

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,  
*Plaintiffs*, and  
STATE OF WASHINGTON,  
*Plaintiff-Intervenor*,  
v.  
DONALD J. TRUMP, in his official capacity  
as President of the United States, et al.,  
*Defendants*.

Case No. 2:17-cv-01297-MJP  
**DECLARATION OF VANESSA  
BARSANTI IN SUPPORT OF LCR 37  
JOINT SUBMISSION REGARDING THE  
GOVERNMENT’S WITHHELD  
COMMUNICATIONS WITH THIRD  
PARTIES**  
NOTE ON MOTION CALENDAR:  
February 27, 2020

1 I, Vanessa Barsanti, swear under penalty of perjury under the laws of the United States to  
2 the following:

3 1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am  
4 competent to be a witness. I make this declaration in support of the LCR 37 Expedited Joint  
5 Motion to Compel Defendants to Produce Communications with Third Parties (the “Motion”)  
6 based on facts within my personal knowledge.

7 2. Attached hereto as Exhibit 1 is a December 13, 2019 letter from counsel for  
8 Plaintiffs, Vanessa Barsanti, to counsel for the Government, Andrew Carmichael.

9 3. Attached hereto as Exhibit 2 is CMR-0000176, a June 2, 2017 email chain from  
10 General Joseph Dunford to Elaine Donnelly of the Center for Military Readiness.

11 4. Attached hereto as Exhibit 3 is a July 29, 2019 email chain from counsel for the  
12 Government, Matthew Skurnik, to counsel for Plaintiffs, Vanessa Barsanti.

13 5. Attached hereto as Exhibit 4 is MCHUGH 00002, an article authored by Dr. Paul R.  
14 McHugh titled “Witches, multiple personalities, and other psychiatric artifacts”, produced by Dr.  
15 McHugh in response to a third-party subpoena in this action.

16 6. Attached hereto as Exhibit 5 is MCHUGH 00062, a February 13, 2018 email chain  
17 between Dr. McHugh and William Bushman, produced by Dr. McHugh in response to a third-  
18 party subpoena in this action.

19 7. Attached hereto as Exhibit 6 is an August 23, 2019 letter from counsel for Plaintiffs,  
20 Vanessa Barsanti, to counsel for the Government, Andrew Carmichael.

21 8. Attached hereto as Exhibit 7 is a September 13, 2019 letter from counsel for the  
22 Government, Andrew Carmichael, to counsel for Plaintiffs, Vanessa Barsanti.

23 9. Attached hereto as Exhibit 8 is USDOE00134724, a January 29, 2018 email chain  
24 between Secretary James Mattis and retired Lieutenant General Greg Newbold.

25 10. Attached hereto as Exhibit 9 is USDOE00285187, a February 6, 2018 email chain  
26 between William Woodruff and William Bushman.

27 11. Attached hereto as Exhibit 10 is a September 20, 2019 email chain between counsel  
28 for Plaintiffs, Vanessa Barsanti, and counsel for the Government, Andrew Carmichael.

1 12. Attached hereto as Exhibit 11 is an October 18, 2019 email chain between counsel  
2 for the Government, Andrew Carmichael, and counsel for Plaintiffs, Jordan Heinz and Vanessa  
3 Barsanti.

4 13. Attached hereto as Exhibit 12 is an October 7, 2019 letter from counsel for Plaintiffs,  
5 Vanessa Barsanti, to counsel for the Government, Andrew Carmichael.

6 14. Attached hereto as Exhibit 13 is a November 4, 2019 email chain between counsel  
7 for the Government, Andrew Carmichael, and counsel for Plaintiffs, Jordan Heinz and Vanessa  
8 Barsanti.

9 15. Attached hereto as Exhibit 14 is a December 19, 2019 email chain between counsel  
10 for the Government, James Powers, and counsel for the Plaintiffs, Vanessa Barsanti.

11 16. Attached hereto as Exhibit 15 is a January 17, 2020 email chain between counsel for  
12 the Government, James Powers, and counsel for the Plaintiffs, Vanessa Barsanti, including an  
13 attached letter.

14 17. Attached hereto as Exhibit 16 is USDOE00290531, a June 19, 2017 email chain  
15 from Mary Krueger to various individuals.

16 18. Attached hereto as Exhibit 17 is USDOE00290535, an August 1, 2017 email chain  
17 from Michael Richter to David Gruber.

18 19. In connection with the Government's production volume 18, the Government  
19 provided a privilege log indicating that USDOE00255288 is being withheld for deliberative  
20 process privilege reasons. The information provided indicates that the communication is from  
21 October 16, 2017, authored by "Atiba Hendrickson" and sent from address  
22 "ismiccdistributionlist@mail-list.com - on behalf of - John Snook  
23 <Snookj@treatmentadvocacycenter.org>" to recipient "ismiccdistributionlist@mail-list.com,"  
24 and titled "Interdepartmental Serious Mental Illness Coordinating Committee draft materials[.]"  
25 The privilege basis is listed as "Deliberations regarding the formulation of the transgender  
26 policy; Deliberations regarding the implementation of the transgender policy; Deliberations  
27 regarding the rescission of the transgender policy."  
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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 27, 2020.

s/ Rachel Horvitz  
Rachel Horvitz, WSBA No. 52987  
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# Exhibit 1

## KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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December 13, 2019

### By E-mail

Andrew E. Carmichael  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW, Rm. 7218  
Washington, D.C. 20530

Re: Document Productions of Communications with Third Parties in *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Drew:

I write regarding the Department of Defense's ("DoD") refusal to produce communications with third parties that have been withheld for deliberative process privilege and/or attorney-client privilege, or even so much as identify whom on Defendants' privilege logs is *not* a third party. As detailed in my October 7 letter, no such privileges apply to the identified communications with third parties, and it is inappropriate to withhold responsive communications or documents shared with third parties.

The burden is on Defendants to support their privilege claims. However, in the spirit of cooperation, Plaintiffs have further assessed the initial list they provided of potential third parties and have reduced it significantly. Plaintiffs have narrowed the approximately 800 individuals previously identified as potential third parties associated with documents withheld for deliberative process privilege and/or attorney-client privilege and ask that, consistent with the parties' conversations during meet and confers, the DoD re-review the smaller subset of approximately 500 potential third parties identified in Exhibit A.

Though Plaintiffs reserve their right to challenge the withholding of documents for deliberative process privilege and/or attorney-client privilege that are not on Exhibit A, those included in the exhibit contain author or recipient metadata that indicate they were shared with an individual that Plaintiffs cannot confirm is employed by Defendants:

KIRKLAND & ELLIS LLP

Andrew E. Carmichael  
December 13, 2019  
Page 2

- Many entries in the exhibit show that documents are being withheld where the domain name information indicates that the email addresses belong to third parties. For example, there are domain names that belong to private universities, hospitals, corporations, etc.
- Similarly, approximately 50 privilege log entries contain popular, public email domains, such as Gmail.com, Hotmail.com, and Yahoo.com.

Please indicate by December 19 whether the DoD will consent to re-reviewing this limited subset of its documents withheld for deliberative process privilege and/or attorney-client privilege. We are available to meet and confer at your convenience.

Sincerely,

/s/ Vanessa Barsanti

Vanessa Barsanti

# Exhibit A

- on behalf of - Duffy M <rmujaahida@yahoo.com>
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Wylie C. Hembree, Peggy Cohen-Kettenis, Henriette A. Delemarre-van de Waal, Louis J. Gooren, Walter J. Meyer, III, Norman P. Spack, Vin Tangpricha, and Victor M. Montori
Xiaoming Zhou
Yoni Hirt <yoni.hirt@Concorde2000.com>

# Exhibit 2

Message

---

**From:** Dunford, Joseph F Jr Gen USMC JS (US) [joseph.f.dunford.mil@mail.mil]  
**Sent:** 6/2/2017 2:58:09 AM  
**To:** Elaine Donnelly [elaine@cmrlink.org]  
**Subject:** RE: [Non-DoD Source] Military Readiness or Transgender Mandates? (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Thanks again Elaine ...

-----Original Message-----

From: Elaine Donnelly [mailto:elaine@cmrlink.org]  
Sent: Thursday, June 01, 2017 10:16 PM  
To: Dunford, Joseph F Jr Gen USMC JS (US) <joseph.f.dunford.mil@mail.mil>  
Subject: RE: [Non-DoD Source] Military Readiness or Transgender Mandates? (UNCLASSIFIED)

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

---

You're welcome, General. You should know about this invitation, which just turned up in a Google search. It appears to be from a private group that has been given access to Pentagon facilities:

Caution-<https://einvitations.afit.edu/inv/index.cfm?i=344650&k=0165460F7E57> < Caution-  
<https://einvitations.afit.edu/inv/index.cfm?i=344650&k=0165460F7E57> >

The event in the Pentagon courtyard or auditorium is supposed to take place on Monday, June 12, and Deputy Secretary Bob Work has been invited to participate. As you know, Work and/or P&R officials serving under Ashton Carter personally authorized the full array of directives and instructions to impose LGBT ideology on our military.

This event, if it takes place, could present a serious problem. Some people seem unaware that there was an election last November.

All the best,

Elaine

---

From: Dunford, Joseph F Jr Gen USMC JS (US) [Caution-mailto:joseph.f.dunford.mil@mail.mil]  
Sent: Thursday, June 1, 2017 8:26 PM  
To: Elaine Donnelly <elaine@cmrlink.org>  
Subject: RE: [Non-DoD Source] Military Readiness or Transgender Mandates? (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Thanks Elaine ...

SF

Joe Dunford

From: Elaine Donnelly [Caution-mailto:elaine@cmrlink.org < Caution-mailto:elaine@cmrlink.org > ]  
Sent: Thursday, June 01, 2017 12:54 PM  
To: Dunford, Joseph F Jr Gen USMC JS (US) <joseph.f.dunford.mil@mail.mil < Caution-mailto:joseph.f.dunford.mil@mail.mil > >  
Subject: [Non-DoD Source] Military Readiness or Transgender Mandates?

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

---

To: General Gen. Joseph F. Dunford, USMC

From: Elaine Donnelly, President, Center for Military Readiness

Re: Military Readiness or Transgender Mandates?

The Center for Military Readiness has released a new article highlighting reasons why the Trump Administration should resist pressures to continue Obama-era mandates for transgenders in the military:

CMR: Holdover Transgender Mandates Impede Efforts to Strengthen Military < Caution-Caution-  
<https://www.cmrlink.org/articles/print/37804?author=0&image=0&domain=0> >

As stated in a recent Memo for the Movement < vCaution-Caution-<https://obamawhitehouse.archives.gov/the-press-office/2016/05/31/presidential-proclamation-lgbt-pride-month-2016> > signed by 85 organizations and leaders, "The process of strengthening our military will not succeed if military service personnel have to contend with problematic military/social policies imposed by the Obama Administration - policies that actually impede mission readiness, command proficiency, and combat effectiveness."

For more information, please contact CMR at 734/464-9430 or [elaine@cmrlink.org](mailto:elaine@cmrlink.org) < Caution-mailto:elaine@cmrlink.org > .

Elaine Donnelly

President

Center for Military Readiness

Caution-Caution-[www.cmrlink.org](http://www.cmrlink.org) < Caution-Caution-<http://www.cmrlink.org> >

734/464-9430

CLASSIFICATION: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED

# Exhibit 3

**From:** Skurnik, Matthew (CIV)  
**To:** Barsanti, Vanessa; Gerard Bradley  
**Cc:** Carmichael, Andrew E. (CIV); Norway, Robert M. (CIV); Enlow, Courtney D. (CIV); Cheung, Ashley (CIV); Heinz, Jordan M.; Cannon, Sara; Rosenberg, Michael E.  
**Subject:** [EXT] RE: Dr. McHugh Subpoena Action in D. Md.  
**Date:** Monday, July 29, 2019 9:30:22 AM

Vanessa,  
 In advance of our call today at 4 PM ET, I have an update from our clients. Defendants no longer object to Dr. McHugh producing his communications with the Department of Defense. As you are aware, however, Defendants still object to production of Dr. McHugh's communications with the White House.  
 In withdrawing our objection to production of Dr. McHugh's communications with DoD, we do not concede that those communications are not subject to the deliberative process privilege. However, in an attempt to resolve this subpoena matter without a need for further litigation, Defendants has chosen to withdraw their objection to Dr. McHugh producing to you his DoD communications.  
 Look forward to speaking later today.

