

**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-GLR

Hon. A. David Copperthite

**PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF PRODUCTION
OF DOCUMENTS AND NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs hereby respond to Defendants' Notice of Production of Documents and Notice of Supplemental Authority Concerning Plaintiffs' Pending Motion to Compel Deliberative Materials (ECF 294). Plaintiffs will join in the submission of an updated status report per the Court's direction (ECF 295), but provide here their response to the issues raised in Defendants' Notice to clarify Plaintiffs' position on these issues.

Nothing in Defendants' Notice suggests that Plaintiffs' pending Motion to Compel should be denied. In fact, developments since Plaintiffs filed their Supplemental Briefing (ECF 276) provide further support for Plaintiffs' Motion.

First, none of Defendants' recent productions bear on the disputes relating to the Category 1 and Category 3 documents discussed in Plaintiffs' Motion.

Second, contrary to Defendants' suggestion, although Category 2 encompasses the documents identified in Defendants' Notice, those documents are not the only ones "that are even arguably relevant," ECF 294, to the Court's evaluation of the policy at issue. The Category 2 documents Plaintiffs seek include not just materials shared among the "Panel of Experts," but

also deliberative materials and information developed by the Panel’s working groups to support the Panel’s work, whether or not these materials were ultimately shared with members of the Panel. *See* ECF 276 at 10–13; ECF 285 at 10–13. As the court in the related *Karnoski* litigation explained when it ordered Defendants to produce these materials, “[t]he data collected and reviewed by the working groups is not deliberative and understanding the decision-making regarding what information the working groups or anyone within the services chose to withhold from the Panel is relevant to evaluating Defendants’ argument that the Panel’s decision was based on the ‘study of relevant data and information.’” *See* Order, *Karnoski v. Trump*, Case No. C17-1297 MJP, ECF 413 (W.D. Wa. Feb. 7, 2020) (the “*Karnoski* Order,” attached hereto as Exhibit A), at 4. The *Karnoski* court also noted that “the relevance of these documents outweighs any deference owed to members of the working groups or services, who were not ‘the most senior executive branch officials.’” *Id.* The *Karnoski* court’s analysis is persuasive and supports an order for production of such materials here. Defendants are nonetheless continuing to resist production of many of the working group documents.¹

The Court should reject Defendants’ assertion that recent decisions in the related *Doe* litigation support denial of Plaintiffs’ Motion, including as to materials not shared with the Panel. As the *Karnoski* court observed in rejecting Defendants’ argument, “it is just as important what you don’t produce to experts as what you do produce.” Transcript of Proceedings, *Karnoski*, Feb. 3, 2020 (attached hereto as Exhibit B), 9:18–20. The *Karnoski* court thus correctly recognized that the working groups’ collecting, sorting, and pruning of documents and data before presenting materials to the Panel are directly relevant to evaluation of the Panel’s ultimate

¹ As Defendants note, they have sought extraordinary mandamus relief from the *Karnoski* Order. That dispute, however, includes issues not raised by Plaintiffs’ Motion to Compel in *this* case. The Ninth Circuit has not yet ruled on the merits of the petition in *Karnoski*.

conclusions. *See id.* at 9:23–10:1 (“[The Court:] I understand that you turned over the stuff that supports what the working groups gave to the panel members. ***But when you’re looking at facts and you’re looking at data, how you sort it can be just as important.***”) (emphasis added).

The *Karnoski* court further noted, in connection with the *Doe* plaintiffs’ request for materials post-dating the Panel’s report including drafts that might reflect interference by third parties, that the *Doe* court’s statements did not amount to a final order embodied in a written opinion. *See id.* at 21:18–22. Rather, the statements constituted provisional comments made during a teleconference and indicated merely that that court had not yet been persuaded to compel the production of such documents, *see id.* at 21:18–24, and that in any event the simple act of “drafting and editing” would not be a deliberative process to which any privilege would attach. *Id.* at 22:8–13. The *Karnoski* court also correctly recognized that the burden of providing information to permit analysis of potentially privileged documents rests with Defendants, who must justify their deliberative process privilege assertions, and not on Plaintiffs to show why the privilege does not apply, because only Defendants have access to the documents. *See id.* at 17:20–18:9. As discussed in Plaintiffs’ Supplemental Briefing, Defendants have provided little to no meaningful information about the contents of the documents being withheld. *See* ECF 276 at 20–22; ECF 285 at 4. The *Karnoski* court’s analysis thus lends further support to Plaintiffs’ Motion to Compel.

Third, it is notable that in both the *Doe* and *Karnoski* decisions that Defendants cite as guidance for this Court, the respective courts have evaluated application of the deliberative process privilege based on categories, not the document-by-document basis Defendants urge in this case. The Court should follow the sound and persuasively reasoned approaches of the *Karnoski* and *Doe* courts in evaluating Defendants’ assertions of privilege based on categories.

See ECF 276 at 20–22 (explaining why Plaintiffs’ categories are sufficiently discrete to conduct the requisite privilege analysis).

Finally, the Court should reject Defendants’ implicit suggestion that it remain on the sidelines while the privilege disputes at issue here are litigated in *Doe* and *Karnoski*. Plaintiffs here have properly challenged Defendants’ overbroad and inappropriate assertions of the deliberative process privilege in this case. The present discovery dispute has lasted more than a year and a half and has hindered the ability of this important case to move forward. Regardless of the rulings by other district courts, or any ruling the Ninth Circuit may eventually issue on Defendants’ request for extraordinary mandamus relief, Plaintiffs here have a right to have their arguments assessed on their own merits, and should not be made to “stand aside while a litigant in another [case] settles the rule of law that will define the rights of both.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

Dated: February 20, 2020

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2020, a copy of the foregoing and accompanying exhibits were served via CM/ECF on all counsel of record. I further certify that I have arranged for a paper courtesy copy to be delivered to chambers.

/s/ Peter J. Komorowski III
Peter J. Komorowski III

EXHIBIT A

1 of relevant data and information pertaining to transgender Service members.” (See Dkt. No. 226
2 at 9-10; Dkt. No. 224, Ex. 2 at 19.) The Panel received its information from several working
3 groups that gathered and sorted information before passing it along to the Panel. (Dkt. No. 402,
4 December 10, 2019 Hr’g Tr. (“Hr’g Tr.”) at 23:1-8; Dkt. No. 375 at 12, 18.)

5 On July 27, 2018 this Court granted Plaintiffs’ Motion to Compel Discovery Withheld
6 Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299.) Defendants appealed,
7 and on June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court’s Order.
8 Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019). The Ninth Circuit found that the
9 record was insufficient to evaluate Defendants’ privilege assertions and suggested that on
10 remand this Court should “consider classes of documents separately when appropriate” and, “[i]f
11 Defendants persuasively argue that a more granular analysis would be proper, [the Court] should
12 undertake it.” Id.

13 On August 22, 2019, Plaintiffs filed a renewed Motion to Compel Documents Withheld
14 Under the Deliberative Process Privilege (Dkt. No. 364). Noting that Defendants asserted the
15 privilege as the sole basis for withholding or redacting 35,000 responsive documents, (Dkt. No.
16 394 at 3) and produced documents by creating and searching lists of terms and custodians,
17 without responding to individual Requests for Production, (Dkt. No. 381, Ex. 1, Declaration of
18 Robert E. Easton (“Easton Decl.”), ¶ 5), the Court found that Defendants’ production did not
19 permit Plaintiffs or the Court to assess Defendants’ privilege claims in the “granular” fashion
20 mandated by the Ninth Circuit. (Dkt. No. 394 at 6-7.) The Court therefore ordered Defendants
21 to begin producing documents responsive to Plaintiffs’ Requests for Production and the Parties
22 to periodically appear before the Court to review Defendants’ deliberative process privilege
23 assertions, in groupings of five Requests for Production at a time. (Id. at 6.)

1 On December 18, 2019 the Court issued an Order Granting Plaintiffs’ Motion to Compel
2 Documents Withheld Under the Deliberative Process Privilege pursuant to Plaintiffs’ Requests
3 for Production Nos. 15, 29, 33, 36, and 44. (Dkt. No. 401.) Relevant here, the Court ordered
4 Defendants to produce:

- 5 1) All documents responsive to Request for Production No. 29, including the names,
6 communications, and deliberative documents of non-voting members of the Panel;
7 and
- 8 2) Drafts, communications, and documents created or relied upon by officials in the
9 Undersecretary of Defense’s Office in drafting the Report and Recommendations.

10 (Id. at 7.) Further, during the December 10, 2019 Status Conference, the Court directed
11 Defendants to “supply [Plaintiffs] with the working group names, who’s on the working group,
12 the dialogue in e-mail or any other communication within those working groups, and the data
13 that they produced. And the communications between those people on each working group.”
14 (Hr’g Tr. at 22:1-3.) Defendants now request clarification of the first part of the Court’s Order
15 and seek a stay of any part of the Order that requires Defendants to produce more than the
16 “documents of Members of the Panel of Experts.” (Dkt. No. 405 at 7, 11.)

17 Discussion

18 A. Motion for Clarification

19 Defendants ask the Court to clarify whether the first part of its December 19, 2019 Order
20 requires Defendants to produce “communications solely between non-Panel members and other
21 non-Panel members, or other documents non-Panel members never shared with Panel members.”
22 (Dkt. No. 405 at 7.) It does.

23 As stated in the Order, Defendants are required to produce “the names, communications,
24 and deliberative documents of non-voting members of the Panel.” (Dkt. No. 401 at 7.) This

1 includes the communications of members of the working groups and the data reviewed by these
2 groups, discussed at length during the December 10, 2019 Status Conference, where the Court
3 ordered Defendants to “supply the dialogue in e-mail or any other communication within those
4 working groups, and the data that they produced.”¹ (Hr’g Tr. at 22:1-3.) This also includes
5 responsive communications among members of the services.² (Dkt. No. 412, Feb. 3, 2020 Hr’g
6 Tr. at 17:22-18:15.)

7 The data collected and reviewed by the working groups is not deliberative and
8 understanding the decision-making regarding what information the working groups or anyone
9 within the services chose to withhold from the Panel is relevant to evaluating Defendants’
10 argument that the Panel’s decision was based on the “study of relevant data and information.”
11 (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Further, as noted by the Court during the
12 December Status Conference, (Hr’g Tr. at 23:16-17), the relevance of these documents
13 outweighs any deference owed to members of the working groups or services, who were not “the
14 most senior executive branch officials.” Karnoski, 926 F.3d at 1206. The Court therefore

16 ¹ The Parties are advised that any Order from the Court must be read in the context of the Court’s oral rulings during
17 the discovery conferences.

18 ² In the February 3, 2020 Status Conference, the Court provided Defendants with the following instruction:

19 The other thing I would say is that under the civil rules, a motion to compel is not necessary. It is a motion
20 to protect. If you’ve got documents out there that you believe are responsive but you’re still withholding,
21 you have the burden of bringing on the motion to protect. They don’t have to move to compel. So among
22 these thousands of documents, if you think that there is something out there that is responsive to this RFP,
23 you’ve got to put it in a log and you’ve got to defend why it is that the deliberative privilege still applies.
24 It’s not the other way around. You have the documents. You can see what’s there. They can’t.

And when you throw out ideas that maybe the services are offering up and saying this is the wrong data, of
course that’s responsive. If you think it’s deliberative, you have to apply the privilege.

So, let’s go back and talk again. I’m going to issue an order that covers – we’ve covered now the first two
categories, we’re going to get to the third. If you think there’s something else out there, because the order
says you have to respond, it’s your obligation to identify what it is, it’s not theirs. Okay?

