

No. 20-70365

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re DONALD J. TRUMP, *et al.*,
Petitioners,

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS
CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS;
PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN;
AMERICAN MILITARY PARTNER ASSOCIATION;

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

**THE DISTRICT COURT’S REQUESTED RESPONSE TO THE PETITION FOR A
WRIT OF MANDAMUS**

1 **INTRODUCTION**

2 At the invitation of the Court of Appeals, the Court takes this opportunity to respond to
3 the Defendants’ Petition for a Writ of Mandamus. Having reviewed the Petition, the Motion for
4 a Stay, Plaintiffs’ Answer to the Petition, and Plaintiffs’ Response to the Motion for a Stay, the
5 Court finds it can best add to the record by describing the discovery review process the Court has
6 conducted since this matter was remanded in June 2019. The Court will therefore address the
7 discovery dispute on remand, the various processes considered by the Parties and the Court for
8 reviewing Defendants’ privilege assertions, the review process undertaken thus far, ongoing
9 issues with the Parties’ positions, and will conclude with a request for guidance from the Circuit.
10 The Court will not address the substance of the Parties’ arguments except as necessary to
11 describe the status of the Parties’ dispute.

12 **BACKGROUND**

13 **A. Relevant Facts**

14 On July 27, 2018, this Court granted Plaintiffs’ previous Motion to Compel Discovery
15 Withheld Under the Deliberative Process Privilege. (Dkt. Nos. 245, 299.) In reaching its
16 conclusion, the Court found that Plaintiffs’ interest in the documents prevailed under the
17 balancing test set forth in FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984),
18 which weighs: “(1) the relevance of the evidence; (2) the availability of other evidence; (3) the
19 government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and
20 independent discussion regarding contemplated policies and decisions.” (Dkt. No. 299 at 6.)

21 On June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court’s
22 discovery Order. Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019). The Circuit approved of
23 the Court’s reliance on Warner and found that the second and third Warner factors—the
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1 availability of other evidence and the government’s role in the litigation—favor Plaintiffs. Id. at
2 1206. Regarding the first and fourth Warner factors, however, the Circuit concluded that “the
3 current record is insufficient to establish relevance” and the fourth factor in particular “deserves
4 careful consideration, because the military’s interest in full and frank communication about
5 policymaking raises serious—although not insurmountable—national defense interests.” Id.
6 The Circuit suggested that on remand this Court should “consider classes of documents
7 separately when appropriate” and, “[i]f Defendants persuasively argue that a more granular
8 analysis would be proper, [the Court] should undertake it.” Id.

9 Following the Circuit’s decision, on July 17, 2019 the Parties held a telephonic
10 conference regarding the documents withheld under the deliberative process privilege. (Dkt. No.
11 365, ¶ 9.) During the conference, Plaintiffs noted that Defendants had asserted the privilege in
12 response to all 68 of Plaintiffs’ Requests, including Requests seeking purely factual, statistical,
13 or other non-deliberative material. (Id., ¶¶ 10-11.) Plaintiffs therefore asked Defendants to
14 withdraw unnecessary assertions of the privilege so the Parties could begin to assess the scope of
15 Defendants’ genuine privilege claims and the contours of the Parties’ dispute. (Id.)

16 In response, Defendants explained that they had completed their search and review before
17 receiving the final 33 of Plaintiffs’ 68 Requests; Defendants had searched lists of terms and
18 custodians, assembled a set of documents from those lists, and then reviewed their collection for
19 privilege without regard to Plaintiffs’ Requests. (Dkt. No. 365, ¶¶ 2-4, 15; Ex. 56 at 3; Dkt. No.
20 381, Ex. 1, ¶ 5.) Defendants then organized their documents “as they would appear in the
21 ordinary course of business—by DoD or Military Service component and custodian.” (Dkt. No.
22 371, Ex. 1, ¶ 10.) The Court would later rule that this method was insufficient to meet the
23 requirements of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 26(b)(5)(A)(ii) (requiring a
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1 party to make its privilege assertions in a manner that will enable other parties to assess the
2 claim); see also Fed.R.Civ.P. 34(b)(2)(C).

3 In response to Plaintiffs’ request that Defendants withdraw unnecessary assertions of the
4 privilege, Defendants explained that they analyzed the privilege on a document-by-document
5 basis, and not in response to any Request from Plaintiffs. (Dkt. No. 365, Ex. 56 at 2.)
6 Defendants therefore would not withdraw their privilege assertions as to any of the 68 Requests.
7 (Id.) Defendants also would not run additional search terms proposed by Plaintiffs or search
8 additional custodians. (Dkt. No. 397 at 17:20-19:4.)

