet-and-confer over Defendants' privilege assertions at this time is inconsistent with Defendants' obligations under the federal rules and Judge Garbis' March 1 order, which contemplates that Plaintiffs' motion to compel on privilege issues will be briefed in "due course"

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<sup>1</sup> The same is true of—at least—Interrogatory No. 12 (directed to Secretary Mattis) and Requests for Production Nos. 6, 7, and 8.

## **COVINGTON**

Ryan B. Parker  
March 16, 2018  
Page 2

as opposed to *seriatim* following consideration of Defendants' pending motion. ECF No. 116. We understand that the parties are at impasse on this issue.

### **II. Other Defendants' Assertions of Privilege with Respect to Communications with the White House**

Regardless of whether President Trump remains a party to this suit or is subject to discovery requests, Plaintiffs have also served discovery requests on the other Defendants regarding their own communications with the White House and with the Office of the Vice President. *See, e.g.*, Requests for Production Nos. 6, 7, 8, 12; Interrogatory No. 12. In their written responses, each Defendant objected to these requests based on the presidential communications privilege (and the deliberative process privilege). However, with the exception of the log of the Chairman of the Joint Chiefs of Staff, the logs produced to date by Defendants other than President Trump do not identify materials purportedly protected by the presidential communications privilege.

Please promptly clarify whether Defendants other than President Trump are asserting both the presidential communications privilege and the deliberative process privilege in response to Requests for Production Nos. 6, 7, 8, and 12 and Interrogatory No. 12 to Secretary Mattis. If so, by Friday, March 23, 2018, please provide Plaintiffs with a privilege log for those documents reflecting, at a minimum, the sender(s), recipient(s), date, and subject matter of each document or communication. We are requesting this minimal identifying information so that we may make a preliminary assessment as to which of the thousands of documents are of greatest relevance to our case. By requesting only this identifying information at this point, we are not waiving our opportunity to seek a full and proper justification for the claims of privilege.

### **III. Other Documents on Defendants' Privilege Logs**

We have repeatedly requested that Defendants provide compliant and adequate privilege logs. In response, Defendants continue to insist that Plaintiffs undertake the impracticable task of identifying discrete documents for Defendants to re-consider. Without waiving Plaintiffs' objections to Defendants' inadequate privilege logs, Plaintiffs will identify, on a rolling basis, a nonexhaustive list of particular withheld documents for which Plaintiffs will request that Defendants either provide an adequate explanation for why the privilege applies or withdraw the assertion of privileges. Based on Defendants' responses, Plaintiffs will determine which documents are necessary to pursue in a motion to compel. Please confirm that Defendants will provide responses to the challenged entries within 10 calendar days of receipt.

### **IV. Federal Rule of Civil Procedure 33(d) (see Defendants' Answers to Interrog. Nos. 13–16, 18–22)**

As we discussed during our meeting, Defendants are required to provide interrogatory answers that either contain adequate narrative responses or comply with Rule 33(d). You indicated that you intended to provide compliant answers for all Defendants, aside from President Trump. If Defendants object to answering any interrogatory (or portion of an interrogatory), Defendants must object with the specificity required by Rule 33(b)(4). You indicated that, to the extent Defendants choose to rely upon Rule 33(d), Defendants will identify

**COVINGTON**

Ryan B. Parker  
March 16, 2018  
Page 3

specific documents, as required by Rule 33(d)(1). If Defendants withhold such documents on the basis of a privilege, we expect that Defendants will object with the specificity required by Rule 34(b)(2)(B). By March 23, 2018, please provide corrected interrogatory answers that comply with the foregoing Rules.

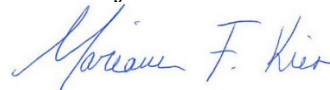
**V. Federal Rule of Civil Procedure 34(b)(2)**

Defendants' written responses to Plaintiffs' requests for production do not comply with Rule 34(b)(2)(B) and (C). By March 23, 2018, please provide corrected responses to Plaintiffs' requests for production that state *with specificity* the grounds for objecting to each request—i.e., a full explanation of why a particular response is subject to the privileges asserted—and indicate whether responsive material is being withheld on the basis thereof.

**VI. Deadline for Discovery Requests**

The Joint Status Report in this case requires all additional written discovery requests to be served by March 24, 2018. ECF No. 102. Please let me know by Monday, March 19, 2018, if Defendants will stipulate to suspend this deadline in light of the pending discovery disputes.

Sincerely,



Marianne F. Kies

# **Exhibit 11**

## COVINGTON

BEIJING BRUSSELS DUBAI JOHANNESBURG LONDON  
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Marianne F. Kies

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mkies@cov.com

### By Electronic Mail

April 9, 2018

Ryan B. Parker  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW,  
Washington, DC 20530  
T: (202) 514-4336  
[ryan.parker@usdoj.gov](mailto:ryan.parker@usdoj.gov)

**Re: Discovery Issues in *Stone, et al. v. Trump, et al.*, Case No.  
1:17-cv-02459-MJG (D. Md.)**

Dear Ryan:

I write to follow up on our March 16, 2018 letter, to which Defendants have not responded (nor acknowledged receipt). Please provide a prompt response to that letter, which we previously requested you do no later than March 23, 2018. That date has long since lapsed.

In light of Defendants' March 23 filings, I also write to follow up on several of Plaintiffs' pending discovery requests. For the following reasons, Defendants should promptly and fully respond to Plaintiffs' Requests for Production Nos. 13, 14, 15, and 16 and Interrogatory Nos. 15, 18, and 19, the original responses to which were due on February 9, 2018. Barring a prompt and complete response, Plaintiffs will move to compel.

\* \* \*

As you know, Plaintiffs served their first set of discovery requests on January 3, 2018. Plaintiffs requested, *inter alia*:

- “All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the ‘Alliance Defending Freedom,’ ‘Focus on the Family,’ the ‘Family Research Council,’ ‘Heritage Action for America,’ and ‘Breitbart News,’ from January 2017 to the present” (RFP No. 13);
- “All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense



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or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets” (RFP No. 14);

- “All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts” (RFP No. 15);
- “All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018” (RFP No. 16);
- “[Identification of] all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt” (Interrog. No. 15);
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Interrog. No. 18); and
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Interrog. No. 19).

Defendants objected to RFPs Nos. 13 through 16 “to the extent” that each seeks: (a) attorney work product; (b) attorney-client communications; (c) communications or information protected by the deliberative process privilege; (d) material “the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation”; or (e) communications or information protected by the presidential communications privilege. Defendants similarly objected to Interrogatory Nos. 15, 18, and 19; moreover, all Defendants save President Trump<sup>1</sup> stated that, “[t]he information responsive to this

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<sup>1</sup> President Trump has objected “to any discovery requests directed to the President” and has not provided a response to any interrogatory.

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interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production."<sup>2</sup>

Defendants' privilege logs indicate that numerous documents were withheld on the basis of a purported deliberative process privilege. Many documents pertinent to Defendants' so-called "Panel of Experts"—convened after President Trump categorically banned transgender people from serving in the Armed Forces in August 2017—were withheld. A small sampling follows:

- **Army Defendants** withheld documents bearing the Bates range ARMY\_352-383, described as "Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria."
- **The CJCS** privilege log alone contains approximately 65 different entries reflecting documents withheld that were received by the "Panel of Experts."
- **Air Force Defendants** withheld documents bearing the Bates range AF\_00000446-448, described as "UPDATE & DECISION: Transgender Working Group Meeting in Prep for Panel of Experts Prep Session (Read: HTML).msg," and numerous other documents described as "RE: REQUEST -- Support to the Panel of Experts Reviewing DoD Policy on Service by Transgender Persons.msg," *see, e.g.*, AF\_000010454-10456.
- **Department of Defense Defendants** withheld documents bearing the Bates range SOPER DEP RFP\_21 01268-01271, described as "E-mail re: Transgender Panel of Experts Question (with Attachments)."
- **Navy Defendants** withheld a document bearing the Bates number Navy\_00042147, on the stated privilege basis of "Request for information for panel of experts," as well as a document bearing the Bates range Navy\_000004460, described as "Request for Military Medical Providers to Brief Medical Personnel Services (MEDPERS) and the Secretary of Defense (SECDEF) Panel of Experts."

On March 23, 2018, Defendants released the February 22, 2018 "recommendations" (ECF No. 120-1) and a February 2018 "report" regarding military service by people who are transgender (ECF No. 120-2, the "Report"). The Report extensively references findings and conclusions of the "Panel of Experts." *See, e.g.*, Report at 33–34 (citing reports made to the Panel "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"); *id.* at 37 (citing incidents reported to the Panel concerning transgender access to bathroom facilities as evidence of the threat transgender service poses to unit cohesion); *id.* at 41 (citing Panel data as evidence that "medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria").

Defendants now insist that the existing preliminary injunction should be "dissolved" in light of the February 2018 recommendations and the Report and President Trump's response.

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<sup>2</sup> As Plaintiffs have previously advised Defendants, this response does not comply with Federal Rule of Civil Procedure 33(d).

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Accordingly, the bases for both the recommendations and Report are of central importance to Defendants' defenses, Plaintiffs' claims, and Plaintiffs' continued entitlement to injunctive relief.

Defendants' numerous assertions of deliberative process privilege over materials regarding the Panel of Experts are fundamentally misplaced.<sup>3</sup> As a threshold matter, the deliberative process privilege does not apply at all when, as here, "a plaintiff's cause of action turns on the government's intent." *See In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Moreover, this privilege is qualified and narrowly construed, and is overcome under the circumstances here. *FDIC v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998); *Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (a party "make[s] a very powerful showing of necessity" where "the decisionmaking process . . . is the case"). The process leading to the recommendations "is the case" here, as is Defendants' intent in implementing the ban on military service by transgender persons that President Trump announced in July 2017 and in developing the proposed policy in response to his August 2017 memorandum. This material is relevant to Plaintiffs' claims that the original ban on transgender military service and the implementation of that ban violate equal protection and substantive due process. Moreover, since Defendants are now using the work of the "Panel of Experts" to defend the Recommendations and Report, they may not withhold documents and information relating to the work of the Panel. *See, e.g., HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (explaining that the "at issue" doctrine "precludes a party from 'disclos[ing] only self-serving communications,' while 'barr[ing] discovery of other communications that an adversary could use to challenge the truth of the claim'").

In addition to withholding documents regarding the Panel of Experts, Defendants have improperly withheld responsive materials comprising, *inter alia*:

- Materials leading up to President's Trump announcement of the Transgender Service Member Ban via Twitter (*see, e.g.,* NAVY\_00003363, described as "Transgender Policy Status Briefing Card" and dated July 26, 2017; numerous entries on the DHA privilege log dated July 24-26, 2017 and identified as "Intradepartment email concerning implementation of transgender policy");
- Materials created in between the Tweets and the August 2017 presidential memorandum (*see, e.g.,* ARMY\_722-724, described as "Execution matrix used in preparation for the release of the Presidential Memorandum;" and dated August 10, 2017; ARMY\_1300-04, described as "Presentation discussing the impact of transgender service on readiness" and dated August 17, 2017; ARMY\_725-728, described as "Presentation showing timeline of events in preparation for release of the Presidential Memorandum" and undated); and
- Materials related to the September 2017 "Interim Guidance" (*see, e.g.,* ARMY\_ARMY\_744-46, described as "Documents providing comments on the draft DoD

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<sup>3</sup> It is impossible for Plaintiffs to determine how many documents President Trump withheld on any specific ground, given that he has refused even to provide a log of withheld communications.

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Interim Guidance” and dated August 30, 2017; CJCS\_00001113, described as “Final draft of interim transgender policy guidance” and dated September 6, 2017).

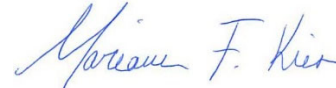
Although the limited and often boilerplate information provided in Defendants’ privilege logs makes it difficult to evaluate conclusively, Defendants also appear to have withheld materials generated in between the finalization of the “Panel of Experts” report and the issuance of the February 2018 recommendations and Report. *See, e.g.*, SOPER DEP RFP\_15 00562-566, described as “Transgender Review Panel Policy Recommendation Worksheet” and undated.

Once again, this is but a small sampling of the documents Defendants have improperly withheld. All of these categories of documents must be produced; they all concern the critical “decisionmaking” process that “*is the case*” here. *See Bd. of Educ. of the City of Chi.*, 610 F. Supp. at 699–700.

Please promptly produce any documents responsive to Requests for Production Nos. 13, 14, 15, and 16, and provide supplemental responses to Plaintiffs’ Interrogatory Nos. 15, 18, and 19 that comply with Rule 33(d). If Defendants assert attorney-client, attorney work-product, or any other privilege over documents and information responsive to these requests, Defendants should supply a full and complete privilege log that complies with District of Maryland Discovery Guideline 10(d).

If Defendants do not fully comply with the above paragraph by April 18, 2018, Plaintiffs will move to compel on the issues raised in this letter and in our March 16, 2018 letter.

Sincerely,

A handwritten signature in blue ink that reads "Marianne F. Kies". The signature is written in a cursive style.

Marianne F. Kies

# **Exhibit 12**

Thomas P. Dee  
SES  
703-819-1314  
December 14, 2017

MEMORANDUM FOR THE RECORD

Subj: Dissenting Opinion from the Majority Recommendations of the “Military Service by Transgender Individuals - Panel of Experts”

This memorandum records my dissent from the majority opinion of the DoD “Military Service by Transgender Individuals - Panel of Experts” which has recommended the following policy be adopted concerning the military service of transgender individuals:

**Redacted**

**Redacted**

The recommendations are

**Redacted**

**Redacted**

are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.

Recommendation 1.

**Redacted**

During the course of our panel, neither the transgender service members, the military doctors, nor the civilian doctors suggested that a person serving outside of their birth

gender would necessarily be unable to meet medical or physical standards, nor did any of our briefers suggest that those standards should be loosened or waived to allow transgender service. [Redacted]

**Redacted**

DODI 6130.03 governs the physical standards for the appointment, enlistment, or induction of Service personnel. Those standards should apply to everyone regardless of gender identity. The instruction states that individuals under consideration for appointment, enlistment, or induction into the Military Services should be:

1. Free of contagious diseases that probably will endanger the health of other personnel.
2. 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 the Service for medical unfitness.
3. Medically capable of satisfactorily completing required training.
4. Medically adaptable to the military environment without the necessity of geographical area limitations.
5. Medically capable of performing duties without aggravation of existing physical defects or medical conditions.

Enclosure (4) of that instruction provides the specific medical conditions that are disqualifying for service. [Redacted] The instruction makes no mention of transgenderism or gender dysphoria, but enclosure (4) paragraph 29.r. states that a “current or history of psychosexual conditions including but not limited to transsexualism... tranvestism... and other paraphilias” is disqualifying. The language in that section is no longer consistent with current medical guidelines, the DSM V, which distinguishes gender dysphoria (identity disorder) from psychosexual conditions and paraphilia’s (sexual attraction or behavioral disorder). [Redacted]

**Redacted**

[Redacted] Of note, the FAA allows persons with a history of gender dysphoria to serve as commercial pilots or air traffic controllers after a stability period of five years.

DODI 1304.26, “Qualification Standards for Enlistment, Appointment, and Induction”, states that waivers for otherwise disqualifying current or past medical conditions may be considered based on a “whole person” review of the applicant. **Redacted**

**Redacted**

**Redacted**

**Redacted** No data was presented during the course of the panel to conclude that such separate accommodation would be required **Redacted** As the total cost of all medical treatment of the entire DoD transgender population over the past few years is \$3.3M (exclusive of unit incurred costs) **Redacted**

**Redacted**

Recommendation 2.

**Redacted**



**Redacted**

Recommendation.

**Redacted**

*//S//*  
Thomas P. Dee

# **Exhibit 13**

Army Privilege Log -- Withheld Documents

**DOCUMENTS WITHHELD IN FULL**

Entry No.	Bates Range	Date	Author(s)/Sender(s)	Recipient(s)	Document Description	Basis for Withholding	Withholding Justification
30	ARMY_352-383	11-Dec-17		POE	Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of assisting DoD to develop an implementation plan regarding updated transgender service and accessions policies in response to the President's directives on the military service of transgender personnel.
55	ARMY_722-724	10-Aug-17			Execution matrix used in preparation for the release of the Presidential Memorandum	Deliberative Process Privilege	Predecisional and deliberative internal Army document created for the purpose of preparing for the President's announcement of his transgender service policy .
56	ARMY_725-728				Presentation showing timeline of events in preparation for release of the Presidential Memorandum	Deliberative Process Privilege	Predecisional and deliberative internal Army document created for the purpose of preparing for and responding to the President's announcement of his transgender service policy .
117	ARMY_1300-1304	17-Aug-17		ASA M&RA	Presentation discussing the impact of transgender service on readiness	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

# **Exhibit 14**

Bates Range	Date	Author/Sender	Recipient(s)	CC	BCC	Original File Name (description)	General Description	JS Custodian(s)	Withheld/Redacted	Basis	Justification
CJCS_0000057-0000063	4-Oct-17	P&R	Panel of Experts			TG - Accession Medical Standards PoE Review V1 2017.10.04	Current and proposed standards relating to policymaking process.	LC	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000114	13-Oct-17	P&R	Panel of Experts			AGENDA Transgender PoE Meeting 13 Oct 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000119-00000130	13-Oct-17	P&R	Panel of Experts			PoE 1 Slides FINAL	Slides for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000131-00000144	30-Sep-16	P&R	Panel of Experts			DoD TG Handbook Panel Extract	Extract of DoD policy	LC, J1	No		
CJCS_00000145-00000148	13-Oct-17	P&R	Panel of Experts			PoE 1 Minutes v3	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000149-00000152	13-Oct-17	P&R	Panel of Experts			TG Panel Meeting 1 Minutes - 13 Oct	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000153-00000161	13-Oct-17	P&R	Panel of Experts			TG - Policy Panel Meeting 2017.10.19	Slides for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000162	13-Oct-17	P&R	Panel of Experts			TG LOE v5	Milestones and deliverables for the policymaking process	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000163	26-Oct-17	P&R	Panel of Experts			AGENDA Transgender PoE Meeting 3 - 26 Oct 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000164-00000165	25-Oct-17	P&R	Panel of Experts			TG LOE v6	Milestones and deliverables for the policymaking process	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000166-00000170	19-Oct-17	P&R	Panel of Experts			TG Panel 2 Minutes DRAFT	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000171	2-Nov-17	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 4 - 2 Nov 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000172-00000193	2-Nov-17	P&R	Panel of Experts			PoE Deliverable 2 FINAL	Health data for consideration in policymaking process	LC, J1	No		
CJCS_00000194-00000198	26-Oct-17	P&R	Panel of Experts			TG Panel 3 Minutes DRAFT	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000199	9-Nov-17	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 5 - 9 Nov 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000200	7-Nov-17	P&R	Panel of Experts			Deliverable 3 Slide 9	Healthcare/insurance data for consideration in policymaking process	LC, J1	No		
CJCS_00000201-00000222	7-Nov-17	P&R	Panel of Experts			PoE - Deliverable 3 - rec authorized Treatments for GD - FOR RAHS	Analysis of health information for consideration in policymaking process	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000223-00000228	26-Oct-17	P&R	Panel of Experts			TG Panel 3 Minutes v3 DRAFT	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000229-00000232	2-Nov-17	P&R	Panel of Experts			TG Panel 4 Minutes DRAFT v2	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000233	16-Nov-17	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 6 - 16 Nov 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000235-00000238	16-Nov-17	P&R	Panel of Experts			MPP ND WG Brief to PoE Nov 16	Slides for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000239-00000268	7-Nov-17	P&R	Panel of Experts			PoE - Deliverable 3 - recommended authorized Treatments for GDv2.0	Analysis of health information for consideration in policymaking process	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000269-00000271	16-Nov-17	P&R	Panel of Experts			Transgender Review Panel - Questions	Framework for discussion during policymaking process	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000272-00000283	20-Nov-17	Terry Adirim (OASD(HA))	Panel of Experts			21 Nov Panel Slides DRAFT	Slides for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000284	20-Nov-17	Terry Adirim (OASD(HA))	Panel of Experts			21 November Handout	Data on reasons for separation	LC, J1	No		
CJCS_00000285	21-Nov-17	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 7 - 21 Nov 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000286	21-Nov-17	Ford, Christopher M LTC USARMY JS DOM (US)*	Panel of Experts			Meeting Seven Summary	Attorney's summary of policymaking meeting	LC	Yes	Attorney Work Product; Deliberative Process Privilege; PII - Personal Privacy	Predictional and deliberative attorney document created by a party's representative to examine potential regulatory change in anticipation of litigation.

Bates Range	Date	Author/Sender	Recipient(s)	CC	BCC	Original File Name (description)	General Description	JS Custodian(s)	Withheld/Redacted	Basis	Justification
CJCS_00000287-00000294	9-Nov-17	P&R	Panel of Experts			TG Panel 5 Minutes DRAFT v3	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000295-00000299	16-Nov-17	P&R	Panel of Experts			TG Panel 6 Minutes DRAFT v2	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000300	30-Nov-17	P&R	Panel of Experts			AGENDA Transgender Policy Review Panel Meeting 8 - 30 Nov 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000301	30-Nov-17	Ford, Christopher M LTC USARMY JS DOM (US)*	Panel of Experts			Meeting Eight Summary	Attorney's summary of policymaking meeting	LC	Yes	Attorney Work Product; Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative attorney document created by a party's representative to examine potential regulatory change in anticipation of litigation.
CJCS_00000302-00000352	1-Aug-17	P&R	Panel of Experts			Policy Q-A as of 1 August 2017	Answers provided to address questions from policymaking body.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000353-00000363	29-Nov-17	P&R	Panel of Experts			TG Admin Record v6 291738NOV17	Administrative data presented during panel meeting to assist policymaking body.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000364-00000368		P&R	Panel of Experts			TG Continuum	Diagrams, questions, and recommendations relating to policy change recommendations.	LC, J1	Redacted	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000369-00000376	9-Nov-17	P&R	Panel of Experts			TG Panel 5 Minutes DRAFT v4	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000377-00000380	16-Nov-17	P&R	Panel of Experts			TG Panel 6 Minutes DRAFT v4	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000381-00000383	21-Nov-17	P&R	Panel of Experts			TG Panel 7 Minutes DRAFT v1	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000384-00000386	30-Nov-17	P&R	Panel of Experts			Transgender Review Panel - Questions	Policy recommendation worksheet for policymaking body.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000387	7-Dec-17	P&R	Panel of Experts			AGENDA Transgender Policy Panel Meeting 9 - 7 DEC 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000388-00000391			Panel of Experts			Days to Recovery - MTF Data		LC, J1	No		
CJCS_00000392-00000395	4-Dec-17		Panel of Experts			FAA Info	Medical data and analysis from FAA relating to policymaking process.	LC, J1	Redacted	Deliberative Process Privilege	Predeliberational and deliberative paragraph relating to proposed regulatory changes.
CJCS_00000396	13-Dec-17	Ford, Christopher M LTC USARMY JS DOM (US)*	Panel of Experts			Meeting Nine Summary	Attorney's summary of policymaking meeting	LC	Yes	Attorney Work Product; Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative attorney document created by a party's representative to examine potential regulatory change in anticipation of litigation.
CJCS_00000397-00000408	13-Dec-17	P&R	Panel of Experts			TG Admin Record v2	Administrative data presented during panel meeting to assist policymaking body.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000409-00000417		P&R	Panel of Experts			TG Continuum II	Diagrams, questions, and recommendations relating to policy change recommendations.	LC, J1	Redacted	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000418-00000425	9-Nov-17	P&R	Panel of Experts			TG Panel 5 Minutes DRAFT v4	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000426-00000429	16-Nov-17	P&R	Panel of Experts			TG Panel 6 Minutes DRAFT v4	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000430-00000432	21-Nov-17	P&R	Panel of Experts			TG Panel 7 Minutes DRAFT v1	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000433	13-Dec-17	P&R	Panel of Experts			AGENDA Transgender Policy Review Panel Meeting 10 - 13 Dec 17	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000434-00000445	2-Nov-17	P&R	Panel of Experts			Data Extracts	Select information used by policymaking panel to make policy recommendations.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000446-00000458	15-Dec-17	P&R	Panel of Experts			DRAFT DSD Brief	Draft of a brief summarizing policy recommendations of policymaking panel.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000459-00000482	13-Dec-17	P&R	Panel of Experts			DRAFT Report v2	Draft report and recommendations of policymaking panel.	LC, J1	Yes	Deliberative Process Privilege	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000483-00000514	12-Dec-17		Panel of Experts			Health Data on Active Duty Service Members with Gender Dysphoria		LC, J1	No		
CJCS_00000515-00000524	30-Nov-17, 7-Dec-17	P&R	Panel of Experts			Panel 8-9 Minutes	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predeliberational and deliberative document created for the purpose of analyzing proposed regulatory changes.

Bates Range	Date	Author/Sender	Recipient(s)	CC	BCC	Original File Name (description)	General Description	JS Custodian(s)	Withheld/Redacted	Basis	Justification
CJCS_00000525-00000537	12-Dec-17	P&R	Panel of Experts			TG Admin Record v3c	Administrative data presented during panel meeting to assist policymaking body.	LC, J1	Yes	Deliberative Process Privilege	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000538-00000542	16-Nov-17	P&R	Panel of Experts			TG Panel 6 Minutes DRAFT v5	Minutes for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000543	22-Dec-17	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 11 - 22 Dec	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000544			Panel of Experts			Proposed Alternate Policy	Alternative process proposed during policymaking process.	LC, J1	Yes	Deliberative Process Privilege	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000545			Panel of Experts			Research Questions	Research questions for consideration during policymaking process.	LC, J1	Yes	Deliberative Process Privilege	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000546	4-Jan-18	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 12	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000547	3-Jan-18	P&R	Panel of Experts			TG COA Flowchart	Processes proposed during policymaking process.	LC, J1	Yes	Deliberative Process Privilege	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000548	11-Jan-18	P&R	Panel of Experts			AGENDA Transgender Panel of Experts Meeting 13 - 11 JAN	Agenda for policymaking meeting	LC, J1	Yes	Deliberative Process Privilege; PII - Personal Privacy	Predecisional and deliberative document created for the purpose of analyzing proposed regulatory changes.
CJCS_00000549-00000698	9-Jan-18	P&R	Panel of Experts, MEDPERS			Centers for Medicare and Medicaid Services Decision Memo for GD and GRS		LC, J1	No		
CJCS_00000115-00000118	13-Oct-17	P&R	Panel of Experts			OPA 2016 Workplace and Gender Relations Survey	DoD survey considered during policymaking process	LC, J1	No		

# **Exhibit 15**



Entry No	BEGDOC	ENDDOC	DATESENT	FROM	TO	DOCUMENT DESCRIPTION	BASIS FOR WITHHOLDING	WITHHOLDING JUSTIFICATION
38	AF_00000446	AF_00000448	11/7/2017	Labrutta, Robert D Maj Gen USAF AF-A1 (US) <robert.d.labrutta.mil@mail.mil>	Grosso, Gina M Lt Gen USAF AF-A1 (US) <gina.m.grosso.mil@mail.mil>	UPDATE & DECISION: Transgender Working Group Meeting in Prep for Panel of Experts Prep Session (Read: HTML).msg	Responsive»Deliberative process;	Predecisional and deliberative internal agency document created as part of the agency's process of assisting DoD to develop recommendations and develop an implementation plan regarding updated transgender service and accessions policies in response to the President's directives on the military service and accessions of transgender personnel.
756	AF_00010454	AF_00010456	10/6/2017	McWhirter, Matthew A Maj USAF AF-A1 (US) </o=easf/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=matthew.a.mcwhirter.MIL>	Bozarth, Macey W Maj USAF (US) <macey.bozarth@us.af.mil>	RE: REQUEST -- Support to the Panel of Experts Reviewing DoD Policy on Service by Transgender Persons.msg	Responsive»Deliberative process; Responsive»PII (personal only)	Predecisional and deliberative internal agency document created as part of the agency's process of assisting DoD to develop recommendations and develop an implementation plan regarding updated transgender service and accessions policies in response to the President's directives on the military service and accessions of transgender personnel. Contains Personally Identifiable Information (PII).

# **Exhibit 16**

Stamps: 7/17/17  
1:17-cv-0259-MJG

Navy's First Production - Documents Withheld for Privilege

Beg Bates	End Bates	Date	Author	Recipient	Title	Privilege(s)	Privilege Basis
Navy_00003363	Navy_00003363	7/26/2017 23:03			Transgender Policy Status Briefing Card	Privileged; Deliberative Process Privilege	Predecisional and deliberative internal Agency document created for the purpose of evaluating proposed regulatory change. Draft Briefing slide, predecisional.
Navy_00004460	Navy_00004460	10/11/2017 18:35	McCaffery, Thomas	ASSISTANT SECRETARY OF THE ARMY (MANPOWER AND RESERVE AFFAIRS) ASSISTANT SECRETARY OF THE NAVY (MANPOWER AND RESERVE AFFAIRS) ASSISTANT SECRETARY OF THE AIR FORCE (MANPOWER AND RESERVE AFFAIRS)	Request for Military Medical Providers to Brief Medical Personnel Services (MEDPERS) and the Secretary of Defense (SECDEF) Panel of Experts	Privileged; Deliberative Process Privilege	Pre-decisional and deliberative material containing opinions and policy recommendations.

Navy's Third Production - Documents Withheld for Privilege

Beg Bates	End Bates	Date	Author	Recipient	Title	Privilege(s)	Privilege Basis
Navy_00042147	Navy_00042147	11/27/2017 13:34	Freedman, Rick CAPT USN BUMED FCH VA (US)	Franzos, Marc Alaric CAPT USN BUMED FCH VA (US)	FW: : Data Requests to DSGs and Director, DHA	Privileged; Deliberative Process Privilege	Request for information for panel of experts

# **Exhibit 17**

DOCUMENTS WITHHELD IN FULL

Entry No.	Bates Range	Date	Author(s)/Sender(s)	Recipient(s)	Document Description	Basis for Withholding	Withholding Justification
1	DHA_00000001-009_UR	20-Jan-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Minarcik, Allison H CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
2	DHA_00000010-019_UR	20-Jan-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Minarcik, Allison H CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
3	DHA_00000020-071_UR	31-Jan-17	Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Miller, David C Lt Col USAF AFMSA (US); Boquard, Michael J CAPT USPHS USCG PSC (US); Green, Alphonsa D CIV USARMY HQDA DCS G-1 (US); Bridges, Michael D CIV USN (US); Soper, Martha P CIV USAF SAF-MR (US); Cerny, Kerry A CIV USMC MANDR AFFAIRS (US); Merriweather, Jason A CAPT USCG (US); Benson, Charles R CAPT USN BUMED FCH VA (US); Minarcik, Allison H CIV (US); Klimkowski, Paul Edward CDR USN BUMED FCH VA (US); Kennedy, Michele R LTC USARMY HQDA ASA MRA (US); Palacios, Cindi L LCDR USN ASSTSECNAV MRA DC (US); Downes, Karen M Lt Col USAF SAF-MR (US); Jackson, Jacqueline F Lt Col USAF AF-A3 (US); Krueger, Mary V COL USARMY HQDA ASA MRA (US); Pelzner, Michael A (Mike) COL USARMY HQDA OTSG (US); Scott, Robert A MSG USARMY HQDA (US); Kipp, Richard C Maj USAF (US); Landez, Michael E CIV USAF (US); Rettke, Matthew S COL USARMY USAREC (US); Reynolds, Frank P CAPT USN COMNAVCRUITCOM (US); Baker, Richard D Col USAF (US); Rohde, Christopher S Col USAF AFMSA (US); Jacobs, Jack L Jr CIV USMC MCRC (US); Siordia, Martina C CIV OSD USMEPCOM (US); Hus, Clayton D CPO USN (US) Cc: Chan, Edmund M CIV OSD HA (US); Ribeiro, Elizabeth M CTR OSD HA (US); Graham, Elizabeth A CTR OSD HA (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Nakamura, Jason M LTC USARMY OSD USMEPCOM (US); Waddelow, Annette D CIV OSD USMEPCOM (US); Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US); Mullen, Lawrence E CIV DHA DIR SUPPORT (US); Smith, Jack W CIV OSD HA (US)	Intradepartment email concerning implementation of transgender policy; and coordination of draft DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
4	DHA_00000072-074_UR	1-Feb-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Intradepartment email concerning implementation of transgender policy; and coordination of draft DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
5	DHA_00000075-077_UR	1-Feb-17	Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Intradepartment email concerning implementation of transgender policy; and coordination of draft DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
6	DHA_00000078-080_UR	1-Feb-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Intradepartment email concerning implementation of transgender policy; and coordination of draft DoDI 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
7	DHA_00000081-097_UR	2-Feb-17	Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Mullen, Lawrence E CIV DHA DIR SUPPORT (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Cc: Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
8	DHA_00000098-115_UR	13-Feb-17	Teneza, Brigilda C COL USARMY OSD USMEPCOM (US)	Pelzner, Michael A (Mike) COL USARMY HQDA OTSG (US); Miller, David C Lt Col USAF AFMSA (US); Minarcik, Allison H CIV (US); Klimkowski, Paul Edward CDR USN BUMED FCH VA (US); Mullen, Lawrence E CIV DHA DIR SUPPORT (US); Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
9	DHA_00000116-145_UR	14-Feb-17	Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Cc: Pelzner, Michael A (Mike) COL USARMY HQDA OTSG (US); Miller, David C Lt Col USAF AFMSA (US); Minarcik, Allison H CIV (US); Klimkowski, Paul Edward CDR USN BUMED FCH VA (US); Mullen, Lawrence E CIV DHA DIR SUPPORT (US); Arendt, Christopher P CIV OSD OUSD P-R (US); Kemp, David S CAPT USN OSD USMEPCOM (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
10	DHA_00000148-152_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Soper, Martha P CIV USAF SAF-MR (US); Cc: Drummond, Samuel C (Sam) CIV DODHRA HQ (US); Warren, Dara J Maj USAF AF-SG (US); Downes, Karen M Lt Col USAF SAF-MR (US); Weaver, Frederick C (Chris) Col USAF AF-SG (US); Lennen, Jason J Lt Col USAF AF-SG (US); Grabowski, Douglas N Maj USAF AF-SG (US); Krueger, Mary V COL USARMY HQDA ASA MRA (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

DOCUMENTS WITHHELD IN FULL

Entry No.	Bates Range	Date	Author(s)/Sender(s)	Recipient(s)	Document Description	Basis for Withholding	Withholding Justification
11	DHA_00000153-212_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Soper, Martha P CIV USAF SAF-MR (US); Cc: Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Drummond, Samuel C (Sam) CIV DODHRA HQ (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
12	DHA_00000213-272_UR	24-Jul-14	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Kemp, David S CAPT USN OSD USMEPCOM (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
13	DHA_00000273-279_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Soper, Martha P CIV USAF SAF-MR (US); Cc: Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bentz, Kevin R MAJ USARMY OSD OUSD R (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
14	DHA_00000280-287_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Cc: Soper, Martha P CIV USAF SAF-MR (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
15	DHA_00000288-298_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Teneza, Brigilda C COL USARMY OSD USMEPCOM (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
16	DHA_00000299-359_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	dodmerb1@gmail.com	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
17	DHA_00000360_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Soper, Martha P CIV USAF SAF-MR (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
18	DHA_00000361-423_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Soper, Martha P CIV USAF SAF-MR (US); Cc: Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US); Brown, Gary W LTC USARMY OSD OUSD P-R (US); Lowry, Cheryl L Col USAF AF-SG (US); Miller, David C Lt Col USAF AFMSA (US); Bcc: Weber, John P CIV (US); Najjar, Donna M CIV DHA DHA CS MGT (US); Stinson, Samantha R CIV (US); Auces, Chiquita A MSG USARMY (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
19	DHA_00000424-486_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Dalitsch, Walter W III CAPT USN NAVMED EAST (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
20	DHA_00000487-549_UR	24-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Page, Neil E COL USARMY HQDA OTSG (US); Peltner, Michael A (Mike) COL USARMY NG NGB (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
21	DHA_00000550-562_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Soper, Martha P CIV USAF SAF-MR (US); Krueger, Mary V COL USARMY HQDA ASA MRA (US); Downes, Karen M Lt Col USAF SAF-MR (US); Wellman, Aaron C LTC USARMY OSD OUSD P-R (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Cc: Kemp, David S CAPT USN OSD USMEPCOM (US); Lowry, Cheryl L Col USAF AF-SG (US); Miller, David C Lt Col USAF AFMSA (US); Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US); Brown, Gary W LTC USARMY OSD OUSD P-R (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
22	DHA_00000563-576_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Mullen, Lawrence E CIV DHA DIR SUPPORT (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Weber, John P CIV (US); Najjar, Donna M CIV DHA DHA CS MGT (US); Stinson, Samantha R CIV (US); Auces, Chiquita A MSG USARMY (US); Bertrand, Matthew J CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

DOCUMENTS WITHHELD IN FULL

Entry No.	Bates Range	Date	Author(s)/Sender(s)	Recipient(s)	Document Description	Basis for Withholding	Withholding Justification	
23	DHA_00000577-590_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	dodmerb1@gmail.com	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.	
24	DHA_00000591-653_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	dodmerb1@gmail.com	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.	
25	DHA_00000654-664_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US); Auces, Chiquita A MSG USARMY (US); Bertrand, Matthew J CIV (US)	Krueger, Mary V COL USARMY HQDA ASA MRA (US); Cc: Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Soper, Martha P CIV USAF SAF-MR (US); Bentz, Kevin R MAJ USARMY OSD OUSD P-R (US); Wellman, Aaron C LTC USARMY OSD OUSD P-R (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Brown, Gary W LTC USARMY OSD OUSD P-R (US); Lowry, Cheryl L Col USAF AF-SG (US); Miller, David C Lt Col USAF AFMSA (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Najjar, Donna M CIV DHA DHA CS MGT (US); Weber, John P CIV (US); Stinson, Samantha R CIV (US); Auces, Chiquita A MSG USARMY (US); Bertrand, Matthew J CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
26	DHA_00000666-670_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Page, Neil E COL USARMY HQDA OTSG (US); Cc: Krueger, Mary V COL USARMY HQDA ASA MRA (US); Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Place, Michael L COL USARMY MEDCOM MAMC (US); Soper, Martha P CIV USAF SAF-MR (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.	
27	DHA_00000671-674_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US); Weber, John P CIV (US); Bertrand, Matthew J CIV (US); MSG Chiquita Auces; Lowry, Cheryl L Col USAF AF-SG (US)	Krueger, Mary V COL USARMY HQDA ASA MRA (US); Cc: Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Page, Neil E COL USARMY HQDA OTSG (US); Place, Michael L COL USARMY MEDCOM MAMC (US); Soper, Martha P CIV USAF SAF-MR (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Najjar, Donna M CIV DHA DHA CS MGT (US); Stinson, Samantha R CIV (US); Weber, John P CIV (US); Bertrand, Matthew J CIV (US); MSG Chiquita Auces; Lowry, Cheryl L Col USAF AF-SG (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
28	DHA_00000675-679_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US)	Krueger, Mary V COL USARMY HQDA ASA MRA (US); Cc: Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Page, Neil E COL USARMY HQDA OTSG (US); Place, Michael L COL USARMY MEDCOM MAMC (US); Soper, Martha P CIV USAF SAF-MR (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Najjar, Donna M CIV DHA DHA CS MGT (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
29	DHA_00000680-683_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US)	Krueger, Mary V COL USARMY HQDA ASA MRA (US); Cc: Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Page, Neil E COL USARMY HQDA OTSG (US); Place, Michael L COL USARMY MEDCOM MAMC (US); Soper, Martha P CIV USAF SAF-MR (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Lowry, Cheryl L Col USAF AF-SG (US); Najjar, Donna M CIV DHA DHA CS MGT (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
30	DHA_00000684-689_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.	
31	DHA_00000690-694_UR	25-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.	
32	DHA_00000695-701_UR	26-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Stinson, Samantha R CIV (US)	Page, Neil E COL USARMY HQDA OTSG (US); Cc: Soper, Martha P CIV USAF SAF-MR (US); Krueger, Mary V COL USARMY HQDA ASA MRA (US); Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Place, Michael L COL USARMY MEDCOM MAMC (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Lowry, Cheryl L Col USAF AF-SG (US); Miller, David C Lt Col USAF AFMSA (US); Najjar, Donna M CIV DHA DHA CS MGT (US); Weber, John P CIV (US); Stinson, Samantha R CIV (US); Green, Alphonso D CIV USARMY HQDA DCS G-1 (US); Auces, Chiquita A MSG USARMY (US); Dowling, Glenn A CDR USN DHA (US); Kuhn, Kenneth D LTC USARMY USAF USAFA (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.



DOCUMENTS WITHHELD IN FULL

Entry No.	Bates Range	Date	Author(s)/Sender(s)	Recipient(s)	Document Description	Basis for Withholding	Withholding Justification
33	DHA_00000702-710_UR	26-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Mullen, Lawrence E CIV DHA DIR SUPPORT (US); Bcc: Stinson, Samantha R CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
34	DHA_00000711-723_UR	26-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Kuhn, Kenneth D LTC USARMY USAF USAFA (US); Dowling, Glenn A CDR USN DHA (US); Najjar, Donna M CIV DHA DHA CS MGT (US); Weber, John P CIV (US); Bertrand, Matthew J CIV (US); Auces, Chiquita A MSG USARMY (US); Bcc: Stinson, Samantha R CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
35	DHA_00000724-731_UR	26-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Krueger, Mary V COL USARMY HQDA ASA MRA (US); Cc: Page, Neil E COL USARMY HQDA OTSG (US); Soper, Martha P CIV USAF SAF-MR (US); Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Place, Michael L COL USARMY MEDCOM MAMC (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US); Bcc: Najjar, Donna M CIV DHA DHA CS MGT (US); Dalitsch, Walter W III CAPT USN NAVMED EAST (US); Stinson, Samantha R CIV (US); Weber, John P CIV (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
36	DHA_00000732-741_UR	26-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	thebohreffect@gmail.com; Glenn A CDR USN Dowling (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
37	DHA_00000742-751_UR	26-Jul-17	Mullen, Lawrence E CIV DHA DIR SUPPORT (US)	Krueger, Mary V COL USARMY HQDA ASA MRA (US); Cc: Place, Michael L COL USARMY MEDCOM MAMC (US); Page, Neil E COL USARMY HQDA OTSG (US); Soper, Martha P CIV USAF SAF-MR (US); Pelzner, Michael A (Mike) COL USARMY NG NGB (US); Teneza, Brigilda C COL USARMY OSD USMEPCOM (US); Kemp, David S CAPT USN OSD USMEPCOM (US)	Intradepartment email concerning implementation of transgender policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the services and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

\* Denotes Attorney

# **Exhibit 18**

Navy's Fourth Production - Documents Redacted for Privilege

Beg Bates	End Bates	Date	Author	Recipient	Title	Privilege(s)	Privilege Basis
Navy_00050593	Navy_00050596	12/14/2017 17:53			TG Dissenting opinion (Dec 14 Dec 2017)	Privileged; Deliberative Process Privilege	Predecisional and deliberative internal Agency correspondence created for the purpose of evaluating proposed regulatory change. Memo for the Record - Dissenting Opinion from Panel of Experts Recommendation.

# **Exhibit 19**



Ryan B. Parker  
Senior Trial Counsel

Tel: (202) 514-4336  
Email: ryan.parker@usdoj.ov

April 19, 2018

By Email

David M. Zions  
Carolyn F. Corwin  
Marianne F. Kies  
COVINGTON & BURLING LLP

*Counsel for Plaintiffs*

Re: *Stone v. Trump* – Notice of Recall for Inadvertently Disclosed Privileged Documents

Dear Counsel,

We write concerning certain privileged documents that were inadvertently disclosed during our productions. First, as we indicated during the deposition of Colonel Mary Krueger on April 17, 2018, the Army document bearing Bates number Army\_10004597.0001 (USDOE00109420 through USDOE00109453) was inadvertently and mistakenly included in our March 20, 2018 production in *Doe v. Trump*. In addition, we have learned that redactions on two additional copies of this briefing, bearing Bates numbers Navy\_00040984 through Navy\_00041017 and Navy\_00041020 through Navy\_00041052, were rendered incorrectly on the images produced to Plaintiffs.

The briefing is a 34-page PowerPoint slide deck presented at the October 2, 2018 meeting of the transgender personnel policy working group. The slide deck is marked in red as “Not for Distribution//Draft Deliberative Document.” It contains deliberative information including, among other things, guidance to the working group, suggested policy options, and the anticipated timeline of the policy making process. The slide deck plainly reflects deliberative guidance given to and proposals discussed by the transgender policy working group and, as such, is protected by the deliberative process privilege.

The disclosure of these documents was mistaken and inadvertent. Defendants withheld this slide deck in its entirety at least ten times in earlier productions: Army\_10001850.0001; Army\_10002447; Army\_10002448; Army\_10002449; Army\_10005269.0001; Army\_10005271.0001; Army\_10005339.0001; DoD00002147; DoD00006212; and DoD00097747.

Second, we have determined that a single slide in the October 2, 2018 slide deck was inadvertently produced to Plaintiffs in *Doe v. Trump* as the Army document bearing Bates number Army\_10000291. At least four other copies of this single slide were withheld as privileged by defendants: Army\_10001011.0001; Army\_10003107.0001; Army\_10005121; and Army\_10005160. For the same reasons as the complete slide deck, this document is protected by the deliberative process privilege.

Third, an Air Force document bearing Bates numbers AF\_00000595 through AF\_00000597 was inadvertently and mistakenly included in our February 9, 2018 production in this case.

This document consists of an email dated December 8, 2017. The email is protected under the deliberative process privilege. The email was sent to Major General Robert D. LaBrutta, Director of Military Force Management Policy, Deputy Chief of Staff for Manpower, Personnel and Services for the Air Force, as well as other Air Force personnel. Major General LaBrutta is responsible for establishing force management policies for the Air Force. The email was sent by Colonel William Fischer, who was reporting the ongoing deliberations of the transgender personnel policy working group and the panel of experts. The email plainly reflects the advice, deliberations, and recommendations of the transgender policy working groups and the panel of experts and, as such, is protected by the deliberative process privilege.

The disclosure was inadvertent. Two other emails in this chain, *see* AF\_00000542 – AF\_00000543, AF\_00002547 – AF\_00002548, and a duplicate of the disclosed email, *see* AF\_00002953 – AF\_00002955, were produced with redactions.

Pursuant to the provisions of part III of the stipulated Fed. R. Evid. 502(D) order, ECF No. 110, we request that you immediately destroy all copies (electronic and hardcopy) in your possession of documents bearing Bates numbers (1) Army\_10004597.0001, (2) Navy\_00040984 through Navy\_00041017, (3) Navy\_00041020 through Navy\_00041052, (4) Army\_10000291, and (5) AF\_00000595 through AF\_00000597. We also ask that you comply with the order's requirements to certify that all copies of the document have been destroyed. We also request that you remove from your litigation support database the images and metadata associated with the documents bearing these Bates numbers.

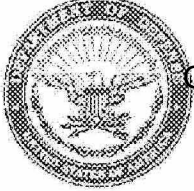
Thank you for your cooperation.

Sincerely,

Ryan B. Parker

Copies:  
Daniel McFadden - FOLEY HOAG LLP

# **Exhibit 20**



9/14/17

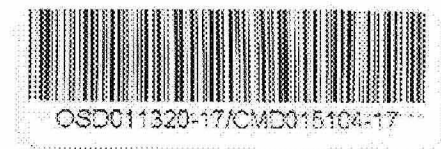
MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
COMMANDANT, U.S. COAST GUARD  
DEPUTY CHIEF MANAGEMENT OFFICER  
CHIEF, NATIONAL GUARD BUREAU  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR OF COST ASSESSMENT AND 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.

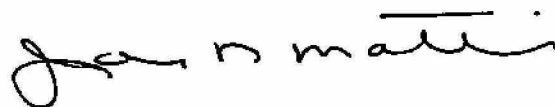
Medical Care: The Presidential Memorandum halts the use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, effective March 23, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign 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

# **Exhibit 21**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, ) Civil Action  
JANE DOE 3, JANE DOE 4, ) No. 17-cv-1597 (CKK)  
JANE DOE 5, JOHN DOE 1, )  
REGAN V. KIBBY, and )  
DYLAN KOHERE, )

Plaintiffs, )

v. )

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

Defendants. )

-----)  
Complete caption on Page 2.

- - -  
Thursday, February 1, 2018  
- - -

Deposition of MARTIE SOPER, taken at the offices  
of Foley Hoag LLP, 1717 K Street NW, Washington, D.C.,  
beginning at 9:13 a.m., before Nancy J. Martin, a  
Registered Merit Reporter, Certified Shorthand  
Reporter.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
Civil Case No. 17-cv-1597 (CKK)

JANE DOE 1, JANE DOE 2, JANE DOE 3, )  
JANE DOE 4, JANE DOE 5, JOHN DOE 1, )  
REGAN V. KIBBY, and DYLAN KOHERE, )

Plaintiffs, )

v. )

DONALD J. TRUMP, in his official )  
capacity as President of the )  
United States; JAMES N. MATTIS, in his )  
official capacity as Secretary of )  
Defense; JOSEPH F. DUNFORD, JR., in his )  
official capacity as Chairman of the )  
Joint Chiefs of Staff; the )  
UNITED STATES DEPARTMENT OF THE ARMY; )  
RYAN D. MCCARTHY, in his official )  
capacity as Secretary of the Army; )  
the UNITED STATES DEPARTMENT OF THE )  
NAVY; RICHARD V. SPENCER, in his )  
official capacity as Secretary of the )  
Navy; the UNITED STATES DEPARTMENT OF )  
THE AIR FORCE; HEATHER A. WILSON, in )  
her official capacity as Secretary of )  
the Air Force; the UNITED STATES )  
COAST GUARD; ELAINE C. DUKE, in her )  
official capacity as Secretary of )  
Homeland Security; the DEFENSE HEALTH )  
AGENCY; RAQUEL C. BONO, in her official )  
capacity as Director of the Defense )  
Health Agency; and the )  
UNITED STATES OF AMERICA, )

Defendants. )

-----)

1       A P P E A R A N C E S :

2

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LAUREN GODLES MILGROOM, ATTORNEY AT LAW

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3 COVINGTON & BURLING LLP  
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8 (202) 662-5780  
9 pkomorowski@cov.com  
10 Representing the Plaintiffs

11 U.S. DEPARTMENT OF JUSTICE  
12 CIVIL DIVISION  
13 BY: RYAN BRADLEY PARKER, ESQ.  
14 ANDREW E. CARMICHAEL, ESQ.  
15 MATTHEW SKURNIK, ESQ.  
16 20 Massachusetts Avenue N.W.  
17 Washington, D.C. 20001  
18 (202) 514-4336  
19 ryan.parker@usdoj.gov  
20 andrew.e.carmichael@usdoj.gov  
21 matthew.skurnik@usdoj.gov

22  
23 ALSO PRESENT:

24 COLONEL LAURA BARCHICK, USAF JAG  
25 LT. COLONEL FELIX SUTANTO, USAF JAG  
LT. COLONEL CHARLES GARTLAND, USAF JAG

1 WASHINGTON, D.C., THURSDAY, FEBRUARY 1, 2018;

2 9:31 A.M.

3 - - -

4 MARTIE SOPER,

5 having been first duly sworn,

6 was examined and testified as follows:

7

8 EXAMINATION

9 BY MS. LAPORTE:

10 Q. All right, Ms. Soper. Good morning.

11 A. Good morning.

12 Q. And thank you for making yourself available  
13 today.

14 Have you ever had your deposition taken  
15 before?

16 A. No, ma'am.

17 Q. Okay. Well, let me explain a little bit  
18 about how it's going to go because it's quite  
19 different from an ordinary conversation.

20 During the deposition I'll be asking you  
21 questions, and you, hopefully, will be answering them,  
22 and our stenographer will be recording everything that  
23 either one of us says.

24 And what that means is that it's important  
25 that we not talk over each other. So if you could

1           So this is a directive-type memorandum  
2           stating to the services, "Go forth and do and develop  
3           your additional policies." So this is not the product  
4           of our working group.

5           Q. Okay. Was any -- do you know what the  
6           process was by which the product of your working group  
7           affected, for example, the timing of this  
8           announcement?

9           MR. PARKER: I'm going to object to the  
10          extent it calls for deliberative material that's  
11          protected by the deliberative process privilege.

12          MS. LAPORTE: Okay. Are you instructing her  
13          not to answer that question?

14          MR. PARKER: I'm instructing her not to  
15          answer to the extent you are asking about  
16          recommendations that came to the group from the  
17          deliberative process that was undertaken by the panel  
18          in making recommendations regarding both the DTM and  
19          the DoDI that have been discussed in the deposition.

20          BY MS. LAPORTE:

21          Q. So for the moment all I'm trying to  
22          understand is how procedurally the work of the working  
23          group fed into this announcement that is Exhibit 5.  
24          In other words, I'm not trying to understand all the  
25          details of what you recommended. I'm just trying to



1 understand whether Exhibit 5 reflects the Secretary of  
2 Defense taking into account recommendations of the  
3 working group or whether these were not -- whether  
4 your recommendations were not feeding into the  
5 development of this announcement.

