

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

**PLAINTIFFS’ NOTICE OF RECENT
FILINGS IN THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT**

1 Plaintiffs respectfully provide to this Court copies of recent briefs related to this case filed
2 by Plaintiffs and Defendants in the United States Court of Appeals for the Ninth Circuit.

3 Specifically:

- 4 • The Ninth Circuit recently directed supplemental briefing on “any legal or factual
5 developments since February that might bear on the issues to be argued in October.”
6 (No. 20-70365, Dkt. No. 21.) On September 4, 2020, both Plaintiffs and Defendants
7 filed their requested responsive letter briefs, which are attached hereto as **Exhibits A**
8 and **B**, respectively.

9
10 Respectfully submitted September 11, 2020.

11 **NEWMAN DU WORS LLP**

12
13 s/ Rachel Horvitz

14 Derek A. Newman, WSBA No. 26967

15 *dn@newmanlaw.com*

16 Jason B. Sykes, WSBA No. 44369

17 *jason@newmanlaw.com*

18 Rachel Horvitz, WSBA No. 52987

19 *rachel@newmanlaw.com*

20 2101 Fourth Ave., Ste. 1500

21 Seattle, WA 98121

22 (206) 274-2800

23 **LAMDBA LEGAL DEFENSE AND
24 EDUCATION FUND, INC.**

25 Tara Borelli, WSBA No. 36759

26 *tborelli@lambdalegal.org*

27 Camilla B. Taylor (admitted pro hac vice)

28 Peter C. Renn (admitted pro hac vice)

Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

Carl Charles (admitted pro hac vice)

Paul D. Castillo (admitted pro hac vice)

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

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

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

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

Steve Patton (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Sam Ikard (admitted pro hac vice)

REDGRAVE LLP
Vanessa Barsanti (admitted pro hac vice)

Counsel for Plaintiffs

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

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 September 11, 2020.

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

EXHIBIT A

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Stephen R. Patton, P.C.
To Call Writer Directly:
+1 312 862 3501
stephen.patton@kirkland.com

300 North LaSalle
Chicago, IL 60654
United States

+1 312 862 2000

www.kirkland.com

Facsimile:
+1 312 862 2200

September 4, 2020

Via ECF

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94103

Re: *In re Donald J. Trump, et al.*, Case No. 20-70365

Dear Ms. Dwyer:

Defendants' supplemental brief still provides no support for their claim that *Warner* requires a showing that the withheld documents are “needed to resolve this litigation,” because there is none. Defendants have created this “requirement” out of whole cloth. Supp.Br. 8. So too their argument that “chilling” effects are heightened when the military is involved. *Id.* No court has said that, because the final *Warner* factor is about the impact on future agency decision-making—not secrecy or agency deference—and the cases they cite have nothing to do with the deliberative process privilege (DPP).

As for subsequent developments, Defendants have no answer to the District Court's findings—based on exactly the “granular” review Defendants seek in their

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 2

petition—that nearly 90% of the documents it reviewed did not qualify for DPP. Instead, Defendants reverse course, asking for new relief not requested in their petition: “halt privileged discovery” altogether. Supp.Br. 12. In doing so, they misrepresent the developments below, which relate to a different issue not raised in their petition (whether DPP applies at all versus whether Plaintiffs can overcome DPP), and press arguments this Court already rejected. The only consistency in Defendants’ shifting positions is they will raise any argument—no matter how unsupported or inconsistent—to avoid disclosing materials revealing the true motivations for the military’s transgender ban.

I. DEFENDANTS CONTINUE TO MISSTATE WHAT PLAINTIFFS MUST SHOW UNDER *WARNER*.

1. Defendants continue to claim—without support—that, to establish “need” under *Warner*, Plaintiffs must show “what additional privileged discovery is needed to resolve this litigation.” Supp.Br. 7-8. But “need” under *Warner* refers to (1) relevance, (2) availability of other evidence, and (3) the government’s role in the litigation, all of which are balanced against the government’s interest in non-disclosure. *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). This Court has already found the second and third factors “favor Plaintiffs” here,

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 3

Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019), and Defendants do not seriously dispute the withheld documents are relevant. Nor could they. *See* Ans. 25-27, 29-32, 34-36. Instead, they invent a “standard” not found in *Warner* or any other case.

Defendants’ “standard” is not only unsupported, but would be impossible for plaintiffs to satisfy and courts to apply. Plaintiffs cannot show they need what they do not know is being withheld, nor can they predict during discovery what evidence it will take to “resolve this litigation.” Nor can a trial court determine, particularly at the discovery stage, before knowing the parties’ proof at trial, how much, or which, evidence is “needed to resolve this litigation.” Moreover, Defendants’ “standard” is illusory. A court does not need *any* evidence to “resolve this litigation”; it must rule based on the evidence before it. The absence of discovery into the events leading to the “Mattis policy” will not prevent resolution of this litigation. It will, however, prevent the searching judicial inquiry heightened scrutiny requires—and that is indispensable to federal courts’ performance of their Article III responsibilities to adjudicate Plaintiffs’ constitutional rights. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004) (government withholding evidence

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 4

may impair “court’s ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction”).

Defendants point to this Court’s observation that a 12-page agency document in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), was “sufficient to allow for judicial review.” Supp.Br. 1-2, 8 (citing *Karnoski*, 926 F.3d at 1206 n.22). But that reference did not speak to the *Warner* factors, much less alter them. Nor did *Hawaii* involve the heightened scrutiny applicable here.

