

No. 20-72793

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS
CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS;
PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN;
AMERICAN MILITARY PARTNER ASSOCIATION;

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

**THE DISTRICT COURT’S REQUESTED RESPONSE TO THE GOVERNMENT’S
THIRD PETITION FOR A WRIT OF MANDAMUS**

INTRODUCTION

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2 At the invitation of the Court of Appeals, the Court takes this opportunity to respond to
3 the Defendants' third Petition for a Writ of Mandamus. The current Petition asks that the Circuit
4 direct the district court to reverse its September 2 and 14 Orders denying the Government's
5 motions to quash subpoenas directed to four high-ranking officials. The Government has also
6 filed a Motion to Stay these Orders that remains pending before this Court. In response to the
7 Motion to Stay, the Plaintiffs have proposed significant accommodations, including agreeing to a
8 court order barring them from noticing the depositions pending further order of this Court. The
9 briefing on the Motion to Stay was not complete until October 1, 2020 and because the Court has
10 yet to rule on that Motion, the Government's Petition is not yet ripe. Further, since the Court has
11 not had the opportunity to address the Government's Motion to Stay and the facts may change
12 significantly upon the Court's ruling, the Court will not address the substance of the
13 Government's arguments about the deposition Orders here.

14 The Court wishes to address the Government's request to halt all remaining discovery in
15 this matter. To this end, the Court will describe the relevance of the contested discovery, the
16 Court's discovery review since the Government's last Petition for a Writ of Mandamus, and the
17 current scope of the Parties' discovery dispute. The Court has been working with the Parties in
18 conferences held every four weeks for nearly a year and has devoted hundreds of hours to
19 reviewing documents *in camera* and overseeing the Parties' discovery process. The Court takes
20 seriously its obligation to develop the record for appellate review, if necessary, and to facilitate
21 the just determination of this matter. The Court therefore asks that the discovery process be
22 permitted to continue.

23 //

BACKGROUND

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2 This is the Government’s third Petition for a Writ of Mandamus filed during a three-year
3 discovery dispute between the Parties. In response to the Government’s first Petition, the Circuit
4 issued a Writ of Mandamus on June 14, 2019, finding that the Government’s ban on transgender
5 persons serving in the military is facially discriminatory and directing the Court to evaluate the
6 Policy under the intermediate scrutiny standard. Karnoski v. Trump, 926 F.3d 1180, 1201 n.18
7 (9th Cir. 2019). Under this standard, “Defendants bear the burden of establishing that they
8 reasonably determined the policy ‘significantly furthers’ the government’s important interests,
9 and that is not a trivial burden.” Id. at 1202. The Government’s “justification ‘must be genuine,
10 not hypothesized or invented post hoc in response to litigation,’ and ‘must not rely on overbroad
11 generalizations about the different talents, capacities, or preferences of males and females.’” Id.
12 at 1200 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

13 Guided by this framework, the Court has conducted an in-depth discovery review process
14 on remand, outlined in part in the Court’s requested response to the Government’s second
15 Petition for a Writ of Mandamus. See In re Donald J. Trump, No. 20-70365 (Dkt. No. 15). But
16 the Government now asks the Circuit to “terminate discovery” and proceed to summary
17 judgment on the current record. Pet. at 10. This proposal would undermine the Court’s
18 responsibility to build a full, honest record for several reasons: The remaining discovery is
19 relevant to the central issues in this matter; the Government has been broadly over-designating
20 documents as privileged; the Court is currently implementing a discovery management tool that
21 has further narrowed the scope of the disputed documents; and the Government’s proposal is
22 antithetical to both civil discovery and constitutional scrutiny, potentially allowing a military
23 defendant adopting a discriminatory policy to terminate discovery upon its own determination.
24

1 **A. Relevance of the Remaining Discovery**

2 Plaintiffs continue to seek discovery regarding the creation of both the Carter Policy,
3 which provided that transgender individuals shall be allowed to serve openly in the military, and
4 the Mattis Policy, which reversed the Carter Policy and disqualified transgender persons with a
5 diagnosis of gender dysphoria from military service. Karnoski, 926 F.3d at 1188, 1191. Because
6 these Policies were developed two years apart with opposite outcomes, the Government seeks to
7 impugn the process for developing the Carter policy, Id. at 1188; (Dkt. No. 412 at 27:16-28:2),
8 while Plaintiffs seek to demonstrate that the Mattis Policy was “dictated” by the President and
9 therefore “preordained,” rather than the product of independent military judgment. Karnoski,
10 926 F.3d at 1201-02.

11 Plaintiffs filed this action on August 28, 2017, following President Trump’s July 2017
12 Tweet announcing that transgender individuals would not be allowed to serve in the military and
13 the President’s August 2017 Memorandum implementing that announcement. (See Dkt. No. 1.)
14 In their original complaint, Plaintiffs alleged that the President’s announcement was a political
15 tactic divorced from any consideration of military needs. (Id. ¶¶ 103-06, 110-11.) While this
16 litigation was proceeding, the Mattis Policy was developed, replacing the President’s 2017
17 policy. Karnoski, 926 F.3d at 1192. On appeal, the Circuit rejected Plaintiffs’ argument that the
18 Mattis Policy was simply a continuation of the President’s Tweet and Memorandum, but allowed
19 that “Plaintiffs may present additional evidence to support this theory on remand.” Id. at 1202.

20 The record demonstrates that developments in the Mattis Policy were closely correlated
21 with milestones in this litigation. The day after this lawsuit was filed, Secretary of Defense
22 James N. Mattis issued a press release announcing that he would form a “panel of experts” “to
23 provide advice and recommendations on the implementation of the president’s direction.” (Dkt.
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1 No. 197, Ex. 2.) On September 14, 2017, the same day Plaintiffs filed their Motion for a
2 Preliminary Injunction, Secretary Mattis issued “Interim Guidance” providing that the pre-2016
3 policies prohibiting the accession of individuals into the military would remain in effect.
4 Karnoski, 926 F.3d at 1190. Two days after the Court issued a preliminary injunction, the Panel
5 presented its Final Report to General Paul J. Selva, the Vice Chair of the Joint Chiefs of Staff,
6 and the Deputy Secretary of Defense, Patrick Shanahan. (Dkt. No. 577, Ex. 16 at 1.)

7 Through discovery, Plaintiffs have been able to further develop this record to include
8 documents showing that after the Panel’s report was rejected (Id., Ex. 2 at 1), the Panel met four
9 more times without recording any meeting minutes, only to issue the same Final Report on
10 January 11, 2018. (See, e.g., Dkt. No. 576, Ex. 20 at 1; Dkt. No. 577, Ex. 14, 16.) Plaintiffs also
11 now have a list of the 53 individuals who took part in drafting the 44-page anonymous Report
12 and Recommendation that was issued five weeks later. (Dkt. No. 577, Ex. 13 at 6-8.) This list
13 includes 25 Department of Justice lawyers, two of whom have entered appearances in this case.
14 (Id.) The record also now includes information that members of the Panel were concerned with
15 the data presented to it and the accuracy of the meeting minutes. (See, e.g., Dkt. No. 594 at 23
16 (Panel member William F Moran writing that “[t]he panel is unanimous in the opinion that the
17 data” presented to it was “so poor that it is nearly impossible to take a purely analytic
18 approach.”); id., Ex. 12 at 2 (Panel member Thomas Dee complaining that the meeting minutes
19 provide “only selective anecdotes of the conversation (all non-supportive of TG retention while
20 leaving out the supportive ones)”.)

21 The Government has argued from the beginning of this matter that the Court’s review
22 should be confined to an evaluation of the Report. (See, e.g., Dkt. No. 225.) But to evaluate the
23 Mattis policy under the intermediate scrutiny standard, the Court must determine whether the
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1 Government’s rationale for the Mattis Policy, which was drafted in part by attorneys during the
2 course of this matter, is “‘genuine, not hypothesized or invented post hoc in response to
3 litigation.’” Karnoski, 926 F.3d at 1200 (quoting Virginia, 518 U.S. at 533). It is therefore
4 imperative that discovery proceeds until there is a complete record on the creation of the Policy.

5 **B. Discovery Since the Second Petition**

6 As the Circuit is aware, the Government filed its second Petition for a Writ of Mandamus
7 in February, following the Court’s December 2019 and February 2020 Orders requiring the
8 production of documents responsive to Plaintiffs’ Requests for Production 15 and 29. In re
9 Donald J. Trump, No. 20-70365. These Requests seek information regarding the development of
10 the Carter Policy and documents related to the creation of the DoD’s Report and
11 Recommendation. (See, e.g., Dkt. No. 398 at 2-3.) The focus of the Court’s December and
12 February Orders and the Government’s Petition was whether Plaintiffs had overcome
13 Defendants’ Deliberative Process Privilege (“DPP”) claims under the balancing test set forth in
14 FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). The Government was
15 particularly concerned that the Court’s Orders required disclosure of “iterative drafts” of the
16 Report and Recommendation created between January 11 and February 22, 2018. 2d. Pet. at 10.
17 The Government also argued that the Court’s Orders required the Government to produce “tens
18 of thousands [of] documents withheld under the deliberative process privilege that would reveal
19 the military’s internal deliberations regarding military service by transgender individuals and
20 individuals with gender dysphoria.” Id.

21 The Orders at issue in the second Petition assumed that the DPP had been properly
22 asserted over the contested documents, but shortly after the second Petition, Plaintiffs filed a
23 series of motions to compel that resulted in the Court reviewing individual documents *in camera*
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1 for the first time. These submissions raised serious concerns about the Government's review
2 process and privilege assertions.

3 First, the Court ordered the Government to submit withheld communications with third
4 parties for *in camera* review. (Dkt. No. 454.) The Government then conceded that there was no
5 colorable privilege claim for 473 of the 487 custodians identified on the Government's privilege
6 log. (See Dkt. Nos. 440 at 20-22, 461, 509 at 3.) Of the 1,500 pages of documents the
7 Government did submit to the Court, only one document was arguably privileged. (Dkt. No. 509
8 at 9.) Next, after the Court ordered Defendants to produce documents that are part of an
9 otherwise responsive "family group" of produced material but were withheld on the grounds of
10 "non-responsiveness," the Government informed the Court that while the Government had not
11 previously asserted any privilege over these documents or listed them on a privilege log, these
12 documents were in fact protected from disclosure by the attorney-client privilege, the attorney
13 work product privilege, the DPP, and the executive privilege. (Dkt. Nos. 449 at 10-12, 463 at
14 2-3.) When the Court ordered Defendants to submit the documents for *in camera* review, the
15 Court found that the Government had asserted privileges over summaries of press accounts
16 prepared by foreign governments and non-privileged communications that were simply sent to
17 attorneys. (Dkt. No. 522 at 4.) In fact, nearly all the Government's privilege assertions in this
18 submission strayed far outside the bounds of the claimed privileges. (*Id.* at 5.)

19 On May 4, 2020 Plaintiffs brought a motion to compel the Government to submit a
20 random sample of 350 documents for *in camera* review, one percent of the total documents the
21 Government was withholding solely on the basis of the deliberative process privilege. (Dkt. No.
22 497.) The Court granted Plaintiffs' motion and also ordered the Government to submit an
23 additional 500 randomly selected documents to the Court for *in camera* review in order to further
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1 determine the scope of the Government's privilege claims. (Dkt. No. 545.) Before submitting
2 the 500 documents, the Government itself determined that 90 of those documents (or 18% of the
3 total) were not subject to a proper DPP claim. (Dkt. No. 542 at 2 n. 1.) Indeed, after reviewing
4 each of the 850 documents individually, the Court concluded that nearly 90% were not
5 privileged. (Id. at 5.) Following these submissions, the Government's attorneys admitted that
6 they had not personally reviewed the withheld documents. (Dkt. No. 65 at 13:4-14:25.)

7 The Government assumes that because this is a military case its privilege assertions are
8 not subject to Court review. Yet each time the Court has ordered the Government to submit
9 documents for *in camera* review, the Government has withdrawn and reduced its privilege
10 designations, demonstrating the very necessity of Court review.

11 **C. Narrowing the Dispute**

12 Due to the Court's growing concern that the Government has been grossly over-asserting
13 privileges, and in light of the enormous task remaining of reviewing the 25,000 to 40,000
14 withheld documents over which the Government has claimed the DPP, on July 15, 2020 the
15 Court outlined a discovery management tool that would speed the Court's review going forward.
16 (Dkt. No. 545.) Defendants were ordered to review their list of documents withheld solely on
17 the basis of the DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 and
18 September 14, 2017 through January 11, 2018, the timeframes that the Carter and Mattis Policies
19 were being considered, respectively. (Id. at 2.) As a fail-safe, the Government is permitted to
20 submit any privilege-claimed documents outside the proposed timeframe for *in camera* review
21 without separate motion practice. (Dkt. No. 566 at 11.) The Court also required that at least one
22 Government attorney appearing in this matter would personally review the submissions to ensure
23 that any privilege claims were well-informed. (Dkt. No. 569 at 2.)

1 The Court recently reviewed the Government’s first *in camera* submission pursuant to
2 this Order, which consisted of approximately 115 pages of communications surrounding the
3 President’s Tweet that the Government had withheld under the Deliberative Process Privilege.
4 (Dkt. No. 572, 614.) After examining each document *in camera*, the Court found that none of
5 the documents fell within the proper scope of the DPP. (Dkt. No. 614.) The Court is currently
6 reviewing the Government’s second submission pursuant to the Court’s July 15, 2020 Order,
7 which comprises 347 documents concerning DoD “policy deliberations that occurred from
8 January 11, 2018 to February 22, 2018.” (Dkt. No. 598, Ex. 1, ¶ 6.) The Government produced
9 “[t]he remaining documents from the period between January 11, 2018 and February 22, 2018
10 that were previously withheld exclusively pursuant to the deliberative process privilege . . . to
11 Plaintiffs.” (Dkt. No. 597 at 2.)

12 As a result of the Court’s recent discovery Orders, there are no longer “tens of thousands”
13 of contested documents at issue in the Government’s second Petition. 2d Pet. at 1. Instead, there
14 are no more than 347 documents comprising the fiercely contested “iterative drafts” of the
15 Report and Recommendation that were created between January 11 and February 22, 2018. *Id.*
16 at 10. And the Government has agreed to a production schedule that accounts for many of the
17 remaining documents at issue in the Government’s second Petition. (Dkt. No. 617 at 2.)
18 Nevertheless, the Government has taken the position that the volume of documents it has
19 produced takes the place of the quality or relevance of the documents. See, e.g., Pet. at 24
20 (discussing the 60,000 documents the Government has produced). But pushing a haystack of
21 documents toward Plaintiffs does not substitute for producing the relevant, responsive documents
22 that Plaintiffs have requested. This is especially the case where the Government’s attorneys have
23 admitted that they did not review these documents before production.

