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August 21, 2020

Ms. Molly C. Dwyer  
Clerk of Court  
United States Court of Appeals  
for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

RE: *In re Trump*, No. 20-70365 (Clifton, Callahan, Friedland, JJ.)

Dear Ms. Dwyer:

Pursuant to the Court's July 31, 2020 order, the government submits this supplemental brief concerning developments following our February 11 petition for a writ of mandamus. Our petition explained that the district court had committed clear and indisputable error in failing (1) to require plaintiffs to justify, in light of the extensive discovery already obtained, what more they need to litigate their claims, and (2) to meaningfully consider if that need outweighs the military's significant confidentiality interests. In response to the petition, the district court itself requested "guidance" and "more direction" on how to proceed. D.Ct.Resp.13.

The district court has not awaited this Court's guidance or direction. As discussed below, it has entered no fewer than a dozen more orders that intrude on the military's serious interests. At no point has it paused to consider whether the trove of

deliberative and non-deliberative discovery that plaintiffs have already obtained is “sufficient to allow for judicial review,” or identified any claims that need additional discovery. *Karnoski v. Trump*, 926 F.3d 1180, 1206 n.22 (9th Cir. 2019) (per curiam). The district court’s recent orders reflect the same errors raised in our petition, and reinforce that this Court’s correction is needed.

At this juncture, this Court should direct the district court to halt further discovery into deliberative materials unless plaintiffs can articulate to the panel what aspect of their claims requires additional discovery, beyond what they already possess.

**A. The District Court Has Continued to Order Intrusive Discovery**

Plaintiffs contend that the Mattis policy is unlawful. They have the policy, the Department’s policy rationales in its Report, and the unredacted Administrative Record supporting those rationales. After more than two years of discovery, the government has also provided around 100 document productions comprising over 50,000 documents—surpassing half a million pages—from over 150 custodians across all levels of the military during a five-year period. Doc.398, at 1; Doc.546, at 11. These include all deliberative materials seen or considered by the Panel of Experts that recommended the challenged policy to Secretary Mattis, which he adopted in full. Plaintiffs have conducted or sought depositions of seven witnesses and have access to the transcripts of five depositions taken in related litigation.

Around 25,000 documents remain withheld solely under the deliberative process privilege. Doc.547, at 1 n.1. The majority of them were addressed in our February 11 petition. Since then, the district court has ordered additional avenues of discovery intruding on the military's significant confidentiality interests, and has addressed the thousands of remaining deliberative documents in the case.

**1. Confidential Information about Transgender Service Members.** The district court has repeatedly ordered disclosure of confidential information about individual, non-party transgender service members. This includes:

- information on “service members’ gender dysphoria medical treatment plans,” and “individual treatment plans,” Doc.455, at 4 (March 4 order);
- for service members who testified to the Panel, “the names of the transgender service members,” which the government had anonymized, Doc.458, at 3 (March 5 order);
- for service members “rendered non-deployable on account of gender dysphoria or transition-related medical care” since 2016, the “duration of and specific reason(s) for such non-deployability” and “specific information about [their] medical status,” Doc.485, at 2, 5 (April 15 order); and
- for service members from the State of Washington, information relating to any disciplinary “complaints arising from the transgender status or a diagnosis of any Washington service member,” Doc.482, at 19; Doc.487 (April 23 order).

The court stated that plaintiffs have a “right to know” such information, Doc.458, at 3, to reassess whether gender dysphoria “negatively impacts readiness,” Doc.485, at 4.

**2. Third-Party Deliberative Documents.** The district court has required all deliberative communications with third parties withheld under the deliberative process privilege’s consultant corollary to be “turned over.” Doc.454, at 5 (March 4 order); *see*

*Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (establishing consultant-corollary doctrine). These include 1500 pages of Department communications with two contractors—RAND Corporation and Kennell and Associates—which both “were hired to provide neutral advice.” Doc.460, at 1. The court declared that, because the final RAND report that supported the Carter policy “was going to be made public,” all deliberations related to the report should be disclosed; and because Kennell just “put together studies” that supported the Mattis policy, there were no deliberations involved. Doc.509, at 4, 8 (May 12 order).

