No. 20-70365

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI, *et al.*,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Plaintiff-Intervenor.

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CERTIFICATE OF SERVICE

I hereby certify that 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 on August 24, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Stephen R. Patton*
Stephen R. Patton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297 MJP ORDER DENYING MOTION TO STAY THE COURT'S JULY 15, 2020 ORDER (DKT. NO. 545)

THIS MATTER comes before the Court on Defendants' Motion to Stay Compliance with the Court's Discovery Order. (Dkt. No. 547.) Having reviewed the Motion, the Response (Dkt. No. 553), the Reply (Dkt. No. 560), and the related record, the Court DENIES the Motion.

Background

Once again the Court is required to discuss the Government's assertion of the Deliberative Process Privilege ("DPP") over tens of thousands of documents. This particular discovery dispute is now more than two years old and has been the subject of dozens of previous motions, Orders, and the Government's two petitions for writs of mandamus with the Ninth Circuit. To date, the Government continues to withhold 25,000 documents solely on the basis of

the DPP and over 40,000 documents based on the DPP in combination with other privileges. (See Dkt. No. 547 at 2 n. 1.)

1. Procedural Background

The Court first addressed Defendants' DPP claims on July 27, 2018, when it granted Plaintiffs' first Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299). In its Order, the Court noted that while several other courts have recognized that the privilege does not apply to cases involving claims of governmental misconduct or where the government's intent is at issue, the application of the privilege in cases involving these claims "appears to be an open question in the Ninth Circuit." Vietnam Veterans of Am. v. CIA, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011). The Court therefore evaluated Defendants' DPP claims under the balancing test set forth in FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), which determines whether Plaintiffs are able to overcome a properly asserted DPP claim. The Court ordered Defendants to produce the requested documents.

In response, the Government filed a Petition for a Writ of Mandamus with the Ninth Circuit. (See Dkt. No. 302.) Almost eleven months later, the Ninth Circuit issued a Writ of Mandamus, concluding, in part, that the record was insufficient to establish the relevance of the documents as balanced against the possible "chilling effect" of disclosure. Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit suggested that on remand, when evaluating Defendants' DPP claims, this Court should "consider classes of documents separately when appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be proper, [the Court] should undertake it." Id.

On remand, Plaintiffs filed a second Motion to Compel Documents Withheld Under the Deliberative Process Privilege. (Dkt. No. 364.) After evaluating groupings of contested documents organized by individual Requests for Production, the Court ordered Defendants to produce documents responsive to Plaintiffs' Request for Production No. 15, which seeks "[a]ll documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005," and Request No. 29, which seeks "Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons." (Dkt. No. 398 at 2-3; Dkt. No. 402 at 34:19-20.)

Following the Court's ruling, Defendants filed their second Petition for a Writ of Mandamus, asking that the Ninth Circuit:

> [R]everse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020, and order that plaintiffs are not entitled to any further deliberative documents from the two requests for production (RFPs) at issue in these orders—RFP 29 and RFP 15—given plaintiffs' inadequate showing of need under the proper standard for overcoming the deliberative process privilege.

(Dkt. No. 414, Ex. 1 at 11.) On February 12, 2020, the Ninth Circuit granted Defendants' request for a temporary administrative stay of the Court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in Defendants' petition. (Dkt. No. 415.) That temporary stay remains in effect today—six months after its entry—although Plaintiffs recently asked for clarification of the scope of the stay, noting that it was entered before any briefing had been submitted and can no longer be considered temporary. (Dkt. No. 561, Ex. 1.)

Following the Government's Petition, the Circuit took the unusual step of inviting the Court to address the Petition; the Court filed its response on March 5, 2020. (Dkt. No. 416.) Oral argument on Defendants' Petition was recently set for October 14, 2020. (Dkt. No. 559.)

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2. Problems with the Government's Privilege Assertions

Until March 2020, the Court's process for analyzing Defendants' privilege claims was based on the assumption that the Government properly asserted the DPP over each of the 35,000 withheld documents (now reduced to 25,000) and that the relevant question was therefore whether the Plaintiffs were able to overcome the privilege under the balancing test set forth in Warner.

