

The Honorable Marsha J. Pechman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**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

**JOINT STATUS REPORT FOR
AUGUST 24, 2020 STATUS
CONFERENCE**

1 In advance of the August 24, 2020 status hearing, the parties respectfully submit the
2 following Joint Status Report.

3 **PLAINTIFF’S AND PLAINTIFF-INTERVENOR’S STATEMENT**

4 In this Joint Status Report, Plaintiffs provide the Court an update regarding the following
5 issues:

- 6 1. Status of the Government’s motions to quash depositions of military officials and
7 Plaintiffs’ motions to transfer those proceedings to this Court;
- 8 2. Updates on depositions;
- 9 3. Plaintiffs’ request for the Government to produce three discrete categories of
10 documents withheld pursuant to the deliberative process privilege with inadequate privilege log
11 entries;
- 12 4. Plaintiffs’ response to the Government’s Special Master request; and
- 13 5. Plaintiffs’ response to the Government’s request to amend the transcript from the
14 December 10, 2019 status conference.

15 **A. Motions to Quash Depositions of Military Officials**

16 All four of the below proceedings have been transferred to this Court, are fully briefed, and
17 have been consolidated with the above-captioned primary case:

- 18 1. *Karnoski, et al. v. Trump, et al.*, No. 2:20-mc-00055 (Subpoena of former Vice
19 Chairman of the Joint Chiefs of Staff General Paul J. Selva)
- 20 2. *Karnoski, et al. v. Trump, et al.*, No. 2:20-mc-00056 (Subpoena of former Under
21 Secretary of Defense for Personnel and Readiness Robert Wilkie Jr.)
- 22 3. *Karnoski, et al. v. Trump, et al.*, No. 2:20-mc-00061 (Subpoena of former Secretary
23 of Defense James N. Mattis)
- 24 4. *Karnoski, et al. v. Trump, et al.*, No. 2:20-mc-00069 (Subpoena of former Vice Chief
25 of Naval Operations Admiral William F. Moran)

26 **B. Deposition Update**

27 Since the last Status Conference in July, Plaintiffs have deposed Dr. Jillian Shipherd, a
28 third party witness who testified before the so-called “Panel of Experts” and who is now a

1 Clinical Research Psychologist with the Department of Veterans Affairs, and the Government
2 has deposed Dr. Jody Herman, Plaintiff-Intervenor's expert witness. No other depositions are
3 currently scheduled while Plaintiffs await the Government's compliance with the Court's
4 July 15, 2020 Order.

5 **C. Plaintiffs' Request for Production of Documents With Inadequate Privilege Log**
6 **Entries**

7 Plaintiffs sent the Government a letter on August 17, 2020 requesting the production of
8 three categories of documents with privilege log entries that fail to support withholding the
9 document pursuant to the deliberative process privilege. First, Plaintiffs requested the production
10 of 245 communications sent in the two weeks following President Trump's July 26, 2017 tweet
11 banning transgender military service. The privilege log entries associated with these documents
12 indicate that the communications reflect mere *post hoc* reactions to the tweet, not deliberative
13 and predecisional policy communications that the Government could conceivably withhold
14 pursuant to the deliberative process privilege. Indeed, the privilege log descriptions associated
15 with these documents include "Re_ Statement to press_ _Please call the WH_ .msg," "Document
16 regarding updated media coverage of the transgender policy," "Email between DoD personnel
17 formulating response to POTUS tweet," and "Email from CSAF to all Airmen re POTUS tweets
18 on transgender." That the Government is withholding these documents pursuant to the
19 deliberative process privilege is astounding.

20 Second, Plaintiffs requested the production of all documents described on the
21 Government's privilege log as "Deliberations regarding the implementation of the transgender
22 policy." Because these documents relate to implementation, rather than formulation, of the
23 military's policy regarding service by transgender individuals, the Government has no basis to
24 withhold these documents pursuant to the deliberative process privilege.