Best,  
 Matt  
**Matthew Skurnik**  
 Trial Attorney  
 United States Department of Justice  
 Civil Division - Federal Programs Branch  
 1100 L Street NW  
 Washington, DC 20005  
 (202) 616-8188 | Matthew.Skurnik@usdoj.gov

**From:** Skurnik, Matthew (CIV)  
**Sent:** Thursday, July 25, 2019 4:22 PM  
**To:** Barsanti, Vanessa ; Gerard Bradley  
**Cc:** Carmichael, Andrew E. (CIV) ; Norway, Robert M. (CIV) ; Enlow, Courtney D. (CIV) ; Cheung, Ashley (CIV) ; Heinz, Jordan M. ; Cannon, Sara ; Rosenberg, Michael E.  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.  
 Yes Monday 4 ET is good. Thank you.

**From:** Barsanti, Vanessa <vanessa\_barsanti@kirkland.com>  
**Sent:** Thursday, July 25, 2019 3:48 PM  
**To:** Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Gerard Bradley <Gerard.V.Bradley.16@nd.edu>  
**Cc:** Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>; Heinz, Jordan M. <jheinz@kirkland.com>; Cannon, Sara <sara.cannon@kirkland.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.  
 Thank you, Matt. Let's discuss Monday then. Would 4 ET work?

**Vanessa Barsanti**  
 -----  
**KIRKLAND & ELLIS LLP**  
 300 North LaSalle, Chicago, IL 60654  
 T +1 312 862 2205  
 F +1 312 862 2200  
 -----  
[vanessa\\_barsanti@kirkland.com](mailto:vanessa_barsanti@kirkland.com)

**From:** Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>  
**Sent:** Thursday, July 25, 2019 12:44 PM  
**To:** Barsanti, Vanessa <vanessa\_barsanti@kirkland.com>; Gerard Bradley <Gerard.V.Bradley.16@nd.edu>  
**Cc:** Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Cheung, Ashley (CIV) <Ashley.Cheung@usdoj.gov>; Heinz, Jordan M. <jheinz@kirkland.com>; Cannon, Sara <sara.cannon@kirkland.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>  
**Subject:** [EXT] RE: Dr. McHugh Subpoena Action in D. Md.

Vanessa,  
 I just received an update from our clients. We're prepared to give a response with regard to Dr. McHugh's White House communications now (see below), but we won't be prepared to give a response on his DoD communications until at least late Monday. Given this, can we try to have a call late Monday or on Tuesday, rather than tomorrow?  
 With regard to Dr. McHugh's communications with the White House, we will not identify the title of the individual(s) with whom he communicated. However, we can confirm for plaintiffs that, as Mr. Bradley stated during our October 15, 2018 telephone status conference with the court, the individual(s) with whom Dr. McHugh communicated was/were in fact member(s) of the Domestic Policy Council staff. We are also prepared to identify the entry on the White House privileged log served in the underlying litigation in which Dr. McHugh's communications are included.

Dr. McHugh's communications with the White House are included in the following entry:

25	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations in some cases, these communications would lead up to advice to the President
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We believe this information is sufficient for plaintiffs to conclude that Dr. McHugh's communications with the White House are subject to the deliberative process privilege and presidential communications privilege.

We have voluntarily chosen to reveal this information for the purpose of attempting to resolve this subpoena matter without a need for further litigation. In doing so, however, we do not waive any applicable privilege, including the presidential communications privilege or the deliberative process privilege. To the contrary, we maintain that Dr. McHugh's communications are subject to multiple privileges. We also do not concede that the government defendants are required to disclose such information. Rather, this disclosure is discretionary. Finally, we do not concede that it is appropriate for plaintiffs to seek such discovery at this time, when they have not yet exhausted alternative sources of non-privilege discovery in the underlying litigation, and have not met their burden to show a heightened need for the discovery sought here. See *Cheney v. U.S. Dist. Court for the District of Columbia*, 542 U.S. 367 (2004).

Please let me know your availability for a call next week.

Best,  
 Matt

**From:** Skurnik, Matthew (CIV)  
**Sent:** Thursday, July 25, 2019 11:46 AM  
**To:** Barsanti, Vanessa <vanessa\_barsanti@kirkland.com>; Gerard Bradley <Gerard.V.Bradley.16@nd.edu>  
**Cc:** Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>; Heinz, Jordan M. <jheinz@kirkland.com>; Cannon, Sara <sara.cannon@kirkland.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Hi Vanessa,  
 Friday works, and the morning is best for us. How about 11:00 AM ET on Friday?  
 Best,

Matt

---

**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Sent:** Wednesday, July 24, 2019 5:12 PM  
**To:** Skurnik, Matthew (CIV) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>  
**Cc:** Carmichael, Andrew E. (CIV) <[ancarmic@CIV.USDOJ.GOV](mailto:ancarmic@CIV.USDOJ.GOV)>; Norway, Robert M. (CIV) <[norway@CIV.USDOJ.GOV](mailto:norway@CIV.USDOJ.GOV)>; Enlow, Courtney D. (CIV) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; Cheung, Ashley (CIV) <[ascheung@CIV.USDOJ.GOV](mailto:ascheung@CIV.USDOJ.GOV)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Matt,

I just wanted to check in and see if you had any updates for us regarding the Government's willingness to waive DPP on communications between Dr. McHugh and the DoD, and whether you will be providing additional information regarding the individuals Dr. McHugh communicated with at the White House?

Perhaps it makes sense for us to discuss on Friday given that we owe the Court a JSR next week. Could you please let me know your availability?

**Vanessa Barsanti**

---

**KIRKLAND & ELLIS LLP**  
300 North LaSalle, Chicago, IL 60654  
T +1 312 862 2205  
F +1 312 862 2200

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

---

**From:** Skurnik, Matthew (CIV) <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>  
**Sent:** Wednesday, July 10, 2019 1:45 PM  
**To:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>  
**Cc:** Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>; Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** [EXT] RE: Dr. McHugh Subpoena Action in D. Md.

Thanks Vanessa. You have the government's consent to file.

---

**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Sent:** Wednesday, July 10, 2019 1:22 PM  
**To:** Skurnik, Matthew (CIV) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>  
**Cc:** Carmichael, Andrew E. (CIV) <[ancarmic@CIV.USDOJ.GOV](mailto:ancarmic@CIV.USDOJ.GOV)>; Norway, Robert M. (CIV) <[norway@CIV.USDOJ.GOV](mailto:norway@CIV.USDOJ.GOV)>; Enlow, Courtney D. (CIV) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; Cheung, Ashley (CIV) <[ascheung@CIV.USDOJ.GOV](mailto:ascheung@CIV.USDOJ.GOV)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Gerry and Matt,

Please let me know if this is okay to file.

**Vanessa Barsanti**

---

**KIRKLAND & ELLIS LLP**  
300 North LaSalle, Chicago, IL 60654  
T +1 312 862 2205  
F +1 312 862 2200

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

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**From:** Barsanti, Vanessa  
**Sent:** Wednesday, July 10, 2019 7:55 AM  
**To:** 'Skurnik, Matthew (CIV)' <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>  
**Cc:** Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>; Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Thank you, Matt. I'll send a proposed JSR shortly for yours and Mr. Bradley's review.

**Vanessa Barsanti**

---

**KIRKLAND & ELLIS LLP**  
300 North LaSalle, Chicago, IL 60654  
T +1 312 862 2205  
F +1 312 862 2200

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

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**From:** Skurnik, Matthew (CIV) <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>  
**Sent:** Wednesday, July 10, 2019 7:51 AM  
**To:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>  
**Cc:** Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>; Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** [EXT] RE: Dr. McHugh Subpoena Action in D. Md.

Vanessa,

As we discussed yesterday, in an attempt to narrow or resolve this subpoena dispute, the Government would consent to asking the court to hold briefing in abeyance for an additional three weeks. During that time, we would consult with our clients about whether they would be willing to (1) waive privilege over Dr. McHugh's communications with DoD, and (2) provide additional information about Dr. McHugh's communications with the White House, such as the title of the person(s) with whom Dr. McHugh communicated.

Gerry – let us know if you are ok with this approach as well.

Thanks,

Matt

---

**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Sent:** Tuesday, July 09, 2019 3:47 PM  
**To:** Skurnik, Matthew (CIV) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>  
**Cc:** Carmichael, Andrew E. (CIV) <[ancarmic@CIV.USDOJ.GOV](mailto:ancarmic@CIV.USDOJ.GOV)>; Norway, Robert M. (CIV) <[norway@CIV.USDOJ.GOV](mailto:norway@CIV.USDOJ.GOV)>; Enlow, Courtney D. (CIV) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; Cheung, Ashley (CIV) <[ascheung@CIV.USDOJ.GOV](mailto:ascheung@CIV.USDOJ.GOV)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Matt,

I just tried to give you a call. Could you please give me a ring so that we can discuss?

**Vanessa Barsanti**

---

**KIRKLAND & ELLIS LLP**  
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T +1 312 862 2205  
F +1 312 862 2200

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

---

**From:** Skurnik, Matthew (CIV) <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>  
**Sent:** Tuesday, July 9, 2019 12:40 PM  
**To:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>

**Cc:** Carmichael, Andrew E. (CIV) <[Andrew.F.Carmichael@usdoj.gov](mailto:Andrew.F.Carmichael@usdoj.gov)>; Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** [EXT] RE: Dr. McHugh Subpoena Action in D. Md.

Hi Vanessa,

The Government does not consent to your proposed schedule. We think the best thing to do would be to request a telephonic status conference with the Court. Would that work for everyone?

Thanks,

Matt

**Matthew Skurnik**

Trial Attorney  
United States Department of Justice  
Civil Division - Federal Programs Branch  
1100 L Street NW  
Washington, DC 20005  
(202) 616-8188 | [Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)

---

**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>

**Sent:** Tuesday, July 09, 2019 2:31 PM

**To:** Skurnik, Matthew (CIV) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; Gerard Bradley <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>

**Cc:** Carmichael, Andrew E. (CIV) <[ancarmic@CIV.USDOJ.GOV](mailto:ancarmic@CIV.USDOJ.GOV)>; Norway, Robert M. (CIV) <[norway@CIV.USDOJ.GOV](mailto:norway@CIV.USDOJ.GOV)>; Enlow, Courtney D. (CIV) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; Cheung, Ashley (CIV) <[ascheung@CIV.USDOJ.GOV](mailto:ascheung@CIV.USDOJ.GOV)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>

**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Matt,

Could you please let me know the Government's position on this schedule?

**Vanessa Barsanti**

---

**KIRKLAND & ELLIS LLP**  
300 North LaSalle, Chicago, IL 60654  
T +1 312 862 2205  
F +1 312 862 2200

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

---

**From:** Barsanti, Vanessa

**Sent:** Monday, July 8, 2019 2:37 PM

**To:** 'Skurnik, Matthew (CIV)' <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>; 'Gerard Bradley' <[Gerard.V.Bradley.16@nd.edu](mailto:Gerard.V.Bradley.16@nd.edu)>

**Cc:** Carmichael, Andrew E. (CIV) <[Andrew.F.Carmichael@usdoj.gov](mailto:Andrew.F.Carmichael@usdoj.gov)>; Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>; Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Cannon, Sara <[sara.cannon@kirkland.com](mailto:sara.cannon@kirkland.com)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>

**Subject:** RE: Dr. McHugh Subpoena Action in D. Md.

Thanks, Matt. We do have to file our JSR on Wed. so please let me know in the morning if you agree to Dr. McHugh's/the Government's opposition being filed on 7/26 and plaintiffs' reply being filed on 8/9. Given the timing, I'm looping Mr. Bradley into this conversation as well to see if will agree to that schedule.