(Dkt. No. 412, Feb. 3, 2020 Hr’g Tr. at 17:20-18:15.)

1 GRANTS Defendants' Motion to Clarify the first part of its Order³ regarding Request for
2 Production No. 29.

3 **B. Motion for Partial Stay**

4 The Government also moves the Court for a stay of its December 19, 2019 Order, which
5 required Defendants to produce all documents responsive to Request for Production No. 29.
6 (Dkt. No. 401 at 7; Dkt. No. 405 at 8-11.) Because Plaintiffs have overcome the deliberative
7 process privilege for these documents (see Section A, supra; Dkt. No. 401 at 5-7) and this
8 dispute has been pending for nearly two years (Dkt. No. 245), the Court will not issue a stay for
9 an unspecified amount of time while Defendants decide whether to appeal. (Dkt. No. 405 at 9.)
10 This is an ongoing process and until the process is complete it is wasteful to appeal one segment
11 at a time. Further, to the extent the Government's Motion is in fact a Motion for Reconsideration
12 of the Court's December Order (see Dkt. No. 405 at 9-11), the Local Rules provide that motions
13 for reconsideration must be filed "within fourteen days." LCR 7(h). The Government has
14 missed its deadline.

15 **Conclusion**

16 Accordingly, the Court GRANTS Defendants' Motion for Clarification. Defendants are
17 required to produce all documents responsive to Request for Production No. 29, this includes,
18 but is not limited to:

- 19 (1) All responsive working group communications, including communications that were
20 never seen or reviewed by the Panel;

21
22
23 _____
24 ³ Defendants have not requested that the Court clarify the second part of its Order regarding drafts from the Undersecretary of Defense's Office and it declines to do so.

- 1 (2) all responsive data reviewed by members of the working groups or members of the
2 services, including data that was never seen or reviewed by the Panel; and
3 (3) all responsive communications among members of the services, regardless of whether
4 those communications were shared with the Panel.

5 Defendants are ORDERED to produce all documents responsive to Request for
6 Production No. 29, including those documents from the categories above, within seven (7) days
7 of the date of this Order. The Court DENIES Defendants' Motion for a Stay.

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

9 Dated February 7, 2020.

11 

12 Marsha J. Pechman
13 United States District Judge

EXHIBIT B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,)	C17-01297-MJP
)	
Plaintiffs, and)	SEATTLE, WASHINGTON
)	
STATE OF WASHINGTON;)	February 3, 2020
)	
Plaintiff-Intervenor,)	9:00 a.m.
)	
v.)	Status Hearing
)	
DONALD J. TRUMP, in his)	
official capacity as)	
President of the United)	
States, et al.,)	
)	
Defendants.)	

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

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1 THE COURT: All right. This is the matter of Ryan
2 Karnoski, State of Washington versus Donald Trump, et al.,
3 it's cause number 17-01297-MJP. Could I have everyone please
4 identify themselves?

5 MR. SIEGFRIED: Dan Siegfried from Kirkland Ellis on
6 behalf of the plaintiffs.

7 MR. HEINZ: Jordan Heinz for the plaintiffs.

8 MR. SYKES: Jason Sykes of Newman & DuWors, for the
9 plaintiffs.

10 MS. ALA'ILIMA: Chalia Stallings-Ala-ilima, with the
11 Attorney General's Office for plaintiff-intervenor, State of
12 Washington.

13 THE COURT: Would you give me your name one more
14 time?

15 MS. ALA'ILIMA: Chalia Stallings-Ala'ilima.

16 THE COURT: Stallings-Ala'ilima?

17 MS. ALA'ILIMA: Yes.

18 THE COURT: Thank you.

19 MS. BORELLI: Tara Borelli of Lambda Legal on behalf
20 of the plaintiffs.

21 MR. POWERS: Jim Powers on behalf of the United
22 States.

23 MR. SKURNIK: Matthew Skurnik on behalf of the
24 defendant.

25 THE COURT: Okay. Where is Mr. Carmichael?

1 MR. SKURNIK: He's on Navy Reserve duty this week.

2 THE COURT: Okay. So I'm assuming you are ready to
3 carry on and have read the materials so that you know what
4 he's said previously?

5 MR. SKURNIK: Yes, Your Honor.

6 THE COURT: All right. We have a fair amount of work
7 to do today. And I've had the opportunity to read your joint
8 status report. I've also had the opportunity to read the
9 transcript from the judge in Washington, D.C. I went back
10 and reread the transcript from our meeting in December. I
11 also have read the plaintiffs' motion for clarification. And
12 I understand that there was some back-and-forth as to whether
13 or not you wanted a conference call. You canceled the
14 conference call in lieu of coming here today.

15 I would like to talk about that, because honestly, I
16 believe the government is delaying and stalling. And when
17 they say that they don't understand, they are not timely
18 bringing their motions. If this is a motion for
19 reconsideration, that has a 14-day time limit.

20 We sat here for two hours and I asked repeatedly if there
21 was anything else. And Mr. Carmichael never, never indicated
22 that he did not understand. The time goes past for
23 production; nothing happens. And then he brings a motion for
24 reconsideration -- or, quote, clarification. So his tactics
25 tell me that he doesn't want to produce and he is using the

1 rules of civil procedure to delay this.

2 I have looked at the order and I see that if you do not
3 read the order in conjunction with the transcript, you may be
4 confused. And so I'm prepared to write a clarifying order
5 within the next couple of days so that this can get back on
6 track.

7 I think the key to understanding the order is going back
8 to the transcript itself. And what I'm going to read from is
9 the exchange I had with Mr. Carmichael that begins on page
10 22 -- I'm sorry, it begins on page 21:

11 So, "Court: All right. So here's another category of
12 documents. What the working group did. Who is on the
13 working groups. And the data that they produced and the
14 communications between those people on each working group.
15 What's the problem with that?

16 "Mr. Carmichael: We have to look at each specific one.
17 So -- and I don't -- these ones, particularly because the *Doe*
18 plaintiffs brought them up and they overlap them a little bit
19 with 44. We're going ahead and doing it. But if there was
20 another specific one, again, we have to figure out a way to
21 identify just those specific documents. Like if there was
22 the head of a particular working group and we have that
23 person as a custodian, we may be able to isolate the
24 documents in the system.

25 "Court: So just for the record, how many working groups

1 were there?

2 "Carmichael: I don't know that off the top of my head. I
3 think it's in the report, the ones that work with -- the
4 primary one is the panel of experts.

5 "Court: But I'm assuming that if you looked, you would be
6 able to tell me what these various working groups are?

7 "Carmichael: Yes. And their involvement on the panel.

8 "Court: And they're a discrete number, four or five?

9 "Carmichael: Yes.

10 "Court: So those are people in the working groups who
11 gathered data, put it together, communicated amongst
12 themselves and passed the reports on to those who were
13 voting, correct?

14 "Carmichael: In some instances; I mean, I think the
15 deployability one didn't do it as much. I think they didn't
16 overlap exactly. But that's information that we can provide
17 as well, like when they started."

18 Drop down to line 22 on page 23. "Yeah, they wouldn't
19 be" -- the court. I'm sorry, line 16.

20 "Court: And these folks are so far down the line that
21 they're not deliberating at all. They are simply providing
22 data, offering material up to those who are actually
23 deliberating and making the decision?

24 "Mr. Carmichael: Yeah. They wouldn't be involved in the
25 actual deliberations. I guess they would deliberate amongst

1 themselves as to how they're going to provide the data.

2 "Court: So how does the deliberative privilege apply at
3 all?

4 "Mr. Carmichael: Our intent is to provide everything --
5 that is, all the data that they presented and how they got
6 that. So that's our intent as we're going back and making
7 sure that we provided all of that.

8 "Court: Okay. Well, intent is one thing, production is
9 another. And as you reminded me, you have very little time
10 left to do this. All right. So this is the next grouping
11 that we're going to look at. You're going to supply them
12 with the working group names, who's on the working group, the
13 dialogue in e-mail, or any other communication within those
14 working groups, and the data that they produced. I don't
15 think the privilege applies at all there because these folks
16 aren't deliberating, they are researchers providing
17 information and having discussions amongst themselves, as I
18 understand the way you just described it to me.

19 "Mr. Carmichael. They addressed other questions as well.
20 And they're all not exactly the same. So I think for -- I
21 mean, certainly it's something we would be willing to
22 consider, but communications, everything besides
23 communications we're already presenting. But if there was
24 some deliberations --

25 "The Court: Well, we are past willing to consider. I'm

1 telling you, you are going to produce it."

2 So, "I'm telling you, you are going to produce it" seems
3 pretty clear. And if you read the order in conjunction with
4 that dialogue, is that what the plaintiffs are after, what I
5 outlined?

6 MR. SIEGFRIED: Yes, Your Honor.

7 THE COURT: So what don't you understand?

8 MR. SKURNIK: So, Your Honor, we have produced all of
9 the working-groups' materials that the working groups
10 provided to the panel, all of the working groups
11 communications with the panel, all presentations they made to
12 the panel, all documents they shared with the panel. The
13 only materials that we have not yet produced -- and we
14 understood that that was what your order required, along with
15 the documents from the non-voting member of the panel, which
16 we've also produced.

17 So what we have not yet produced are communications
18 between two individuals, whether on a working group or
19 somewhere else, that were never shared with the panel, or
20 documents that the panel members never saw, documents that
21 were not presented to the panel.

22 And as to that category of materials, which were never
23 shared with the panel, the panel never saw, the *Doe* court
24 recently, the plaintiffs in that case asked for that exact,
25 same material. Judge Kollar-Kotelly called it, quote,

1 fishing, and she rejected their request for those exact
2 materials.

3 THE COURT: And how is her ruling precedent to mine?

4 MR. SKURNIK: It's not precedent. But this court has
5 relied on the *Doe* ruling in both of its last two
6 deliberative-process rulings. So in interpreting -- in
7 trying to determine what the meaning of the court's order
8 was, we certainly relied in part on the conclusions of the
9 *Doe* court.

10 THE COURT: Well, I don't know -- I understand her
11 arguments that she was presented with, which were not the
12 same arguments that were made here. She also has to be
13 constrained by what the district court -- what the circuit
14 court has told her to do, which is different from what the
15 Ninth Circuit has told me to do. And, honestly, I'm not so
16 sure that what she says can inform what I meant.

17 So, I'm going to write an order that will encompass what I
18 just quoted. The problem that I see with your argument is it
19 is just as important what you don't produce to experts as
20 what you do produce. It's my position that people who are
21 sorting data, you can leave out studies that you don't think
22 support your position. And that's what they're looking for.

23 I understand that you turned over the stuff that supports
24 what the working groups gave to the panel members. But when
25 you're looking at facts and you're looking at data, how you

1 sort it can be just as important. And that was the point of
2 this dialogue.

3 So I'm going to issue an order. I want to hear from the
4 plaintiffs as to whether they want to continue to write on it
5 or if they want to write in response to the order that I put
6 out.