25 Third, Plaintiffs requested the production of documents relating to the Transgender Action
26 Officer Working Group and Transgender Senior Implementation Working Group that are dated
27 prior to July 13, 2015, the date Secretary Carter announced the military would begin to study the
28 implications of allowing transgender troops to serve in the military, and dated between

1 June 30, 2016, the date the Carter Policy was announced, through September 14, 2017, the date that
2 Secretary Mattis established the Panel. These documents are neither pre-decisional nor deliberative
3 with respect to the formulation of either the Carter Policy or the February 2018 Policy, and instead
4 concern implementation of those policies.

5 Plaintiffs await the Government's response to this letter and will bring a LCR 37 motion
6 should the Government not produce these documents in response to Plaintiffs' letter or pursuant to
7 the Court's July 15, 2020 Order.

8 **D. Government's Request to Object to Special Master Recommendations**

9 In its statement below, the Government asserts that Federal Rule of Civil Procedure 53
10 requires that the parties be permitted an opportunity to object to the Special Master's review of
11 documents submitted *in camera* before the Court reviews those findings *de novo*. The
12 Government is incorrect for two reasons. First, the Government expressly consented to the
13 current master structure and waived its objection below. The Court and the parties discussed this
14 very issue at the May 13, 2020 status conference, and the Court explained that "where the
15 Special Master is being used as a staff member to chambers and does not write a report and
16 recommendation but simply acts in the same sort of role as law clerk," no "appeal" or objection
17 of the Special Master's work was warranted. (5/13/2020 Status Conf. Tr. at 22:15-24:17.) The
18 Court then expressly invited the Government's input on this structure, and in response, counsel
19 for the Government stated:

20 **We don't believe -- I guess to begin, we wouldn't object to the special**
21 **master being utilized by the court in the manner that the court is**
22 **contemplating. We don't necessarily believe that the special master**
23 **needs to issue a report and recommendation himself.**

24 (*Id.* at 24:13-17.) The Government cannot now belatedly call for a report and recommendation
25 ("R&R") and two-step objection process when it *expressly declined* to object to the current
26 structure of the Special Master assisting the Court without issuing a separate order or R&R. The
27 Government has waived that argument.

1 Second, setting aside the Government’s express waiver, there is no requirement that a
 2 master issue an order or R&R. Rule 53, upon which the Government relies below, does not
 3 *require* a master to issue an order or R&R, but rather requires this Court to issue an appointing
 4 order that sets forth the master’s duties and procedures. *See* Fed. R. Civ. P. 53(b). The Court
 5 issued such an appointing order on April 9, 2020 (Dkt. No. 479) that clearly set forth the Special
 6 Master’s duties (“evaluation of Defendants’ privilege assertions over documents the Defendants
 7 submitted for *in camera* review”) (Dkt. 479 at 4) and procedure (the Court reviews the master’s
 8 analysis *de novo*, the master “may not issue orders” and “shall report his findings directly to the
 9 Court”) (*id.*). As such, the Court declined to order the master to issue separate orders or R&Rs,
 10 and instead ordered the master to assist the Court similar to a law clerk. The Rule 53
 11 requirements for providing the parties notice and an opportunity to be heard only apply if the
 12 master is ordered to issue such orders or R&Rs, and here the master was not so ordered. *See* Fed.
 13 R. Civ. P. 53(e) (“A master must report to the court as required by the appointing order. The
 14 master must file the report and promptly serve a copy on each party, *unless the court orders*
 15 *otherwise.*”) (emphasis added).¹ If the Government had objections to this structure, it should
 16 have timely moved to reconsider the April 9 order appointing the Special Master — or at the
 17 very least raised its concerns at the May 13 status conference when expressly invited to do so.
 18 Having failed to do either, its objection below has been waived.