But in March, upon two motions to compel brought by Plaintiffs, the Court ordered the Government to submit documents for *in camera* review for the first time and these submissions raised serious concerns about the Government's review process and privilege assertions. First, Plaintiffs moved to compel the Government's withheld communications with third parties, asking the Court to conduct an *in camera* review of the Government's DPP and attorney-client privilege claims over communications with 487 third party custodians from the Government's privilege logs. (Dkt. No. 440.) The Government objected on the grounds that its communications with those third parties are shielded by the "consultant corollary" doctrine. (Id. at 20-22.) But when the Court ordered the Government to submit the privilege-claimed documents for *in camera* review, the Government produced communications from only 14 of the 487 persons identified by Plaintiffs, conceding that there was no colorable privilege claim for the remaining 473 custodians. (See Dkt. Nos. 461, 509.) Further, of the 1,500 pages of documents the Government did submit to the Court, only one document was arguably privileged. (Dkt. No. 509 at 9.) One particularly egregious example of the Government's over-assertion was a copy of the publicly available RAND Report indicating it could be purchased for $22.50, but which the Government had marked as subject to the DPP. (Id. at 4.)

Plaintiffs' second motion to compel in March sought documents that are part of an otherwise responsive "family group" of produced material but were withheld on the grounds of "non-responsiveness"; as an example, the Government withheld attachments to emails as "non-responsive" where the email itself was produced. (Dkt. No. 449.) After the Court granted Plaintiffs' Motion, the Government informed the Court that while the Government had not asserted any privilege over these documents or listed them on a privilege log, the Government was now claiming the documents were protected from disclosure by the attorney-client privilege, the attorney work product privilege, the DPP, and the executive privilege. (Dkt. No. 463 at 2.) The Court ordered Defendants to submit the subset of documents that Defendants believed to be privileged to the Court for *in camera* review along with a privilege log. (Dkt. No. 464.) After reviewing the approximately 1,700 pages the Government submitted, the Court found that for most of these documents—which included summaries of press accounts prepared by foreign governments, responses to Congressional questions, and non-privileged communications that were simply sent to attorneys—the Government's privilege assertions strayed far outside the bounds of the claimed privileges. (Dkt. No. 522 at 5.)

Following these rulings, on May 4, 2020 Plaintiffs brought a motion to compel the Government to submit a random sample of 350 documents for *in camera* review, one percent of the total documents the Government was still withholding solely on the basis of the deliberative process privilege. (Dkt. No. 497.) It seemed evident that before the Court could apply the balancing test set out in the Ninth Circuit's decision, as directed by Warner, 742 F.2d at 1161, it first had to determine if the documents at issue even qualified as being subject to the DPP, rather than simply accepting the Government's privilege assertions. To qualify for the DPP, "a document 'must be *both* (1) 'predecisional' or 'antecedent to the adoption of agency policy' and

(2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th Cir. 1988) (citation omitted, emphasis in original). In its *in camera* review of the Government's DPP claims, the Court found that many documents were neither predecisional nor deliberative.

The Court granted Plaintiffs' motion and after reviewing the Government's submission of 350 randomly selected documents withheld as privileged under the DPP, the Court ordered the Government to submit an additional 500 randomly selected documents to the Court for *in camera* review in order to further determine the scope of the Government's privilege claims. (Dkt. No. 545.) Yet before submitting the set of 500 documents, the Government itself determined that 90 of those documents (or 18% of the total) were not subject to a proper DPP claim. (Dkt. No. 542 n. 1.)

After reviewing each of the 850 documents individually and applying the two-step test set out in National Wildlife Federation, the Court concluded that nearly 90% were not privileged. (Dkt. No. 545 at 5.) The Court also noted that the Government failed to segregate portions of documents which may be partially protected by the DPP from those that are not, despite its obligation to do so. See Karnoski, 926 F.3d at 1204 (quoting Army Times Publ'g Co. v. Dep't of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)) ("Unlike the presidential communications privilege, the deliberative process privilege does not protect documents in their entirety; if the government can segregate disclosed non-privileged factual information within a document, it must.").

In sum, in its four submissions for *in camera* review, the Government has displayed largescale and pervasive failures in its discovery process, leaving the Court with little, if any confidence that the Government is properly asserting the DPP privilege over the remaining

withheld documents. Further, the Government's lawyers recently admitted that although they have been strenuously arguing against the disclosure of these documents for years, they have not personally reviewed the withheld documents, making the Court's "granular" review all the more difficult where arguments about the documents are often made in general, hypothetical terms. (Dkt. No. 548.)

