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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

RYAN KARNOSKI, et al.,)
)
 Plaintiffs, and)
)
 STATE OF WASHINGTON,)
)
 Plaintiff-Intervenor,) No. 2:17-cv-01297-MJP
)
 vs.) Seattle, WA
)
 DONALD J. TRUMP, in his)
 official capacity as)
 President of the United)
 States, et al.,)
) Status Conference (via Zoom)
 Defendants.) August 24, 2020
) 9:00 a.m.

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

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Reported by stenotype, transcribed by computer

Karnoski, et al. v. Trump, et al., 8/24/2020

1 THE CLERK: United States District Court for the
2 Western District of Washington is now in session, the Honorable
3 Marsha Pechman presiding.

4 This is the matter of Karnoski, et al. vs. Trump, et al.,
5 Cause Number C17-1297, assigned to this court.

6 Counsel, please make their appearances for the record.

7 MR. HEINZ: This is Jordan Heinz, on behalf of the
8 plaintiffs.

9 MR. SIEGFRIED: Dan Siegfried, on behalf of the
10 plaintiffs.

11 MS. HORVITZ: This is Rachel Horvitz, on behalf of
12 the plaintiffs.

13 MS. BUCHERT: This is Sasha Buchert, on behalf of the
14 plaintiffs.

15 MS. STALLINGS-ALA'ILIMA: Good morning. Chalia
16 Stallings-Ala'ilima, on behalf of the State of Washington.

17 MR. CARMICHAEL: Andrew Carmichael, on behalf of the
18 federal government.

19 THE COURT: Good morning.

20 Go ahead, Mr. Powers.

21 MR. POWERS: Excuse me, Your Honor. Jim Powers, on
22 behalf of the United States as well.

23 THE COURT: Thank you, Mr. Powers.

24 JUDGE DONOHUE: James Donohue, special master, is
25 present.

1 THE COURT: Counsel, I've had an opportunity to read
2 your joint status report, and so I suggest that we begin to go
3 through the issues that you've identified there for me.

4 So, Mr. Heinz, I'm wondering if you can give me -- you
5 gave me an update of what's still outstanding with the Court
6 right now, and those are the four motions to quash the
7 subpoena. And so I want to tell you that the Court is working
8 on those. I'm hoping that we're going to have some answers for
9 you perhaps in the next week.

10 So can you give me an update as to where this case is on
11 the trial track with the other cases around the country? In
12 other words, what stage are each of them currently at?

13 MR. HEINZ: Sure. And I will also invite counsel for
14 the defendants to correct me, if I'm wrong, as they may be more
15 up to date on all of those cases than me.

16 But so there are three other cases. The *Stockman* case,
17 which is pending in federal court in California, that case has
18 been stayed for quite some time, pending the resolution of the
19 current mandamus petition before the Ninth Circuit. So that
20 case has been on ice for quite some time.

21 The *Stone* case has had a motion pending for many months on
22 the magistrate's decision to order the production of certain
23 deliberative materials, similar to Your Honor's orders. That
24 order was objected to by the federal government, and that still
25 has been pending for some time.

1 And, finally, the *Doe* case, pending in the District of
2 Columbia, that case has been working through discovery.
3 They've been trying to schedule depositions in that case, and
4 we're trying to coordinate with them. And I believe they've
5 asked for a couple deposition dates in September, although we
6 have informed the *Doe* team that we would prefer waiting on
7 those depositions until the government completes its production
8 pursuant to Your Honor's July 15 order. So we've just told
9 them the same thing that we told you; that we'd rather have the
10 documents before we start depositions. So the *Doe* team has
11 been waiting to take those depositions until we can get those
12 documents in this case.

13 THE COURT: Does the *Doe* case have a trial date?

14 MR. HEINZ: No. To my knowledge, none of the cases
15 have a trial date. And also, none of the cases have a fact
16 discovery close date.

17 THE COURT: All right. Thank you.

18 Mr. Carmichael, is that a correct recitation, from what
19 you understand?

20 MR. CARMICHAEL: Yes, Your Honor, that's correct. I
21 don't -- yeah, there's nothing there that I disagree with.
22 It's all correct.

23 THE COURT: All right. So let's talk a bit about the
24 August 17 letter, Mr. Heinz, that you sent to the defense, and
25 the categories of documents that you are asking for at this

1 time.

2 What would you like to tell me about that?

3 MR. HEINZ: Your Honor, we sent that letter a week
4 ago, because at the time, we were under the impression that the
5 government was likely to seek a stay of Your Honor's July 15
6 order, at the Ninth Circuit. And so we were pressing forward
7 with three kind of discrete categories of documents, where we
8 felt like there was just no basis to assert the deliberative
9 process privilege.

10 So those categories were, in the two weeks following
11 President Trump's tweet, there are about 250 privilege log
12 entries that appear to just be reacting to the tweets. It's
13 about media coverage, how the government -- or how the
14 Department of Defense is going to respond, all of that, but
15 certainly not deliberative, and definitely not pre-decisional,
16 of course, either. So on both scores, we didn't feel like
17 there was a basis to withhold those.

18 And then the other two categories relate to working groups
19 at the Department of Defense that were discussing how to
20 implement the Carter policy. And so we requested documents
21 regarding those implementation communications, because those do
22 not appear to be pre-decisional or deliberative either.

23 And then in response, the government has told us, in both
24 the joint status report and then also one of the filings at the
25 Ninth Circuit, on Friday, that they are going to comply with

1 the July 15 order. All of the documents in our letter would
2 fall outside of the presumptive deliberative time frames. So
3 under Your Honor's order, those documents would be produced to
4 plaintiffs this Friday. So I think that moots the letter; all
5 of that assuming that the government is actually going to
6 produce those documents.

7 But as Your Honor knows, the government also has the
8 option of submitting documents in camera for the Court to
9 review. So we don't know whether the government is planning to
10 actually produce anything on Friday, or if instead they intend
11 to provide a mountain of documents to the Court for review.

12 THE COURT: Okay. Mr. Carmichael?

13 MR. CARMICHAEL: Your Honor, we're going through
14 those documents now, and we agree that the current order
15 requires us either to produce them to the plaintiffs and/or
16 produce them to the --

17 THE COURT REPORTER: I'm sorry. Excuse me, Your
18 Honor. I'm sorry.

19 Mr. Carmichael, I'm having a little bit of trouble with
20 what you were saying. There was some interruption. What I
21 have is: Your Honor, we're going through those documents now,
22 and we agree that the current order requires...

23 MR. CARMICHAEL: Okay. I'll take it from there.

24 The current order requires the government either to
25 produce those documents to plaintiffs or to produce them in

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1 camera to the Court, and we're doing that right now. We're
2 sort of sifting through which ones will be produced to
3 plaintiffs and which ones will be produced to the Court.

4 THE COURT: So you've changed your mind about going
5 to the Ninth Circuit at this time.

6 MR. CARMICHAEL: Yes, Your Honor. Yes. Because now
7 that there's an in-process -- or in camera review and the
8 documents are not going to necessarily get released, we're --
9 we don't plan on going to the Ninth Circuit on that order.

10 THE COURT: All right. So tell me about the volume
11 of these documents.

12 MR. CARMICHAEL: We're still trying to go through
13 them right now, but it will be a -- it will be a large volume
14 of documents that we will produce in camera, because we have a
15 large privilege log that covers a lot of them.

16 THE COURT: Okay. When you say "large," are we
17 talking hundreds of documents? Are we talking thousands of
18 documents?

19 MR. CARMICHAEL: Thousands of documents, Your Honor.

20 THE COURT: Okay. And are you producing new
21 privilege logs for each of these?

22 MR. CARMICHAEL: Not for -- well, we're -- we're
23 reviewing our privilege log to make sure. Our privilege log
24 already covered everything, but we're just reviewing it, making
25 sure that there's -- there's no blanks, things are -- are, you

1 know, properly explained. So there will be a privilege log
2 for -- that covers every document that we produce in camera.

3 THE COURT: Well, as you know, I've looked at your
4 privilege logs before and found them lacking in being able to
5 tell why you are asking for the privilege. So I'm hoping that
6 the logs that you're producing are more robust than the ones
7 that you produced in the past.

8 There's also an issue of every time you've delivered
9 documents in camera, we've had to send them back to have
10 them -- have them reidentified or remarked. And I'm hoping
11 that you will take care of that, so we don't have to be delayed
12 any further, taking up time to get those things corrected.

13 Finally, I'm going to ask that when you submit something
14 in camera, that the lawyer who's signing off on these documents
15 is certifying to me that you have actually reviewed them,
16 personally. And I think that's been problematic in the past,
17 that you have large volume of documents that it doesn't appear
18 to me that any lawyer really looked at carefully. So I'm going
19 to ask for that kind of declaration, that the people who are
20 reviewing it -- presumably the people who have entered notices
21 of appearance -- will be certifying that they have actually
22 looked at that, and that they believe that the objection is
23 taken in good faith.

24 MR. CARMICHAEL: Your Honor, I would say that that's
25 not required by the federal rules, and there is about a million

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1 pages of documents. So I -- you had -- you had made a
2 statement in -- in your order, and I think it is important to
3 sort of clarify that point.

4 The trial attorneys on the team did not -- did not review
5 every single document, nor is it required to review every
6 single document. The DOD attorneys -- DOJ attorneys did
7 provide guidance, and they did review many of the documents.
8 We had scores of attorneys from the agency assisting us in the
9 review. So in addition to DOJ attorneys, attorneys from the
10 Department of Defense, the Army, the Navy, the Marine Corps,
11 the Air Force, the Coast Guard, the Defense Health Agency,
12 Office of the Chairman of the Joint Chiefs, and the Department
13 of Homeland Security all reviewed a portion of the documents,
14 and collectively this adds up to government attorneys reviewing
15 all documents. But no one attorney can or did review a million
16 pages of documents.

17 THE COURT: Well, then, perhaps, before you start
18 producing documents in camera, which is a separate,
19 time-consuming exercise for the Court, if you expect me to look
20 at them, I expect you to look at them. And I know that that is
21 not a requirement, generally, but it is my requirement.
22 Because I think you need to be more circumspect in what it is
23 you're taking the Court's time to do. And if you have to do
24 that on a rolling basis, let's do it on a rolling basis.

25 But it's not acceptable to the Court for you to have

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1 dozens and dozens of lawyers, who I have no idea what
2 instructions they were given when they did their review, and
3 it's obvious that you have overwithheld. Witness the fact
4 that, even when you've been asked to produce certain numbers of
5 documents, you, on your own, decided to remove the privilege.
6 Plaintiffs have come multiple times saying that you have
7 overextended the privilege.

8 So if you're going to practice in this court, I expect you
9 to be responsible for what gets filed. Just like you would put
10 your name on a brief, I expect you to put your name on the
11 documents that you are asking us to review.

12 MR. CARMICHAEL: Your Honor, I would say that the
13 first step of this, instead of going through the "how" of how
14 we would produce this, should have been to answer the Ninth
15 Circuit's question as to why we are actually providing these
16 documents. The Ninth Circuit gave us an explicit question
17 about the relevance of documents pertaining to the presidential
18 memo, and that question has never been answered. We've just
19 been asked to provide all of these documents, without ever
20 answering and having the plaintiffs have to explain why
21 documents from a year before that are relevant, and why we must
22 submit them or -- or lose the privilege.

23 THE COURT: Mr. Carmichael, you have the burden of
24 exercising the privilege. They do not. So you have to justify
25 why they are withheld. They don't have to justify why they

1 should get it at this point. So that's your burden.

2 Also, I've told you before that you haven't redacted
3 anything; that there are documents that may be protected, and
4 there are some portions of the documents that aren't. You
5 haven't done anything with redaction. That is also your
6 obligation. So, you know, I doubt that the Ninth Circuit is
7 going to change whose obligation it is. When you assert a
8 privilege, you have to show the Court that the privilege is
9 deserving of being considered.

10 So you're going to have to -- you're going to have to
11 decide who's going to review these documents. But it is not
12 appropriate for you to dump a million documents on the Court
13 and -- without looking at them yourself. So that's the way
14 it's going to be.

15 All right --

16 MR. CARMICHAEL: It will be impossible for one person
17 to do that. We'd have to have many, many declarations.

18 THE COURT: I'm not suggesting that one person would
19 do it. You've had multiple lawyers who have signed off and
20 entered appearances on this case. And I'm expecting that
21 those -- you can divide up the work. But I'm expecting that
22 you put your name on it, not you, personally, but you and
23 others, that tells me that some lawyer that is responsible in
24 this proceeding is asking the Court to review them.

25 MR. CARMICHAEL: It's likely going to have to -- just

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1 practicality, we're going to probably have to do an emergency
2 stay and probably have to go up to the Ninth Circuit for
3 another emergency stay, so documents about the Secretary of
4 Defense's deliberations don't go out the door. This -- this is
5 just something that we cannot meet in this matter.

6 THE COURT: Well, Mr. Carmichael, this is your case,
7 and you have exerted this privilege. All I'm asking you to do
8 is have lawyers who are responsible tell me that they are
9 wishing to assert the privilege and they have a good-faith
10 basis to do it. I can't control the cadre of, I don't know,
11 paralegals in various departments. But what I can do is say,
12 just like any brief that you sign off on, I would expect that
13 you would have read it.

14 Is that fair?

15 MR. CARMICHAEL: Yes, Your Honor.

16 THE COURT: All right. Then it's fair, I think, when
17 you want to assert a privilege, that you tell me, or your team
18 tells me, that they have reviewed it, and they believe it's
19 taken in good faith.

20 MR. CARMICHAEL: Can we have agency counsel sign the
21 declarations?

22 THE COURT: I'm not asking -- I'm asking for people
23 who make appearances to tell me that this is what they have
24 done. You're expecting me to do it. I don't see why I
25 shouldn't expect you to do it as well.

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1 So, Mr. Heinz, any comments that you would like to make?

2 MR. HEINZ: Two related but somewhat separate points.

3 The first would be, it seems like the government is
4 planning to submit a good volume of documents to the Court.
5 And as we prepare for the Ninth Circuit argument on October 14,
6 to the extent that the Court and special master are
7 prioritizing certain batches of documents, the documents during
8 that time frame, between July [sic] 11 and February 22, 2018,
9 those documents are the most relevant for the current mandamus
10 petition.

11 THE COURT: Mr. Heinz, I'm sorry. I had a blip
12 there, and I didn't hear the dates that you're talking about.
13 Give those to me again, please.

14 MR. HEINZ: Sure. January 11, 2018, through
15 February 22, 2018. You'll recall that that window of time,
16 you, in your amended order, asked that all of those
17 deliberative documents be produced, or all documents withheld
18 pursuant to the privilege. And so I -- I suspect that the
19 government will comply with that and produce those documents to
20 Your Honor on Friday.

21 And just in terms of prioritizing the documents that the
22 Court reviews, that batch of documents is most relevant for the
23 current mandamus petition. And in that -- one of those RFPs,
24 RFP 29, that is the subject of that petition, relates to those
25 documents in some respect. So to the extent that the Court is

1 prioritizing documents, that batch of documents would be
2 important for our preparation for that mandamus argument in
3 October.

4 And then secondly, Your Honor, on Friday, the parties
5 submitted some further filings with the Ninth Circuit. The
6 Ninth Circuit asked the parties to each submit a supplemental
7 letter brief with any new facts or legal arguments since the
8 parties finished their briefing on the mandamus petition in the
9 early part of this year. The parties filed those letter briefs
10 on Friday, and then the parties also finished briefing
11 plaintiffs' motion to clarify the administrative stay. And so
12 the government has now filed an opposition. And on Friday, the
13 plaintiffs filed our reply in support of that motion.

14 So I would just ask if the Court would find it helpful for
15 us to file those as a courtesy copy, on the District Court
16 docket, or perhaps that's unnecessary. So I just wanted to ask
17 the Court.

18 THE COURT: Well, it's helpful for -- for me to have
19 it. I can also get it off of the Ninth Circuit. But it's --
20 it's part of this case, so I think it should be part of the
21 record that you informed your trial court exactly what you're
22 arguing elsewhere.

23 Now, let's talk a little bit more about Mr. Carmichael's
24 distress that he has to turn over these volumes of material and
25 actually have to certify that his team has reviewed it.

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1 If that's the -- you just identified to me the most
2 important grouping of those documents. What's next? In other
3 words, what's the next group that is important to you?

4 MR. HEINZ: The -- so I think apart from -- from that
5 early 2018 period, I think that the next category would be in
6 the summer of 2017 and right around the tweets and -- and
7 reactions thereto.

8 The government, in its briefing, has tried to distance
9 itself from the surprise of the President's tweet, and instead
10 characterized that tweet and the ban as a continuum of the
11 Department of Defense analyzing the policy on transgender
12 military service. And we think that those documents, in the
13 summer of 2017, after the President's tweet, will demonstrate
14 that that wasn't the case at all; that the Department of
15 Defense had no idea that the -- that that tweet was coming;
16 that they weren't consulted.

17 And one of the most recent depositions, Your Honor, was of
18 a -- a psychiatrist who testified before the so-called panel of
19 experts. And during her deposition, she testified that she was
20 at the Pentagon the two days prior to the tweet, for one of
21 these implementation groups that were discussing how to
22 implement the Carter policy. And they were discussing things
23 like how to provide hormone treatments to soldiers in deployed
24 environments, so something very relevant. And they were
25 discussing how to work through that issue. And that was the

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1 day before the tweet. And so we asked her, you know: Was
2 there any discussion, during that working group at the
3 Pentagon, about the fact that the President, the next day, was
4 going to ban transgender military service? And she said:
5 Absolutely not.

6 So -- so we feel that -- that those documents, in that
7 summer 2017 time frame, are going to be very instructive and
8 very relevant.

9 THE COURT: And I take it that -- that the defense
10 has never answered the question as to who the President
11 consulted, when he put out his tweet saying that he had
12 consulted others?

13 MR. HEINZ: No. That -- that was certainly one of
14 our interrogatories, but the President has -- has refused to
15 participate in any of the civil discovery.

16 THE COURT: Okay. So it's -- if there's no response
17 to that question, isn't -- is the assumption that you're
18 drawing is that he consulted with nobody, and he lied in the
19 tweet?

20 MR. HEINZ: That's certainly a very plausible
21 explanation. So far, we have found no one that he consulted
22 with.

23 THE COURT: All right. And the third set of -- of
24 documents, you say the next grouping is not as important to
25 you?

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1 MR. HEINZ: So really it -- in terms of priority,
2 it's just that early 2018 time frame. So after the panel
3 issued its -- its decision, on January 11, 2018, and then
4 through the date that the -- that the February 2018 report was
5 issued, on the 22nd of February, that's a very critical time
6 frame, and then also that summer of 2017 time frame. I think
7 those are the two priority areas.

8 THE COURT: Okay. Mr. Carmichael, is there a problem
9 with prioritizing in that order?

10 MR. CARMICHAEL: There's not, Your Honor. And so if
11 we want to actually lay out a plan for that, I don't -- I don't
12 have a problem with that. For -- for -- we could -- we could
13 get through the 250 documents, our team, and certify that we've
14 all reviewed them, by this Friday. So that would not be a
15 problem. That's a reasonable request.

16 The other one, the -- it's about 2,000, I think, in the
17 other group. I think we would probably need three weeks to get
18 through that, and then we could do that. So if we wanted to do
19 those two things, I think we could accomplish both of those and
20 provide them in -- you know, in camera, with the certification
21 that we reviewed them all.

22 THE COURT: Okay. Mr. Heinz?

23 MR. HEINZ: Your Honor, the -- a three-week delay on
24 the early 2018 documents means we won't have those in time for
25 the -- for the argument at the Ninth Circuit. And so that's

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1 just not -- that's not going to work, from our perspective.

2 THE COURT: Mr. Carmichael, that's not a time frame
3 that's going to work. So you turn over the first set that
4 we're talking about by this Friday, and you turn over the
5 second set in ten days after that. So that -- that should give
6 you the documents by early September? Wait. We have to have
7 the review. We have to have -- we have to have me review it.

8 So -- all right. We're going to back that up. The first
9 batch is -- comes in on Friday. The second batch comes in on
10 the Friday after. And we'll try and turn it around.

11 Mr. Heinz?

12 MR. HEINZ: Sure, Your Honor.

13 And in terms of which batch, the early 2018 documents are
14 really the most important. So we would ask that those be the
15 first batch, and then the mid-2017 documents being the second
16 batch.

17 THE COURT: That was -- that is what I understood.
18 So to be clear, it's the documents of January 11, 2018, to
19 February 22, 2018.

20 MR. HEINZ: Correct.

21 THE COURT: And then following that would be the
22 summer of 2017, the period after the President's first tweet.

23 MR. CARMICHAEL: Your Honor, I would just -- because
24 the letter came first, we -- we wouldn't be able to meet that
25 one, because we started on the letter already, and we're mostly

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1 through with the letter, and we can immediately start on the
2 other documents. So it's just because we had already -- we
3 thought the priority was based off what was in the letter, so
4 that's why we -- we can't do that one. But, I mean, we'll try
5 our best. We may be able to meet the other deadline, if it is
6 the tweets by this Friday and it is the other one by the next
7 Friday.

8 THE COURT: Mr. Heinz?

9 MR. HEINZ: Well, all of these documents should have
10 been ready to go this Friday, not only these, but all of the
11 other ones. So this is just -- it's just -- it's just more
12 delay. It's just more excuses. You know, I don't understand
13 why, for the 2,000 documents --

14 THE COURT REPORTER: I'm sorry. Excuse me. I'm
15 sorry, Your Honor. Excuse me?

16 THE COURT: Mr. Heinz? Mr. Heinz? Mr. Heinz? I
17 can't get a record on you. You're breaking up.

18 MR. HEINZ: Oh, I'm sorry.

19 THE COURT: All right. The court reporter -- the
20 court reporter is telling me there's some distress here in
21 getting a record on you. So let's go for the period of time as
22 they should have had them ready for this Friday.

23 MR. HEINZ: And perhaps it's good that the court
24 reporter didn't get that last statement, because I was getting
25 a little emotional, Your Honor. It's just frustrating when all

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1 of these documents should have been ready to be produced on
2 Friday. And they should have been ready to be produced a year
3 and a half ago. So I don't understand why it takes the
4 government another two weeks to pick through 2,000 documents
5 and determine whether or not there's a good-faith basis to
6 assert the privilege, particularly during this early 2018 time
7 frame when, you know, these are some of the most important
8 documents in the case. I'm shocked that the attorneys who
9 haven't -- who have appeared in this matter haven't already
10 looked at each of these documents. So it just seems
11 implausible to me that it would take the government that long
12 to look at those.

13 THE COURT: Well, Mr. Heinz, I'm exerting a little
14 self-preservation here, because even if they were to dump them
15 all on me, I can't -- I can't get through them without --
16 without staging them. So --

17 MR. HEINZ: I understand.

18 THE COURT: -- think of it as me trying to manage the
19 volume at the same time I'm trying to push them to get through.
20 Because I agree with you that this should have been looked at
21 long ago.

22 MR. HEINZ: Then, Your Honor, what we would request
23 would be, rather than start with the 2017 documents -- well,
24 scratch that. From what Mr. Carmichael said, it sounds like
25 that they're almost done with looking at those 2017 documents

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1 and the other documents in the letter that we sent them last
2 week. So, you know, let's start with those, and then let's
3 move on to the 2018 documents next.

4 THE COURT: Okay. So you're flipping what it is that
5 you asked previously.

6 MR. HEINZ: Well, it sounds like from -- that the
7 government can't produce the 2018 documents first. It sounds
8 like that they've already started with 2017 documents, and
9 those are almost ready to go.