**Vanessa Barsanti**

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---

**From:** Skurnik, Matthew (CIV) <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>

**Sent:** Monday, July 8, 2019 2:32 PM

**To:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>

**Cc:** Carmichael, Andrew E. (CIV) <[Andrew.F.Carmichael@usdoj.gov](mailto:Andrew.F.Carmichael@usdoj.gov)>; Norway, Robert M. (CIV) <[Robert.M.Norway@usdoj.gov](mailto:Robert.M.Norway@usdoj.gov)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>

**Subject:** [EXT] Dr. McHugh Subpoena Action in D. Md.

Hi Vanessa,

I still have to check with some folks over here, so I won't be able to get you our position on your proposed schedule today. But I will try to get back to you as soon as I can.

Best,

Matt

**Matthew Skurnik**

Trial Attorney  
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# Exhibit 4

# Witches, multiple personalities, and other psychiatric artifacts

Contemporary psychiatric misdirections derived primarily from standard medical errors of oversimplification, misplaced emphasis, and invention are reviewed. These particular errors, however, were in part prompted and sustained by the sociocultural fads and fashions of the day. The results have been disastrous for everyone — patients, families, the public and psychiatry itself.

PAUL R. McHUGH

Psychiatry is a medical discipline long on disorders and short on explanations. Just a glance at the *Diagnostic and Statistical Manual* now in its fourth edition (DSM-IV) will confirm this verdict. DSM-IV presents hundreds of psychiatric disorders arranged according to their symptoms—depression, anxiety, schizophrenia and the like—but quite scrupulously avoids an etiological arrangement. Its authors are aware that psychiatrists tend to split up into camps, based on purported explanation — hence, biological, dynamic, behavioural, and even the eclectic — and go to war with one another.

However, this shortage of agreed-upon explanations brings good news and bad news. The good news is there is plenty of room for useful scientific research in psychiatry and a great deal of this is going on at the moment! The bad news is, because practitioners in this discipline are hungry for explanations today, at least once each decade, psychiatry is swept by an enthusiasm for a fundamentally incoherent practice, and then must spend at least ten years subsequently digging out of the troubles that this practice produced. These misdirections of psychiatry rest squarely on standard medical mistakes such as oversimplification, misplaced emphasis or pure invention. The enthusiasms for these misdirections, however, usually derive from an uncritical acceptance of transient cultural attitudes and fashionable ideas. The repeated combination of these elements proves how all too often the discipline of psychiatry has been the captive of culture, to the detriment of everyone.

## Anti-psychiatry

The most conspicuous misdirection of psychiatric practice — the precipitate dismissal of patients with severe, chronic mental disorders such as schizophrenia, from psychiatric hospitals — required a vastly oversimplified view of mental illness. Ironically, these actions were defended as efforts to bring 'freedom' to

these people, sounding a typical 1960s cultural theme that marched right by the fact that it was the patients' illnesses that had deprived them of freedom in the first place. There were several collaborators in this sad enterprise. Prominent among them were state governments looking for release from the traditional but heavy fiscal burden of housing the mentally ill. Crucial to the process was the combination of fashionable opinions of the era about society's institutions as oppressive and oversimplified explanatory opinions about schizophrenia and other mental illnesses generated by the so-called anti-psychiatrists, Thomas Szasz, R.D. Laing, Erving Goffman, and Michel Foucault, notably among them.

A simple description of the mental problems of psychiatric patients was not the style of our 1960s commentators. They were more interested in painting a picture of their own devising. A picture that would provoke first suspicion and then disdain for contemporary psychiatric practices. And it did so, not by producing new standards or reforming specific practices, but by ridiculing and caricaturing efforts of the doctors and the institutions, just as fashion directed. The power of scorn was surprising and had amazing results, leading many in the public and not a few in the profession to believe that it was the institutions that provoked the patients' troubles rather than illness that called out for shelter and treatment. Here from Szasz's book, *Schizophrenia — The Sacred Symbol of Psychiatry*<sup>2</sup>, is a typical comment: "The sense in which I mean that Psychiatry creates schizophrenia is readily illustrated by the analogy between institutional psychiatry and involuntary servitude. If there is no slavery there can be no slaves . . . Similarly if there is no psychiatry there can be no schizophrenics. In other words, the identity of an individual as a

schizophrenic depends on the existence of the social system of (institutional) psychiatry."

Effective replies to such commentary demanded knowledge first of the patients themselves, in schizophrenia, people impaired by delusions, hallucinations and disruptions of thinking capacities, but also understanding of how the concept of disease has, essentially since Sydenham, provided physicians with a coherent, logical, and stepwise approach to human afflictions, from symptom clusters to etiology, ultimately. The disparagement of this approach by the likes of Szasz demonstrated an ignorance of the explanatory potential of the concept of disease right from the start.

A saving grace for any medical theory or practice (the thing that spares it perpetual thralldom to the gusty winds of fashion) is the patients. They are real, they are around and a knowledge of their distressing symptoms guards against oversimplification. The claim that schizophrenic patients are in any sense living an alternative life style that our institutions were inhibiting was fatuous. Every urban citizen now recognizes, because of a familiarity with the many homeless people that the anti-psychiatric fad generated, that these patients have impaired capacities to comprehend the world and that they need protection and serious active treatment.

As well, and fortunately, the enterprises of brain research launched subsequent to these pronouncements have documented a cerebral source for many of the particular symptoms of schizophrenia<sup>3,4</sup>. This research tends to confirm that the conceptual model of epilepsy that helped sort out that condition (distinguishing symptomatic epilepsies, caused by some coarse brain pathology, from the idiopathic epilepsies, that rest upon genes) also makes sense of the group of conditions called schizophrenia<sup>5</sup>. The ultimate solutions for the homeless mentally ill are still to

be found but, as the saying goes, the anti-psychiatrists are history.

### A question of gender

A similar combination of a cultural fad amidst a dearth of explanations led to the grim practice of sex reassignment surgery in the 1970s. I happen to know about this because Johns Hopkins was one of the places in the United States where this practice, with what at the time were called transsexuals, was given its start.

Typically a man comes to the clinic and says something like, "As long as I can remember, I've thought I was in the wrong body. True, I've married and had a couple of kids but always, in the back and now more often in the front of my mind, there's this idea that actually I'm more a woman than a man. I'm here because all this male equipment is disgusting to me. I want medical help to change my body: hormone treatments, silicone implants, surgical amputation of my genitalia and the construction of a vagina. Will you do it?"

The patient claims it is a torture for him to live as a man, especially now that he has read in the newspapers about the possibility of switching surgically to womanhood. Upon examination it is not difficult to identify other mental and personality difficulties in him, but he is primarily disquieted because of his intrusive thoughts that his sex is not a settled issue in his life.

The skills of our plastic surgeons, particularly on the genitourinary system, are impressive. They were obtained, however, not to treat a presumptive gender identity problem but to repair congenital defects, injuries and the effects of destructive diseases such as cancer in this region of the body. That you can get something done doesn't always mean that you should do it. There are so many problems right at the start. In sex reassignment cases, the patient's claim that this has been a lifelong problem is seldom checked with others who have known him since childhood. It seems so intrusive and untrusting to discuss the problem with others even though they might provide a better gauge of the seriousness of the problem, how it emerged, its fluctuations of intensity over time and its connection with other experiences.

When you discuss what the patient means by "feeling like a woman," you often get a sex stereotype in return and something that female physicians note immediately as a male caricature of women's attitudes and interests. One of our patients, for example, said that, as a woman, he would be more "invested with being than with doing."

Experts say that a sense of one's own maleness or femaleness rests upon a complicated biopsychological process and suggest that some derangement in this

*. . . psychiatrists do not understand what is the problem here but hope surgery may do the poor wretch some good.*

natural process may be the explanation for this problem. They venture that, although their research on those born with genital and hormonal abnormalities may not apply to a person with normal bodily structures, something must have gone wrong in this patient's early and formative life to cause him to feel as he does. Why not help him look more like what he says he feels? Our surgeons can do it.

On the other hand it is not obvious how this patient's sense that he is a woman trapped in a man's body differs from the feelings of a patient with anorexia nervosa that she is obese despite her emaciated, cachectic state. We don't do liposuction on anorexics. So why amputate the genitals of these patients? Surely, the fault is in the mind, not the member.

A plastic surgeon at Hopkins provided the voice of reality on this matter based on his practice and his natural awe at the mystery of the body. One day while we were talking about it, he said to me: "Imagine what it's like to get up at dawn and think about spending the day slashing with a knife at perfectly well formed organs, because you psychiatrists do not understand what is the problem here but hope surgery may do the poor wretch some good."

The zeal for this sex change surgery did not derive from critical reasoning or thoughtful assessments. The energy came from the fashions of the 1970s that invaded the clinic. If you can do it and he wants it, do it. This fashion was integral to an aesthetic that saw diversity as everything, and could accept any idea, including that of surgical sex change, as interesting, and resistance to such ideas as uptight or even oppressive. Yet, moral matters should have some salience here.

These include the confusions imposed on society where these men/women insist on acceptance even in athletic competition with women; the encouragement of the 'illusion of technique' which assumes that the body is like a suit of clothes to be hemmed and stitched to style; there is the ghastliness of the mutilated anatomy to consider; and finally, consider that this surgical practice has distracted effort from genuine investigations attempting to find out just what has gone wrong for these people. What has, by their testimony, given them years of torment and psychological distress and prompted them to accept these grim and disfiguring surgical procedures.

We now appreciate that this condition falls into the category of "overvalued ideas"<sup>6</sup> described very thoroughly by Carl Wernicke<sup>7</sup> at the beginning of the century. This is a category that includes morbid jealousies, anorexia nervosa and litigious personalities. Fortunately the diagnostic term transsexualism has been abandoned and replaced with the term Gender Identity Disorder making it clear that the problem is one of ideas rather than of bodily constitution and should be treated as such.

Psychiatrists collaborated in an exercise of folly with distressed people, and a misplaced emphasis proved hazardous when explanations were at a premium.

### Artifactual behaviour

Medical errors of oversimplification and misplaced emphasis usually play themselves out with consequences all can see. Pure inventions can bring out a darker, hateful potential when psychiatric thought goes awry in search for an explanation. Most psychiatric histories choose to describe such invention by detailing its most vivid example — witches. The experience in Salem, Massachusetts, of 300 years ago is prototypical<sup>8</sup>.

Briefly, in 1692, several young women and girls who had for some weeks been secretly listening to tales of spells, voodoo, and illicit cultic practices from a Barbados slave suddenly displayed a set of mystifying mental and behavioural changes. They developed trance-like states, falling on the ground and flailing, and screaming at night and at prayer, seemingly in great distress and in need of help. The local physician, who witnessed this, was as bewildered as anyone else and eventually made a diagnosis of "bewitchment". "The

evil hand is on them”, he said and turned them over to the local law officials for examination and ultimately for protection. The clergy and magistrates assumed, taking their lead from the doctor, that local agents of Satan were at work and, using as grounds the answers of these young women to leading questions, indicted several citizens for bewitching them. The accepted proof of guilt was bizarre. The young women spoke of ghostly visitations by the defendants to their homes to torment them, all occurring while the accused were known by the testimony of reliable witnesses to be elsewhere. The victims often screeched out in court that they felt the accused pinching them even as everyone could see the defendants sitting quietly on the other side of the court room. Strange as it seems this testimony had great weight because the judges and the juries believed that capacities of this kind — provoking injury from a distance or being in two places at the same time — were skills and powers of witches. On the basis of this “spectral” evidence they dismissed all protests of innocence by the defendants and promptly executed them. The whole exercise should have been discredited when, after the executions, there was no change in the distraught behaviour of the young women. Instead more and more citizens were indicted. Eventually, good sense began to prevail, in part because many citizens came to recognize that no one was safe against these accusations and in part because a prosecution depending on spectral evidence was recognized to be as irrefutable as it was undemonstrable. The trials ceased and ultimately several of the young women admitted that their beliefs had been “delusions” and their accusations false.

