

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, JANE DOE 2, JANE DOE 3,
JANE DOE 4, JANE DOE 5, JOHN DOE 1,
REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States; JAMES N.
MATTIS, in his official capacity as Secretary of
Defense; JOSEPH F. DUNFORD, JR., in his
official capacity as Chairman of the Joint Chiefs
of Staff; the UNITED STATES DEPARTMENT
OF THE ARMY; MARK T. ESPER,¹ in his
official capacity as Secretary of the Army; the
UNITED STATES DEPARTMENT OF THE
NAVY; RICHARD V. SPENCER, in his official
capacity as Secretary of the Navy; the UNITED
STATES DEPARTMENT OF THE AIR
FORCE; HEATHER A. WILSON, in her
official capacity as Secretary of the Air Force;
the UNITED STATES COAST GUARD;
ELAINE C. DUKE, in her official capacity as
Secretary of Homeland Security; the DEFENSE
HEALTH AGENCY; RAQUEL C. BONO, in
her official capacity as Director of the Defense
Health Agency; and the UNITED STATES OF
AMERICA,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

PARTIES' JOINT STATEMENT

Plaintiffs Jane Doe 1, Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, John Doe 1,
Regan V. Kibby, and Dylan Kohere (“Plaintiffs”) and Defendants Donald J. Trump, in his

¹ Mark T. Esper has been substituted as the Secretary of the Army pursuant to Federal Rule of Civil Procedure 25(d).

official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; the United States Department of the Navy; Mark T. Esper, in his official capacity as Secretary of the Army; the United States Department of the Navy; Richard V. Spencer, in his official capacity as Secretary of the Navy; the United States Department of the Air Force; Heather A. Wilson, in her official capacity as Secretary of the Air Force; the United States Coast Guard; Elaine C. Duke, in her official capacity as Secretary of Homeland Security; the Defense Health Agency; Raquel C. Bono, in her official capacity as Director of the Defense Health Agency; and the United States of America (“Defendants”), under LCvR Rule 16.3(c) and (d) of this Court and Fed. R. Civ. P. 26(f), conferred on November 20, 2017, and submit this joint statement in connection with the scheduling conference to be held by the Court on November 28, 2017.

Information Required by Rule 16.3(c):

1. *Dispositive motions.*

The Court has denied in part and granted in part Defendants’ motion to dismiss. The parties may file motions for summary judgment.

2. *Joinder of parties and amendment of pleadings.*

The Parties propose to join any parties and amend the pleadings no later than December 15, 2017.

3. *Assignment to Magistrate Judge.*

The Parties do not consent to trial by a Magistrate Judge, or to the disposition of dispositive pre-trial motions by a Magistrate Judge.

4. *Settlement possibility.*

The Parties do not believe that settlement is likely.

5. *Alternative dispute resolution (ADR).*

At this point, the Parties do not consent to ADR and do not think that the case could benefit from ADR procedures.

6. *Dispositive motions.*

The Parties may file summary judgment motions and have provided dates for the filing of dispositive motions in their respective proposed case schedules below.

7. *Initial disclosures.*

Plaintiffs' Position

The Parties will exchange the initial disclosures required by Fed. R. Civ. P. 26(a)(1) no later than December 1, 2017.

Defendants' Position

As set forth below, the Court should set another initial scheduling conference in March 2018, and should set a date for initial disclosures, if they are still necessary, at that conference. If the Court declines to wait until after the Secretary of Defense submits his Implementation Plan to set a discovery schedule, Defendants believe that they could be prepared to provide initial disclosures by December 15, 2017.

8. *Discovery.*

Plaintiffs' Position

Plaintiffs intend to seek discovery concerning principally (1) the genesis and announcement of the President's ban on transgender service members (the "Ban"); (2) the factual basis for the justifications offered by Defendants for the Ban; and (3) Defendants'

implementation of the Ban. Plaintiffs anticipate this will involve written discovery (including requests for production of documents, interrogatories, and requests for admission) and depositions of relevant fact witnesses (including individuals and Rule 30(b)(6) designees).

Plaintiffs are mindful of the limitations imposed on discovery of certain aspects of executive decision-making processes. At the same time, Plaintiffs are entitled to “discovery regarding any nonprivileged matter that is relevant to [their] claim[s] or defense[s] and proportional to the needs of the case, considering,” as relevant here, “the importance of the issues at stake in the action, ... the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). In particular, Plaintiffs are entitled to discover the factual basis for the President’s formulation and announcement of the Ban and the justifications Defendants have offered for it. *See Ctr. for Biological Diversity v. U.S. Envtl. Prot. Agency*, __ F. Supp. 3d __, 2017 WL 4326381, at *13-15 (D.D.C. Sept. 28, 2017).