7 MR. HEINZ: I think we'll write in response to the
8 order that you put out. And just one other point.
9 Mr. Skurnik spoke quite a bit about the information from the
10 working groups and the information that was presented to the
11 panel. We haven't talked about the set of documents after
12 the panel ended their work and the Department of Defense then
13 drafted the --

14 THE COURT: I haven't gotten to part two yet.

15 MR. HEINZ: Okay. I just didn't want that to get
16 lost.

17 THE COURT: You're good to remind me of it. But I'm
18 trying to clean up this part.

19 So is there anything that you misunderstand about what
20 I've just said?

21 MR. SKURNIK: So, yes, Your Honor. So the
22 plaintiff --

23 THE COURT: Yes, you don't understand; or, yes, you
24 do understand?

25 MR. SKURNIK: There is something I don't understand,

1 Your Honor. And what that is, is during the course of
2 meeting and conferring with the plaintiffs about the court's
3 most recent order, the position that they've taken is that
4 the order requires the government to produce all documents
5 referring or relating to the Department of Defense's report
6 and recommendation. That's the language they use in their
7 RFP 29.

8 As we stated in the declaration of Mr. Easton, that's
9 approximately 22,000 deliberative documents. So I just want
10 to make sure that -- clarify whether it's that entire
11 universe of documents -- essentially, every deliberative
12 document from September 2017 to February 22, 2018 -- or if
13 there's a more narrow universe that the court is ordering us
14 to produce at this time.

15 THE COURT: Okay. Well, we already went through
16 other categories that I said that the deliberative process is
17 overcome. This is the one where we're talking about the
18 working groups and the data that was collected.

19 I just told you -- or I told you in December that
20 collecting data and doing research is not a deliberative
21 process. So your privilege doesn't apply at all to the
22 collection of data.

23 So I'm not understanding these 22,000 deliberative
24 documents that you think you've got that you still haven't
25 turned over. Who produced those documents? I mean, who are

1 they from?

2 MR. SKURNIK: It varies, Your Honor. So one group of
3 them would be communications at the working-group level, say
4 someone in a working group says: Hey, what if we tried
5 Idea X, I think that would be a good idea. Someone else
6 says: Oh, maybe that's not such a good idea. And that never
7 makes it up to the panel.

8 Similarly at the services. Someone, say, in the Army
9 says: Oh, what if we tried Idea X, I think that would be a
10 good idea. Someone else in the Army says: Oh, yeah, that is
11 or maybe that isn't a good idea. But that was never passed
12 up to the panel.

13 THE COURT: That's exactly what they're looking for.

14 MR. SKURNIK: And at this time, that encompasses
15 approximately 22,000 documents. And the way we've come up
16 with that number is that plaintiffs have interpreted the
17 order to cover all documents responsive to RFP 29, which is
18 an incredibly broad RFP that encompasses essentially every
19 deliberative document from September 2017 until February 22,
20 2018.

21 Now, if that's what the court is ordering, that's fine. I
22 just want to make sure we understand exactly what the court
23 is ordering so we don't have another clarification problem.

24 THE COURT: Well, then I think in December, I told
25 you what you had to turn over. The working groups are data

1 gatherers. They are researchers. The conversations between
2 them is part of gathering that data.

3 I want you to turn over who they are and the
4 communications between them, the data that they reviewed and
5 did not pass on, in addition to the data that they did. I
6 mean, I'll say it again. So I don't know why 22,000 is some
7 magic number. What are you trying to tell me there, that
8 it's too much?

9 MR. SKURNIK: What I'm trying to do, Your Honor, is
10 clarify exactly what documents we're talking about here. And
11 the reason is is that plaintiffs, their interpretation of the
12 order encompasses not just the working groups, but a much
13 broader universe of deliberative documents, including, for
14 instance, documents at the service level from folks who
15 weren't even on working groups. And I guess as far as the
16 individuals on the working groups, we've already produced all
17 of that to plaintiffs in response to interrogatories. So
18 they know all the individuals on working groups.

19 THE COURT: Plaintiff want to respond?

20 MR. SIEGFRIED: Sure. I guess so far all we've heard
21 that this 22,000 encompasses is we've talked about three
22 categories: The working-group documents that Your Honor just
23 ordered them to produce and ordered them to produce back in
24 December; the panel documents, which apparently are not
25 included in the 22,000; and the post-panel documents. I

1 guess we don't understand what else there is, what else is
2 encompassed in this 22,000.

3 MR. SKURNIK: So plaintiffs told us during the course
4 of meeting and conferring that they believed the court's
5 order required production of all documents responsive to
6 RFP 29.

7 THE COURT: Um-hum.

8 MR. SKURNIK: Now, RFP 29 reads, "All documents or
9 communications relating or referring to the February 2018
10 Department of Defense report and recommendations on military
11 service by transgender persons." That's much broader than
12 simply just working-group documents. That's essentially all
13 documents within the Department of Defense and the military
14 services across the 156 custodians from which we collected,
15 any of those that we've withheld under the
16 deliberative-process privilege during the relevant period.

17 THE COURT: But we spent two hours in December going
18 through this. So we have the working group that I just spoke
19 to you about. It's part of the transcript. We have the
20 documents that concern those who are decisionmakers on the
21 panel, including the one non-voting decisionmaker. And then,
22 as we pointed out, we have the documents that after the
23 decision is made, we have the documents that are used to
24 draft the final report. Those are three discrete categories.
25 I've told you that the first category, the working group, I

1 don't believe falls under the deliberative privilege. I
2 already made a ruling on those who are the panel members.
3 And in my last order, I also included the panel member who
4 was non-voting.

5 In my December order I also included the post documents,
6 which I'm assuming we're going to talk about in just a
7 minute. What about that don't you understand?

8 MR. SKURNIK: So that makes sense to me, Your Honor.
9 The issue is the plaintiffs have taken -- have contended that
10 the court's order from December requires -- at least Part 1
11 of that order, which talked about non-voting members of the
12 panel of experts -- that that requires not just working-group
13 materials, but all deliberative materials during the relevant
14 time period.

15 If the court's order is just the working-group materials,
16 then we can find a way to identify those materials and that
17 can be the scope of the order. But I just want to make sure
18 we know exactly what the court is ordering so we don't have
19 to -- so that there's no further confusion between the
20 parties about what the order requires, precisely.

21 THE COURT: All right. Do we have an understanding?

22 MR. HEINZ: The problem is, Mr. Siegfried just asked,
23 what else is there besides those three categories of
24 documents within the 22,000? What else is there that you're
25 withholding that you believe is not encompassed by her order

1 but is responsive to RFP 29?

2 MR. SKURNIK: For instance, any custodians from which
3 we've collected that have deliberative documents that were
4 not members of a working group.

5 MR. HEINZ: So, for instance, someone at the services
6 flagging the issue that the data being presented to the
7 working group and the panel is incorrect. We'd want to know
8 that. That's very relevant information.

9 MR. SKURNIK: So my question here, Your Honor, is
10 what -- is whether the court's order extends to, for
11 instance, someone at the services saying -- who is not a
12 member of any of the working groups -- saying: Hey, what if
13 we tried Idea X for transgender policy? And someone else who
14 is not a member of a working group responding: No, I don't
15 think that's a great idea. And then that never makes it up
16 further, never makes it to a working group or a panel,
17 whether the court's order encompasses everything; which is
18 broader than just working groups.

19 MR. SIEGFRIED: So, Your Honor, our position first of
20 all is, yes, that is responsive and should be produced. And
21 I think the Ninth Circuit addressed this when they placed the
22 burden on the defendants to say, when you're doing the
23 analysis, when the court is doing the analysis for
24 deliberative-process privilege, if the defendants believe the
25 analysis should be more granular, they have the burden to

1 explain why. And, frankly, I don't understand what these
2 documents are or why the analysis would be meaningfully
3 different.

4 THE COURT: Okay. Well, we're running into a problem
5 that honestly the government, further down in its joint
6 status report, they make the complaint that the plaintiffs
7 have not brought a motion to compel. And, therefore, certain
8 requests are not ripe. I don't know what you think this
9 whole privilege is about. I mean, we are here to sort out
10 discovery over a motion to produce. So there is a motion to
11 compel. And each side wrote for me in a way that I didn't
12 think was helpful for me to sort this out. So I said, this
13 is the path that we're going to take.

14 And so I've methodically looked at each request. The
15 government complained that this was too much, they couldn't
16 respond. I say, fine, we're going to do five at a time. For
17 you to come back and tell me that there's no motion to compel
18 on the table and therefore it's not ripe, makes absolutely no
19 sense to me.

20 The other thing I would say is that under the civil rules,
21 a motion to compel is not necessary. It is a motion to
22 protect. If you've got documents out there that you believe
23 are responsive but you're still withholding, you have the
24 burden of bringing on the motion to protect. They don't have
25 to move to compel. So among these thousands of documents, if

1 you think that there is something out there that is
2 responsive to this RFP, you've got to put it in a log and
3 you've got to defend why it is that the deliberative
4 privilege still applies. It's not the other way around. You
5 have the documents. You can see what's there. They can't.

6 And when you throw out ideas that maybe the services are
7 offering up and saying this is the wrong data, of course
8 that's responsive. If you think it's deliberative, you have
9 to apply the privilege.

10 So, let's go back and talk again. I'm going to issue an
11 order that covers -- we've covered now the first two
12 categories, we're going to get to the third. If you think
13 there's something else out there, because the order says you
14 have to respond, it's your obligation to identify what it is,
15 it's not theirs. Okay?

16 MR. SKURNIK: Your Honor, just to be clear. We have
17 done so. Every single document that is responsive that we've
18 withheld is listed on a privilege log. So plaintiffs know
19 about every single document.

20 THE COURT: Okay. Well, we've got some problems with
21 the privilege logs, because they're telling me you've got a
22 whole lot of people on those logs that they can't tell
23 whether they give you cover or not, because they don't know
24 who they are. But let's stop and work through the next
25 portion. And that is post-decision, the write-up portion.

1 Everybody with me with that definition?

2 MR. SIEGFRIED: Yes, Your Honor.

3 MR. SKURNIK: Your Honor, could I just ask one last
4 question about the previous category that we just discussed?

5 THE COURT: Um-hum.

6 MR. SKURNIK: So the defendants, in our motion, have
7 requested a stay of the court's order while the Solicitor
8 General considers whether to seek relief in the Court of
9 Appeals. So we'd just like to request that stay.

10 THE COURT: You're not going to get a stay. But you
11 can certainly -- we have other clawback provisions that if
12 something gets turned over that has to be clawed back, we'll
13 claw it back, if the Ninth Circuit says that's what we're
14 going to do. But we're not going to wait for the Solicitor
15 General on every single ruling that I make.

16 It seems to me we ought to get through this whole thing
17 and then you decide if you want to take the package up. But
18 I consider it a real tactic of delay that every time I hold
19 one of these hearings, that's the threat. We're going to go
20 to the Ninth Circuit. It's delay, delay, delay. We've been
21 at this for years now. And I'm giving you every opportunity
22 to tell me what you don't understand.

23 If you disagree with it, there may be a time for you to
24 take it up. But in the middle of an ongoing hearing over
25 what you have to produce, I don't think is the right time.

1 Let me finish it. Okay? If you don't like it, you have a
2 perfect right to do whatever procedural maneuver you wish.
3 But this is an ongoing process. Okay?

4 So, let's go forward and talk about the post-decisional
5 documents. Plaintiff, tell me what are you not getting and
6 what do you think you deserve?

7 MR. SIEGFRIED: Well, Your Honor, we haven't gotten
8 anything. And I think we talked about this, and I think Your
9 Honor analyzed it, in the December 18th order. All of the
10 post-decisional information, the drafts, the communications,
11 post-panel, we think -- we've overcome the privilege for all
12 the reasons Your Honor analyzed. And the defendants'
13 response I think at this point is: Well, we're going to
14 respond to an interrogatory and amend and give you names of
15 people who reviewed, I think reviewed or commented on drafts;
16 is that right?