19 **E. The Government’s Attempt to “Correct” the December 10, 2019 Hearing Transcript**

20 After the close of business on Wednesday, August 19, Plaintiffs’ counsel received an email
 21 from the Court’s court reporter informing Plaintiffs that the Government had requested a change
 22 to the transcript from the December 10, 2019 status conference where the Government’s counsel
 23

24 ¹ The cases cited by the Government below are inapposite because in each case the master issued
 25 a separate order or R&R, which therefore triggered the notice requirements in Rule 53(f). *See*
 26 *Disney Enterprises, Inc. v. Stephen Slesinger, Inc.*, 499 F. App’x 707, 708 (9th Cir. 2012)
 27 (special master had issued a “report and recommendation” regarding a fee application); *Nat.-*
 28 *Immunogenics Corp. v. Newport Trial Grp.*, No. SACV1502034JVSJCGX, 2018 WL 6165522,
 at *1 (C.D. Cal. Jan. 24, 2018) (special master issued a “preliminary order” requiring *in camera*
 review and a final order on plaintiff’s fraud motion); *Brown v. Chinen*, No. CIV.07-00556 ACK-
 LEK, 2010 WL 1783571, at *3 (D. Haw. May 3, 2010) (special master issued a “report and
 recommendation” on attorneys’ fees).

1 admitted that “Drafts aren’t deliberative process.” The Government never informed Plaintiffs
2 that it was contacting the court reporter to request such a change, nor was Plaintiffs’ counsel
3 copied on any communications with the court reporter or even made aware of this issue until the
4 court reporter’s email on August 19. As such, Plaintiffs have not had time to properly consider
5 this issue. Plaintiffs request an opportunity to discuss this issue with the Court at the upcoming
6 status conference.

8 DEFENDANTS’ STATEMENT

9 I. Plaintiffs’ Discovery Letter

10 Through recent correspondence Plaintiffs have sought the release of three categories of
11 deliberative documents from Defendants: 1) Department of Defense (“DoD”) deliberative
12 documents immediately following the President’s statements on Twitter; 2) deliberative
13 documents where the Government’s privilege log mentions implementation of the Carter and
14 Mattis policies; 3) deliberations prior to the creation of the Carter Transgender Service Review
15 Working Group.

16 As an initial matter, this correspondence was sent before this Court issued its amendment
17 to its July 15, 2020 Order. *See* Dkt. No. 566. The amended order requires the Government to
18 either submit documents that fall “outside the timeframe of July 13, 2015 through June 30, 2016
19 and September 14, 2017 through January 11, 2018” to the Court for *in camera* review or to
20 produce such documents to Plaintiffs. *Id.* at 13. Each of the three categories raised by Plaintiffs
21 falls within the scope of the amended order. The Government is preparing to comply with the
22 amended order and thus will either submit the documents that fall within Plaintiffs’ three
23 categories to the Court for *in camera* review or produce them to Plaintiffs. Accordingly, there is
24 no need for judicial intervention on this issue at this time.

25 Nonetheless, Defendants note that Plaintiffs continue to repeat the same fundamental errors
26 when assessing the Government’s claims of privilege pursuant to the deliberative process.
27 “[T]he ‘emphasis on the need to protect pre-*decisional* documents does not mean that the
28 existence of the privilege turns on the ability of an agency to identify a specific decision in

1 connection with which a memorandum is prepared.” *Lahr v. National Transp. Safety Bd.*, 569
2 F.3d 964, 981 (9th Cir. 2009) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18
3 (1975)); *see also Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988)
4 (applying a “functional” test for evaluating the privilege because its objective is to “safeguard the
5 deliberative *process* of agencies”). Thus, even if certain documents are not immediately pre-
6 decisional as to the Carter and Mattis policies in particular, it does not follow that they are not
7 protected by the deliberative process privilege. For example, working drafts of further guidance
8 documents such as drafts of the DoD Transgender Handbook, *see* Dkt. 542 at 6, draft guidance
9 for the treatment of gender dysphoria for active and reserve component service members, *id.*, and
10 draft Service specific guidance, *id.* at 6-7, would all be subject to the deliberative process
11 privilege. And the privilege would apply even though final versions of these documents are
12 publicly available. *Nat’l Wildlife Fed’n*, 861 F.2d at 1120 (documents were pre-decisional
13 because they were “working drafts subject to revision”).