9 It was also clear that the Parties have a fundamental disagreement regarding who bears
10 the burden of establishing whether the privilege applies. Defendants take the position that
11 Plaintiffs have the burden of establishing that they are entitled to specific withheld documents in
12 Defendants’ collection (Dkt. No. 402 at 9:18-22; Dkt. No. 397 at 44:21-22, 48:22-49:20), and if
13 Defendants’ original collection is inadequate, Plaintiffs must move to compel production of
14 documents outside of Defendants’ collection. (Dkt. No. 412 at 47:17-21.) Plaintiffs disagree:
15 “That’s not how discovery works. You don’t let the defendant pick a few documents . . . and
16 shift the burden to the plaintiffs to try to use those to get more documents.” (Dkt. No. 397 at
17 52:10-13.)

18 Unable to resolve these disputes, on August 22, 2019, Plaintiffs filed a renewed Motion
19 to Compel Documents Withheld Under the Deliberative Process Privilege. (Dkt. No. 364.)

20 **B. Review Process**

21 In their renewed Motion, Plaintiffs proposed that the Court evaluate Defendants’
22 privilege claims through the lens of nine broad categories of documents and devoted their
23 Motion to arguments supporting the relevance of each category. (Dkt. No. 364 at 9-12.) In
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1 opposition, Defendants argued that the categories were “far too broadly defined for the Court to
2 properly apply the Warner balancing test” (Dkt. No. 380 at 7) and instead suggested that the
3 Plaintiffs choose specific custodians from the list Defendants created and determine “why [the
4 Plaintiffs] think there’s a deficiency in what we already gave them.” (Dkt. No. 397 at
5 34:24-35:2.) Faced with the task of evaluating the 35,000 to 50,000 documents over which the
6 Defendants asserted the deliberative process privilege (Dkt. No. 364 at 6), the Court held oral
7 argument with the goal of crafting a process for evaluating Defendants’ privilege claims in
8 keeping with the Circuit Court’s instruction to engage in a “granular” process where appropriate.
9 Karnoski, 926 F.3d at 1206; (Dkt. No. 393.)

10 1. Processes Considered

11 During oral argument on Plaintiffs’ Motion, the Parties and the Court considered various
12 options for reviewing Defendants’ privilege assertions. The Court began by asking whether it
13 was possible to review Defendants’ assertions on a document-by-document basis as the court did
14 with the two memoranda in Warner, 742 F.2d at 1161. The Parties acknowledged the
15 impossibility of reviewing 35,000 documents for privilege in addition to privilege logs so
16 voluminous they could not be filed on the docket. (Dkt. No. 397 at 19:7-12; 41:4-5; Dkt. No.
17 366.)

18 Plaintiffs argued in support of evaluating the documents pursuant to the nine broad
19 categories proposed in their Motion. (Dkt. No. 397 at 5:18-6:13; Dkt. No. 364 at 9-12.) When
20 the Court expressed skepticism that the categories allowed for precise review, Plaintiffs proposed
21 an alternative process where the Plaintiffs would group Requests by narrower topics and then
22 begin by explaining (1) why the privilege does not apply to these topics and (2) if the privilege
23 does apply, why the privilege is overcome. (Dkt. No. 397 at 26:24-27:6.) Plaintiffs also agreed
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1 to limit the inquiry to those documents withheld by the DoD, leaving aside documents withheld
2 by the President. (Id. at 28:4-12.) Defendants argued that Plaintiffs’ proposal was not
3 reasonable because it would not require Plaintiffs to identify documents by custodian, timeframe,
4 and category. (Id. at 40:11-13.)

5 In turn, Defendants argued in favor of their proposal that the Plaintiffs review the Panel
6 deliberations that were already produced to determine “what else they reveal.” (Id. at 37:9-12.)
7 If the documents show that someone at a Panel meeting made a comment demonstrating animus,
8 Defendants proposed that Plaintiffs could then request the deliberative documents from that
9 person and if the Government declined to produce the documents, then and only then could the
10 Plaintiffs bring the documents to the Court for an *in camera* review. (Id. at 37:20-38:2;
11 39:23-40:5.) Plaintiffs argued that the Defendants’ proposal impermissibly shifted the burden to
12 the Plaintiffs to argue for more documents based on the few hand-picked documents Defendants
13 decided to produce. (Id. at 52:2-55:10.) Plaintiffs also noted that animus is unlikely to be
14 apparent “in the sanitized documents that the [G]overnment will choose to give us that then we
15 have to use as a basis to ask for more documents.” (Id. at 53:19-21.)

16 The Court then proposed another alternative, called “smoke-and-fire,” where each side
17 chooses a selection of documents from the privilege logs for the Court to evaluate, and if the
18 Court determines the privilege was asserted correctly, Plaintiffs’ Motion to Compel documents
19 from that Request would be denied. (Id. at 23:18-24:11.) Plaintiffs argued this method would
20 give Defendants an advantage because it is premised on the assumption that the privilege applies
21 at all. (Id. at 26:13-17.)

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1 2. The Selected Process

2 After weighing each of these approaches and the Parties’ briefing, the Court concluded
3 that Defendants’ privilege assertions would be evaluated through individual Requests for
4 Production, setting a schedule for review where every six to eight weeks the Parties would have
5 two hours to present arguments on five Requests, as prioritized by Plaintiffs. (Dkt. No. 394 at
6 6-7.)

7 This process was based on the Court’s findings that the volume of withheld documents
8 prevented document-by-document review and the nine categories Plaintiffs proposed for
9 organizing the Court’s review were, as Defendants suggested, “far too broadly defined for the
10 Court to properly apply the Warner balancing test.” (Dkt. No. 380 at 7; Dkt. No. 394 at 5.) The
11 Court also found that Defendants’ method of production—assembling a set of documents as
12 though kept in the ordinary course of business—was insufficient, as it did not allow Plaintiffs or
13 the Court to assess Defendants’ privilege claims as required by Federal Rule of Civil Procedure
14 26(b)(5)(A)(ii) or to conduct the type of “granular analysis” suggested by the Ninth Circuit.
15 (Dkt. No. 394 at 6.) In this case, Defendants’ method of collecting and producing documents
16 meant the Court could neither review Defendants’ privilege assertions through individual
17 documents nor through individual Requests for Production.

18 The Court therefore ordered the Defendants to begin responding to individual Requests,
19 consulting with the Plaintiffs to apply additional search terms or search additional custodians.
20 Dkt. No. 394 at 6; Dkt. No. 397 at 60:4-11.) Plaintiffs were ordered to provide the Defendants
21 with a list of Requests, sorted by order of priority. (Dkt. No. 394 at 6.) The Parties were ordered
22 to return three weeks later to begin reviewing the first five prioritized Requests. (Dkt. No. 394 at
23 6-7.)

1 3. December Hearing

2 The next hearing was held on December 10, 2019. (Dkt. No. 399.) The Parties
3 submitted a Status Report ahead of the hearing in which they stated their positions and
4 arguments in regard to each Request. (Dkt. No. 398.) During the hearing, the Court reviewed
5 Plaintiffs’ first five prioritized Requests, (Nos. 15, 29, 33, 36, and 44), and it quickly became
6 apparent that three of these Requests were no longer contested. (Dkt. No. 402 at 36:6-25,
7 39:4-19, 39:25-40:10.) Defendants also asserted that their upcoming production would include
8 their response to a fourth Request, Request No. 15, which seeks “[a]ll documents or
9 communications relating to Secretary of Defense Ash Carter’s Directive Type Memo 16-005.”
10 (Dkt. No. 398 at 3; Dkt. No. 402 at 34:19-20.) In reliance on the Defendants’ statements, the
11 Court advised the Plaintiffs to review the Defendants’ upcoming production and to raise any
12 remaining issues concerning Request No. 15 at the next status conference. (Dkt. No. 402 at
13 35:10-13.) Defendants would eventually produce only 12 documents responsive to Request No.
14 15, while continuing to withhold 15,000. (Dkt. No. 412 at 32:3-4, 38:4-6.)

15 The remainder of the December hearing involved arguments concerning Request for
16 Production No. 29, which seeks “Documents or Communications relating or referring to the
17 February 2018 Department of Defense Report and Recommendations on Military Service by
18 Transgender Persons.” (Dkt. No. 398 at 2-3.) For more than an hour the Parties contested two
19 categories of documents responsive to Request for Production No. 29: (1) the data and
20 communications of any group within the DoD that reviewed or considered transgender issues;
21 and (2) drafts created by officials in the Office of the Undersecretary of Defense, who were
22 tasked with writing the Report and Recommendations after the Panel concluded its work. (Dkt.
23 No. 402 at 4:3-33:15.) Throughout the hearing, the Court urged Defendants to support their
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1 | privilege assertions with greater detail when they failed to make category or custodian-specific
2 | arguments against producing the documents:

3 | [I]f [Plaintiffs] don't know what you've got, it's your obligation to lay out what it
4 | is. So I can see, yes, those people are important and those people aren't. You
5 | need to lay that out for me, if not for them. And I'm wondering why that hasn't
6 | been done.

7 | (Dkt. No. 402 at 14:1-14:4; see also id. at 8:11-13.)

8 | After hearing from the Parties, the Court ordered Defendants to produce “[a]ll documents
9 | responsive to Request for Production No. 29,” which would necessarily include “non-voting
10 | members of the Panel” and documents explicitly described by the Court during the hearing: “the
11 | working group names, who’s on the working group, the dialogue in e-mail, or any other
12 | communication within those working groups, and the data that they produced.” (Dkt. No. 401 at
13 | 7; Dkt. No. 402 at 24:8-10.) The Court also ordered Defendants to produce “[d]rafts,
14 | communications, and documents created or relied upon by officials in the Undersecretary of
15 | Defense’s Office in drafting the Report and Recommendations.” (Dkt. No. 401 at 7; Dkt. No.
16 | 402 at 32:16-19.) The Court further ordered that these documents be produced for attorneys’
17 | eyes only. (Dkt. No. 401 at 8.)

18 | 4. Motion for Clarification

19 | Five weeks later, the Defendants filed a Motion for Clarification of the Court’s December
20 | Order regarding Request for Production No. 29, asking the Court to explain whether its Order
21 | compels disclosure only of documents pertaining to “non-voting members of the Panel” or all
22 | documents “relating or referring” to the Department of Defense’s (DoD’s) Report and
23 | Recommendation. (Dkt. No. 405 at 3.) Defendants did not move to clarify the Court’s ruling
24 | requiring Defendants to produce drafts created by officials in the Undersecretary of Defense’s
25 | Office, but nevertheless argued for the first time that Plaintiffs could obtain the same information

1 through Defendants' amended Interrogatory responses so Defendants should not be required to
2 produce those documents. (Id. at 9.) Defendants also moved for a stay of compliance as to both
3 parts of the Court's ruling with respect to Request No. 29. (Id. at 8-11.)

4 The Court granted Defendants' Motion for Clarification, explaining that its Order
5 required Defendants to produce all documents responsive to Request No. 29, including the
6 dialogue in e-mail or any other communication within those working groups, the data that they
7 produced, and responsive communications among members of the services. (Dkt. No. 413 at 4.)
8 The Court denied Defendants' Motion for a Stay, noting that this dispute has been pending for
9 nearly two years and to the extent Defendants simply disagreed with the second part of the
10 Court's Order, they had missed their deadline for reconsideration under the Local Rules. (Dkt.
11 No. 413 at 5 (citing LCR 7(h).))

12 5. February Hearing

13 The Court held its next hearing on February 3, 2020. (Dkt. Nos. 410, 412.) The Court
14 learned through the Parties' Status Report submitted ahead of the hearing and during the hearing
15 itself that Defendants had not complied with several of the Court's orders. (Dkt. No. 408, 412.)
16 In addition to Defendants' ongoing refusal to produce documents responsive to Request No. 29,
17 as ordered by the Court in December, it also became clear that Defendants had produced only 12
18 documents responsive to Request No. 15—while withholding 15,000—although Defendants had
19 asserted in December that their upcoming production would answer this Request. (Dkt. No. 402
20 at 34:2-11, 34:15-16, 34:19-21.) Plaintiffs also asserted that the Defendants' response to several
21 of the Requests elides their obligations under the Court's previous orders:

22 Defendants are not aware of any other complaints or documents reflecting,
23 referring, or relating to such complaints within Defendants' collection that
24 Defendants are withholding on the basis of the deliberative process privilege.

1 (See, e.g., Dkt. No. 408 at 18, 20, 21.) Plaintiffs contend that although Defendants were ordered
2 to respond to individual Requests, search additional custodians, and use additional search terms
3 suggested by Plaintiffs, the “collection” Defendants refer to is Defendants’ original set of
4 documents, collected before Plaintiffs served 33 of their 68 Requests. (Dkt. No. 394 at 6; Dkt.
5 No. 397 at 17:20-19:4; Dkt. No. 412 at 60:17-20 (as explained by the Court: “In order to be
6 responsive to the requests, [Defendants are] going to have to look at not just what they gathered,
7 but where they might find documents that might be responsive.”).) A week after the February
8 hearing, Defendants filed their Petition for a Writ of Mandamus. The Court had not yet issued
9 its order on the Requests discussed during the hearing, including Request No. 15, which is at
10 issue in the Petition.

11 6. Ongoing Problems

12 An orderly and productive discovery process depends on the Parties’ adherence to the
13 Court’s orders, maintaining clear and consistent positions, and the Court’s ability to count on the
14 the Parties’ representations. Throughout this process, Defendants have failed to comply with
15 Court orders, changed their arguments, retracted previous statements, and have often been unable
16 to respond to questions about their own documents.

17 As an example, at the first hearing on Plaintiffs’ Motion to Compel in November, the
18 Court found that Defendants’ production of documents as kept in the ordinary course of business
19 was inadequate and ordered Defendants to respond to individual Requests for Production. (Dkt.
20 No. 397 at 60:4-11; see also Dkt. No. 394 at 5-7.) Three months later, Defendants informed the
21 Court that they were not required to respond to individual Requests because they “reviewed and
22 produced documents as they were kept in the ordinary course of business.” (Dkt. No. 408 at 23.)
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1 As an example of Defendants’ changing arguments, when arguing against producing
2 drafts of the Report and Recommendations in December, Defendants explained:

3 [The] [d]rafts aren’t deliberative process. [These documents are] little subparts of
4 the decision, tweaking how you’re going to do a particular sentence or how you’re
going to write a particular paragraph . . . [and] there’s not a lot of relevance to
that, too, if they’re drafts.

5 (Dkt. No. 402 at 27:24-25, 30:18-19.) But in their Motion for Clarification the following month,
6 Defendants disputed their own representation, informing the Court that “Defendants did not
7 ‘argue that these documents are not relevant because the officials were solely engaged in editing
8 the Report for grammatical clarity.’ Indeed, many edits were focused on the substance of the
9 Report, and such edits clearly reflect opinions, recommendations, and advice.” (Dkt. No. 405 at
10 11 n.4 (citation omitted).) Defendants then offered an entirely new argument—raised for the
11 first time more than a month after the Court’s ruling—that Plaintiffs should obtain the
12 information contained in the drafts through other, more limited avenues of discovery, namely
13 Defendants’ amended Interrogatory responses. (Dkt. No. 405 at 9-11.)

14 Perhaps most representative of Defendants’ inconsistent positions is the assertion in their
15 Petition that the Court concluded “the privilege has been overcome as to documents from the
16 highest levels of the Department” including “Secretary Mattis’s handwritten comments on a draft
17 Report [and] also his personal notes on a draft letter to the President.” Pet. 4, 25. In nearly six
18 hours of oral argument and in dozens of pages of briefing, Defendants never raised this issue or
19 described these documents to the Court. (See Dkt. Nos. 370, 397, 398, 402, 408, 412.) Instead,
20 their prior position was that these documents were created by “four or five people who are pretty
21 far down the line . . . taking direction of how to write the report.” (Dkt. No. 402 at 30:14-19.)

22 A final factor in the efficient administration of this discovery process requires the Parties
23 to have a thorough understanding of the evidence. Defendants have been unable at times to
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1 respond to the Court’s basic inquiries about the facts of their case. For example, during oral
2 argument, Defendants could not answer simple questions about the logistics of the Panel’s
3 decision-making process, such as how many working groups were convened in support of the
4 Panel’s deliberations or the number of meetings held by the Panel. (Dkt. No. 402 at 22:13-17,
5 6:15-18; Dkt. No. 435, Ex. 17 at 2.)

6 These problems have created delays that have derailed the Court’s case schedule in this
7 matter.

8 **C. Request for Guidance**

9 The Court conducts this lengthy and detailed ongoing review in furtherance of the
10 Circuit’s guidance in Karnoski v. Trump, 926 F.3d 1180. The Court has allowed the parties
11 dozens of pages of briefing and nearly six hours of oral argument with the goal of carefully
12 evaluating Defendants’ privilege assertions in response to Plaintiffs’ first ten Requests for
13 Production. (See Dkt. Nos. 397, 398, 402, 408, 412.) Nevertheless, the discovery review
14 process has been undermined by the issues described above. The Court therefore concludes with
15 a request for guidance from the Circuit about the nature of the review process the Court should
16 undertake in light of the Court’s obligation to conduct a fair evaluation of the weighty
17 constitutional issues at stake. In particular, the Court requests more direction as to how a
18 “granular” review should be conducted in this matter.

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

21 Dated March 5, 2020.

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24 Marsha J. Pechman
United States District Judge