The proper psychiatric diagnosis for those young women is, of course, not bewitchment but any of a series of terms such as hysteria, factitious disorder or malingering, all attempting to communicate the view that the mental states and behaviours of these individuals should be recognized as artifacts. A psychiatric or psychological artifact, like a physical artifact, is a product of human crafting. It is not a product of nature, such as a disease, but something manufactured by some person or persons for some human purpose or action. Behavioural displays in

***A psychiatric or psychological artifact . . . is a product of human crafting.***

which physical or mental disorders are imitated (artifactual clinical disorders) are common enough on any medical service. On inspection, the patient’s manufactured imitations of illness derive from a variety of different sources of information and suggestion, and they serve a variety of personal goals. In this era artifactual clinical conditions usually represent an effort on the part of a troubled person to take on the sick role with the benefits of care, attention and support this status brings to an individual. The status of ‘bewitched’ in Salem of 1692 brought both attentive concern and the license to indict any enemy to young women previously scarcely noticed by the community.

Forms of artifactual behaviour whether they are physical activities, such as falling and shaking, or mental phenomena, such as pains, visions or memories are partially shaped by unintended suggestions from others and sustained by the attention of onlookers and especially onlookers such as doctors who are socially empowered to assign, by affixing a diagnosis, the status of patient to a person. Whenever a diagnostician mistakes an artifact for what it is attempting to imitate by misidentifying the artifact either as some natural process, such as epilepsy, or inventing some specious explanation for it, such as bewitchment, then the behavioural display will continue, expand, prove treatment resistant and, in certain settings, spread to others. The usual result is trouble. Over the last decade a remarkable example of manufactured artifactual behaviour has surfaced and has been misidentified and bolstered by an invented view of its cause that fits a cultural fashion. This condition is Multiple Personality Disorder (MPD).

**Multiple personality disorder**

Patients who are eventually diagnosed as suffering from MPD come to therapists with standard psychiatric complaints such as depression or anxiety. Some therapists see much more in these symptoms and suggest to the patient, and to others, that the symptoms represent the subtle actions of several alternative personalities, alters, coexisting in the patient’s mental life. These suggestions encourage many patients to see their problems in a new light. Suddenly they are transformed

into odd people with repeated shifts of demeanor and deportment that they display on command and sometimes in response to hand signals from the therapist. An artifactual behaviour has been generated by the combination of the vulnerabilities of the patient to suggestion and the beliefs of the therapists.

Sexual politics in the 1980s and 1990s, particularly about sexual oppression and victimization, galvanizes these inventions. Forgotten (repressed) sexual mistreatment is the proffered explanation of MPD. Just as an epidemic of bewitchment served to prove the arrival of Satan in Salem, so in our day an epidemic of MPD is used to propose that a vast number of adults were sexually abused by guardians during their childhood, the MPD being one of the presumed expressions of the traumatic experience. Now, I do not for a moment deny that children are sometimes victims of sexual abuse or that such abuse would produce psychiatric symptoms. Such realities are not at issue. What I am concerned with here is what has been imagined from these realities and inventively applied.

Adults with MPD, so theory goes, were assaulted as young children by a trusted and beloved person, usually a father although grandfathers, uncles, brothers, or others, often abetted by women in their power, are also possibilities. This sexual assault, the theory holds, is blocked from memory (repressed and dissociated) because it was so shocking. This dissociating blockade itself is purported to destroy the integration of

***Today’s awful version of psychiatric invention is the notion that many people suffered sexual abuse — if only they remembered.***

mind and evokes multiple personalities as separate, disconnected, sequestered, ‘alternative’ collections of thought, memory and feeling. These resultant distinct ‘personalities’ produce a variety of what might seem standard psychiatric symptoms, such as depression, weight problems, panic states or demoralization, that only careful review, by experts on psychic life, will reveal to be expressions of MPD and the outcome of sexual abuse.

These patients have not come to treatment reporting a sexual assault in childhood. Only as the therapy is developed is the possibility that they were sexually abused as children suggested to them. From recollections of the mists of childhood, a vague sense of vulnerability may

COMMENTARY

slowly emerge, facilitated and encouraged by the treating group. This sense of vulnerability is thought a harbinger of clearer memories of victimization that, although buried, have been active for decades producing the different 'personalities'. The long 'forgotten' abuse is finally 'remembered' after sessions of 'uncovering' therapy, during which long conversations take place, often enhanced by sodium amytal or by hypnotic inductions, between the therapist and alter personalities, personalities that usually will be of all age ranges, differing sexes and not uncommonly animals that must also be made to speak.

Any actual proof of the provocative sexual assault is thought unnecessary since the presence of the MPD is thought proof enough. Theory about how the mind works and how its manifestations are to be understood is considered quite adequate to accuse the patient's parents of vile and atrocious acts against the patient when she (some 85% are women) was a child, with nothing more than this new form of spectral evidence, evidence that is just as irrefutable as that at Salem.

The idea of MPD and its cause has caught on among large numbers of psychotherapists. Its partisans see the patients as victims, cosset them in groups, encourage more expressions of alters (up to as many as 100 or more), and are ferocious towards any defenders of the perpetrators of the abuse. Just as the divines of Massachusetts were convinced that they were fighting Satan by recognizing bewitchment, so the contemporary divines, these therapists, are confident that they are fighting sexual oppression and child abuse, by recognizing MPD. The incidence of MPD has of late taken on epidemic proportions particularly in certain treatment centers. Whereas its diagnosis was reported less than 200 times from a variety of supposed causes prior to 1970, it has been applied to more than 20,000 people in the last decade and largely attributed to sexual abuse.

I have been involved, either directly or indirectly, with more than thirty such cases in the last few years. In every one, the very same story has been played out in a stereotyped script-like way. In each, a young woman with a rather straightforward set of psychiatric symptoms (depression and demoralization) sought psychotherapeutic help and her case was stretched during a course of therapy into a diagnosis of repressed memories of sex-

ual abuse, a delayed form of Post Traumatic Stress Disorder and usually MPD. In each case, an accusation of prior sexual abuse was levelled by her, usually against her father but in about thirty percent of cases against the mother. The accusation developed, always after the onset of therapy, first as vague feelings of dream-like childhood reminiscences of danger and darkness and eventually crystallizing, sometimes in a flash, into a rec-

ollection of father forcing sex upon the patient as a child. No other evidence of these events was presented. Refuting testimony, coming from former nursemaids or the other parent for example, was dismissed if presented.

On one occasion, the identity of the molester changed. This change was as telling about the nature of evidence as was the emergence of the original charge. A woman called her mother to

The Salem witch trial

Bettmann Archives

claim that she had come to realize that when she was young she was severely and repeatedly sexually molested by a maternal uncle. The mother questioned the daughter about the dates and times of these incidents to determine if they were even possible. She soon discovered that her brother was on military service in Korea at the time of the alleged abuse and with this information, the mother went to her daughter with the hope of showing her that her therapist was misleading her in destructive ways. When she heard this new information, the daughter seemed momentarily taken aback, but then said, "I see, Mother. Yes. Well, let me think. If your dates are right, I suppose it must have been Dad." And with that, she began to claim that she had been a victim of her father's abusive attentions and nothing could dissuade her.

The accused parents whom I studied, denying the charges and amazed at their source, submitted to detailed reviews of their sexual lives and any other efforts up to and including polygraphic testing to try to prove their innocence. Professional requests by me to the daughters' therapists for better evidence of the abuse were dismissed as derived from the pleadings of the guilty and were deemed beneath contempt given that the diagnosis of MPD indicated, and the ultimate testimony of the patient's patently confirmed, the sex abuse.

### Remembered trauma

In Salem, the convictions of the defendants depended on how judges thought witches behaved. In our day, similar convictions depend on how some therapists think memory of trauma customarily works. In fact, standard psychiatric teaching in the past held that severe traumas are usually remembered all too well. They are amplified in consciousness, remaining like grief to be reborn and re-emphasized on anniversaries and in settings that can simulate the environments where they occurred. Good evidence for this was found in the memories of children from concentration camps. More recently, the children of Chowchilla, California, who were kidnapped in their school bus and buried in sand for many hours, remembered every detail of their traumatic experience years later and needed psychiatric assistance, not to bring out forgotten material that was repressed but to help them move away from a constant ruminative preoccupation with the experience<sup>9</sup>.

Many psychiatrists upon first hearing of these diagnostic formulations (MPD being a form of post traumatic stress and the result of repressed memories of sexual abuse in childhood) have fallen back upon what they think is an even-handed way of approaching it. The mind is very mysterious in its ways, they say, anything is possible in a family. In fact, this credulous stance towards evidence and the failure to consider the alternative of artifactual behaviours, memories and beliefs continue to support this crude psychiatric analysis, and if the kinds of practices that lie behind the diagnosis of MPD become standard in psychiatry, then no family with a member in psychotherapy is safe from a persecution galvanized by the same kind of energy and reasoning that launched the witches' court or the lynch mob.

The helpful clinical approach to the patient with putative MPD, as with any instance of an artifactual display, is to direct attention away from the manufactured behaviour — one simply never talks to an alter. Within a few days of a consistent therapeutic focus away from the MPD behaviour and on to the issues of depression and anxiety that were the presenting matters, preoccupations with alters and supposed repressed memories fade and generally useful psychotherapy begins.

This epidemic will end in the same way that the witch craze ended in Salem. The MPD phenomena will be seen as manufactured, the 'repressed memory' explanations will be recognized as misguided, and psychiatrists will become immunized against the practices that generated these artifacts<sup>10</sup>. Meanwhile, time is passing, many families are being hurt and confidence in the competence and impartiality of psychiatry is eroding.

### A time to learn

Major psychiatric misdirections often share this intimidating mixture of a medical mistake and a trendy idea. Any challenge to such a misdirection must confront simultaneously the professional authority of the proponents and the political power of fashionable convictions. Such challenges are not for the faint-hearted or inexperienced. They seldom quickly succeed because they are often misrepresented as ignorant or, in the cant word of our day, uncaring.

In ten years much damage can be done, and much effort over a longer period of time is required to repair it. Thus

with the mentally ill homeless, only a new crusade and social commitment will bring them adequate psychiatric services again. Age increases the sad caricature of the sexual reassigned and saps their bravado. Some, pathetically, even ask about re-assignment. And groups of parents falsely accused of sexual mistreatment by their grown children are gathering together to fight back against psychotherapists in ways that are producing dramatic but distressing court room spectacles. How good it would have been if all these misguided programs had been avoided or at least their span abbreviated.

Psychiatry is a medical discipline. It is capable of medical triumphs and serious medical mistakes. We don't know the secret of human nature. We cannot build the New Jerusalem. We can describe how our explanations for mental disorders are devised and develop, and where they are strong and where they are limited. We can clarify the presumptions about what we know and how we know it. With more research, steadily, we can construct a clinical discipline that, while delivering less to fashion, will bring more to patients and their families.

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A prior version of this essay appeared entitled "Psychiatric Misadventures" in *The American Scholar*, **61**, 497-510, (1992).