17 MR. SKURNIK: Everyone who was involved in drafting
18 the reports, who edited it, had any comments, everyone
19 involved in the drafting process.

20 MR. SIEGFRIED: Our problem with that, Your Honor, is
21 we're actually just looking for the communications. So we
22 know, for example, that there were folks at the Department of
23 Defense who were out soliciting or having communications with
24 folks who we don't have any reason to believe actually
25 reviewed or commented on a draft. But those communications

1 that then fed into whatever happened in the report are
2 equally relevant, whether or not they commented on the draft.

3 So I don't know that this interrogatory response changes
4 anything, although we're happy to have that information.

5 MR. SKURNIK: So, Your Honor, the plaintiffs' theory
6 this whole time for why they have a need for drafts of the
7 report and recommendation and communications about those
8 drafts, has been that there's some untoward involvement by
9 outside third parties.

10 Now, by providing plaintiffs with the names of everyone
11 who is involved in the drafting process, and if someone from
12 a third party was communicating with folks at the Department
13 of Defense and that's reflected in any communications, we'll
14 include those names as well, the names of everybody.

15 But we're facing another situation where the *Doe* court in
16 D.C., Judge Kollar-Kotelly, ordered that defendants in that
17 case did not have to produce these drafts.

18 THE COURT: For now. Her order -- you represented it
19 as a final order. And I read it as she said "for now" and
20 you can come back. She wasn't satisfied with the arguments
21 that were made. She hasn't issued a written opinion, as I
22 understand it.

23 MR. SKURNIK: That is correct, Your Honor, this was
24 just during a teleconference call. However, what we've
25 presented to the plaintiffs is we've asked for a stay. And

1 in the meantime, what we would do is provide plaintiffs with
2 this information of everyone involved in the drafting process
3 and that would allow them to test their theory that there was
4 untoward outside involvement. And it would do so in a way
5 that reconciles the positions of where we are in *Doe* and
6 where we are in this court, and also without sort of undue
7 intrusion into executive branch decisionmaking.

8 THE COURT: Well, Mr. Carmichael told me that this
9 was simply drafting, that that was one of the arguments he
10 made. And so if it's simply drafting and editing, that
11 wouldn't be deliberative process. And so the privilege
12 wouldn't apply, from what Mr. Carmichael told me the last
13 time.

14 Now, you only want to give them the names. That means
15 they've got to contact each of those people, find out what
16 they said, get the custodians, get their data of any e-mails
17 that they might have sent -- and interrupt me if I'm wrong
18 with what you'd have to do -- and that's needless if you're
19 sitting on top of that information.

20 So in December, I told you that you had to turn it over.
21 I asked -- we put out an order. That part of the order I
22 think is very clear. And you don't do anything. You don't
23 move on it. You let the time go by. You don't produce.
24 That's not acceptable.

25 If you have a motion for reconsideration, I'm telling you

1 you have to speak up promptly. That's what the rules
2 provide. You don't wait until something else, quote,
3 something may happen and another judge issues not an order
4 but a comment that, as I understood it, that she is not ready
5 to order it at this point. She wasn't satisfied with the
6 arguments that were made. And, quite frankly, the arguments
7 are not the same as the ones that were made here.

8 So you're late. Turn it over. Okay?

9 Plaintiff, does that satisfy you?

10 MR. HEINZ: Yes, Your Honor.

11 THE COURT: Okay. Now, I will issue an order in the
12 next couple of days. This is what is going to happen. If
13 the plaintiffs are satisfied with the order, fine, you can
14 simply file a -- you know -- we agree. If you believe that
15 there is something else that needs to be put in the record to
16 defend whatever position you believe you need to take, you've
17 already heard the threat of going to the Ninth Circuit, then
18 you build your record.

19 I will look at it to see if it changes the amended order
20 that I put out. In the meantime, I am not going to slow this
21 process down for some solicitor somewhere to make a decision,
22 I don't know when. One of the things that we did when we
23 first set the trial date is this is a very important case for
24 many, many people. So to keep slowing it down every time
25 doesn't do the public any good.

1 So that's why I say when we get done, if you want to go to
2 the solicitor and have him make a decision, fine. But you
3 haven't given me any criteria to know when that decision
4 would be made. Is it two days? Two weeks? Two years?
5 We're not going to wait for that.

6 MR. SKURNIK: So, Your Honor, it would not be two
7 years. It would probably closer to around two weeks. But as
8 I understand the court's order, I just want to make sure I
9 understand correctly that our motion for stay is being denied
10 on the drafts?

11 THE COURT: The motion for the stay is being denied.

12 Now, if it turns out that that material should not have
13 been turned over, we can claw it back and the plaintiffs will
14 be in the position that this is for the attorneys to work
15 with at this time, it's not to be passed on or published.
16 Everybody understand that?

17 MR. SIEGFRIED: Understood, Your Honor.

18 MR. HEINZ: (Nods head.)

19 THE COURT: Okay. So that's the way we'll keep
20 moving forward to get this material. I understand between
21 December 10th and today, you've been putting this material
22 together, because you were under an order to do so. So it
23 shouldn't take you very long to produce it, because you
24 haven't had a stay. So I'm telling you that this material
25 has to be turned over in a week.

1 MR. SKURNIK: Yes, Your Honor.

2 THE COURT: A week from when my amended order comes
3 out, okay? So that gives you a little more time.

4 MR. SKURNIK: Your Honor, I'd ask that that week
5 deadline apply to just the drafts and communications about
6 the drafts. As to the first part of the order that we
7 discussed earlier, working groups and documents that are
8 referring or relating to the report and recommendation,
9 that's a much larger universe of documents. And so
10 defendants would need certainly much more than a week in
11 order to produce that material.

12 THE COURT: I don't understand that, because you
13 should have already been gathering that along the way. And
14 you told me at the beginning, or Mr. Carmichael told me at
15 the beginning, that they had analyzed all this data and put
16 it in categories. It can't possibly be that difficult to
17 call up those various categories if you have organized it
18 appropriately.

19 MR. SKURNIK: Your Honor, as we stated in the
20 declaration of Mr. Easton, this is approximately 22,000
21 documents that we withheld on the basis of the
22 deliberative-process privilege that are at issue here. And
23 in order to produce those documents, the Department of
24 Defense and military services would have to re-review those
25 documents to ensure that there is not either personally

1 identifying information, specifically personally identifying
2 information that would need to be redacted in preparing those
3 documents for production. And that would likely take a
4 significant amount of time.

5 THE COURT: I've already told you that there are
6 certain categories of documents. Why we are doing this is to
7 identify those that the privilege applies to and those that
8 it does not. I don't know why you would have to re-review if
9 it's already in a category that I've already told you the
10 privilege does not apply. You've already had two years to
11 review this data. And why you wouldn't have started
12 December 10th when you heard what I had to say about it, I
13 don't know.

14 But 22,000 documents -- you know, this afternoon I'm going
15 to have a conference over lumber producers. The documents
16 that we're talking about in that lawsuit are five times
17 bigger than what you are talking about now. This is not a
18 big-document case, as document cases go. So when you tell me
19 22,000, I kind of go, really? You're the federal government.
20 You've had two years to do this. If you've organized
21 carefully, it should not be tough. So you produce it. I
22 don't know how many times I have to say it. But I've told
23 you over and over again that that's what you must do.

24 MR. SKURNIK: Yes, Your Honor.

25 THE COURT: Okay? All right. That takes care of

1 that portion.

2 Now let's start working through what we've got on the rest
3 of the joint status report. I don't know how plaintiff wants
4 to do this, but we -- No. 15, is that the one you want to
5 start with?

6 MR. SIEGFRIED: Sure, Your Honor.

7 THE COURT: So as I understand it, your expert was
8 deposed, and during the course of that deposition the
9 government used documents they had previously withheld under
10 the deliberative privilege in that deposition. And if I
11 understand you correctly, you're not asking to open up that
12 set of documents, but you are saying if you're not going to
13 turn it over, you can't use it.

14 MR. HEINZ: Well, we would want all of the documents
15 responsive to Request for Production No. 15 produced.
16 Because now we've had two full depositions, seven hours long,
17 each of them. And they're almost entirely about what
18 happened with the Carter working group, what the process was
19 like. And the questions asked by the government lawyers are
20 designed to impugn that process. They won't give us the
21 documents about the process.

22 And then kind of icing on the cake, Your Honor, was when
23 the government decided to selectively cherry-pick one
24 document that they withheld pursuant to the
25 deliberative-process privilege, and it's a communication

1 among the members of the Carter working group, and then waive
2 privilege, and then use that document against our experts.

3 So it's not a waiver argument, Your Honor, it's just
4 fairness. We can't respond to these arguments attacking the
5 credibility of the Carter working group that came to the
6 opposite conclusion than the panel did just two years before,
7 unless they give us the documents.

8 THE COURT: Okay.

9 MR. SKURNIK: Your Honor, can I be heard on that?

10 THE COURT: Sure.

11 MR. SKURNIK: What plaintiffs are leaving out is that
12 they are the ones who put the integrity of the Carter working
13 group at issue. And the way they did it is they have
14 retained expert witnesses who participated in the Carter
15 working-group process. And they've served expert disclosures
16 that discuss that process, that make representations about
17 that process.

18 Now, certain of those representations defendants believe
19 are either incorrect or are mischaracterizations, and as a
20 result, we've waived the privilege over certain particular
21 documents that impeach those representations or statements by
22 plaintiffs' witnesses. So this is not the government putting
23 it into issue here.

24 And just to give one example here. During the recent
25 deposition of Mr. Brad Carson, who was the former

1 Undersecretary of Defense for Personnel and Readiness, who
2 was involved in the Carter policy process, in his expert
3 disclosure he states essentially that the military services
4 were all in agreement about the Carter policy. During his
5 deposition, Mr. Carmichael took that deposition, he
6 introduced a document that we contend shows that, in fact,
7 with regards to accession policy for the Carter policy --

8 THE COURT: What is a "session policy"?

9 MR. SKURNIK: So accession is the policy for joining
10 the military.

11 THE COURT: Oh, accession. Okay.

12 MR. SKURNIK: The document, we contend, shows that
13 actually the services had varying views about what would be
14 the proper accession policy. So this is certainly not --
15 this is grounds for the government, sort of based on the way
16 we've approached these depositions, to disclose thousands of
17 Carter policy deliberative documents. And I know plaintiffs
18 say, well, it's not a waiver argument. But that's precisely
19 what they're arguing is that because we've waived the
20 privilege over certain documents, we should have to produce
21 similar documents. And the case law here is crystal clear,
22 there is no subject matter waiver for the
23 deliberative-process privilege.

24 MR. SIEGFRIED: May I respond, Your Honor?

25 THE COURT: Yes.

1 MR. SIEGFRIED: Recall how we got here, which is we
2 put this RFP as one of our top five. When we were here the
3 last time we agreed -- the government said, hey, this isn't
4 as important, what if we just give you a few documents and we
5 can start there. We're not going to get into communications.
6 And we're not going to do the mirror image what we're giving
7 you for the panel.

8 Our argument had been, look, the analysis is 100 percent
9 the same. So to the extent we have overcome the privilege
10 for the panel documents, which Your Honor held we did, the
11 same would be true here. But as a compromise we said, we
12 will just take these initial documents. But this is not a
13 waiver issue.

14 The point is, we've overcome the privilege. And it's no
15 longer acceptable, whoever put it at issue, where we are
16 today, to not get all these communications, given that we
17 believe we've clearly overcome the privilege under the *Warner*
18 factors.

