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September 4, 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:

Plaintiffs' arguments and the district court's recent orders—including a new order entered two days ago authorizing plaintiffs to depose current and former Cabinet officials and senior military leaders—only heighten the need for this Court's guidance. This Court should direct the district court to halt further discovery into deliberative materials unless, at a minimum, plaintiffs can articulate to the panel what aspect of their claims requires additional discovery, beyond the voluminous discovery already produced.

A. The District Court's Intrusive Discovery Orders Demonstrate Widespread Errors in Its Rulings, Not in the Government's Assertions of Privilege

1. Plaintiffs characterize (at 1, 11-12) the district court's ongoing discovery orders as "granular" and "careful" in contending that this Court's guidance is

unnecessary. But the district court has not heeded this Court's admonition that, before ordering additional privileged discovery, it should assess whether further intrusions are warranted in light of the massive discovery plaintiffs have already received. And as we have explained, the "granular" review that plaintiffs celebrate rests on the mistaken premise that all deliberative documents that do not immediately precede the two "specific policies at issue in this litigation" are not pre-decisional for purposes of the privilege. Clarification Opp. 15-19; Gov't Suppl. Br. 5; *see* Doc.545 (July 15 order); Doc.566 (August 17 order). That premise led the court to implausibly conclude, for instance, that the privilege would not even cover Secretary Mattis's own handwritten notes on a 2017 recommendation memo. Doc.547, at 7

Plaintiffs' assertion (at 4-6) that the district court's orders requiring disclosure of the military's deliberative communications with consultants "reveal defendants' abuse of the privilege" is likewise incorrect. As is the case with many of the court's orders, the government was provided only ten days to comply. Given the timeframe, the government focused its privilege assertions on RAND and Kennell. Doc.509 (May 12 order); Doc.454 (March 4 order). The court rejected the privilege even as to these documents on the theory that the deliberations reflected in the documents were made in support of a report that "was going to be made public." Doc.509, at 5-7. But records protected by the deliberative process privilege often concern a policy or determination that will become public. And the court's further holding that the

privilege is inapplicable to all communications relating to “studies” of potential policy similarly reflects a basic misunderstanding of how decisionmaking happens.

2. Plaintiffs seek to capitalize on the district court’s legal errors by arguing (at 5-7, 11) that the July 15 and August 17 rulings demonstrate an “error rate” of 88%. This “error rate” correlates directly to the multiple legal errors in the court’s understanding of the deliberative process privilege. As explained in our mandamus petition, the court has rejected the privilege with respect to virtually all documents immediately relating to the Carter and Mattis policies. Its subsequent orders hold that documents that (in the court’s view) are *outside* the timeframes for the development of the Carter and Mattis policies are not pre-decisional and thus also not privileged. *See* Clarification Opp. 16. Given the cumulative import of these legal misconceptions, it is unsurprising that the court’s “granular” review has the same effect as a blanket order overruling almost all of the government’s privilege assertions as “erroneous.”

Plaintiffs’ arguments attempt to distract from their overbroad demands and the district court’s sweeping orders by nitpicking the government’s efforts. In a typical case involving focused discovery, the government would determine not only which documents are subject to privilege but those documents over which it would formally assert privilege. If discovery in this case proceeded in anything resembling a normal fashion, plaintiffs would thus identify specific groupings of documents; the government would then determine which should be the focus of formal privilege assertions and disclose the remainder. *See* Doc.573 (noting how government

proceeded in related *Doe* litigation); *Landry v. FDIC*, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (formal privilege assertion must be made by sufficiently high-level officials). That approach would not be an “error” in the government’s privilege claims, but a determination to focus formal assertions as appropriate. *E.g.*, Doc.574 (formal assertion through declarations of 409 post-Panel documents).

3. The district court’s orders since our supplemental brief further underscore its failure to heed this Court’s guidance and its willingness to order extraordinary discovery without requiring plaintiffs to make any showing of need, despite the massive amount of materials they already have obtained. On September 2, the court ordered the depositions of current Secretary of Veterans Affairs Robert Wilkie Jr., former Secretary of Defense James Mattis, as well former Vice Chairman of the Joint Chiefs of Staff Paul Selva and former Vice Chief of Naval Operations William Moran. Doc.596. That order is altogether improper and, at a minimum, the district court should not have taken such drastic steps absent this Court’s guidance.

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

Plaintiffs’ supplemental brief and subsequent developments underscore they cannot justify that their claims require yet more discovery, and that this Court should direct the district court to halt further discovery into deliberative materials.

Recently, the district court’s *in camera* review has turned to targeting the documents at issue in our petition and subject to this Court’s stay. These documents

include deliberations post-dating the Panel’s work but preceding Secretary Mattis’s adoption of the Panel’s recommendation—such as the Secretary’s personal notes and drafts of the Department’s Report—which had been previously excluded from *in camera* review. *See* Clarification Opp. 4, 7, 14. The court ordered the government to submit those documents no later than September 4, or disclose them. Doc.569 (August 24 order). As to such post-Panel documents, the court declared that plaintiffs “don’t have to justify why they should get [deliberative documents] at this point.” Doc.571, at 11:25-12:1 (August 24 hearing transcript).

The district court’s statement is particularly extraordinary because the only “need” for the documents urged by plaintiffs was “for the Ninth Circuit argument.” Doc.571, at 14:5. To accommodate the goal of ordering disclosure that preempts this Court’s argument date, the district court has announced its intention to “give [plaintiffs] the documents by” then. *Id.* at 19:5-6. In other words, the sole object of the ongoing discovery process is to frustrate this Court’s review of the documents that are the subject of the mandamus petition and this Court’s stay order. If disclosure of these documents is ordered on a short timeframe, it may become necessary to request emergency relief in this Court.

Plaintiffs’ description of the proceedings in district court as unremarkable “day-to-day discovery” does not withstand scrutiny. Even setting aside that the court has based its discovery rulings on an erroneous theory that the military nature of the case has no effect on the bounds of discovery, the sheer scope of the discovery ordered

here belies plaintiffs' assertion that this is how discovery normally proceeds. And of course, plaintiffs identify no case in which a court has ordered disclosure of virtually every single deliberative document related to multiple policies from all levels of the military (or any agency) over a five-year period. The court has thus wrongly accepted plaintiffs' assertion, repeated here (at 12-13), that it is immaterial whether they present a need for privileged documents at all, and that "the only remaining consideration is whether the documents are relevant to Plaintiffs' claims." As in many other respects, neither plaintiffs nor the district court has heeded this Court's guidance, disregarding its admonition that mere relevance is insufficient to justify sweeping disclosure orders for privileged documents and that plaintiffs must establish a "need for the materials." *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (per curiam).

Plaintiffs assert (at 4, 13) that they need the deliberative documents addressed in our petition to "test the truth of Defendants' assertions that the 'Mattis Policy' was developed (1) completely independent and separate from the President's August 25, 2017 'directives,' and (2) because of legitimate military interests and not inaccurate and unsupported stereotypes and prejudice." But plaintiffs have (1) every communication to and deliberation of the Panel that recommended the policy to probe whether it was "completely independent," and (2) the policy rationales and underlying documentation in the Department's Report and unredacted Administrative Record. Plaintiffs' assertions simply demonstrate that they have made no attempt to

account for the discovery they already have in demanding still more, and that this Court's intervention is warranted.

Sincerely,

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¹ The Acting Assistant Attorney General is recused from this matter.

CERTIFICATE OF COMPLIANCE

This response to plaintiffs' supplemental letter brief complies with the type-volume limit of this Court's July 31, 2020 order because it contains 1399 words. This response also complies with the typeface and type-style requirements of 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

DENNIS FAN

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 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

DENNIS FAN