**3. Special Master Review of Deliberative Documents.** The district court has, moreover, ordered *in camera* review of other deliberative documents through appointment of a special master. Doc.479 (April 9 order). Plaintiffs requested review of a random sample of documents; plaintiffs did not assert that a random process bore any relationship to their claims, but rather wanted to “test” the government’s privilege assertions. Doc.497, at 3. The court authorized review of 350 (and then 500 more) random deliberative documents that were not addressed in our petition to assess whether the government was “improperly withholding documents.” Doc.514, at 4 (May 14 order); Doc.536 (June 24 order). Because these documents stretch back as far as March 2014 and do not immediately relate to the Carter and Mattis policies, *see* Doc.545-2, at 48, the government provided a detailed timeline of the military’s policy development since that time to aid review, Doc.542, at 4-10.

**4. All Remaining Deliberative Documents.** The district court has also continued discovery into the remaining deliberative documents in this case.

a. On July 15, the district court in effect set aside the deliberative process privilege as to all remaining documents. Doc.545 (July 15 order). The court did so by defining two narrow timeframes during which, in its view, the Department formulated the Carter policy (July 2015 to June 2016) and Mattis policy (September 2017 to January 2018). *Id.* at 7-9. The court held that all policy deliberations outside of these timeframes were not pre-decisional for purposes of the privilege, because they did not pertain to the two “specific policies at issue in this litigation.” *Id.* at 5. As our clarification opposition explained (at 15-19), that understanding of the privilege and military decisionmaking is manifestly incorrect.

Because the orders addressed in our petition require disclosure of deliberative documents relating to the Carter and Mattis policies, the July 15 order—which focuses on events outside of narrow Carter and Mattis timeframes—in effect required disclosing all remaining deliberative documents. Despite having had such documents available for *in camera* review, the court ruled that Secretary’s Mattis’s handwritten notes on a 2017 “Recommended Transgender Way Ahead” memorandum, for instance, were not privileged based on its artificial timeframes. Doc.547, at 7. Upon the government’s motion, the court temporarily stayed disclosure under its order. Doc.550 (July 23 order).

b. During the stay, the government urged that, if the district court were to proceed with *in camera* review on the remaining deliberative documents not immediately relating to the Carter or Mattis policies, it should ask plaintiffs to “identify the actual or contemplated decisions for which [they] believe they need further information to advance their case,” as many documents bore “a highly attenuated relationship to the military policy [they] challenge.” Doc.560, at 5. The court did not engage in that inquiry.

Instead, on August 17, the district court amended its July 15 order to require *in camera* review of all remaining deliberative documents, regardless of their relationship to plaintiffs’ claims. The court repeated its prior ruling that, for purposes of assessing the privilege, “the policies at issue here are the Carter and Mattis policies.” Doc.566, at 10 (August 17 order). The court concluded that, if “certain deliberative documents fall outside of [its] proposed timeframes,” then the government needed to submit the documents for review. *Id.* The court also demanded review of numerous deliberative documents that are before this Court, including documents that post-dated the Panel recommendation (January 11, 2018) but pre-dated Secretary Mattis’s proposal of that policy to the President (February 22, 2018)—such as the Secretary’s personal notes and drafts of the Department’s Report. *Id.* at 13.

The government intends to submit deliberative documents for *in camera* review no later than the order’s August 28 deadline for those submissions.

## **5. Depositions about Privileged Information and of High-Ranking**

**Officials.** The district court has permitted plaintiffs several seven-hour depositions of Rule 30(b)(6) witnesses, Doc.519 (May 29 order), and plaintiffs have conducted other depositions. Though the court has not required government witnesses to disclose deliberative information during depositions (because of this Court's stay), it has held that if it later overrules government counsel's objections based on the privilege, then the government must bear the costs of additional depositions.

