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' REPLY IN SUPPORT OF MOTION TO STAY THE COURT'S JULY 15, 2020 ORDER, DKT. 545

NOTE ON MOTION CALENDAR: July 31, 2020

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INTRODUCTION

In July 2018, this Court ordered Defendants to produce all documents solely withheld pursuant to the deliberative process privilege. Order, Dkt. 299. The Ninth Circuit then vacated that order. *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019). Plaintiffs do not meaningfully dispute that, through four subsequent orders, this Court in effect has reinstated its July 2018 order, by again requiring Defendants to produce essentially every deliberative document. *See* Order, Dkt. 401 (December 18, 2020); Feb. 3, 2020 Hr'g Tr. 40:3–7; Order, Dkt. 413 (Feb. 7, 2020); Order, Dkt. 545 (July 15, 2020). All but one of these new orders already has been stayed by the Ninth Circuit. *See* Order, Dkt. 415 (staying December 18, 2019, February 3, 2020, and February 7, 2020 orders). The question now before the Court is whether to stay its most recent order, from July 15, 2020, pending "guidance" this Court requested from the Ninth Circuit.[1] Tellingly, even Plaintiffs do not contend the Court's order ultimately should be maintained, instead requesting that it be rewritten to allow for *in camera* review before thousands of documents are produced. Under these circumstances, the Court's July 15, 2020 order should be stayed at a minimum, if not set aside in full.

ARGUMENT

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

If the Court's July 15, 2020 order is not stayed, Defendants will be required to produce essentially all remaining deliberative documents in this case, without individualized review. Even with a protective order in place, such disclosures would 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." Easton Decl. ¶ 24, 27, Dkt. 381-1. In light of these manifest harms, the Ninth Circuit consistently has stayed orders to produce broad categories of deliberative documents in this case. *See* Order, Dkt. 316-1, Order, Dkt. 415. Plaintiffs do not even attempt to explain how the Ninth Circuit's prior stay orders could be

[1] On July 31, 2020, the Ninth Circuit issued an order requesting supplemental briefing and scheduling oral argument for October 14, 2020. Dkt. 559.

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consistent with requiring immediate production of thousands of deliberative documents here.

Instead, Plaintiffs downplay the Court's sweeping order as merely a "discovery management tool," because Defendants purportedly could "seek relief" from the Court or "claw back" certain documents. Pls.' Opp. 1, Dkt. 553. It is not "discovery management" to require the actual production of all remaining deliberative documents in the case. Plaintiffs' argument rests on the same flawed reasoning as their arguments about a protective order: It ignores the fact that serious harm occurs as soon as privileged documents are disclosed to an opposing party in litigation. *See* Ninth Circuit Order, Dkt. 316-1 (staying July 2018 discovery order despite existence of a protective order). This is why the Federal Rules of Civil Procedure permit parties to withhold "otherwise discoverable" information where it is "privileged." Fed. R. Civ. P. 26(b)(5)(A). The Court's approach would turn the Federal Rules on their head, by requiring Defendants to disclose privileged information wholesale based on a "presumption" applicable only in this case.[2]

Curiously, Plaintiffs cite to *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 101 (2009), to argue that disclosure of privileged material would not harm Defendants. Pls.' Opp. 9. But *Mohawk* involved neither a stay request nor a discussion of irreparable harm. Instead, the question in *Mohawk* was whether appellate jurisdiction existed over a collateral order appeal from an attorney-client privilege ruling—an issue with no bearing on Defendants' stay motion—and the Court required instead that parties request mandamus relief. *See* 558 U.S. at 205. Seeking mandamus relief, and requesting an associated stay, is precisely what Defendants have done here. Moreover, the Court in *Mohawk* "express[ed] no view" on whether its decision would apply where governmental privileges were at issue. *Id.* at 113 n. 4.

Perhaps recognizing the harms that would result from disclosure, Plaintiffs resort to a new contention: that Defendants "can redact any privileged information regarding unrelated

[2] Plaintiffs cite the fact that of the 850 randomized documents submitted to the Court for *in camera* review, 88% were found to be not privileged. That statistic is meaningless, because it appears the majority of those documents were found to be not privileged solely because they fell outside of the two time periods identified by the Court. Dkts. 545-1, 551-1.