# Exhibit 5

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**Subject:** FW: [EXT] Fwd: FW: attachments  
**Attachments:** j.1365-2265.2009.03625.x.pdf

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**From:** Paul McHugh  
**Sent:** Tuesday, February 13, 2018 12:34 PM  
**To:** 'Bushman, William CIV SD' <[William.Bushman@sd.mil](mailto:William.Bushman@sd.mil)>  
**Subject:** RE: attachments

Mr. Bushman I've attached a copy of the study you wanted. Also I realize that I sited Tom Wise in Fairfield. I of course meant Fairfax Virginia. Sorry Paul McHugh

---

**From:** Bushman, William CIV SD [<mailto:William.Bushman@sd.mil>]  
**Sent:** Monday, February 12, 2018 6:00 PM  
**To:** Paul McHugh <[pmchugh1@jhmi.edu](mailto:pmchugh1@jhmi.edu)>  
**Subject:** RE: attachments

Thank you, sir. This is most helpful.

One additional question: do you have access to a copy of the following study?

- Mohammad Hassan Murad et al., "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," *Clinical Endocrinology* 72 (2010): 214-231.

Thank you again for your help.

Best,  
Will

**William G. Bushman**

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

NIPR: [william.bushman@sd.mil](mailto:william.bushman@sd.mil)

SIPR: [william.bushman@sd.smil.mil](mailto:william.bushman@sd.smil.mil)

JWICS: [william.bushman@sd.ic.gov](mailto:william.bushman@sd.ic.gov)

---

**From:** Paul McHugh [<mailto:pmchugh1@jhmi.edu>]  
**Sent:** Monday, February 12, 2018 2:12 PM  
**To:** Bushman, William CIV SD <[William.Bushman@sd.mil](mailto:William.Bushman@sd.mil)>  
**Subject:** RE: attachments

Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins and Dr. Thomas Wise at Fairfield. PM

---

**From:** Bushman, William CIV SD [<mailto:William.Bushman@sd.mil>]  
**Sent:** Sunday, February 11, 2018 3:30 PM  
**To:** Paul McHugh <[pmchugh1@jhmi.edu](mailto:pmchugh1@jhmi.edu)>  
**Subject:** RE: attachments

Dr. McHugh,

Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?

Thanks,

Will Bushman

**William G. Bushman**

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

NIPR: [william.bushman@sd.mil](mailto:william.bushman@sd.mil)

SIPR: [william.bushman@sd.smil.mil](mailto:william.bushman@sd.smil.mil)

JWICS: [william.bushman@sd.ic.gov](mailto:william.bushman@sd.ic.gov)

---

**From:** Paul McHugh [<mailto:pmchugh1@jhmi.edu>]  
**Sent:** Monday, February 5, 2018 2:51 PM  
**To:** Bushman, William CIV SD <[William.Bushman@sd.mil](mailto:William.Bushman@sd.mil)>  
**Subject:** attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

# Exhibit 6

# KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Vanessa Barsanti  
To Call Writer Directly:  
+1 312 862 2205  
vanessa.barsanti@kirkland.com

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Chicago, IL 60654  
United States

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August 23, 2019

## By E-mail

Andrew E. Carmichael  
United States Department of Justice  
Civil Division, Federal Programs Branch  
(202) 514-4336

Re: Document Productions of Communications with Third Parties in *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Drew:

I write to request clarification regarding Defendants' document productions and interrogatory responses as they pertain to Defendants' communications with and documents containing two specific third parties. Plaintiffs recently received communications between the Department of Defense and third party Paul McHugh ("McHugh"). See MCHUGH00001 through MCHUGH00085. In one of those documents, on February 11, 2018, William Bushman of the Office of the Secretary of Defense ("Bushman") asks McHugh, "During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?" MCHUGH00085. On February 12, 2018, McHugh responds, "Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins [sic] and Dr. Thomas Wise at Fairfield." MCHUGH00084.

Plaintiffs have searched the documents produced by Defendants to date for communications with or documents containing reference to Chester Schmidt or Thomas Wise. However, Defendants do not appear to have produced any communications with or documents containing reference to either of these individuals. Plaintiffs have also searched the privilege logs produced by Defendants, but have been unable to locate any entries for communications or documents containing Chester Schmidt or Thomas Wise that have been withheld based on any claim for privilege. To the extent that Defendants did in fact communicate with Chester Schmidt or Thomas Wise, Plaintiffs believe that these communications would be responsive to a number of Plaintiffs' requests for production ("RFPs"). For example, RFP No. 29 requests:

All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by

KIRKLAND & ELLIS LLP

Andrew E. Carmichael  
August 23, 2019  
Page 2

Transgender Persons (the “Report and Recommendations”), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

Additionally, RFP No. 31 requests:

All Documents and Communications relating or referring to any person or group providing analysis, advice, or recommendations to Secretary Mattis, the Department of Defense, and/or the Panel of Experts concerning the Report and Recommendations, military service by transgender people or any restrictions on such service, including the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues.

Defendants agreed to produce documents responsive to these and other RFPs to which documents and communications with Chester Schmidt and Thomas Wise may be responsive. *See also* RFP Nos. 1, 8, 27, 28, 30, 32, 33.

Plaintiffs also believe that communications with Paul McHugh, Chester Schmidt, and Thomas Wise would be responsive to certain interrogatories. For example, Interrogatory No. 7 states:

Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

KIRKLAND & ELLIS LLP

Andrew E. Carmichael  
August 23, 2019  
Page 3

*See also* Interrogatory Nos. 18 & 19. Despite the responsiveness of these communications, none of the three individuals' names appear in Defendants' interrogatory responses.

Because Plaintiffs believe that Defendants' communications with or documents containing reference to Paul McHugh, Chester Schmidt, or Thomas Wise are responsive to Plaintiffs' RFPs and interrogatories, please amend your interrogatory responses accordingly and produce these responsive documents (including notes of telephone calls or voicemails) or, to the extent that they do not exist, please confirm that no such responsive documents exist, by August 30, 2019.

Sincerely,

/s/ Vanessa Barsanti

Vanessa Barsanti

# Exhibit 7



**U.S. Department of Justice**  
Civil Division, Federal Program Branch

Andrew E. Carmichael  
Trial Attorney

Tel: (202) 514-3346  
Email: andrew.e.carmichael@usdoj.gov

September 13, 2019

By Email

Vanessa Barsanti  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654

*Counsel for Plaintiffs*

Re: Documents Productions of Communications with Third Parties in *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash.)

Dear Vanessa,

In response to your letter of August 23, 2019, the Department of Defense (“DoD”) believes it has reasonably searched for and collected materials that would reflect possible outreach to, actual communications with, or conversations stemming from communication with Dr. Paul McHugh, Dr. Chester Schmidt or Dr. Thomas Wise in conjunction with DoD’s review of military service by transgender individuals and individuals with gender dysphoria.

In response to your letter DoD conducted a search in its Electronic Discovery database and identified the following documents in its collection that reference at least one of these individuals. That list is as follows:

**Documents DoD or the Military Services have previously released in full:**

USDOE00134724

USDOE00206512 - USDOE00206513

USDOE00207706

**Documents over which DoD or the Military Services have asserted deliberative process privilege:**

USDOE00134732

USDOE00206588

USDOE00206610

USDOE00206612

USDOE00206614

USDOE00206616

USDOE00206618

USDOE00206620

USDOE00206622

USDOE00206743

USDOE00207482 (with attorney client and/or work product privilege redactions)

USDOE00207525

USDOE00207527

USDOE00207591 (with attorney client and/or work product privilege redactions)

USDOE00238554 (with attorney client and/or work product privilege redactions)

USDOE00263483 (with attorney client and/or work product privilege redactions)

USDOE00263525 (with attorney client and/or work product privilege redactions)

Attorneys from the Department of Defense then reviewed these documents and spoke with the following custodians of the documents listed above to determine if they had any additional documents in their possession that reflected communications with any of these individuals:

Ryan Newman

Will Bushman

Colonel Mary Krueger, USA

One custodian, Mr. Newman, a DoD attorney, indicated that he had one additional document containing hand written notes from a phone call with Dr. McHugh on February 5, 2018. This document was collected and will be withheld pursuant to the attorney work product privilege. DoD will prepare a privilege log with additional details pertaining to this document. None of the other custodians DoD spoke with regarding your letter indicated that they had additional documents reflecting communications with these individuals. Further, DoD confirmed that Mr. Bushman never spoke with Dr. Chester Schmidt or Dr. Thomas Wise.

Attorneys from DoD also spoke with Dr. Terry Adirim (compiled and presented health related data to the Panel of Experts) and David Gruber (served as an advisor to the Carter Transgender Working Group) to confirm that neither Dr. Paul McHugh, Dr. Chester Schmidt or Dr. Thomas Wise presented to the Carter Transgender Working Group or the Panel of Experts.

At your request, DoD will no longer assert the deliberative process privilege over any of the documents listed above. However, where other privileges apply DoD will maintain its assertion of those privileges. The documents over which DoD is no longer asserting privilege will be included in a forthcoming production.

Sincerely,

/s/ Andrew E. Carmichael

Andrew E. Carmichael

**EXHIBIT 8**

**FILED UNDER SEAL**

**EXHIBIT 9**

**FILED UNDER SEAL**

# Exhibit 10

**From:** Barsanti, Vanessa  
**To:** [Carmichael, Andrew E. \(CIV\)](#)  
**Cc:** [Heinz, Jordan M.](#); [Siegfried, Daniel I.](#); [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org); [\\*tborelli@lambdalegal.org](mailto:*tborelli@lambdalegal.org); [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov); [Stallings-Ala'ilima, Chalia \(ATG\)](#); [Rosenberg, Michael E.](#); [Enlow, Courtney D. \(CIV\)](#); [Cheung, Ashley \(CIV\)](#); [Skurnik, Matthew \(CIV\)](#); [Powers, James R. \(CIV\)](#); [Norway, Robert M. \(CIV\)](#)  
**Subject:** RE: Karnoski v. Trump -- Discovery Letter  
**Date:** Friday, September 20, 2019 1:20:00 PM  
**Attachments:** [EAS](#)

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Drew,

Thank you for the information in response to my August 23, 2019 letter regarding communications with McHugh, Wise, and Schmidt. Will you please confirm when we should expect to receive the supplemental production of documents identified in your response? Additionally, in reviewing the produced documents identified in your response we do not appear to have a document for USDOE00238554. Please provide it in your supplemental production as well.

Regarding Ryan Newman's "hand written notes from a call with Dr. McHugh on February 5, 2018," please confirm whether the notes contain any factual information, which would not be subject to work product protection and should be produced. *See Am. Civil Liberties Union of N. California v. United States Dep't of Justice*, 880 F.3d 473, 485 (9th Cir. 2018).

Plaintiffs further request that the DoD produce all communications with third-parties Woody Woodruff and Greg Newbold that have been withheld. Those third-party communications cannot be withheld on the basis of the deliberative process privilege and no other privilege applies. Please confirm these communications will be produced no later than October 1, 2019.

Thank you,

**Vanessa Barsanti**

-----  
**KIRKLAND & ELLIS LLP**  
300 North LaSalle, Chicago, IL 60654  
**T** +1 312 862 2205  
**F** +1 312 862 2200  
-----

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

**From:** Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>  
**Sent:** Friday, September 13, 2019 5:08 PM  
**To:** Barsanti, Vanessa <vanessa.barsanti@kirkland.com>  
**Cc:** Heinz, Jordan M. <jheinz@kirkland.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; \*prenn@lambdalegal.org <prenn@lambdalegal.org>;

\*tborelli@lambdalegal.org <tborelli@lambdalegal.org>; \*colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Cheung, Ashley (CIV) <Ashley.Cheung@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Norway, Robert M. (CIV) <Robert.M.Norway@usdoj.gov>  
**Subject:** [EXT] RE: Karnoski v. Trump -- Discovery Letter

Vanessa,

Please see attached correspondence.

