

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

**PLAINTIFFS AND PLAINTIFF-  
INTERVENOR’S RESPONSE TO THE  
COURT’S ORDER PROVIDING NOTICE  
OF THE APPOINTMENT OF A SPECIAL  
MASTER [DKT. NO. 466]**

1 Pursuant to the Court’s March 24, 2020 Order regarding its intent to appoint a special  
2 master, Plaintiffs and Plaintiff-Intervenor submit their position on the “scope of the special  
3 master’s review.” (Dkt. No. 466 at 2.) To begin, Plaintiffs appreciate the Court’s prompt rulings  
4 on motions under Local Civil Rule 37, which have been vital to Plaintiffs’ ability to obtain  
5 relevant documents in advance of depositions and before the close of fact discovery. Plaintiffs  
6 therefore intend to continue using the LCR 37 process to expeditiously resolve discovery  
7 disputes, (e.g. Dkt. Nos. 455, 458), and anticipate filing two additional LCR 37 motions next  
8 week.

9 At the same time, Plaintiffs agree with the Court that the parties continue to have  
10 fundamental disputes over the Government’s withholding of tens of thousands of responsive  
11 documents. To aid in resolving these privilege disputes, Plaintiffs propose the special master’s  
12 role be limited to *in camera* review of documents to assist the Court in a supportive capacity. As  
13 set forth below, Plaintiffs have serious concerns about the defensibility of the Government’s  
14 deliberative process privilege claims, and the special master could assist the Court in resolving  
15 those claims. Plaintiffs respectfully request, however, that the Court remain the sole authority for  
16 issuing orders on discovery disputes, so as to not add another layer of review that enables the  
17 Government to inject further delay.

18 **A. The special master’s role should be limited to *in camera* review of documents to**  
19 **support the court’s resolution of the parties’ discovery disputes.**

20 Plaintiffs respectfully request that the special master serve a supportive role by assisting  
21 the Court with *in camera* review of any documents submitted in connection with the parties’  
22 ongoing discovery disputes. For example, the special master could assist in reviewing documents  
23 withheld pursuant to the deliberative process privilege, as explained below. The Court can thus  
24 reduce its burden by delegating these time-consuming tasks to the special master. But Plaintiffs  
25 respectfully request the Court not delegate resolution of other disputes by requiring the parties to  
26 submit discovery motions to the special master in the first instance. *See Fed. R. Civ.*

27 *P. 53(b)(2)(A).* Doing so would provide the Government opportunities to delay proceedings and  
28 resist production of documents in response to an adverse order. *See Fed. R. Civ. P. 53(f)(2).*

1 Plaintiffs recently experienced this outcome in another jurisdiction, where the Government  
 2 intervened in a third-party discovery action and objected to multiple magistrate judge rulings,  
 3 adding months to the resolution of Plaintiffs' motion to compel. *See Karnoski v. Trump*, Case  
 4 No. 2:18-mc-51013 (E.D. Mich.), Dkt. Nos. 20, 37. And as the Government's countless requests  
 5 for reconsideration, clarification, and mandamus make clear, it is unlikely any adverse special  
 6 master determination will go unchallenged. Plaintiffs wish to avoid similar delays here.  
 7 Therefore, Plaintiffs respectfully request the Court narrowly tailor the special master's role to  
 8 assist with review of documents submitted *in camera* while maintaining primacy over discovery  
 9 disputes.<sup>1</sup> Finally, to promote efficiency and minimize costs, Plaintiffs request that the Court  
 10 permit the special master to work with associates or professional staff, and to bill the work of  
 11 those individuals at their standard rates.

12 **B. For example, the special master should broadly review the Government's deliberative**  
 13 **process privilege assertions.**

14 Plaintiffs provide the following example of how a special master with a document-review  
 15 focus may assist the Court and the parties. Documents the Government recently produced—and  
 16 only when compelled by this Court—reveal the Government is likely broadly misapplying the  
 17 deliberative process privilege. This Court recently ordered the Government to produce third-  
 18 party communications that the Government withheld pursuant to the deliberative process  
 19 privilege. (*See* Dkt. No. 454.) In compliance with that Order, the Government produced 307  
 20 documents to Plaintiffs on March 13, 2020. The Government also recently withdrew its privilege  
 21 claims over another 75 documents. Plaintiffs have now reviewed these documents, and the vast  
 22 majority had no colorable claim of privilege in the first place, because they are not predecisional,  
 23 not deliberative, or both. These productions include numerous communications about news  
 24 articles covering transgender military service that do not contain any conceivable policy  
 25 deliberations (*e.g.*, Exs. 1–10); talking points or preparation notes for teleconferences,  
 26 interviews, or confirmation hearings that do not reflect policymaking (*e.g.*, Exs. 11–18); post-  
 27

28 <sup>1</sup> Alternatively, if the special master is permitted to issue orders, the Court should substantially reduce the default 21-day period to object to any order to minimize delay. *See* Fed. R. Civ. P. 53(f)(2).

1 decisional and nondeliberative documents about the Carter Policy (e.g., Exs. 19–25); and  
2 emails/invitations regarding speeches and events (e.g., Exs. 26–27).<sup>2</sup>

3 Plaintiffs are deeply concerned that many thousands of other documents the Government  
4 has withheld likewise have no colorable privilege claim and never should have been withheld in  
5 the first place. While Plaintiffs recognize that errors occur during document review, these are not  
6 isolated review issues. Rather, the Government appears to have broadly misapplied this privilege  
7 and instead withheld a substantial number of documents without justification. All the while,  
8 Plaintiffs have spent hundreds of hours fighting to overcome the privilege, and this litigation has  
9 been delayed *for two years* while the Government goes to the most extreme lengths to protect  
10 documents from disclosure that never should have been withheld in the first place. More  
11 perverse, the Government has sought to leverage the sheer scope of its (now-questionable)  
12 claims as a basis to resist judicial review on anything but a document-by-document basis. The  
13 special master could assist the Court in conducting any necessary *in camera* review, including  
14 whether the privilege even applies to large numbers and categories of the documents withheld by  
15 the Government.

16 \* \* \*

17 Finally, pursuant to the Court’s Order, Plaintiffs and Plaintiff-Intervenor also submit the  
18 following individuals as possible special masters: Judge John Erlick (who is retiring on  
19 April 30, 2020); Jeremy Roller of Arete Law Group; and Toby Marshall of Terrell Marshall Law  
20 Group.

21 **CONCLUSION**

22 Plaintiffs and Plaintiff-Intervenor respectfully ask the Court, in any order appointing a  
23 special master, to: (1) specify that the scope of the special master’s authority is limited to aiding  
24 the Court by reviewing documents and making recommendations regarding the discoverability of  
25 withheld documents; and (2) permit the special master to work with associates or professional  
26 staff to complete the special master’s work, and to bill the work of those individuals at their  
27 standard rates.

28 <sup>2</sup> True and correct copies of each of these documents are attached hereto as Exhibits 1 to 27.

1 Respectfully submitted March 31, 2020.

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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 March 31, 2020.

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# **EXHIBIT 1**

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