3. July 15, 2020 Order

Based on the Court's growing concerns that the Government has been haphazardly and mistakenly labelling documents as privileged without proper review, the age of this particular discovery dispute, and in light of the enormous task remaining of reviewing the 25,000 to 40,000 withheld documents over which the Government has claimed the DPP, on July 15, 2020 the Court outlined a discovery management tool that would speed the Court's review going forward. (Dkt. No. 545.) Defendants were ordered to review their list of documents withheld solely on the basis of the DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018, the timeframes that the Carter and Mattis Policies were being considered, respectively. (Id. at 2.) This timeframe was based on the Court's review of the relevant record, the Ninth Circuit's discussion in Karnoski, 926 at 1188-98, and the Parties' answers to questions posed by the Court about the two Policies. (Dkt. Nos. 536, 540-42).

The Court concluded that going forward, documents outside this timeframe are presumptively not privileged under the DPP because they are not predecisional, "but if it turns out that some documents falling outside the predecisional and post-decisional date ranges are properly the subject of DPP, specific documents can be brought to the Court's attention on subsequent motion." (Dkt. No. 545 at 6-7.) Defendants were also ordered to produce documents

from their 850-document submission that were reviewed *in camera* and determined not to be privileged. (Dkt. No. 545 at 11.) The Order specifically exempted documents subject to the stay in the pending Mandamus Petition.

On July 20, 2020 the Government brought the current Motion to Stay the Court's Jul 15, 2020 Order. (Dkt. No. 547.) In response, Plaintiffs propose that the Court make two modifications to its Order that would allow the Government to submit privileged documents that fall outside the timeframes the Court has adopted for *in camera* review without motion practice. (Dkt. No. 553 at 11.) For the reasons discussed below, the Court DENIES the Government's Motion and adopts Plaintiffs' proposed modifications to the Court's July 15, 2020 Order.

Discussion

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). As such, it is "not a matter of right, even if irreparable injury might otherwise result." Id. at 433 (citation omitted). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." Id. (internal quotation marks and citation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 433-34.

In determining whether to grant a stay, the Court considers: (1) whether Defendants have made a strong showing that they are likely to succeed on the merits of their Mandamus Petition; (2) whether Defendants will be irreparably injured absent a stay; (3) whether a stay will substantially injure Plaintiffs; and (4) whether the public interest supports a stay. Id. at 434.

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A. Likelihood of Success on the Merits

The Government first argues that the Court's July 15 Order is likely to be contrary to the Ninth Circuit's ruling on the Governments' pending mandamus petition because: (1) the Order would require the production of a large trove of documents, and is therefore not a "granular" discovery order; (2) the Order misapplies the predecisional requirement; and (3) the Court has selected timeframes that "are not congruent with the facts of this case." (Dkt. No. 547 at 7-8.)

As to the first objection, the Order challenged by the Government specifically carves out the documents subject to the pending Mandamus Petition. Moreover, the pending Mandamus Petition is unrelated to the Court's July 15, 2020 Order. The Government's pending mandamus petition requests that the Ninth Circuit "reverse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020 . . . given [P]laintiffs' inadequate showing of need under the proper standard for overcoming the deliberative process privilege." (Dkt. No. 414, Ex. 1 at 11 (emphasis added).) The challenged Orders did not evaluate whether the Government properly asserted the DPP in the first place, but assumed the withheld documents met the threshold of being predecisional and deliberative. (Dkt. No. 545 at 11.) Subsequent *in camera* review showed the error of the Court's assumption. Finally, the Government fails to explain why the Court's *in camera* document-by-document review of the Government's 850-document submission was not "granular," yet the Government resists producing these documents as well.

The Government's second and third objections relate to the time frame chosen as a discovery management tool to deal with the "predecisional requirement." As noted in the Court's Order, one DPP requirement is that it be "predecisional," so that the privilege applies "prior to the time the decision is made" and not to "communications made after the decision and designed to explain it." (Dkt. No. 545 at 4 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S.

132, 151-52 (1975)). In an attempt to get the Parties' views on the issues, the Court submitted written questions to the Parties and received responses. From the Government's perspective, the time frame at issue began in March 2014, when certain individuals began to consider transgender policies, and continues through today. (Dkt. No. 545 at 5.) Although this is in keeping with the way it has handled its DPP designations, this approach reads out of existence the requirement that documents be predecisional.