Best regards,

Drew

Drew Carmichael  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
Tel: (202) 514-3346

**From:** Carmichael, Andrew E. (CIV)  
**Sent:** Friday, September 06, 2019 1:30 PM  
**To:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Cc:** Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Siegfried, Daniel I. <[daniel.siegfried@kirkland.com](mailto:daniel.siegfried@kirkland.com)>; \*prenn@lambdalegal.org <[prenn@lambdalegal.org](mailto:prenn@lambdalegal.org)>; \*tborelli@lambdalegal.org <[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)>; \*colleen.melody@atg.wa.gov <[colleen.melody@atg.wa.gov](mailto:colleen.melody@atg.wa.gov)>; Stallings-Ala'ilima, Chalia (ATG) <[Chalia.SA@atg.wa.gov](mailto:Chalia.SA@atg.wa.gov)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>; Enlow, Courtney D. (CIV) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; Cheung, Ashley (CIV) <[ascheung@CIV.USDOJ.GOV](mailto:ascheung@CIV.USDOJ.GOV)>; Skurnik, Matthew (CIV) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; Powers, James R. (CIV) <[jpowers@CIV.USDOJ.GOV](mailto:jpowers@CIV.USDOJ.GOV)>; Norway, Robert M. (CIV) <[rnorway@CIV.USDOJ.GOV](mailto:rnorway@CIV.USDOJ.GOV)>  
**Subject:** RE: Karnoski v. Trump -- Discovery Letter

Vanessa,

DoD reached out to Mr. Bushman and he confirmed that he did not speak with Chester Schmidt or Thomas Wise.

DoD is still checking to ensure that it reasonably searched for and collected materials that would reflect communications with these individuals or references to these individuals in conjunction with DoD's review of military service by transgender individuals and individuals with gender dysphoria.

I plan to follow up with more next week and should be able to point you to some specific documents in the production.

Best regards,

Drew

Drew Carmichael  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
Tel: (202) 514-3346

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**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Sent:** Friday, September 06, 2019 1:16 PM  
**To:** Carmichael, Andrew E. (CIV) <[ancarmic@CIV.USDOJ.GOV](mailto:ancarmic@CIV.USDOJ.GOV)>  
**Cc:** Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Siegfried, Daniel I. <[daniel.siegfried@kirkland.com](mailto:daniel.siegfried@kirkland.com)>; \*prenn@lambdalegal.org <[prenn@lambdalegal.org](mailto:prenn@lambdalegal.org)>; \*tborelli@lambdalegal.org <[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)>; \*colleen.melody@atg.wa.gov <[colleen.melody@atg.wa.gov](mailto:colleen.melody@atg.wa.gov)>; Stallings-Ala'ilima, Chalia (ATG) <[Chalia.SA@atg.wa.gov](mailto:Chalia.SA@atg.wa.gov)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>; Enlow, Courtney D. (CIV) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; Cheung, Ashley (CIV) <[ascheung@CIV.USDOJ.GOV](mailto:ascheung@CIV.USDOJ.GOV)>; Skurnik, Matthew (CIV) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; Powers, James R. (CIV) <[jpowers@CIV.USDOJ.GOV](mailto:jpowers@CIV.USDOJ.GOV)>  
**Subject:** RE: Karnoski v. Trump -- Discovery Letter

Drew,

Following up on this. Could you please provide me an update?

**Vanessa Barsanti**

---

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---

[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

**From:** Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>  
**Sent:** Friday, August 30, 2019 8:21 AM  
**To:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Cc:** Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Siegfried, Daniel I. <[daniel.siegfried@kirkland.com](mailto:daniel.siegfried@kirkland.com)>; [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org) <[prenn@lambdalegal.org](mailto:prenn@lambdalegal.org)>; [\\*tborelli@lambdalegal.org](mailto:*tborelli@lambdalegal.org) <[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)>; [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov) <[colleen.melody@atg.wa.gov](mailto:colleen.melody@atg.wa.gov)>; Stallings-Ala'ilima, Chalia (ATG) <[Chalia.SA@atg.wa.gov](mailto:Chalia.SA@atg.wa.gov)>; Rosenberg, Michael E. <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>; Enlow, Courtney D. (CIV) <[Courtney.D.Enlow@usdoj.gov](mailto:Courtney.D.Enlow@usdoj.gov)>; Cheung, Ashley (CIV) <[Ashley.Cheung@usdoj.gov](mailto:Ashley.Cheung@usdoj.gov)>; Skurnik, Matthew (CIV) <[Matthew.Skurnik@usdoj.gov](mailto:Matthew.Skurnik@usdoj.gov)>; Powers, James R. (CIV) <[James.R.Powers@usdoj.gov](mailto:James.R.Powers@usdoj.gov)>  
**Subject:** [EXT] RE: Karnoski v. Trump -- Discovery Letter

Hi Vanessa,

We are tracking your request but there are some DoD folks out of the office this week that we need to ask about this and I can't give you an answer until they return.

We should be able to answer your letter by the end of next week.

Best regards,

Drew

Drew Carmichael  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
Tel: (202) 514-3346

**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Sent:** Friday, August 23, 2019 8:24 PM  
**To:** Carmichael, Andrew E. (CIV) <

Attachments:

image001.jpg (2099 Bytes)

# Exhibit 11

**From:** Carmichael, Andrew E. (CIV)  
**To:** [Heinz, Jordan M.](#); [Barsanti, Vanessa](#)  
**Cc:** [Siegfried, Daniel I.](#); [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org); [\\*borelli@lambdalegal.org](mailto:*borelli@lambdalegal.org); [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov); [Stallings-Ala'ilima, Chalia \(ATG\)](#); [Enlow, Courtney D. \(CIV\)](#); [Cheung, Ashley \(CIV\)](#); [Skurnik, Matthew \(CIV\)](#); [Powers, James R. \(CIV\)](#); [Norway, Robert M. \(CIV\)](#)  
**Subject:** [EXT] RE: Karnoski, et al. v. Trump, et al.  
**Date:** Friday, October 18, 2019 1:26:36 PM  
**Attachments:** [EAS](#)

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Jordan,

Thank you for your response. We can meet and confer next Wednesday regarding the issues you have raised in your September 20, 2019 email (attached). I suspect that meet and confer will be fairly straightforward as we have already produced the DoD communications with McHugh, Wise, and Schmidt. I also believe we have already released the communications with LtGen (ret.) Newbold. I anticipate that we will be agreeing to release the DoD communications with Woody Woodruff. I believe we will continue to withhold the handwritten notes from Mr. Newman in full. We anticipate being able to give you our definitive position on all of these issues on that call.

Additionally, the Military Services have been actively working on summaries of their productions in response to your first September 27, 2019 letter and we are on track to provide that to you by the end of next week. I suggest that you review that additional information and we meet and confer the following week to discuss if you have any additional issues.

This timeline is reasonable considering that we will be able to meet and confer regarding the issues you raised in your September 20, 2019 email within your proposed timeline, will answer the questions you raised in your first September 27, 2019 letter by the end of next week with detailed description regarding the searches and productions of the Military Services, have already provided such detailed descriptions from DoD, and we will agree to meet and confer on the issues you raised in that letter the following week after you have had time to reviewed the additional information we have provided you.

I also note that Plaintiffs could have raised the majority of the issues in their September 27, 2019 letters for well over a year ago. And at the urging of the Plaintiffs the Court previously denied Defendants' 56(d) motion on February 22, 2018, based on Defendants' lack of diligence in pursuing discovery because the case had at that time "been pending for nearly six months." *See* ECF 189 at 4; ECF 185 at 6. Given Plaintiffs' substantial delay in raising these issues, and given that Defendants can meet and confer next week on the issues you raised in your September 20, 2019 email and expect to provide you detailed responses regarding your ten-page single-spaced September 27, 2019 discovery letter by the end of next week, Defendants certainly believe our proposed timeline in response is reasonable.

Best regards,

Drew

Drew Carmichael  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
Tel: (202) 514-3346

**From:** Heinz, Jordan M. <jheinz@kirkland.com>  
**Sent:** Thursday, October 17, 2019 8:52 PM  
**To:** Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Barsanti, Vanessa <vanessa.barsanti@kirkland.com>  
**Cc:** Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; \*prenn@lambdalegal.org <prenn@lambdalegal.org>; \*tborelli@lambdalegal.org <tborelli@lambdalegal.org>; \*colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Cheung, Ashley (CIV) <ascheung@CIV.USDOJ.GOV>; Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Norway, Robert M. (CIV) <rnorway@CIV.USDOJ.GOV>  
**Subject:** RE: Karnoski, et al. v. Trump, et al.

Drew -

Thank you for your email.

We cannot agree to a further delay in meeting and conferring.

To review, Plaintiffs first raised these issues in a September 20 email and formal letters on September 27 and October 3 and 7. Plaintiffs requested to meet and confer promptly. We are now nearly a month past our first request for conference and, more importantly, we are only four months shy of the discovery cutoff in this case. Under these circumstances, further delay is unacceptable.

Plaintiffs respectfully request the Government meet and confer with us to try to resolve these issues on or before Wednesday, October 23 at 12PM PT. While we would prefer to address all the issues raised in our correspondence at the same meet and confer, in the spirit of compromise, we will agree to limit next week's meet and confer to the issues raised in the September 20 email and the September 27 letters, and the parties can meet and confer on the remaining issues the following week. If the Government refuses to make itself available to meet and confer early next week, Plaintiffs reserve the right to seek relief from the Court. Of course, Plaintiffs would prefer to try to resolve this without imposing the burden of motions practice on the Court or counsel. For that reason, Plaintiffs respectfully urge the Government to satisfy its duty under LCR 37(a) to meet and confer in a timely fashion on issues that

Plaintiffs first raised four weeks ago.

We look forward to speaking with you early next week and working with the Government to resolve these issues.

Regards,

Jordan

**Jordan M. Heinz**

-----  
**KIRKLAND & ELLIS LLP**

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-----

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**From:** Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>

**Sent:** Tuesday, October 15, 2019 12:21 PM

**To:** Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>

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**Subject:** [EXT] RE: Karnoski, et al. v. Trump, et al.

Jordan,

We are currently working to provide more information on the document production from the Military Services which we believe would resolve many of the discovery issues you raised in your first letter. Mr. Easton's declaration primarily covered DoD but the Military Services conducted their own searches and productions. However, along with our response to your first letter, we are currently working on deadlines in the related cases and I have a hearing on the West Coast in another case on Thursday. Therefore, we are unable to meet and confer this week. But, we should be able to meet and confer on some of these issues towards the end of next week. Again if you would like us to prioritize any particular issue we can do that.

One of the deadlines we are working on is identifying deliberative documents that would be

responsive to the Court's recent order in *Doe v. Esper* (see attached). We have a JSR due in that case October 25, 2019. Resolution of that issue (provided there is no appeal) may also benefit Plaintiffs and might help the Court determine Plaintiffs' pending discovery motion.

Best regards,

Drew

Drew Carmichael  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
Tel: (202) 514-3346

**From:** Heinz, Jordan M. <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>  
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**Subject:** RE: Karnoski, et al. v. Trump, et al.

Drew -

Plaintiffs sent two letters two weeks ago, on September 27. Defendants should have reviewed those two letters long before now and responded with their positions. Plaintiffs cannot be waiting 3-4 weeks to receive an initial response from the government regarding discovery disputes. Accordingly, please either respond to those two letters by Tuesday, October 15, or provide your availability to meet and confer that day on those issues. In addition, please respond to

Attachments:

RE: Karnoski v. Trump -- Discovery Letter (78127 Bytes)

# Exhibit 12

## KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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October 7, 2019

### By E-mail

Andrew E. Carmichael  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, NW, Rm. 7218  
Washington, D.C. 20530

Re: Document Productions of Communications with Third Parties in *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Drew:

I write to request clarification regarding the Department of Defense's ("DoD") document productions as they pertain to the DoD's communications with and documents shared with several third parties and withheld for deliberative process privilege and/or attorney-client privilege. No such privileges apply to the identified communications with third parties.

