

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

JANE DOE 2, *et al.*,

Plaintiffs

v.

DONALD J. TRUMP, *et al.*,

Defendants

Civil Action No. 17-1597 (CKK)

ORDER

(April 16, 2018)

On April 11, 2018, Defendants contacted chambers via e-mail to notify the Court of a discovery dispute.¹ Plaintiffs would like to schedule the deposition of the Vice Chairman of the Joint Chiefs of Staff, General Paul J. Selva. Defendants argue that they should not have to make the Vice Chairman (who is the second highest ranking uniformed military official in the armed forces) available for a deposition at this point in this litigation. They offer instead to make available Anthony Kurta, the Deputy Assistant Secretary of Defense for Military Personnel Policy. Plaintiffs would agree to depose the Vice Chairman only after deposing Mr. Kurta, but would like to at least schedule the Vice Chairman's deposition now. Plaintiffs contend that such a deposition will eventually be necessary even after they depose Mr. Kurta, because "Mr. Kurta cannot speak to the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups." Defendants oppose the scheduling of the Vice Chairman's deposition. They represent to the Court that Mr. Kurta can speak with authority to the topics quoted above.

The Court will accept Defendants' representation and, based thereon, not order Defendants to schedule the Vice Chairman's deposition at this point. Plaintiffs shall first depose Mr. Kurta. If, after deposing Mr. Kurta, Plaintiffs still contend that they need to depose the Vice Chairman, they shall meet and confer with Defendants about the prospect of a targeted deposition of the Vice Chairman. If the parties cannot reach an agreement, they may contact the Court again.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

¹ The parties' e-mails are attached to this Order as Exhibit A.

Exhibit A



RE: Doe v. Trump, Case No. 17-01597: Discovery Dispute
Parker, Ryan (CIV)

to:
Kollar-Kotelly_Chambers@dcd.uscourts.gov, Laporte, Claire
04/16/2018 09:59 AM

Cc:
Alan Schoenfeld, "Carmichael, Andrew E. (CIV)", "Enlow, Courtney D. (CIV)", "Wolfson, Paul"

Hide Details

From: "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>

To: "Kollar-Kotelly_Chambers@dcd.uscourts.gov" <Kollar-Kotelly_Chambers@dcd.uscourts.gov>, "Laporte, Claire" <CLL@foleyhoag.com>

Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carmichael@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>, "Wolfson, Paul" <Paul.Wolfson@wilmerhale.com>

Dear Chambers of Judge Kollar-Kotelly,

In response to the Court's email, Defendants have confirmed that Mr. Anthony Kurta, who is the Deputy Assistant Secretary of Defense for Military Personnel Policy, was the Chair of the Panel of Experts, and was personally involved throughout the policy-making process, can speak with authority on the subjects identified by Plaintiffs. Specifically, Mr. Kurta can speak authoritatively to "the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups."

Civilian officials in the Office of the Under Secretary for Personnel and Readiness are primarily responsible for personnel issues, such as the DoD policy at issue in this case. As a result, Mr. Kurta performed the lead role coordinating matters concerning transgender individuals, not the Vice Chairman of the Joint Chiefs of Staff. We are advised that the Vice Chairman attended only one meeting of the Panel as an observer and did not vote in any proceedings. Mr. Kurta or another official from the Office of the Under Secretary of Defense for Personnel and Readiness ran the Panel meetings and briefed the Vice Chairman approximately six times regarding the Panel's work. Upon the conclusion of the Panel's work, the Vice Chairman was briefed on the findings of the Panel by Mr. Kurta. Therefore, Mr. Kurta is best positioned to speak authoritatively about the process and timeline that resulted in the position set forth in DoD's new policy.

Defendants note, however, that information related to these subjects may be privileged. As Plaintiffs have not established that General Selva possesses unique, non-privileged, relevant information that cannot be obtained through other means, Defendants should not be required to schedule his deposition. To the extent the Court is inclined to order Defendants to schedule General Selva's deposition, Defendants respectfully request an opportunity to fully brief the issue.

Best,

Ryan B. Parker

Senior Trial Counsel

United States Department of Justice

Civil Division, Federal Programs Branch

Tel: 202-514-4336 | ryan.parker@usdoj.gov

From: Alec_Levy@dcd.uscourts.gov [mailto:Alec_Levy@dcd.uscourts.gov] **On Behalf Of** Kollar-Kotelly_Chambers@dcd.uscourts.gov
Sent: Thursday, April 12, 2018 3:09 PM
To: Laporte, Claire <CLL@foleyhoag.com>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Wolfson, Paul <Paul.Wolfson@wilmerhale.com>; Parker, Ryan (CIV) <ryparker@CIV.USDOJ.GOV>
Subject: RE: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Government Counsel,

Plaintiffs have proffered that Mr. Anthony Kurta will not be able to speak with authority to "the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups." Plaintiffs assert that only Vice Chairman Selva (or Deputy Secretary of Defense Shanahan) would be able to speak to those issues. Please respond briefly to this assertion by no later than **10:00 a.m. on Monday, April 16, 2018**. Specifically, indicate whether Mr. Kurta is or is not able to speak with authority on the issues identified by Plaintiffs.

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
202-354-3340

From: "Laporte, Claire" <CLL@foleyhoag.com>
To: "Kollar-Kotelly_Chambers@dcd.uscourts.gov" <Kollar-Kotelly_Chambers@dcd.uscourts.gov>, "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carmichael@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>, "Wolfson, Paul" <Paul.Wolfson@wilmerhale.com>
Date: 04/11/2018 04:15 PM
Subject: RE: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Dear Chambers of Judge Kollar-Kotelly:

Defendants are correct that Plaintiffs intend to notice the deposition of General Selva, Vice Chairman of the Joint Chiefs of Staff, although the notice has not yet been served. The Vice Chairman is likely to have important information regarding the implementation plan that other deponents do not. Plaintiffs are willing to accommodate the Vice Chairman's schedule and to propose dates for after the deposition of Mr. Kurta, but that is not a basis to defer scheduling the deposition. And there is every reason for the parties to set a mutually agreeable time for this deposition sooner rather than later to avoid further delays in discovery.

Plaintiffs believe that Vice Chairman Selva is uniquely situated to illuminate how the actual decision makers charged with presenting an implementation plan to Secretary Mattis did (or did not) incorporate material from the so-called panel of experts. Pursuant to Secretary Mattis's September 14, 2017 memorandum entitled "Terms of Reference – Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (attached), Vice Chairman Selva is one of only two officials (the other being Deputy Secretary of Defense Shanahan) who were personally responsible for "developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum, Military Service by Transgender Individuals, dated August 25, 2017" and for "propos[ing] for [Secretary Mattis's] consideration recommendations" concerning such implementation. The Defendants have placed the origins and substance of this recommendation directly at issue in the litigation, including by asserting (against all evidence) that it was the product of "professional, independent judgment" rather than an "implementation" of the President's policy. *See, e.g.,* Mot. to Dissolve Inj. (Docket No. 96) at 1. The purported "Panel of Experts," which Mr. Kurta evidently chaired, is relevant in that it was tasked with "support[ing]" the Vice Chairman and Deputy Secretary in developing their recommendation, but ultimately Mr. Kurta cannot speak to the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups. *See, e.g.,* Mot. to Dissolve Inj. (Docket No. 96) at 7 (purported "new policy" was the product of the Panel's recommendations "along with additional information"). Accordingly, a deposition of Vice Chairman Selva (or, alternatively, Deputy Secretary Shanahan) is necessary and appropriate. *See, e.g.,* *Byrd v. District of Columbia*, 259 F.R.D. 1, 6-8 (D.D.C. 2009) (explaining that deposition of high ranking officials is appropriate where those officials are "likely have information that no other source could provide since only they can testify to their own motives").

For the efficient use of both the litigants' and the Court's resources, Plaintiffs are willing—and indeed intend—to depose the Vice Chairman only after the deposition of Mr. Kurta. Plaintiffs expect to pursue more targeted questioning of the Vice Chairman in light of testimony from others, including Mr. Kurta. But Plaintiffs do not believe that they should defer scheduling the Vice Chairman's deposition simply because other deponents have knowledge that overlaps with his if he is likely to have additional knowledge unavailable through those other sources. In particular, as explained, Plaintiffs expect that Mr. Kurta will be unable to testify to important aspects of the decision-making process (outside the panel of experts) that led to the implementation plan, thereby necessitating the Vice Chairman's deposition. Plaintiffs believe the appropriate course at this stage is for the parties to schedule a mutually agreeable date and time for the Vice Chairman's deposition in order to avoid further delays in resolving this litigation fully and fairly on the merits.

