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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 TELEPHONIC CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE
MARCH 28, 2018

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

Proceedings reported by stenotype.
Transcript produced by computer-aided transcription.

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1 THE COURT: Good morning, everyone. Sorry about
2 the delay.

3 This is Judge Kollar-Kotelly. I was doing an
4 order denying the motion to intervene by the press on the
5 telephone conference call. They will have access to a
6 transcript, and, of course, I do an order. And this is a
7 scheduling conference.

8 So let me call the case. *Doe, et al., vs. Trump,*
9 *et al.* It is 17-cv-1597.

10 If plaintiffs' counsel would identify themselves,
11 and if you would indicate who is going to be speaking and
12 who is on the line as well.

13 MR. SCHOENFELD: Sure. Good morning, Your Honor.
14 This is this is Alan Schoenfeld from Wilmer Hale for the
15 plaintiffs. I'll be speaking this morning.

16 THE COURT: Okay.

17 MR. SCHOENFELD: I'm joined by my colleagues
18 Paul Wolfson and Kevin Lamb from Wilmer. Claire Laporte,
19 Dan McFadden, and Lauren Milgroom from Foley Hoag. And
20 Shannon Minter from the National Center for Lesbian Rights.

21 THE COURT: Could you do the last one?

22 MR. SCHOENFELD: Sure. It's Shannon Minter.

23 THE COURT: Okay. We have it.

24 MR. SCHOENFELD: From the National Center for
25 Lesbian Rights.

1 THE COURT: We have quite a long list of
2 attorneys, so I just want to make sure that the court
3 reporter has the correct people.

4 MR. SCHOENFELD: Sure.

5 THE COURT: And for the defendants?

6 MR. PARKER: Good morning, Your Honor. This is
7 Ryan Parker for the defendants. I'll be speaking this
8 morning. With me on the line are Andrew Carmichael,
9 Josh Gardner, Matthew Skurnik, Ashley Cheung, and Tony
10 Coppolino, all from the Department of Justice.

11 THE COURT: Okay. All right. Anybody else on the
12 line? I assume not.

13 All right. We'll proceed as we have before. Let
14 me just set out sort of where I see we are in terms of
15 pending motions, et cetera. I'll call on you -- and I would
16 ask that, although we know who the speakers are, but if you
17 give us your last name to make sure we ascribe the comments
18 to the correct people, and I will let you, at the end, if
19 there are additional things you want to bring up beyond what
20 I'm going to be addressing this morning.

21 So let me start with the motions. Prior to the
22 new recommendations regarding transgender persons in the
23 military, we have the defendants' motion for a protective
24 order regarding discovery from the President, which is fully
25 briefed. Also the defendants' partial motion for judgment

1 on the pleadings, which is also fully briefed, which
2 basically requests that the President be dismissed, and that
3 the motion to partially dissolve the preliminary injunction,
4 the present one that's in place. And that, again, is to --
5 the dissolution would be relating to the President, which I
6 understand that aspect of it at least the plaintiff consents
7 to.

8 Once we've had the notice regarding the new
9 policy, two motions were filed in addition that have not
10 been fully briefed. One is a motion for a protective order
11 as to all discovery, in essence, asking for a stay. And a
12 motion to dissolve the preliminary injunction.

13 So there's obviously some briefing schedules that
14 would need to be set and some discussion about the ones that
15 are already pending, but I think I would like to start, in
16 light of the new policy, what plaintiffs propose to do. Are
17 you amending the complaint? What are you doing.

18 MR. SCHOENFELD: Sure, Your Honor. Thanks. This
19 is Alan Schoenfeld from Wilmer.

20 The only thing that I would add to your agenda is
21 that we would like an extension of discovery. I'm happy to
22 explain how all these things interact.

23 THE COURT: Okay.

24 MR. SCHOENFELD: But we think a two-month
25 extension of discovery is warranted here for reasons that I

1 can get into.

2 Our proposal with respect to the two motions that
3 were filed on Friday night by the Government is to -- our
4 view is that the motion for a protective order with respect
5 to discovery should be denied outright, and I'm happy to get
6 into that.