Doc.536 (June 24 order). Plaintiffs have also sought to depose former Secretary Mattis, current Secretary of Veterans Affairs Robert Wilkie Jr., former Vice Chairman of the Joint Chiefs of Staff Paul Selva, and former Vice Chief of Naval Operations William Moran. The government's motions to quash those depositions are pending, and the court may permit the depositions at any time.

### **B. The Court Should Halt Discovery into Materials Unless Plaintiffs Justify that Their Claims Need More Discovery**

The government's pending mandamus petition was occasioned by three orders in which the district court required the disclosure of over ten thousand deliberative documents without assessing whether plaintiffs actually needed more discovery to litigate their claims, and without meaningfully weighing the serious interests protected by the deliberative process privilege. In none of the dozen rulings since our petition

has the district court assessed what additional privileged discovery is needed to resolve this litigation, and plaintiffs have failed to provide that simple explanation.

At this juncture, this Court should direct the district court to halt further discovery into deliberative materials unless, at a minimum, plaintiffs can justify that their claims require more discovery, beyond what they already have.

1. The district court’s rulings in the past six months embody the errors addressed in our petition and underscore the need for this Court’s correction. Challenges to agency policies are regularly resolved based on the administrative record supporting the policy—which plaintiffs possess in full—and this Court has confirmed that the Mattis policy “must be evaluated on the record supporting that decision.” *Karnoski*, 926 F.3d at 1207. This Court has recognized that, in similar challenges, far less discovery (if any) was “sufficient to allow for judicial review.” *Id.* at 1206 n.22 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018)).

In ignoring these instructions, the district court has continued to assume that the proper scope of discovery does not depend on the nature of plaintiffs’ claims or the substantive legal “standard for evaluating the record.” Doc.485, at 4. But as the Supreme Court has explained, evidence adduced through discovery is “quite beside the point” in challenges to military policies. *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). The sheer breadth of discovery that has transpired would be remarkable in any challenge to agency action; it is astonishing in a challenge to military policy where

it is “quite wrong” for a federal court as a factfinder to conduct “an independent evaluation of [the] evidence.” *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

Even if some discovery were appropriate, this Court has rejected the implausible proposition that plaintiffs should obtain all deliberative documents. *Karnoski*, 926 F.3d at 1206. Rather, plaintiffs need to demonstrate that they need privileged materials, and that they need it in light of what they already have.

The district court’s recent rulings exemplify that the ongoing discovery is untethered from plaintiffs’ remaining need. The August 17 order requires the government to submit for *in camera* review in effect all deliberative documents not addressed in our petition (as well as privileged post-Panel notes and drafts at issue in our petition). The court still assumes that plaintiffs’ requests for those remaining documents are “focused” on “the Carter and Mattis policies.” Doc.566, at 10. This is perplexing. The court already ordered disclosure of all deliberative documents immediately relating to the Carter and Mattis policies; those are the orders addressed in our petition. The August 17 order targets all remaining deliberative documents in the case, and—together with any resulting disclosure orders—is impossible to reconcile with any recognized conception of proper discovery in challenges to military policy.

In considering whether the remaining deliberative documents warrant protection, the district court has itself expressed doubt about “why thousands of documents relating to other policies” would be “responsive” or “related to the

[Mattis] Policy.” Doc.566, at 10 (quotation omitted). These are sensible questions that a court should pose to plaintiffs. Plaintiffs have demanded extensive discovery relating to military service by transgender individuals stretching as far back as 2014, without explaining how it advances this litigation. *See* Doc.365-3, at 55 (from October 2014); Doc.482, at 6 n.4 (from January 2014); *see also* Doc.371-1, at 7 (declaration describing that, based on plaintiffs’ broad requests, discovery sought includes all documents “remotely related to DOD’s transgender policy, past or present”). The court, rather than pause to assess what more plaintiffs need, has declined to even ask them to “identify the actual or contemplated decisions for which [they] believe they need further information to advance their case.” Doc.560, at 5.