6 MR. PARKER: Objection. To the extent you're  
7 asking the witness whether this reflects the work  
8 product or the recommendations of the working group,  
9 the answer to that question would be protected by the  
10 deliberative process privilege.

11 MS. LAPORTE: And that's not what I'm asking.  
12 I'm just trying to understand the work flow here.

13 Q. So can you explain that in terms of how the  
14 work that the working group did fed into Exhibit 5  
15 without getting into the detail of the policies that  
16 you recommended?

17 A. I don't know the work flow, ma'am. I don't  
18 know the part that we submitted and how it got  
19 approved by the Secretary of Defense.

20 Q. Were you aware that Secretary Carter was  
21 going to make that announcement on June 30 before it  
22 happened?

23 A. No, ma'am.

24 Q. Okay. What -- so you mentioned that you were  
25 involved in a working group relating to accessions. I

1 think you referred to it specifically as an accessions  
2 group within the working group. Do you recall that?

3 A. It's the accessions medical standards working  
4 group, yes, ma'am.

5 Q. Yes. Okay. And did that actually relate to  
6 the specifics of the accessions policy?

7 MR. PARKER: I'm going to object. The term  
8 "relate to" is a little vague. Can you specify so  
9 that I can decide whether there's a privilege  
10 objection? What do you mean by "relate to"?

11 BY MS. LAPORTE:

12 Q. When you were on the accessions medical  
13 standards working group, were you working on the  
14 standards or procedures that would be required in  
15 order for transgender people to accede to the  
16 military? And you can answer that "yes" or "no."

17 A. Yes.

18 Q. What process did you follow to determine what  
19 kind of standards and practices would be needed to  
20 permit transgender applicants to accede to the  
21 military?

22 MR. PARKER: I'm going to object to the  
23 extent this calls for information related to the types  
24 of discussions or the substantive recommendations that  
25 would come out of the panel or the subcommittee that

1 you participated on, on deliberative process grounds.

2 MS. LAPORTE: All right. Let me move on to  
3 another topic then.

4 Q. I have heard that you were involved in a  
5 hotline relating to issues of transgender service in  
6 the military. Is that accurate, or is that an  
7 informal way of referring to some of the  
8 responsibilities that you've had that have more fancy  
9 titles?

10 A. I would ask you to clarify what you mean by  
11 "hotline."

12 Q. Okay. So it sounds like "hotline" is not a  
13 term that you use?

14 A. No, ma'am.

15 Q. Okay.

16 A. Sounds like the red phone, and I don't do  
17 that.

18 Q. And you don't work on the red phone?

19 A. No, ma'am.

20 MS. LAPORTE: Well, in that case, let me...  
21 (Deposition Exhibit 6 was marked for  
22 identification.)

23 BY MS. LAPORTE:

24 Q. Okay. So Exhibit 6 should be labeled  
25 USDOE0018301 and -302. Is that what you have before

1 study group of 691, and then the mental health control  
2 group of 3,500, 3,400. So what was confusing is the  
3 picture they were trying to paint with the information  
4 here. It wasn't very clear on where we were going.

5 Q. Were there any other aspects of it that you  
6 found confusing?

7 A. Some of the information in the time lines  
8 that were presented.

9 Q. When you're talking about the time lines,  
10 you're referring to the deployment statistics?

11 A. Well, on Page 11, this top number says  
12 "Service members were a primary diagnosis of gender  
13 dysphoria," and it has the number 994.

14 And then underneath it says, "Deployed in  
15 support of OEF/OIF" and "OND." Gender dysphoria  
16 didn't exist during those time lines. So we're not  
17 really sure what they're trying to say here at this  
18 time.

19 Q. Okay. Did you have any discussion with the  
20 people who were in attendance when Dr. Adirim  
21 presented this material? Did you have any discussion  
22 with them after the fact?

23 A. No, ma'am.

24 Q. Are you aware of the panel of experts having  
25 reached any decisions about accessions?

1 MR. PARKER: I'm going to just object to the  
2 extent this is more than a "yes" or "no" question.

3 BY MS. LAPORTE:

4 Q. You can answer that "yes" or "no."

5 A. Yes.

6 Q. So you're aware that they have reached some  
7 decisions about accessions?

8 A. I am aware that they have provided  
9 recommendations.

10 Q. Okay. And did they vote on the  
11 recommendations that they were going to be making?

12 A. I have no idea.

13 Q. Okay. Is it true that they recommended in  
14 favor of accessing only transgender people who will  
15 not seek transition to the preferred gender?

16 MR. PARKER: Objection. The answer to that  
17 question calls for deliberative material.

18 MS. LAPORTE: Well, I think that once they're  
19 done deliberating and they've voted on it, it's not  
20 really deliberative anymore.

21 MR. PARKER: You're asking for the  
22 recommendation of a panel for a decision process  
23 that's ongoing. There hasn't been a final decision.  
24 So it's both predecisional and deliberative.

25 BY MS. LAPORTE:

1 Q. Well, once they've voted, I don't think that  
2 it's deliberative at all. It just reflects the final  
3 decision that they've arrived at.

4 MR. PARKER: The witness testified that the  
5 panel has made a recommendation and an ongoing  
6 decision process. A recommendation would be a  
7 deliberative statement or a recommendation, and it  
8 would be predecisional because a final decision hasn't  
9 been made on a new policy.

10 BY MS. LAPORTE:

11 Q. Are you aware -- this is just "yes" or  
12 "no" -- of what the recommendations are that the panel  
13 of experts has made to the Secretary of Defense?

14 A. No.

15 Q. Are you aware of what their recommendations  
16 about accessions have been, "yes" or "no"?

17 A. No.

18 Q. What about the handling of people who are  
19 already in service and who identify as transgender?  
20 Have you heard, yes or no, what their decisions have  
21 been with respect to those people?

22 A. No.

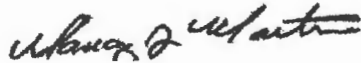
23 MS. LAPORTE: All right. Why don't we take a  
24 brief break.

25 (A recess was taken from 4:15 p.m.)

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C E R T I F I C A T E

I do hereby certify that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.



Nancy J. Martin, RMR, CSR

Dated: February 5, 2018

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying shorthand reporter.)

# **Exhibit 22**



# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
97	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation and included assessments of litigation risk; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning transgender individuals' service in the military and the 2016 Secretary of Defense Memorandum; emails and documents reflecting White House Counsel's Office legal deliberations concerning issues surrounding transgender individuals' service in the military, which predate a policy decision on transgender individuals' service in the military
153	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
85	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding policies governing the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the 8/25/2017 Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced (the Doe Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
343	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the implementation of the 8/25 Presidential Memorandum and regarding pending litigation	8/26/2017-1/9/2018	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding pending litigation and regarding the implementation of the 8/25/2017 Presidential Memorandum; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum and legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
161	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel to deliberate regarding the formulation, form and legality, and implementation of the 8/25/2017 Presidential Memorandum, including drafts of the 8/25/2017 Presidential Memorandum	6/30/2017-12/4/2017	WHCO and OLC Attorneys	WHCO and OLC Attorneys (in some cases, attorneys from DOD or from other DOJ components are also recipients or cc:ed)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation, or after litigation had commenced, assessing the form and legality of the 8/25/2017 Presidential Memorandum and implementation thereof; emails and documents to and from attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
188	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division regarding pending litigation	8/9/2017-1/11/2018	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys during pending litigation regarding litigation strategy, updates, and filings; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division seeking and providing confidential legal advice concerning pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
31	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys and DOD Attorneys	WHCO Attorneys and DOD Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning policies governing transgender individuals' service in the military and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding policies governing transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
44	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted in anticipation of litigation, regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
19	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted after litigation had commenced (the Doe Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum



# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
8	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military	1/20/2017-7/25/2017	WH Communications Staffers or other EOP Staffers (including some attorneys)	WH Communications Staffers or other EOP Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
98	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military and his 7/26/2017 Tweet	7/26/2017-8/25/2017	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies, as presented in his 7/26/2017 Tweet, regarding the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation, or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
70	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum	8/26/2017-12/29/2017	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
13	Emails and documents in which members of the President's National Security Council Communications staff and other staffers within the Executive Office of the President and the Department of Defense deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military	1/20/2017-7/25/2017	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
117	Emails and documents in which members of the President's National Security Council Communications staff and other staffers within the Executive Office of the President or the Department of Defense deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military and his 7/26/2017 Tweet	7/26/2017-8/25/2017	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies, as presented in his 7/26/2017 Tweet, with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
163	Emails and documents in which members of the National Security Council's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum	8/26/2017-1/8/2018	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
93	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding military readiness and the service of transgender individuals in the military before Congress, in order to advise the President re: same	1/20/2017-7/25/2017	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents drafted by members of the President's Legislative Affairs team to deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re: aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
70	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding military readiness and the service of transgender individuals in the military before Congress, in order to advise the President re: same	7/26/2017-8/25/2017	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re: aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
29	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding the service of transgender individuals in the military before Congress, in order to advise the President re: same	8/26/2017-1/18/2018	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re: aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
32	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re: same	1/20/2017-7/25/2017	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to a policy recommendation to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military

# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
56	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re: same	7/26/2017-8/25/2017	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
11	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re: same	8/26/2017-1/4/2018	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
62	(Generally pre-decisional) emails and documents drafted by senior members and staff of the National Security Council in order to advise the President regarding the formulation and implementation of his policy concerning the service of transgender individuals in the military and to deliberate re: same	1/20/2017-7/25/2017	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the impact of the service of transgender individuals on military lethality and readiness, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
104	(Generally pre-decisional) emails and documents drafted by senior members of the National Security Council in order to advise the President regarding the formulation and implementation of his policy concerning the service of transgender individuals in the military and to deliberate re: same	7/26/2017-8/25/2017	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the impact of the service of transgender individuals on military lethality and readiness, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
6	(Generally pre-decisional) emails and documents drafted by senior members of the National Security Council in order to advise the President regarding the implementation of his policy concerning the service of transgender individuals in the military and to deliberate re: same	8/26/2017-1/4/2018	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the implementation of his policy concerning the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
8	Emails and documents drafted by attorneys within the White House Counsel's Office, the Executive Office of the President's Office of Administration, and the Department of Justice regarding discovery in the four pending cases challenging the 8/25/2017 Presidential Memorandum	11/3/2017-1/8/2018	Attorneys from WHCO, OA, or DOJ	Attorneys from WHCO, OA, or DOJ	Work Product (in many cases, also covered by Attorney Client Privilege or Deliberative Process Privilege)	Emails and documents drafted in anticipation of litigation or for pending litigation, as the attorneys within the White House Counsel's Office, the Executive Office of the President's Office of Administration, or the Department of Justice discussed how to meet their discovery obligations in the four pending suits challenging the 8/25/2017 Presidential Memorandum; emails and documents from Attorneys from WHCO, OA, or DOJ providing or seeking confidential legal advice concerning the four pending suits; emails and documents reflecting WHCO deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
113	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	1/20/2017-7/25/2017	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
109	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	7/26/2017-8/25/2018	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
185	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	8/26/2017-1/10/2018	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
15	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with DOD staff regarding interactions with Congress (and members of Congress) and advancing the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military before Congress	7/11/2017-9/12/2017	Members of the President's Legislative Affairs team and/or DOD staff	Members of the President's Legislative Affairs team and/or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with DOD regarding legislative efforts impacting the service of transgender individuals in the military
26	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military	1/25/2017-7/25/2017	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President)

# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
35	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military	7/26/2017-1/3/2018	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President)
26	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality and the service of transgender individuals in the military	1/20/2017-7/25/2017	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
27	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality and the service of transgender individuals in the military	7/26/2017-8/25/2017	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
65	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality, the service of transgender individuals in the military, and implementation of the 8/25/2017 Presidential Memorandum	8/26/2017-1/9/2018	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents reflecting confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
67	Emails and documents touching on military service by transgender individuals drafted by members of the White House Staff, National Security Council Staff, and agency staff as part of the Staff Secretary or National Security Council Executive Secretary process in order to advise the President or to produce a document for Presidential signing or review	6/16/2017-9/19/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Presidential Communications Privilege (in most cases, also covered by Deliberative Process Privilege; in some cases, also covered by Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
34	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including materials that were ultimately reviewed by the President and records of his briefings	1/20/2017-7/25/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
37	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including drafts of the 8/25/2017 Presidential Memorandum, including materials that were ultimately reviewed by the President and records of his briefings	7/26/2017-8/25/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
14	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including materials that were ultimately reviewed by the President and records of his briefings.	8/26/2017-10/6/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
50	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-7/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
251	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	7/26/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
29	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	8/26/2017-1/11/2018	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President

# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
19	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
2	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	8/26/2017-1/11/2018	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President

\* Document tallies do not include attachments

\*\* Although some documents fall into multiple categories, each document is tallied as only belonging in one category to more accurately reflect volume of documents at issue.

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPEL  
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

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## INTRODUCTION

After serving broad discovery requests touching on numerous policies and decisions made by the President and the Department of Defense (“DoD”) related to military service by transgender persons, Plaintiffs now seek a sweeping ruling from the Court that the deliberative process privilege does not apply, purely as a matter of law, to documents or discovery responses withheld on the basis of that privilege. As explained below, such a broad-brush ruling would be contrary to law. The deliberative process privilege is a critical protection to enable effective governmental decision-making, and the Court cannot set it aside *per se* as a matter of law in this case.

As a threshold matter, however, the Court should not even issue a ruling on the applicability of the deliberative process privilege in this case because significant events have occurred since Plaintiffs served the discovery requests at issue that could obviate the need for discovery altogether—or, at the least, impact the outcome of the motion to compel. Indeed, there are no fewer than five pending motions that address these subsequent events. To begin, much of the discovery Plaintiffs seek is related to a policy challenged in Plaintiffs’ original complaint—the President’s August 2017 Memorandum addressing military service by transgender individuals—that has been expressly revoked. While Plaintiffs now seek to compel all deliberative documents and information related to that August 2017 Memorandum (and preceding statements by the President on Twitter), two of Defendants’ currently pending motions (to dissolve a prior preliminary injunction and to dismiss the original claims) question whether the Court continues to have jurisdiction in this case. Specifically, Defendants contend that any challenge to the revoked August 2017 policy is moot, which should obviate the need for any discovery related to that policy.

In addition, after Plaintiffs amended their complaint to challenge the Department of Defense’s new March 2018 policy related to military service by transgender individuals, Defendants also sought dismissal on the grounds that Plaintiffs lack standing to challenge the new policy and have failed to state a valid claim on the merits as to that policy. In the alternative, Defendants sought summary

judgment based on an extensive administrative record of the new policy. Defendants also moved to stay all discovery in this case, in part because numerous motions were pending that would impact the scope of discovery and because judicial review going forward should be limited to the administrative record.<sup>1</sup> Separately, Defendants have also moved to dismiss the President as a Defendant, which would also impact whether the discovery Plaintiffs seek of presidential materials, at issue in the motion to compel, is appropriate at all. All of these issues remain pending before the district court, and all of them bear on whether or to what extent any discovery should occur. Moreover, on May 25, 2018, Plaintiffs themselves moved for summary judgment, contending there is no genuine dispute as to any material fact to preclude the entry of judgment in their favor. Their filing of that motion implicitly acknowledges that they view discovery as unnecessary in this case.

In these circumstances, Plaintiffs' demand that the deliberative process privilege be set aside as a matter of law—not only as to all materials related to the President's deliberations leading to the now-revoked August 2017 Memorandum, but also as to all deliberative documents related to DoD's new policy issued in March 2018—would, at the very least, be highly premature. But even on the merits, the notion that the deliberative process privilege does not apply to deliberations that led to the actions and policies that Plaintiffs seek to put at issue in this case is otherwise plainly meritless and should be denied.

### **BACKGROUND**

Defendants first set forth the background of the policy changes at issue and the procedural history of this case in order to provide the Court with the full context in which the pending motion to compel arises.

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<sup>1</sup> See Defs.' Mot. 5–6, Dkt. 121; Defs.' Reply 5–6, Dkt. 146. The Government filed the administrative record on April 20, 2018. See Dkt. 133. The administrative record is numbered "Administrative\_Record\_000001—003075," but this brief cites to the record as "AR\_\_."

**I. Department of Defense Policy Decisions Prior to this Litigation**

For decades prior to the onset of this litigation, the Department of Defense maintained a long-standing policy, rooted in medical concerns, that presumptively disqualified transgender persons from military service. As explained in its recent report on the issue, the Department “has historically taken a conservative and cautious approach” in setting standards for military service given the unique demands of military life. *See* DoD Report and Recommendations (“Report”) 3, Dkt. 120-2. “Most mental health conditions” are “automatically disqualifying” absent a waiver, even when an individual no longer suffers from that condition. *Id.* at 20. In general, the military has aligned these disqualifying conditions with the ones listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). *Id.* at 10. Military standards for decades therefore presumptively disqualified individuals with a history of “transsexualism” from military service, consistent with the inclusion of that term in the third edition of the DSM. *Id.* at 7, 10–11.<sup>2</sup>

In 2015, then-Secretary of Defense Ashton Carter ordered the creation of a working group “to study the policy and readiness implications of welcoming transgender persons to serve openly,” and instructed it to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness.” *Id.* at 13. As part of this review, DoD commissioned the RAND National Defense Research Institute to conduct a study. *Id.* The resulting

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<sup>2</sup> In 2013, the APA published a new edition of the DSM, which replaced the term “gender identity disorder” (itself a replacement for “transsexualism”) with “gender dysphoria.” Report 10, 12. In doing so, the APA explained that a subset of transgender people suffer from the medical condition of gender dysphoria, a “marked incongruence between one’s experience/expressed gender and assigned gender, of at least 6 months duration” that is “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.* at 12–13; *see id.* at 20–21; *see also* Op. 8 n.9, Dkt. 85 (recognizing that “some transgender individuals experience significant distress due to the gender-sex mismatch and are considered to have a medical condition called gender dysphoria”). Individuals diagnosed with gender dysphoria sometimes transition genders—including through cross-sex hormone therapy or sex-reassignment surgery—to treat this condition. AR114–15, 128.

RAND report concluded that the proposed policy change would have “an adverse impact on health care utilization and costs, readiness, and unit cohesion,” but that these harms would be “‘negligible’ and ‘marginal’ because of the small estimated number” of transgender servicemembers relative to the size of the armed forces as a whole. *Id.* at 14; *see* AR102–03, 145–48, 150, 152–53, 172–73.

After this review, Secretary Carter ordered the Defense Department on June 30, 2016, to implement various changes to its policies (hereinafter, the “Carter policy”). First, the Department had until July 1, 2017, to revise its accession standards. Report 14. Under this revision, a history of “gender dysphoria,” “medical treatment associated with gender transition,” or “sex reassignment or genital reconstruction surgery” would remain disqualifying unless an applicant provided a certificate from a licensed medical provider attesting that the applicant had been stable or free from associated complications for 18 months. *Id.* at 15. Second, and effective immediately, current service members could not be discharged “solely on the basis of their gender identity” or their “expressed intent to transition genders,” AR323, but instead, if diagnosed with gender dysphoria, could transition genders, Report 14. Transgender service members who did not meet the clinical criteria for gender dysphoria, however, had to continue to serve in their biological sex. *Id.* at 15.

On June 30, 2017, the day before the Carter accession standards were set to take effect, Secretary of Defense Mattis, on the recommendation of the services and in the exercise of his discretion, decided that it was “necessary to defer” those standards until January 1, 2018, so that the military could “evaluate more carefully” the effect of accessions by transgender individuals “on readiness and lethality.” AR326. Without “presuppos[ing] the outcome,” he ordered a five-month study that would “include all relevant considerations” and give him “the views of the military leadership and of the senior civilian officials who are now arriving in the Department.” *Id.*

While this study was ongoing, the President stated on Twitter on July 26, 2017, that the government “will not accept or allow Transgender individuals to serve in any capacity in the U.S.

Military.” *See* Op. 10, Dkt. 85. He then issued a memorandum on August 25, 2017, explaining that, in his judgment, former-Secretary Carter had “failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy”—which generally disqualified transgender individuals from service—“would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” AR327. The President therefore called for “further study” to ensure that implementation of the Carter policy “would not have those negative effects.” *Id.* In the interim, he directed the military to “return to the longstanding policy” on “service by transgender individuals . . . until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have the negative effects discussed.” AR327–28. The President also ordered the Secretary of Defense to prepare a “plan for implementing” this directive by February 2018 that would also “determine how to address transgender individuals currently serving.” AR328. The President stressed, however, that the Secretary of Defense, after consultation with the Secretary of Homeland Security, “may advise [him] at any time, in writing, that a change to this policy is warranted.” *Id.* Thereafter, on September 14, 2017, Secretary Mattis established a Panel of Experts to “conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members.” Report 17. The Panel consisted of senior military members who had “the statutory responsibility to organize, train, and equip military forces” and were “uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force.” *Id.* at 18; *see also* AR330.

## **II. This Litigation and Subsequent Policy Decisions by the Department of Defense**

On August 28, 2017, Plaintiffs filed their complaint, which they amended on September 14, 2017. *See* Compl., Dkt. 1; Am. Compl., Dkt. 39. Plaintiffs alleged that the President’s August 2017 Memorandum violated their equal protection and substantive due process rights under the Fifth Amendment to the Constitution, and also violated 10 U.S.C. § 1074. Am. Compl. ¶¶ 135–69. Plaintiffs also filed a motion for a preliminary injunction, and Defendants moved to dismiss the

amended complaint. *See* Pls.’ Mot., Dkt. 40; Defs.’ Mot., Dkt. 52.

On November 21, 2017, the Court dismissed the alleged statutory violation, but otherwise denied Defendants’ motion to dismiss the first amended complaint. *Op.*, Dkt. 85. It also granted Plaintiffs’ motion for a preliminary injunction. *Id.* Although the Court stated that it “does not disagree” with Defendants’ argument that “deference is owed to military personnel decisions and the military’s policymaking process,” the Court found that Plaintiffs demonstrated a likelihood of success on the merits of their constitutional challenges to the President’s August 2017 Memorandum based upon the “circumstances surrounding the President’s announcement and the departure from normal procedure.” *Id.* at 43. The Court also “found persuasive the D.C. Court’s ruling for applying intermediate scrutiny” to Plaintiffs’ challenge to the August 2017 Presidential Memorandum and concluded that the directives in that memorandum likely would not survive either intermediate scrutiny or rational basis review. *Id.* at 43–44.

On March 1, 2018, Defendants filed a motion to dismiss Plaintiffs’ claims against the President and dissolve the preliminary injunction as to the President. Dkt. 115. Defendants argued that the President is not a proper defendant in this case because the Court may not enter injunctive or declaratory relief against the President in his official capacity in the performance of discretionary actions. *Id.* at 3–8. That motion is fully briefed and pending before the Court.

Meanwhile, while this case has been pending, the DoD Panel of Experts, established by the Secretary of Defense in September 2017, met 13 times over the span of 90 days with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. Report 18. The Panel reviewed information regarding gender dysphoria, its treatment, and the effects of gender dysphoria on military effectiveness, unit cohesion, and resources. *Id.* And unlike in prior reviews, the Panel relied on the “the Department’s own data and experience obtained since the Carter policy took effect.” *Id.* After “extensive review and

deliberation,” which included consideration of evidence that supported and cut against its proposals, the Panel “exercised its professional military judgment” and presented its recommendations to the Secretary. *Id.*

After considering these recommendations along with additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy, consistent with the panel’s conclusions, that differed from both the Carter policy and the longstanding policy that preceded it. *See* Mattis Mem., Dkt. 120-1. The Secretary’s memorandum was accompanied by a 44-page report explaining the military’s position. *See id.*; Report. Noting that the President had “made clear” that the Secretaries “could advise” him “at any time, in writing, that a change to [the pre-Carter] policy was warranted,” Secretary Mattis recommended that the President “revoke” his 2017 memorandum, “thus allowing” the military to adopt this new policy. Mattis Mem. 3.

Like the Carter policy before it, the Department’s 2018 policy turns on the medical condition of gender dysphoria, not on transgender status. Under each policy, transgender individuals without a history or diagnosis of gender dysphoria may serve if they meet the standards associated with their biological sex, whereas those with gender dysphoria are presumptively disqualified. Report 4–6; AR323–24. The main difference between the two policies is the nature of the exceptions to that presumptive disqualification. Under the 2018 policy, individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither require nor have undergone gender transition, are willing and able to adhere to the standards associated with their biological sex, and can meet additional criteria. Report 5. For accession into the military, they must demonstrate 36 months of stability (*i.e.*, absence of gender dysphoria) before applying. *Id.* They may then remain in the military as long as they can satisfy deployability standards. *Id.* These exceptions rest on the Department’s judgment that “a history of gender dysphoria should not alone” be disqualifying given evidence that

the presence of this condition in children does not always persist into adulthood and given the military's interest in retaining those in whom "it has made substantial investments." *Id.* at 42.

By contrast, individuals with gender dysphoria who require or have undergone gender transition are disqualified absent an individualized waiver. *Id.* at 5. "In the Department's military judgment," this was a "necessary departure from the Carter policy" because service by these individuals was "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." *Id.* at 32, 41. This judgment was based on numerous military concerns, including evidence that these individuals continued to have higher rates of psychiatric hospitalization and suicidal behavior even after transition, evidence that transition-related treatment could render these individuals non-deployable for a significant period of time, the creation of irreconcilable privacy demands particularly in austere or deployed environments, the safety risks and perceptions of unfairness arising from having training and athletic standards turn on gender identity, the frustration of non-transgender servicemembers who also wish to be exempted from uniform and grooming standards for identity purposes, and disproportionate transition-related costs. *See id.* 19–41.

Recognizing, however, that a number of individuals with gender dysphoria had "entered or remained in service following the announcement of the Carter policy," the Department included a categorical reliance exemption in its 2018 policy. *Id.* at 43. Specifically, those servicemembers "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" as well as "serve in their preferred gender, even after the new policy commences." *Id.*<sup>3</sup>

After DoD presented its new policy to the President, the President "revoke[d]" his 2017

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<sup>3</sup> A chart describing the differences between the military's pre-Carter policy, the Carter policy, and the 2018 policy is set forth at Exhibit 1.



memorandum on March 23, 2018, along with “any other directive [he] may have made with respect to military service by transgender individuals,” thereby allowing the Secretaries of Defense and Homeland Security to “exercise their authority to implement any appropriate policies concerning military service by transgender individuals.” 2018 Presidential Mem., Dkt. 119-1.

### **III. Discovery and Further Proceedings in This Case**

After the Court entered its preliminary injunction, and while the DoD policy process described above proceeded to conclusion, the parties also engaged in discovery. Plaintiffs served broad discovery requests on all Defendants, including the President. Plaintiffs issued requests for production and interrogatories seeking information on: (1) the Carter policy and the RAND report; (2) the decision by Secretary Mattis to defer the start of accessions by transgender individuals under the Carter policy; (3) the President’s statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (4) the work by the Panel of Experts that was convened to develop policy proposals in fall 2017; (5) Secretary Mattis’s February 2018 decision memorandum and the accompanying Report regarding the new policy; and (6) the March 2018 Presidential Memorandum that revoked the 2017 Memorandum. *See* Kies Decl. Exh. 1, 2; Exh. 2 (Pls.’ Second Set of Interrogatories and Requests for Production, May 21, 2018).

In response to discovery requests on these topics, Defendants conducted an extensive search and have produced over 30,000 non-privileged, responsive documents (consisting of over 150,000 pages). Defendants also objected to some discovery requests and withheld information and thousands of documents that are protected by the deliberative process privilege (among others). *See* Kies Decl. Exh. 3, 4, 6, 7. Finally, Defendants objected to interrogatories when they called for privileged information, but otherwise responded. *See id.* Although they have had ample opportunity to do so, Plaintiffs have not taken any depositions, and declined to participate in at least one deposition scheduled in the related case, *Doe v. Trump*, No. 17-cv-1597 (D.D.C.). *See* Exh. 3 (email from Marianne

Kies to Ryan Parker, Apr. 11, 2018).

On February 22, 2018, after the Department of Defense completed its study of the policies at issue, Secretary Mattis sent the Department's policy proposal to the President. Mattis Mem., Dkt. 120-1. The President subsequently issued his March 23, 2018 Memorandum, which revoked the August 2017 Memorandum. *See* 2018 Presidential Mem., Dkt. 119-1. Immediately thereafter, on March 23, 2018, Defendants filed a motion to dissolve the preliminary injunction, arguing that the bases for the preliminary injunction no longer exist because Plaintiffs' challenge to the revoked August 2017 Memorandum is moot. *See* Defs.' Mot. 9–11, Dkt. 120. Defendants also contended that the Department's new policy—which turns on a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status—is subject to rational basis review and withstands constitutional scrutiny. *See id.* at 11–29. This motion is fully briefed and pending before the Court.

That same day, Defendants filed a motion for a protective order, arguing that discovery should be stayed pending the resolution of the motion to dissolve the preliminary injunction. *See* Defs.' Mot., Dkt. 121. In particular, Defendants argued that because the August 2017 Presidential Memorandum had been revoked, any discovery related to that Memorandum or to the President's preceding statements on Twitter is irrelevant and, in any event, disproportionate to the needs of the case under Rule 26 of the Federal Rules of Civil Procedure. *Id.* at 5. Defendants further argued that because the new policy resulted from an administrative process by the Department of Defense, further litigation should be confined to the administrative record provided by the agency.<sup>4</sup> *Id.* at 5–6. This motion also is fully briefed and pending before the Court.

On April 27, 2018, Plaintiffs filed their second amended complaint, adding new Plaintiffs and raising constitutional challenges to both the revoked August 2017 Presidential Memorandum and the

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<sup>4</sup> Defendants subsequently filed the administrative record with the Court. *See* Dkt. 133.

Department's new policy. *See* Second Am. Compl. ¶¶ 205–40. Defendants then filed a motion to dismiss, or, in the alternative, for summary judgment. Dkt. 158. Defendants argued that the Court does not possess jurisdiction over the case because Plaintiffs lack standing to challenge the Department's new policy and any challenge to the revoked 2017 Memorandum is moot. *Id.* at 9–19, 21–23. Defendants also argued that the Department's new policy is subject to rational basis review and withstands constitutional scrutiny. *See id.* at 23–50. Finally, Defendants argued that even if the Court did not dismiss the case or enter judgment for Defendants, the Court should dismiss the President from the case because Plaintiffs' claims against him are not redressable. *See id.* at 19–21. Plaintiffs cross-moved for summary judgment, simultaneously arguing that they are entitled to judgment in their favor because there is no genuine dispute as to any material fact, while also arguing that a dispute of material facts precludes judgment for Defendants and entitles Plaintiffs to additional discovery. *See* Pls.' Mot., Dkt. 163. These motions will be fully briefed in June.

#### **IV. The Current Discovery Dispute**

By letter dated February 21, 2018, Plaintiffs advised counsel for the Defendants that they plan to challenge *all* of Defendants' withholdings on the basis of the deliberative process privilege. *See* Kies Decl. Exh. 8. The parties met and conferred twice in an attempt to resolve the dispute. During a call on March 1, 2018, defense counsel requested that Plaintiffs identify specific documents or discovery responses to which Plaintiffs contest Defendants' privilege assertions. Enlow Decl. ¶ 2. Defense counsel further stated that if Plaintiffs identified specific documents, Defendants could review the documents to determine whether to perfect the deliberative process privilege over those documents or whether to withdraw the assertion of privilege over the documents with the goal of narrowing the dispute.<sup>5</sup> *Id.* Defense counsel reiterated this request when the parties met in person on March 13,

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<sup>5</sup> As defense counsel informed Plaintiffs' counsel, this procedure is occurring in the related case, *Doe v. Trump*, No. 17-cv-1597 (D.D.C.). Enlow Decl. ¶ 2. In *Doe*, plaintiffs' counsel identified specific

2018. *Id.*

On April 23, 2018, Plaintiffs served Defendants with a motion to compel broad categories of documents and discovery responses that Defendants have withheld under the deliberative process privilege.<sup>6</sup> *See* Pls.’ Mot. 2. Plaintiffs seek the disclosure of each and every document and discovery response withheld on the basis of the deliberative process privilege regarding: (1) the President’s statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (2) the activities of the Department’s Panel of Experts and its working groups; and (3) the February 2018 Memorandum issued by Secretary Mattis and the March 2018 Presidential Memorandum. *Id.* Plaintiffs request that the Court “order Defendants . . . to supplement their interrogatory responses and document production to include deliberative information and documents relating to these decisions that they have improperly withheld based on the deliberative process privilege.” *Id.* at 26.<sup>7</sup>

Because Plaintiffs’ broad request implicated perfecting the privilege over thousands of documents and appeared to challenge documents and information subject to the presidential communications privilege, Defendants requested a conference with the Court. *See* Exh. 4 (email from Ryan Parker to Chambers of Judge Garbis, May 2, 2018). In response, Plaintiffs clarified that they do not seek to compel any particular document with their motion. *See id.* (email from Mitchell Kamin to

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documents, and, upon further review of the documents, Defendants produced some of the documents and maintained the assertion of privilege over others.

<sup>6</sup> Plaintiffs also appear to contest the sufficiency of Defendants’ privilege logs, *see* Pls.’ Mot. 7, but they do not move to compel Defendants to supplement the logs. Therefore, this response does not address the sufficiency of the privilege logs, aside from noting that to the extent there may be defects in the logs, it is a result of the broad discovery requests issued by Plaintiffs. *See Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 370 n.24 (4th Cir. 2009) (“Parties who frame massive and all-inclusive requests for documents should expect some fall-off from perfection when the agency responds.”).

<sup>7</sup> Plaintiffs also “request that the Court order Defendants to supplement their prior interrogatory responses and document production,” arguing that Defendants’ responses were not compliant with Rule 33(d) of the Federal Rules of Civil Procedure. Pls.’ Mot. 3, 6, 6 n.4, 26. Defendants produced more than 13,000 documents to Plaintiffs on May 22, 2018. Defendants will serve supplemental interrogatory responses concurrently with this response (or shortly thereafter). This aspect of Plaintiffs’ request should be moot.

Chambers of Judge Garbis). Plaintiffs stated that their motion is “not a dispute about whether particular documents are privileged” and instead presents “a legal question that does not require review of thousands of documents.” *Id.* Plaintiffs also clarified that despite their request that the Court order Defendants to supplement their discovery responses with deliberative information related the President’s statements on Twitter and his August 2017 and March 2018 Memoranda, “the motion to compel does not raise any issues specific to President Trump, such as the presidential communications privilege.”<sup>8</sup> *Id.*

Accordingly, Plaintiffs do not identify specific documents that they presently seek to compel. Nor do Plaintiffs seek to compel any document or information withheld on the basis of the presidential communications privilege (or other privileges, such as the attorney-client privilege). Rather, the only issue before the Court at this time is the threshold legal issue of whether the deliberative process privilege *per se* does not apply as a matter of law to any information at issue in discovery in this case.<sup>9</sup>

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<sup>8</sup> Despite this latter representation, Plaintiffs’ instant motion to compel still puts implicates information and documents concerning presidential communications and deliberations. At least two of the three categories of information at issue in their motion expressly concern presidential materials and communications, even if the motion itself purports to be limited solely to the application of the deliberative process privilege as a matter of law to these materials. Because many of the materials at issue concern discovery directed at the President and his deliberations, and encompass materials that would also be subject to the presidential communications privilege, *see* Kies Decl. Exh. 6, 7, Defendants expect to file a motion for a protective order to preclude discovery directed at the President and at information concerning presidential communications and deliberations. Indeed, on May 21, 2018, Plaintiffs served additional sets of interrogatories and requests for production on all Defendants, including the President. Exh. 2 (Pls.’ Second Set of Interrogatories and Requests for Production, May 21, 2018). Defendants’ responses are not due until mid-June, but Plaintiffs’ requests again appear to seek information and documents that may be subject to the presidential communications privilege as well as the deliberative process privilege (among others). *See id.* Thus, the notion that Plaintiffs’ motion does not implicate the President’s deliberations is wrong—it specifically targets those deliberations, among others.

<sup>9</sup> As a result, Defendants are not required to perfect the privilege at this time as to documents or information contained in each of the thousands of documents, or with respect to information that has been withheld on the basis of the deliberative process privilege in response to other discovery requests.

## ARGUMENT

### **I. The District Court Should Decide Pending Threshold Matters Before Resolving Plaintiffs' Motion to Compel.**

As a preliminary matter, there are five motions pending before the Court, all of which raise threshold issues that directly affect the extent and scope of discovery in this case and thus should be decided before the Court rules on this discovery dispute. The pending motions are as follows:

Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment: This fully dispositive motion raises jurisdictional issues of standing and mootness and addresses the merits of the new policy, explaining the proper standard of review and demonstrating that the new policy withstands scrutiny. *See* Defs.' Mot. 9–50, Dkt. 158. If the Court grants Defendants' motion and dismisses the case or enters judgment for Defendants, then Plaintiffs would not be entitled to any discovery and Plaintiffs' Motion to Compel would be moot.

Even if the Court does not dismiss the case in its entirety or enter judgment for Defendants, the Court's ruling on the motion could at least narrow the issues in dispute, such as whether the President's 2017 Memorandum is still at issue, the appropriate level of scrutiny, or what genuine issues of material fact may exist as to which discovery is potentially necessary. Any of these issues could impact whether or to what extent any discovery should proceed, and obviate the need to reach the motion to compel regarding the deliberative process privilege.

Defendants' Motion to Dissolve the Preliminary Injunction: Similar to the motion to dismiss, Defendants' Motion to Dissolve the Preliminary Injunction raises mootness as a threshold jurisdictional issue. *See* Defs.' Mot. 9–11, Dkt. 120. A ruling that Plaintiffs' challenge to the 2017 Presidential Memorandum is moot would at least significantly narrow the scope of discovery, as discovery related to the 2017 Presidential Memorandum would be irrelevant to any challenge to the new policy.

Defendants' Motion to Dismiss the President: Defendants have also moved to dismiss the

President as a party from this case. *See* Defs.’ Mot. 19–21, Dkt. 158; *see also* Defs.’ Mot. 1–8, Dkt. 115. Yet Plaintiffs have served 22 interrogatories and 21 requests for production directly on the President, seeking information concerning the President’s deliberations and decisionmaking process. *See* Kies Decl. Exh. 1, 2. If the Court dismisses the President from the case, that alone would substantially impact the scope of the discovery being sought and at issue in the motion to compel. Indeed, even assuming *arguendo* that the President could ever be subject to civil discovery, as a non-party the President would be under no obligation to respond to interrogatories under Rule 33 or requests for production of documents under Rule 34. *See Horne v. Methodist Home for Children, Inc.*, No. 2:12CV12, 2013 WL 856175, at \*2 (W.D.N.C. Feb. 28, 2013) (“Interrogatories served on a defendant requesting that a non-party answer the interrogatory is improper under Rule 33.” (citations omitted)); *Maynard v. City of Huntington*, No. CIV.A. 3:09-0101, 2009 WL 4675788, at \*1 (S.D.W. Va. Dec. 8, 2009) (stating that “a party seeking documents from a non-party must obtain and serve a subpoena upon that non-party in accordance with Rule 45”). Dismissal of the President from the case would therefore significantly narrow the scope of the discovery dispute at issue in the motion to compel. *See NetJets Large Aircraft, Inc. v. United States*, No. 2:11-CV-1023, 2015 WL 1526346, at \*1 (S.D. Ohio Apr. 3, 2015) (noting that the district court’s resolution of “certain motions for summary judgment . . . altered the scope of the pending discovery motions”).<sup>10</sup>

Defendants’ Motion for a Protective Order: Defendants have also moved for a protective order to stay discovery pending the resolution of Defendants’ dispositive motions. *See* Defs.’ Mot., Dkt. 121; *see also* Defs.’ Reply, Dkt. 146. If that motion is granted, then the Court would not need to rule on this discovery dispute until the Court rules on Defendants’ pending dispositive motions. In

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<sup>10</sup> As noted above, Defendants expect to bring a separate motion for protective order related to the discovery sought of the President and concerning presidential deliberations, materials, and communications. Since much of the instant motion to compel implicates presidential materials and deliberations, that forthcoming motion also should also be decided before the instant motion to compel is resolved.

their motion for a protective order, Defendants also argue that because the new policy resulted from an administrative process by the Department of Defense, any further litigation should be confined to the administrative record prepared by the Department. *See* Defs.’ Mot. 5–6, Dkt. 121. If the Court agrees with Defendants on this question, then Plaintiffs’ motion seeking broad discovery would be moot and any challenge to the sufficiency of that record—including whether the record properly omitted materials covered by the deliberative process privilege<sup>11</sup>—would need to be addressed by a separate motion.

Plaintiffs’ Cross-Motion for Summary Judgment: Plaintiffs themselves now argue that judgment should be entered in their favor because there is no genuine dispute of material fact that the Department’s new policy violates the Equal Protection Clause. *See* Pls.’ Mot. 26–44, Dkt. 163-2. If the Court enters judgment for Plaintiffs or Defendants in response to their respective motions for summary judgment, the motion to compel of course would be moot. And if the Court does not enter summary judgment based on the administrative record, then any discovery should at least be limited to any identified genuine issues of material fact. In the meantime, categorical rejection of the deliberative process privilege as a matter of law would be improper.

Accordingly, because there are five pending motions before the District Court that bear

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<sup>11</sup> Plaintiffs appear to allege that the Government improperly withheld deliberative documents from the administrative record and failed to produce a privilege log with the record. Pls.’ Mot. 8–9. But it is well established that privileged materials are not part of an administrative record, and there is no requirement for the Government to provide a privilege log with an administrative record. *See Outdoor Amusement Bus. Ass’n, Inc. v. Dep’t of Homeland Sec.*, No. ELH-16-1015, 2017 WL 3189446, \* (D. Md. July 27, 2017) (“[A] complete administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege[.]” (quoting *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008))); *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013) (“As a corollary to th[e] principle [that privileged materials are not part of the administrative record], the agency need not provide a privilege log of the documents withheld pursuant to the privilege.”); *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F.Supp.2d 15, 32 (D.D.C. 2013) (“[P]redecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record.”) (internal citation omitted)).



directly on the resolution of Plaintiffs' motion to compel, the Court should deny Plaintiffs' premature motion, or, at the very least, defer ruling on the motion until those motions are resolved.

## **II. If the Court Reaches the Merits of Plaintiffs' Motion, the Motion Should Be Denied.**

Not only is Plaintiffs' motion premature, it is meritless as well. As an initial matter, Plaintiffs do not dispute that the documents the Government has withheld under the deliberative process privilege are predecisional and deliberative. Instead, Plaintiffs contend that the privilege does not apply as a matter of law either because the Government's intent is at issue or because there the Government's "discriminatory" policy amounts to misconduct. But Plaintiffs' contention finds no basis in Fourth Circuit precedent. Rather, application of the appropriate balancing test applied by courts in this Circuit demonstrates that the Government's interest in non-disclosure of deliberative information concerning the development of a military policy outweighs Plaintiffs' generalized need for thousands of deliberative documents. Finally, Plaintiffs' contention that Defendants have waived the privilege by selectively relying on privileged information is simply wrong, as Defendants are not relying on privileged information to establish that the Department's new policy withstands constitutional scrutiny.

### **A. The Deliberative Process Privilege Generally**

The deliberative process privilege protects the Government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "This privilege is designed to protect the quality of administrative decisionmaking by ensuring that it is not done 'in a fishbowl.'" *City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1252 (4th Cir. 1993) (quoting *Emt'l Prot. Agency v. Mink*, 410 U.S. 73, 87 (1973)). "Thus, the privilege encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding

deliberations; and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, but for matters they considered before making up their minds.” *Id.* at 1252–53 (quotation omitted); *see also Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government.” (quotation omitted)).

“Documents withheld or redacted pursuant to the deliberative process privilege must be both ‘predecisional’ and ‘deliberative.’” *Rein*, 553 F.3d at 372 (quoting *City of Va. Beach*, 995 F.2d at 1253). “Predecisional documents are ‘prepared in order to assist an agency decisionmaker in arriving at his decision.’” *City of Va. Beach*, 995 F.2d at 1253 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)). “Deliberative material ‘reflects the give-and-take of the consultative process,’ by revealing the manner in which the agency evaluates possible alternative policies or outcomes.” *Id.* (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

“The deliberative process privilege is a qualified one; that is, where a party can establish the existence of a sufficient need for the information that outweighs any harm from its production, the privilege may be overcome.” *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at \*3 (E.D.N.C. Sept. 12, 2014) (citing *Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D. W.Va. 1992)). “The burden of showing an overriding need for the information rests with the party seeking it.” *Id.* (citing *Redland Soccer Club, Inc. v. Dep’t of Army*, 55 F.3d 827, 853 (3d Cir. 1995) (“The party seeking discovery bears the burden of showing that its need for the documents outweighs the government’s interest.”)); *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a “particularized need” for specific documents to overcome the privilege); *Marriott Int’l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a

“compelling need” to overcome the privilege). Courts have used a four factor test in balancing the deliberative process privilege with the need of the party seeking disclosure: “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government’s role (if any) in the litigation, and (4) ‘the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.’” *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table) (quoting *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)); *see also Heyer*, 2014 WL 4545946, at \*3 (quoting *Scott*, 142 F.R.D. at 294).

**B. Plaintiffs’ Contention that the Deliberative Process Privilege Does Not Apply as a Matter of Law is Meritless.**

Plaintiffs argue that the deliberative process privilege does not apply as a matter of law to any deliberative materials at issue in this case, including materials “regarding” the “July 2017 Tweets and August 2017 Memorandum,” the “Panel of Experts and its working groups,” and the so-called “Implementation Plan and the President’s acceptance of the Plan” because “Plaintiffs’ claims turn on governmental intent” and there is “reason to suspect government misconduct has occurred.”<sup>12</sup> Pls.’ Mot. 2, 10–14. But Plaintiffs do not cite to any authority within the Fourth Circuit for their contention that the deliberative process privilege does not apply as a matter of law to broad categories of deliberative materials when the party seeking discovery challenges the Government’s intent or alleges governmental discrimination or misconduct. *See id.* at 10–14. Indeed, Plaintiffs’ assertion is contrary

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<sup>12</sup> Plaintiffs’ argument that the Government committed misconduct by engaging in “unlawful discrimination” is merely a reiteration of their argument that the Government’s intent is at issue because they have brought a discrimination claim. *See id.* But the intent behind a policy is not the same as governmental misconduct, which turns on specific actions taken by Government officials. *See, e.g., Alexander v. FBI*, 186 F.R.D. 170, 171 (D.D.C. 1999) (allegations the “FBI improperly handed over to the White House hundreds of FBI files of former political appointees and government employees from the Reagan and Bush Administrations”); *Convertino v. Dep’t of Justice*, 674 F. Supp. 2d 97, 100 (D.D.C. 2009) (allegations that the Department of Justice leaked information regarding an investigation into purported prosecutorial misconduct by an Assistant United States Attorney); *Tax Reform Research Grp. v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976) (no privilege where documents concerned recommendation to use the powers of the Internal Revenue Service against “enemies” of the Nixon administration). No such allegation of “misconduct” credibly exists in this case.

to the Fourth Circuit's approach in *Cipollone*, 812 F.2d at 1400, which requires a balancing of an articulated need for specific deliberative documents or information being sought against the Government's interests in non-disclosure to determine whether the privilege can be overcome. *See Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at \*3 (E.D. Va. Sept. 22, 2014) (finding that the court must analyze whether the deliberative process privilege applies "on a case-by-case basis by balancing the damage to the executive department or the public interest and the potential harm to the plaintiffs from nondisclosure"); *Spell v. McDaniel*, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) (finding that the deliberative process privilege "must be demonstrated on a case by case basis by performance of a balancing function"); *see also Murray Energy Corp.*, 2016 WL 6902359, at \*4 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.") (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980))). District courts in this Circuit have applied the *Cipollone* balancing test to determine whether plaintiffs' need for specific privileged documents or information outweighs the Government's interest in non-disclosure, even when intent is at issue or misconduct is alleged. *See, e.g., Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at \*3 (N.D. W. Va. July 20, 2016) ("[P]ossible government misconduct or deficiencies in the deliberative process are factored into any analysis and, where present, weigh in favor of denying the privilege."); *F.D.I.C. v. Hatziyannis*, 180 F.R.D. 292, 294 (D. Md. 1998) (applying the balancing test even when defendants "raised allegations of bad faith and unfair dealing"); *Heyer*, 2014 WL 4545946, at \*5–6 (applying the balancing test even where plaintiffs alleged deliberate indifference); *cf. Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) (applying the balancing test from the deliberative process privilege context to the state legislative privilege context, even where plaintiffs alleged unlawful racial gerrymanders in violation of the Equal Protection Clause). To hold otherwise would have the extraordinary consequence of eviscerating the deliberative process privilege for broad categories of deliberative

materials in any case in which plaintiffs challenge the Government's intent as a *per se* legal matter, and without a party seeking any particular information or challenging its withholding. See *In re United States*, 678 F. App'x 981, 990 (Fed. Cir. 2017) ("The privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure."); *Utah Med. Prods. v. McClellan*, No. 2:03-cv-525-PGC, 2004 WL 988877, at \*8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative process privilege did not apply when a party challenges the decision-making process would lead plaintiffs to "recast [their] complaints as a challenge to the decision-making process").

Moreover, even assuming that "intent" or "misconduct" were at issue in the challenged policies, Plaintiffs' argument misapplies nonbinding authority, in particular a D.C. Circuit case, *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), which held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made "with actual intent to hinder, delay, or defraud." Notably, the Fourth Circuit has not followed *In re Subpoena*, nor held that the deliberative process privilege categorically does not apply as matter of law in cases in which the plaintiffs challenge the Government's intent or allege misconduct. Indeed, other courts have been skeptical of the categorical approach applied in *In re Subpoena*, 145 F.3d at 1424. See, e.g., *In re Delphi Corp.*, 276 F.R.D. 81, 84–85 (S.D.N.Y. 2011) (rejecting plaintiff's argument that the deliberative process privilege "is not applicable where the litigation 'involves a question concerning the intent of the governmental decisionmakers or the decisionmaking process itself'" and instead applying the five factor balancing test); *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at \*10 (N.D. Cal. Oct. 5, 2011) (declining to adopt a categorical rule that the deliberative process privilege is inapplicable when plaintiffs challenge intent, and explaining that the issue of "intent is properly considered as a factor in the substantial need analysis"); *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321–22 (2000) ("declin[ing] to follow the reasoning of *In re Subpoena* to the extent that it supports an automatic bar

on assertions of deliberative process privilege in any case where the Government’s intent is potentially relevant,” and applying the balancing test weighing “a showing of evidentiary need” against “the harm that may result from disclosure”).

Plaintiffs rely on another D.C. Circuit case, *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997), for the proposition that “the deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred.” Pls.’ Mot. 13. But, as another court has recognized, *In re Sealed Case* “provides little or no guidance” for evaluating a deliberative process privilege claim because “this standard is stated in the case in order to contrast it with the higher standard for overcoming the Presidential privilege, which is the actual subject matter of the case.” *City of Colton v. Am. Promotional Events, Inc.*, No. CV 05-01479 JFW (EX), 2011 WL 13223955, at \*3 (C.D. Cal. Nov. 14, 2011). Notably, Plaintiffs cite to no Fourth Circuit case finding that the deliberative process is inapplicable even when a plaintiff alleges governmental misconduct. *See* Pls.’ Mot. 13–14.

The other cases cited by Plaintiffs actually support the Government’s view: in two of the cases Plaintiffs cite for the proposition that the privilege is “does not apply at all” when intent is at issue, Pls.’ Mot. 10–11, the courts declined to apply the deliberative process privilege to “routine personnel decisions,” such as the decision to terminate an employee, but observed that the deliberative process privilege is intended to protect deliberations behind broad policy decisions—precisely the kind of information at issue here. *See United States v. Lake Cty. Bd. of Comm’rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005); *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). Further, in *Jones*, the court applied the balancing test despite finding that “government intent is at the heart of the issue in this case”—contrary to Plaintiffs’ own position. 237 F.R.D. at 521.<sup>13</sup> Moreover, despite advocating for a

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<sup>13</sup> Plaintiffs also cite *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001). But in that case, the court held that “Plaintiff is simply wrong in asserting that the deliberative process privilege should yield in this case because of his claim of governmental misconduct,” and the court’s discussion of when the privilege may yield due to a challenge to the Government’s subjective intent is dicta.

*per se* rule, Plaintiffs cite a case where the court applied the balancing test. *See* Pls.’ Mot. 18 (citing *Holmes v. Hernandez*, 221 F. Supp. 1011, 1021 (N.D. Ill. 2016)).

Additionally, Plaintiffs’ argument that the deliberative process privilege does not apply as a matter of law rests ultimately on the assumption that intent is at issue in this case, Pls.’ Mot. 11, which the Court has not yet decided, *see supra* Section I. The Court should not reach that issue at this stage in connection with this discovery motion, but if it does, it should find that Plaintiffs’ arguments are meritless. As Defendants’ Motion to Dismiss, or, in the Alternative, for Summary Judgment, explains, the Department’s new policy, on its face, triggers rational-basis review in connection with Plaintiffs’ equal protection challenge. Defs.’ Mot. 23–24, Dkt. 158. The new policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition)—eminently reasonable considerations in setting standards for military service—and not transgender status. *Compare* Report 3–5, *with* AR323–24 (DTM 16-005 at Attachment 1–2); *see also* Op. 8 n.9, Dkt. 85 (recognizing the difference between transgender status and the medical condition of gender dysphoria). Such classifications receive only rational-basis review. *See, e.g., Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974). Given that courts should be “reluctant to establish new suspect classes”—a presumption that “has even more force when the intense judicial scrutiny would be applied to the ‘specialized society’ of the military”—there is no basis for departing from rational-basis review here. *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (*en banc*).<sup>14</sup>

Under rational-basis review, it is “constitutionally irrelevant [what] reasoning in fact underlay

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<sup>14</sup> This Court should not follow a recent decision by a court in a related case to subject the new policy to strict scrutiny. *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, \*11 (W.D. Wash. Apr. 13, 2018), *appeal filed*, No. 18-35347 (9th Cir.). That court did not cite a single example of another decision concluding that a policy that classified on the basis of transgender status was subject to strict scrutiny, let alone a military policy turning on gender dysphoria adopted after a substantial review process. *See id.*

the [policy] decision.” *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)); *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (“[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.”). Intent is thus irrelevant to this case; the Government’s “choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (citing *Vance v. Bradley*, 440 U.S. 93 111 (1979); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)). But the “Court’s review does require that a purpose may conceivably or ‘may reasonably have been the purpose and policy’ of the relevant governmental decisionmaker.” *Nordlinger*, 505 U.S. at 15 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959)).

Plaintiffs rely on *Romer v. Evans*, 517 U.S. 620, 634 (1996), to support their argument that intent is at issue, even when rational-basis review applies.<sup>15</sup> *See* Pls.’ Mot. 11–12. However, this reliance is misplaced. In *Romer*, the Supreme Court held that an amendment to the Colorado Constitution violated the Fourteenth Amendment’s Equal Protection Clause because it was not “directed to *any* identifiable legitimate purpose or discrete objective.” 517 U.S. at 635. The Court explained that the amendment’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects,” causing the law to “lack[ ] a rational relationship to legitimate state interests.” *Id.* at 632. In contrast, in the case at hand, the Department of Defense has offered a “conceivable,” “legitimate purpose” for the new policy, *see*

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<sup>15</sup> Plaintiffs also rely on *United States v. Windsor*, 570 U.S. 744, 770 (2013). Pls.’ Mot. 11. But, as the dissent noted in *Windsor*, it is unclear which standard of review the Supreme Court applied in that case. 570 U.S. at 793 (Scalia, J., dissenting) (stating that the majority “opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality”).



*Nordlinger*, 505 U.S. at 17, *Romer*, 517 U.S. at 635, that is not “so discontinuous” from the policy: as the Department has explained, allowing service by individuals with a history or diagnosis of gender dysphoria, or who require or have already undertaken a course to change their gender, would create unacceptable risks to military readiness, undermine good order and discipline as well as unit cohesion, and impose disproportionate costs. Mattis Mem. 2, Dkt. 120-1; *see* Defs.’ Mot. 28–41, Dkt. 158. Thus, unlike the amendment in *Romer*, the new policy is not “inexplicable by anything but animus,” nor based on “a bare . . . desire to harm a politically unpopular group.” 517 U.S. at 632, 634 (internal citation and quotation marks omitted) (alteration in original). In contrast here, the new DoD policy is supported by a 44-page report, which provides a detailed explanation as to why, in the professional judgment of officials of the Department of Defense, this policy is necessary to further military interests, and thus is not “divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests.” *Id.* at 635.

Additionally, to support their argument, Plaintiffs rely on the Court’s Order granting Plaintiffs’ motion for a preliminary injunction, *see* Pls.’ Mot. 11–12, 14 (citing Op. 43–44, Dkt. 85), which held that heightened scrutiny applies and that the directives set forth in the 2017 Presidential Memorandum likely would not survive constitutional scrutiny. But the bases for that Order—the 2017 Presidential Memorandum and the President’s preceding statements on Twitter—have been expressly revoked. *See* Dkt. 119-1; *see also* Op. 43 (stating that “President Trump’s tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest”). Indeed, Plaintiffs’ reliance on the Court’s Order granting Plaintiffs’ motion for a preliminary injunction serves to highlight Plaintiffs’ refusal to acknowledge the changed circumstances in this case and the internal inconsistencies in Plaintiffs’ positions. Plaintiffs seek information related to the President’s intent, arguing that “deliberative materials generated by Defendants in the months

leading up to the July 2017 Tweets and August 2017 Memorandum should help reveal exactly what [the President's] true motivations were.” Pls.’ Mot. 12. However, in filing a Second Amended Complaint challenging the new policy, Dkt. 148, Plaintiffs acknowledge that the circumstances of this case have changed, under which the 2017 Presidential Memorandum has been expressly revoked, and the Department has issued a new policy. Plaintiffs mischaracterize the new DoD policy as a mere “implementation” of the President’s 2017 Memorandum and preceding statements on Twitter. *See, e.g.*, Pls.’ Mot. 8. But that plainly is not the case—the new DoD policy differs markedly and materially from the August 2017 Memorandum. *Compare* AR 327–28 (2017 Memorandum), *with* Mattis Mem., Dkt. 120-1; *see also supra* pp. 5, 7–8. In any event, Plaintiffs cannot rely on the alleged intent behind now revoked actions to negate application of the deliberative process privilege as a matter of law with respect to every document put at issue in discovery, including deliberations as to DoD’s subsequent policy.

Finally, Plaintiffs generally argue that each of the three categories of deliberative materials they seek are “likely to contain evidence reflecting Defendants’ intent” or would reflect governmental misconduct. Pls.’ Mot. 12, 14. But Plaintiffs make no effort to show how *each and every* document and discovery request related to the “July 2017 Tweets and August 2017 Memorandum,” the “Panel of Experts and its working groups,” and the so-called “Implementation Plan and the President’s acceptance of the Plan,” would shed light on the Government’s intent or on alleged misconduct.<sup>16</sup>

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<sup>16</sup> Plaintiffs’ bare allegation that the “Ban was driven not by legitimate military considerations, but by political and discriminatory animus” because the “illegitimate motivation animating the July 2017 Tweets and the August 2017 Memorandum . . . inevitably flows down” to the study by the Panel of Experts, Secretary Mattis’s February 2018 Memorandum, and the 2018 Presidential Memorandum, Pls.’ Mot. 14, is far from a “clear showing of misconduct,” *Franklin Sav. Ass’n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991), and is contradicted by record evidence. For example, Secretary Mattis stated that he created the Panel of Experts to “develop policy proposals based on data, as well as their own professional military judgment” and that he directed the Panel to “provide its best military advice . . . without regard to any external factors.” Dkt. 120-1. Using his “professional military judgment,” Secretary Mattis agreed with the Panel’s recommended policy. *Id.* Plaintiffs have provided no basis for any allegation of misconduct by Secretary Mattis, the Panel of Experts, or anyone else at the

Accordingly, even if the deliberative process privilege did not apply when intent is at issue, or when there is reason to suspect governmental misconduct, Plaintiffs' bare allegations still would be insufficient to overcome the privilege as a categorical matter with respect to every document for which the privilege is claimed. *See Am. Petroleum Tankers Parent*, 952 F. Supp. 2d at 268 (requiring plaintiffs to provide "an adequate factual basis for believing that the requested discovery would shed light upon governmental misconduct"); *Murray Energy Corp.*, 2016 WL 6902359, at \*4 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." (quoting *Coastal States Gas*, 617 F.2d at 867); *ICM Registry, LLC v. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008) ("If every hint of marginal misconduct sufficed to erase the [deliberative process] privilege, the exception would swallow the rule.")).

**C. The Balancing Test Weighs in Favor of Upholding Defendants' Privilege Claims.**

Plaintiffs have failed to demonstrate that the deliberative process privilege cannot apply as a matter of law in this case, and they expressly decided not to seek to compel any specific documents being withheld on the basis of privilege at this time. *See* Exh. 4 (email from Mitchell Kamin to Chambers of Judge Garbis, May 2, 2018). Their motion should be denied on those bases alone. That is, under the relevant balancing test, Plaintiffs bear a heavy burden of showing an "overriding" and "particularized" need for any documents and information they seek. *Heyer*, 2014 WL 4545946, at \*3 (citing *Redland Soccer Club*, 55 F.3d at 853); *Farley*, 11 F.3d at 1389. But they cannot meet that burden over documents or information not specifically identified or addressed in their motion to compel. *See*

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Department of Defense or the military Services. *See* Pls.' Mot. 14. Plaintiffs cite internet news articles in an attempt to show that the White House may have intervened in the Department's process, *see* Pls.' Mot. 8, 17 n.6, but such unsubstantiated hearsay should be entirely disregarded, *see In re Neustar Sec.*, 83 F. Supp. 3d 671, 686 (E.D. Va. 2015) (refusing to rely on anonymously sourced news article because the court had "no way to assess the credibility of anonymous sources quoted in the article, whether the sources have personal knowledge of the events described, and whether the sources were in a position to learn of such events personally").

*Brown*, 2014 WL 4701170, at \*3; *Spell*, 591 F. Supp. at 1116; *Murray Energy Corp.*, 2016 WL 6902359, at \*4. Although Plaintiffs purport to seek three categories of deliberative materials “regarding” “the President’s original July 2017 Tweets and August 2017 Memorandum,” the “Panel of Experts and its working groups,” and the so-called “Implementation Plan and the President’s acceptance of the Plan,” Pls.’ Mot. 2, these enumerated categories are much too broad for the Court to be able to properly apply the balancing test, which requires a balancing of an articulated need for specific deliberative documents or information being sought against the Government’s interests in non-disclosure. *See Farley*, 11 F.3d at 1389; *Vietnam Veterans of Am.*, 2011 WL 4635139, at \*10. Thus, even if the Court were to consider Plaintiffs’ generic arguments, any balancing of the *Cipollone* factors would not justify the disclosure of each and every document subject to a claim of the deliberative process privilege in this case.

Relevance of the evidence: Plaintiffs argue that “the government’s decision-making processes are critical to determining whether the Ban and the implementation policies stemming from it violate the Plaintiffs’ equal protection and substantive due process rights.” Pls.’ Mot. 18. But this generalized assertion of need is far from the “strong showing of relevance” and “particularized need” required to overcome the privilege for *each and every* document withheld relating to the President’s 2017 actions, the Panel of Experts’ study, or the 2018 policy. *VVA*, 2011 WL 4635139, at \*10; *Farley*, 11 F.3d at 1389. Plaintiffs have not identified any particular document for which they have a compelling need, let alone provided any specific information regarding why their need for such a document outweighs Defendants’ interest in non-disclosure. *See Cipollone*, 812 F.2d at 1400 (affirming the district court’s decision to override the privilege after finding that the corporation “demonstrated a compelling need for the materials”); *Marriott Int’l Resorts*, 437 F.3d at 1307 (stating that a plaintiff must show a “compelling need” to overcome the privilege); *Farley*, 11 F.3d at 1390 (holding that a party could not establish “need” as a matter of law where it could not establish relevance).

Even accepting Plaintiffs' view that the Department's policy merely "implements" the August 2017 Presidential Memorandum, Plaintiffs still have not set forth any particularized need for the deliberative materials that went into the 2018 policy, particularly where their focus remains on the intent reflected in deliberations that preceded the 2017 Memorandum. And while Plaintiffs argue that the intent behind the 2017 Presidential Memorandum is at issue, they have not demonstrated a particularized need for any deliberative materials which preceded that decision, given that the 2017 Memorandum and any preceding directives have been expressly revoked.

Although Plaintiffs provide a "handful of examples" of documents they contend were improperly withheld, they do not actually seek to compel them or to provide anything but a generalized assertion that those documents may contain evidence of "Defendants' intent and rationale." Pls.' Mot. 22–25. For example, Plaintiffs cite to a dissenting opinion by a member of the Panel, Acting Under Secretary of the Navy Thomas Dee, which expressed his view of the Panel's recommended policy. But one Panel member's view of the recommended policy, which plainly is deliberative, has no bearing on whether the policy passes constitutional muster. *Cf. Sears*, 421 U.S. at 152 (recognizing in the FOIA context that "[t]he public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground"); *see also Coastal States Gas Corp. v. Dep't of Energy*, No. CIV. 76-1173, 1979 WL 6202, at \*10 (D.D.C. Aug. 22, 1979), *aff'd*, 617 F.2d 854 (D.C. Cir. 1980) (stating that "to the extent that policy and regulatory options presented in these memoranda were rejected by the decisionmakers, the public has little legitimate interest in them").

Finally, by filing a motion for summary judgment arguing that there is no genuine dispute of material fact and that they are entitled to judgment in their favor, Plaintiffs effectively conceded that the deliberative material they seek is irrelevant or unnecessary to prove their claims.

Availability of other evidence: Aside from failing to show a particularized need for any

document or information, Plaintiffs have available to them ample discovery and other information (including over 30,000 non-privileged documents and upcoming responses to Plaintiffs' second set of discovery requests). Plaintiffs have also had the opportunity to take depositions and attend depositions taken in the related *Doe* case, but they have failed to do so.

In addition, the reasoning and evidence behind the Department's new policy is set forth in the Department's Report, and Defendants have produced an administrative record to Plaintiffs that comprises over 3,000 pages of supporting documentation for that policy.<sup>17</sup> See *Utah Med. Prods.*, 2004 WL 988877 at \*5 (finding that even though the requested document was relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff with] a clear explanation" as to why the agency took an enforcement action). Taken together, the availability of other evidence strongly undercuts Plaintiffs' demand to negate the deliberative process privilege as a matter of law in this case.

The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions: This factor strongly weighs against wholesale waiver of the deliberative process privilege or the disclosure of any information, especially given Plaintiffs' lack of any effort to compel, or show any need for, particular documents. Plaintiffs first argue that because "[t]he decision to ban transgender persons from the military has already been made, . . . disclosure will not chill that deliberative process." Pls.' Mot. 19. But that is not the relevant inquiry, and in any event is simply wrong. The question is not just whether disclosure will chill discussions on the same policy, but whether disclosure will chill discussions on a *future* policy. *Warner*, 742 F.2d at 1162; *Heyer*, 2014 WL 4545946, at \*5. Indeed, the Supreme Court has held that documents "shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since

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<sup>17</sup> The next factor in the *Cipollone* balancing test is the role of the Government in the litigation. 812 F.2d at 1400 (citing *Warner*, 742 F.2d. at 1161). As there is no dispute that the Government's policy is at issue in this case, this brief does not address that factor.

disclosure at any time could inhibit the free flow of advice[.]” *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979).

Plaintiffs also argue that “[p]rospectively, the specific circumstances of these deliberations are so unique that disclosure should not chill future legitimate policy discussions.” Pls.’ Mot. 19. But Plaintiffs ignore that the Department of Defense and the military Services routinely make decisions related to personnel, composition of the fighting force, and national security. *See, e.g.*, AR2 (discussing studies undertaken by the Air Force and a contractor regarding “the viability of allowing individuals with disabilities to join the military in certain occupations”); AR32–33 (setting forth the Department’s retention policy for non-deployable service members that was made “[b]ased on the recommendations of the Military Personnel Policy Working Group”); AR210–61 (setting forth a change made in 2011 to the medical standards for appointment, enlistment, or induction into the Services). Disclosure of deliberative material, whether on the wholesale basis sought here or even as to particular material, from the Department of Defense and the military Services plainly risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. In particular, disclosure of deliberative material related to Secretary Mattis’s decisions could diminish his subordinates’ willingness to present their candid views to the Secretary in the future. If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. Such harm to the core Government responsibility to protect its citizens should carry overwhelming weight. *Cf. Heyer*, 2014 WL 4545946, at \*5 (in a case involving due process claims from inmates, finding that “the unique security and other concerns presented by the correctional setting enhance the need for correctional facility decision makers to be able to freely and openly consider among themselves appropriate accommodations for inmates”).

**D. Defendants Have Not Waived the Deliberative Process Privilege.**

Lastly, the Court should reject Plaintiffs' arguments that Defendants have somehow "waived" the deliberative process privilege on a blanket basis as to all of the documents related to the Panel of Expert's findings by "selectively disclosing those findings publicly" in the Department's Report. Pls.' Mot. 15. Specifically, Plaintiffs argue that Defendants have waived the deliberative process privilege as to deliberative materials generated by the Panel of Experts by "publicly rel[ying] on those materials to support" the new policy. *Id.* at 16. This argument is wrong factually and fundamentally misconstrues the concept of waiver.

Defendants' issuance of a new policy through a presidential memorandum, a memorandum by the Secretary of Defense, and an accompanying report cannot serve to negate the deliberative process privilege as a matter of law as to the deliberations concerning the new policy. Plaintiffs' contention that once a final policy is made public, the deliberative process by which that policy was determined is *per se* discoverable, would stand the deliberative process privilege on its head. As should be apparent, innumerable government policies are the result of a deliberative process. If publicly announcing a final policy and referencing the preceding deliberations required disclosure of those internal deliberations, including candid assessments and opinions by military officials, the very notion of the deliberative process privilege would be eliminated, in disregard of its vital role in protecting the quality of government decisionmaking. *See Judicial Watch, Inc. v. Dep't of Def.*, No. 14-1935, 2016 WL 410993, \*3 (D.D.C. Feb. 2, 2016), *aff'd*, 847 F.3d 735 (D.C. Cir. 2017) ("[T]he cases plaintiff cites do not go so far as to call for the abrogation of the deliberative process privilege merely because the decisionmaker ultimately acted in accordance with the recommendation in a deliberative document."); *see also City of Va. Beach*, 995 F.2d at 1252-53.

At the core of Plaintiffs' flawed argument is an attempt to erroneously conflate reliance on the final new policy and the Department's accompanying report that *resulted* from the policy process with



reliance on the “deliberations” that led to the policy outcome. The fact that the Panel of Experts’ deliberations led to a final policy and report that were made public does not negate protection of those internal deliberations. See *Utah Med. Prods.*, 2004 WL 988877 at \*6 (finding that the plaintiff’s argument that the release of a completed report “justifies disclosure of [the] redacted supporting information” was “in error” because the “release of the [report] does not warrant disclosure of the subjective information and opinions that went into the creation of the [report]”); *Am. Soc. of Pension Actuaries v. IRS*, 746 F. Supp. 188, 191 (D.D.C. 1990) (“[P]ermitting FOIA to reach all documents expressing the bottom-line conclusion eventually espoused by the government would intrude severely into the deliberative process exemption.”). Plaintiffs’ contention that Defendants are using the deliberative process privilege as a “shield and a sword,” Pls.’ Mot. 15, is thus plainly wrong. The “sword/shield” concept applies only where a party seeks to *use* privileged information to support its claims. But in disclosing the new policy and the Report, Defendants are not relying on deliberative process information and are not waiving privilege over that information. Rather, Defendants are relying on the *outcome* of the deliberative process: the Department’s new policy and the accompanying 44-page Report, which provides a detailed explanation for why, in the professional judgment of Department officials, this policy is necessary to further military interests. Indeed, it is Plaintiffs who seek to turn reliance on a final policy into a sword that would eliminate deliberative process protections *per se* for a broad category of documents. There is no support in the law for this sweeping proposition.<sup>18</sup>

Similarly, Plaintiffs’ argument that the deliberative process privilege cannot apply to *any* deliberative materials of the Panel of Experts because these materials were “adopted as an official

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<sup>18</sup> Plaintiffs cite *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) to support their argument that Defendants are impermissibly using the deliberative process privilege as a “shield and a sword.” But that case is about the attorney-client privilege, and the court concluded that there was “no basis for concluding that [the plaintiff] ha[d] used the attorney-client privilege as a shield and a sword.” Similarly, Plaintiffs cite *U.S. ex rel. Mayman v. Maritz Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995) in support of its argument that Defendants waived the deliberative process privilege by “selective disclosure.” However, that case concerns waiver of the attorney-client privilege.

position” or “incorporate[d] by reference,” *see* Pls.’ Mot. 15, holds no weight. The concept of obviating the deliberative process privilege by adoption or incorporation by reference applies to “documents that *are themselves* later adopted as documents that express a policy or decision, and not all documents *leading to* a policy or decision that is subsequently adopted.” *Freeman v. Dep’t of Justice*, 723 F. Supp. 1115, 1121 (D. Md. 1988). Thus, adoption can only be applied to specific documents, not to broad categories of deliberative materials. *See N.Y. Times Co. v. Dep’t of Justice*, 915 F. Supp. 2d 508, 547 (S.D.N.Y. 2013), *aff’d in part, rev’d in part on other grounds*, 752 F.3d 123 (2d Cir. 2014), and *aff’d in part, rev’d in part on other grounds and remanded*, 756 F.3d 100 (2d Cir. 2014) (“The first thing to note about adoption is that it refers to the adoption of a ‘memorandum’—i.e., adoption of a particular document.”). Plaintiffs’ contention that Secretary Mattis and the Department of Defense have “adopted as an official position” *all* of the deliberative materials generated by the Panel of Experts is thus quite meritless. *Cf. Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 357 (2d Cir. 2005) (concluding that “*the Memorandum*” was incorporated by reference into the new policy (emphasis added)); *Judicial Watch, Inc.*, 2016 WL 410993, at \*2 (“The Court has been provided with no indication that the Secretary of Defense ever ‘expressly adopted’ *the Lumpkin Memorandum*, or that *the document* was incorporated by reference in a memorandum that followed the decision.” (emphasis added)). Rather, deliberative materials of the Panel of Experts were “used to arrive at a decision,” but the deliberative documents themselves were not “adopted as documents that express a policy or decision.” *Freeman*, 723 F. Supp. at 1121 (rejecting plaintiff’s argument that because the information in deliberative documents was used to arrive at a decision, the documents were “adopted as the [agency’s] decision”); *Judicial Watch*, 2016 WL 410993, at \*3 (rejecting plaintiff’s argument that a memo was expressly adopted the record showed “at most, that [the memo] may have been used as part of the larger decision-making process”). For these reasons, the Court should reject Plaintiffs’ argument that

Defendants have waived the deliberative process privilege.<sup>19</sup>

### CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied.

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<sup>19</sup> It also bears noting that there is no general subject matter waiver for the deliberative process privilege. See *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989) (“[Plaintiff] cites no case and we have found none in which the release of certain documents waived the exemption as to other documents.”). Thus, Plaintiffs’ demand that the deliberative process privilege be set aside *en masse* finds no support in the law of the privilege itself. Plaintiffs cite *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982), and *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974), see Pls.’ Mot. 17, but those cases involve the waiver of the attorney-client privilege. Unlike with the attorney-client privilege, “there is no authority for applying the waiver rule to the deliberative process privilege,” *Murray Energy Corp.*, 2016 WL 6902359, at \*5 (quoting *Gen. Elec. Co. v. Johnson*, 2006 WL 2616187, at \*17 (D.D.C. Sept. 12, 2006)); see also *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 66 (1st Cir. 2007) (“Courts have held in the context of executive privilege that ‘release of a document only waives these privileges for the document or information specifically released, and not for related materials.’” (quoting *In re Sealed Case*, 121 F.3d at 741)); *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 218 (2010) (stating that “[t]here is no subject-matter waiver associated with the deliberative process privilege”); *Marisol v. Giuliani*, No. 95 Civ. 10533, 1998 WL 132810, \*8 (S.D.N.Y. Mar. 23, 1998) (“[R]elease of the document only waives [the deliberative process] privilege for the documents specifically released and not for related materials.”). “This limited approach to waiver serves important interests in open government by ‘ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.’” *Commonwealth of Puerto Rico*, 490 F.3d at 66 (quoting *In re Sealed Case*, 121 F.3d at 741); see also *Murray Energy Corp.*, 2016 WL 6902359, at \*5. “Thus, the Government’s release of a document waives the privilege only for the document specifically released, not for related materials.” *Murray Energy Corp.*, 2016 WL 6902359, at \*5 (citing *In re Sealed Case*, 121 F.3d at 741).

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 29, 2018, I served the foregoing Defendants' Response in Opposition to Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Productions via electronic mail on Plaintiffs' counsel, Marianne Kies, at mkies@cov.com, and Mitchell Kamin, at mkamin@cov.com.

Dated: May 29, 2018

/s/ Courtney D. Enlow

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

*Counsel for Defendants*

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DECLARATION OF COURTNEY ENLOW IN SUPPORT OF  
DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPEL  
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

I, Courtney D. Enlow, swear under penalty of perjury under the laws of the United States to the following:

1. I am a Trial Attorney at the United States Department of Justice and counsel of record for Defendants in this action. I submit this declaration in support of Defendants' Response in Opposition to Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production.

2. During a call on March 1, 2018, that I participated in, Ryan Parker, counsel for Defendants, requested that Plaintiffs identify specific documents or discovery responses to which Plaintiffs contest Defendants' privilege assertions. Mr. Parker explained that if Plaintiffs identified specific documents, Defendants could review the documents to determine whether to perfect the deliberative process privilege over those documents or whether to withdraw the assertion of privilege over the documents with the goal of narrowing the dispute. Mr. Parker further explained that this procedure is occurring in the related case, *Doe v. Trump*, No. 17-cv-1597 (D.D.C.).

Mr. Parker reiterated this request when the parties met in person on March 13, 2018. I participated in that meeting.

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

EXECUTED this 29th day of May, 2018.

/s/ Courtney D. Enlow

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

*Counsel for Defendants*

# Exhibit 1

Chart showing the differences between the military's pre-Carter policy, the Carter policy, and the 2018 policy



	<b>Issue</b>	<b>Pre-Carter Policy</b>	<b>Carter Policy</b>	<b>2018 Policy</b>
<b>No History or Diagnosis of Gender Dysphoria</b>	<i>Accession</i>	Generally disqualified	May serve in biological sex	May serve in biological sex
	<i>Retention</i>	Generally disqualified	May serve in biological sex	May serve in biological sex
	<i>Funded Transition</i>	Unavailable	Unavailable	Unavailable
<b>History or Diagnosis of Gender Dysphoria</b>	<i>Accession</i>	Generally disqualified	If no history of gender transition, disqualified unless stable for 18 months	If no history of gender transition, disqualified unless stable for 36 months
			If history of gender transition, disqualified unless stable in preferred gender and no complications for 18 months	If history of gender transition, disqualified absent waiver
	<i>Retention</i>	Generally disqualified	May serve in biological sex or preferred gender upon completing transition	If no history of gender transition, may serve in biological sex if meet deployability standards
				If history of or need for gender transition, may serve in preferred gender under reliance exception
	<i>Funded Transition</i>	Unavailable	Available if medically necessary	Available under reliance exemption if medically necessary

# Exhibit 2

Plaintiffs' Second Set of Interrogatories and Requests for Production,  
dated May 21, 2018

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. ) No. 1:17-cv-02459-MJG  
 )  
 DONALD J. TRUMP, *et al.*, )  
 )  
 Defendants. )

**PLAINTIFFS' SECOND SET OF INTERROGATORIES  
TO CERTAIN DEFENDANTS<sup>1</sup>**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and D. Md. Local Rule 104, Plaintiffs hereby request that Defendants answer the following interrogatories separately, fully, and under oath, by serving written responses on the undersigned counsel, to the attention of Marianne F. Kies at the offices of Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956.

**DEFINITIONS**

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and Local Rules.

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<sup>1</sup> These interrogatories are propounded to Defendants Trump, Mattis, Esper, Spencer, and Wilson. Plaintiffs are contemporaneously serving a First Set of Interrogatories on Defendants Nielsen and Zukunft, who were added as named defendants in the Second Amended Complaint. ECF No. 148.

1. “Person” means any natural person, firm, proprietorship, partnership, joint venture, group, trust, estate, governmental entity, agency, association, corporation, or any other type of organization or entity.

2. “Communication” means any transmission of information (whether formal or informal) by one or more Persons and/or between two or more Persons by means including, but not limited to, telephone conversations, letters, faxes, electronic mail, text messages, instant messages, other computer linkups, written memoranda, and face-to-face conversations.

3. “Document” has the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a), and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Defendants’ possession, custody, or control. “Documents” include, but are not limited to, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

4. “Identify,” when used with respect to: (a) an individual, shall mean to provide the individual’s full name, job title, and employer during the period referred to, and current or last known address and telephone number and business address and telephone number; (b) any entity other than an individual, shall mean to provide the entity’s full name and current or last-known address (designating which is provided).

5. “Including” or “Includes” means “including, but not limited to” or “including without limitation.”

6. “Relating to,” “Referring to,” or “Concerning,” when referring to any given subject matter, means any information or Document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

7. “Date” means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.

8. “Describe” means to state what is requested to be described, Including all facts and opinions known and held Relating to what is requested to be described, and Identifying (i) each Person involved or having any knowledge of each fact or opinion that Relates to what is so described; (ii) each Document evidencing the answer or response given or Relating to said subject-matter in any way; and (iii) all relevant or material Dates and time periods, specifying the way in which said Dates or time periods Relate to the subject-matter described.

9. “Individual Defendants” means Donald J. Trump, James Mattis, Mark Esper, Richard Spencer, Heather Wilson, Kirstjen Nielsen, and Paul Zukunft.

10. “Military Services” refers to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

11. “You,” “Your,” or “Defendants” refers to the Individual Defendants, their predecessors (where applicable), and their respective agencies and agency components (Including the Executive Office of the President and Military Services) and all others acting or purporting to act on behalf of the Individual Defendants, their predecessors, or their agencies or agency components, Including current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

12. The “Working Group” shall refer to the working group directed by former Secretary of Defense Ashton Carter in his “Memorandum for Secretaries of the Military Departments,” dated July 28, 2015. (Ex. A in ECF No. 13-4, *Doe v. Trump*, No. 17-1597 (D.D.C.).)

13. The “Open Service Directive” shall refer to the directive issued by former Secretary of Defense Ashton Carter titled “Memorandum for Secretaries of the Military Departments,” *et al.*, dated June 30, 2016. (ECF No. 40-4.)<sup>2</sup>

14. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Deputy Secretary of Defense Robert O. Work titled

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<sup>2</sup> Unless otherwise stated, ECF numbers refer to documents filed in this case.

“Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.

15. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff,” dated June 30, 2017. (ECF No. 40-11.)

16. The “Tweets” shall refer to the series of tweets issued by President Trump on Twitter on July 26, 2017 that stated: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.” (ECF No. 40-22.)

17. The “Transgender Service Member Ban” or “Ban” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.” (ECF No. 40-21.)

18. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis with the subject line “Military Service by Transgender Individuals — Interim Guidance,” dated September 14, 2017. (ECF No. 60-5.)

19. “Panel of Experts” means the individuals who collectively comprise the “panel of experts” referred to in the Interim Guidance, including those individuals who attended meetings with the intent to discuss and develop the Implementation Plan, subordinates who attended meetings on behalf of a member of the panel, and every author of each section listed in the Table of Contents of the February 2018 DoD Report (available at ECF No. 120-2).

20. “Mattis Memorandum” shall refer to the Memorandum sent by Secretary Mattis to President Trump titled “Memorandum for the President” with the subject “Military Service by Transgender Individuals,” dated February 22, 2018. (ECF No. 120-1.)

21. “The Report” shall refer to “Department of Defense Report and Recommendations on Military Service by Transgender Persons,” dated “February 2018.” (ECF No. 120-2.)

22. “Implementation Plan” shall refer to the Mattis Memorandum, the Report, and the 2018 Trump Memorandum titled “Memorandum for the Secretary of Defense, Secretary of Homeland Security,” with the subject “Military Service by Transgender Individuals,” dated March 23, 2018 and available at ECF No. 120-3. The definition of “Implementation Plan” is inclusive of references to the “implementation plan due on February 21, 2018” in Plaintiffs’ First Set of Interrogatories and Production of Documents to Defendants, served on January 3, 2018.



23. The words “and” as well as “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of these requests any information that might otherwise be construed as falling outside the scope of these requests.

24. Words used in the singular shall, when the context permits, be deemed to include the plural, and words used in the plural shall, when the context permits, be deemed to include the singular. The masculine gender shall, when the context permits, be deemed to include the feminine or neuter genders.

### **INSTRUCTIONS**

1. Pursuant to Federal Rule of Civil Procedure 26(e), these interrogatories are continuing and You must revise or supplement Your responses whenever new or additional responsive information becomes known.

2. Each interrogatory solicits all information that is known to You or in Your possession, custody, or control, and all information available to You from Your employees, contractors, agents, representatives, consultants, attorneys, accountants, advisors, or other person(s) directly or indirectly connected with You or subject to your control.

3. Each interrogatory is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular interrogatory.

4. These interrogatories are to be answered in detail. If You cannot answer any interrogatory in full, You should answer it to the extent possible and explain your inability to answer any further.

5. If You claim that the language of any interrogatory is vague or ambiguous, then You must identify the language you believe is ambiguous and describe the different interpretations that You believe may apply to such language. Regardless of any vagueness or ambiguity You claim, You are to answer the interrogatory to the best of your ability.

6. If any of the answers to these interrogatories are derived from Documents in Your possession or under Your control, please attach a copy thereof to Your answers; in the alternative, please describe each of the Documents with specificity and state when and where they will be available to Plaintiffs' counsel for inspection and copying. Each page of every Document You attach or produce must be marked with a unique identifier or "Bates stamp."

7. If You contend that information responsive to any interrogatory is protected from disclosure pursuant to any privilege, then You must comply with Federal Rule of Civil Procedure 26(b)(5) and the operative scheduling order (ECF No. 100) and describe that information to the extent possible and the nature of the privilege claimed.

8. Unless otherwise specified, these Interrogatories cover the period July 13, 2015 through the present.

## INTERROGATORIES

### ***TO BE ANSWERED BY DEFENDANTS ESPER, SPENCER, AND WILSON***

**Interrogatory No. 25:** Identify all Communications between You or your staff and (i) President Trump or any officer or employee of the Executive Office of the President (Including Vice President Pence) or (ii) Secretary Mattis or his staff, Concerning the issue of military service by transgender individuals.

### ***TO BE ANSWERED BY DEFENDANTS MATTIS, ESPER, SPENCER, AND WILSON***

**Interrogatory No. 26:** Identify all requests by President Trump, his advisors, or any officer or employee of the Executive Office of the President (Including Vice President Pence) for Documents and Information regarding the service of Transgender individuals in the U.S. military that you have received since January 20, 2017.

**Interrogatory No. 27:** Identify any of Your current or former officials, officers, subordinates, employees, contractors, or agents who are the “Generals” or “military experts” that the Tweets state consulted with or advised President Trump on whether to allow transgender individuals to serve in any capacity in the U.S. military, and state the Date of such Communications.

**Interrogatory No. 28:** Identify all Persons who are currently or formerly part of Your service branch or department with whom President Trump (or others acting or purporting to act on his behalf) has communicated Concerning the Ban or the Implementation Plan, and state the Date of such Communications.

**Interrogatory No. 29:** Identify any justifications for the “meaningful concerns” referenced in the Ban that allowing transgender service could “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources,” and identify any Persons who expressed those concerns to President Trump.

**Interrogatory No. 30:** Identify all Documents and Communications of which You are aware that were reviewed, relied upon directly or indirectly, or considered by President Trump in preparing and issuing the Transgender Service Member Ban, indicating which component of the Ban each Document or Communication pertains to (medical care, accessions, discharge).

**Interrogatory No. 31:** Identify each Person who drafted, revised, or commented on any section identified in the Table of Contents of the Report, and state the role(s) each Person played in drafting, revising, or commenting on the Report.

**Interrogatory No. 32:** Describe in detail the process by which the Report was created, Identifying each Person who participated in or provided input during the creation of the Report and stating the role(s) each Identified Person played in that process.

Dated: May 21, 2018

David M. Zionts\*  
Carolyn F. Corwin\*  
Mark H. Lynch (Bar No. 12560)  
Augustus Golden\*  
Jeff Bozman\*  
Marianne F. Kies (Bar No. 18606)  
Christopher J. Hanson\*  
Joshua D. Roselman\*  
Peter J. Komorowski (Bar No. 20034)  
Mark Neuman-Lee\*  
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Respectfully submitted,

/s/ Marianne F. Kies

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*Attorneys for Plaintiffs*

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ssunderland@cov.com

\* *Admitted pro hac vice*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of May 2018, a true and correct copy of the foregoing Plaintiffs' Second Set of Interrogatories to Certain Defendants was served by e-mail on counsel of record for Defendants.

*/s/ Marianne F. Kies*

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Marianne F. Kies

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:17-cv-02459-MJG
	)	
DONALD J. TRUMP, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**PLAINTIFFS' SECOND SET OF REQUESTS FOR PRODUCTION  
OF DOCUMENTS TO CERTAIN DEFENDANTS<sup>1</sup>**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and D. Md. Local Rule 104, Plaintiffs hereby serve their Second Set of Requests for Production of Documents to Defendants.

**DEFINITIONS**

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and Local Rules.

1. "Person" means any natural person, firm, proprietorship, partnership, joint venture, group, trust, estate, governmental entity, agency, association, corporation, or any other type of organization or entity.

2. "Communication" means any transmission of information (whether formal or informal) by one or more Persons and/or between two or more Persons by

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<sup>1</sup> These requests are propounded to Defendants Trump, Mattis, Esper, Spencer, and Wilson. Plaintiffs are contemporaneously serving a First Set of Requests for Production on Defendants Nielsen and Zukunft, who were added as named



means including, but not limited to, telephone conversations, letters, faxes, electronic mail, text messages, instant messages, other computer linkups, written memoranda, and face-to-face conversations.

3. “Document” has the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a), and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Defendants’ possession, custody, or control. “Documents” include, but are not limited to, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

4. “Including” or “Includes” means “including, but not limited to” or “including without limitation.”

5. “Relating to,” “Referring to,” or “Concerning,” when referring to any given subject matter, means any information or Document that constitutes,

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defendants in the Second Amended Complaint. ECF No. 148.

comprises, involves, contains, embodies, reflects, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

6. “Date” means the exact date, month, year, and time if ascertainable, or, if not, the best available approximation.

7. “Social Media” means all forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content, including, but not limited to, Facebook, Twitter, LinkedIn, Google+, YouTube, Pinterest, Instagram, Tumblr, Flickr, Reddit, Snapchat, and WhatsApp.

8. “Individual Defendants” means Donald J. Trump, James Mattis, Mark Esper, Richard Spencer, Heather Wilson, Kirstjen Nielsen, and Paul Zukunft.

9. “Military Services” refers to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

10. “You,” “Your,” or “Defendants” refers to the Individual Defendants, their predecessors (where applicable), and their respective agencies and agency components (Including the Executive Office of the President and Military Services) and all others acting or purporting to act on behalf of the Individual Defendants, their predecessors, or their agencies or agency components, Including current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

11. The “Working Group” shall refer to the working group directed by former Secretary of Defense Ashton Carter in his “Memorandum for Secretaries of the Military Departments,” dated July 28, 2015. (Ex. A in ECF No. 13-4, *Doe v. Trump*, No. 17-1597 (D.D.C.).)

12. The “Open Service Directive” shall refer to the directive issued by former Secretary of Defense Ashton Carter titled “Memorandum for Secretaries of the Military Departments,” *et al.*, dated June 30, 2016. (ECF No. 40-4.).<sup>2</sup>

13. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Deputy Secretary of Defense Robert O. Work titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.

14. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff,” dated June 30, 2017. (ECF No. 40-11.)

15. The “Tweets” shall refer to the series of tweets issued by President Trump on Twitter on July 26, 2017 that stated: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs

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<sup>2</sup> Unless otherwise stated, ECF numbers refer to documents filed in this case.

and disruption that transgender in the military would entail. Thank you.” (ECF No. 40-22.)

16. The “Transgender Service Member Ban” or “Ban” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.” (ECF No. 40-21.)

17. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis with the subject line “Military Service by Transgender Individuals — Interim Guidance,” dated September 14, 2017. (ECF No. 60-5.)

18. “Panel of Experts” means the individuals who collectively comprise the “panel of experts” referred to in the Interim Guidance, including those individuals who attended meetings with the intent to discuss and develop the Implementation Plan, subordinates who attended meetings on behalf of a member of the panel, and every author of each section listed in the Table of Contents of the February 2018 DoD Report (available at ECF No. 120-2).

19. “Mattis Memorandum” shall refer to the Memorandum sent by Secretary Mattis to President Trump titled “Memorandum for the President” with the subject “Military Service by Transgender Individuals,” dated February 22, 2018. (ECF No. 120-1.)

20. “The Report” shall refer to “Department of Defense Report and Recommendations on Military Service by Transgender Persons,” dated “February

2018.” (ECF No. 120-2.)

21. “Implementation Plan” shall refer to the Mattis Memorandum, the Report, and the 2018 Trump Memorandum titled “Memorandum for the Secretary of Defense, Secretary of Homeland Security,” with the subject “Military Service by Transgender Individuals,” dated March 23, 2018 and available at ECF No. 120-3. The definition of “Implementation Plan” is inclusive of references to the “implementation plan due on February 21, 2018” in Plaintiffs’ First Set of Interrogatories and Production of Documents to Defendants, served on January 3, 2018.

22. The words “and” as well as “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of these requests any information that might otherwise be construed as falling outside the scope of these requests.

23. Words used in the singular shall, when the context permits, be deemed to include the plural, and words used in the plural shall, when the context permits, be deemed to include the singular. The masculine gender shall, when the context permits, be deemed to include the feminine or neuter genders.

### **INSTRUCTIONS**

1. Unless otherwise agreed in writing, all Documents are to be produced to the attention of Marianne Kies at the offices of Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956.

2. Each page of every Document must be marked with a unique identifier or “Bates stamp.”

3. If Defendants object to any portion of any Request, Defendants shall identify the portion to which Defendants object, state the basis for the objection, and respond to the remainder. Pursuant to Federal Rule of Civil Procedure 34(b)(2)(C), Defendants' objection must state whether any responsive materials are being withheld on the basis of the objection(s).

4. Produce all Documents within Your possession, custody, or control, including all Documents in the possession, custody, or control of any of Your agency and its components, officials, officers, subordinates, employees, contractors, agents, representatives, consultants, attorneys, accountants, advisors, or other person(s) directly or indirectly connected with You or subject to your control.

5. Documents that are in paper form or that constitute other physical objects from which recorded information may be visually read, as well as audio or video tapes or text messages or Social Media data and similar recordings, including drafts, should be produced in their original form or in copies that are exact duplicates of the originals. Computer files and similar electronic records should be produced in a readable form mutually agreed upon by the parties.

6. Produce all Documents in the order in which they appear in Your files. Documents that, in their original condition, are stapled, clipped, or otherwise fastened together shall be produced in this same condition.

7. Produce password-protected Documents with any applicable passwords.

8. Pursuant to Federal Rule of Civil Procedure 26(b)(5) and the operative scheduling order (ECF No. 100), if You contend that any responsive Document is protected from disclosure pursuant to any privilege, please specify the nature of the privilege that is being claimed. In addition: for (A) oral Communications, please specify (i) the name of the Person making the communication and the names of Persons present while the communication was made, and, where not apparent, the relationship of the Persons present to the Person making the communication, (ii) the Date and place of the Communication, and (iii) the general subject matter of the Communication; and for (B) Documents, please specify: (i) the type of document, (ii) the general subject matter of the Document; (iii) the Date of the Document, and (iv) such other information as is sufficient to identify the Document, Including, where appropriate, the author, addressee, custodian, and any other recipient of the Document, and, when not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

9. If no Documents responsive to a particular Request exist, or if such Documents exist but are not in Your possession, custody, or control, then Your response to that Request shall so state.

10. If any of the requested Documents was previously, but is no longer, in Defendants' possession or subject to Defendants' control, state what disposition was made of the Document and when, including the Date it left Defendants' possession or control, identify the Person to whom Defendants transferred it if applicable, and explain the reasons for such disposition.

11. If a Request asks for a Document which no longer exists, then in response to such a Request, Defendants shall identify each such Document; identify all information that was contained in each such Document; state the Date on which each such Document ceased to exist; state what happened to cause each such Document to cease to exist; state why each such Document was caused to or happened to cease to exist; state the time periods during which such types of Documents were maintained; identify each Person having knowledge of the circumstances under which each such Document ceased to exist; and identify each Person having knowledge of each such Document and state the substance of said knowledge.

12. Each paragraph is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular Request.

13. Pursuant to Federal Rule of Civil Procedure 26(e), these Requests are continuing and You must revise or supplement Your responses and production whenever new or additional responsive information becomes known.

14. Unless otherwise specified, these Requests cover the period July 13, 2015 through the present.



## **REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 22:** All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Implementation Plan including any drafts of the Implementation Plan.

**REQUEST FOR PRODUCTION NO. 23:** All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Implementation Plan.

**REQUEST FOR PRODUCTION NO. 24:** All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Implementation Plan, including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

**REQUEST FOR PRODUCTION NO. 25:** All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Homeland Security or the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Homeland Security or the Department of Defense or its components, to the Implementation Plan.

**REQUEST FOR PRODUCTION NO. 26:** Documents and Communications Concerning the Implementation Plan between July 25, 2017, and the present between President Trump or Persons acting or purporting to act on President

Trump's behalf (Including, but not limited to, Vice President Pence, White House officials, and senior staff to the President) on the one hand, and the Department of Defense, Department of Justice, other federal government agency, any military service, or any non-government individual or group, on the other.

**REQUEST FOR PRODUCTION NO. 27:** Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormones provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and cross-sex hormones.

**REQUEST FOR PRODUCTION NO. 28:** Communications that You referred to or considered in connection with responding to Plaintiffs' Second Set of Interrogatories to Defendants Trump, Mattis, Esper, Spencer, and Wilson.

Dated: May 21, 2018

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of May 2018, a true and correct copy of the foregoing Plaintiffs' Second Set of Requests for Production of Documents to Certain Defendants was served by e-mail on counsel of record for Defendants.

*/s/ Marianne F. Kies*

---

Marianne F. Kies

# Exhibit 3

Email from Marianne Kies to Ryan Parker,  
dated April 11, 2018

**From:** Kies, Marianne  
**To:** [Parker, Ryan \(CIV\)](#)  
**Cc:** [Kamin, Mitchell A](#); [Corwin, Carolyn](#); [Skurnik, Matthew \(CIV\)](#); [Enlow, Courtney D. \(CIV\)](#)  
**Subject:** RE: Briefing in re Defendants' Motion for Protective Order (Stone v. Trump, D. Md.)  
**Date:** Wednesday, April 11, 2018 2:50:34 PM

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Ryan:

After further discussions with the *Doe* team, the *Stone* plaintiffs will not participate in the Kurta deposition on April 20 in light of Defendants' pending motions in *Stone*, and the parties' many disputes regarding Defendants' privilege assertions and failure to produce documents. It is our understanding that the *Doe* team still wishes to proceed on that date.

Plaintiffs reserve all rights, including scheduling a further deposition of Mr. Kurta following resolution of the pending motions and any forthcoming motions to compel.

Sincerely,  
Marianne

**Marianne Kies**

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**COVINGTON**

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**From:** Kies, Marianne  
**Sent:** Tuesday, April 10, 2018 5:44 PM  
**To:** 'Parker, Ryan (CIV)' <[Ryan.Parker@usdoj.gov](mailto:Ryan.Parker@usdoj.gov)>  
**Cc:** Kamin, Mitchell A <[MKamin@cov.com](mailto:MKamin@cov.com)>; Corwin, Carolyn <[ccorwin@cov.com](mailto:ccorwin@cov.com)>; 'Skurnik, Matthew (CIV)' <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>; 'Enlow, Courtney D. (CIV)' <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>  
**Subject:** Briefing in re Defendants' Motion for Protective Order (Stone v. Trump, D. Md.)

Ryan,

Following up on our conversations this afternoon and my voicemail of a few minutes ago. We are working with the *Doe* team to answer your question about the Kurta deposition timing. As you know, however, the *Stone* Plaintiffs' deadline for the opposition to Defendants' motion for protective order is looming. As the Court will soon be closed, can we please agree to the amended briefing schedule you proposed (April 13 for Opposition; April 25 for Reply)? We will circle back with you on the separate Kurta issue as soon as we're able.

Please respond as soon as possible, so we can inform the Court.

Sincerely,  
Marianne

**Marianne Kies**

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This message is from a law firm and may contain information that is confidential or legally privileged. If you are not the intended recipient, please immediately advise the sender by reply e-mail that this message has been inadvertently transmitted to you and delete this e-mail from your system. Thank you for your cooperation.



# Exhibit 4

Emails from Ryan Parker and Mitchell Kamin to the Chambers of Judge Garbis,  
dated May 2, 2018

**From:** Kamin, Mitchell A  
**To:** [Parker, Ryan \(CIV\)](#); [MDD\\_MJGChambers@mdd.uscourts.gov](mailto:MDD_MJGChambers@mdd.uscourts.gov)  
**Cc:** [Kies, Marianne](#); [Zionts, David](#); [Enlow, Courtney D. \(CIV\)](#); [Carmichael, Andrew E. \(CIV\)](#); [Norway, Robert M. \(CIV\)](#)  
**Subject:** RE: Stone v Trump: Case No. 1:17-cv-2459 - Request for Scheduling Call  
**Date:** Wednesday, May 02, 2018 1:46:32 PM  
**Attachments:** [MTC - Motion.pdf](#)  
[Memo ISO Motion to Compel.pdf](#)  
[Proposed Order on MTC.PDF](#)

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Dear Judge Garbis:

Plaintiffs agree that a scheduling call would be useful, but we write to respond to several inaccuracies in Defendants' email.

Since at least February 21, 2018, Plaintiffs have challenged Defendants' invocation of deliberative process privilege and attempted repeatedly—in formal and email correspondence, by phone, and in person—to meet and confer with Defendants. As explained in our motion to compel, which we attach to this email, this is not a dispute about whether particular documents are privileged. It is a dispute about whether the deliberative process privilege applies as a matter of law to discrete categories of documents that are of central importance to this case. This is a straightforward legal question that does not require review of “thousands of documents.” Resolving this question in a timely manner is essential because Defendants have invoked the deliberative process privilege to block all inquiry into the essential facts of this case through written discovery or depositions. Defendants' obligations to the district court in D.C. do not lessen their obligations to this Court, and to Plaintiffs, to proceed in a fair and expeditious manner. Further, the motion to compel does not raise any issues specific to President Trump, such as presidential communications privilege.

Plaintiffs have advised Defendants that we agree to a reasonable 1-week extension to oppose the motion to compel, which would bring Defendants' total response time to 3 weeks (on top of the several months Defendants have already had to consider Plaintiffs' arguments). Plaintiffs also advised Defendants that we will agree to a longer extension of time for Defendants to file a motion to dismiss Plaintiffs' Second Amended Complaint. Defendants did not respond to this offer.

Contrary to Defendants' suggestion, Plaintiffs have agreed to numerous prior extensions and remain willing to work with Defendants for reasonable extensions going forward. Defendants' demand for a 39 day extension to oppose the motion to compel, however, is both unreasonable and unprecedented in this litigation.

Respectfully submitted,

Mitch Kamin

**Mitchell Kamin**

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## COVINGTON

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**From:** Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>

**Sent:** Wednesday, May 02, 2018 8:45 AM

**To:** MDD\_MJGChambers@mdd.uscourts.gov

**Cc:** Kamin, Mitchell A <MKamin@cov.com>; Kies, Marianne <MKies@cov.com>; Zionts, David <DZionts@cov.com>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>

**Subject:** Stone v Trump: Case No. 1:17-cv-2459 - Request for Scheduling Call

Chambers of Judge Garbis,

I am counsel for the Defendants in *Stone v. Trump*, Case No. 1:17-cv-2459, and I have included counsel for the Plaintiffs on this email. Defendants respectfully request a scheduling call with the Court as soon as possible. On April 23, Plaintiffs served Defendants with a sweeping motion to compel entire categories of documents that Defendants have withheld under the deliberative process privilege. Plaintiffs' motion implicates issues that are currently before the Court in Defendants' fully-briefed motions to dismiss the President, ECF No. 115, and for a protective order staying discovery, ECF No. 121. Defendants' opposition to Plaintiffs' motion to compel is currently due on May 7, 2018.

Defendants have conferred with Plaintiffs and requested an extension of time to respond to Plaintiffs' motion to compel for several reasons. First, Defendants have been ordered by the Court in the related *Doe* litigation (DDC) to complete their document production by May 15, and are dedicating significant resources to producing all of the remaining responsive documents in *Doe* by that date. Defendants intend to produce the same documents to the Plaintiffs in this case and the other two related cases shortly after May 15. Defendants should not be required to divert resources from attempting to meet that *Doe* Court's deadline to respond to Plaintiffs' motion to compel. In addition, Plaintiffs should wait until they receive all of the responsive records in this case so that they can raise their discovery issues in one motion, rather than litigating the issues in piecemeal fashion.

Relatedly, Plaintiffs' motion to compel challenges withholdings from the Army, Navy, Air Force, Joint Chiefs of Staff, Defense Health Agency, and Department of Defense. It is also unclear from Plaintiffs' motion whether they are challenging deliberative process privilege withholdings from the White House. As just limited to DoD and the military services, however, thousands of documents are potentially at issue in this motion and, in order to adequately oppose Plaintiffs' motion, Defendants will need additional time to work with these different entities on multiple necessary declarations. If Plaintiff is also seeking information from the White House, a response to the motion will need to address that significant issue as well.

Finally, Plaintiffs have filed a Second Amended Complaint, and Defendants' deadline for moving to dismiss the complaint is May 11. Defendants also have a reply brief in support of Defendants' motion to dissolve the preliminary injunction due on May 11, and a brief due in the related

*Stockman* case (C.D. Cal.) on May 7.

For all of these reasons, counsel for Defendants conferred with counsel for Plaintiffs and requested an extension of time until June 15, one month after the completion of Defendants' document production, to oppose Plaintiffs' motion to compel. Despite the fact that Defendants have repeatedly consented to Plaintiffs' extension motions, *see e.g.*, ECF No. 122 (Plaintiffs' consent motion for an extension of time to respond to Defendants' motion to dissolve the injunction and motion for a protective order), Plaintiffs have indicated that they will only agree to a one week extension, until May 14, for Defendants' to oppose their motion to compel.

Because this scheduling issue implicates broader issues in this case, including two motions that are fully briefed and pending before the Court, and the parties have not been able to resolve it, Defendants respectfully request a scheduling call with the Court as soon as possible.

Best,

**Ryan B. Parker**  
Senior Trial Counsel  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Tel: 202-514-4336 | [ryan.parker@usdoj.gov](mailto:ryan.parker@usdoj.gov)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL SUPPLEMENTAL  
INTERROGATORY ANSWERS AND PRODUCTION**

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## INTRODUCTION

Defendants' opposition to the Motion to Compel is their latest salvo in a continuing effort to delay or shut down this litigation. For many months, Defendants have sought to defer their discovery obligations and persuade this Court and others to dismiss entirely this and all other cases challenging Defendants' efforts to ban transgender persons from military service. In particular, Defendants have asserted broad objections to Plaintiffs' discovery requests based on the deliberative process privilege, seeking to shield documents and information that would shed light on how and why Defendants drafted the Implementation Plan released on March 23, 2018.

On June 7, 2018, the District Court denied Defendants' Motion for a Protective Order (ECF 121), which had sought to stay all discovery. ECF 170. The Court further directed that discovery be completed on August 31, 2018—just a few months away. Accordingly, prompt resolution of the parties' outstanding discovery disputes—including the significant disputes raised in the instant Motion—is imperative. In the instant Motion, Plaintiffs request a ruling that will define the contours of the deliberative process privilege as it applies in the circumstances of this case. Such a ruling would provide guidance to the parties and potentially avoid the need for Plaintiffs to request a time-consuming *in camera* review of thousands of individual documents constituting tens of thousands of pages.

Plaintiffs' opening brief showed that, because the government's intent is the focal point of Plaintiffs' constitutional challenges, the deliberative process privilege does not shield documents and information concerning key decisions regarding the development of the ban on transgender military service and implementation of that ban. Defendants' opposition fails to overcome that showing. Indeed, Defendants have failed to identify *any* decision in which a court has upheld a party's assertion of deliberative process privilege where the government's subjective intent was a central issue in the case and the discovery was probative of that intent.

Similarly, Defendants fail to identify *any* decision in which a court has required a party to demonstrate a particularized need for each wrongfully withheld document where subjective intent was at issue. Because Defendants' subjective intent during the deliberative process is at issue in this case, documents and information withheld on the basis of deliberative process privilege are, by definition, critically relevant to Plaintiffs' claims and should be produced.

**I. The Existence Of Pending Motions Does Not Prevent A Ruling On The Motion To Compel.**

This Court recently rejected Defendants' argument that the existence of various pending motions is a reason to delay discovery and ordered that all discovery be completed by the end of August. ECF 170 at 2. This order should be dispositive of Defendants' demand that the Court delay ruling on Plaintiffs' Motion to Compel until the Court has decided other motions.

Postponing resolution of Defendants' privilege claims would be particularly inappropriate at this juncture because Defendants have sought summary judgment in their favor. ECF 158. Plaintiffs opposed that motion, in part because Defendants are "withholding material facts from Plaintiffs." ECF 163-2 at 3. Plaintiffs filed a lengthy Rule 56(d) affidavit setting forth specific evidence and discovery essential to oppose Defendants' request for judgment as a matter of law. ECF 163-16 at 8–14. At a minimum, "[t]he existing record . . . reveals genuine disputes of material fact on issues central to Plaintiffs' constitutional arguments (including animus and the nature of the government's decisionmaking process)," as to which discovery must proceed. ECF 163-2 at 45. A ruling on Defendants' privilege claims will significantly aid the Court, and the parties, in resolving these disputes.

Because Plaintiffs need the information they have requested to oppose Defendants' motion for summary judgment, and because the existing record already contains numerous disputes of material fact, Plaintiffs' Motion to Compel should be resolved immediately. *Cf.*

*Wilderness Soc’y v. Griles*, 824 F.2d 4, 19–20 (D.C. Cir. 1987) (holding that a district court’s grant of defendants’ motion for a protective order precluding discovery until after a ruling on defendants’ pending motion constituted an abuse of discretion when plaintiffs’ interrogatories and document requests “were directly relevant to the . . . question on which summary judgment was granted.”); *Hovermale v. Sch. Bd. of Hillsborough Cty.*, 128 F.R.D. 287, 289–90 (M.D. Fla. 1989) (finding that “it would be improper and an abuse of discretion to stay general discovery in this case pending a determination on defendants’ motion for summary judgment” when plaintiffs’ discovery requests make it “apparent that at least some of the queries may produce answers which will help plaintiff respond to the arguments raised in defendants’ summary judgment motion”); *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) (“[T]he Court ordinarily should not stay discovery which is necessary to gather facts in order to defend against the motion.” (citation omitted)).

## **II. The Deliberative Process Privilege Does Not Protect The Categories Of Documents And Information Plaintiffs Seek To Compel.**

Plaintiffs seek a ruling on Defendants’ claims of deliberative process privilege as they relate to documents and information concerning three specific policy decisions and processes of central importance to this case. Defendants argue that Plaintiffs’ motion sweeps too broadly. Defs’ Resp. at 1. If Plaintiffs’ motion is broad, that is an issue of Defendants’ own making: Defendants have asserted the deliberative process privilege in an expansive way, shielding tens of thousands of documents and large swathes of information relevant to decisions at the heart of this case, and their privilege logs provide minimal information about the documents withheld or redacted on this ground. Because Defendants have chosen to impermissibly assert the deliberative process privilege over hundreds of thousands of pages and have refused to provide

any information to indicate whether the privilege was validly asserted, a broad ruling on the applicability of the privilege is not just warranted, it is critical.

**A. The Government’s Intent Is Central To This Case.**

Defendants do not seriously contend that the government’s intent and its decisionmaking process are irrelevant to Plaintiffs’ original constitutional challenge to President Trump’s decision to ban transgender persons from military service. *See generally* Am. Compl. (ECF 39). Indeed, the Court cited the absence of a normal decisionmaking process in granting Plaintiffs’ motion for preliminary injunction. ECF 85 at 43. Instead, Defendants have pivoted: claiming that their *implementation* of President Trump’s original directives was somehow “independent” from the decision that directed it and passes constitutional muster. The existing record soundly refutes Defendants’ claim. For instance, slides for the “Kickoff Meeting” for the Department of Defense (“DoD”) Transgender Personnel Policy Working Group characterized as “Policy Guidance” President Trump’s July 26, 2017, Twitter post proclaiming that the “United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” Decl. of Marianne F. Kies (“Kies Decl.”) (attached hereto), Ex. 1 at 11.<sup>1</sup> Defendants’ own talking points acknowledge that DoD issued an “implementation plan to meet the President’s intent.” ECF 163-9. *See also* Kies Decl., Ex. 2 (“In response to the 26 July announcement on transgender policy by the President, OSD [Office of the Secretary of Defense] is working with the White House to discern the President’s intent.”); Kies Decl., Ex. 3 (memorandum from the Chairman of the Joint Chiefs of Staff Joseph F. Dunford, Jr., stating that “[t]here will be no

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<sup>1</sup> On April 19, 2018, Defendants attempted to claw back this document, which bears extensive redactions. Kies Decl., Ex. 4. They have since withdrawn that request, but maintain a clawback request for the un-redacted version.

modifications to the current policy until the President’s direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.”).

Indeed, this Court has already concluded that President Trump’s directive to DoD to develop an “implementation plan” was “not a request for a study but an order to implement the Directives contained therein.” ECF 85 at 50. Secretary Mattis himself directed that the “independent” review process simply “inform the Implementation Plan.” ECF 139-5. The act of “informing” the Implementation Plan did not include the potential to reach an outcome different from President Trump’s dictates.<sup>2</sup> President Trump himself earlier acknowledged that he took away the military’s discretion on the issue, and that he believed he was “doing the military a great favor” by “coming out and just saying” that transgender service members would be banned. ECF 40-12. And though the implementation plan Secretary Mattis issued uses the term “gender dysphoria,” the clear effect of the reworded policy would be to ban service by transgender individuals, since under that policy transgender individuals must serve in their “biological sex” and may not serve if they have gender dysphoria or have undergone gender transition. The existing record plainly demonstrates that the purported “independent” review process had a clear mandate: implement President Trump’s intent.

Defendants suggest that the implementation plan should be evaluated under the rational basis test and that intent and the decisionmaking process are irrelevant under that standard. Defs.’ Resp. at 23–24. Defendants are wrong on both counts. *See* ECF 85 at 43–44. As Plaintiffs

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<sup>2</sup> For example, instead of asking whether to continue allowing transgender military service, the review process was simply to “recommend updated accession policy guidelines to reflect currently accepted medical terminology.” ECF 139-5. And rather than determining whether or not government resources should fund sex-reassignment surgical procedures, the review was to “enumerate specific surgical procedures associated with sex reassignment treatment that shall be prohibited.” *Id.*

established in other filings, heightened scrutiny should apply to the Court’s evaluation of the implementation plan, which on its face discriminates against people who are transgender. ECF 163-2 at 30; ECF 139 at 18–19. In any event, the President’s intent and its effect on DoD’s implementation of the President’s directives are central to this case under any level of scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 516 (1996) (inquiring into the policy’s justifications under intermediate scrutiny); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[B]are . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

**B. Defendants’ Privilege Claims Need Not Be Analyzed On A Document-By-Document Basis.**

Throughout their opposition brief, Defendants claim that Plaintiffs must articulate why the deliberative process privilege does not apply to “each and every document” individually. *See e.g.,* Defs.’ Resp. at 26, 28. Defendants’ demand is unsupported by any authority and ignores the impossibility of imposing such a burden on Plaintiffs where Defendants have failed to provide adequate descriptions of the documents or meaningful explanations of why the privilege applies to specific documents. On the record supplied by Defendants, the only way to make document-by-document determinations would be through *in camera* review by the Court, and that would impose a staggering burden on the Court. There is no need to impose such a burden where (as here) the heavy weight of authority dictates that the deliberative process privilege does not shield the types of documents and information covered by Plaintiffs’ motion to compel.

As Plaintiffs have repeatedly explained to Defendants, *see, e.g.,* Decl. of Marianne F. Kies in Support of Motion to Compel dated April 23, 2018, Exs. 8 and 11, Defendants’ conduct has rendered it practically impossible for Plaintiffs to determine the validity of Defendants’ privilege assertions as to any particular document or discovery request. Defendants’ privilege

logs claim the deliberative process privilege for over 25,000 documents,<sup>3</sup> and Defendants have yet to provide privilege logs for over one third of their document production—approximately 35,000 documents. Kies Decl. ¶ 6.<sup>4</sup> In many cases, the logs that Defendants have provided omit sender or recipient information for communications, omit subject matter or meaningful description of documents, and employ conclusory boilerplate language instead of the substantive description of “the nature of the documents, communications, or tangible things not produced or disclosed” that would enable Plaintiffs to assess Defendants’ privilege claims, as required under Federal Rule of Civil Procedure 26(b)(5)(A)(ii). *See* Pls.’ Mem. at 7. Accordingly, Plaintiffs filed the instant motion, designed to determine at the threshold whether the deliberative process privilege applies to three discrete categories of documents. As discussed *infra* Section II.C, in light of the central role that Defendants’ intent plays in Plaintiffs’ claims, the privilege does not protect these categories of documents. A ruling to this effect would allow the Court to avoid the laborious task of reviewing *in camera* the tens of thousands of documents Defendants are withholding or redacting on the basis of the privilege.

Despite Defendants’ implication to the contrary, Courts frequently determine the applicability of the deliberative process privilege to large groups of documents or to a case as a whole. *See, e.g., Ferrell v. U.S. Dep’t of Hous. & Urban Dev.*, 177 F.R.D. 425, 430–31 (N.D. Ill. 1998) (ordering disclosure of all 457 documents defendants had withheld pursuant to the

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<sup>3</sup> Defendants have invoked the deliberative process privilege for an unusually large percentage of documents they deemed responsive to Plaintiffs’ discovery requests. *Cf. In re United States*, 678 F. App’x 981, 986, 987 (Fed. Cir. 2017) (noting that the government disclosed approximately 48,000 documents and asserted the deliberative process privilege for only eight).

<sup>4</sup> Plaintiffs expressly reserve the right to move to compel production of specific documents or information at a future stage if that becomes necessary.



deliberative process privilege because the “the government’s decisionmaking process in this matter . . . [was] ‘the case’ and [was] directly relevant and crucial” to the plaintiffs’ motion).

Defendants cite two cases for the proposition that the deliberative process privilege “must be demonstrated on a case-by-case basis.” Defs.’ Resp. at 20 (citing *Brown v. Meehan*, 2014 WL 4701170, at \*3 (E.D. Va. Sept. 22, 2014); *Spell v. McDaniel*, 591 F. Supp. 1090, 1117 (E.D.N.C. 1984)). But “case by case” does not mean “document by document.” Further, the decision in *Brown* is distinguishable: the plaintiff did not allege that the government’s intent was at issue, and, even if it had, the court would not have reached the issue because it found that the government had “failed to meet[] its heavy burden of proving an executive privilege.” *Brown*, 2014 WL 4701170, at \*4. The decision in *Spell* actually supports Plaintiffs’ Motion here. In *Spell*, the plaintiffs did not argue that the key role of the government’s intent should render the privilege inapplicable, yet the court—without analyzing individual documents—still found that the balance tipped “decidedly in favor of the plaintiff,” given allegations that the government was “deliberately indifferent” to allegations of misconduct, and “[i]n order for plaintiff to prove these allegations, he must have an opportunity to discover and review internal investigative files and reports.” 591 F. Supp. at 1117–19. The court ordered the disclosure of thirteen categories of documents and placed the burden on the defendants to identify specific documents falling within a few narrow categories whose disclosure defendants believed, in good faith, would harm the public interest. *Id.* at 1114, 1118.

In *United States v. Farley*, 11 F.3d 1385 (7th Cir. 1993), on which Defendants also rely, the Seventh Circuit held that the plaintiff could not simply show that documents were “relevant and generally important,” but had to show a “particularized need.” *Id.* at 1390. However, a later Seventh Circuit case applied *Farley*’s particularized-need test and determined, without reviewing

documents individually, that plaintiffs had a particularized need for the documents because their case turned on the government's decisionmaking process. *Ferrell*, 177 F.R.D. at 429. Plaintiffs here have shown a particularized need without identifying specific documents, because the decisionmaking process and intent of the President and the allegedly independent DoD review are central to Plaintiffs' constitutional claims.

As other courts have noted, withholding documents based on the deliberative process privilege would improperly shield the very type of documents litigants need when the government's intent is at issue. This is the relevant point for a "case-by-case" analysis. As discussed in Plaintiffs' opening memorandum (Pls.' Mem. at 10), when the government's intent is central to a case, courts either find the deliberative process inapplicable, or weigh that factor heavily—or dispositively. *See, e.g., In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (noting that the deliberative process privilege determination is made on a "case-by-case basis" and "that privilege disappears altogether when there is any reason to believe government misconduct occurred"); *In re Delphi Corp.*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011) ("Where the deliberative or decisionmaking process is the 'central issue' in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers."). In such cases there is no need for a separate showing as to each document withheld as deliberative.

In any event, there is now an opportunity for the Court to review two specific documents for which Defendants have asserted the deliberative process privilege. In April 2018, Defendants sought to claw back five inadvertently produced documents, asserting that they were protected by the deliberative process privilege. Kies Decl., Ex. 4. Defendants later withdrew their clawback request for three of the documents, and Plaintiffs have informed Defendants that they

are challenging the privilege claims for the remaining two documents. *In camera* review of these documents should assist the Court in determining the importance of such deliberative materials to Plaintiffs' case.

**C. Defendants Fail To Show That The Deliberative Process Privilege Protects Information About The Decisions At Issue.**

Defendants assert that, even when the government's intent is a central issue in the case, courts must undertake a balancing analysis to determine if the deliberative process privilege applies. Defendants are mistaken. The "dominant view" of courts that have considered the question is that the privilege does not apply when the government's intent is at issue. *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005). As discussed in Plaintiffs' opening memorandum, the lead case of *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), holds that "[I]f either the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a nonsequitur." And, as demonstrated by cases cited by Defendants, whether courts apply a balancing test or determine that the privilege simply does not apply is a distinction without a difference: when government intent is a central issue, the plaintiff's need for the privileged documents weighs heavily enough to be determinative.

Defendants cite several district court cases within this circuit for the proposition that courts apply a *balancing* test to determine the applicability of the deliberative process privilege—even when intent or misconduct is alleged—and that the significance of the government's intent to a claim is merely one of multiple factors. Defs.' Resp. at 20 (citing *Murray Energy Corp. v. McCarthy*, 2015 WL 7017009, at \*3 (N.D.W. Va. Nov. 12, 2015); *F.D.I.C. v. Hatziyannis*, 180 F.R.D. 292, 294 (D. Md. 1998); *Heyer v. U.S. Bureau of Prisons*, 2014 WL 4545946 (E.D.N.C. Sept. 12, 2014); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F.

Supp. 3d 323, 340 (E.D. Va. 2015)). But a review of the decisions cited by Defendants reveals that the cases are either distinguishable or support Plaintiffs' argument, not Defendants'.

*Murray Energy*, 2015 WL 7017009,<sup>5</sup> concerned whether the plaintiffs could depose an agency head. Defendants purport to quote the *Murray Energy* court's statement that "possible government misconduct or deficiencies in the deliberative process are factored into any analysis and, where present, weigh in favor of denying the privilege." Opp. at 20. However, Defendants fail to mention that this statement appears in a block quote from an out-of-circuit case, *Libertarian Party of Ohio v. Husted*, 33 F. Supp. 3d 914, 919 (S.D. Ohio 2014), and they ignore the next (critical) sentence in the quotation: "[W]here there is reason to believe the documents sought may shed light on government misconduct, 'the privilege is routinely denied,' on the grounds that shielding internal government deliberations in this context does not serve 'the public's interest in honest, effective government.'" *Murray Energy*, 2015 WL 7017009, at \*3 (quoting *In re Sealed Case*, 121 F.3d at 738). Finally, Defendants fail to note that the court in *Murray Energy* ultimately allowed the plaintiffs to probe the "deliberative processes" of the EPA Administrator in light of "prima facie evidence of wrongdoing." *Id.* at \*8; *see also id.* at \*2 ("[T]he deposition may not delve into the mental processes or deliberative processes of the deponent unless there is a prima facie showing of misconduct or wrongdoing.").

*Hatziyannis*, 180 F.R.D. at 294, also does not support Defendants. There, the plaintiffs did not argue that deliberative process privilege is inapplicable in cases involving governmental intent. While the court applied a balancing test, the plaintiffs' allegations of bad faith were dispositive:

[O]n balance this Court agrees that it would be "fundamentally unfair" to allow the FDIC to shield its reasoning behind this

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<sup>5</sup> In an apparent error, Defendants cite a *Murray Energy* case that does not contain this quotation. The correct citation is provided here.

qualified privilege, particularly when the defendants have raised allegations of bad faith and unfair dealing, for which the government's own records of decision are likely to contain the best evidence. *Id.* at 294 (quoting *EEOC v. Citizens Bank & Trust Co.*, 117 F.R.D. 366, 366 (D. Md. 1987)).

Defendants' reliance on *Heyer v. U.S. Bureau of Prisons*, 2014 WL 4545946 (E.D.N.C. Sept. 12, 2014), is equally misplaced. In *Heyer*, the court simply determined that the plaintiffs' allegations were "conclusory" and "relate to only some of their claims." *Id.* at \*4. The *Heyer* court quoted cases stating that the deliberative process privilege "was fashioned in cases where the decisionmaking process is *collateral* to the plaintiff's suit," *id.* (quoting *In re Subpoena*, 145 F.3d at 1425) (emphasis added), and contrasted cases (like this one) where "the government's subjective motivation" was "the very 'essence of a claim.'" *Id.* (quoting *Gen. Elec. Co. v. Johnson*, 2006 WL 2616187, at \*7 (D.D.C. Sept. 12, 2006)).

*Bethune-Hill*, 114 F. Supp. 3d at 340, is irrelevant to Plaintiffs' Motion. That case concerned the legislative privilege. In any event, the court there stated that, because the "intent of the legislature [was] the dispositive issue in the case, the balance of interests call[ed] for the legislative privilege to yield." *Id.* at 343.

Defendants fare no better with the cases they cite from other circuits, none of which are binding on this Court. The court in *In re Delphi Corp.*, 276 F.R.D. 81, described the *In re Subpoena* line of cases as simply "involv[ing] logical applications of the balancing test. Where the deliberative or decisionmaking process is the 'central issue' in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers." *Id.* at 85. The court in *Delphi* determined that the plaintiffs were *not* challenging the government's decisionmaking process, and it "[t]herefore," applied a balancing test. *Id.* In *Vietnam Veterans of America v. C.I.A.*, 2011 WL 4635139, at \*10 (N.D. Cal. Oct. 5, 2011), the court simply found it "unnecessary to decide this issue." And while

the court in *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312 (2000), applied the balancing test, the court found that the balance weighed in favor of disclosure because the documents provided the “only way to obtain information critical to responding to the various defenses raised by the Government.” *Id.* at 322.

Defendants also fail in their attempts to recast cases that unequivocally support Plaintiffs’ argument. Defendants correctly note that *Lake County Board of Commissioners* limits the deliberative process privilege to communications formulating important public policy, but they omit the qualifying sentence: “[h]owever, ‘if either the Constitution or a statute makes the nature of the governmental officials’ deliberations the issue, the privilege is a nonsequitor [sic].” 233 F.R.D. at 526 (quoting *In re Subpoena*, 145 F.3d at 1424).

Defendants assert that the court in *Jones v. City of College Park*, 237 F.R.D. 517 (N.D. Ga. 2006), applied the balancing test, but the court did so only after determining that it would reach the same result whether it “applies a balancing test or finds that the privilege simply does not apply.” *Id.* at 521. The court “conclude[d] that the privilege is simply inapplicable, because government intent is at the heart of the issue in this case.” *Id.*; *see also id.* at 520 (“The prevailing view appears to be that the government misconduct exception is simply a restatement of the principle that the deliberative process privilege does not apply when the government’s intent is at issue.”).

Thus, contrary to Defendants’ assertion, the clear weight of authority supports Plaintiffs’ argument: when the government’s intent is a key issue, the deliberative process privilege does not protect deliberative materials that would shed light on that intent. The Court should conclude that the privilege does not protect the three categories of documents and information addressed by Plaintiffs’ Motion.

**D. Application Of The Balancing Test Also Requires Rejection Of Defendants' Deliberative Process Privilege Claims.**

Even if this Court were to rely on the balancing test, the result is the same: a plaintiff's need for documents going to the government's intent is so great that this factor is virtually dispositive. *See In re Delphi Corp.*, 276 F.R.D. at 86.

Relevance

Plaintiffs have explained in this reply and in their opening memorandum why the governments' intent is central to this case. Because Defendants' intent and the processes surrounding the decisions identified by this motion are highly relevant to Plaintiffs' claim that the ban on service by transgender persons was motivated by animus, Plaintiffs have a compelling need for documents that will shed light on Defendants' intent and process. Defendants now claim that any documents not relied on by the Panel of Experts are irrelevant, citing cases in the FOIA context. *Opp.* at 29. But when the government's decisionmaking process is "the case," such documents are highly relevant:

[I]t is hard to imagine a case in which the government's deliberative process is more relevant or crucial . . . . [T]his is not the usual "deliberative process" case in which a private party challenges governmental action or seeks documents via the Freedom of Information Act, and the government tries to prevent its decisionmaking process from being swept up unnecessarily into public. Here, the decisionmaking process is not "swept up into" the case, it is the case . . . . The nature of this unique case is such that the "roads not taken" are as relevant as those taken.

*Ferrell*, 177 F.R.D. at 430 (quoting *United States v. Bd. of Educ. of City of Chi.*, 610 F. Supp. 695, 699 (N.D. Ill. 1985)).

Defendants make a half-hearted argument that Plaintiffs have conceded that these documents are irrelevant by filing a cross-motion for summary judgment. *Defs.' Resp.* at 29. Defendants' misconstrue Plaintiffs' filing. Plaintiffs have argued that the undisputed facts in the

existing record provide sufficient evidence to determine that the Implementation Plan unconstitutionally discriminates, *see supra* Section II.A; ECF 163-2. But there is no assurance that the cross-motion will be granted, and—critically—Plaintiffs’ opposition to Defendants’ motion for summary judgment rests in part on the position that Defendants’ motion presents disputed issues of material fact as to which discovery is needed under Rule 56(d). *See supra* Section I. With the cross-motions in this posture, the Court should issue a ruling on this important discovery issue in order to avoid further delay as the case moves forward.

*Availability of other evidence*

Defendants point to the 30,000 non-privileged documents they have now produced, their (largely non-responsive) interrogatory responses, a few depositions taken in the related *Doe* case, and the “administrative record” they have filed as reasons why Plaintiffs have supposedly received “ample” discovery. Defs.’ Resp. at 30. But Defendants are withholding what is likely the most relevant evidence through their broad assertions of deliberative process privilege. Plaintiffs calculate that Defendants have asserted the deliberative process privilege for nearly half of all documents they identified as responsive to Plaintiffs’ discovery requests. *See* Kies Decl. ¶ 6. In addition, Defendants have asserted an objection based on deliberative process privilege as part of every single interrogatory response. *See, e.g.*, Decl. of Marianne F. Kies in Support of Motion to Compel dated April 23, 2018, Ex. 4 (Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to Secretary Mattis, served on February 9, 2018). Furthermore, deliberative process privilege objections asserted by Defendants’ counsel have limited the information the witnesses provided in several of the depositions in the *Doe* case that Defendants cite. *See, e.g.*, Kies Decl., Ex. 5 (deliberative process privilege objection asserted 11 times during the deposition of Martie Soper).