7 And with respect to the motion to dissolve the
8 preliminary injunction, our view is that overlaps
9 considerably with the merits of this case, which are going
10 to be resolved in due course in a reasonable period of time,
11 and that the Court's consideration of the motion to vacate
12 and the parties' dispositive motion should essentially be
13 treated together.

14 I'm happy to spell out in more precise proposal
15 with dates for how to address that, and I'm also happy to
16 speak a little bit more about why we think the Court should
17 handle the two motions in that way.

18 I don't know if you want to hear preliminary views
19 from the parties and then --

20 THE COURT: Okay. Well, let me ask one thing. I
21 mean, we now have a new policy. It's not an outright ban as
22 it was before. It's a new policy. How are you planning on
23 dealing with that?

24 MR. SCHOENFELD: So our view, Your Honor, is that
25 this is not a new policy but instead an implementation of

1 the President's directive from last summer which this Court
2 enjoined.

3 Under the current implementation plan per
4 Secretary Mattis is, in fact, an implementation of the
5 President's directive, transgender people are barred
6 entirely from accession, and they're subject to separation
7 from the military if they attempt to live in accord with
8 their gender identity.

9 The only way a trans person can enlist or serve
10 under this policy is by suppressing their gender identity.
11 It's as if the President had tweeted that no Jews could
12 serve in the military, and the Government delivered an
13 implementation plan that said Jews can serve so long as they
14 practice Christianity.

15 With respect to the very small number of trans
16 service members who have already come out, transitioned and
17 openly serving, those people are entitled to serve, but they
18 serve under the same unconstitutional exclusion, and they
19 only serve so long as their retention in the military
20 doesn't prejudice the Government's litigation position in
21 this or any other challenge. There's an expressed severance
22 provision in the policy. So our view is that this policy is
23 simply continuous with the policy that was enjoined by this
24 Court, and we would amend the complaint to include factual
25 allegations to bring it up to date and potentially to add

1 new plaintiffs, but we think that this is entirely
2 continuous with the challenge that we've been litigating
3 since last summer.

4 THE COURT: Okay. So let me ask one other
5 question. In terms of amending the complaint for new facts,
6 I take it you're not doing that immediately? This would be
7 done at a later point? Is that what you're saying?

8 MR. SCHOENFELD: We're prepared to amend shortly.
9 We were going to propose an April 6th deadline to
10 essentially bring the allegations and the complaint up to
11 date and conform with the implementation plan that was
12 issued on Friday.

13 THE COURT: Okay. All right. That's really what
14 I was asking about in terms of how you want to --

15 MR. SCHOENFELD: Sure.

16 THE COURT: Why don't you set out your proposal,
17 and I'll hear from the defendants.

18 MR. SCHOENFELD: Sure. So our specific proposal
19 is as follows: We would propose to amend the complaint on
20 Friday, April 6th. Any motion directed to the amended
21 complaint by the Government would be due April 20th, and
22 we could negotiate a briefing schedule on that. Our view is
23 that our outstanding discovery requests encompass the
24 March 23rd policy under the defendants' ongoing obligation
25 to respond to them under Rule 26. But to the extent any

1 additional discovery needed to be served, we would serve it
2 no later than Friday, April 13th. Any additional experts
3 and any amendments to outstanding expert disclosures would
4 also be due Friday, April 13th, and discovery would close
5 on Friday, June 1st.

6 Thereafter, as in the original scheduling order
7 that this Court entered in November, the Court would hold a
8 teleconference to discuss dispositive motions and also to
9 discuss resolution of the Government's motion to vacate the
10 preliminary injunction.

11 THE COURT: Okay. And in terms of -- so you would
12 expect that the Court would go ahead, from your perspective,
13 on ruling on the fully briefed motions, which is the
14 protective order relating to the President and then the
15 partial motion for judgment on the pleadings.

16 Then in terms of the other two motions, the motion
17 for a protective order as to stay and a motion to dissolve
18 the preliminary injunction, I think those need to be
19 briefed. We can't just do it orally in this conference
20 call.

21 MR. SCHOENFELD: We're certainly happy to brief on
22 an expedited time a motion to -- as a protective order for
23 discovery. We think it should be denied expeditiously and
24 discovery should continue. And at the very least, the
25 discovery that the Government promised us by the end of

1 March should be served, but we can brief that motion on, you
2 know, expedited time.

3 With respect to the motion to dissolve the
4 preliminary injunction, as I mentioned, our view is that it
5 collapses entirely with the merits of the plaintiffs'
6 challenge, and there's no efficiency in distracting the
7 parties and the Court from an expedited, two-month tail end
8 discovery period in order to brief that motion.

9 THE COURT: Okay. And your motion for protective
10 orders to all discovery to stay, what is an expedited
11 schedule from your perspective?

12 MR. SCHOENFELD: I think we can -- I'm speaking a
13 little bit out of turn because I haven't discussed that
14 precise issue with my colleagues, but I think we could serve
15 an opposition by Wednesday, April 4th, if that works for
16 the Court.

17 THE COURT: Okay. All right.

18 And in terms of the -- all right. I think that
19 sets out where you are.

20 Let me hear from the defendants. One question
21 that I have is -- it wasn't totally clear, but I have to say
22 that I need to review the new 40-plus-page policy with a
23 little more time to go through all of it. Is this
24 immediately implemented, or is there an implementation date
25 at some point, or what?

1 MR. PARKER: Thank you, Your Honor. This is Ryan
2 Parker for the defendants.

3 I would be happy to answer that question. Your
4 Honor, the President's memorandum issued on March 23rd,
5 2018, revokes the previous memorandum from August 25th,
6 2017, and any prior statements regarding military service by
7 transgender individuals. So any prior policy -- frankly,
8 all of the policies that were challenged by plaintiffs in
9 their complaints and in the motion -- in their complaints
10 have been withdrawn.

11 As far as when the new policy actually takes
12 effect, it's the Government's position that because the only
13 thing that was at issue in the plaintiffs' complaint, the
14 only thing that was being challenged was the President's
15 August 25th, 2017 memorandum that the military's new
16 policy should be allowed to take effect. However, in light
17 of the preliminary injunctions that were entered in this
18 case and in the other cases, and out of an abundance of
19 caution, DOD has moved for a dissolution of those
20 preliminary injunctions before putting the new policy in
21 place. And that's why it is vitally important to the
22 defendants that the Court decide without any delay the
23 motion to dissolve the preliminary injunction because the
24 military has made a determination set forth in that report
25 that this new policy is important for military readiness,

1 and the military would like to put that policy in place. So
2 the motion to dissolve for the defendants is of the utmost
3 importance.

4 I would further just say that that motion tees up
5 two fundamental issues that need to be resolved before this
6 case proceeds, and those would be, one, mootness, and, two,
7 the standing of the plaintiffs.

8 As the Court is aware, the majority of the
9 individual plaintiffs in this case are currently serving
10 service members who, under the new policy, will be allowed
11 to continue to serve. Those individuals, in defendants'
12 view, do not have standing in this case. In addition, it is
13 unclear whether the remaining two plaintiffs would have
14 standing to pursue their claims based on the new policy. So
15 defendants' position is that the issues of mootness and
16 standing should be decided before burdensome discovery
17 continues, before there are dispositive motions in this
18 case, and that both of those issues are teed up for the
19 Court in defendants' motion to dissolve the preliminary
20 injunction.

21 And so because the Department of Defense needs the
22 Court to decide that motion to dissolve and needs the Court
23 to dissolve the injunction before it can put its new policy
24 in place, and because defendants' motion tees up those
25 fundamental issues of mootness and standing, defendants

1 would ask that the motion to dissolve be briefed and decided
2 on an expedited schedule before there are further
3 proceedings in this case.

4 We did not have an opportunity to -- plaintiffs
5 did not provide their schedule to us beforehand, but I think
6 it would be in both the Court and the parties' interest for
7 the Court to decide issues of standing, for example, and
8 mootness before the Court continues on to decide motions
9 related to discovery and other issues that may be overcome
10 by the Court's decision on the motion to dissolve.

11 THE COURT: All right. Do you want to respond,
12 Mr. Schoenfeld, presumably around the issue of mootness
13 standing?

14 MR. SCHOENFELD: Sure.

15 THE COURT: And I assume that your amended
16 complaint will address some of this?

17 MR. SCHOENFELD: It will, Your Honor. We think
18 that even as the case stands, there's no mootness or
19 standing, as I will address in a second.

20 But with respect to the Government's position that
21 implementing the ban is important for military readiness,
22 they've asked for a decision from this Court by May 23rd.
23 We're proposing a discovery period that ends June 1st.
24 There's only so much urgency in the Government's own view
25 that it needs to be decided by May 23rd, and the extension

1 we're asking for beyond that opponent is quite modest. So
2 there's really no prejudice to the Government here.

3 With respect to the mootness and standing issues
4 they raise, let me take standing first. We believe that the
5 plaintiffs have standing notwithstanding their potential
6 susceptibility to the exception for currently serving trans
7 service members because, number one, they still have to
8 serve under the pall of this overwhelmingly discriminatory
9 ban. They're also subject to separation at any point that
10 their presence in the military compromises the Government's
11 litigation position.

12 The Government also doesn't challenge the standing
13 of Plaintiff Dylan Kohere here. They say that his injury is
14 not imminent. They don't dispute that he would be injured
15 by the ban and that he would be precluded from participating
16 in the ROTC. They only make the point about imminence. But
17 Your Honor addressed that point in the preliminary
18 injunction papers and said that because there are obstacles
19 to his entry into ROTC, even if they are in the future,
20 that's sufficient to confer standing.

21 So we think that the plaintiffs currently have
22 standing, and we think that any plaintiffs who are added in
23 the amended complaint will also have standing.

24 With respect to mootness, the Government's
25 mootness argument depends on two propositions, both of which

1 are, I think, are false. The first one is that the
2 President -- because the President rescinded his August 2017
3 memorandum, there's nothing left to this challenge.

4 This Court's clarification order made entirely
5 clear that any action taken by any of the defendants that
6 changes the status quo is preliminarily enjoined. That has
7 nothing to do with the status of the August 2017 memorandum.

8 This announcement by the Government on
9 March 23rd is an implementation of the ban that is
10 enjoined. There is nothing moot about this dispute at all.

11 The Government is also free to change its mind
12 about this policy whenever it wants, and, indeed, there are
13 escape hatches for the Government inscribed in Secretary
14 Mattis' report and recommendation; for example, allowing the
15 separation of even currently serving service members if
16 their presence in the military compromises their litigation
17 position presumably in any of the four pending challenges
18 but also in any subsequent challenge.

19 So under those circumstances, there's no credible
20 argument that the dispute that they first brought to this
21 Court, and which has just materialized and continued through
22 this implementation plan, is moot.

23 THE COURT: All right. Well, let's not make this
24 into a motions hearing, but I do have an understanding where
25 everybody is.

1 My suggestion is in terms of setting some dates
2 out at least, that we proceed to do the amended complaint so
3 that we at least, in terms of the motions, will be looking
4 at them in the context of that.

5 You propose April 6th, and I think you've
6 indicated for the Government April 20th.

7 Does that work for you, Mr. Parker?

8 MR. PARKER: Yes, Your Honor.

9 THE COURT: Okay. What I can do is once I get
10 both, I'll see what I would like you to address in the reply
11 or put some date in, or you can propose some date at this
12 point unless you want to give me a date now.

13 Mr. Schoenfeld?

14 MR. SCHOENFELD: For plaintiffs' opposition to the
15 Government's motion?

16 THE COURT: Well, no. I'm working with the
17 amended complaint first. You're amending the complaint on
18 the 6th, they're opposing it on the 20th, or if they're
19 going to oppose it.

20 When do you want to file a reply?

21 MR. SCHOENFELD: Would Wednesday, May 2nd, work?

22 THE COURT: Sure.

23 Okay. Apart from that, in terms of -- I do have
24 the other motions for the -- the issues relating to the
25 President have been fully briefed at this point, and so I

1 will take a look at those.

2 I think the motion for the protective order, I
3 would like a response. I would like that briefed. I would
4 also like to have some briefing on the motion to dissolve
5 the preliminary injunction, which can include what you have
6 just been arguing, Mr. Schoenfeld. And I believe that
7 Mr. Parker has set out the argument that's actually in the
8 pleadings at this point. I would like to have that done
9 rather quickly.

10 The motion for protective order, one thing that
11 would be helpful is for the plaintiffs to set out --
12 obviously, in terms of proceeding with discovery in the
13 future, you would want discovery around this new policy, but
14 I would be interested to know what you wanted out of the
15 earlier, say, from August on, what you would want out of
16 that.

17 It would seem to me the President's -- unlike the
18 August pronouncements and the other memo that he put out,
19 certainly the latest one lacks specificity, I'll put it that
20 way. It's a very general, "Let me leave it to Secretary
21 Mattis" kind of thing.

22 And I'm assuming this is with a hope that there
23 would be no further discovery about the President because
24 he's shifting into the Secretary of Defense and others in
25 the military to make these decisions.

1 But it may be, Mr. Schoenfeld, that the discovery
2 prior to the new announcement, or that relates to the new
3 announcement -- I'll put it that way -- may need to be
4 narrowed somewhat since we are -- they've now come out with
5 something -- it's more specific than the straight just
6 outright ban. So it would seem to me that there might be a
7 narrowing of the discovery in terms of what led up to the
8 total ban by the President and then obviously the discovery
9 that you would have with the rest of it.

10 So in the stay that -- you know, in your response
11 to the stay, which you're opposing, it would be helpful to
12 give some indication of, you know, not a discovery plan
13 exactly but sort of where you're going with the discovery so
14 I have some sense of what was going to be proposed from your
15 end.

16 Does that make sense, Mr. Schoenfeld?

17 MR. SCHOENFELD: It does, Your Honor.

18 Respectfully, I think we take a different view about the
19 scope of discovery relates -- the relevance now of the
20 President's July and August announcements, but we're happy
21 to brief that in our opposition.

22 THE COURT: Okay. Well, I think you need to.
23 We're in a different posture, so I think you need to
24 indicate to me what the relevance is for -- I'm not
25 suggesting it's not relevant, but I think you need to be

1 more specific as to precisely why you think it's relevant
2 and how it fits into the case as a whole because there's
3 obviously disputes relating to -- it sounds like, and I'll
4 just touch on this lightly -- it sounds like the
5 interrogatories seem to be a major dispute. It wasn't clear
6 to me in terms of the documents. I thought that some
7 documents were going to be provided, but it wasn't clear
8 whether they were, or, Mr. Parker, you were taking the
9 absolute privilege for all of the document requests.

10 Can you answer that question quickly, Mr. Parker?

11 MR. PARKER: Yes. I'm happy to, Your Honor.

12 I want to make sure that I understood the
13 question. So defendants have produced over 120,000 pages of
14 documents.

15 THE COURT: Okay.

16 MR. PARKER: But I maybe understood your question
17 to relate directly to White House documents, or do you mean
18 documents in general?

19 THE COURT: Well, the discussion that we had on
20 the discovery dispute was around the assertion of the
21 absolute presidential privilege, apart from the President,
22 Secretary Mattis, and everybody else. So what I was trying
23 to do was -- what does that relate to? Is that only
24 White House documents that you were discussing and you've
25 produced other discovery? Can you just clarify that for me?

1 MR. PARKER: Yes. Thank you, Your Honor. I'm
2 happy to do that.

3 So defendants have asserted the presidential
4 communications privilege over communications that the
5 President and his close advisers have had with other
6 individuals, including individuals of different services,
7 and documents that were communications between the President
8 and other individuals were withheld. But other documents, a
9 substantial number of documents, as I said, over 120,000
10 pages of documents from all of the other defendants have
11 been produced to plaintiffs up to this point, and defendants
12 are still working to produce documents that are still being
13 processed and reviewed, and those documents have been
14 produced also in the format that's very close to what
15 plaintiffs have requested.