19 MR. SKURNIK: Your Honor, I'd just like to clarify
20 what we did produce. So, separate and apart from this issue
21 of particular documents at depositions, the discussion we had
22 last time we were before the court was that defendants would
23 produce some of the key most important deliberative documents
24 from the Carter policy, then come back and regroup and
25 determine whether plaintiffs at that point had any need for

1 further documents.

2 So we produced briefing slides from the RAND Corporation.
3 Remember, the RAND Corporation did this study that supported
4 the Carter policy? We produced all of the RAND Corporation's
5 briefing slides to the Department of Defense explaining.
6 Here are the findings of our study, here are updates on the
7 course of our study. We've produced internal Department of
8 Defense slide presentations and documents that contain
9 potential policy options and courses of action that were
10 considered by the Carter policy.

11 And most importantly, we've produced an internal draft
12 report called "The Final Report of the Carter Policy Working
13 Group," the group that develop the Carter policy. This
14 report explains the work they did, it explains the
15 considerations that they had, it outlines -- it contains
16 agendas from the different meetings the working group had.
17 It has lists of individuals who presented at those working
18 groups. And it contains, at the end, the different courses
19 of action and policy options that they considered.

20 Now, when you take into account all of that, that we've
21 disclosed, along with the fact that plaintiffs have as expert
22 witnesses individuals who served on the Carter policy working
23 group -- Margaret Wilmoth is one of them, we took her
24 deposition recently -- plaintiffs at this point have no need
25 for any additional materials having to do with the Carter

1 policy.

2 MR. HEINZ: Your Honor, if I may briefly respond.

3 All of what Mr. Skurnik described is 12 documents. That's
4 how many they produced, 12.

5 And he has not addressed the government's selective
6 waiver, so to speak, of the documents that are good for them.
7 But the documents that perhaps may be good for us, out of
8 fairness, should be produced.

9 And finally, yeah, we do have two hybrid fact expert
10 witnesses who sat on the Carter working group. And we're
11 able to talk to them, ask them questions, what happened, who
12 presented? But those people don't have the documents.
13 They've left the government or they've moved on to other
14 positions. They don't have the documents. The gentlemen
15 sitting across the table have the documents, and they're the
16 only people that do.

17 THE COURT: Okay. This actually I think is
18 relatively easy. You're not going to use any document to
19 question a witness that hasn't been produced previously.
20 Okay?

21 So we're going to handle this as, if you took depositions
22 where there were documents that had not been produced
23 previously, you may not use the responsive answers.

24 Now, if there's only 12 documents that you've turned over,
25 you only examine on 12 documents. You want to play the

1 situation where somebody says something wrong and you
2 impeach, you have to give those people the opportunity to
3 refresh their recollections. That's why you have to turn
4 over the documents. But you cannot selectively sort out the
5 ones that are good for you and hide the ones that aren't.
6 You may not use the privilege as a shield and a sword.

7 Now, I understand that in impeachment, you normally don't
8 have to reveal the document ahead of time. That doesn't
9 answer the question of whether or not you have to produce it
10 for discovery, if it's discoverable.

11 So the rule that says that you can spring a document on
12 someone is after they've had an opportunity to review what
13 you have already turned over.

14 So, if these depositions wind up not being able to be
15 used, so be it. But at any trial in front of me, or any
16 summary judgment argument, or any other motion, you can't use
17 the answers that are produced if you didn't turn over the
18 material.

19 MR. HEINZ: And, Your Honor, they did produce those
20 handful of documents in advance of the deposition. But
21 they're only producing the documents that are good for them.
22 And it's a handful. And then they're using those against our
23 experts. So we did have them. They were produced. But we
24 want the balance of the documents so we get the full story.

25 THE COURT: So that you can respond?

1 MR. HEINZ: Exactly. That's the problem. So it's
2 not a production issue.

3 THE COURT: So it's not a production issue.

4 MR. HEINZ: It's a completeness issue of, you can't
5 withhold an entire group of documents and then pick the
6 documents that are good for your case and not produce the
7 rest. That's just not how discovery works.

8 THE COURT: Okay.

9 MR. SKURNIK: Your Honor, I think the case law on
10 this point is crystal clear, that when it comes to executive
11 privileges, like the deliberative-process privilege, it's not
12 like the attorney-client privilege. It's different. We are
13 allowed to waive the privilege over individual documents
14 without waiving the privilege over related documents. And
15 that does not give the plaintiffs a sufficient need to then
16 overcome the privilege as to all related documents.

17 THE COURT: Here is the deal: If you are calling
18 witnesses, the whole idea is to seek the truth. Okay? It's
19 not to play gotcha. And if that's what you're going to do
20 with a witness saying: Ah, but we have this document that
21 says something different, if you want the truth out of your
22 witnesses, you give them the full documents that they can
23 prepare with.

24 MR. SKURNIK: Your Honor, we've produced -- all of
25 these documents that we've used at these depositions, we've

1 produced in advance.

2 THE COURT: Okay. And what I understand now is that
3 the problem is is that you have picked certain documents that
4 you think benefit you and have left out documents that would
5 hurt you or that could be used to rehabilitate a witness who
6 has been impeached.

7 MR. SKURNIK: Your Honor, at least from our position,
8 we are not withholding documents that we think -- we're not
9 saying: This document is bad, let's hold this document back.
10 We are withholding documents that are privileged and subject
11 to the deliberative-process privilege.

12 THE COURT: How do they know?

13 MR. SKURNIK: We've listed every single one of these
14 documents on privilege logs that we've produced to the
15 plaintiffs, which we're permitted to do under the federal
16 rules, as a way to identify and justify our privilege to the
17 plaintiff.

18 MR. SIEGFRIED: Look -- I'm sorry, Your Honor. We're
19 basically back to where we were December 10th. We're back to
20 no compromise on this Request for Production, because it
21 unfortunately didn't work out. We're back. And forget
22 waiver, forget any of that. We're just asking the court to
23 then order production of these communications. And, frankly,
24 we'd be happy, I believe, with less than everything. We want
25 the communications, the reciprocal stuff that you've already

1 produced for the panel documents.

2 MR. SKURNIK: And, Your Honor, we've produced the
3 most important key deliberative documents from the Carter
4 policy. Plaintiffs have not articulated any reason why they
5 need additional materials from --

6 THE COURT: They just did. They just did. You're
7 giving me the same arguments over and over. They need to
8 look at -- their witness needs to know what she or he
9 communicated, to refresh their recollection, to make sure
10 that they don't make statements that are false. Nobody is
11 wanting them to go bigger than what they have. And so you're
12 the only one that has a copy of that, they don't. So in
13 order to prepare a witness, they need those documents.

14 Now, you can decide that you're not going to question
15 them. You can decide that you're not going to take the
16 deposition. But if you're going to take the deposition and
17 talk to them about what they remember, or say that's not what
18 this document says, you've got to give them a full set of
19 documents so that they can prepare.

20 MR. SIEGFRIED: Your Honor, to be crystal clear about
21 this, our need for the documents, that was something that we
22 covered in the December joint status report. And I'm happy
23 to go back through why we think that the documents responsive
24 to Request for Production No. 15 are relevant.

25 So we mentioned, for instance, rebutting claims that this

1 2018 policy is the product of reasoned, independent military
2 judgment, because the same group considered the same
3 evidence, argument and justifications, two years earlier, and
4 came to the opposite conclusions. We went through all of
5 that. Nothing has changed in terms of the need for it other
6 than this compromise of receiving what the government
7 considered the 12 most important documents wasn't satisfying
8 based on subsequent events.

9 MR. SKURNIK: And what plaintiffs have not
10 articulated is why those 12 documents are not sufficient, why
11 they need additional documents.

12 THE COURT: Because apparently you questioned their
13 expert in a way that did not allow them to rehabilitate based
14 on other documents that you're sitting on. That's the
15 articulation. And they've said it at least three times now.

16 MR. SKURNIK: In that case, Your Honor, I think what
17 would be helpful is whatever order the court issues to
18 delineate specifically that the documents that the government
19 must now produce are limited to documents having to do with
20 deposition testimony of particular witnesses.

21 MR. SIEGFRIED: Your Honor, respectfully, that is not
22 what we asked for. When we were here on December 10th, we
23 said that we would like the mirror image of the documents you
24 have already produced for the panel of experts under the *Doe*
25 order. Right? That was the communications among panel

1 members, so communications among these folks, which you have
2 produced, as far as I can tell, two of, which are the ones
3 you used at the depositions of the experts.

4 MR. SKURNIK: Your Honor, just to be clear, so what
5 plaintiffs are asking for here is approximately 15,000
6 documents that would be responsive to RFP 15. They do not
7 need 15,000 documents in order to properly rehabilitate their
8 witnesses at depositions. What the government could do and
9 what I think would address the concerns plaintiffs have about
10 document usage at depositions, would be to produce -- when
11 the government plans to use a particular document at a
12 deposition, to produce related documents, or even to produce
13 documents that relate to the particular witness that we are
14 deposing, rather than all 15,000 or so documents that are
15 responsive to RFP 15.

16 MR. HEINZ: I guess let's step back. Some of the
17 very same people, two of which you have deposed now, sat on
18 both groups, the Carter working group and the panel of
19 experts, yet somehow, two years before the current policy,
20 some of the very same people came to the opposite conclusion.
21 Well, we're interested to know what were they shown? What
22 information were they considering? What discussions were
23 they having, where they came to the opposite conclusion two
24 years before that?

25 So, it's not just documents surrounding whatever the

1 government selectively decides to use, it's the entire group
2 of documents that led to that opposite conclusion. It is
3 hard for me to understand a more relevant group of documents
4 than those.

5 MR. SKURNIK: And, Your Honor, we've produced
6 documents that show precisely that, show what individuals who
7 developed the Carter policy considered, what courses --
8 potential policy options and courses of action they
9 considered. It lists who came and presented to them.
10 There's also the RAND report, which extensively justifies the
11 Carter policy.

12 The plaintiffs don't have any further need for further
13 documents and communications in order to do a comparison
14 between the Mattis policy, in which they have everything,
15 they have every single document that the panel reviewed, that
16 was presented to the panel, any e-mail any panel member
17 received, they have all of that. And, for example, for
18 Mr. Kurta, who served on both the panel of experts for the
19 Mattis policy and the Carter transgender working group, they
20 have all of his Mattis policy documents.

21 So at this point, plaintiffs still haven't articulated any
22 need for any additional documents.

23 THE COURT: All right. This is what we're going to
24 do: I think I'm getting some more clarity as to what it is
25 that you're trying to do in marshalling your case, is that

1 obviously you want to compare and contrast these two
2 decisionmaking processes.

3 So what's going to happen as for the panel members, voting
4 and non-voting, you're going to get -- exactly the same type
5 of documents that you got for Mattis, you're going to get it
6 for Carter. Because in order to do the analysis of what's
7 different, you need both. And that's relevant.

8 So the government needs to turn over that material. And I
9 suggest that they don't get to take anybody's deposition
10 further until they do turn over the material.

11 So the material gets turned over. I would expect that
12 your witnesses would have an opportunity to review it. And
13 I'm assuming you don't want your witnesses to go bigger than
14 what you've got in terms of backing up documents.

15 So let's do this as a truth-seeking process to find out
16 exactly what was done in both of these settings, the Carter
17 and the Mattis setting. Okay?

18 MR. SKURNIK: Your Honor, if I could just clarify.

19 THE COURT: All right.

20 MR. SKURNIK: So you mentioned the panel that
21 developed the Carter policy. It was not a panel of experts,
22 it was a working group. So this is all members of the
23 working group; is that correct?