Plaintiffs understand that Defendants are likely to assert privilege objections to Plaintiffs’ discovery requests, and that the Parties are unlikely to agree on the scope of the privilege as relevant to these requests. As set forth below, Plaintiffs propose to conduct discovery expeditiously so that any privilege disputes can be presented to the Court for early resolution, in time for a ruling and production of the relevant documents or information no later than January 12, 2018—so that, as set out below, the Parties can file summary judgment motions no later than February 16, 2018, with the full benefit of discovery

Defendants' Position

If the Court decides to move forward with discovery at this stage, it should allow the parties adequate time to complete that discovery. Plaintiffs have provided no justification for rushing the parties through discovery, particularly in light of the Court's entry of a preliminary injunction. Defendants should be given a reasonable opportunity to depose each of the Plaintiffs and all of the third-parties who submitted declarations in support of Plaintiffs' motion for a preliminary injunction. Moreover, Defendants should be allowed at least the thirty-days provided under the Federal Rules of Civil Procedure to respond to Plaintiffs' interrogatories and requests for documents, especially when those discovery requests will likely implicate privileged information. Finally, Defendants should be permitted a reasonable opportunity to assert privilege and other objections where necessary. Defendants object to discovery from the Executive Office of the President absent a showing of heightened need under *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367 (2004), and on the basis of the President's general immunity from civil process related to official acts as set forth in *Nixon v. Fitzgerald*, 457 U.S. 731, 748-55 (1982) and *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). The Court should, therefore, give Defendants at least the fourteen (14) days provided in the local rules to respond to any motion to compel discovery with an assertion of privilege and should provide additional time if motions to compel are filed over the holidays.

9. *Disclosure, discovery, and preservation of electronically stored information.*

It is anticipated that the Parties may seek emails and the content of other electronically stored communications and information to the extent that those communications are non-privileged. The Parties agree to continue to preserve such electronically stored communications and information until such time as the case has been concluded and the window for any appeal

has expired. The Parties also agree that if information to be produced in this case is subject to production only under a protective order to protect certain confidential information (such as Privacy Act protected personal information), they will seek to negotiate and submit such an order in advance of that production.

10. *Claims of privilege.*

The Parties anticipate that some or all Plaintiffs and Defendants will assert privilege or other protections from disclosure with respect to documents or information requested in discovery. The Parties' respective positions with respect to privilege issues are set out above.

11. *Expert reports.*

Plaintiffs' Position

Plaintiffs recommend the schedule for exchange of expert witness reports and depositions as provided in the proposed Case Schedule below.

Defendants' Position

Plaintiffs bear the burden of proof in this case and should be required to identify their expert witnesses and provide their expert reports first so that Defendants can determine whether they will need expert witnesses to defend against Plaintiffs' claims. In addition, expert discovery should not begin until fact discovery is complete to prevent the parties' expert reports from being overcome by factual developments in the case.

12. *Class actions.*

Not applicable.

13. *Bifurcation.*

Not applicable.

14. *Pre-trial conference.*

The Parties anticipate that this case may be resolved on summary judgment, and accordingly have not proposed a date for the Pretrial Conference.

15. *Trial setting.*

The Parties anticipate that this case may be resolved on summary judgment, and accordingly have not proposed a date for the Pretrial Conference.

16. *Other matters.*

The Parties are not aware of any other matters to be brought to the Court's attention at this time.

Information Required by LCvR 16.3(d)

1. *Discovery plan.*

The Parties do not agree on a schedule and have provided their respective proposed schedules below.

2. *Statement of agreements reached with respect Rule 16.3(c).*

The Parties' responses to Rule 16.3(c) provides the agreement of the Parties.

3. *Description of the positions of each party on any matters on which they disagree.*

The Parties' response to Rule 16.3(c) provides the positions of the Parties with respect to matters on which they disagree.

Plaintiffs' Position

The Court has already "decline[d] Defendants' invitation to stay the case." ECF No. 63. Plaintiffs respectfully submit that discovery and summary judgment briefing should be completed on the schedule set out below so that the case can be resolved on the merits no later than March 23, 2018.

Defendants' Position

Discovery in this matter should be delayed until at least March 2018. Under the terms of the President's August 25, 2017 Memorandum, the Secretary of Defense, in consultation with the Secretary of Homeland Security, is scheduled to submit an Implementation Plan to the President by February 21, 2018, which will include the Secretary's determination regarding how to address transgender individuals currently serving in the United States military. *See* Presidential Memorandum, 82 FR 41319. The Secretary's Implementation Plan could have a dramatic effect on the appropriate scope of discovery. The Court should, therefore, wait for the Secretary to issue his Implementation Plan before setting a discovery schedule and permitting any discovery.