The Government's objections that the Court's focus on the Carter and Mattis Policies could lead to mass disclosure of deliberative documents relating to other policies, is misplaced. (Dkt. No. 547.) To begin, the policies at issue here are the Carter and Mattis policies and the withheld documents are responsive to Plaintiffs' discovery requests, which were focused on the current litigation over these Policies. (Dkt. No. 547 at 8.) The Government does not explain why thousands of documents related to other policies would be responsive to discovery requests seeking "[a]ll Documents and Communications related to the [Mattis] Policy," for example. (Dkt. No. 365, Ex. 1 at 3.)

More importantly, the Court's timeframes are a discovery management tool, meant to counteract the Government's troubling and apparently prevalent practice of mislabeling documents as privileged, while also aiding the Court's review of the 25,000 to 40,000 documents the Government continues to withhold under the DPP. Should the Government determine that certain deliberative documents fall outside of the Court's proposed timeframes for presumptively privileged documents, the Court's Order makes clear that the Government can bring those individual documents to the Court's attention for an *in camera* review. (Dkt. No. 545 at 11.) This procedure also allows the Government another opportunity to review its privilege claims and to redact documents in accordance with its obligations, as outlined by the Ninth Circuit.

Finally, the Government's concerns about the timeframes chosen by the Court do not warrant a stay, especially when mitigated by Plaintiffs' proposals. The Government is particularly concerned with producing drafts created by officials in the Office of the Undersecretary of Defense, who were tasked with writing the Report and Recommendations after the Panel concluded its work on January 11, 2018. The Government has taken contradictory positions on these documents. On December 10, 2019, the Government's lead attorney, Andrew Carmichael, told the Court that these "[d]rafts aren't deliberative process. [These documents are] little subparts of the decision, tweaking how you're going to do a particular sentence or how you're going to write a particular paragraph," and the documents were created after "the final decision was made." (Dkt. No. 402 at 27:24-25, 28:19, 30:18-19.) But the Government now argues that these drafts are not only predecisional but "some of the most sensitive documents in this case." (Dkt. No. 547 at 9.) The Government's inconsistent position on these documents notwithstanding, the Court finds that the Government's concerns can be addressed by Plaintiffs' proposed modifications to the review process.

Plaintiffs suggest that the Court make clear in its order that the Government can submit any documents it claims are privileged but outside the proposed timeframe for *in camera* review without separate motion practice. (Dkt. No. 553 at 11.) Second, Plaintiffs suggest the Government immediately submit for *in camera* review the documents dated January 11, 2018 to February 22, 2018—representing the period between the Panel of Expert's recommendations and the date the Department of Defense published the 44-page Report and Recommendation—so the Court can assess whether these documents are predecisional and deliberative, as the Government now argues. (Id.) The Court adopts both proposals. The Government will be permitted to bring any privileged document to the Court's attention for *in camera* review, without motion practice,

and shall submit any privileged documents from the timeframe January 11, 2018 to February 22, 2018 for the Court's *in camera* review by **August 28, 2020**.

B. Likelihood of Irreparable Harm

The Government has also failed to demonstrate a likelihood of irreparable harm. The Government's assertion that the Court's July 15, 2020 Order "will result in the irretrievable disclosure of thousands of privileged documents relating to multiple military policies" ignores explicit protections in the Order, which allow specific documents to be brought to the Court's attention upon subsequent motion. (Dkt. No. 545 at 6-7; Dkt. No. 547 at 4.) Further, as discussed above, the Court adopts Plaintiffs' proposal that in lieu of production, the Government may submit any privileged document falling outside the Court's proposed timeframes for *in camera* review without motion practice. This procedure allows the Government an additional level of protection while acknowledging that the Government's troubling practice of over-asserting privileges means it is no longer entitled to the benefit of the doubt.

C. Injury to Plaintiffs and Impact on the Public Interest

Finally, the Court finds that a stay would harm Plaintiffs and the public interest. While the Government guesses that the Ninth Circuit will issue its ruling on the second petition for a writ of mandamus "in short order," the Circuit recently set oral argument for October 14, 2020, eight months after the Government filed its petition. (Dkt. Nos. 547 at 5; 559.) Given this timing and the 11 months it took the Circuit to adjudicate the Government's first petition, the Court finds it unlikely that the Ninth Circuit will issue a ruling shortly. And as the Plaintiffs recently noted, under the current policy, "hundreds if not thousands of lives [] are directly affected every single day," preventing countless potential servicemembers from "fulfilling a dream they have had their entire lives." (Dkt. No. 565 at 24:14-16, 24:22-23.) "It is

heartbreaking to our plaintiffs every time we have to tell them there is a further delay in the case." (Id. at 25:7-9.)