Finally, the administrative record is plainly insufficient to provide “alternative evidence on the same matters.” *Cipollone v. Liggett Grp.*, 812 F.2d 1400 (Table), at \*2 (4th Cir. Feb. 13, 1987). This record, which itself is riddled with redactions for deliberative process privilege, provides Defendants’ stated justifications for the Implementation Plan—not the actual decisionmaking process, which is allegedly shielded by privilege. Moreover, the administrative record that is compiled to provide a basis for decision on an APA claim (which Plaintiffs have not brought) does not exhaust, limit, or define the discovery to which Plaintiffs are entitled on their constitutional claims. *See Miccosukee Tribe of Indians of Fla. v. United States*, 2010 WL 337653, at \*2 (S.D. Fla. Jan. 22, 2010) (“[D]iscovery related to the Plaintiff’s equal protection claim is not limited by the APA Act nor the agency record, but rather requires independent review.”). This Court, by denying Defendants’ Motion for a Protective Order, has implicitly rejected Defendants’ position that the evidence should be limited to Defendants’ administrative record. ECF 170 at 2. The district courts in the related *Doe* and *Karnoski* cases have similarly held that plaintiffs in those cases are entitled to full discovery despite Defendants’ assertion there that the evidence should be limited to the administrative record. *Doe v. Trump*, No. 17-CV-01597 (CKK) (D.D.C. Apr. 18, 2018) (explaining that because “Plaintiffs assert claims under the Fifth Amendment to the United States Constitution,” the APA’s limitations on discovery do not apply); *Karnoski v. Trump*, No. C17-1297-MJP (W.D. Wa. Apr. 19, 2018) (“[T]here is no reason for discovery to be confined to the administrative record” because Plaintiffs “raise direct constitutional claims.”).

Contrary to Defendants’ argument that sufficient evidence is otherwise available, the *unavailability* of other evidence is a factor that weighs heavily in favor of granting Plaintiffs’ motion.

Extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions

Defendants offer “conclusory allegations” that disclosure of the deliberative materials Plaintiffs seek here would chill future policy discussions. *See Cipollone*, 812 F.2d 1400 (Table) at \*3. However, the cases holding that the deliberative process privilege is not available in cases where the decisionmaker’s intent is a central issue either explicitly or implicitly reject this rationale for applying the privilege. *See, e.g., In re Delphi Corp.*, 276 F.R.D. at 85; *Jones*, 237 F.R.D. at 521–22. So too should this Court.

**III. Even If The Deliberative Process Privilege Could Apply To The Documents Referenced In Plaintiffs’ Motion, Defendants Waived It As To Documents Relied On Or Incorporated By Reference Into The Implementation Plan.**

Defendants mischaracterize Plaintiffs’ argument concerning Defendants’ waiver of the deliberative process privilege. Plaintiffs do not contend that Defendants have waived the privilege on a “blanket basis.” As discussed above, the deliberative process privilege does not shield the three categories of documents and information subject to Plaintiffs’ Motion. *See Pls.’ Mem.* at 10–14. Even if the privilege did apply, Plaintiffs’ contention concerning waiver is simply that Defendants have waived the privilege “*to the extent they have publicly relied on those materials to support the Implementation Plan.*” *Id.* at 16 (emphasis added). The Implementation Plan Defendants published is rife with references to the work of the so-called “Panel of Experts,” including specific factual findings, incidents, and statistics. *See id.* at 16–17. By expressly relying on those findings and the analysis supporting them, or incorporating them by reference, in developing and defending the public Implementation Plan, Defendants have waived any privilege as to those findings. *See Afshar v. U.S. Dep’t of State*, 702 F.2d 1125, 1139-40 (D.C. Cir. 1983) (“[I]f a recommendation contained in a predecisional memorandum is expressly adopted or incorporated by reference in a nonexempt postdecisional memorandum, the

predecisional recommendations must be made public as well.”). Defendants’ assertion that Plaintiffs seek a categorical order that privilege has been waived as to the entire deliberative process leading to the Implementation Plan, Defs’ Resp. at 32, sets up a straw man this Court need not address.

Plaintiffs’ position is entirely consistent with applicable caselaw, including the cases Defendants rely on in their Opposition. For example, in *American Society of Pension Actuaries v. I.R.S.*, 746 F. Supp. 188 (D.C. Cir. 1990), the D.C. Circuit concluded that where the IRS had included a specific figure in a public explanation, the government expressly adopted the computations used to produce that figure, and thus it was appropriate to expose the “analytic backup” used to arrive at that figure. *Id.* at 192. The same reasoning applies here: the DoD has cited specific findings and incidents throughout its Implementation Plan, and it is therefore appropriate to order Defendants to reveal documents reflecting the analysis used to arrive at those findings. Moreover, to the extent the documents withheld by Defendants are factual, that factual content is not subject to the privilege and must be produced. *Freeman v. U.S. Dep’t. of Justice*, 723 F. Supp. 1115, 1121 (D. Md. 1988); *Md. Restorative Justice Initiative v. Hogan*, 2017 WL 4280779, at \*2 (D. Md. 2017).

Defendants further attempt to draw a line between the *outcome* of DoD’s deliberative process and the process itself, but there is no such line. This is clear from a reading of the Implementation Plan documents, which assert that the work of the panel formed the basis for the ultimate policy recommendation. Secretary Mattis’s Implementation Memo states that its conclusion is “[b]ased on the work of the Panel”, and that his recommendation was made “in light of the Panel’s professional military judgment.” ECF 120-1 at 1. The Implementation Report, meanwhile, states that “[t]he Panel made recommendations based on each Panel

member's independent military judgment," and that DoD's policy recommendation was made "[c]onsistent with those recommendations." ECF 120-2 at 4. The conclusion of the Implementation Report notes that the new policy recommendation is "informed by the data collected" by the Panel. *Id.* Thus, according to DoD, it did not just rely on the outcome of the Panel's work (i.e., the Implementation Report) but relied on the larger body of recommendations and data collected by the Panel, including both the Panel's conclusions and its analysis. These documents should therefore be produced. *See Nat'l Council of La Raza v. U.S. Dep't of Justice*, 411 F.3d 350, 359 (2d Cir. 2005) (holding deliberative process privilege waived where agency adopted the reasoning of deliberative documents as its own); *N.L.R.B. v Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975) ("the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted").

### CONCLUSION

For the foregoing reasons and those stated in the opening memorandum, Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production should be granted.

Dated: June 12, 2018

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Respectfully submitted,



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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**DECLARATION OF MARIANNE F. KIES IN SUPPORT OF REPLY  
IN SUPPORT OF MOTION TO COMPEL  
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

I, MARIANNE F. KIES, depose and say as follows:

1. I make this declaration in support of the remedies and relief sought by Plaintiffs in this case. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in this action.

3. Attached hereto as “Exhibit 1” is a true and correct copy of a document produced by Defendants bearing the Bates range USDOE00063224–57. This document is a compilation of slides identified as the “Kickoff Meeting” for the “Transgender Personnel Policy Working Group,” dated October 02, 2017. This document was produced by Defendants with extensive redactions.

4. Attached hereto as “Exhibit 2” is a true and correct copy of a document produced by Defendants bearing the Bates range USDOE00067027–28. This document is identified as a “Memorandum for the Secretary of the Navy.”

5. Attached hereto as “Exhibit 3” is a true and correct copy of a document produced by Defendants bearing the Bates number USDOE00036612. This document is identified as a Memorandum from the Chairman of the Joint Chiefs of Staff with the subject of “Transgender Policy.”

6. Plaintiffs calculate that Defendants’ privilege logs produced through June 12, 2018, list 25,779 documents as withheld or redacted on the basis of the deliberative process privilege. This number includes 3,672 documents listed on the privilege log for the President. Because Defendants have not yet produced privilege logs for the six most recent production sets—approximately 35,000 documents, accounting for more than 45% of Defendants’ total production—the total number of documents Defendants have withheld or redacted on the basis of the deliberative process privilege is likely much larger.

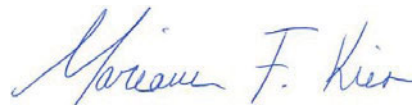
7. Attached hereto as “Exhibit 4” is a true and correct copy of a letter sent by Ryan Parker to Counsel for Plaintiffs, dated April 19, 2018, requesting a claw back of certain documents.

8. Attached hereto as “Exhibit 5” is a true and correct copy of a transcript of the February 1, 2018 deposition of Martie Soper in *Doe v. Trump*, No. 17-cv-01597 (CKK).

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

Executed this 12th day of June, 2018.



A handwritten signature in blue ink that reads "Marianne F. Kies". The signature is written in a cursive style with a prominent initial 'M'.

Marianne F. Kies (Bar No. 18606)

# **Exhibit 1**



# **Transgender Personnel Policy Working Group**

**Kickoff Meeting – October 02, 2017**



# Agenda

Introductions

Guidance

Deliverables

Timeline

Questions



# Introductions



# Guidance

POTUS memo to the SECDEF, 25 AUG 17

SECDEF Interim Guidance, 14 SEP 17

SECDEF Terms of Reference, 14 SEP 17



# Guidance

believe any individual who meets the physical and mental standards,  
is worldwide deployable and is currently serving, should be afforded  
opportunity to continue to serve.”

General Joseph F. Dunford  
Chairman, Joint Chiefs of Staff  
Testimony given to the SASC

September 26, 2017



# Deliverables

Transgender accessions policy (MEDPERS)

Multi-Disciplinary review and study of relevant data (MEDPERS)

Authorized gender dysphoria medical procedures policy (MEDPERS)

Universal deployability retention standards (Ret & Non-Dep WG)

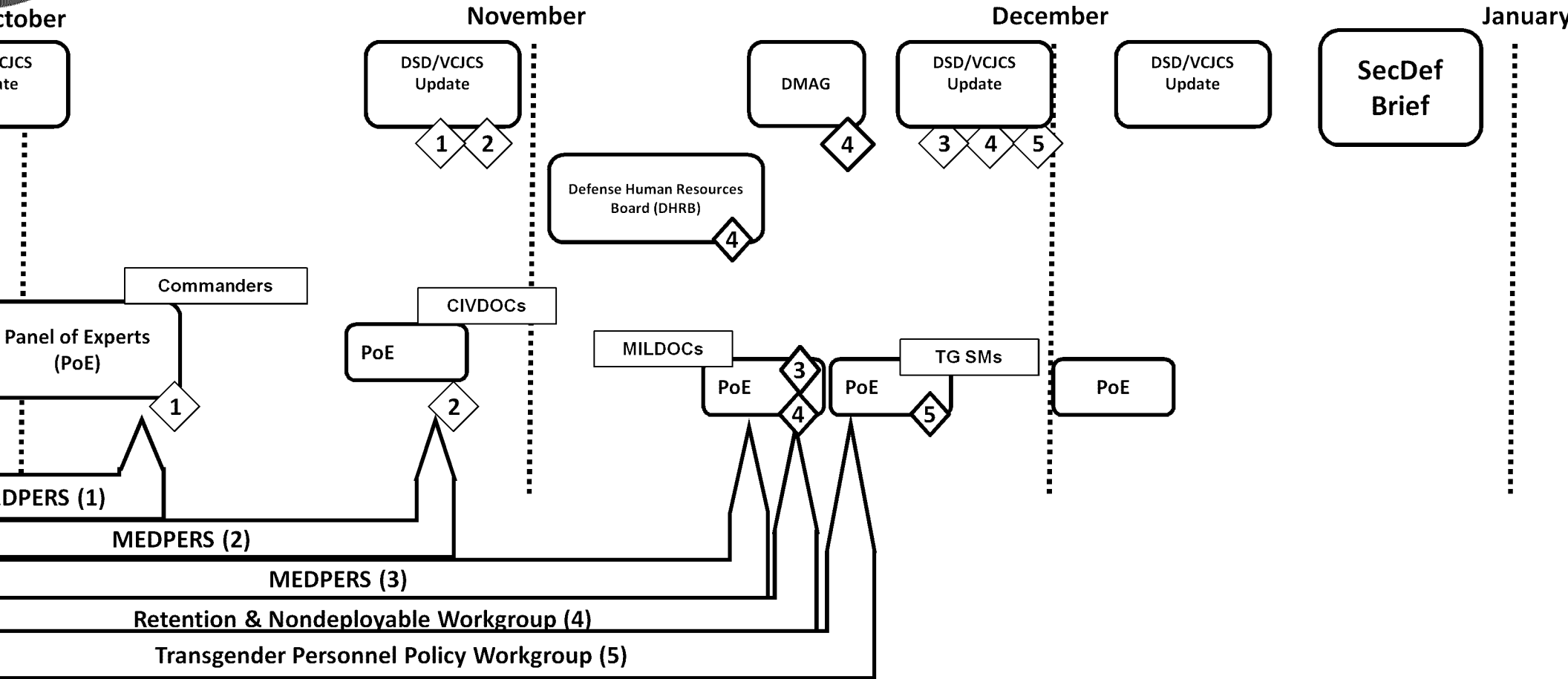
***Single policy document for current transgender service members (Personnel***

***Policy WG)***





# Timeline



<u>Deliverables/Milestones</u>	<u>Meeting Frequency</u>	<u>Beyond Dec</u>
<ul style="list-style-type: none"> <li>Discussions policy</li> <li>disciplinary review and study of relevant data</li> <li>Authorized GD medical procedures policy</li> <li>Personal deployability retention standards</li> <li>Policy document for current transgender service members</li> </ul>	<ul style="list-style-type: none"> <li>DSD update: Monthly</li> <li>DHRB/DMAG: 8 Nov (DHRB), 15 Nov (DMAG)</li> <li>Panel of Experts; meetings the week of 30 Oct-3 Nov, 13-18 Nov, 20-24 Nov, 4-8 Dec</li> <li>Medical Personnel Executive Steering Committee (MEDPERS): Week of 16-20 Oct, 30 Oct- 3 Nov</li> <li>Retention &amp; Nondeployable WG: Weekly</li> <li>Transgender Personnel Policy WG: Weekly</li> </ul>	<ul style="list-style-type: none"> <li>Final policy recommendations</li> <li>White House</li> <li>February</li> </ul>



# Timeline Matrix

MEDPERS	R&N WG	TG Pers Policy WG	Panel of Experts	DSD/VO
	Weekly meeting to develop universal ret and Nondep standard (Del #4).	Weekly meeting, begin work on DoDI (Del #5) Email: 27 SEP 17		Receive inbrief from approve process
	Weekly meeting to develop #4.	2 OCT: Kickoff meeting; Review DoDI 1300.28 – Sections 1 and 2	Introductory meeting Review DoDI Accessions language	
	Weekly meeting to develop #4.	Friday, 13 OCT: Review DoDI 1300.28 – Sections 1 and 2		
Meet to discuss Del #1 and #2. Prepare to brief findings	Weekly meeting to develop #4.	16 OCT: Review DoDI 1300.28 – Sections 1 and 2		
	Weekly meeting to develop #4.	Tuesday, 24 OCT @1000: Review DoDI 1300.28 – Section 3	Receive MEDPERS brief on 1 & 2; app progress / provide guidance	
	Weekly meeting to develop #4.	30 OCT: Review DoDI 1300.28 – Section 3		Receive briefing on D
Meet to discuss Del #3. Prepare to brief findings	Weekly meeting to develop #4.	6 NOV: Review DoDI 1300.28 – Section 3		
	15 NOV: Brief DMAG universal ret and Nondep standard (4); brief PoE upon completion.	13 NOV: Finalize DoDI 1300.28 –	Receive brief from MEDPERS on 3, R&N WG on 4; approve progress and provide guidance	
		TBD: Brief PoE on Deliverable #5	Receive brief from TG WG on 5; app progress/provide guidance	
				Receive briefing on D
			Receive pre-brief on SECDEF briefing	
				Receive pre-brief on briefing

bles:

policy  
 y review and study of relevant data  
 medical procedures policy

4 – Universal deployability and retention standards  
 5 – Single policy document for current TG  
 Service members

**SecDef Brief: 22 December**

Navy\_00040991  
 USDOE00063231



# Questions?



# Review of Last WG Product



# Policy Guidance

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.”

President Donald Trump

26 July 2017



# DoD Definition of Transgender SM

Transgender Service Member Per DoDI 1300.28: A Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any Service member who intends to begin transition, is undergoing transition, or has completed transition and is stable in the preferred gender.

Military Transgender population as of 26 Jul 17 ~ 994

Gender transition process: Gender transition in the military begins when the Service member receives a diagnosis from a military medical provider indicating that the members gender transition is medically necessary, and concludes when the Service member's gender mark in DEERS is changed and the member is recognized in the preferred gender.



# Assumptions

## Deliberative Process Privilege



# Courses of Action

# Deliberative Process Privilege





# Deliberative Process Privilege

# Deliberative Process Privilege



## **Deliberative Process Privilege**

# **Deliberative Process Privilege**



# Deliberative Process Privilege

# Deliberative Process Privilege



## Deliberative Process Privilege

COAs

How

When

Medically Nec  
Care

# Deliberative Process Privilege



# Deliberative Process Privilege

# Deliberative Process Privilege



# Deliberative Process Privilege

Deliberative Process Privilege



## **Deliberative Process Privilege**

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# Courses of Action

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**Deliberative Process Privilege**





# Deliberative Process Privilege

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**Deliberative Process Privilege**

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# Courses of Action

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**Deliberative Process Privilege**



## **Deliberative Process Privilege**

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# Deliberative Process Privilege

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# Deliberative Process Privilege

**Deliberative Process Privilege**





# Deliberative Process Privilege

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# Courses of Action

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**Deliberative Process Privilege**



# Service Academy / ROTC Populations

# Deliberative Process Privilege



# Questions?

# **Exhibit 2**

28 July 2017

MEMORANDUM FOR THE SECRETARY OF THE NAVY

FROM: Robert Woods, Acting Assistant Secretary of the Navy (M&RA)

SUBJECT: Weekly Activity Report for Manpower and Reserve Affairs

SecNav Priority Issues:

- **Transgender Policy.** In response to the 26 July announcement on transgender policy by the President, OSD is working with the White House to discern the President's intent. Per DSD direction, the Transgender Working Group, with members from ASN(MRA), Navy and USMC, is developing products to shape further discussion and policy consideration. Until the Secretary of Defense issues implementation guidance, there will be no modifications to the current transgender policy. We will continue to provide email updates to you when we receive additional information.

CNO and CMC issued guidance, per CJCS direction to the Services as follows:

“I know there are questions about yesterday's announcement on the transgender policy by the President. There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance. In the meantime, we will continue to treat all of our personnel with respect. As importantly, given the current fight and the challenges we face, we will all remain focused on accomplishing our assigned missions.”

Week in Review/Key Items from This Week:

26-27 Jul OSD Transgender Working Group

28 Jul USD(P&R)-led meeting regarding Administrative and Personnel Policies to Enhance Readiness and Lethality

- **Administrative and Personnel Policies to Enhance Readiness and Lethality.** SECDEF promulgated a memo on 21 July directing a review of "requirements for mandatory force training that does not directly support core tasks," and also a review "professional military education to regain a concentration on the art and science of warfighting." The OSD led Common Military Training Working Group will be the forum to address the first requirement.
- **Senior Executive Seminar.** CNO and CMC have both accepted the invitation to speak to the 2017 Senior Executive Seminar, which is open to all DON executives. The seminar will be held 11-12 October at Joint Base Anacostia-Bolling. Online registration and other information is available at <https://portal.secnav.navy.mil/orgs/MRA/DONHR/DONTrainingEvents/DON-Senior-Executive-Leadership-Seminar-2017/Pages/default.aspx>.
- **Reconciliation of Cap Numbers for 10 USC 5014 (Update).** Navy, Marine and DON Secretariat representatives will meet on 2 August to move forward on reconciliation of OPNAV & HQMC numbers regarding compliance with 10 USC 5014 statutory cap on the size of the Secretariat, OPNAV and HQMC.

- Suicide Prevention. September is National Suicide Prevention Month (NSPM). The theme remains the same as last year – "Be There." We expect a DoD/VA memorandum of agreement on suicide prevention and the revised DoDI on suicide prevention to be signed out by the end of September. In advance of NSPM, a DoD/VA Suicide Prevention Training Conference will convene in Denver on 1-3 August to bring together experts from a variety of disciplines to cross-train and share best practices. Over 1200 are anticipated to participate, including researchers, clinicians, caregivers, and others within the suicide prevention community of interest. USMC and Navy specific training will occur on 31 July and 4 August respectively.
- Reserve Mobilizations. This week I forwarded one Navy Reserve and one Marine Corps Reserve mobilization package for your signature. The Navy Reserve package – comprising 33 events totaling 77 Sailors, 6 of whom are non-volunteers and first time mobilizers – supports CENTCOM, AFRICOM, SOUTHCOM, EUCOM, PACOM and CONUS requirements. The Marine Corps Reserve package – comprising one event of 161 non-volunteers and 136 first time mobilizers – supports CENTCOM requirements. No mobilizations this week require SECDEF approval.
- Executive Engagement: Leader As Mentor. The Executive Management Program Office (EMPO) hosted the 2-day Leader as Mentor workshop 25-26 July, facilitated by Korn Ferry International. The workshop taught the process and guidelines that define mentoring and introduced executives to the art and skill of mentoring. This workshop is offered twice yearly and is highly rated by executive participants.

Look Ahead/Key Items for Next Week:

31 Jul Cyber Executive Committee Meeting – VCNO and RD&A Hosted  
1-2 Aug BCNR Annual Training Conference – Andrews AFB  
1-3 Aug DoD/VA Suicide Prevention Training Conference –Denver  
3 Aug Military Health System Reform Senior Leader Group Discussion – OSD Hosted

Congressional Engagement (Member level only) and Items of Interest: NSTR

30-60 Day Look Ahead:

7-9 Aug USMC HR Training Forum – Miramar, CA  
17 Aug Executive Management Advisory Panel (EMAP)  
21-25 Aug Acting ASN(M&RA) Leave  
22 Aug Diversity & Inclusion Strategic Partners Meeting – OPM hosted  
24 Aug Norfolk Operations Center 20th Anniversary  
13 Sep Strategic Workforce Council – VCNO Hosted  
19-20 Sep Senior Executive Seminar – JBAB  
21 Sep Executive Management Advisory Panel (EMAP)  
28 Sep Joint Executive Committee Meeting – VA Hosting

Copy to: Under Secretary of the Navy

# **Exhibit 3**






CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
WASHINGTON, DC 20318-9999

CM-0179-17  
27 July 2017

MEMORANDUM FOR CHIEFS OF THE MILITARY SERVICES  
CHIEF, NATIONAL GUARD BUREAU  
SENIOR ENLISTED LEADERS OF THE MILITARY SERVICES

SUBJECT: Transgender Policy

1. I know there are questions about yesterday's announcement by the President on the transgender policy. There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.
2. In the meantime, we will continue to treat all of our personnel with respect. As importantly, given the current fight and the challenges we face, we will all remain focused on accomplishing our assigned missions.

  
JOSEPH F. DUNFORD, JR.  
General, U.S. Marine Corps

CJCS\_0000004

USDOE00036612

# **Exhibit 4**



Ryan B. Parker  
Senior Trial Counsel

Tel: (202) 514-4336  
Email: ryan.parker@usdoj.ov

April 19, 2018

By Email

David M. Zions  
Carolyn F. Corwin  
Marianne F. Kies  
COVINGTON & BURLING LLP

*Counsel for Plaintiffs*

Re: *Stone v. Trump* – Notice of Recall for Inadvertently Disclosed Privileged Documents

Dear Counsel,

We write concerning certain privileged documents that were inadvertently disclosed during our productions. First, as we indicated during the deposition of Colonel Mary Krueger on April 17, 2018, the Army document bearing Bates number Army\_10004597.0001 (USDOE00109420 through USDOE00109453) was inadvertently and mistakenly included in our March 20, 2018 production in *Doe v. Trump*. In addition, we have learned that redactions on two additional copies of this briefing, bearing Bates numbers Navy\_00040984 through Navy\_00041017 and Navy\_00041020 through Navy\_00041052, were rendered incorrectly on the images produced to Plaintiffs.

The briefing is a 34-page PowerPoint slide deck presented at the October 2, 2018 meeting of the transgender personnel policy working group. The slide deck is marked in red as “Not for Distribution//Draft Deliberative Document.” It contains deliberative information including, among other things, guidance to the working group, suggested policy options, and the anticipated timeline of the policy making process. The slide deck plainly reflects deliberative guidance given to and proposals discussed by the transgender policy working group and, as such, is protected by the deliberative process privilege.

The disclosure of these documents was mistaken and inadvertent. Defendants withheld this slide deck in its entirety at least ten times in earlier productions: Army\_10001850.0001; Army\_10002447; Army\_10002448; Army\_10002449; Army\_10005269.0001; Army\_10005271.0001; Army\_10005339.0001; DoD00002147; DoD00006212; and DoD00097747.

Second, we have determined that a single slide in the October 2, 2018 slide deck was inadvertently produced to Plaintiffs in *Doe v. Trump* as the Army document bearing Bates number Army\_10000291. At least four other copies of this single slide were withheld as privileged by defendants: Army\_10001011.0001; Army\_10003107.0001; Army\_10005121; and Army\_10005160. For the same reasons as the complete slide deck, this document is protected by the deliberative process privilege.

Third, an Air Force document bearing Bates numbers AF\_00000595 through AF\_00000597 was inadvertently and mistakenly included in our February 9, 2018 production in this case.

This document consists of an email dated December 8, 2017. The email is protected under the deliberative process privilege. The email was sent to Major General Robert D. LaBrutta, Director of Military Force Management Policy, Deputy Chief of Staff for Manpower, Personnel and Services for the Air Force, as well as other Air Force personnel. Major General LaBrutta is responsible for establishing force management policies for the Air Force. The email was sent by Colonel William Fischer, who was reporting the ongoing deliberations of the transgender personnel policy working group and the panel of experts. The email plainly reflects the advice, deliberations, and recommendations of the transgender policy working groups and the panel of experts and, as such, is protected by the deliberative process privilege.

The disclosure was inadvertent. Two other emails in this chain, *see* AF\_00000542 – AF\_00000543, AF\_00002547 – AF\_00002548, and a duplicate of the disclosed email, *see* AF\_00002953 – AF\_00002955, were produced with redactions.

Pursuant to the provisions of part III of the stipulated Fed. R. Evid. 502(D) order, ECF No. 110, we request that you immediately destroy all copies (electronic and hardcopy) in your possession of documents bearing Bates numbers (1) Army\_10004597.0001, (2) Navy\_00040984 through Navy\_00041017, (3) Navy\_00041020 through Navy\_00041052, (4) Army\_10000291, and (5) AF\_00000595 through AF\_00000597. We also ask that you comply with the order's requirements to certify that all copies of the document have been destroyed. We also request that you remove from your litigation support database the images and metadata associated with the documents bearing these Bates numbers.

Thank you for your cooperation.

Sincerely,

Ryan B. Parker

Copies:  
Daniel McFadden - FOLEY HOAG LLP