24 THE COURT: These two processes label the
25 decisionmakers differently, apparently. So is it enough to

1 say the "decisionmakers," or is there some other term of art
2 that needs to be used in order to get you what you're looking
3 for?

4 MR. HEINZ: We would want the documents from the
5 Carter working group. And we don't have enough of those
6 documents, because they've only given us 12 of them, to
7 really fully understand the terminology and whether there
8 were sub-working groups reporting up to the Carter working
9 group. Once we get more documents, maybe we'll know. But
10 we're interested in the documents that the Carter working
11 group generated, how they communicated, and how they came to
12 their decision.

13 MR. SKURNIK: Just to be clear, Your Honor, does the
14 order then reach not just the members of the working group,
15 but just like we discussed earlier, some person let's say in
16 the services that had a view that was expressed but that view
17 never made it up to the working group itself? Is it the
18 exact, same sort of broad scope of all documents?

19 THE COURT: Let's start with whatever the
20 nomenclature is for what was generated for the
21 decisionmakers, what they reviewed, how they communicated,
22 how they went about making their decisions. Once they get
23 that, they probably will be able to tell me if there was
24 another label that was applied or other avenues of
25 information. But we're going to start here, okay?

1 MR. SKURNIK: Yes, Your Honor.

2 THE COURT: Okay.

3 Moving right along. Do you want to talk about 26?

4 MR. SIEGFRIED: Sure. So our position, Your Honor,
5 on 26 is fundamentally, we've asked for -- this is factual
6 information that we have sought. There's no possible
7 deliberative-process objection. And, frankly, in sort of
8 going through this process, it appears that I don't think
9 there is a deliberative-process objection. Although we did
10 learn that the government -- I mean, the government in their
11 response to request 26 very clearly said, "We will produce
12 responsive documents," and we have not gotten any.

13 And I suppose they're saying it should be limited only to
14 documents the panel saw. But I'm not sure why that would be,
15 since particularly in response they said that they would
16 produce these documents.

17 MR. SKURNIK: Your Honor, we have produced these
18 documents. We've produced all cost data that was considered
19 by the panel of experts, as well as the underlying data that
20 the services used to compile the cost data that was presented
21 to the panel of experts. We're not aware of any responsive
22 documents that we're withholding under the
23 deliberative-process privilege.

24 MR. SIEGFRIED: And, Your Honor, this leads to our
25 other sort of overarching problem to all of this is when they

1 say they're not withholding anything from their collection,
2 it's because apparently they did not go out and collect this
3 information that was responsive to these requests. So I'm
4 limited to some universe of documents that were collected in
5 many cases before we even served the requests.

6 And I understand this does not appear to be a
7 deliberative-process issue anymore. But I don't understand
8 why the collection would be limited to what the panel
9 considered, when we're asking for factual information just
10 about the amount that the military had spent on hormone
11 therapy, which is relevant I think to our claims.

12 MR. SKURNIK: Your Honor, we've given them that
13 information.

14 THE COURT: Well, here's the fundamental problem
15 going back and forth is you say you gave them everything that
16 was before the panel. And they're asking for the entire
17 universe of documents. And so when you keep saying, "We've
18 given them everything that was before the panel," that's not
19 responsive.

20 MR. SKURNIK: Your Honor, in addition to that, we've
21 also provided them with a URL to a website where the exact
22 information that they are looking for is publicly available.
23 So I don't think there's any dispute about this.

24 THE COURT: Well, directing them to a website, are
25 you willing to stipulate that the information on the website

1 is true and accurate and admissible?

2 MR. SKURNIK: Yes, Your Honor.

3 THE COURT: All right. Does that answer 26?

4 MR. HEINZ: It does.

5 MR. SIEGFRIED: I think so, Your Honor.

6 THE COURT: All right. Let's talk about 16.

7 MR. SIEGFRIED: Do you mean Interrogatory 16, Your
8 Honor? I think the next --

9 THE COURT: You tell me, because we're jumping back
10 and forth.

11 MR. SIEGFRIED: I believe the next document request
12 -- we skipped 13, but I don't think that there is actually an
13 issue with 13, other than the government for some reason
14 objected on deliberative-process grounds as they have for all
15 68 requests. Once we actually discussed these with them, all
16 of a sudden we find out nothing is being withheld. We have
17 flagged that. I think in our motion from back last summer,
18 one of the things we requested is for the government to
19 actually just withdraw objections where there are no
20 objections and that would save us all a lot of grief.

21 THE COURT: You're using the deliberative-process
22 objection for everything and it doesn't cover everything.
23 Why don't you go back and figure out whether there is, in
24 fact, a deliberative-process objection here.

25 MR. SKURNIK: Your Honor, on 13, we have provided to

1 the plaintiffs not only -- not only are we not withholding
2 anything responsive to 13 that's deliberative, we have given
3 them everything they're looking for on 13.

4 THE COURT: So there is no deliberative-process
5 objection there?

6 MR. SKURNIK: We're not currently withholding
7 anything on the basis of deliberative process.

8 THE COURT: That doesn't answer my question. You are
9 not asserting the deliberative-process objection to that
10 answer?

11 MR. SKURNIK: That's correct, Your Honor.

12 THE COURT: Okay. All right.

13 Next issue.

14 MR. SIEGFRIED: The next issue, Your Honor, I think
15 is 43, which relates to identifying transgender service
16 members evacuated from theaters of deployment. This is
17 another one that, again, it seeks purely factual information
18 and there should not be any plausible deliberative-process
19 objection. Again, the government's response relates to
20 information that was sent to the panel, so limited to
21 documents before 2018. We don't exactly understand why that
22 was the case. And I think the government has also suggested
23 that it's not available because they don't keep statistics
24 only for transgender people, which is something else that I
25 don't exactly understand. If you know who the transgender

1 service members are, you should be able to know whether they
2 were evacuated from a theater of employment.

3 So, again, I don't know that this is a
4 deliberative-process issue; it shouldn't be because it seeks
5 purely factual information. But I'll let the government
6 speak to that.

7 MR. SKURNIK: First of all, Your Honor, the
8 Department of Defense does not know who all transgender
9 service members are. We only know of service members who
10 have a diagnosis of gender dysphoria or who have had
11 transition treatment, but those are different things. So to
12 get into 43, I think this is now encompassed by the court's
13 earlier ruling on RFP 29, because we've produced everything
14 responsive to 43 that has been provided to the panel, that
15 the panel considered. And plaintiffs are now asking -- so we
16 want -- let's say somebody else, not part of the panel, had
17 some information about evacuations from theater, they want
18 that information as well. And that is now encompassed within
19 the scope of the court's order as RFP 29.

20 MR. SIEGFRIED: I think we're talking past each
21 other. We're not looking for what anyone considered. We're
22 just looking for information about whether folks, in 2017,
23 2018, January of 2020, were evacuated. So whether someone
24 considered it or not, we're purely just seeking this
25 information.

1 THE COURT: They're not seeking -- you're making this
2 request very narrow as to what the panel considered. They're
3 looking to test whether what the panel considered is accurate
4 given even the entire database out there. That's where
5 you're talking past one another.

6 So if you know -- I mean, obviously you don't know
7 everyone who is transgender, because the rules basically are
8 having people not disclose. But you do know those who are
9 participating who identified themselves as transgender or
10 have a diagnosis of gender dysphoria, and they're asking,
11 were any of those people pulled from theaters so that they
12 can see whether they were pulled for, they broke their foot;
13 or they were pulled because of being transgender.

14 MR. SKURNIK: So it sounds like, Your Honor, what
15 plaintiffs' complaint then is, is not one about privilege,
16 but rather one about the scope of our search, whether we've
17 collected this information. And this hearing is focused on
18 privilege. While they have moved to compel on privilege
19 grounds, they have not moved to compel on further collection
20 of this material. So I don't think this issue is properly
21 before the court.

22 THE COURT: And I think I started out by saying I am
23 sitting here hour-by-hour, line-by-line, to get you through
24 discovery. In December, I told them to identify the next
25 criteria of information. I told you that that's what you

1 were going to work on next. They don't need a motion to
2 compel in order for you to go out and seek the data. You
3 have to move to protect. You haven't done so. The timeframe
4 for responding is usually 30 days. You're way past that. So
5 they're asking for this data.

6 Tell me why you haven't gone to get it, because I
7 understand that you are talking past each other. You're
8 trying to restrict it to what the panel members saw. They
9 want the whole universe of information to test whether the
10 panel's conclusions are supported by the data in the field.
11 That's not a hard concept.

12 MR. SKURNIK: We can produce that information to the
13 plaintiffs.

14 THE COURT: Okay. All right.

15 MR. SKURNIK: Now, Your Honor, I just want to
16 clarify. The Department of Defense may not possess all of
17 this information, but we can go and search for whatever
18 information exists on this topic and we will give that to the
19 plaintiffs.

20 THE COURT: All right.

21 MR. SIEGFRIED: Thank you.

22 THE COURT: Next.

23 MR. SIEGFRIED: Next is -- and all of these, by the
24 way, were document requests that were served, I think after
25 this government collection happened, so I think we're in the

1 same boat here where, again, this one requests information
2 about waivers, including criteria, department criteria for
3 granting waivers, whether a waiver was granted and the basis
4 for that decision. And this, if Your Honor recalls, is
5 important, because the government has consistently said this
6 is not a ban, because there is this waiver process you can go
7 through.

8 The government's response was, "We're not aware of
9 anything in our collection being withheld for
10 deliberative-process privilege." But our understanding is
11 they didn't actually collect any documents responsive to
12 this. And waivers were not in place and you couldn't seek a
13 waiver until after the panel finished; is that right?

14 MR. SKURNIK: Your Honor, what plaintiffs have
15 requested here is information about waivers that postdate the
16 release and implementation of the Mattis policy. So
17 basically what they are wanting to know is after the policy
18 has come out, let's say in the future, give us information
19 about whether particular waivers have been granted or denied.
20 That has nothing to do with the lawfulness of the policy
21 itself. As the Ninth Circuit said, the policy must be
22 reviewed based on the record supporting it. Information
23 postdating the policy about some waiver that may or may not
24 have been granted has nothing to do with whether the policy
25 itself is reasonable.

1 THE COURT: Well, they're going to argue that it's
2 not reasonable because it's a total ban, that there isn't any
3 particularized way that someone can get around the ban.

4 You have argued or the government has argued to me that
5 this is not a ban, this is a medical condition. And if
6 you're going to have waivers built into the plan, then
7 whether or not that process is viable is one of the things to
8 be considered.

9 So you need to produce how many of these waivers have been
10 requested. And if people have asked for waivers, you know,
11 I'm assuming the waiver goes to their being transgender. So
12 if the answer is none, then you've got to say none. If the
13 answer is 10, you say 10, and you give them the documents,
14 redacting who the individual is.

15 MR. SKURNIK: Your Honor, I ask that we be ordered
16 just to produce information such as how many waivers have
17 been requested and how many waivers have been granted or
18 denied, and not more specific information about the waiver
19 requests themselves, such as the analysis in the waivers, the
20 grounds given or not given for denial of a waiver. And the
21 reason is, I don't think it's relevant in any way to the
22 lawfulness of the policy itself and would better protect
23 personal and private information.

24 THE COURT: Are there documents that talk about -- in
25 the policy, is the waiver described and said what criteria

1 are used to grant or deny a waiver?

2 MR. SKURNIK: Not in the policy, Your Honor. The
3 department has sort of general standards that they apply to
4 waiver requests.

