The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' MOTION TO STAY THE COURT'S JULY 15, 2020 ORDER, DKT. 545

NOTE ON MOTION CALENDAR: July 31, 2020

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

INTRODUCTION

On February 11, 2020, Defendants filed a petition for a writ of mandamus challenging an order by this Court compelling production of thousands of documents withheld pursuant to the deliberative process privilege. *See* Dkt. 414-1. The Ninth Circuit subsequently recognized that Defendants' petition "raises issues that warrant an answer," Order, Dkt. 416, and granted the Government's request for a "temporary administrative stay," Order, Dkt. 415, which has remained in place pending the petition. This Court thereafter filed a response to Defendants' petition, requesting "guidance" from the Ninth Circuit on how the Court should address the deliberative process privilege moving forward. *See* District Court's Requested Response, *In re Trump*, 20-70365 (9th Cir.), Dkt. 15.

Defendants' petition is still pending. Nonetheless, without obtaining the requested guidance from the Court of Appeals, this Court has entered a series of orders over the Government's objections related to the deliberative process privilege. Most recently, on July 15, 2020, this court ordered Defendants, by July 29, 2020, to produce thousands of deliberative documents falling outside of two date ranges set by the Court, because such documents purportedly were not "pre-decisional."[1] Order, 1–3, 11, Dkt. 545. The Court's order also requires Defendants to produce approximately 743 documents by July 22, 2020. *Id.*

In light of the pending mandamus petition and this Court's request for guidance from the Ninth Circuit, Defendants respectfully request a stay of the Court's July 15, 2020 order, Dkt. 545, until the mandamus petition is resolved. In the absence of a stay, Defendants will be required to produce thousands of documents based on discovery standards that may be inconsistent with the requested guidance from the Ninth Circuit. At a minimum, Defendants

[1] While the Court's Order describes the number of documents withheld solely on the basis of the deliberative process privilege as 35,000, *see* Order 6, the current figure, as of July 17, 2020, is approximately 25,000 documents. The Court's order further describes the number of documents withheld for both the deliberative process privilege *and* one or more other privileges as encompassing 48,000 documents, *see* Order 3, however, as of July 17, 2020, that figure is approximately 40,000 documents. To date, the Government has disclosed numerous documents withheld solely on the basis of the deliberative process privilege. *See, e.g.*, Declaration of Robert E. Easton ¶ 6, Dkt. 405-2.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

request a temporary stay until July 29, 2020, for the 743 documents currently set for disclosure on July 22, 2020.

Should Defendants' request for a stay be denied or remain pending, Defendants intend, by close of business on July 21, 2020, to file an emergency motion in the Ninth Circuit requesting a stay of this Court's July 15, 2020 order. Pursuant to Federal Rule of Appellate Procedure 8, Defendants are first moving in this Court to stay the order before requesting a stay in the Court of Appeals. Defendants have conferred with counsel for Plaintiffs and Plaintiff-Intervenor State of Washington, and they oppose a stay.

STANDARD FOR SEEKING A STAY

A district court may stay an order pending resolution of appellate proceedings. Fed. R. App. P. 8. In such circumstances, district courts apply a four-factor test to determine whether to issue a stay of an order: (1) the applicant's likely success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Nken v. Holder*, 556 U.S. 418, 433–34 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011) (applying a balancing test showing "that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor"). A party that shows that the "hardship balance . . . tips sharply" in its favor need not show a substantial likelihood of success on the merits; in that situation "serious questions going to the merits" are sufficient. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "A 'serious questions' standard is particularly appropriate when a district court is asked to stay its own order; under such circumstances, the court has already determined that the applicant failed to succeed on the merits." *In re A2P SMS Antitrust Litig.*, 2014 WL 4247744, at *2 (S.D.N.Y. Aug. 27, 2014).

ARGUMENT

I. In The Absence Of A Stay, Defendants Will Suffer Irreparable Harm.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

Compliance with the Court's July 15, 2020 Order will result in the irretrievable disclosure of thousands of privileged documents relating to multiple military policies. As Defendants have explained, such disclosures have "an immediate chilling effect on future deliberations," thus "degrad[ing] DoD's decision-making process" and potentially "expos[ing] the nation to greater overall risk." Declaration of Robert E. Easton ¶ 24, 27, Dkt. 381-1.

Because the disclosure of documents and information cannot be undone, courts routinely grant stays in such contexts. *See, e.g.*, *HHS v. Alley*, 129 S. Ct. 1667 (2009) (in a FOIA case, ordering stay of district court's order directing agency to disclose records to plaintiff, pending final disposition of appeal, following denial of stay by court of appeals); *see also In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001) (after granting an emergency stay of the district court's order that directed disclosure of material covered by the attorney-client privilege, issuing a writ of mandamus that directed the court to vacate its disclosure order). Indeed, in this very case, the Ninth Circuit previously stayed an order to produce deliberative materials pending a mandamus petition, *see* Order, Dkt. 316-1 (staying July 27, 2018 discovery order), and granted a temporary administrative stay of subsequent orders pending a second mandamus petition that is currently before the Ninth Circuit, *see* Order, Dkt. 415 (staying December 18, 2019, February 3, 2020, and February 7, 2020 orders). In light of the Ninth Circuit's actions in this case, it is beyond dispute that disclosure of deliberative materials can irreparably harm Defendants.

The fact that the parties have agreed to a "protective order with claw back provisions" does not change the analysis. Order 5; *see* Stipulated Uniform Protective Order and Cross-Use Agreement, Dkt 183. The same protective order was in place when the Ninth Circuit stayed, and subsequently vacated, this Court's July 27, 2018 order related to the deliberative process privilege. *See* Order, Dkt. 316-1; *Karnoski v. Trump*, 926 F.3d 1180, 1208 (9th Cir. 2019). And it was in place when the Ninth Circuit issued a temporary administrative stay of this Court's December 18, 2019, February 3, 2020, and February 7, 2020 orders. Order, Dkt. 415. Indeed, despite recognizing this Court's reliance on the protective order, *see Karnoski*, 926

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

F.3d at 1197, the Ninth Circuit has not concluded that the protective order prevents the harms that accrue to Defendants when ordered to disclose deliberative material. On the contrary, the Ninth Circuit has consistently stayed such discovery orders in this case, and for good reason: the interest in protecting frank exchanges of views is not vindicated by ordering disclosures to opposing counsel who may, of course, use the documents in litigation. *See* Easton Decl. ¶ 27, Dkt. 381-1 (harms from disclosure occur "regardless of the entry of a judicial protective order because a motivated party would still second-guess the underlying advice and analysis in depositions and other proceedings which could later influence the decision to abstain or provide less than complete candor during policy development"); *see also Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009) ("A protective order limiting dissemination" may "ameliorate but cannot eliminate" the chilling effects of disclosure).

In short, given the Ninth Circuit's prior orders in this case and the immediate harm Defendants will sustain if further deliberative materials are disclosed, Defendants have established that they will suffer irreparable harm absent a stay.

II. A Stay Will Not Harm Plaintiffs.

Plaintiffs will not be harmed by a stay of Defendants' obligation to produce deliberative materials during the remainder of the current mandamus proceeding. The mandamus petition was filed in February and has been fully briefed since March 10, 2020. Although the Government cannot predict precisely when the Ninth Circuit will rule, given that more than four months have passed since briefing on the petition was completed, it is likely that the Ninth Circuit will decide the petition in short order.

By the same token, there currently is no discovery deadline in place, *see* Order, Dkt. 513, as the previous deadline was lifted at Plaintiffs' request, *see* Joint Status Report 5, Dkt. 500. And while Defendants recently asked that the discovery deadline be reset for September 1, 2020, *see* Joint Status Report 9, Dkt. 546, Defendants would not oppose disclosing documents after the deadline if the appellate courts find such disclosures to be warranted. Discovery likely will not conclude until the Ninth Circuit issues its decision in any event, given

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

that the parties already have agreed to defer the depositions of former Secretary of the Navy Raymond Mabus and former Secretary of the Air Force Deborah James until after the Ninth Circuit resolves issues related to Carter Working Group documents.[2] Order 2, Dkt. 513.

To be sure, Plaintiffs no longer enjoy the protections of a preliminary injunction; the military policy they challenge is currently in effect. That fact, however, appears not to have spurred the Plaintiffs to swifter resolution of this case. They recently made clear that their "most important consideration in terms of scheduling is developing the fullest and most complete evidentiary record that is reasonably possible," even if doing so means pushing back the October 22, 2020 trial date. Joint Status Report 2, Dkt. 546. The upshot is Plaintiffs have little ground to argue that a delay in receiving deliberative materials while the Ninth Circuit decides the mandamus petition would cause them any harm. The balance of the harms thus plainly cuts in Defendants' favor. *Hiken v. DoD*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (finding that the balance of harms "tips sharply" for defendants where the stay "would only briefly postpone" the plaintiffs' access to the information).

III. On The Merits, The Ninth Circuit's Guidance Is Likely To Be Contrary To This Court's Approach To The Deliberative Process Privilege.

Since the Ninth Circuit's June 2019 decision vacating this Court's July 2018 order to produce all deliberative materials, this Court has continued to approach the deliberative process privilege in ways contrary to circuit precedent. This Court's July 15, 2020 order in particular cannot be squared with the law in this area. As a result, any requested guidance provided by the Ninth Circuit is likely to conflict with this Court's order.

a. This Court Has Improperly Issued Sweeping Deliberative Process Privilege Rulings.

At the outset, this Court has continued to issue sweeping deliberative process privilege

[2] Defendants of course remain prepared to have this case proceed to summary judgment now, if the Court is amenable, so that Defendants' policy may be "evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Karnoski*, 926 F.3d at 1207; *see* Joint Status Report 9, Dkt. 546.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

rulings that purport to set aside the privilege as to thousands of documents at once. In its December 18, 2019, February 3, 2020, and February 7, 2020 orders, this Court concluded that the privilege had been overcome as to all documents "related" to DoD's report and recommendation, as well as deliberative documents from the Carter policy working group. *See* Order, Dkt. 413; Order, Dkt. 401; Feb. 3, 2020 Hr'g Tr. 40:3–7. These rulings encompassed tens of thousands of deliberative documents from dozens of DoD and Military officials. Then, on July 15, 2020, this Court ordered the production of all deliberative documents that did not fall within two time frames determined by the Court to constitute the Carter policy and Mattis policy decision periods. Order, Dkt. 545. Again, that ruling encompassed thousands of documents from dozens of officials. In combination, the Court's December 2019, February 2020, and July 2020 orders compel production of essentially every document solely withheld pursuant to the deliberative process privilege.[3] Such an approach cannot be described as "granular," *Karnoski*, 926 F.3d at 1206, and in effect all but reinstates the Court's now-vacated July 2018 order to produce all documents solely withheld pursuant to the deliberative process privilege, *see* Order, Dkt. 299. Nor can these orders be squared with the Ninth Circuit's instruction "to reconsider discovery by giving careful consideration to executive branch privileges," *id.* at 1187, and that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests," *id.* at 1206.

b. The Court Has Misapplied The "Pre-Decisional" Requirement.

The Government has previously shown that the Court's approach to documents covered by the deliberative process privilege fails to adequately weigh the Government's interest in confidentiality against the Plaintiffs' demonstrated need for the requested disclosures. *See Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019) (remanding so this Court could "reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives"). The Court's most recent order considers the antecedent issue of whether

[3] There are potentially a small number of deliberative documents not ordered for immediate production from the period of the Carter policy's development that were never seen or considered by the Carter policy working group. *See* Feb. 3, 2020 Hr'g Tr. 41:19–25.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

documents are subject to the privilege at all, and in particular whether they are "pre-decisional." But the Court's approach to the "pre-decisional" prong of the deliberative process privilege test is likely to conflict with any Ninth Circuit guidance as well.

In its July 15, 2020 order, this Court applied the "pre-decisional" requirement by focusing on only "the specific policies at issue in this litigation." Order 5, Dkt. 545. That is, the Court identified the Carter and Mattis policies as the "focus" of the case, and held that materials related to any other agency decision or deliberation could not be "pre-decisional." *Id.* Thus, the Court determined that deliberations related to, for example, Secretary Mattis's decisions in the summer of 2017 to delay the Carter accessions policy or in February 2018 to adopt the Panel's recommendation categorically were not privileged. But this is not how the Ninth Circuit approaches the pre-decisional prong, nor would it make sense for it to do so. The Ninth Circuit routinely holds, for example, that draft documents are pre-decisional without any analysis of whether the draft documents relate to the principal focus of the litigation. *See, e.g.*, *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1120 (9th Cir. 1988) (documents were pre-decisional simply because they were "working drafts subject to revision"). Following this Court's approach would mean that whether a particular document is privileged turns not on the nature of the document or its role in an agency's decision-making process, but rather on the focus of the litigation where the document is sought. Such an approach would significantly undercut the scope of the privilege and incentivize litigants to seek out deliberative materials tangential to the central issues in their cases.

