No. 17-72917

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNITED STATES OF AMERICA, *et al.*,
Petitioners.

UNITED STATES OF AMERICA; DONALD J. TRUMP, President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; and ELAINE DUKE, Acting Secretary of Homeland Security,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET NAPOLITANO, President of the University of California; STATE OF CALIFORNIA; STATE OF MAINE; STATE OF MARYLAND; STATE OF MINNESOTA; CITY OF SAN JOSE; DULCE GARCIA; MIRIAM GONZALEZ AVILA; SAUL JIMENEZ SUAREZ; VIRIDIANA CHABOLLA MENDOZA; NORMA RAMIREZ; JIRAYUT LATTHIVONGSKORN; COUNTY OF SANTA CLARA; and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521,
Real Parties in Interest-Plaintiffs.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

CHAD A. READLER
Acting Assistant Attorney General

BRIAN STRETCH
United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
ABBY C. WRIGHT
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-2000

INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government has asked this Court to issue a writ of mandamus to stay the district court's order expanding the administrative record to include deliberative and sensitive privileged materials—including documents from the White House—and to halt ongoing discovery, including the depositions of high-ranking government officials. On October 24, this Court stayed "discovery and record supplementation in the district court pending the resolution of this petition for writ of mandamus." Order (Oct. 24, 2017). In parallel litigation, the Second Circuit issued an order on October 24 extending the emergency stay it had previously granted, *see* Order, *In re Duke*, No. 17-3345 (Oct. 20, 2017) (Cabranes, J.), "until determination of the mandamus petition" that was filed by the government the previous day. Order, *In re Duke*, No. 17-3345 (Oct. 24, 2017). And the Second Circuit delayed "[r]esolution of the mandamus petition . . . until such time as the district court has considered and decided expeditiously issues of jurisdiction and justiciability." *Id.*

Exercise of this Court's mandamus authority is even more crucial here. The district court has ordered that the government create a new administrative record that includes deliberative and White House materials that the Acting Secretary does not rely on to defend her decision. Moreover, the district court's rulings make clear that it will freely order disclosure of documents protected by the deliberative process and presidential communications privileges, as it has already done in summary fashion. The

sole purpose of these orders is to allow plaintiffs and the court "to probe the mental processes" of the agency decisionmaker, in direct contravention of *United States v. Morgan*, 304 U.S. 1, 18 (1938). At no point in their opposition do plaintiffs offer any *other* reason for requiring inclusion in the record of deliberative materials—which are not properly part of an administrative record to begin with—or burdensome and intrusive discovery, including the deposition of the Acting Secretary herself, which the magistrate judge ordered yesterday shortly before this Court issued a stay. If this radical approach to judicial review of administrative action were to become routine practice, the cumulative burdens would be staggering.

The district court magnified its error by including the White House itself (as well as the Justice Department) within its demand that the government supplement the administrative record with "all DACA-related materials" considered by anyone "anywhere in the government" who provided the Acting Secretary with written or verbal input on the policy decision. Add. 26-27. Plaintiffs do not dispute that the order reaches beyond the Department of Homeland Security (DHS) and includes the White House, and they fail to refute our showing that this is plainly contrary to *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 390 (2004).

The court has entered these extraordinary orders without considering whether ruling on the government's threshold arguments will obviate the need to review the administrative record at all or, if these grounds are not dispositive, whether the agency decision may be sustained on the record submitted by the government, which is the

proper course of adjudication involving review of agency action. Plaintiffs' opposition fails to explain why the vast record expansion and discovery they seek are necessary or proper to adjudicate their claims, contrary to the routine practice in challenges to agency action, including in discriminatory-motive challenges to agency enforcement decisions. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 & n.9 (1999).

ARGUMENT

THE COURT SHOULD EXERCISE ITS MANDAMUS AUTHORITY TO CORRECT AN ORDER THAT DISREGARDS ESTABLISHED PRINCIPLES OF SEPARATION OF POWERS AND JUDICIAL REVIEW OF AGENCY DECISIONS.

A. The District Court Has Improperly Ordered a Vast Expansion of the Administrative Record and Has Permitted Discovery Designed To Probe the Mental Processes of the Agency.

1. In reviewing agency action, "the task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)). In carrying out that review, it is "not the function of the court to probe the mental processes" of the agency. *United States v. Morgan*, 304 U.S. 1, 18 (1938). "Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan II*). Accordingly, an agency's deliberative materials are not part of the administrative record, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*,

789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc), and a court must review the agency's action based on the grounds that the agency has offered in its record, *see Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007). This does not harm plaintiffs, because if the agency's action "is not sustainable on the administrative record made," then the administrative "decision must be vacated and the matter remanded to [the agency] for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).[1]

Thus, "[w]hen a party challenges agency action as arbitrary and capricious the reasonableness of the agency's action is judged in accordance with its stated reasons," and "[a]gency deliberations not part of the record are deemed immaterial." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (on pet. for reh'g). As the D.C. Circuit explained, "[t]hat is because the actual subjective motivation of agency decisionmakers is immaterial as a matter of law—unless there is a showing of bad faith or improper behavior." *Id.* Deliberative materials reflect the mental processes of agency personnel. They are not "considered" by the agency decisionmaker in the sense relevant to APA review, just as a judge's consideration of a law clerk's bench memorandum, draft opinions, or communications

[1] Plaintiffs complain that the record in this case was "compiled *post hoc* and provided by the agency." Op. 12. But with the exception of formal adjudications and notice-and-comment rulemakings, administrative records are routinely compiled by the agency after the action is challenged in district court. *See*, *e.g.*, *Women Involved in Farm Econ. v. U.S. Dep't of Agric.*, 876 F.2d 994, 999 (D.C. Cir. 1989) ("[I]f an agency had no obligation to explain its actions contemporaneously . . . the entire record, or a good part of it, is actually created for the sole purpose of judicial review; by definition, much that is presented to the court is developed *post-hoc*.").

with other judges does not render those materials part of the record of the court's decision. *See, e.g.*, *San Luis Obispo*, 789 F.2d at 45 ("[T]he analogy to the deliberative processes of a court is an apt one."); *see also* Fed. R. App. P. 16 cmt. ("The record in agency cases is thus the same as that in appeals from the district court—the original papers, transcripts, and exhibits in the proceeding below.").

2. Plaintiffs do not dispute that the district court has expanded the record to include deliberative materials; indeed, they vigorously defend the district court's order requiring disclosure of the deliberative materials reviewed by the Acting Secretary that the government was required to submit for *in camera* examination by the district court. Op. 22-24. Plaintiffs' insistence that the court's orders nevertheless do not entail "an impermissible examination of the 'mental process' of the decision-maker," Op. 14, does not bear even cursory scrutiny. Plaintiffs declare that the court has "simply require[d] defendants to complete the documentary record so that the district court can determine whether the record supports the articulated basis for the decision to rescind," urging that "[c]ompiling a complete documentary record does not impinge on the mental processes of an agency head" but rather "enables review of the agency's decision based on the relevant information." *Id.* If the agency's decision cannot be sustained on the basis of the record submitted by the agency, the proper course is to remand to the agency for further proceedings, not for the court to conduct a search (through discovery or otherwise) for other materials, much less to expand the "record" to include deliberative material. Indeed, plaintiffs do not explain how reviewing deliberative

materials would facilitate judicial review in any way other than by allowing comparison of mental processes to the "articulated basis" for the decision in the agency's certified record; indeed, that is all that plaintiffs could mean by "relevant information." Op. 14.

Invitations to engage in such comparisons must be refused absent the "rare exception" of bad faith "if agencies are to engage in uninhibited and frank discussions during their deliberations." *San Luis Obispo*, 789 F.2d at 44. Otherwise, agencies would limit their deliberative materials "with judicial scrutiny in mind," making them "useless both to the agency and to the courts." *Id.* The district court has not made any finding of bad faith, and indeed, plaintiffs make no such assertion themselves. And the fact that the administrative record does not include deliberative content can obviously not itself be evidence of bad faith since it is not part of the administrative record to begin with.

Indeed, agencies would grind to a halt if it became routine to demand deliberative material considered within the agency every time agency action is challenged. Under plaintiffs' theory, litigants challenging a rule adopted by the Securities and Exchange Commission could, *e.g.*, demand to see whether any of the Commissioners were advised not to adopt the rule (and for what reasons) and then use that deliberative material to attempt to cast doubt on the sincerity of the Commission's published analysis. Such discovery demands would place an enormous—and entirely improper—burden on agency officials, and invite the court to review agency action on grounds other than those offered by the agency. *See Safe Air For Everyone*, 488 F.3d at 1101.

Plaintiffs dismiss *San Luis Obispo* as an "out-of-circuit" decision, but they do not attempt to engage with its reasoning, which derives from *Morgan, Overton Park,* and other governing Supreme Court decisions. Plaintiffs do not suggest that this Court has previously gone into conflict with the D.C. Circuit on this question, and they do not explain why it should do so now.[2] Nor do they acknowledge that this Court drew upon the same reasoning in *Portland Audubon Society v. Endangered Species Comm'n,* 984 F.2d 1534, 1549 (9th Cir. 1993), when it distinguished between "allegedly improper ex parte contacts between decisionmakers," which must be included in the administrative record of a formal agency adjudication, and documents reflecting "the internal deliberative processes of the agency [or] the mental processes of individual agency members," which are not included. See 5 U.S.C. §§ 556(e), 557(d).[3] This is especially true in this case,

[2] Plaintiffs urge that cases from other courts cannot "establish that it was clearly erroneous for a district court in *this* circuit to require production of a privilege log." Op. 18. But "the necessary 'clear error' factor does not require that the issue be one as to which there is established precedent." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158-59 (9th Cir. 2010) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964), and *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984)).

[3] Plaintiffs cite *Portland Audubon Society* for the proposition that the administrative record includes "everything that was before the agency pertaining to the merits of its decision" and documents "the agency relied on." Op. 11 (quoting 984 F.2d at 1548). But that case involved a formal agency adjudication, *id.* at 1540-41, subject to specific rules regarding the composition of the administrative record. 5 U.S.C. §§ 556(e), 557(d)(1). As we argued in our petition, and plaintiffs fail to refute (Op. 13 n.3), the fact that the APA lacks specific rules for the administrative record in informal proceedings such as this makes it all the more improper to compel the agency to include material, much less deliberative material, within the administrative record it chooses to provide to defend its action.

which involves a decision that is not required to be made on a formal record and, indeed, is a classic statement of policy concerning the exercise of prosecutorial discretion that does not require the creation of an evidentiary record at all.

Thompson v. United States Department of Labor, 885 F.2d 551 (9th Cir. 1989), on which plaintiffs rely, did not involve the kinds of sensitive, internal deliberative materials that plaintiffs seek here. Rather, *Thompson* involved letters that an *outside entity* submitted to the agency decisionmaker. *Id.* at 556. Nor does the decision support plaintiffs' assertion that the record should be expanded to include documents never considered by the Acting Secretary. The Court made clear that because judicial review was based on the record "before the agency *when it made its decision*," the "critical inquiry is whether [documents] were before the Secretary at the time of the decision." 885 F.2d at 556 (emphasis in original). The letters at issue in that case were submitted directly "to the Secretary" and were "properly part of the administrative record" because they were "considered by the Secretary, either directly or indirectly, during [the] motion for reconsideration." *Id.* [4]

3. Contrary to plaintiffs' suggestion, the government did not acquiesce in the expansion of the record or the discovery at issue here. The government expressly

[4] Plaintiffs misinterpret (Op. 14-15, 18) a 1999 memorandum from the Department of Justice's Environment and Natural Resources Division to its client agencies providing informal advice regarding administrative record preparation, *see* Reply Add. 5, and in any event that advice is no longer current. *See* Reply Add. 7.

objected to any discovery in this case, explaining that "we think discovery at this point would be premature and unnecessary and really inappropriate," Reply Add. 2, yet the district court nonetheless ordered discovery to proceed. Dkt. 49. The government renewed its objections to discovery, most recently in its district court stay motion, and the district court again overruled those objections. Add. 29. Plaintiffs do not suggest that the district court lacks any understanding of the government's position on the appropriateness of discovery, and they fail to explain why requiring the government to again press its objections in district court would advance the resolution of this litigation or obviate the pressing need for this Court's supervisory review.

B. The District Court's Errors Are Epitomized by the Requirement that the White House Search for and Assert Privilege over Documents Within the Scope of the Order.

Plaintiffs do not dispute that the district court's order requires the White House to search for and assert privilege on an item-by-item basis over documents within the scope of its expansive redefinition of the administrative record. Although this intrusion precisely mirrors the intrusion at issue in *Cheney,* plaintiffs seek to distinguish the Supreme Court's decision on the ground that "[t]he Vice President himself was a party to the action and a subject of the discovery order." Op. 16. Here, of course, *the President* is a defendant, and the district court sustained "[p]laintiffs' insistence that defendants scour . . . the White House for documents" to the extent that "White House personnel fall within the category" of people "who gave verbal or written input to the Acting Secretary." Add. 27. The order sets coequal branches on the same "collision course"

here as in *Cheney*, despite *Cheney*'s explicit directive that a court must "explore other avenues, short of forcing the Executive to invoke privilege," such as, in this case, considering the government's dispositive threshold arguments and whether the Acting Secretary's decision can be sustained on the basis of the record filed in the court. 542 U.S. at 390. *Cheney* also leaves no doubt that a court should exercise its mandamus authority when faced with the type of intrusion at issue in that case and replicated here.[5]

Plaintiffs are thus quite wrong to assert that it is "premature" to halt record "completion" and discovery pending the resolution of threshold issues. Op. 25. Indeed, the Second Circuit has ruled to the contrary in parallel litigation, granting the government's emergency motion for a stay of discovery and record supplementation pending an adjudication of the government's forthcoming motion to dismiss in the United States District Court for the Eastern District of New York. *See* Order, *In re Duke*, No. 17-3345 (Oct. 24, 2017). The district court's orders in this case would be improper even if there were no dispositive grounds for dismissal, but at an absolute minimum, there can be no basis for requiring the discovery and record supplementation mandated

[5] That "this Court ordered [White House] materials included in the administrative record in *Portland Audubon*," Op. 16, has no bearing on the inquiry here. The documents at issue there were in the possession of the agency decisionmaker, and, in any event, that decision predated *Cheney* by over a decade.

by the district court's orders until the issues presented by the government's dispositive motion, due on November 1, are resolved.[6]

C. The District Court's Privilege Rulings and the Depositions of Agency Officials Underscore the Mistaken Endeavor of Probing the Agency's Mental Processes.

Plaintiffs seek to defend the district court's privilege rulings and urge that this Court should disregard the district court's view that the Acting Secretary herself should be deposed because, although the court has already announced that such a deposition should occur (and the magistrate judge so ordered prior to this Court's entry of a stay, *see* Reply Add. 3), the district court has not yet formally denied a motion to quash.

Plaintiffs fail to grasp the full significance of these issues. The government does not seek mandamus simply to correct mistaken privilege rulings or simply to preclude the deposition of the Acting Secretary ordered by the magistrate judge (although those errors would independently warrant mandamus relief). The court's rulings are particularly significant because they underscore that the purpose of the record expansion and discovery is to probe the agency's mental processes. Plaintiffs' discussion of those questions make clear that they share this view entirely.

1. The district court ordered disclosure of numerous documents protected by the deliberative process privilege with no explanation other than that "[t]he undersigned

[6] Plaintiffs attempt to cast doubt on the strength of the government's threshold arguments. *But see* Pet. 16. *Cheney* does not call for this Court to consider the strength of the threshold arguments and other issues entailed in a dispositive motion. Rather, it calls for this Court to order the district court to do so.

judge has balanced the deliberative-process privilege factors and determined *in camera"* that documents must be disclosed. Add. 27. Plaintiffs declare that "[i]t is impossible for the government to explain why the district court clearly erred in concluding that access to these documents" was necessary. Op. 24. But the government has explained at length that there is no legitimate purpose for including or disclosing deliberative material in the administrative record. And it is impossible to explain why the court erred in holding that the privilege had been overcome with respect to particular documents, because the district court offered no basis for its conclusion. Plaintiffs are quite wrong to suggest that the government was required to seek reconsideration in the district court. Op. 24. *See In re TS Tech USA Corp.,* 551 F.3d 1315, 1322 (Fed. Cir. 2008) (explaining that "the 'no other means' requirement is not intended to ensure that [petitioners] exhaust every possible avenue of relief at the district court before seeking mandamus relief").

Plaintiffs insist that the district court's decision is nonetheless defensible because the government did not properly assert privilege. Op. 19-20. But the district court did not base its ruling on an alleged failure to properly assert the privilege, and for good reason. The government was directed to produce a privilege log, which it did in approximately two days. *See* Add. 1. But the government was never given the opportunity to submit any argument as to "why [the documents] fall[] within the scope of the privilege," or to more formally assert the privilege. *See* Op. 19 (quoting *Landry v. FDIC*, 204 F.3d 1124, 1135 (D.C. Cir. 2000)). The privilege log gave *plaintiffs* an opportunity to raise specific challenges, to which the government could have

responded. Instead, the district court reviewed documents *in camera* without the benefit of any briefing regarding particular documents and, accepting that the documents were covered by the privilege, issued a conclusory statement that the privilege should be overcome and documents disclosed.

The district court's errors are especially egregious with respect to its order requiring production of White House documents based on its belief that those documents were not covered by the presidential communications privilege. Plaintiffs' only defense of the district court's decision is to question whether the documents withheld were "presidential communications." Op. 24. As ordered, the government produced a privilege log on an extraordinarily expedited timeframe, and the district court never ruled that the privilege log was inadequate. The district court received the documents for *in camera* review; and, indeed, Document Tab #19 (RLIT69) makes plain that the document in question is a White House memorandum. Given the importance of the privilege to the separation of powers, *see United States v. Nixon*, 418 U.S. 683, 708 (1974), the district court should not have so lightly ordered the documents' disclosure. And the court's order summarily requiring disclosure of privileged White House documents, without briefing, is symptomatic of its errors in the handling of record and discovery issues in this litigation more generally.

2. Plaintiffs also offer no plausible justification (Op. 20) for the district court's conclusion that the government had waived the attorney-client privilege as to "any materials that bore on whether or not DACA was an unlawful exercise of executive

power and therefore should be rescinded." Add. 24. That the decision to wind down the DACA policy reflected an assessment of litigation risk does not mean that assessing the correctness of that determination depends on the "legal research" used to reach that conclusion—just as an agency's internal legal research is irrelevant to its adoption of a regulation. Add. 23. There is no basis at all for the district court's belief that "assessing the reasonableness of the Secretary's legal rationale would turn, in part, on how consistent the analysis has been in the runup to the rescission." *Id.* Assuming judicial review is available at all with respect to the Acting Secretary's enforcement decision, that review would concern questions that can be considered on the basis of the administrative record provided by the agency, which, as explained in our petition for writ of mandamus, includes the Attorney General's memorandum.

Chevron Corp. v. Pennzoil Col, 974 F.2d 1156, 1162 (9th Cir. 1992) (cited at Op. 21), fails to advance plaintiffs' argument. In that private party litigation, the defendant claimed that its belief that certain disclosures were not misleading was based on legal advice, but refused to provide that legal advice, claiming that it was privileged. *Id.* That holding is wholly inapposite here, where plaintiffs challenge agency action, the government is not asserting an advice-of-counsel defense, and the government in any event has disclosed the legal opinion provided by the Attorney General to the Acting Secretary and referenced in her decision.

3. Plaintiffs' discussion of their formally noticed deposition of Acting Secretary Duke does not deny that the entire purpose of the deposition is to investigate the

decisionmaking process. Plaintiffs recognize that the district court has already indicated that such a deposition should be permitted to proceed. *See* Op. 28-29. And on October 24, prior to this Court's entry of a stay, the magistrate judge ordered that the Acting Secretary appear for deposition by November 15. Reply Add. 3. The magistrate judge stated that "chief among the reasons for this Order is the fact that the testimony of lower-level deponents is that Acting Secretary Duke was the sole decision maker with regard to the rescission of DACA." Reply Add. 3-4. As this order makes plain, the only purpose of the deposition is to interrogate the decisionmaker. This is precisely what the Supreme Court held impermissible in *Morgan II*.[7]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of mandamus, vacate the order of October 17, and halt discovery and requirements to expand the record.

[7] Plaintiffs mistakenly rely on *In re Kessler,* 100 F.3d 1015 (D.C. Cir. 1996) (concerning FDA commissioner). There is no doubt that a sitting Cabinet official, such as the Acting Secretary here, would meet the criteria used by the D.C. Circuit in that case. And here, the deposition is part of a broader pattern of impermissible discovery. *See also In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (issuing a writ of mandamus to preclude deposition of the Vice President's chief of staff).

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

BRIAN STRETCH
United States Attorney

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

MARK B. STERN
ABBY C. WRIGHT
THOMAS PULHAM
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-2000

OCTOBER 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the page limit of Ninth Circuit Rule 21-2(c). It does not exceed 15 pages, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Mark B. Stern
MARK B. STERN

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, by 9am PST (12pm EST), I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished through that system.

The district court has been provided with a copy of this reply.

s/ Mark B. Stern
MARK B. STERN

REPLY
ADDENDUM

TABLE OF CONTENTS

Pages 1 - 68

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Before The Honorable William H. Alsup, Judge

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA and JANET NAPOLITANO in her official capacity as President of the University of California, Plaintiffs, VS. U.S. DEPARTMENT OF HOMELAND SECURITY and ELAINE DUKE in her official capacity as Acting Secretary of the Department of Homeland Security, Defendants.	**NO. C 17-05211 WHA**
STATE OF CALIFORNIA, STATE OF MAINE, STATE OF MARYLAND, and STATE OF MINNESOTA, PlaintiffS, VS. U.S. DEPARTMENT OF HOMELAND SECURITY, ELAINE C. DUKE in her official capacity as Acting Secretary of the Department of Homeland Security; and UNITED STATES OF AMERICA, Defendants.	**NO. C 17-05235 WHA**

San Francisco, California
Thursday, September 21, 2017

TRANSCRIPT OF PROCEEDINGS

(CAPTION AND APPEARANCES CONTINUED ON NEXT PAGE)

Reported By: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

MR. SHUMATE: Thank you, Your Honor.

We understand the plaintiffs have concerns about what will go in the administrative record, but we think discovery at this point would be premature and unnecessary and really inappropriate.

The Government should have an opportunity to prepare the administrative record, and we're willing to receive any suggestions from the plaintiffs about what specifically they think should go --

THE COURT: Let me interrupt you on that. If we had all day and all year -- okay? -- I'd agree with you; but I think you should respond to their discovery requests if they're reasonable even if it's not going to be in the administrative record.

MR. SHUMATE: Our concern, Your Honor, is that it will likely be a fishing expedition; and if we start going down the road of discovery, we're going to take this litigation sideways and the Court won't be in a position to make a quick decision. So --

THE COURT: Well, if it gets going too far sideways, I'll put a stop to it, but reasonable discovery I think is okay because I know what's going to happen. You're just going to put in the things you want into the administrative record. So this is kind of a thing that helps keep you honest to show some of the things you don't want the Court to see maybe.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UC REGENTS, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 17-cv-05211-WHA (SK)
Case No. 17-cv-05235-WHA (SK)
Case No. 17-cv-05329-WHA (SK)
Case No. 17-cv-05380-WHA (SK)
Case No. 17-cv-05813-WHA (SK)

ORDER RE DEPOSITION OF ACTING SECRETARY OF HOMELAND SECURITY DUKE

Regarding Docket No. 88

The Parties have submitted a joint letter brief regarding Defendants' objection to the deposition of Defendant Acting Secretary of Homeland Security (DHS) Elaine C. Duke. The Court is aware of the pending deadline of November 1, 2017 to file various important motions, the pending *mandamus* petition with the Ninth Circuit, and the trial date of February 5, 2018, all resulting from the looming deadline of March 5, 2018 for the rescission of DACA.

The Court ORDERS that Defendant Acting Secretary of Homeland Security (DHS) Elaine C. Duke appear for deposition before November 15, 2017. The deposition of Acting Secretary Duke may take place via videoconference or, if not available, by telephone, and shall not exceed four hours (not including breaks).

This Court will issue a memorandum decision following this short order, issued under time constraints. However, chief among the reasons for this Order is the fact that the testimony of lower-level deponents is that Acting Secretary Duke was the sole decision maker with regard to the rescission of DACA. (Dkts. 90-1 and 90-2.) The extraordinary circumstances required for a deposition of Acting Secretary Duke exist.

/ / /

IT IS SO ORDERED.

Dated: October 24, 2017

SALLIE KIM
United States Magistrate Judge

United States District Court
Northern District of California

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

December 23, 2008

MEMORANDUM

To: Selected Agency Counsel

From: Ronald J. Tenpas RJT
Assistant Attorney General

Re: "Guidance to Federal Agencies on Compiling the Administrative Record" (January 1999)

In January 1999, the Environment and Natural Resources Division authored a document entitled "Guidance to Federal Agencies on Compiling the Administrative Record." That document identified issues that agencies may confront in assembling an administrative record. As explicitly stated in the document, it was intended only as internal Department of Justice guidance, and did not create any rights, substantive or procedural, nor did it limit the "otherwise lawful prerogatives of the Department of Justice or any other federal agency." As was stated in a recent brief by the Department of Justice, the 1999 memorandum "does not represent a formal policy of the Department of Justice, nor even an official directive of the Environment and Natural Resources Division (ENRD). The memorandum focuses on the compilation of an administrative record in the absence of a contemporaneous docket."

It has come to our attention, however, that outside parties have sought to use this 1999 document in litigation against federal agencies, and have argued that it supports a particular composition of the administrative record, or a particular process for its assembly. This memorandum serves to clarify that the January 1999 document does not dictate any requirement for, or otherwise provide binding guidance to, federal agencies on the assembly of the administrative record. The composition of an administrative record is left to the sound discretion of the relevant federal agency, within the bounds of controlling law. This is an agency responsibility in the first instance and the Supreme Court has made clear that an agency has discretion in how to create the record to make and explain its decisions. *See, e.g., Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978) (in rejecting the need for adjudicatory hearing in the context of rulemaking, the Court refers to the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure" and noting that "the agency should normally be allowed to 'exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence. . . .'").

The Department of Justice has defended in litigation the legal position that deliberative documents are not generally required in an administrative record, and thus has also defended the position that in such circumstances no privilege log reflecting such documents would need to be prepared. The 1999 document should not be read as casting doubt on this legal position. Obviously,

specific statutory provisions and/or case law in the jurisdiction will play a significant role in determining the appropriate approach in a particular case. Agencies would likely benefit from having their own internal guidance regarding the contents and compilation of the record. An agency's guidance should, of course, be informed by applicable case law and the agency's experience and internal procedures.

Should you have any question about the development of agency procedures for compiling an administrative record, or the preparation of a particular administrative record, the Division would be pleased to consult with you. This memorandum is being sent to agencies with whom the Division frequently works, although it is available for use or reference by any federal agency.

U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division ("ENRD") wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice ("DOJ"), which addresses the scope of the administrative record in Administrative Procedure Act ("APA") record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ's view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency's predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled "Guidance to the Federal Agencies in Compiling the Administrative Record," should be disregarded.[1] This updated guidance is specifically

[1] Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ's long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.