5 THE COURT: So why would they not be allowed to test
6 whether the government is applying the standards that are out
7 there? Because whether or not this whole thing works as a
8 policy consideration would depend on whether it's being
9 properly interpreted.

10 MR. SKURNIK: Well, Your Honor, the question before
11 the court is not whether this policy works as a policy
12 matter, the question is whether it was lawfully approved.
13 And the granting or not granting of any particular waiver
14 request afterwards doesn't bear on whether the policy itself
15 was lawful.

16 Now, we can give the plaintiffs -- we can give them the
17 number of waivers that have been requested, whether they've
18 been granted or denied. Now, if they've all been denied and
19 the plaintiffs want to argue that means the policy is a total
20 ban, then they can do so. They don't need further specific
21 information about individual waiver requests in order to make
22 those arguments.

23 MR. SIEGFRIED: Your Honor, to be clear, our claims
24 are not about whether it was approved lawfully, it's whether
25 it was discriminatory. And this obviously plays into that.

1 And we're happy to brief this, if Your Honor would like our
2 position on it. I think it is certainly relevant what the
3 basis for the decision is and what the analysis was. I don't
4 know what the objection is. Is it to relevance? Is it to --
5 I mean, I don't know why that would not be something that
6 we're entitled to.

7 MR. SKURNIK: It's a proportionality objection, Your
8 Honor. It would not be relevant to plaintiffs' claims and
9 defenses. And, therefore, under Rule 26, under the
10 proportionality analysis, plaintiffs are not entitled to it.

11 THE COURT: Wait a second. Proportionality has to do
12 with how much, and how much it costs in relationship to the
13 issues presented. I don't understand what proportionality
14 has to do with it, because I'm assuming that we're not
15 talking about a universe of documents that's huge. I'm
16 betting it's fairly small.

17 MR. SKURNIK: Your Honor, regardless of the size of
18 the universe, if the documents plaintiffs are seeking are
19 completely irrelevant to their claims and defenses, then
20 defendants aren't obligated --

21 THE COURT: Well, now you're changing your rationale.
22 You said it was proportionality a minute ago and now you're
23 saying it's relevance.

24 MR. SKURNIK: They're tied to each other, Your Honor.
25 First of all, these documents are not relevant; second of

1 all, because they are not relevant, under the proportionality
2 test, plaintiffs aren't entitled to them.

3 THE COURT: If you're arguing this is a medical
4 condition and not a complete ban, wouldn't the reasons for
5 going through the analysis be relevant?

6 MR. SKURNIK: It would not be relevant, Your Honor,
7 to whether the policy itself was lawful. And it's our
8 contention that you can look at the policy and just based on
9 the terms of the policy itself determine whether it is a
10 complete ban on transgender service or whether it's a policy
11 that turns on medical conditions and medical treatment.

12 THE COURT: Well, that's the argument you've made,
13 that it's a medical; why can't they test whether that's
14 correct?

15 MR. SKURNIK: They can test whether it's correct by
16 looking at the policy itself. The Ninth Circuit instructed
17 that the policy should be evaluated based on the records
18 supporting it.

19 The waiver requests that were granted or denied in the
20 future after the policy was released and decided have nothing
21 to do with whether the policy itself was lawful on the record
22 supporting it.

23 THE COURT: Let's go back and talk about what the
24 reason for discovery is. It is to uncover relevant
25 information or potentially relevant information. Okay? So I

1 don't know why you're fighting this so hard, because it seems
2 it should be, (a), easy to find out; and (b), is this policy
3 being interpreted as a total ban or is it being interpreted
4 as a medical condition? And that's one of the big issues
5 here as to whether gender dysphoria is an ongoing medical
6 condition, and whether the policy is written in such a way
7 that you can make these distinctions of people who have
8 completed their transition, people who are in the middle of
9 their transition, people who have not started their
10 transition, and people who simply have gender dysphoria. So
11 you're going to turn that over.

12 Now, I'm not interested in exposing any particular
13 servicemen. That's not the point. So you can redact the
14 names and identifying information. But if somebody has asked
15 for a waiver, give them the requests for the waiver. You can
16 number them: One, two, three, four, five. And if all five
17 were turned down, you give them the documents to turn them
18 down. Or if one was granted, you give them the documents of
19 what was granted.

20 MR. SKURNIK: Yes, Your Honor.

21 THE COURT: All right. Next issue.

22 MR. SIEGFRIED: I think the last Request for
23 Production we identified is documents related to the
24 Department of Defense's own data and experience since the
25 Carter policy, which is a reference in the actual report.

1 THE COURT: Say that to me again.

2 MR. SIEGFRIED: Okay. Let me talk slowly. Documents
3 related to the Department of Defense's own data and
4 experience under the Carter policy, or since the Carter
5 policy. I think it is fair to say that this is tied up in
6 the larger Request for Production 29 issue.

7 Is that your position?

8 MR. SKURNIK: Yes. So, again, we've produced
9 everything responsive to 65 that was considered by the panel,
10 presented to the panel, anything like that we have produced.

11 Because plaintiffs word RFP 65 to include reflecting or
12 relating to that line, it's possible there's some
13 communication, say, down at the services, that is somehow
14 relating to this line that is deliberative and we're
15 withholding. But I think the court's order on RFP 29
16 encompasses that.

17 THE COURT: I'm not getting this.

18 MR. HEINZ: Let me reset a little bit on this one.

19 THE COURT: Okay.

20 MR. HEINZ: In the Mattis report, which is what the
21 Undersecretary of Defense's office drafted after the panel
22 concluded their work, this is the 44-page report from
23 February that was the basis the justification for the ban, in
24 that report one of the justifications that the government is
25 proffering for why they have the ban is, quote, that they

1 relied on the department's own data and experience obtained
2 since the Carter policy took effect.

3 So, what is the data and the experience from the Carter
4 policy that led, this time around, for them to reverse
5 course? We just want to know what they meant by that and
6 what they were relying on.

7 So surely, whomever drafted the Mattis report, which maybe
8 now we'll find out, finally, they know what they were
9 referencing and that's the information that we want. Plain
10 and simple.

11 MR. SKURNIK: Your Honor, I'm glad Mr. Heinz
12 clarified that, because we have produced all of the data from
13 the Carter policy that was relied on in formulating the
14 Mattis policy. So when it says the department's own data and
15 experience obtained since the Carter policy, that data has
16 been produced to the plaintiffs.

17 MR. HEINZ: Fine.

18 THE COURT: Okay.

19 MR. SYKES: With respect to something the court
20 touched on briefly a few minutes ago, which is part of the
21 reason we're having this back-and-forth, there is this
22 blanket objection to deliberative-process privilege that we
23 only find out after we bring these to you that there are no
24 documents being withheld under that privilege.

25 Is there a way for the remaining RFPs that you can go

1 through and say: We're not withholding documents under the
2 deliberative-process privilege on this one, this one, this
3 one, but we are on this one, this one, this one.

4 THE COURT: I thought I just told them to go back and
5 do that.

6 MR. SYKES: I did too, I just wanted to make sure
7 that it was clear.

8 THE COURT: You can't use these boilerplates on every
9 single one. If there is a request that you don't have
10 documents withheld under a certain category, for that matter
11 it's not just deliberative privilege, it's any privilege,
12 don't be throwing out attorney-client privilege if there
13 isn't one. Don't be throwing out privileges that aren't
14 there. At this stage, you can't just respond with every
15 civil procedure word to block production.

16 So, please, go back through and remove anything that
17 you're not really relying upon.

18 MR. SKURNIK: Just to be clear, Your Honor. We have
19 our privilege logs which list every single document we've
20 withheld and the basis for withholding those documents. Then
21 we have the 218 requests for productions we've received
22 across all four cases. Now, when we conducted our search in
23 this case, we did not say, all right, conduct 218 separate
24 searches, one for each Request for Production, and then we
25 have a different bucket of documents for each Request for

1 Production. As we're allowed to do under the Federal Rules
2 of Civil Procedure, we searched for documents and produced
3 them as they are held in the ordinary course of business.

4 So we did an extraordinarily broad search. We picked 156
5 custodians. And basically anything those custodians had that
6 related to transgender went into our collection. And any
7 documents that were responsive and that we withheld as
8 privilege, we noted those on a privilege log.

9 Now, last August, plaintiffs filed a motion on this exact
10 grounds to try to compel us to, I guess, adjust our specific
11 objections and responses in regard to individual
12 interrogatories. Now, we filed an opposition explaining why
13 the approach we had taken was permitted under the local rules
14 and why it was proper. Plaintiffs then withdrew their
15 motion. So I don't really understand how or why they're
16 trying to now bring this back up, after previously
17 withdrawing their motion over this exact issue.

18 THE COURT: All right. You're re-plowing old ground
19 and you're not listening to what it is that I just told you
20 to do. Right now we've got ten requests on the table. Go
21 back for those ten and tell them that you're not withholding
22 anything on the basis of deliberative privilege, if you're
23 not. Just like we went through these five. That's all I'm
24 asking you to do.

25 Now, as for collecting your material in the ordinary

1 course of business, we already went through that. Both sides
2 brought to me what I considered a mishmash of how they were
3 going to categorize things. I started out with this, and I
4 said, no. That's not the way we're going to approach this
5 production. That's why we started in with having them pick
6 the next five, and then the next five, and the next five,
7 because just throwing the haystack across the table wasn't
8 going to do it. So I know that argument. That argument
9 didn't fly. We are beyond that. Okay?

10 Now, do you understand what you need to do with the ten
11 requests that are currently on the table?

12 MR. SKURNIK: Yes, Your Honor.

13 THE COURT: All right.

14 MR. HEINZ: Your Honor, the ten requests would be
15 helpful, but as we go on to additional RFPs, it would be nice
16 to know beyond the ten requests whether they're withholding
17 documents based on the privilege, because then we don't need
18 to go through those. But starting with the ten is fine.

19 THE COURT: We're about to pick five more. So we'll
20 make that first on the list that as you start to look at
21 this, first you have to say, is the deliberative privilege
22 involved.

23 MR. HEINZ: Understood.

24 THE COURT: Okay. Now, does that take care of what
25 the plaintiff wanted answers on?

1 MR. HEINZ: For those first five -- for the very
2 first five RFPs, yes. So now we have the next five, which I
3 believe, Your Honor, will be more expeditious.

4 MR. SKURNIK: Your Honor, we've actually addressed a
5 number of the next five, if not --

6 THE COURT: Wait a second. You're interrupting
7 counsel. So I'll give you an opportunity to speak after he
8 tells me what the next ones that they want to consider in
9 the, I'll call, the current five.

10 MS. ALA'ILIMA: Your Honor, before we move on to the
11 next five or current five, I just had one question about the
12 five we've addressed and come to resolution on, and that is
13 whether the government is going to be running a new search
14 for, like for example, the waivers in those requests. And I
15 didn't hear confirmation that they will be doing that. But I
16 may have missed it.

17 THE COURT: Well, in order to be responsive to the
18 requests, they're going to have to look at not just what they
19 gathered, but where they might find documents that might be
20 responsive.

21 MS. ALA'ILIMA: Thank you.

22 MR. SIEGFRIED: Just to be clear on that, Your Honor,
23 I think there are a number of requests that both the State of
24 Washington and the plaintiffs here have served since the
25 collection happened. And so we're going to encounter this

1 issue again, because the government stopped collecting before
2 discovery closed, is essentially the issue. So, whatever the
3 prediction was of what would be responsive may not have
4 actually borne out with what we actually requested.