14 **II. Opportunity to Object to Special Master Recommendations**

15 The Court’s recent order grants Plaintiffs’ request for *in camera* review of further
16 documents withheld under the deliberative process privilege, which presumably the Special
17 Master will review, and concluded that this would be done “without motion practice.” Dkt. 566,
18 at 13. From the most recent round of Special Master review, this Court has indicated that the
19 Special Master may be recommending dispositions on such documents to the Court. *See* Dkt.
20 545, at 10 (recounting that the Special Master “spent several hours” conducting review and
21 “concluded” that 500 documents should be resolved based on the Court’s timeframes).

22 The government wishes to ensure in advance that the mandatory requirements of the
23 federal rules apply to future documents submitted for review. To the extent the Special Master
24 recommends to the Court a disposition on any document submitted *in camera*: (1) those
25 “recommendations” must be “served” on the government, (2) the government “may file
26 objections” to the recommendations within 21 days, and (3) “the court *must* give the parties
27 notice and an opportunity to be heard” before it “act[s]” on a recommendation. Fed R Civ P
28 53(f)(1) & (2) (emphasis added); *Disney Enterprises, Inc. v. Stephen Slesinger, Inc.*, 499 F.

1 App'x 707, 708 (9th Cir. 2012) (Rule 53 “require[s] that a district court give the parties ‘notice
2 and an opportunity to be heard,’” because “a party is entitled to object to a master’s report.”)
3 (citing Fed.R.Civ.P. 53(f)(1) & (2)); *accord Nat.-Immunogenics Corp. v. Newport Trial Grp.*,
4 No. SACV1502034JVSJCGX, 2018 WL 6165522, at *3 (C.D. Cal. Jan. 24, 2018) (citing
5 *Slesinger*); *Brown v. Chinen*, No. CIV.07-00556 ACK-LEK, 2010 WL 1783571, at *3 (D. Haw.
6 May 3, 2010) (“In acting on a special master’s order, report, or recommendation, the district
7 court must afford an opportunity to be heard . . .”). These are mandatory rules permitting
8 objections to the Court on adverse recommendations, regardless of motions practice between the
9 parties, and regardless of whether those “recommendations” are in the form of a formal report or
10 a spreadsheet indicating where the Special Master believes the privileges were improperly
11 applied. *See Moore as next friend to Moore v. Tangipahoa Par. Sch. Bd.*, 771 F. App’x 540, 545
12 (5th Cir. 2019) (“prior to accepting the [court appointed compliance officer’s] recommendation,
13 rather the court is . . . required to give the parties ‘an opportunity to be heard.’”).

14 Plaintiffs’ argument that Defendants waived any objection to the procedures required
15 under the Federal Rules for all future uses of the Special Master is plainly meritless. The
16 statement Plaintiffs quote was specifically made in response to Plaintiffs’ motion seeking a
17 sampling of 350 documents. *See* Dkt. 497; 5/13/2020 Status Conf. Tr. at 22-26. The Court has
18 since issued a new order for *in camera* review which applies to an exponentially greater universe
19 of documents including a large segment of documents dating between January 11, 2018 and
20 February 22, 2018 that are currently at issue in the Government’s pending mandamus petition.
21 *See* Dkt. 566 at 13 (“The Government may bring any privileged documents outside the timeframe of
22 July 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018 to the Court
23 for an *in camera* review without motion practice”). Accordingly, if the Court intends to use the
24 Special Master to review Defendants August 28, 2020 *in camera* production and “identify to the
25 Court those documents over which he believes the Defendants erroneously made privilege
26 assertions,” Dkt. 479 at 4, or in any other capacity, the Government requests to be provided with
27 those recommendations and an opportunity to be heard as required by the Federal Rules.