Finally, the information Plaintiffs seek *is* necessary for judicial review under heightened scrutiny. Plaintiffs have materials the Panel received, but not documents withheld from it; Plaintiffs received the DoD Report, but no discovery concerning its creation; and Plaintiffs know the Carter Working Group reached the opposite conclusion, but have no discovery into why. *See* Dkt. 596 at 4, 12-13 (District Court finding “Plaintiffs have little insight into ... the decision-making process about what data was provided to the Panel, ... the process used in drafting the Report,” or why the Carter Working Group “only a year before had recommended transgender persons be permitted to serve openly”).

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 5

2. Defendants’ “confidentiality” arguments fare no better. They still offer nothing beyond a generalized claim that because documents relate to the military, disclosure will chill future decision-making. Supp.Br. 8-9. They do not attempt to show *why* or *how* specific categories of documents will do so. And their suggestion that many of these documents relate to military service by transgender persons unrelated to any particular decision or to other, unspecified decisions, Supp.Br. 3-4, 6, undermines their general assertions of chilling effect. How can disclosure chill future decision-making when Defendants do not and cannot identify any specific decision to which a document relates? Indeed, such documents are not privileged to begin with. *See Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997) (to assert privilege, government must identify “specific decision to which the document is predecisional”).

To maintain the privilege under *Warner*, Defendants must explain how disclosing specific documents or categories of documents will hinder future decision-making. *Karnoski*, 926 F.3d at 1206. There is no legal support for just invoking the military as a talisman. Defendants’ approach would convert the

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 6

qualified privilege into an absolute one precluding any discovery relating to military decisions. That is not the law.

II. DEFENDANTS MISREPRESENT THE DISTRICT COURT'S ORDERS AND IGNORE THIS COURT'S PRIOR OPINION.

Defendants' recitation of recent developments is equally flawed.

First, Defendants mischaracterize the District Court's recent decisions, which were unrelated to *Warner* balancing issues. Defendants argue the "recent rulings exemplify that the ongoing discovery is untethered from plaintiffs' remaining need," Supp.Br. 9, but "need" did not factor into those orders, which were limited to the threshold question whether DPP applies in the first place—*i.e.*, whether documents were deliberative and pre-decisional. Plaintiffs' "need" for the documents does not enter that determination.

Here is what the District Court actually did: After reviewing an 850-document random sample of purportedly privileged documents *in camera* and finding Defendants broadly over-asserted DPP, the court implemented a discovery management tool to identify likely non-privileged documents, while allowing Defendants full opportunity to submit *any* purportedly privileged document for *in camera* review. The District Court did *not* "set aside the deliberative process

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 7

privilege as to all remaining documents,” as Defendants claim. Supp.Br. 5. Tellingly, Defendants offer no response to the *in camera* results, which uncovered “largescale and pervasive failures in [Defendants’] discovery process.” SER 006-009.

Second, Defendants’ supplemental brief confirms this protracted DPP fight is nothing but a game of whack-a-mole this Court should end. In recent months, the District Court has given Defendants exactly what they seek in their petition: the most “granular analysis” possible. *See* Pet. 5. Now that such review has revealed their massive DPP over-designation, Defendants change course and ask this Court to “direct the district court to halt further discovery.” Supp.Br. 8, 10. Not only is this an improper request for *new* mandamus relief in a supplemental brief, but their request also lacks legal support on the merits.

Defendants’ only bases for “halting all further discovery into deliberative materials” are two extreme and completely unsupported arguments this Court has already rejected: (1) discovery should be limited to an “administrative record”; and (2) discovery is barred or limited in “military cases.” Supp.Br. 5-6. But the so-called “administrative record” does not relate to an agency rule-making or

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 8

adjudicatory proceeding—it is not an administrative record at all, and instead is a collection of documents assembled by Defendants’ attorneys after-the-fact. This Court correctly recognized discovery should *not* be confined to that limited record or barred entirely, finding instead that heightened scrutiny is warranted; further discovery is needed to determine the nature and scope of the applicable military deference; and even with a “presumption of deference” to products of independent military judgment—which may or may not be warranted here based on what discovery uncovers—“deference does not mean abdication.” *Karnoski*, 926 F.3d at 1202.

At bottom, Defendants filed a mandamus petition claiming they were entitled to more process in the District Court, yet now that they have received it ask this Court to shut down that process altogether. Their shifting arguments reveal what the government actually wants: dispensation from the truth-seeking process and what it will reveal.

KIRKLAND & ELLIS LLP

Molly C. Dwyer, Clerk of Court
September 4, 2020
Page 9

Respectfully submitted,

/s/ Stephen R. Patton

Stephen R. Patton
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
(312) 862-2000
stephen.patton@kirkland.com

*Counsel for Real Parties in Interest–
Plaintiffs*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits set forth in this Court's July 31, 2020 Order, ECF No. 21, because the body of the letter totals 1,396 words.

/s/ Stephen R. Patton

Stephen R. Patton

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 September 4, 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

EXHIBIT B



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm. 7213
Washington, DC 20530

Tel: 202-514-2494

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,

DAVID M. MORRELL
*Deputy Assistant Attorney General*¹

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER
BRAD HINSHELWOOD
ASHLEY CHEUNG

s/ Dennis Fan
DENNIS FAN
Attorneys
Civil Division, Appellate Staff
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-2494
dennis.fan@usdoj.gov

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