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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, et al.,

Plaintiffs,

vs.

1:17-cv-1597

DONALD J. TRUMP, et al.,

Defendants.

TRANSCRIPT OF INITIAL SCHEDULING CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

NOVEMBER 28, 2017

Court Reporter:
Richard D. Ehrlich, RMR, CRR
Official Court Reporter
United States District Court
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3269

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A P P E A R A N C E S

FOR THE PLAINTIFFS:

PAUL REINHERZ QUITMA WOLFSON
KEVIN LAMB
WILMER HALE
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

CLAIRE LAPORTE
FOLEY HOAG, LLP
155 Seaport Boulevard
Boston, MA 02210-2600
(617) 832-1210
c11@foleyhoag.com

JENNIFER LEVI
GLBTQ LEGAL ADVOCATES & DEFENDERS
30 Winter Street
Suite 800
Boston, MA 02108
(617) 426-1350
jlevi@glad.org

SHANNON P. MINTER
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street
Suite 370
San Francisco, CA 94102
sminter@nclrights.org

FOR THE DEFENDANTS:

RYAN BRADLEY PARKER
ANDREW EVAN CARMICHAEL
ANTHONY CAPPOLINO
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
(202) 514-5302
ryan.parker@usdoj.gov
andrew.e.carmichael@usdoj.gov
anthony.cappolino@usdoj.gov

1 THE COURT: All right. Let's proceed.

2 THE CLERK: Civil Case 17-1597. *Jane Doe 1, et*
3 *al., vs. Donald J. Trump, et al.*

4 Counsel, would you please identify yourselves for
5 the record?

6 MR. WOLFSON: Good afternoon, Your Honor. I'm
7 Paul Wolfson appearing for the plaintiffs.

8 THE COURT: All right.

9 MR. WOLFSON: Today with me are my colleagues and
10 co-counsel, Claire Laporte, Jennifer Levi, Shannon Minter,
11 and Kevin Lamb.

12 THE COURT: All right. Good afternoon.

13 MR. PARKER: Good afternoon, Your Honor. Ryan
14 Parker for the defendants. With me at counsel table today
15 are my colleagues, Andrew Carmichael and Anthony Cappolino.

16 THE COURT: All right. Good afternoon.

17 All right. We're here to enter into a scheduling
18 order. Obviously, you have differing views both in terms of
19 having discovery at all as well as what schedule it should
20 be. I've considered both views. Plaintiff wants an
21 expedited and targeted discovery. Defense counsel would
22 like probably no discovery, but since I've decided we're
23 going to have some, would want a more stretched out
24 approach.

25 So I'm going to tell you what I'm thinking of, and

1 then I'll let you react to it. I think that's the easiest
2 way of doing it.

3 In terms of written discovery, what my proposal is
4 to have a range of dates. The earliest that written
5 discovery would go out, whether it's interrogatories or
6 documents, would be December 5th, and the latest would be
7 December 15th. So within that range you could send
8 something out. You would have 30 days to respond, both
9 sides. I would expect that a privilege log, should it be
10 necessary, would be filed two business days after the
11 response is due. Since I don't know precisely when you
12 would be sending it out, you have 30 days to do it, you
13 would come back.

14 I would hope that in -- it seems to me that there
15 is a way of at least asking some of the questions in the
16 interrogatories and the document requests such that it
17 should not raise privilege issues. Some of your questions
18 may, but some basic questions seems to me you can phrase in
19 such a way that, you know, there shouldn't be a problem, but
20 I'll leave that up to you. I would do initial disclosures
21 by December 15th. If people want to do it earlier, fine,
22 but do it by then. So it would be -- you would have gotten
23 them depending on where you're doing -- where in the
24 December 5th to the 15th prospect you're sending it out.
25 Amended pleadings based on the present record. So it would

1 be based on what we have at this time, the present record,
2 the present complaint, would be done by December 15th if
3 there's going to be anything extra.