To provide just a handful of examples, the Court's order deems the following documents not pre-decisional and, thus, not subject to the privilege:

- A memorandum from Deputy Secretary Robert Work to Secretary Mattis titled "Recommended Transgender Way Ahead," describing recommended courses of action as to military policy on the service of transgender persons and persons diagnosed with gender dysphoria. The document reflects handwritten notes in response from Secretary Mattis (circulated July 7, 2017). *See* DoD00002876.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

- A draft version of DoD Instruction 1300.28, the document that governed "In-Service Transition for Service Members Identifying as Transgender" under the Carter Policy. The draft, circulated June 10, 2016, contains tracked changes and reviewer comments and recommendations. *See* DoD00003625.
- A July 24, 2017, email to Secretary Mattis from his Chief of Staff, briefing the Secretary on multiple issues, including a recommendation that the Secretary discuss a particular issue with the National Security Advisor (unrelated to military personnel policy). *See* DoD00084030.
- An August 25, 2017 draft version of the Interim Guidance on Military Service by Transgender Individuals issued after the President's August 2017 memorandum, containing tracked changes and reviewer comments and recommendations. *See* DoD00012449.

These documents illustrate the fundamental inconsistency between the Court's approach to evaluating the deliberative process privilege and the Ninth Circuit's approach to the privilege. *See Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) (applying a "functional" test for evaluating the privilege because its objective is to "safeguard the deliberative *process* of agencies").

Nor are the time frames selected by the Court for the Carter and Mattis policies congruent with the facts of this case. Most strikingly, the Court selected January 11, 2018 as the end date for the Mattis policy, despite the fact that Secretary Mattis did not submit the new policy to the President along with the Report and Recommendation until February 22, 2018, and the President did not accept that recommendation and withdraw his August 2017 memorandum until March 23, 2018. *See* Defs.' Notice of Compliance 8–9, Dkt. 542 (timeline submitted by Defendants). In shaving off those crucial months, the Court purported to strip the privilege from some of the most sensitive documents in this case, such as a draft of the Report and Recommendation with Secretary Mattis's handwritten comments, as well as Secretary Mattis's personal notes on a draft letter to the President. *See* Petition 25, Dkt. 414-1. And

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

although the policy recommended by the Panel of Experts was the same policy Secretary Mattis ultimately adopted, Order 8, deliberations about whether to adopt the recommended policy and the content of the Report and Recommendations nonetheless took place after the panel's recommendation.

At the same time, deliberative documents from January 11, 2018 to February 22, 2018 are squarely encompassed in the Ninth Circuit's mandamus petition. Although the Court excepted documents "specifically subject to the pending appeal to the Ninth Circuit" from Defendants' current production obligations, Order 2, Dkt. 545, the plain implication of the Court's ruling is that, at some point, these documents will have to be produced. Accordingly, the Court's approach to the "pre-decisional" prong of the two-part deliberative process privilege test is inconsistent with circuit precedent and the facts of this case, and likely will conflict with any forthcoming Ninth Circuit guidance.

IV. A Stay Is In The Public Interest.

Finally, disclosure of thousands of documents from dozens of Department of Defense and Military Service custodians would hinder frank and independent discussion on future policies that could directly impact national security. *See* Easton Decl. ¶ 23–28, Dkt. 381-1. Therefore, staying disclosure of those documents while a higher court provides guidance on whether they should be released serves the public interest.

CONCLUSION

Accordingly, the Court should enter a stay of the Court's July 15, 2020 discovery order, Dkt. 545, pending the Ninth Circuit's decision on Defendants' petition for a writ of mandamus.

Dated: June 20, 2020

Respectfully submitted,

DAVID M. MORRELL
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

ANTHONY J. COPPOLINO

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

Deputy Director

/s/ Matthew Skurnik
MATTHEW SKURNIK (NY 5553896)
JAMES R. POWERS
Trial Attorneys
ANDREW E. CARMICHAEL
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Telephone: (202) 616-8188
Email: matthew.skurnik@usdoj.gov

Counsel for Defendants

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO STAY THE COURT'S JULY 15, 2020 ORDER, DKT. 545

Upon Review of Defendants' Motion to Stay the Court's July 15, 2020 Order, Dkt. 545, and for good cause shown, it is **ORDERED** that Defendants' motion is **GRANTED**. The Court's July 15, 2020 Order, Dkt. 545 is hereby **STAYED** pending resolution of *In re Trump*, 20-70365 (9th Cir.).

DATED this ____ day of _____, 2020

The Honorable Marsha J. Pechman
United States District Court Judge

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 616-8188

Presented by:

DAVID M. MORRELL
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Matthew Skurnik
MATTHEW SKURNIK (NY 5553896)
JAMES R. POWERS
Trial Attorneys
ANDREW E. CARMICHAEL
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Telephone: (202) 616-8188
Email: matthew.skurnik@usdoj.gov

Counsel for Defendants