A cautious approach is particularly appropriate in this instance, where Plaintiffs have expressed their intention to seek discovery from the President and have acknowledged that their discovery requests are likely to raise issues of Executive Privilege. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 390 (2004) (“[T]here is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege...”). Plaintiffs proposed discovery is likely to raise significant separation of powers concerns. Indeed, Plaintiffs have stated that they intend to seek discovery regarding “the President’s justification for his statements that transgender service members ‘hinder military effectiveness and lethality,’ ‘disrupt unit cohesion,’ and ‘tax military resources.’” ECF No. 62. Attempts to probe the President’s deliberative process are inappropriate, *see Morgan v. United States*, 304 U.S. 1, 18 (1938) (emphasizing that it is “not the function of the court to probe the mental processes” of Executive Branch officials), and implicate important issues of executive privilege and separation of powers that “should be avoided whenever possible.” *Cheney*, 542 U.S. at 390.

In addition, delaying discovery would save the parties from serving and responding to discovery that may no longer be relevant following the submission of the Secretary of Defense's Implementation Plan and would relieve this Court and possibly the D.C. Circuit from having to unnecessarily adjudicate the complicated and sensitive discovery issues related to Executive Privilege. Moreover, under the preliminary injunction entered by the Court on October 30, none of the Plaintiffs would be harmed by delaying discovery until March 2018.²

And apart from the preliminary injunction, Defendants respectfully disagree with the Court's conclusion that current service members face discharge after March 23, 2018. *See* ECF No. 61 at 1 (concluding that "[p]ursuant to the Presidential Memorandum and the Interim Guidance, the protections afforded to transgender service members against discharge lapse early next year."); *see also id.* at 17. To the extent this is a basis for consideration of expedited discovery and merits adjudication before the current policy review is completed, it is incorrect for several reasons. The Presidential Memorandum directed the Secretary of Defense to "determine how to address transgender individuals currently serving in the United States military" and stated unequivocally that, "[u]ntil the Secretary has made that determination, no action may be taken against such individuals" because of their transgender status. Presidential Memorandum, 82 FR 41319. In addition, after receiving the Memorandum, Secretary Mattis announced that he was assembling a panel of experts who would bring "mature experience, most notably in combat and deployed operations, and seasoned judgment" to the task of providing advice and recommendations regarding future policies concerning military service by transgender individuals. Statement of Secretary Jim Mattis, Release No: NR-312-17.2. There

² On November 21, 2017, Defendants filed a Notice of Appeal of the Court's October 30 preliminary injunction. Defendants are also preparing and intend to file very shortly a motion to clarify one aspect of the preliminary injunction.

would be no need to convene a panel of military experts with combat and deployment experience if Secretary Mattis was charged by the President only with recommending how and when transgender service members should be discharged from the military.

The Court should, therefore, set a new initial scheduling conference for March 2018, during which the parties could report to the Court regarding the effect of the Secretary's Implementation Plan on Plaintiffs' remaining claims and, if necessary, propose a reasonable discovery schedule for the issues that remain in dispute.

4. *Proposed case schedule.*

Plaintiffs' Position:

As set out in the Parties' November 10, 2017 submission to the Court, Plaintiffs propose to complete discovery and summary judgment motion practice no later than a date that would allow the Court to rule on the merits no later than March 23, 2018, the date when key provisions of the Ban are scheduled to go into effect. Plaintiffs of course defer to the Court's scheduling needs and judgment as to an appropriate schedule to accomplish this, but propose the following dates for the Court's consideration:

Action	Date
Deadline to amend pleadings and/or join parties.	December 15, 2017
Service of initial requests for production and interrogatories.	December 1, 2017
Responses to initial requests for production and interrogatories.	December 18, 2017
Motions to compel/motions for protective order with respect to assertions of privilege in discovery responses.	December 22, 2017

Oppositions to motions to compel/motions for protective order with respect to assertions of privilege in discovery responses.	January 3, 2018
Replies in support of motions to compel/motions for protective order with respect to assertions of privilege in discovery responses.	January 8, 2018
Hearing on motions to compel/motions for protective order with respect to assertions of privilege in discovery responses.	To be set by the Court
Deadline to produce documents/information ordered by the Court in light of motions to compel/motions for protective order with respect to assertions of privilege in discovery responses.	January 19, 2018
Fact (individual and Rule 30(b)(6)) deposition notices to be served.	December 8, 2017
Completion of fact discovery.	February 2, 2018
Mutual exchange of expert reports.	December 29, 2017
Completion of expert discovery.	February 9, 2018
Summary judgment motions to be filed.	February 16, 2018
Summary judgment oppositions to be filed.	March 2, 2018
Summary judgment replies to be filed.	March 9, 2018

Defendants' Position

Subject to the Defendants' foregoing objections to any discovery and merits proceedings at this stage, if the Court intends to go forward with discovery before the Secretary of Defense submits his Implementation Plan, the particular schedule proposed by Plaintiffs is unreasonable for several different reasons.

- First, Defendants will not be prepared to provide initial disclosures on December 1, only three days after the initial scheduling conference.

- Second, Defendants will need the full thirty (30) days provided by the Federal Rules of Civil Procedure to respond to Plaintiffs' discovery requests, especially in light of the Executive Privilege issues that are likely to be implicated by those requests.
- Third, Plaintiffs' proposed schedule gives Defendants only twelve days over the Christmas holiday to respond to Plaintiffs' motions to compel and assert privilege where necessary. This is not possible and not reasonable in light of the fact that the discovery sought is likely to implicate highly significant claims of privilege, including Executive Privilege.
- Fourth, the proposed schedule also would not provide Defendants a reasonable opportunity to take discovery, including depositions, of the Plaintiffs, the third-parties who submitted declarations in support of Plaintiffs' motion for a preliminary injunction and any additional third-parties associated with Plaintiffs' declarations. Since Plaintiffs and these third parties are located throughout the country (and Plaintiff Jane Doe 3 is presently deployed overseas), the time available for the Defendants to take its discovery is plainly unreasonable under Plaintiffs' proposed schedule.
- Fifth, Plaintiffs' proposed schedule calls for the parties to disclose their expert reports on the same day, but Plaintiff bears the burden of proving its case, and Defendants will not know whether they need to retain experts until they have had an opportunity to review Plaintiffs' expert reports.
- Sixth, Plaintiffs' proposed schedule call for the parties to file simultaneous motions for summary judgment. Simultaneous briefing is inefficient for the parties and the Court. It multiplies the number of briefs that are filed and makes it difficult for the parties to directly address each other's arguments.

In light of the prejudice to Defendants that would result from Plaintiffs' proposed schedule, if the Court intends to go forward with discovery before the Secretary of Defense submits his Implementation Plan, Defendants respectfully propose the following expedited schedule, which would allow for the completion of discovery and briefing of cross-motions for summary judgment by the end of June 2018. While any discovery at this stage would be inappropriate, wasteful, unduly burdensome, and otherwise objectionable, under Defendants' proposed schedule it would at least proceed in a less onerous process and would enable the parties and the Court to take into account the results of the ongoing policy review by the Secretary of Defense before the submission of summary judgment motions.

Action	Date
<ul style="list-style-type: none"> • Initial disclosures • Deadline for parties to amend pleadings and/or join parties 	December 15
<ul style="list-style-type: none"> • Service of initial requests for production and interrogatories • Notice of depositions 	December 29
<ul style="list-style-type: none"> • Responses to initial requests for production and interrogatories. 	January 29
<ul style="list-style-type: none"> • Motions to compel/motions for a protective order with respect to assertions of privilege and other objections in discovery responses 	February 5
<ul style="list-style-type: none"> • Oppositions to motions to compel/motions for a protective order 	February 19
<ul style="list-style-type: none"> • Replies regarding motions to compel/motion for a protective order 	February 26
<ul style="list-style-type: none"> • Close of fact discovery 	March 16
<ul style="list-style-type: none"> • Plaintiffs provide Defendants with their expert reports 	March 23
<ul style="list-style-type: none"> • Defendants provide Plaintiffs with their expert reports 	April 30
<ul style="list-style-type: none"> • Close of expert discovery 	May 11
<ul style="list-style-type: none"> • Plaintiffs move for summary judgment 	May 18
<ul style="list-style-type: none"> • Defendants file their opposition to Plaintiffs' motion for summary judgment and cross-motion for summary judgment. 	June 1
<ul style="list-style-type: none"> • Plaintiffs file their reply in support of their motion for summary judgment and opposition to Defendants' cross-motion for summary judgment 	June 15

<ul style="list-style-type: none"> Defendants file their reply in support of their cross-motion for summary judgment. 	<p>June 29</p>
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November 21, 2017

Respectfully submitted,

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