Because this discovery dispute is years old and has caused numerous delays to the Court's case schedule, and because Plaintiffs and the public have a strong interest in the timely determination of the issues of national and constitutional importance involved in this matter, the Court finds that further delays would cause substantial injury to the Plaintiffs and negatively impact the public interest. (See, e.g., Dkt. No. 347 (Second Amended Complaint), ¶¶ 69, 79, 90; Dkt. No. 130, Declaration of Ryan Karnoski, ¶¶ 22-23.)

Conclusion

The Government has failed to demonstrate a likelihood of success on the merits or that irreparable injury will result in the absence of a stay. The Court therefore DENIES the Government's motion. Further, the Court adopts Plaintiffs' proposals, modifying the July 15, 2020 Order as follows:

(1) The Government may bring any privileged documents outside the timeframe of July 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018 to the Court for an *in camera* review without motion practice;

(2) The Government must submit all privileged documents from the time period January 11, 2018 to February 22, 2018 to the Court for *in camera* review by **August 28, 2020**.

The Government is ORDERED to comply with the Court's July 15, 2020 Order (Dkt. No. 545) with these additional modifications by **August 28, 2020**.

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The clerk is ordered to provide copies of this order to all counsel.

Dated August 17, 2020.

Marsha J. Pechman
United States Senior District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J TRUMP, et al., Defendants.	CASE NO. C17-1297 MJP ORDER RE (DKT. NOS. 497, 514, 536, 540-42); ESTABLISHING A TIMEFRAME FOR ASSERTION OF THE DELIBERATIVE PROCESS PRIVILEGE; REQUIRING DEFENDANTS TO REVIEW THEIR DELIBERATIVE PROCESS PRIVILEGE CLAIMS AND PRODUCE THOSE THAT ARE NOT PREDECISIONAL OR DELIBERATIVE

This matter comes before the Court upon the Parties' Joint Submission Regarding Defendants' Deliberative Process Privilege Claims (Dkt. No. 497). Having reviewed the 850 documents submitted pursuant to the Court's Orders on the Joint Submission (Dkt. No. 514, 536), the Parties' responses to the questions posed by the Court (Dkt. Nos. 540-42), and two earlier *in camera* document reviews, the Court finds and ORDERS:

(1) Defendants must produce all documents where the privilege category is designated with "N" in the spreadsheets attached to this Order by **July 22, 2020**. As to those documents where the privilege category is marked "Y", the Court is satisfied that a *prima facie* case of deliberative process privilege ("DPP") privilege has been established, subject to a possible further review under the balancing test set out in FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984);

(2) Defendants will review their list of approximately 35,000 documents withheld solely on the basis of DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 (Carter policy) and September 14, 2017 through January 11, 2018 (Mattis policy). All documents falling outside of these two timeframes and withheld solely pursuant to the a DPP claim will be produced by **July 29, 2020**. The only exception shall be any documents specifically subject to the pending appeal to the Ninth Circuit. The temporal time filter will also apply to the documents withheld on the basis of other privileges in addition to a DPP claim, and the Defendants shall delete DPP as a claim for withholding the documents that fall outside of this time frame.

(3) Not later than **July 29, 2020**, the Defendants will filter the remaining documents withheld solely under a DPP claim, and file a privilege log of documents relating to those documents that fall within the designated time frames.

(4) Not later than **July 22, 2020**, the Defendants will produce paper copies of 500 documents submitted for *in camera* review that are not considered privileged as indicated in Attachment 2 to this Order, so the Court can review these documents to satisfy the "deliberative" test. The documents will each bear the "PrivWithhold"

number on the bottom of the document corresponding to the "PrivWithhold" designation in the privilege log submitted to the Court.

Background

In this ongoing discovery dispute, the Government has withheld approximately 50,000 documents from production claiming they are exempt from disclosure, at least in part, pursuant to the deliberative process privilege ("DPP"). Within these 50,000 documents, a subset of approximately 35,000 has been withheld *solely* on the basis of a DPP claim. To test whether the Government has been properly asserting the DPP privilege, the Parties and the Court devised a process where 1% (350) of the documents withheld solely on a DPP claim were randomly selected and sent to the Court for an *in camera* review. (See Dkt. Nos. 497, 514.) After reviewing the first submission of 350 documents, and due to a problem of overreach in the claim of DPP privilege, the Court ordered the Government to submit another batch of 500 randomly selected documents for *in camera* review, in order to test the extent of Defendants' assertion of the privilege. (Dkt. No. 536.)

The Court has had difficulty with the Government's over-assertion of the DPP in the past. On two prior occasions, the Court has reviewed, with the assistance of the Special Master, more than 3,500 pages of documents, withheld for privilege claims, including the DPP. In very few instances was the Government's assertion of the DPP sustained.

In light of the enormous task remaining before the Parties and the Court on this issue of privilege, the Court is setting out discovery standards to be followed relating to the remaining approximately 48,000 documents to which a DPP claim has been asserted. This Order will describe the boundaries for documents that are presumptively not entitled to DPP protection. The Order will deal specifically with the 850 random DPP-claimed documents submitted for *in*

camera review. Finally, the Government will be directed to review its DPP claims for the remaining approximately 48,000 documents, and remove its claim of DPP protection from those documents that do not reach the *prima facie* threshold described in this Order, and to produce the documents not reaching this threshold to the Plaintiffs.

Discussion

The DPP applies to protect the decision-making process. To qualify, "a document 'must be *both* (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th Cir. 1988) (citation omitted, emphasis in original). For the reasons that follow, the Court finds that the Government has asserted the DPP over many documents that do not meet this definition.

A. Predecisional

Before a document can be withheld pursuant to the DPP, it must be predecisional. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 (1975) (explaining the privilege applies "prior to the time the decision is made" and not to "communications made after the decision and designed to explain it"); Lahr v. NTSB, 569 F.3d 964, 981 (9th Cir. 2009) (noting "we have rejected the argument that a continuing process of agency self-examination is enough to render a document 'predecisional,'" instead, "[t]he documents must be prepared to assist an agency decision-maker in arriving at a future particular decision") (internal quotations and citations omitted); Fishermen's Finest, Inc. v. Gutierrez, No. C07-1574MJP, 2008 WL 2782909, at *2 (W.D. Wash. July 15, 2008) ("A document that was prepared to support a decision already made is not predecisional."). But, what, then, is predecisional in this case?

The Government appears to make the claim that because certain individuals began to consider transgender policies in March 2014, and because policies continue to change even today, the predecisional date begins in March of 2014, and everything since that date to the present remains predecisional. The Court rejects this reasoning, because the analysis fails to focus on the specific policies at issue in this litigation. The Government's position reads the DPP "predecisional" requirement out of existence.

There are two policies at issue in this case: (1) The Carter policy which permitted transgender service members to enlist and serve in the U.S. Military; and (2) the Mattis policy which reversed the Carter policy. While these two decisions resulted in a number of spin-off plans designed to execute and implement the two underlying policies, the fundamental issue being challenged by Plaintiffs is the reversal of the Carter policy in favor of the Mattis policy. The implementation and execution plans are simply secondary to the policy switch. As a result, for purposes of determining the "predecisional" and "post-decisional" timeframes for *prima facie* applicability of DPP, the timeframe around these two policy decisions is paramount.

For discovery purposes, documents outside the predecisional timeframe for these decisions are presumptively not subject to the DPP. In National Wildlife, supra, the court recognized that there may be instances in which production of documents after the policy might provide a roadmap as to the actual decision-making process, which could otherwise protect those documents. This is because the focus of the DPP is to protect the decision-making process. In reviewing the 850 documents submitted for DPP examination, the Court could identify but a handful of documents as to which this could be seriously asserted. However, as explained below, the handful of these documents will continue to be protected under protective order with claw back provisions in the process described.

The Court is exercising its discretion to manage discovery in this manner, for several reasons. First, this is consistent with the pleadings in this case, and as analyzed by the Ninth Circuit in the previous appeal. Second, based upon the Court's examination of four batches of documents submitted for *in camera* review (approximately 8,813 pages of documents), the Court finds that the Government has consistently been overbroad in asserting the DPP.

Third, the Government fails to segregate portions of documents which may be partially protected by the DPP from those that are not, despite its obligation to do so. See Karnoski v. Trump, 926 F.3d 1180, 1204 (9th Cir. 2019) (quoting Army Times Publ'g Co. v. Dep't of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)) ("Unlike the presidential communications privilege, the deliberative process privilege does not protect documents in their entirety; if the government can segregate disclosed non-privileged factual information within a document, it must."). Thus far, the Government has not performed any segregation, instead simply tossing this responsibility to the Court.

Fourth, the Government claims that 50,000 documents are covered by the DPP and other privileges, and of that quantity, 35,000 are subject to the DPP and no other privilege. Yet after making a random selection of 500 documents for *in camera* inspection, the Government acknowledged that 90 of the randomly selected documents (or 18% of the total) were not subject to a proper DPP claim. (Dkt. No. 542 n. 1.) The Government produced these 90 documents to Plaintiffs and then chose an additional 90 documents to submit to the Court for review. This does not give the Court much, if any, confidence that the Government is properly asserting the DPP privilege, a concern that is amplified by the earlier poor showing on its DPP claims.

Finally, the Court opts for this arrangement because all documents produced will still be subject to the protective order in place, and if it turns out that some documents falling outside the

predecisional and post-decisional date ranges are properly the subject of the DPP, specific documents can be brought to the Court's attention on subsequent motion. The Order includes a claw-back provision for documents produced erroneously. This decision is made for discovery rather than for trial purposes. Accordingly, as a discovery management tool, the Court sets the following pre and post-decisional dates to establish a framework for evaluating the Government's DPP assertions.

1. Carter Policy

As to the Carter policy, on July 13, 2015, then-Secretary Carter announced the military would begin to study the implications of allowing transgender troops to serve in the military. (Dkt. No. 540, Ex. 14). A working group was formed on July 28, 2015 to formulate a policy decision on use of transgender troops. (Dkt. No. 540, Ex. 15.) The work of the committee was completed and on June 30, 2016, Secretary of Defense Carter formally announced the new policy. (Dkt. No. 540, Ex. 12; Dkt. No. 542 at 7; Dkt. No. 505 at 7.) This Court previously ordered production of certain earlier Carter-policy documents on the grounds that it appeared that the Department of Defense ("DOD") and RAND contemplated that the underlying RAND studies would be published contemporaneously with the announcement of the Carter policy. (Dkt. No. 540, Ex. 12; Dkt. No. 542 at 7; Dkt. No. 505 at 7.) The Court found that the policy was in effect before the public announcement, based on emails from February of that year between the lead contact for RAND and her DoD counterpart discussing the public announcement of the new policy. (Dkt. No. 509 at 4 (citing PrivWithhold 1106).) The practical effect of this is to back up the post-decisional date of the Carter policy to February 6, 2016. However, for purposes of this discovery management tool, the Court will use the announcement

date of the Carter policy – June 30, 2016 – to define the end of the predecisional time frame relating to the Carter policy.

Thus, only documents within the date range July 13, 2015 through June 30, 2016 are presumptively predecisional, and therefore subject to a proper DPP claim regarding the Carter policy. As a result, documents created prior to July 13, 2015 are presumptively not considered pre-decisional regarding the Carter policy. Documents created after June 30, 2016 are presumptively considered post-decisional. Just as the Court previously concluded, the end date of the "predecisional" time frame may ultimately be backed up by applying the fourth factor of the Warner test – an issue to be resolved at a later point.

2. Mattis Policy

Secretary Mattis formed his working panel to consider the issues surrounding use of transgender troops on September 14, 2017. (Dkt. No. 542 at 8.) And the Government has long taken the position that the Panel's recommendations, issued on January 11, 2018, "were adopted in their entirety by then-Secretary of Defense James Mattis." (Dkt. No. 414-1, Pet. for Mandamus at 8.) When the Court asked the Government whether "the decision had been made" once the Panel sent over its recommendations to the Office of the Secretary of Defense, the Government responded that yes, at that point, "the final decision was made." (Dkt. No. 402, Tr. 28:16-17, 19.) As a result, documents created before September 14, 2017 are presumptively not predecisional, and documents created after January 11, 2018 are presumptively post-decisional.

Although Plaintiffs have argued that the Government adopted the challenged policy no later than August 25, 2017, when the President issued a memorandum that formalized his July 26, 2017 Tweets banning transgender military service and ordered the military to implement that policy (Dkt. No. 540 at 6), because the President's March 23, 2018 Presidential Memorandum

revoked his 2017 Memorandum and because the Ninth Circuit determined that "the 2018 Policy is a significant change from the 2017 Memorandum" Karnoski v. Trump, 926 F.3d 1180, 1189-92, 1202 (9th Cir. 2019), the Court's focus here is on the adoption of the Mattis policy.

Therefore, in the Government's privilege log, only documents that fall within the date ranges of July 13, 2015 to June 30, 2016 (Carter policy) and September 14, 2017 to January 11, 2018 (Mattis policy) are presumptively predecisional and entitled to possible DPP protection.

B. Deliberative

In the Ninth Circuit, the DPP applies "whenever the unveiling of factual materials would be tantamount to the 'publication of the evaluation and analysis of the multitudinous facts' conducted by the agency." Nat'l Wildlife, 861 F.2d at 1119 (citations omitted). In National Wildlife, the court confronted the issue of whether a document was deliberative or merely factual. The plaintiff argued that because certain information in an Environmental Impact Statement ("EIS") was factual, rather than opinion, the document was not subject to a proper DPP claim. The Ninth Circuit held this distinction was too narrow. Instead, the court held that the analysis of whether a document was protected or not from disclosure should focus on the "*deliberative process.*" Id. at 1118 (emphasis in original). Under this approach, nonbinding recommendations on law or policy would be exempt from disclosure. Factual material would be exempt from disclosure to the extent that it revealed the mental processes of decisionmakers. Ultimately, the court held that draft Environmental Impact Statements and "previews" were subject to the DPP and concluded they were "predecisional" because they were drafts, subject to change, and that disclosure would reveal the deliberative process of the Forest Service.

In this case, many of the documents submitted by the Government for *in camera* review contain no deliberative process thoughts or opinions. Instead, many fall into the "factual" arena.

Moreover, these "factual" documents do not amount to "previews" of the policies or otherwise reveal the deliberative thought process of the Department of Defense. Even if the documents could be at least partially so classified, the Government has not sought to segregate any portions of the documents which express an opinion (potentially protectible) from the facts portion of the documents (generally not protectible, unless revealing thought processes), as required. In the attached analysis of DPP-claimed documents, those which fall into this "factual" arena, or which are not otherwise substantive and thus not subject to DPP protection, are labelled "not deliberative," and the privilege category is marked with "N" in the attachment to this Order.[1]

In the second batch of 500 documents submitted to the Court for *in camera* review, the paper documents sent to the Court lacked corresponding identifying Bates numbers corresponding to the privilege log. The Special Master spent several hours attempting to use or find certain identifying characteristics on the documents to match up with the privilege log. Ultimately, the Special Master concluded that the second batch should simply be filtered on the basis of disqualifying dates as set forth above. For documents falling outside the date range as described on the privilege log, the document was denied DPP status as being "Not predecisional." The Special Master could not conduct a "deliberative" process review. For all documents that fell within the time frame that defines the DPP in this case, no determination of privilege could be made. This does not require that all documents be sent to the Court with appropriate PrivWithhold Bates numbers. It does, however, require that the Government submit

[1] The Court began its work by declaring some of the documents "not predecisional" and "not deliberative." As the review continued, the Court stopped undertaking a dual analysis. The Court only examined whether a document was "deliberative" or "Not deliberative" after a predecisional determination had been made. The Parties should not assume that because a document was determined to be "predecisional" that the absence of comment that the document is "not deliberative" is a determination that the document was, in fact "deliberative." To qualify for DPP protection, a document must be both predecisional and deliberative.

properly labelled copies of the documents with appropriate Bates labels for those documents as to which no ruling is reflected on Attachment 2.

Conclusion

After conducting an *in camera* review of the randomly selected sample of documents the Government has withheld solely on the basis of the DPP, the Court finds that Defendants have broadly over-asserted the privilege. The Court therefore ORDERS Defendants to produce documents, as indicated in the attachment to this Order. As to those documents where the privilege category is designated with "N", the Government is required to produce these documents not later than **July 22, 2020**. As to those documents where the privilege category is marked "Y", the Court is satisfied that a *prima facie* case of DPP privilege has been established. Further, Defendants must produce all documents that fall outside the date ranges of July 13, 2015 to June 30, 2016 (Carter policy) and September 14, 2017 to January 11, 2018 (Mattis policy) and all documents or portions of documents that are purely factual by **July 29, 2020**.

This Order does not reach the issue of whether Plaintiffs can overcome Defendants' privilege assertions under the factors described in Warner, 742 F.2d at 1161, but the Court will entertain future briefing from the Parties as to specific documents the Government continues to withhold after complying with this Order. The Court will also review additional documents *in camera* if necessary to determine the accuracy of the Government's privilege claims.

The clerk is ordered to provide copies of this order to all counsel.

Dated July 15, 2020.

Marsha J. Pechman
United States Senior District Judge