As the Court in *In re Subpoena of Center for Military Readiness* recently found when applying the Ninth Circuit's discussion of the deliberative process privilege in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), the deliberative process privilege does not apply to DoD's communications with third parties. *See In re Subpoena of Ctr. for Military Readiness*, No. MC 18-51013, 2019 WL 4733602, at \*9 (E.D. Mich. Sept. 28, 2019) (holding that the magistrate judge "correctly concluded the deliberative process privilege does not apply here"); *see also In re Subpoena of Ctr. for Military Readiness*, No. MC 18-51013, 2018 WL 6722247, at \*10 (E.D. Mich. Nov. 6, 2018) ("Since [the Center for Military Readiness] is a private organization, documents reflecting communication between it and the government do not enjoy an executive or deliberative process privilege."). The parties have briefed this issue extensively in relation to their third-party subpoena disputes relating to the Center for Military Readiness and Dr. Paul McHugh. Plaintiffs refer the DoD to their briefing for further case law.

Many entries in the privilege log show that documents are being withheld where the domain name information indicates that the email addresses belong to third parties. For example, there are domain names that belong to private universities, hospitals, corporations, etc. Specific examples of such entries are included below:

## KIRKLAND & ELLIS LLP

Andrew E. Carmichael  
October 7, 2019  
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- “Allison, Graham' <Graham\_Allison@hks.harvard.edu>”
- “Cassandra Fraga (cfraga1@humana.com)” and six other entries including the domain name “humana.com”
- “Chris Karr <Chris.Karr@riinternational.com>”
- “christian.puff@christushealth.org”
- “Clayton Chau <Clayton.Chau@stjoe.org>”
- “kmkerr@AD.UCSD.EDU”
- “Montori, Victor M., M.D. <Montori.Victor@mayo.edu>” and one other entry including the domain name “mayo.edu”
- “Richter, Michael P <Michael.Richter@skadden.com>”

Similarly, approximately 70 privilege log entries contain popular, public email domains. For example, such entries include “Monika Juska <monikajuska@gmail.com>,” “Dave Gruber <dgruber10@hotmail.com>,” and “Ryan McCarthy <ryn\_mccarthy@yahoo.com>.” The presence of such public email domain names suggests that the addresses belong to third parties.

Lastly, several entries in the privilege log name individuals who are clearly third parties. Plaintiffs do not believe these persons were employed by a federal agency at the time of the communications. For example, the privilege log names “Robert S. Taylor.” Mr. Taylor stepped down from his position as DoD’s Principal Deputy General Counsel in January 2017 and serves as the General Counsel of MCE Social Capital. Similarly, the entry for “Melanie Bukhari” likely represents communications with Dr. Melanie Bukhari, who is an obstetrician-gynecologist at Johns Hopkins Community Physicians East Baltimore Medical Center. In addition, the entry for “Morgan Haight” likely represents communications with Ms. Morgan Haight, who is a senior researcher for the Fors Marsh Group.

We have flagged such entries in the privilege log that appear to represent communications with third parties, and have consolidated those entries in Exhibit A, attached hereto. The DoD’s communications with these third parties are not protected by the deliberative process privilege or any other privilege and must be produced. Please produce these documents by October 15, 2019. To the extent the DoD refuses to produce such documents, please identify your ability to meet and confer.

KIRKLAND & ELLIS LLP

Andrew E. Carmichael  
October 7, 2019  
Page 3

Sincerely,

/s/ Vanessa Barsanti

Vanessa Barsanti

# Exhibit A

- on behalf of - Duffy M <rmujaahida@yahoo.com>
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# Exhibit 13

**From:** Carmichael, Andrew E. (CIV)  
**To:** [Barsanti, Vanessa](#); [Heinz, Jordan M.](#)  
**Cc:** [Siegfried, Daniel I.](#); [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org); [\\*tborelli@lambdalegal.org](mailto:*tborelli@lambdalegal.org); [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov); [Stallings-Ala'ilima, Chalia \(ATG\)](#); [Enlow, Courtney D. \(CIV\)](#); [Skurnik, Matthew \(CIV\)](#); [Powers, James R. \(CIV\)](#); [Norway, Robert M. \(CIV\)](#); [\\*Rachel@newmanlaw.com](mailto:*Rachel@newmanlaw.com); [\\*jason@newmanlaw.com](mailto:*jason@newmanlaw.com); [Rosenberg, Michael E.](#); [Schroeder, Joseph C.](#)  
**Subject:** [EXT] RE: Karnoski, et al. v. Trump, et al.  
**Date:** Monday, November 4, 2019 1:48:45 PM  
**Attachments:** [EAS](#)

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Vanessa,

Thank you for putting this summary together. I have included comments under each bullet point below. Also, please see the attached correspondence.

Best regards,

Drew

Drew Carmichael  
Trial Attorney | United States Department of Justice  
Civil Division | Federal Programs Branch  
Tel: (202) 514-3346

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**Sent:** Thursday, October 31, 2019 6:42 PM  
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**Subject:** RE: Karnoski, et al. v. Trump, et al.

Drew,

Thank you for this email and for speaking with us on Tuesday. I've summarized below our understanding of the parties' positions on the discovery disputes and issues that we discussed during Tuesday's call. If you believe the summary contains any material errors or omissions, or if the government wishes to discuss any of these issues further, please let us know as soon as possible.

1. The Department of Defense agrees to release all previously withheld communications with William Woodruff and expects to produce them by Friday, Nov. 1;

Yes. They were included in Friday's production.

2. Your client agrees to provide a complete list of the custodians whose documents it searched in connection with Plaintiffs' Requests For Production; the list will include the following information for each custodian:

- a. Custodian Name
- b. Title
- c. Department
- d. Terms Searched by Custodian
- e. Date Range Searched by Term Searched

I have asked the Military Services and the Coast Guard to provide additional information on these topics. I expect there to be some exceptions as there are several minor custodians that may not be included because they have very little if any relevance to the present litigation. For example, there was a collection at the Naval Academy based on the allegations in the related *Doe* litigation and information from that collection is not relevant to any issue in *Karnoski*

3. You will confirm whether you have collected documents from all custodians listed in categories (1) and (2) on page 2 of my September 27, 2019 letter. That is each member of the Panel of Experts and each leader(s), chair(s), or person(s) in charge of each working group that provided support to the PoE.

Yes. DoD and the Military Services are working on this now.

4. You confirmed that you have not collected from all individuals listed in categories (3) and (4) on page 2 of my September 27, 2019 letter, which are the authors/reviewers of the February 2018 Memorandum and the Report and Recommendations.

I confirmed that there was not a collection from Department of Justice attorneys (such as myself). As to DoD and the Military Services, we are not answering this question based on the same privilege objections we have asserted in Interrogatories 16-19. Therefore, I suggest that we postpone further discussions on this issue until after the Court rules on Plaintiffs' pending motion as the Court's ruling may resolve the issue.

5. With regards to each of the RFPs identified in my September 27 letter on pages 4-5 under the header "Records Requiring Targeted Collections" (RFP Nos. 11, 12, 16-17, 26, 36, and 47-54), you indicated that you will provide information regarding whether your client has searched for these records;

We will provide additional information regarding DoD's and the Military Services' search and collection of documents responsive to (RFP Nos. 11, 12, 16-17, 26, 36, and 47-54).

6. **Beyond what's stated above, your client will not perform any additional collections or searches to identify documents responsive to Plaintiffs' document requests. Your client will not make searches across all custodians consistent with respect to search terms and date ranges, and it will not run any of the additional search terms requested by Plaintiffs;**

That is correct. DoD and the Military Services believe that their collection, searches and production of materials in this and the related litigation already go well beyond what the case law and the Federal Rules require and except where noted in my October 30, 2019 email (below) will not agree to conduct additional collections or searches. We note that the original search and collection process in this case took approximately 8 months and was extremely costly in time, money and manpower resources. The additional collections and searches you propose (nearly a year after the original search and collection process concluded) would likely take months to complete, would cost a significant amount of additional resources, and would likely provide no additional relevant information.

7. **With respect to Plaintiffs' October 7 letter re: production of third-party communications, your client agrees to identify the individuals it believes are not third parties and divide Plaintiffs' list into those that are third parties and those that are not. You intend to share these lists with Plaintiffs and inform Plaintiffs whether Defendants will waive their claims of privilege over communications with third parties. Please provide this information by November 8;**

Please see attached correspondence regarding Plaintiffs' October 7, 2019 letter.

8. **You agreed to review the specific examples of non-responsive slipsheets provided in Plaintiffs' September 27 letter, but your client will not conduct a broader review to ensure all responsive documents have been produced. Please provide the results of your review by November 8;**

DoD and the Military Services will review the specific examples of non-responsive slipsheets provided in Plaintiffs' September 27 letter. DoD and the Military Services previously reviewed all documents in their collection for responsiveness as detailed in the Declaration of Robert Easton, *see* Dkt. 371-2, Dkt. 381-1, and the draft declarations from the Military Services I provided to you on Monday, October 28, 2019. DoD and the Military Services will not conduct a re-review of all documents it previously determined were non-responsive as that process would be extremely burdensome—likely taking several months to complete—and would likely provide no additional relevant information to Plaintiffs. If DoD and the Military Services release additional documents pursuant to its review of the specific examples you have provided, I expect them to be in the November 22, 2019 production.

9. **The parties have agreed that neither side will move to compel or move for a**

protective order regarding Interrogatory Nos. 16-19 until after the Court rules on Plaintiffs' pending motion regarding the deliberative process privilege. With respect to Defendants' responses to the other interrogatories at issue in Jordan Heinz's September 27 letter, your client stands on their objections and does not plan to amend its responses to Plaintiffs' interrogatories.

That is correct. Also please see bullet 4 above.

10. Your client will not consent to use the expedited procedure set forth in Local Rule 37(a)(2) to resolve the parties' remaining disputes.

That is correct.

Thank you,

**Vanessa Barsanti**

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**From:** Carmichael, Andrew E. (CIV) <[Andrew.E.Carmichael@usdoj.gov](mailto:Andrew.E.Carmichael@usdoj.gov)>

**Sent:** Wednesday, October 30, 2019 1:24 PM

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**Subject:** [EXT] RE: Karnoski, et al. v. Trump, et al.

Jordan and Vanessa,

Thank you for the call yesterday. As discussed, I will get additional information from the Military Services regarding the custodians in an effort to answer many of the specific questions you pose on pages 1 and 2 of your September 27, 2019 letter.

Finally, please see below a series of requests by the Plaintiffs in the related *Doe* litigation. We have agreed to search for and produce documents respons

Attachments:

Karnoski v. Trump - Letter in Response to Oct 7 Letter 11.4.19.pdf (213711 Bytes)



**U.S. Department of Justice**  
Civil Division, Federal Program Branch

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November 4, 2019

By Email

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*Counsel for Plaintiffs*

Re: Your Letter of October 7, 2019 in *Karnoski v. Trump*, No. 17-1297

Dear Vanessa,

I write in response to your letter of October 7, 2019, which purports to challenge DoD's withholding of "communications with and documents shared with several third parties" under the deliberative process or attorney-client privileges. Your letter notes 14 individuals and also incorporates an Exhibit A, which contains hundreds of names and email addresses. Your letter does not refer to any specific privilege log entries nor does it contain any details about particular documents to which you object to Defendants' invocation of privilege. For the reasons set forth below, Defendants will not undertake an unduly burdensome review of the entries identified in Exhibit A.