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and non-responsive military policies." Pls.' Opp. 10. But the ability to redact non-responsive privileged information is cold comfort to the Department of Defense and Military officials who still would have their *responsive* deliberations about controversial policies produced to opposing counsel and advocacy groups in litigation. Particularly in light of the Ninth Circuit's multiple rulings staying similar orders in this case, there is no real dispute that compliance here would cause Defendants irreparable harm.

II. A Stay Will Not Harm Plaintiffs.

In contrast to the serious and immediate harms facing Defendants, Plaintiffs will suffer no harm if a stay is granted. The trial date has now been set for April 26, 2021, and there is no close of discovery date. Order, Dkt. 554. Discovery likely cannot conclude until the Ninth Circuit rules on the mandamus petition in any case, as several discovery orders have been stayed and depositions postponed until after the Ninth Circuit's decision. *See* Defs.' Mot. 4–5.

Plaintiffs nonetheless insist they need the documents covered by the Court's order now, so they can "test the Government's assertion that the Mattis Policy was unrelated to and developed completely separately from the President's Ban and August 25, 2017 directive." Pls.' Opp. 8. But Defendants already produced the very evidence that would allow Plaintiffs to test that theory. As Defendants repeatedly have explained, Plaintiffs have received every deliberative and non-deliberative communication to and within the Panel, *see* Joint Status Report 13–14, Dkt. 408; if their theory is that the Panel developed its recommendations based on the President's directives, they have all conceivable discovery they need. More fundamentally, the entire premise of the Court's July 15, 2020 order is that the documents it covers are not "pre-decisional" because they are not related to the development of the Mattis and Carter policies. Thus, under that analysis, the documents Plaintiffs seek concerning the President's 2017 memorandum necessarily do not bear on the development of the Mattis policy—the only reason they could even be at issue. A stay, accordingly, would not affect Plaintiffs' ability to prosecute their challenge to the Mattis policy.

Plaintiffs further contend they would be harmed by a stay because the Government has

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caused delays, citing, among other things, the Government's "two mandamus petitions." Pls.' Opp. 9. Defendants have previously explained why any delays in this case are of Plaintiffs' own making. *See* Joint Status Report 9–12, Dkt. 546; Joint Status Report 11–13, Dkt. 500. But the citation to Defendants mandamus petitions is particularly misplaced. Plaintiffs seem to forget it was Defendants who *prevailed* in the first petition, which vacated an overbroad discovery order sought by the Plaintiffs. On remand, Plaintiffs sought *the same order*, *see* Dkt. 365 at 5, and now the Court, in effect, has reinstated that order. It should have been no surprise that, under these circumstances, Defendants would file a second petition, or that the Ninth Circuit would grant a temporary administrative stay and determine that the petition "warrant[s] an answer." Order, Dkt. 416; Order, Dkt. 415. It is as much the result of Plaintiffs' choices that discovery has been delayed until the Ninth Circuit rules on the second petition. A temporary stay of the July 15 order pending that petition would cause Plaintiffs no harm.

III. The Court's July 15, 2020 Order Is Incorrect, And Is Likely To Be Impacted By The Forthcoming Ninth Circuit Guidance.

The Court's July 15, 2020 order is the latest in a series of sweeping orders that, collectively, require the wholesale disclosure of deliberative process information in this case.[3] Rather than engage in the "granular" analysis identified by the Ninth Circuit, the order requires production of thousands of documents at once based on an incorrect interpretation of the "pre-decisional" requirement. *See* Defs.' Mot. 6–9. Plaintiffs neither deny that the Court's orders have again compelled production of all deliberative documents nor suggest any reason to suspect that the Ninth Circuit would have endorsed that approach. Nor do they point to a single case that has held that documents can be "pre-decisional" only if they relate to the "focus" of the litigation. That is because the law is clear: Documents are "predecisional" if they are

[3] Contrary to the Court's contention, *see* Order 2 n.1, Dkt. 550, Defendants in August 2019 filed a declaration indicating that more than 42,000 privileged documents were being withheld. *See* Easton Decl. ¶ 18, Dkt. 371-1. Since then, Defendants have made multiple productions pursuant to court orders. *See, e.g.*, Easton Decl. ¶ 6, Dkt. 405-2 (describing *Doe* production). The current figure, as of July 17, 2020, is approximately 40,000 documents. Defs.' Mot. 1 n. 1.

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"prepared in order to assist an agency decisionmaker in arriving at his decision," and that analysis does not depend on courts "identify[ing] the actual decision that was made." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997) (quotation omitted); *see also N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n. 18 (1975) (same).