4 Now, the number of depositions are usually 10 each
5 side, but it sounded as if perhaps there was, at least from
6 the defendants' perspective, more, but I'll get to that in a
7 minute. 25 interrogatories, 25 document requests, and 25
8 requests for admissions is the usual. Expert reports I
9 would do proponents. So whoever is proposing an expert
10 would be -- and this is the full report. So it would be
11 February 5th rebuttal, is a true rebuttal. If you have
12 somebody who is a rebuttal and also a proponent of a
13 different theory or whatever, you should be filing this
14 February 5th. But if it's a true rebuttal, then it's
15 March 5th and a reply March 12th.

16 The close of discovery based on all of this
17 hopefully would work would be March 30th of 2018.

18 Now, you know, it depends on if we have issues
19 that get into, you know, privilege logs and problems with
20 that aspect of it, that may be longer, but I'm hopeful not.

21 One of the things that I generally do is I require
22 a -- it's, in essence, a joint discovery plan. I call it a
23 status report. I'm going to put in a Court order the dates
24 that I've spoken about. As I said, I'll hear from you, but
25 I would be putting in those particular dates. You need to

1 come back to me in order to change them. Your joint
2 discovery plan would be sort of filling in the blanks. In
3 other words, you would look at do you need protective orders
4 of some sort, which you may need. You want to do those
5 before you send out written discovery or people won't
6 produce stuff. You may want to identify the experts and at
7 least their subject matter at an earlier point than the
8 actual, full reports. I mean, there's a bunch of things
9 that -- I'll leave it to you to figure that out.

10 Depositions, certainly you'll know some people you wish to
11 depose, negotiate some time period, figure out when it would
12 be, and I'm not expecting you to say, you know,
13 "January 5th at 10:00, we're going to depose X." But I
14 would ask you, since, you know, people have other lives
15 connected, you're going to be doing some of the plaintiffs
16 in terms of their availability, if they're overseas or
17 someplace else, and whomever you're going to be deposing
18 from the defendants' perspective presumably has schedules as
19 well. So try and figure out a time that they're available.
20 Start early talking and carve in your time frame. So those
21 kinds of things is in this joint discovery plan. I will
22 look at it. I'm not going to order the dates. Okay? These
23 are your dates that you're working hopefully cooperatively
24 together.

25 If you don't look like you've taken it seriously,

1 I'll strike it and make you do it again, but I'm not going
2 to order these.

3 It does not look like ADR is useful. So if you
4 come to some point where you would like it, please get back
5 to me. I'm more than happy to set something up: Magistrate
6 judges, court ADR, outside people, whatever. You can
7 certainly do that.

8 I was looking at a status hearing the week of
9 April 6th so that there would be a little bit of -- after
10 the March 30th date.

11 So let me start off with my initial proposal of
12 what I'm talking about in terms of dates. It's not as
13 expedited as plaintiff wants, but is it workable?

14 MR. WOLFSON: If I may have the Court's indulgence
15 for just a minute?

16 THE COURT: Certainly. Go ahead. And you all can
17 talk as well.

18 MR. WOLFSON: Thank you, Your Honor. That sounds
19 fine. We are happy to have the initial discovery requests
20 go out the 15th.

21 THE COURT: Okay.

22 MR. WOLFSON: In light of the rest of the schedule
23 the Court has articulated.

24 THE COURT: Okay. That's fine.

25 MR. WOLFSON: In terms of deposition limits, the

1 Government has said they want 15 at least, which seemed --

2 THE COURT: He's shaking his head.

3 MR. WOLFSON: Okay. They disagree. I was going
4 to say, I'll let them speak first, and then maybe I'll
5 respond to that.

6 THE COURT: What do you want?

7 MR. WOLFSON: Well, 15 is fine for us if the
8 Government wants 15.

9 THE COURT: Okay. And the 25 works for the rest?

10 MR. WOLFSON: Yes.

11 THE COURT: Okay. Government?

12 MR. PARKER: Your Honor, let me just generally
13 address the schedule, and then I'll come to the deposition
14 question.