2. In addition to the relief requested in our petition, this Court should direct the district court to halt discovery into deliberative materials unless, at a minimum, plaintiffs can justify to the panel, based on the discovery they have, what more they need to litigate their claims.

Any serious inquiry would reveal that plaintiffs’ need for further deliberative documents is non-existent, or close to it. Following this Court’s 2019 decision, plaintiffs asserted that deliberative documents in the Department’s possession “go to the heart of [their] claims.” Doc.364, at 2. Plaintiffs elaborated on a few categories of documents they viewed as particularly probative. The government has since disclosed each category:

- “documents related to the government’s purported justifications,” *id.*, were produced in the unredacted Administrative Record;
- “communications and materials considered by the so-called ‘Panel of Experts,’” *id.*, were produced with the deliberative Panel documents;
- “statistics and data regarding transgender military service” and “objective data” considered by the Panel, *id.*, were disclosed with those Panel documents, and other medical information was disclosed following the orders discussed above; and
- “names of those who contributed” to the Department’s Report that also allegedly go to “the heart” of the case, Doc.445, at 15, were disclosed pursuant to court order, Doc.458.

Having received all the information they once viewed as central to this litigation, and around half a million pages of documents overall, it would be remarkable if plaintiffs needed more.

Plaintiffs’ claimed need for further privileged discovery is elusive. As to the documents addressed in our petition, plaintiffs declare that deliberative information never seen by the Panel “goes to the heart” of the case, Ans.26; that post-Panel drafts and deliberations of Secretary Mattis and others also “go to the heart” of the case, Ans.29; and that Carter-policy deliberations “get to the core issue,” too, Ans.34. Outside of those materials, 850 documents selected at random would also apparently “go to the heart of this dispute,” Clarification Mot. 15, and plaintiffs say all other deliberative documents in the case (those under the August 17 order) are “indispensable,” Doc.553, at 11. There is no credible basis to assert that every document is critical to litigation. As another district court in related litigation has

recognized, these remaining discovery efforts are nothing more than a “fishing” expedition. Doc.405, at 7 (quoting transcript in *Doe* litigation).

Plaintiffs and the district court appear to be treating discovery as an end unto itself. The ongoing process for *in camera* review was not designed to focus on plaintiffs’ needs, but to “test,” Doc.497, at 3, whether the government w “improperly withholding documents” by scrutinizing the remaining materials, Doc.514, at 4, whose relevance even the court doubts. Discovery is “not a punishment.” *In re Clinton*, 2020 WL 4745104, at \*6 (D.C. Cir. Aug. 14, 2020). Insofar as the court has been willing to require additional discovery as a consequence for what it views as incorrect assertions of privilege, that approach could not begin to justify the breadth of discovery here. *E.g.*, Doc.536, at 8 (requiring government to bear costs of depositions if privilege objections are overruled); Doc.566, at 3-7 (criticizing the government’s privilege assertions). In any case, the court’s criticisms of our privilege assertions only reflect its own novel and erroneous understandings of the privilege. *See* Clarification Opp. 16-20.

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If plaintiffs have a theory of the case upon which additional discovery is meaningful, it is incumbent on them to provide it before more disclosures of deliberative information are permitted. It is implausible that every deliberative document goes to “the heart” or “the core” of their case. This Court should direct the district court to halt privileged discovery unless, at a minimum, plaintiffs can

justify (based on the available discovery) what additional information they need to litigate their claims.

Sincerely,

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<sup>1</sup> The Acting Assistant Attorney General is recused from this matter.

## CERTIFICATE OF COMPLIANCE

This supplemental letter brief complies with the type-volume limit of this Court's July 31, 2020 order because it contain 2799 words. This brief also complies with the typeface and type-style requirements of Ninth Circuit Rule 32-3 and Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*s/Dennis Fan*  
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DENNIS FAN

**CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/Dennis Fan*  
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DENNIS FAN