10 THE COURT: Okay. Mr. Carmichael, would that make it
11 easier for you, to produce the 2017 documents first?

12 MR. CARMICHAEL: Yes, Your Honor, it would.

13 THE COURT: All right. Then let's do that.
14 Okay. Any other clarification that's needed there?

15 Okay. All right. Now, let's move on to the next topic,
16 and that concerns the issue of the special master.

17 And, Mr. Carmichael, I understand that you have taken a
18 different position on this now.

19 MR. CARMICHAEL: Well, yes, Your Honor, from the --
20 from the initial 350. We would -- because the -- it looks like
21 the special master has been issuing recommendations as -- in
22 the form of the spreadsheets, we'd like to -- to actually get
23 the time to look at those spreadsheets, and to comment and have
24 an opportunity to be heard, before they're adopted by the
25 Court.

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1 THE COURT: And why would you agree to a certain
2 process -- and Mr. Powers was the one who was there and agreed
3 to it -- and now tell me that I can't use the special master as
4 I described?

5 MR. CARMICHAEL: It's really the -- it's the volume
6 of it. It is there, but, you know, this is -- if things are --
7 I'm not as -- I don't think we're as concerned about the -- the
8 first set, for the first set of the tweet. I think we're
9 particularly concerned about the mandamus petition, on making
10 sure that doesn't get mooted out. So, you know, for the second
11 set, if the special master is going to issue a -- issue a
12 recommendation, a spreadsheet, we would want to, you know, have
13 a -- have notice of it and opportunity to be heard on that
14 spreadsheet.

15 THE COURT: Well, Mr. Carmichael, spreadsheets are
16 not orders. They're a means of organizing material that then
17 becomes a way that people in chambers can look at the material.
18 So I don't know of any -- any time that you would be allowed to
19 see the work of the Court, in progress, as we went through
20 this.

21 You do -- go ahead.

22 MR. CARMICHAEL: The special master is more like a
23 magistrate, where -- where it is. Like, he issues some sort of
24 a report or recommendations, and we have the opportunity to --
25 to object and provide some comments, and then the Court accepts

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1 it or not. So that's -- that's sort of how we're thinking the
2 special master would be.

3 THE COURT: Mr. Carmichael, that's not the scope that
4 I set up, and that's not how Judge Donohue is being used. I
5 told you, I'm using him the same way I would use my staff. And
6 that means that it's a collaborative effort to help organize,
7 to help review, to make suggestions, to do research on the
8 topic, to debate with the Court over issues, and then I issue
9 an order. But I don't know that there's any obligation for me
10 to basically have you make objections on a product that is not
11 even a product. It's just a work in progress.

12 You do realize that I could simply strike the word
13 "special master" and continue to use Judge Donohue as I see
14 fit.

15 MR. CARMICHAEL: Yes, I mean, you obviously could
16 hire him as law clerk, you know, and use him how you see fit.
17 So it's a -- but because he's a special master -- I think the
18 concern is just particularly the -- mooted out the -- any sort
19 of petition to the -- to the Ninth Circuit, and having --
20 having those particular documents, the January 11, 2018,
21 documents to February 22nd.

22 THE COURT: Well, how would you be mooted out, in the
23 sense that -- that you can appeal -- you can appeal me? You
24 don't have to have another layer of appeal, which I -- which
25 strikes me as simply just slowing things down.

1 And I want to correct you, is that you do understand that
2 you complained -- or I think that Mr. Powers may have
3 complained -- that you didn't want to pay for a special master.
4 So Judge Donohue is a volunteer to the Court. Now, if you want
5 me to go out and hire a special master, you can pay the \$700 an
6 hour that that special master would be charging you. But you
7 asked for one that wasn't going to cost you. So I think you
8 should thank your lucky stars that you've got an experienced
9 judge who is willing to spend their time contributing to the
10 Court. Otherwise, you're going to pay for it.

11 MR. CARMICHAEL: Your Honor, is it possible for -- to
12 just have -- if the Court is going to order release of the
13 documents at issue in the mandamus petition, to give us more
14 time? So have the timeline for -- for production of those, you
15 know, be a longer -- maybe 14 days, or 21 days, or something
16 like that, rather -- because sometimes it's been seven or ten,
17 and that -- you know, that -- that is difficult for our
18 appellate folks and all, if we're going to bring it to the
19 Ninth Circuit.

20 THE COURT: Well, Mr. Carmichael, the answer to that
21 is no. I just gave you ten days. And you -- this has been a
22 continual process of delay. So, you know, I don't -- I don't
23 know that you can appeal the special master order. It seems to
24 me that that would be quite -- quite frivolous. Because as I
25 just told you, I can just convert the special master into a

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1 working chambers staff. And I don't know where that gets you.
2 Or, you know, we can hire somebody.

3 Do you want to pay the bill?

4 MR. CARMICHAEL: No, Your Honor, we -- we don't want
5 to -- we don't want to pay -- pay the bill.

6 THE COURT: Okay.

7 MR. CARMICHAEL: I mean, we just -- we want a little
8 bit more time, if we have to go to the appellate court, I think
9 is the --

10 THE COURT: Well, the answer to that is no. If
11 you've got enough people to work on these cases, in the Justice
12 Department, you've got enough people to make that kind of
13 decision. You make a decision that you're going to go, then
14 you retract it. You know, if you're going to go, you know how
15 to get there.

16 All right. Let's talk about the next issue.

17 Mr. Carmichael, I have some questions for you. It's my
18 understanding that you contacted the court reporter without
19 notifying the Court that you were going to do so.

20 Is that correct?

21 MR. CARMICHAEL: I asked for the audio transcript,
22 Your Honor.

23 THE COURT: Okay. So you did, in fact, contact the
24 court reporter without asking the Court for what it is you
25 wanted.

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1 MR. CARMICHAEL: For the -- I mean, like we do with
2 other transcripts, yes. We -- we frequently contact the court
3 reporter about transcripts, yes, Your Honor.

4 THE COURT: And you didn't notify Mr. Heinz that the
5 purpose of your contact was to speak with the court reporter
6 about what you considered an error in a transcript.

7 MR. CARMICHAEL: The -- the purpose of it was to
8 obtain the audio, just like we obtain a transcript. I -- the
9 court reporter told me that she's not allowed to give the
10 audio, and said: Well, is there a part that you want me to
11 check? And then I asked her to check that. I did not ask for
12 a correction.

13 THE COURT: Well, didn't you say to her, "On the
14 transcript, on the bottom of Page 27, it records me as saying
15 'Drafts aren't deliberative process.' But that does not really
16 make sense, because I was arguing the exact opposite in that
17 paragraph, as well as immediately before and after that
18 paragraph"? So, in fact, you were telling her that there had
19 been a mistake, and she should look at the context of what you
20 were arguing, and you were attempting to persuade her to change
21 the transcript.

22 MR. CARMICHAEL: I'm happy with just the audio, Your
23 Honor. It just seems to be an issue with the -- with the --
24 that plaintiffs have raised with the Ninth Circuit. So if --
25 I'm happy with just the audio.

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1 THE COURT: Mr. Carmichael, let's answer my question.
2 Is that a direct quote from your e-mail?

3 MR. CARMICHAEL: Yes, I believe that that is a --
4 that is a direct quote from my e-mail.

5 THE COURT: Okay. And you didn't turn over this
6 exchange to Mr. Heinz.

7 MR. CARMICHAEL: I have turned over the exchange to
8 Mr. Heinz. They asked for it on Friday, and I gave it to them.

9 THE COURT: All right. Now, Mr. Carmichael, this is
10 a transcript from December 10; correct?

11 MR. CARMICHAEL: Yes, Your Honor.

12 THE COURT: And this portion of the transcript has
13 been cited in briefings to the Ninth Circuit previously.
14 Isn't that also correct?

15 MR. CARMICHAEL: I -- I don't know. I think it
16 was -- it was recently cited, I believe --

17 THE COURT: Well --

18 MR. CARMICHAEL: -- and I think the motion for
19 clarification that they -- they -- I don't remember if it was
20 cited in the past.

21 THE COURT: Well, I believe it certainly was -- was
22 referenced in the open -- in your responsive brief to the Ninth
23 Circuit, in February. And Mr. Heinz can correct me if I'm
24 wrong. And then I cited it again, in my response to the Court
25 in March.

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1 You did not seek clarification in February; did you?

2 MR. CARMICHAEL: I did not, no.

3 THE COURT: You did not seek clarification in March;
4 did you?

5 MR. CARMICHAEL: I did not, no.

6 THE COURT: So how is it that eight-and-a-half months
7 later, you now decide that there's an error?

8 MR. CARMICHAEL: I -- it's -- I wanted to know
9 whether or not it was an error in me speaking, you know, a
10 flub, or if it was an error in the transcript. I -- I don't
11 know. I haven't listened to the audio. And, you know, I'm a
12 human being, and people make mistakes.

13 I can -- I can tell you that before that and after that,
14 and in every briefing, we have argued that draft documents are
15 protected by the deliberative process, so certainly that's what
16 I meant. But I don't know if it's a misspoke [sic], or if it
17 is an error in the transcript, because I'd have to listen to
18 the audio to know. And I just -- I just wanted to listen to
19 the audio to know whether or not it was, because it keeps
20 coming up.

21 THE COURT: Okay. But, well, my question is, how is
22 it that this slips by you, for eight-and-a-half months, and you
23 don't bring it to the Court's attention in a timely manner?

24 MR. CARMICHAEL: It's not that it slipped by me.
25 It's that it just -- it -- it really seemed, like, so minor.

1 And -- and -- and I couldn't -- it's one of those things that I
2 couldn't imagine ever addressing with more than a footnote.
3 Because it is clearly just either a flub or a --
4 mis-transcribed. But because it keeps coming up, I wanted to
5 know the difference.

6 THE COURT: Okay. Mr. Heinz, what would you like to
7 say?

8 MR. HEINZ: From the context, Your Honor, it's --
9 Mr. Carmichael, in the subsequent and -- and preceding portions
10 of the transcript, explained how, you know, the Department of
11 Defense was making wordsmithing changes and was changing, you
12 know, the way sentences read. And so from the context, it
13 seems like that those wouldn't be deliberative documents.
14 Those aren't deliberations about a policy. And his explanation
15 are that these are, you know, inconsequential documents. So it
16 seems strange to us that there would be this change.

17 But I guess kind of two primary responses, Your Honor.
18 One, the parties have extensively relied on or opposed various
19 motions, including at the Ninth Circuit, based on that
20 language. And so it -- we haven't had time to research the
21 issue, but it seems like there's an element of estoppel here,
22 or at least waiver, that we can't now go back and re-litigate
23 those -- those issues, based on a corrected transcript. If
24 there was a concern about whether that was accurately
25 transcribed, that should have been brought up when the

1 transcript was released, or at the very least shortly after we
2 cited it in opposition to their mandamus proceeding.

3 And then, secondly, Your Honor, we haven't heard the audio
4 either, so we can't comment on that, one way or the other.

5 MR. CARMICHAEL: I would just say, as far as that
6 particular point of -- when I'm arguing that wordsmithing -- or
7 saying that I'm wordsmithing, and corrections, that's all part
8 of the working draft. That is an argument that it is
9 deliberative process. And that's -- that's the binding case
10 law. It is -- a working draft is -- is protected by the
11 deliberative process. And even -- and wordsmithing and
12 changing and correcting, that stuff, all of that is protected
13 by the deliberative process privilege. Whether or not it
14 overcomes the need on the *Warner* factors, that's a different
15 question. But it is protected by the deliberative process.

16 THE COURT: Well, Mr. Carmichael, you know, I was at
17 the conference, obviously. And I obviously thought that you
18 said that it -- they were not deliberative. That's what my law
19 clerk thought you said. That's what the court reporter thought
20 you said. And I have listened to the tape. And honestly, I
21 can't tell. It is -- the -- if you listen to the tape, you
22 know, five, ten, fifteen times, it's not going to clarify
23 anything. It simply is not capable of being sorted out at this
24 point.

25 So I don't know where we go from here, but this is what I

1 will say to you: Don't you ever, ever, contact one of my
2 employees in an attempt to convince them that they have made an
3 error that accrues to your advantage. Asking somebody to
4 change something from a "yes" to a "no," without having brought
5 this to the Court's attention or even to your opposition's
6 side, is underhanded and inappropriate. So I don't know where
7 you want to go from here, but the recording isn't going to
8 change anything.

9 MR. CARMICHAEL: If it's unclear, then it's unclear.
10 So -- and I was -- I will say, again, I was -- I was just -- I
11 just wanted to check it out. I -- I don't know. It very well
12 could have been -- I could have said it. I'm not -- I'm not
13 saying I didn't. It could have been a flub. I just wanted to
14 know. And I asked for the audio, and then I asked her to
15 check. And that's it.

16 THE COURT: And I don't know, Mr. Carmichael, whether
17 you misspoke or whether we misheard. But the time to correct
18 it was early on. And the way to correct it is to bring it to
19 the Court's attention, not the way you did it.

20 MR. CARMICHAEL: Understood.

21 THE COURT: All right. Other issues for today?

22 MR. HEINZ: None from the plaintiffs, Your Honor.

23 THE COURT: Okay. Mr. Carmichael, anything further?

24 MR. CARMICHAEL: No, Your Honor.

25 THE COURT: Okay. I'll put out an order that

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1 memorializes the decisions that were made today.

2 And let me just check. Judge Donohue, is there -- are
3 there any other issues that you wish to bring to my attention
4 at this time?

5 JUDGE DONOHUE: None, Your Honor.

6 THE COURT: Okay. All right. Thank you. Have a
7 good day.

8 Oh, before you go -- before you go, we need another date
9 that I'll have you work with Mr. Cogswell, who's the Court's
10 scheduling deputy for this, and we'll put you on in another
11 month.

12 Okay. Thank you.

13 (Adjourned)

14

15 C E R T I F I C A T E

16

17 I certify that the foregoing is a correct transcript from
18 the record of proceedings in the above-entitled matter.

19

19 /s/ *Andrea Ramirez*

20 ANDREA RAMIREZ
21 COURT REPORTER

22

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