28 **III. Correction of December 10, 2019 Hearing Transcript**

1 Finally, the Government requested the Court Reporter permit undersigned counsel to
2 review the audio of the December 10, 2019 hearing. Government counsel explained his belief
3 that the words “are a” may have been inadvertently transcribed as “aren’t[.]” 12/10/19 Hr’g. Tr.
4 27:21. Rather than provide the audio for review, the Court Reporter stated that she reviewed the
5 relevant audio and portion of the transcript and agrees and has prepared a corrected copy of the
6 transcript for the Court’s approval.²

7
8 Dated: August 21, 2020
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 ² Government counsel will provide all correspondence with the Court Reporter on this issue if
28 either the Court or Plaintiffs request it but has not filed such correspondence on the docket out of
respect for the privacy of the Court Reporter.

1 Respectfully submitted,

2 **NEWMAN DU WORS LLP**

**UNITED STATES
DEPARTMENT OF JUSTICE**

3
4 s/ Rachel J. Horvitz

s/ Andrew E. Carmichael

5 Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com

DAVID M MORRELL
Deputy Assistant Attorney General

6 Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com

ALEXANDER K. HAAS
Branch Director

7 Rachel J. Horvitz, WSBA No. 52987
rachel@newmanlaw.com

ANTHONY J. COPPOLINO
Deputy Director

8 2101 Fourth Ave., Ste. 1500
9 Seattle, WA 98121
10 (206) 274-2800

ANDREW E. CARMICHAEL, VA Bar #
76578

11 **LAMDBA LEGAL DEFENSE AND
EDUCATION FUND, INC.**

andrew.e.carmichael@usdoj.gov
Senior Trial Counsel

12 Tara Borelli, WSBA No. 36759
tborelli@lambdalegal.org

MATTHEW SKURNIK, NY Bar # 5553896
Matthew.Skurnik@usdoj.gov

13 Camilla B. Taylor (admitted pro hac vice)

JAMES R. POWERS, TX Bar #24092989
james.r.powers@usdoj.gov

14 Peter C. Renn (admitted pro hac vice)

Trial Attorneys

15 Sasha Buchert (admitted pro hac vice)

United States Department of Justice
Civil Division, Federal Programs Branch

16 Kara Ingelhart (admitted pro hac vice)

1100 L Street NW, Suite 12108

17 Carl Charles (admitted pro hac vice)

Washington, DC 20530

18 Paul D. Castillo (admitted pro hac vice)

(202) 514-3346

19 **OUTSERVE-SLDN, INC. N/K/A
MODERN MILITARY ASSOCIATION
OF AMERICA**

Counsel for Defendants

Peter Perkowski (admitted pro hac vice)

**OFFICE OF THE WASHINGTON
STATE ATTORNEY GENERAL**

20 **KIRKLAND & ELLIS LLP**

s/ Chalia I. Stallings-Ala'ilima

21 James F. Hurst, P.C. (admitted pro hac vice)

Chalia I. Stallings-Ala'ilima, WSBA
No. 40694

22 Steve Patton (admitted pro hac vice)

chalias@atg.wa.gov

23 Jordan M. Heinz (admitted pro hac vice)

Colleen M. Melody, WSBA No. 42275

24 Vanessa Barsanti (admitted pro hac vice)

colleenm1@atg.wa.gov

25 Daniel I. Siegfried (admitted pro hac vice)

Assistant Attorney General

26 Sam Ikard (admitted pro hac vice)

Wing Luke Civil Rights Division

Office of the WA Attorney General

27 *Counsel for Plaintiffs*

800 Fifth Avenue, Suite 2000

Seattle, WA 98104

(206) 464-7744

28 *Counsel for Intervenor-Plaintiff State of
Washington*

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 August 21, 2020.

s/ Rachel J. Horvitz
Rachel J. Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28