Faced with this dilemma, Plaintiffs abandon the Court's order and request that it be largely rewritten. Pls.' Opp. 10. They urge that rather than require Defendants to produce documents covered by the order, Defendants should be permitted to submit those documents for *in camera* review. Thus, after repeatedly accusing the Government of not acting in good faith in bringing the stay motion, *see* 7/21/20 Status Conference Hr'g Tr. 5:6–8, 17:21–24, 24–25:25–2, Plaintiffs now concede that the Court should not have ordered broad disclosure without individualized review in the first place—the exact concern Defendants raised in their stay motion. Given Plaintiffs' new position, it is beyond dispute that the July 15 Order suffers from serious errors and should be set aside or at least stayed.[4]

If the Court is inclined instead to rewrite its order, as Plaintiffs request, the Court should require Plaintiffs to consult the timeline submitted by Defendants and identify the actual or contemplated decisions for which Plaintiffs believe they need further information to advance their case. *See* Dkt. 542 at 4–10 (timeline). Documents related to the decisions Plaintiffs select should then be the focus of any *in camera* review. Otherwise, the Court may end up reviewing document about decisions with a highly attenuated relationship to the military policy Plaintiffs challenge. *See, e.g.*, *id.* at 4 (pre-Carter policy working group deliberations), 6 (drafts and comments on guidance documents briefly in effect after the Carter policy's development).

Notwithstanding their change in position, Plaintiffs still wrongly contend that a stay

[4] Plaintiffs further seek to alter the July 15 order by requesting that the Court conduct *in camera* review to "resolv[e] the DPP dispute" for documents from January 11, 2018 to February 22, 2018. Pls.' Opp. 11–12. Given the time period, however, *in camera* review of such documents could violate the Ninth Circuit's administrative stay. Indeed, this Court has previously instituted procedures to guard against such violations. *See* Order 4, Dkt. 514 (permitting Defendants to "provide a replacement document for the Court's *in camera* review" where a document is "implicated by the Ninth Circuit's stay").

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would be improper because the Ninth Circuit will not address the "pre-decisional" analysis undergirding the July 15 order. Pls.' Opp. 6–7. This point should be rejected out of hand. Plaintiffs themselves raised the pre-decisional issue with the Ninth Circuit in their response to the second mandamus petition. *See* Answer to Petition 27–28, *In re Trump*, 20-70365 (9th Cir.), Dkt. 15 (arguing that documents post-dating the Panel of Experts were "post-decisional—and thus not privileged as a matter of law"). Plaintiffs cannot credibly argue the Ninth Circuit is unlikely to address an issue that they themselves put before that court. This Court should at least await further guidance from the Ninth Circuit before proceeding further.[5]

IV. A Stay Is In The Public Interest.

Notwithstanding Plaintiffs' assertion, *see* Pls.' Opp. 11, this Court already has access to all the evidence it needs to execute its Article III responsibilities to adjudicate this case. Indeed, the only documents at issue in this motion are those that do not relate to the development of the military policy under review. In these circumstances, the unnecessary disclosure of thousands of confidential documents from dozens of Department of Defense and Military Service custodians plainly would be contrary to the public interest.

CONCLUSION

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

[5] Contrary to Plaintiffs' argument, *see* Pls.' Opp. 11, Defendants did not concede that drafts of the Report and Recommendation were not deliberative. Although the transcript of the December 10, 2019 hearing records Government counsel as stating "Drafts aren't deliberative process," 12/10/19 Hr'g. Tr. 27:21, moments thereafter, that same Government counsel, in discussing the drafting process, clarifies that "There's deliberations that go into that," *id.* at 28:2–3, and "there's still deliberations there involved," *id.* 28:21–22; *see also* Dkt. 497 at 8–9 (subsequent argument by Defendants that deliberative process privilege protects drafts). Nor have Defendants conceded that documents post-dating the Panel cannot be pre-decisional, as Plaintiffs also suggest. *See* Pls.' Opp. 10–11. Here too, Plaintiffs fail to mention that their own counsel states that while such documents are "post-panel-of-expert decision," they are "pre-decision by the Secretary of Defense." 12/10/19 Hr'g. Tr. 26:19–21. Government counsel then responds that Plaintiffs' counsel's description is "pretty accurate." *Id.* at 26:25.

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Respectfully submitted,

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