15 THE COURT: Okay.

16 MR. PARKER: Thank you for considering the
17 parties' submissions and the concerns that the defendants
18 put in in the submission. I would like to just note for the
19 Court that 12 weeks from tomorrow, the Secretary of Defense
20 will submit his implementation plan to the President. The
21 defendants' view is that that implementation plan could have
22 a significant effect on this case, that it could
23 significantly narrow the claims, and it could affect whether
24 the discovery that is taken in the interim period between
25 now and then would be relevant. So we would ask at least

1 that the Court consider the effects of that implementation
2 plan, which is due to the President on February 21st, and
3 how that may affect the discovery that's taken before that
4 time. And for that reason, we would just renew our request
5 that the Court consider having another initial scheduling
6 conference after the Secretary of Defense has issued that
7 implementation plan on February 21st. At that point, we
8 will have a much better understanding of what the policy is
9 and how it affects plaintiffs' claims. It could be that
10 discovery that's taken, for example, depositions or written
11 discovery is overcome by the implementation plan itself and
12 that even discovery disputes -- and I think Your Honor has
13 noted that there's the possibility of significant discovery
14 disputes that raise significant questions of privilege, and
15 those issues may be mitigated, limited, or avoided
16 altogether if we wait until after the Secretary of Defense
17 implements or presents his implementation plan to the
18 Secretary of Defense.

19 THE COURT: Okay. I'll let them respond to that
20 in a moment. But in terms of a schedule, should I go
21 forward?

22 MR. PARKER: In terms of the schedule, if Your
23 Honor chooses to move forward now, we appreciate the dates
24 that have been proposed. I think the defendants can do
25 their best to comply with those dates. As far as

1 depositions, we don't intend to take a significant number of
2 depositions. It's unclear to us at this time whether -- the
3 plaintiffs submitted a number of declarations from third
4 parties, and it was unclear to us whether those individuals
5 would be designated as experts or how they would be treated.
6 If those individuals turn out to be experts, I think the
7 depositions that defendants would need could be very limited
8 and maybe even limited to the plaintiffs themselves. I
9 don't think we foresee far reaching discovery. We just want
10 to make sure that we're able to depose the plaintiffs and
11 those individuals.

12 THE COURT: But it would be more than 10 it sounds
13 like. I'm just trying to get -- you don't have to use them
14 all. I'm setting it up so you don't have to come back to
15 me. If I put down 15, you get 15; if you get 10, then you
16 get 10, and you have to come back for more. So I would
17 rather give you too many than not enough.

18 MR. PARKER: I think 15 will be sufficient, Your
19 Honor. Thank you.

20 THE COURT: Okay. All right. Let me hear back
21 from -- in terms of the delay.

22 MR. WOLFSON: Thank you, Your Honor. You know,
23 our basic proposition, as we said before, is we want to --

24 THE COURT: Slow down.

25 MR. WOLFSON: Am I speaking too loud?

1 THE COURT: The court reporter is going to have
2 trouble keeping track of you.

3 MR. WOLFSON: You know, our clients are living
4 under sort of great uncertainty about what their future is
5 going to look like, certainly after March 23rd, you know,
6 when the current state of affairs, you know, may change. We
7 do, on the other hand, view what the Secretary is doing now
8 as an implementation plan, and the policy is the policy set
9 forward in the presidential directive it issued last summer.
10 So I think that's reflected in the Court's opinion as well
11 from last month. So our view is we should get going to
12 probe the basis of the policy and, you know, what is the
13 justification for what the administration, the executive
14 branch is doing, which is why we need to get going. We
15 would've preferred a more compressed schedule yet, but we
16 can live with what the Court has suggested.

17 The Court did not articulate dates for dispositive
18 briefing. I assume they'll come after.

19 THE COURT: I'm not doing that. I've learned not
20 to do this in the initial scheduling. It's easier -- I
21 bring you back for the status hearing. At that point, we'll
22 see where this case is as to what the procedure would be.
23 Generally what I do in most cases at the status is, if
24 people are not interested in doing some ADR, is to set a
25 motion schedule or move to pretrials. So I would do the

1 motion schedule at that point. You might have a much better
2 idea of what kind of motions and what would be a briefing
3 schedule than you do now, and since we don't know whether
4 the terrain, shall we say, changes over time as to setting a
5 schedule, so I will do it when you come back.

6 MR. WOLFSON: That's fine.

7 THE COURT: At that point, if discovery is truly
8 done, and we're ready, then I'll go ahead and set a
9 schedule.

10 MR. WOLFSON: That's fine. Thank you.

11 THE COURT: All right. I am going to go forward,
12 I think, with the schedule.

13 Did you want to say something else?

14 MR. PARKER: Your Honor, if I could just respond
15 very briefly. Let me say this: The defendants are not
16 trying to delay the discovery in this case, and one avenue
17 that Your Honor could take is to allow the defendants to
18 serve their discovery and set a response date after
19 February 21st. The defendants then could prepare their
20 responses and prepare any assertions of privilege that would
21 be necessary and then could have time, if the Court were to
22 set a date, for example, in the first week of March, to come
23 back to the Court. If the landscape has changed
24 significantly with regard to the initial disclosures, and
25 that may allow the Court to have the parties at least start

1 discovery without having to dive into privilege issues and
2 other issues.

3 THE COURT: Let me see if I understand. The
4 plaintiffs would send it to you? You said the "defendants."

5 MR. PARKER: I apologize, Your Honor. The
6 plaintiffs could serve their written discovery.

7 THE COURT: And then you would not be responding
8 until after they had developed whatever the new --

9 MR. PARKER: After the implementation plan, the
10 parties would be able to come back to the Court, if that
11 plan significantly changes the landscape of the case; and if
12 not, defendants will have had that time to work on
13 responding to plaintiffs' discovery and will be prepared to
14 do so shortly thereafter, and that way the discovery will
15 not be greatly slowed. That also, I think, would prevent
16 issues of privilege from having to be litigated before
17 February 21st when those issues, to some extent, may
18 become moot based on the implementation plan. So I think it
19 could provide a happy medium that allows discovery to at
20 least progress without going too far down the road and
21 potentially wasting the resources of the Court and the
22 parties on issues that may be moot after February 21st.

23 THE COURT: In this proposal you have, are you
24 asking for discovery, or are you not asking for discovery?

25 MR. PARKER: Your Honor, I think we could do it

1 either way. We could wait, or we could ask for discovery,
2 and they could also have a deadline that is after the
3 February 21st deadline. It seems like the latter might be
4 a better course.

5 THE COURT: Isn't that, in essence, just putting
6 it off?

7 MR. PARKER: Well, I wouldn't say that it's
8 putting it off because in the interim period, you know, the
9 defendants typically would have 30 days to respond to
10 discovery, and so that period would take place while the
11 Secretary is completing the implementation plan. So it
12 certainly would allow the discovery process to proceed at a
13 more rapid pace and would take into account the
14 implementation plan that the Secretary will be providing on
15 February 21st.

16 THE COURT: You know, I'm assuming that if they
17 sent out document requests or interrogatories, since you
18 would have a continuing responsibility to update them, that
19 you would be providing your answers based on the present
20 record, and that as other things got developed, that you
21 would then supplement it. So they would get both types of
22 information, right?

23 MR. PARKER: That's true, Your Honor. But, for
24 example, if plaintiffs were to submit discovery requests
25 under the current schedule, the Court could be faced with

1 significant issues of privilege and motions to compel.

2 THE COURT: You can wait and see whether that
3 happens. I mean, you can do -- this is sort of an initial,
4 on the present record. It may be that there will need to be
5 further written discovery or other things as it moves along.
6 My sense is, in most instances, in most cases, you do a
7 longer discovery period because you send out more than one
8 set of interrogatories. They have proposed to do one set of
9 interrogatories based on the present record, which doesn't
10 preclude them coming back or doing more during -- I'm just
11 starting the initial discovery because you had disputes
12 about when it was going to start. It may be that in this
13 process, they will send another set of interrogatories. It
14 doesn't preclude them from doing it.

15 I'll hear what they have to say. My feeling is
16 that they're asking for the present record, and as it
17 develops, I'm assuming that you would be providing that
18 information and responding. I'm also suggesting strongly
19 that you word your request in such a way, and I think you
20 can based on the record we have at this time and avoid
21 pretty much -- I can think of a number of ways of doing this
22 and avoid, really, major privilege issues.

23 MR. PARKER: Your Honor, if I could also just
24 quickly address -- Mr. Wolfson mentioned the harm to the
25 plaintiffs of delaying the discovery. In this instance, our

1 view is that the plaintiffs are protected both by the
2 interim guidance that was issued by Secretary Mattis and by
3 this Court's injunction and additionally by the injunction
4 that's been entered by the District Court in the District of
5 Maryland.

6 So the plaintiffs in this case, specifically the
7 plaintiffs who wish to accede to the military, are not
8 eligible to do so for another three to four years until, I
9 guess, two-and-a-half to three years until 2020. And the
10 plaintiffs who are already in the military, if the Court
11 were to at least slow discovery, to take into consideration
12 the Secretary's implementation plan still would be protected
13 under the Court's preliminary injunction and the interim
14 guidance at that point.

15 In addition to the economy and the efficiency
16 concerns, I think the plaintiffs would not be harmed by
17 structuring the discovery to take into account the
18 Secretary's implementation plan in February.

19 THE COURT: All right.

20 Counsel.

21 MR. WOLFSON: Thank you, Your Honor. A few
22 points. First of all, in terms of the effect on the
23 plaintiffs. The plaintiffs need to know what the answer is
24 going to be to the case as soon as they can. They need to
25 know whether they need to find a new job, move on with their

1 lives, et cetera. So the fact that they are protected by
2 the preliminary injunction now is not the end of the matter.
3 They have a strong interest in having a resolution of the
4 case as soon as is possible.

5 The other things I would say is under what the
6 Government has proposed, if I understand it correctly, the
7 Government would not respond to the interrogatories until
8 February 23rd or so.

9 THE COURT: That's right.

10 MR. WOLFSON: But if the Court stays to its
11 proposal of the close of discovery being March 30th, I
12 don't think that would work because we need the answers to
13 interrogatories and document requests before we do
14 depositions.

15 THE COURT: Well, it would obviously push
16 everything back. That's why I said, in essence, it's a
17 pushback of all of them. If they're not responding to
18 February 23rd or whatever, obviously everything else would
19 get pushed back.

20 MR. WOLFSON: Right. And for the reasons I've
21 already articulated, we would oppose that.

22 I did have one question for the Court. The Court
23 referred to the limits of 25 interrogatories, and my only
24 question was whether the Court meant 25 for each side for
25 everybody or --

1 THE COURT: No, no, no. For each side. I mean,
2 for each plaintiff are you asking?

3 MR. WOLFSON: Well, the normal rule is any party
4 can send any other party 25, and, you know, there are
5 certainly -- I think there are, you know, several parties on
6 each side.

7 THE COURT: It's usually 25 for each party unless
8 you want to combine it in some other way.

9 MR. WOLFSON: No, no, no. As long as it's the
10 normal rule of Rule 33.

11 THE COURT: Yes.

12 MR. WOLFSON: That's fine. Okay. Thank you.

13 THE COURT: All right. I'm going to go forward
14 with the present, at least based on what I know at this
15 point. I've heard your arguments, and I'm going to proceed
16 with the schedule that I've set out.

17 Let me just say my scheduling -- let me highlight
18 a couple things. This will get posted today. If there are
19 motions for extensions or rescheduling of hearings or
20 something, and I'll get to the date we need to set, I need
21 at least four business days, hopefully you will not be
22 asking, but it comes as emails, so it's regular emails, ECF
23 emails and everything else. So I have a lot of traffic, and
24 so it makes it much easier if I can at least get some
25 additional time.

1 Make sure you anticipate so you have an
2 opportunity to speak to the other side to find out their
3 position. The fact that they've consented doesn't mean that
4 I necessarily will grant it. If you'll notice, under the
5 rules, just saying you both agree to it doesn't do it. You
6 still need to provide me with a reason that I will accept.
7 So look at the rules on that since I know in some
8 jurisdictions all you need is both sides doing it.

9 The other major thing is that in terms of
10 discovery disputes, should there be some, before you start
11 filing motions to compel, whether there are privilege issues
12 or anything else, what I would ask that you do is you
13 obviously need to confer, see if you can narrow the issues,
14 is to contact chambers, both of you, and to request a
15 telephonic conference call. I do them on the record, but
16 instead of doing paper, what I would ask you to do is call.
17 I may ask you to file a letter, which is the only time you
18 get to do so under the rules, which sets out what the issues
19 are, and the other side can do something as well. So I've
20 got something that I know you're going to be talking about
21 once I get on the phone. Generally, at least it will narrow
22 it, or I can resolve it, or, you know, we can deal with it
23 instead of doing paper, which delays everything. So even if
24 it's a privilege log issue, please call, and then we can
25 work something out in terms of how it gets done. Then I've

1 got various other rules about motions, depositions, et
2 cetera, which I would ask that you take a look at.

3 So anything else from plaintiffs' counsel?

4 MR. WOLFSON: Nothing from plaintiffs. Thank you.

5 THE COURT: Okay. Anything from defense counsel?

6 MR. PARKER: Nothing from defense, Your Honor.

7 THE COURT: Okay. Let me pick a date. I had
8 suggested the week of April 6th since the last date of the
9 reply for the expert, should be there experts, is
10 March 12th to give a little bit of -- and the close is
11 March 30th. I thought that if we did it, I would do it
12 the week of -- I guess it's the week of the 2nd. The week
13 of the 9th I have a bunch of long matters. So it would
14 probably be better to either do it maybe Friday the 6th,
15 if you're available. I would have skip to the week of April
16 the 16th. It probably would be better to do it earlier
17 rather than later in terms of where everybody is.

18 Does that work?

19 MR. WOLFSON: That's fine for plaintiffs.

20 THE COURT: Does that work for you all?

21 MR. PARKER: April 6th is fine also.

22 THE COURT: All right. Then we'll do it at 10:00.

23 All right. The parties are excused, and you'll
24 see the scheduling procedures order up on the docket later
25 today. I don't have anything right after this, so if you

1 want to stay for a few minutes and work out when you're
2 going to talk about your discovery -- let me mention one
3 thing. Generally, it's due within 10 days to be filed,
4 which is December 8th. Is that enough time, or do you
5 need more time? I would rather you make sure you do a good
6 job with it. This is more for you than for me. So if
7 that's not enough time for you to do it, I'd be happy to
8 give you a little bit more time.

9 If you want to talk to each other, why don't you.
10 And this is to fill in the blanks; protective orders and
11 whatever else you need to do. So you need to figure out
12 what you want and then talk, you know, put something
13 together.

14 MR. WOLFSON: Your Honor, I think the two of us
15 have conferred, and I think December 15th might be better
16 just for scheduling reasons.

17 THE COURT: Perfect. That's fine. Not a problem.

18 All right. The parties are excused. As I said,
19 you can stay if you want to take a few minutes and work on
20 your schedules together.

21 (Hearing concluded.)
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CERTIFICATE OF REPORTER

I, Richard D. Ehrlich, a Registered Merit Reporter and Certified Realtime Reporter, certify that the foregoing is a true, complete, and accurate transcript of the proceedings ordered to be transcribed in the above-entitled case before the Honorable Colleen Kollar-Kotelly, in Washington, D.C., on November 28, 2017.

s/Richard D. Ehrlich November 30, 2017

Richard D. Ehrlich, Official Court Reporter

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