To begin, Plaintiffs appear to have made no serious effort to narrow this dispute before transmitting their letter. Exhibit A purports to contain entries from the privilege log "that appear to represent communications with third parties" but even a cursory review by undersigned counsel indicates that this is not true as to numerous entries. For example, Exhibit A contains references to no less than: the current and most recent former Secretaries of Defense ("Esper, Mark T." and "Jim Mattis jim Mattis@jimmattis.com"), two DOJ counsel of record in this case ("Brinton Lucas" and "Ryan Parker"), and numerous attendees at meetings of the Panel of Experts, all of whom have been previously identified in Defendants' discovery responses. Defendants need not undertake a burdensome review of the hundreds of entries in Exhibit A where Plaintiffs appear not to have made even a passing effort to consult, for example, Defendants' responses to Plaintiffs' interrogatories to determine whether the individuals they have supposed are third parties are, in fact, employees or officials of the Department of Defense or Military Services.

Even if Defendants undertook this review, it is unclear what doing so would accomplish where Plaintiffs have provided no information about the particular privilege log entries they challenge. A one-size-fits-all analysis with respect to the deliberative process privilege and third party communications is not possible. Instead, for example, information generated by third parties may be protected by the privilege where it is solicited by the agency as part of its deliberative process. *See, e.g., Public Citizen, Inc. v. Dep't of Justice*, 111 F.3d 168, 171 (D.C. Cir. 1997) (“If it is to effectively deliberate, an agency may need or want to enlist the help of outside experts skilled at unravelling the knotty complexities of problems outside their ken.” (citation and alterations omitted)); *Ryan v. Dep't of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980) (“Such consultations [with outside consultants] are an integral part of [an agency’s] deliberative process . . . .”); *National Institute of Military Justice v. Department of Defense*, 512 F.3d 677, 681 (D.C. Cir. 2008). Even if Defendants were to confirm that particular entries in Exhibit A correspond to third parties that would be of little consequence without Plaintiffs pointing to specific privilege log entries to provide Defendants a basis to determine the context for the assertion of privilege. Additionally, as to persons that were previously employed by DoD, the date of the document is essential, as it would determine whether the individual was part of the agency at the time the privileged document was transmitted.

Nonetheless, as to the 14 individuals identified in your letter itself, Defendants will investigate further and provide additional information about their identities, which may be of use in determining whether you intend to dispute any particular privilege assertions by Defendants. I note that at least one of the individuals identified in your letter, Dave Gruber, is an employee of the Department of Defense, identified as such in Defendants’ interrogatory responses.

We will be in touch as soon as practicable with additional information about the 13 other individuals identified in your letter.

Sincerely,

/s/

Andrew E. Carmichael

# Exhibit 14

**From:** Powers, James R. (CIV)  
**To:** [Barsanti, Vanessa](#); [Carmichael, Andrew E. \(CIV\)](#)  
**Cc:** [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org); [\\*tborelli@lambdalegal.org](mailto:*tborelli@lambdalegal.org); [\\*Rachel@newmanlaw.com](mailto:*Rachel@newmanlaw.com); [\\*jason@newmanlaw.com](mailto:*jason@newmanlaw.com); [Siegfried, Daniel I.](#); [Stallings-Ala'ilima, Chalia \(ATG\)](#); [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov); [Enlow, Courtney D. \(CIV\)](#); [Gerardi, Michael J. \(CIV\)](#); [Heinz, Jordan M.](#); [Skurnik, Matthew \(CIV\)](#); [Mathew, Josh](#); [Rosenberg, Michael E.](#)  
**Subject:** [EXT] RE: Karnoski - Third Parties on Privilege Log  
**Date:** Thursday, December 19, 2019 9:42:18 AM

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Vanessa – Defendants will review the entries in Exhibit A to your letter. We anticipate providing additional identifying information by January 17.

Thanks,  
Jim

**From:** Barsanti, Vanessa <[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)>  
**Sent:** Friday, December 13, 2019 12:37 PM  
**To:** Carmichael, Andrew E. (CIV) <[ancarmic@CIV.USDOJ.GOV](mailto:ancarmic@CIV.USDOJ.GOV)>  
**Cc:** [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org) <[prenn@lambdalegal.org](mailto:prenn@lambdalegal.org)>; [\\*tborelli@lambdalegal.org](mailto:*tborelli@lambdalegal.org) <[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)>; [\\*Rachel@newmanlaw.com](mailto:*Rachel@newmanlaw.com) <[Rachel@newmanlaw.com](mailto:Rachel@newmanlaw.com)>; [\\*jason@newmanlaw.com](mailto:*jason@newmanlaw.com) <[jason@newmanlaw.com](mailto:jason@newmanlaw.com)>; [Siegfried, Daniel I.](#) <[daniel.siegfried@kirkland.com](mailto:daniel.siegfried@kirkland.com)>; [Stallings-Ala'ilima, Chalia \(ATG\)](#) <[Chalia.SA@atg.wa.gov](mailto:Chalia.SA@atg.wa.gov)>; [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov) <[colleen.melody@atg.wa.gov](mailto:colleen.melody@atg.wa.gov)>; [Enlow, Courtney D. \(CIV\)](#) <[cenlow@CIV.USDOJ.GOV](mailto:cenlow@CIV.USDOJ.GOV)>; [Gerardi, Michael J. \(CIV\)](#) <[mgerardi@CIV.USDOJ.GOV](mailto:mgerardi@CIV.USDOJ.GOV)>; [Powers, James R. \(CIV\)](#) <[jpowers@CIV.USDOJ.GOV](mailto:jpowers@CIV.USDOJ.GOV)>; [Heinz, Jordan M.](#) <[jheinz@kirkland.com](mailto:jheinz@kirkland.com)>; [Skurnik, Matthew \(CIV\)](#) <[maskurni@CIV.USDOJ.GOV](mailto:maskurni@CIV.USDOJ.GOV)>; [Mathew, Josh](#) <[josh.mathew@kirkland.com](mailto:josh.mathew@kirkland.com)>; [Rosenberg, Michael E.](#) <[michael.rosenberg@kirkland.com](mailto:michael.rosenberg@kirkland.com)>  
**Subject:** Karnoski - Third Parties on Privilege Log

Drew,

Please see the attached correspondence.

#### Vanessa Barsanti

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**KIRKLAND & ELLIS LLP**  
300 North LaSalle, Chicago, IL 60654  
T +1 312 862 2205  
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[vanessa.barsanti@kirkland.com](mailto:vanessa.barsanti@kirkland.com)

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# Exhibit 15

**From:** [Powers, James R. \(CIV\)](#)  
**To:** [Barsanti, Vanessa](#); [Heinz, Jordan M.](#); [\\*prenn@lambdalegal.org](mailto:*prenn@lambdalegal.org); [\\*tborelli@lambdalegal.org](mailto:*tborelli@lambdalegal.org); [\\*Rachel@newmanlaw.com](mailto:*Rachel@newmanlaw.com); [\\*jason@newmanlaw.com](mailto:*jason@newmanlaw.com); [Siegfried, Daniel L.](#); [Stallings-Ala'ilima, Chalia \(ATG\)](#); [\\*colleen.melody@atg.wa.gov](mailto:*colleen.melody@atg.wa.gov); [Ikard, Sam](#)  
**Cc:** [Carmichael, Andrew E. \(CIV\)](#); [Enlow, Courtney D. \(CIV\)](#); [Skurnik, Matthew \(CIV\)](#); [Gerardi, Michael J. \(CIV\)](#)  
**Subject:** [EXT] Karnoski - discovery issues  
**Date:** Friday, January 17, 2020 10:23:41 AM  
**Attachments:** [Exhibit A - Responsive Communications \(65449446 2\) w R and msg removed - 50 Random w comments from DoD and Services.XLSX](#)  
[Karnoski v. Trump - Letter in Response to December 13 Letter.pdf](#)

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Vanessa,

I write to follow up on a couple of discovery issues ongoing between the parties. First, I have attached correspondence in response to your December 13 letter regarding purported third parties on Defendants' privilege logs. Second, I have attached comments from Defendants concerning the 50 documents marked non-responsive that Plaintiffs randomly selected.

Thanks,

Jim

**James R. Powers**

Trial Attorney

Federal Programs Branch

U.S. Department of Justice, Civil Division

(202) 353-0543 (direct) | [james.r.powers@usdoj.gov](mailto:james.r.powers@usdoj.gov)



**U.S. Department of Justice**  
Civil Division, Federal Program Branch

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James R. Powers  
Trial Attorney

Tel: (202) 353-0543  
Email: James.R.Powers@usdoj.gov

January 17, 2020

By Email

Vanessa Barsanti  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654

*Counsel for Plaintiffs*

Re: Your Letter of December 13, 2019 in *Karnoski v. Trump*, No. 17-1297

Dear Vanessa,

I write in response to your letter of December 13, 2019, which purports to challenge DoD's withholding of "communications with third parties" under the deliberative process or attorney-client privileges. Your letter does not refer to any specific privilege log entries nor does it contain any details about particular documents to which you object to Defendants' invocation of privilege. Defendants have reviewed Exhibit A attached to your letter and determined that it does not raise any basis to provide further information at this time in light of Plaintiffs' continued lack of effort to narrow this dispute.

Your December 13 letter follows a similar letter sent October 7, 2019, which also attached an Exhibit A. That document contained approximately 800 entries purportedly "appear[ing] to represent communications with third parties." To the contrary, Exhibit A contained references to, for example, the current and most recent former Secretaries of Defense, two DOJ counsel of record in this case, and numerous attendees at meetings of the Panel of Experts, all of whom have been previously identified in Defendants' discovery responses. As we discussed in our November 4, 2019, letter in response, Defendants had no obligation to undertake a burdensome review of the hundreds of entries in Exhibit A where Plaintiffs made no serious effort to minimize the dispute by consulting, for example, Defendants' responses to Plaintiffs' interrogatories to determine whether the individuals they supposed are third parties are, in fact, employees or officials of the Department of Defense or Military Services.

Exhibit A attached to your December 13 letter does little to resolve this fundamental flaw. After numerous hours spent reviewing the entries contained in the approximately 500-line

spreadsheet, we have noted that it is littered with problematic entries, including the following issues:

- At least two references to Plaintiff Lindsey Muller, who you are well aware is a member of the Armed Forces.
- References to numerous senior executive officials, including former Deputy Secretary of Defense Robert Work, former Secretary of Homeland Security and DoD General Counsel Jeh Johnson, retired Army General Carter F. Ham, and DoD Deputy General Counsel Ryan Newman.
- Entries corresponding to numerous employees of the federal government whose email addresses indicate that fact.
- Numerous references to DoD contractors, such as the principal author of the RAND report, Agnes Schaefer.
- Numerous entries where we have been unable to identify any communication in the collection to which the individual named was sender or recipient, raising questions about the methodology employed by Plaintiffs in preparing Exhibit A. It is also unclear whether Plaintiffs have updated this list based on the hundreds of deliberative documents Defendants recently released in the *Doe* litigation.

All of these problems indicate that Plaintiffs have ignored their obligation to minimize the parties' discovery dispute. As stated in our prior letter of November 4, the only reasonable approach to this dispute is a discussion of particular privilege log entries corresponding to documents Plaintiffs believe have been improperly withheld because of the involvement of outside third parties. This approach is likely to substantially reduce the burdens of this dispute. For example, at least 18 of the entries in Exhibit A appear to correspond to USDOE00255328, an email addressed to members of the U.S. Department of Health and Human Services Interdepartmental Serious Mental Illness Coordinating Committee. Defendants are happy to discuss the applicability of privilege as to any particular document, such as USDOE00255328; they will not engage with a list of hundreds of names served without any context.

Based on our work reviewing Exhibit A, however, Defendants have determined they will withdraw their assertion of deliberative process privilege as to any communications to which the following individuals were a party, and will provide a supplemental production accordingly:

- Anna Pohl
- Lolita Baldor
- Michael P. Richter
- Elizabeth Kocienda
- Dan Lamothe
- Amy Wilson
- Mary Wilfert

- Chris Geidner

I look forward to hearing from you further on this matter.

Sincerely,

/s/

James R. Powers

**EXHIBIT 16**

**FILED UNDER SEAL**

**EXHIBIT 17**

**FILED UNDER SEAL**