Respectfully,

Claire Laporte

Claire Laporte | Partner

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From: Alec_Levy@dcd.uscourts.gov <Alec_Levy@dcd.uscourts.gov> On Behalf Of Kollar-

Kotelly_Chambers@dcd.uscourts.gov

Sent: Wednesday, April 11, 2018 11:23 AM

To: Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>

Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Laporte, Claire <CLL@foleyhoag.com>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Wolfson, Paul <Paul.Wolfson@wilmerhale.com>

Subject: Re: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Plaintiffs' Counsel,

Please briefly respond, by no later than **5:00 p.m. today**, to the Government's statement of this discovery dispute. Specifically, assuming that Mr. Anthony Kurta has information that Plaintiffs seek from the Vice Chairman, indicate Plaintiffs' willingness to take Mr. Kurta's deposition before the Vice Chairman's.

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
202-354-3340

From: "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>

To: "[Kollar-Kotelly Chambers@dcd.uscourts.gov](mailto:Kollar-Kotelly_Chambers@dcd.uscourts.gov)" <[Kollar-Kotelly Chambers@dcd.uscourts.gov](mailto:Kollar-Kotelly_Chambers@dcd.uscourts.gov)>

Cc: "Schoenfeld, Alan E" <Alan.Schoenfeld@wilmerhale.com>, "CLL@foleyhoag.com" <CLL@foleyhoag.com>, "Wolfson, Paul" <Paul.Wolfson@wilmerhale.com>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carmichael@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>

Date: 04/11/2018 10:13 AM

Subject: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Chambers of Judge Kollar-Kotelly,

I am counsel for Defendants in *Doe v. Trump*, Case No. 17-01597, and have included Plaintiffs' counsel on this email. Plaintiffs have asked to depose the Vice Chairman of the Joint Chiefs of Staff, General Paul J. Selva. The Vice Chairman is the second highest ranking uniformed military official in the armed forces. He has significant military operational responsibilities which include serving as a voting member of the Joint Chiefs of Staff, serving as the head of numerous DoD and interagency national security committees, and serving in the role of acting Chairman during the Chairman's absence. See, e.g., 10. U.S.C. § 154. As we informed Plaintiffs, deposing the Vice Chairman, who is a high-ranking Government official, is inappropriate at this point in the litigation. "[I]n the D.C. Circuit, there is a presumption against deposing high-ranking government officials," *Kelley v. FBI*, No. CV 13-0825 (ABJ), 2015 WL 13648073, at *1 (D.D.C. July 16, 2015), and Plaintiffs have not shown extraordinary circumstances necessary to overcome that presumption. Specifically, Plaintiffs have not established that the Vice Chairman possesses unique, non-privileged, relevant information that cannot be obtained through other means. See *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985); *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998). We informed Plaintiffs that, to the extent that the Vice Chairman has personal knowledge regarding this matter, Plaintiffs likely could obtain the same information through the deposition of Anthony Kurta, who served as chair of the Panel of Experts.

Mr. Kurta previously served for 32 years on active duty as a Surface Warfare Officer, and thus has a similar operational background to the Vice Chairman. His current duties as Deputy Assistant Secretary of Defense for Military Personnel Policy, however, are not operational in nature and thus Defendants have agreed to make him available for a deposition. We

requested that Plaintiffs, at a minimum, take Mr. Kurta's deposition (scheduled for April 20, 2018) before seeking to depose the Vice Chairman of the Joint Chiefs of Staff. As Plaintiffs have refused to withdraw their request to schedule the Vice Chairman's deposition, Defendants respectfully request a telephone conference to discuss this matter with the Court.

Respectfully,

Ryan B. Parker

Senior Trial Counsel

United States Department of Justice

Civil Division, Federal Programs Branch

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