5 In terms of the next five, I think, Your Honor, we just
6 need to confer based on Your Honor's guidance today and can
7 get back to the government with our next five in the next day
8 or so.

9 THE COURT: Now we're talking about 10 through 15, or
10 are we talking about 5 through 10?

11 MR. SIEGFRIED: No, 5 through 10 we've actually
12 already gone through today.

13 THE COURT: Okay.

14 MR. SIEGFRIED: I think we're good.

15 MR. HEINZ: So the next five, we will send those over
16 to the government by the end of the week and we'll begin work
17 on those.

18 THE COURT: Okay.

19 Now, please, don't be asking for more than you need. We
20 have enough problems. Okay?

21 What I'm asking of you is to get to work on those, because
22 I'm going to expect that you turn out your next five. They
23 are due in 30 days. And if there are protective orders that
24 need to be put in place, talk about those things. But it's
25 not going to work for you to run out to day 45 and come back

1 to me and say, "I don't understand." You need to act on it
2 promptly if there's a problem.

3 MR. SKURNIK: Yes, Your Honor.

4 THE COURT: Okay. All right.

5 Now, next issue: Scheduling. What I get from this is
6 that nobody thinks we're going to meet our June trial date.

7 MR. HEINZ: We think that's aggressive, Your Honor.
8 Right now, as you saw in the joint status report, we're only
9 asking for an extension from the current closure, which
10 occurs in two weeks, until the end of April. But we're still
11 waiting for information.

12 That being said, three weeks ago, we sent the government a
13 list of kind of our first 11 witnesses that we'd like to
14 depose. And we asked for specific dates for two of those,
15 either at the end of this month or the beginning of March.
16 But it does depend on kind of when we get all of these
17 documents that we've been discussing.

18 MR. SKURNIK: Just to be clear, Your Honor, they
19 asked for those dates for those two witnesses just this past
20 Friday.

21 THE COURT: Well, I think in December I said, get
22 your dates reserved now. And apparently you waited on that.

23 MR. HEINZ: Well, no. We sent the government -- I
24 personally sent the e-mail three weeks ago saying: These are
25 the people we want to depose. Didn't hear anything back.

1 No, "We're going to try to find dates. Here are the dates
2 they're available." Nothing.

3 So then on Friday, I e-mailed and said: Okay, let's get
4 -- in this timeframe we want these two witnesses to begin.

5 So we can quibble over that, but we've asked for two
6 specific dates, given the list of 11 people that we initially
7 want to depose -- I believe there will be more people -- but
8 those 11. And we're going to move forward with those
9 depositions, those two.

10 MR. SKURNIK: Your Honor, just to be clear about
11 this, plaintiff sent us an e-mail with a list of 13
12 individuals. And they said something along the lines of, we
13 won't be able to figure out dates or we'll have to work on
14 dates once more documents are produced. So I don't think
15 they necessarily have been following what the court ordered
16 or discussed at least at the last hearing.

17 THE COURT: All right. Well, guess what? You're all
18 here today and you don't need me to set your schedules for
19 you. Why don't you take the time to do that while you're
20 here.

21 Honestly, I don't know why you're not talking to each
22 other. I see these letters going back and forth, but you're
23 often missing each other in the night.

24 MR. SIEGFRIED: Your Honor, could I ask for one piece
25 of guidance that I think would help us get through the

1 deposition issue, which is, we suspect based on prior
2 experience with the few depositions that have been taken,
3 that there will be a lot of objections on
4 deliberative-process privilege grounds during these
5 depositions.

6 Then furthermore, we have this issue of documents should
7 or will be coming in the future. So, I guess we sort of seek
8 Your Honor's guidance. We're happy to take all of these
9 depositions now, sort of with the caveat that we imagine the
10 government wouldn't want to put them up twice, but we'd have
11 to keep the deposition open or reopen the deposition, pending
12 the documents we get. And, furthermore, how to handle
13 deliberative-process objections as they come up.

14 THE COURT: Well, there are very few things that can
15 stop the answer from being given. And what I would suggest
16 is if there is an objection based upon deliberative process,
17 the objection is made, then the question is answered, and you
18 seal the deposition. And if we have to, we will go over
19 line-by-line as to what comes in and what doesn't in terms of
20 public testimony.

21 But otherwise, you're going to have to keep -- we're going
22 to have to keep going back and re-deposing people in order to
23 do it. So I guess my order is, the question gets answered,
24 the deposition is sealed, and then we sort it out.

25 Now, you all need to remember that I'm the factfinder

1 here. So when you make objections, you've got to tell me
2 what the objection is, in order for me to forget it. So
3 you're in a dilemma there.

4 Talking about scheduling. Originally this was set for a
5 two-day bench trial. That doesn't seem to be the way it is
6 shaping up here. And maybe I should go back and comment.
7 The government originally told me there was only one document
8 that they were going to put in. I saw in the joint status
9 report that they seem to think that that position has
10 changed.

11 But that's what they entered into this whole dialogue,
12 they said one 44-page order and that was going to be it. So
13 it was going to be a pretty simple case when we started.
14 It's not shaping up that way.

15 So I think one of the things you need to talk about is
16 just how much of my time do you need? And we should start
17 talking about whether you're going to bring witnesses. Are
18 you going to offer up depositions? And how it is that you
19 want to teach me what it is I need to know to be the
20 factfinder here.

21 MR. SIEGFRIED: Your Honor, I have a quick question.
22 In this court for bench trials, is direct testimony live if
23 they're live witnesses, or only cross examination?

24 THE COURT: If you want to bring them live, I'll
25 listen to them live for both direct and cross examination.

1 This is my philosophy: I am the pupil. You are the
2 teachers. You have to put in front of me what it is that I
3 need to learn in order to render a good decision for you.

4 If that is live, then it will be live. If it is written,
5 it will be written. Just like teachers do lectures or
6 homework assignments. I'm willing to work at whatever plan
7 you come up with. But you need to think about how you're
8 going to present the material.

9 One thing, however, that drives me crazy is, don't expect
10 me to sit and listen to a talking head. I can read about
11 five times faster than somebody can talk. So it's painful to
12 sit and watch that talking head speak to me. If it's
13 question and answer, pull the camera back and show me the
14 questioner, if that's the way you need to do it.

15 The other thing we can do is we have the capacity to beam
16 the witnesses in here. So you don't have to physically bring
17 the person in. We can watch them and do the examination -- I
18 can't remember what it's called, and I hesitate to say
19 Facebook-style. That's not what I mean. All that person
20 needs to be is in another federal courthouse. So we have the
21 capacity to make those presentations.

22 But if you're going to take a chunk of time, I need to
23 know where to put you. And if we don't hit June, the next
24 time we're going to do it is October. So I'd like to have
25 both sides sit down and come up with what's realistic.

1 MR. SKURNIK: Your Honor, one point on scheduling is
2 that, sort of however we adjust the schedule, defendants
3 would like to make sure there's sufficient time between
4 summary judgment briefing and any potential trial, to
5 hopefully, if possible, have a ruling on summary judgment
6 before trial. It's our position that we think this case
7 really can be decided on summary judgment, either one way or
8 the other.

9 THE COURT: We already did a round of summary
10 judgments.

11 MR. SKURNIK: The current schedule in place, Your
12 Honor, has summary judgment briefing included in there. And
13 there's been significant sort of factual changes since the
14 initial round of summary judgments. The new policy has come
15 out. A lot of the arguments have changed in the case. So I
16 think that the court will be able to reach a decision --
17 ruling one way or the other, and that there won't be material
18 disputes of fact that require a trial in this case.

19 MR. HEINZ: We do believe there will be a trial and
20 there will be factual issues that need to be resolved.

21 THE COURT: What about summary judgments?

22 MR. HEINZ: Still under consideration. We just don't
23 -- we haven't really started to take depositions yet. I
24 think it's unlikely that the plaintiffs would move for
25 summary judgment. But we may revisit that. But I think it's

1 unlikely.

2 THE COURT: All right. If I could request this: I'm
3 not ordering you to do it, but if there are cross motions,
4 would you please consider giving me four briefs and not six?
5 By the time I get to the sixth brief, I'm ready to pull my
6 hair out.

7 MR. SIEGFRIED: I agree.

8 THE COURT: Now, next issue.

9 If there are additional discovery disputes that you
10 believe need writing for, what you need to do is use Local
11 Rule 37. Okay? The benefit to Local Rule 37 is that it
12 doesn't have to take time to percolate. It is ripe the day
13 it hits my desk. And so we don't have to have these delays.
14 And I can get you an answer much faster.

15 In addition, it's easier for me to follow if I have a
16 single document, where I see you argue one side against the
17 other, rather than page 15 in this brief, page 29 in that
18 brief, and you go back and forth. So that will be the rule
19 from now on.

20 Now, the next time to come see me. You know there's an
21 additional five. You're going to do that by Friday. You're
22 going to come see me the first week in April. You're going
23 to meet and confer and give me what you believe is your best
24 guess at when this case can actually go to trial, given the
25 production.

1 I already outlined when the production on the first five
2 is forthcoming. And I think I've outlined that 10 through
3 15, you know, we're on a 30-day turnaround.

4 Okay. What have I left out?

5 MS. ALA'ILIMA: Your Honor, you discussed the date
6 for trial, but will we also be discussing the rest of the
7 case schedule accordingly? For example, discovery cutoff in
8 April, therefore discovery motions --

9 THE COURT: I'm willing to entertain the whole thing.
10 Now usually what I need is I need three months from the time
11 you file your summary judgment, before trial. Because,
12 remember, summary judgment takes 30 days to ripen. And then
13 under my local rules, I have 30 days to respond. And so
14 before we ever get anyplace, we're past 60 days. I want you
15 to have time to get ready for trial on the issues. So just
16 because you get it off your desk doesn't mean it instantly
17 gets decided on mine. Please build in the time for me to
18 give you a decent answer.

19 MR. SYKES: And, Your Honor, will the court address,
20 in the order, moving -- formally moving the discovery date?

21 THE COURT: Not until I see your proposals. Okay?
22 What is it right now?

23 MR. SYKES: It's February 28th, Your Honor.

24 THE COURT: We're not going to meet February 28th.
25 So let's push it back a month, the end of March.

1 MR. HEINZ: So I'm just --

2 THE COURT: For now.

3 MR. HEINZ: And, Your Honor, I don't think that we
4 will be able to take all of those depositions by the end of
5 March. I just don't think that that's going to be possible,
6 since we're still awaiting documents. And there's going to
7 be a lot.

8 So I think the end of April may be more realistic. Or
9 else we're going to try to squeeze them all in before the end
10 of March and it's going to be a tight squeeze.

11 THE COURT: Well, I'm designing it so it feels tight.
12 Okay? You're going to come back and see me on April the 3rd
13 and you can tell me -- or a date first week in April.

14 THE CLERK: First week in April?

15 THE COURT: You're going to come back and see me then
16 and we'll see where we are. But I want you to propose,
17 within ten days, what you think is realistic. But I'm not
18 going to move those dates right now, except the one that I
19 just did, because I want to see what your plan is.

20 MR. HEINZ: You want to see, within ten days from
21 today, our proposed schedule?

22 THE COURT: Yeah.

23 MR. HEINZ: Understood.

24 THE COURT: All right. Anything else I can help you
25 with?

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MR. SIEGFRIED: No, Your Honor.

THE COURT: Any further clarification?

MR. SKURNIK: No, Your Honor.

THE COURT: All right, then have a good trip home and I'll see you in April.

(Adjourned.)

C E R T I F I C A T E

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

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER