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

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

**DEFENDANTS' MOTION TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

Defendants respectfully request that the district court stay the effect of the August 14, 2018 Magistrate Judge's Memorandum Opinion, Dkt. 204, and Order, Dkt. 205, pending the Court's resolution of Defendants' forthcoming Objections to the Magistrate Judge's Memorandum Opinion and Order, which will be filed no later than August 28, 2018. Defense counsel conferred with Plaintiffs' counsel regarding this motion, and Plaintiffs oppose a stay pending appeal of the part of the Order granting Plaintiffs' motion to compel, but, in light of the stipulation the parties have entered into, Dkt. 185-2, Plaintiffs do not oppose a stay pending appeal of the part of the Order denying Defendants' motion for a protective order with respect to discovery of information or documents in the custody, possession, or control of Defendants other than the President that would disclose information concerning presidential communications and deliberations.

**INTRODUCTION**

On August 14, 2018, the Magistrate Judge granted Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production, Dkt. 177, granted in part and denied in part Defendants' Motion for a Protective Order, Dkt. 179, and dismissed Plaintiffs' Motion for Judicial

Determination of Privilege, Dkt. 178. *See* Mem. Op., Dkt. 204; Order, Dkt. 205. That sweeping order compelled the Department of Defense ("DoD") and the Military Services to disclose thousands of deliberative documents concerning military policies. Specifically, the Magistrate Judge ordered DoD and the Services to disclose "(1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the DoD's so-called panel of experts and its working groups (the 'Panel') tasked with developing a plan to study and implement the President's decision; and (3) Deliberative materials regarding the DoD's implementation Plan and the President's acceptance of that Plan in his March 23[, 2018] memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists." Mem. Op. 3. The Magistrate Judge ordered disclosure notwithstanding the fact that the numerous dispositive motions currently pending before the district court could obviate the need for *any* discovery in this case, and, at a minimum, Defendants' contention that the military's 2018 policy is the only relevant policy at issue in this case warrants resolution before sweeping discovery on other policies is sought. Based on this ruling, the Magistrate Judge also dismissed as moot Plaintiffs' challenge of Defendants' clawback of an inadvertently produced document protected by the deliberative process privilege. *Id.* at 11. Finally, although the Magistrate Judge stayed discovery directed to the President pending the Court's resolution of Defendants' motion to dismiss the President as a party to the case, the Magistrate Judge permitted Plaintiffs to seek discovery from other sources concerning presidential communications and deliberations. *Id.* at 10–11.

Defendants are moving as expeditiously as possible to seek review by the district court and, in compliance with Federal Rule of Civil Procedure 72(a) and Local Rule 301, will file objections to the Magistrate Judge's Memorandum Opinion and Order no later than August 28,

2018. In light of this schedule, Defendants now move to stay the Memorandum Opinion and Order pending resolution of the objections. Unless stayed, the Magistrate Judge's Memorandum Opinion and Order will require the Department of Defense and the Services to disclose thousands of privileged documents at the same time Defendants seek meaningful review of the Memorandum Opinion and Order.

Absent a stay, Defendants' objections to disclosure of the deliberative materials will become moot. Plaintiffs may also now seek discovery concerning presidential communications and deliberations from sources other than the President, which would put at issue the need to invoke the presidential communications privilege as to these materials in response to a motion to compel and thus raise significant separation of powers concerns at this stage of the case, in direct conflict with Supreme Court precedent. The Supreme Court has made clear that this "inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances," which "should be avoided whenever possible." *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 389–90 (2004). Indeed, following a similar order to disclose deliberative materials, and rejecting the government's presidential-communications arguments, in the related case *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), the government sought the extraordinary writ of mandamus, and the Ninth Circuit entered an interim stay of Defendants' disclosure obligations to consider the government's mandamus petition. This Court should follow that same approach.

Because Defendants would suffer irreparable harm absent a stay, and other relevant factors weigh in Defendants' favor, the Court should grant Defendants' motion for a stay of the Magistrate Judge's Memorandum Opinion and Order pending this Court's review.

**STANDARD FOR GRANTING A STAY**

Pursuant to Local Rule 301(5)(a), the effect of a magistrate judge's order is not automatically stayed upon the filing of Objections by one of the parties. Although the Local Rules do not set forth the standard for granting a stay of a magistrate judge's order, this Court has broad discretion to stay proceedings as an incident to its power to control its own docket. *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). "[P]roper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Williford*, 715 F.2d at 127 (internal quotation omitted). "The party seeking the stay must demonstrate a clear case of hardship or inequity, if there is even a fair possibility that the stay would damage another party." *Weirton Steel Corp. Liquidating Tr. v. Zurich Specialties London, Ltd.*, No. CIV.A. 5:07CV122, 2009 WL 357888, at *1 (N.D.W. Va. Feb. 12, 2009) (internal quotation omitted). Along with balancing the harms to the parties as a result of a stay, certain courts in the Fourth Circuit also consider whether the party seeking the stay has made a strong showing of success on the merits and whether a stay is in the public interest. *See, e.g.*, *GTSI Corp. v. Wildflower Int'l, Inc.*, No. 1:09CV123 (JCC), 2009 WL 3245396, at *1 (E.D. Va. Sept. 29, 2009); *Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix Inc.*, No. 2:09CV555, 2010 WL 11450510, at *3 (E.D. Va. Apr. 22, 2010) (applying all four factors even after finding that, upon review of *GTSI*, there is "a lack of clarity regarding whether this court is required to apply such test, or whether . . . the court simply has the broad discretion to consider the propriety of a stay based on whatever factors the court deems appropriate").

## ARGUMENT

### I. The Magistrate Judge Prematurely Decided the Discovery Motions.

As an initial matter, the Magistrate Judge issued the sweeping Memorandum Opinion and Order even though there are several motions pending before the Court that raise threshold issues directly affecting the extent and scope of discovery in this case. Specifically, Defendants' Motion to Dissolve the Preliminary Injunction, Dkt. 120, argues that Plaintiffs' challenge to the President's August 2017 Memorandum is moot. Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, Dkt. 158, also raises mootness as a threshold jurisdictional issue and addresses the merits of the new policy, explaining the proper standard of review and demonstrating that the new policy withstands scrutiny. Even a partial ruling in Defendants' favor on either motion 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. Moreover, Plaintiffs themselves have filed a cross-motion for summary judgment, arguing that there is *already* no genuine dispute of material fact that the Department of Defense's new policy violates the Equal Protection Clause. *See* Pls.' Mot. 26–44, Dkt. 163-2. Faced with similar cross-motions for summary judgment, the court in the related case *Doe v. Trump* has held in abeyance motions concerning privilege until after the resolution of the parties' cross-motions for summary judgment. *See* Order, *Doe v. Trump*, No. 17-1597 (D.D.C. June 19, 2018), Dkt. 145 (finding that "[i]f summary judgment is granted for either party, there will be no need to resolve the questions of privilege that the parties have raised"). The Magistrate Judge should have done the same here.

Instead, the Magistrate Judge decided critical issues that are currently pending before the district court in Defendants' motion to dissolve the preliminary injunction and the parties' cross-motions for summary judgment. For example, the Magistrate Judge rejected Defendants' argument that the express revocation of the August 2017 Presidential Memorandum and "any other

directive [the President] may have made with respect to military service by transgender individuals" renders claims against the prior policy moot. Presidential Memorandum, 83 Fed. Reg. 13,367 (Mar. 23, 2018); *see* Defs.' Mot. to Dissolve the Prelim. Inj. 9–11, Dkt. 120; Mem. Op. 6–7. But the Magistrate Judge ignored the fact that the substance of DoD's new policy departs substantially from the district court's understanding of the August 2017 Presidential Memorandum. *Compare* Mem. from Secretary of Defense James Mattis (Feb. 22, 2018), Dkt. 120-1, *and* DoD Report and Recommendations, Dkt. 120-2, *with* Mem. and Order, Dkt. 85 at 10–12. If this Court agrees that the Magistrate Judge has erroneously focused his analysis on a now-revoked presidential memorandum, the justification for the scope of the discovery order will disappear, as there will be no need to obtain discovery regarding the now-revoked memorandum and claims that are moot.

Several other factual and legal premises underlying the Magistrate Judge's Memorandum Opinion and Order are also before the district court in Defendants' motions. As an example, the Magistrate Judge found that a review panel from DoD would not have existed but for the President's statement on Twitter and the August 2017 Presidential Memorandum. Mem. Op. at 6–7. But the Magistrate Judge overlooked that Secretary Mattis ordered a review of the accessions policy "to evaluate more carefully the impact of such accessions on readiness and lethality" prior to the President's Twitter statements.[1] AR 326, Dkt. 133-4; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 4, Dkt. 120; Defs.' Mot. to Dismiss 3–4, Dkt. 158. As a second example, the Magistrate Judge found that "circumstances regarding readiness and deployability [could not] have

[1] Similarly, the Magistrate Judge's factual finding that "a previous panel under a previous Secretary of Defense did extensive studies before a decision was rendered, Mem. Op. 6, overlooks that former Secretary of Defense Ashton Carter directed a working group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness or readiness, unless and except where objective, practical impediments are identified," AR 319, Dkt. 133-4.

changed so dramatically" between 2016 and 2018 to warrant the creation of a new policy. Mem. Op. 6. But the Magistrate Judge ignored that unlike in prior reviews, the Panel of Experts relied on the "the Department's own data and experience obtained since the [2016] Carter policy took effect." DoD Report and Recommendations 18, 40, Dkt. 120-2; *see* AR2821–47 (Panel Meeting Minutes); AR3059 (Action Memo) (stating that the "Panel considered available DoD data and information on currently-serving transgender personnel"). As a final example, the Magistrate Judge found that the Department's new policy has resulted in "transgender persons [being] barred from military service." Mem. Op. 9. But the new policy does not operate on the basis of transgender status and allows transgender individuals without a history of gender dysphoria to serve, if they meet the standards associated with their biological sex. *See* Mem. from Secretary Mattis (Feb. 22, 2018), Dkt. 120-1; DoD Report and Recommendations, Dkt. 120-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 6–8, Dkt. 120; Defs.' Mot. to Dismiss 6–8, Dkt. 158. The Magistrate Judge's finding that the new policy bars transgender individuals from military service also overlooks the reliance exemption, which allows service members "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy," including those who entered the military "after January 1, 2018," to "continue to receive all medically necessary care, to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences." DoD Report and Recommendations 5–6, Dkt. 120-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 7, Dkt. 120; Defs.' Mot. to Dismiss 7, Dkt. 158.

In sum, the Magistrate Judge's Memorandum Opinion and Order hinges on erroneous legal rulings and factual findings that are currently pending before this Court in several dispositive

motions. Because the sweeping ruling threatens extraordinary intrusions into the deliberations underlying military policies, the Court should stay Defendants' compliance with the Order.

## II. The Court Should Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order Because the Four Factors Weigh in Defendants' Favor.

### A. Defendants Will Suffer Immediate, Irreparable Harm Absent a Stay.

Compliance with the Magistrate Judge's Memorandum Opinion and Order will result in the irretrievable disclosure of thousands of privileged documents covering multiple military policies. Because the disclosure of documents and information cannot be undone, courts routinely grant stays in such contexts.[2] *See HHS v. Alley*, 129 S. Ct. 1667 (2009) (in a FOIA case, ordering stay of district court's order directing agency to disclose records to plaintiff, pending final disposition of appeal, following denial of stay by court of appeals); *see also In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001) (after granting an emergency stay of the district court's order that directed disclosure of material covered by the attorney-client privilege, issuing a writ of mandamus that directed the court to vacate its disclosure order); *Weirton Steel Corp. Liquidating Tr.*, 2009 WL 357888, at *3 (staying a magistrate judge's order requiring disclosure of privileged documents "until such time as Magistrate Judge Seibert conducts the *in camera* review and submits a report and recommendation to this Court, and this Court considers the matter further"); *Herbalife Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 5:05CV41, 2006 WL 2560271, at *4 (N.D. W.Va. Sept. 5, 2006) (staying a magistrate judge's order compelling production of documents pending review of that order because "the documents may be found to

[2] The Supreme Court regularly grants stays of disclosure orders in FOIA cases pending appeal. *See, e.g.*, *DOJ v. Rosenfeld*, 111 S. Ct. 2846 (1991); *Dep't of Commerce v. Assembly of the State of Cal.*, 112 S. Ct. 19 (1991); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308–09 (1989) (Marshall, J., in chambers) (issuing stay in FOIA action and observing that disclosure of documents would moot defendant's ability to appeal, thereby resulting in irreparable injury). Lower courts do the same. *See, e.g.*, *Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012); *People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007); *Center for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003); *Center for National Security Studies v. DOJ*, 217 F. Supp. 2d 58 (D.D.C. 2002).

be protected by the attorney-client privilege and/or the work product doctrine"). As courts have found, the Government's right to secure meaningful review would be undermined if disclosure were required prior to a final decision:

> Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals. Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored.

*Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *see also In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("[O]nce information is published, it cannot be made secret again."); *United States v. Fei Ye*, 436 F.3d 1117, 1123 (9th Cir. 2006) (recognizing that an order directing the disclosure of trade secrets would cause irreparable harm to the Government). The Magistrate Judge's Memorandum Opinion and Order requires disclosure of information that would reveal DoD's internal deliberations concerning military policy, something that could never be undone, thus causing irreparable harm to Defendants. Furthermore, absent a stay, Plaintiffs may move to compel information concerning presidential communications and deliberations from sources other than the President, which would put at issue the need to invoke the presidential communications privilege—a circumstance that the Supreme Court has warned "should be avoided whenever possible." *Cheney*, 542 U.S. at 389–90; *see generally* Defs.' Mot. for a Protective Order, Dkt. 179.

**B. Plaintiffs Will Not Be Harmed by a Stay.**

On the other side of the balance, there is plainly no meaningful harm to Plaintiffs simply by staying compliance pending review of the Order. Plaintiffs have moved for summary judgment, *see* Dkt. 163, thus effectively asserting that, even absent further evidentiary development, "there is no genuine dispute as to any material fact" in this case, Fed. R. Civ. P. 56 (a). If Plaintiffs' assertion is credited, then a delay in Defendants' disclosure obligations could in no way prejudice

Plaintiffs. Even assuming these materials are needed to litigate the merits of this case, if Plaintiffs ultimately prevail in this dispute, they would obtain the documents at issue. And because there is a preliminary injunction in place, Plaintiffs cannot point to any alleged ongoing harm as grounds to require the immediate production of deliberative materials. *See* Order, *Doe v. Trump*, No. 17-1597 (D.D.C. June 19, 2018), Dkt. 145 (emphasizing that holding discovery disputes in abeyance would "not prejudice Plaintiffs, because the Court's preliminary injunction remains in place").

And even if Plaintiffs could be said to incur some harm from a stay of the Order, it would pale in comparison to the Government's immediate and irreparable harm of sacrificing meaningful review by producing the underlying privileged documents. As another court found in a similar situation:

> Failure to grant a stay will entirely destroy appellants' rights to secure meaningful review. On the other hand, the granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure assuming the Journal prevails by whatever period of time may be required for us to hear and decide the appeals. Weighing this latter hardship against the total and immediate divestiture of appellants' rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.

*Providence Journal Co.*, 595 F.2d at 890; *see also Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (finding that the balance of harms "tips sharply" for Defendants because their right to appeal would be moot if they had to disclose information, while a stay would only briefly postpone Plaintiffs' access to that information). Accordingly, the balance of harms weighs heavily in Defendants' favor.

**C. Defendants Are Likely To Prevail on the Merits of Their Objections.**

Pursuant to Federal Rule of Civil Procedure 72(a), the district court "must . . . modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A); Local Civil Rule 301(5)(a). "A court's 'finding is 'clearly

erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Bruce v. Hartford*, 21 F. Supp. 3d 590, 593–94 (E.D. Va. 2014) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (citing *Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985)). "The standard of review for 'contrary to law,' however, is different." *Perez v. Figi's Companies, Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at *2 (S.D.W. Va. Feb. 26, 2016) (quotation omitted). "For questions of law, there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and a de novo standard." *Id.* (quotation omitted); *Bruce*, 21 F. Supp. 3d at 594 (quotation omitted). The Court therefore "review[s] the factual portions of the Magistrate Judge's order under the clearly erroneous standard, but . . . review[s] legal conclusions to determine if they are contrary to law." *Bruce*, 21 F. Supp. 3d at 594 (citations omitted). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F.Supp.2d 70, 74 (N.D.N.Y. 2000)).

Defendants are likely to succeed in their argument that the Magistrate Judge's Memorandum Opinion and Order directing disclosure of thousands of documents protected by the deliberative process privilege is contrary to law because the Magistrate Judge entirely overlooked binding Supreme Court precedent. The Magistrate Judge found that the deliberative process privilege "is simply inapplicable where government intent is at the heart of the issue" and that "Defendants' intent—whether it was for military purposes or whether it was purely for political and discriminatory purposes—is at the very heart of this litigation." Mem. Op. 5–6. But in reaching these conclusions, the Magistrate Judge, in addition to disregarding preexisting Fourth Circuit law, *see infra*, most notably failed to apply established principles of military deference

most recently set forth in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *see also* Defs.' Supp. Br. Concerning the Impact of *Trump v. Hawaii* on Pls.' Mot. to Compel Supp. Interrog. Answers and Prod., Dkt. 197. *Hawaii* confirms that when the Government acts in the areas of national security or foreign affairs, its subjective intent is irrelevant so long as the Government's action "can reasonably be understood to result from a justification independent of unconstitutional grounds" based on the face of the challenged policy. 138 S. Ct. at 2420. Here, DoD's new policy that concerns the composition of the fighting force is unquestionably related to national security, and DoD has released a 44-page report that sets out in detail the legitimate military justifications supporting its policy. *See* DoD Report and Recommendations, Dkt. 120-2. Had the Magistrate Judge properly applied *Hawaii*, the Magistrate Judge would have concluded that discovery into Defendants' deliberative process is neither necessary nor appropriate in this case.

*Hawaii* involved an Establishment Clause challenge to a presidential proclamation concerning the entry to the United States of certain foreign nationals. 138 S. Ct. at 2403. The Supreme Court rejected that challenge and vacated a nationwide preliminary injunction issued against the proclamation. *Id.* at 2423. In doing so, the Supreme Court applied a form of "rational basis review," stressing that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). The Court explained that the central consideration in applying this deferential form of review is whether the policy at issue is "plausibly related to the Government's stated objective." *Id.* at 2420. Indeed, the Court stated that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* Although the Court stated that it "may consider plaintiffs' extrinsic evidence" of previously revoked executive orders and past statements by the President about Muslims, *id.*, it rejected the theory that prior statements

forever "contaminated" the proclamation with "impermissible discriminatory animus," *compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J., dissenting). Instead, in analyzing whether a sufficient justification for the policy existed, the Court focused on the proclamation itself and the "multi-agency review" that supported it. *See id.* at 2417, 2421 (majority op.). That targeted inquiry was not influenced by prior, revoked or expired executive orders preceding the proclamation, or by past statements by the President about Muslims and terrorism. *See id.* at 2417–23.

Here, by focusing on the President's statements on Twitter, the Magistrate Judge erroneously agreed with Plaintiffs that deliberative materials related to the President's statements are relevant to this case. *See* Mem. Op. 5–7. *Hawaii* instructs that the Court must assess the 2018 policy on its own terms, not on the purported intent behind the policy as evidenced by prior statements, including as to an expressly revoked policy. Thus, Plaintiffs' demand for all deliberative process materials related to the challenged Department of Defense policy, and assertion that the deliberative process privilege does not apply to these materials, cannot be sustained based on alleged animus behind prior, revoked presidential statements and policy. Such alleged animus is not pertinent to judicial review of the military's new policy, and the Magistrate Judge erred by finding that the alleged animus could serve as a basis to negate the deliberative process privilege in this litigation.

Not only did the Magistrate Judge overlook binding Supreme Court precedent, but the Magistrate Judge's ruling that the deliberative process privilege "is simply inapplicable where government intent is at the heart of the issue," Mem. Op. 5, is contrary to the Fourth Circuit's approach in *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)), which requires balancing 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* Order at 2, *State of New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. Aug. 14, 2018), Dkt. 241 ("conclud[ing] that a 'balancing approach that considers the competing interests of the party seeking disclosure and of the government—specifically, its need to engage in policy deliberations without the omnipresent threat of disclosure—is more appropriate than a *per se* rule' providing that the deliberative-process privilege does not apply to any claim challenging governmental decisionmaking" (quoting *Winfield v. City of New York*, No. 15-CV-5236 (KHP) (LTS), 2018 WL 716013, at *5 (S.D.N.Y. Feb. 1, 2018))). By concluding that the deliberative process privilege is categorically inapplicable when the government's intent is at issue, the Magistrate Judge failed to apply the *Cipollone* balancing test. In doing so, the Magistrate Judge failed to weigh the relevance of the documents and the chilling effect on 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 that would result from the disclosure of thousands of deliberative documents in this case.

Defendants are also likely to succeed in their argument that the Magistrate Judge's denial of Defendants' Motion for a Protective Order as to discovery of presidential communications and deliberations from sources other than the President is contrary to law. As an initial matter, the

Magistrate Judge stayed discovery directed to the President pending the Court's resolution of Defendants' motion to dismiss the President as a party to the case. Mem. Op. 10. Holding resolution of this issue in abeyance pending the Court's resolution of the pending motion was appropriate, especially considering that the court in the related case *Doe v. Trump* recently dismissed the President as a party to that case "to avoid unnecessary constitutional confrontations." Op. at 2, *Doe v. Trump*, No. 17-1597 (D.D.C. Aug. 6, 2018), Dkt. 155.

Although the Magistrate Judge appropriately stayed discovery against the President, his decision regarding other presidential materials is contrary to law. The Magistrate Judge correctly noted that *Cheney* requires district courts to "afford Presidential confidentiality the greatest possible protection," Mem. Op. 7–8 (citing *Cheney*, 542 U.S. at 368), but failed to apply this principle to a subset of presidential materials. In particular, the Magistrate Judge failed to recognize that discovery of the President's communications and deliberations from individuals or agencies *with whom the President or his advisors communicated* implicates the very same separation-of-powers concerns—and thus the same collision between the branches—as discovery of the President directly. Indeed, as the Magistrate Judge recognized, the core purpose of *Cheney* is to "explore other avenues, short of forcing the Executive to invoke Privilege," *id.* at 8 (quoting *Cheney*, 542 U.S. at 390), yet discovery of presidential materials from Defendants other than the President inevitably results in just that: forcing the Executive to invoke privilege in response to a motion to compel. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (finding that the privilege does not have to be formally invoked "in advance of the motion to compel"). *Cheney*'s protections would soon become a nullity if litigants could evade them by simply seeking presidential communications from the individuals with whom the President communicated. The Magistrate Judge thus erred in denying Defendants a protective order over such materials.

Accordingly, because the Magistrate Judge's Memorandum Opinion and Order overlooks or misapplies Supreme Court precedent and Fourth Circuit case law, Defendants are likely to prevail on the argument that the Memorandum Opinion and Order is contrary to law. This factor thus weighs in favor of granting a stay.

**D. A Stay Is In The Public Interest.**

Disclosure of thousands of deliberative documents from the Department of Defense and the Services covering multiple policies 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 public interest should carry overwhelming weight.

## III. A Stay Would be Consistent with, and Avoid the Discovery Litigation Ongoing in, the Related Case *Karnoski v. Trump*.

Staying compliance with the Memorandum Opinion and Order would be consistent with the posture of the related case *Karnoski v. Trump*, and also avoid duplicating that discovery dispute here. In *Karnoski*, Defendants filed a similar motion for a protective order concerning discovery of the President and of presidential communications and deliberations, and the plaintiffs filed a similar motion to compel documents withheld under the deliberative process privilege. The *Karnoski* Court denied Defendants' motion for a protective order, granted Plaintiffs' motion to compel, and ordered the President and the Department of Defense to, among other things, disclose "documents that have been withheld solely under the deliberative process privilege." Order at 11,

*Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299. Defendants filed a petition for a writ of mandamus in the Ninth Circuit and moved to stay compliance with the *Karnoski* Court's Order pending appellate review. *See* Defs.' Mot., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 31, 2018), Dkt. 300. Defendants also filed a motion to stay compliance with the district court's order in the Ninth Circuit, which granted "a temporary stay of the district court's July 27, 2018 discovery order pending the district court's decision on petitioners' July 31, 2018 motion to stay the July 27, 2018 order." Order at 2, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 2, 2018), Dkt. 4. The Ninth Circuit stated that "[i]f the district court denies the July 31, 2018 motion, the temporary stay will remain in effect for 7 days following the entry of the district court's decision." *Id.* at 2. At present, that stay order remains in effect and oral argument is set for October 10, 2018; the discovery dispute in that case, which overlaps the dispute here, is therefore not resolved. A stay of the Magistrate Judge's Memorandum Opinion and Order pending further review would not only be consistent with the current posture of proceedings in the related case, but would avoid the same kind of expansive litigation here over the same deliberative process materials at issue in the ongoing dispute in *Karnoski*. Finally, because many of the same deliberative documents are at issue in *Karnoski*, if the Court does not enter a stay of the Magistrate Judge's Memorandum Opinion and Order, the majority of the Government's petition for a writ of mandamus in the Ninth Circuit could be effectively moot.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay the Magistrate Judge's Memorandum Opinion and Order pending the Court's resolution of Defendants' forthcoming Objections to the Magistrate Judge's Memorandum Opinion and Order.

Date: August 17, 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/ Courtney D. Enlow*
COURTNEY D. ENLOW
ANDREW E. CARMICHAEL
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 616-8467
Email: courtney.d.enlow@usdoj.gov

*Counsel for Defendants*