16 THE COURT: Okay. Let me get back, then, to the
17 plaintiffs for a second.

18 So what I want you in this -- and maybe this isn't
19 the greatest motion to do it in, but it would be certainly
20 helpful in terms of putting out -- they've given their
21 position. So if you can indicate to me what you've gotten
22 and what you still want without getting into whatever -- I
23 don't know whether you thought through all of the things you
24 may want going forward, but at least in terms of the past
25 requests, whether you're asking for all of them still,

1 whether you're not asking for all of them; and if you're
2 asking for all of the ones in terms of communications
3 between the President and close advisers that would cover
4 prior to his statement of the ban, then if you can indicate
5 why you think this is particularly relevant because I think
6 that needs to be briefed.

7 MR. PARKER: Certainly.

8 THE COURT: Okay. So you indicated the motion for
9 protective order just, et cetera, and what I've asked for
10 you can do by the 4th; is that correct? Or do you want
11 more time?

12 MR. SCHOENFELD: Yes, Your Honor.

13 THE COURT: When do you want to oppose it,
14 Mr. Parker?

15 MR. PARKER: Our reply? If we can have a week to
16 do that on April 11th?

17 THE COURT: Okay. And then the motion to dissolve
18 the preliminary injunction. You obviously both have
19 differing views about this. Clearly you would need to do it
20 after you had -- I think we should have this briefed after
21 the amended complaint so that it would be done at least in
22 the context of understanding what is in the complaint and
23 what's not and how it relates to it.

24 When would you be able to do that, Plaintiff?

25 MR. SCHOENFELD: So I think what you're proposing

1 is that we file the amended complaint, and then the
2 Government essentially renew its motion to vacate?

3 THE COURT: Yeah.

4 MR. SCHOENFELD: Okay.

5 THE COURT: I think that's probably the best way
6 of doing it since we don't know precisely what you're going
7 to put in the amended complaint and the effect it will or
8 will not have on the preliminary injunction that I've
9 already issued. So I think that's the better way of doing
10 it.

11 MR. SCHOENFELD: Yeah. I think that makes sense,
12 Your Honor.

13 We propose to file our amended complaint on
14 April 6th, and if it doesn't upset the apple cart too
15 much, I actually think it makes sense for us to file our
16 opposition to the protective order particularly in light of
17 the content that you've requested the same time we file the
18 amended complaint. So perhaps we can file both the amended
19 complaint and our opposition on April 6th, and then they
20 can file their reply on April 13th. Does that work?

21 THE COURT: Yeah, assuming that these are all --
22 yeah, the 13th is still on a business day.

23 All right. So that's the motion -- so let's see.

24 MR. PARKER: Your Honor --

25 THE COURT: Let me just set out a couple things,

1 and then I'll hear from you.

2 Is that Mr. Parker?

3 MR. PARKER: Yes, Your Honor.

4 THE COURT: Okay. Let me just -- so we're not
5 mixing up the dates, and then I'll hear from you.

6 Don't worry. You'll get an opportunity to say
7 something.

8 So the motion for protective orders, what we're
9 talking about, and that would be the April -- now
10 April 6th, April 13th. They would amend the complaint
11 on April 6th.

12 You would oppose, if you're going to oppose
13 whatever is in there, and you would, I think, at that point,
14 since I'm not sure precisely what they're going to say, I
15 think you need to renew your motion to vacate the
16 preliminary injunction in light of the amended -- what
17 they've indicated. Your opposition can include both,
18 however you want to word it, but I think we need to see what
19 the amended complaint is to see whether it makes a
20 difference as to whether the preliminary injunction should
21 actually be vacated.

22 I would agree with Mr. Schoenfeld to this extent
23 that I didn't hinge all of it on the President's. I did it
24 in the context of going back to the status quo. So you at
25 least need to address that in doing this.

1 Now, let me hear from you, Mr. Parker.

2 MR. PARKER: Thank you, Your Honor. This is
3 Mr. Parker.

4 We would respectfully ask that the parties
5 continue with the briefing schedule on the motion to
6 dissolve the preliminary injunction because the issue of
7 whether the preliminary injunction should be dissolved
8 really does not hinge on what plaintiffs put in their
9 amended complaint.

10 The four factors, which are the same for answering
11 a preliminary injunction, will not be affected by the entry
12 of an amended complaint. And as I mentioned before, there
13 is a great deal of urgency on the part of the Department of
14 Defense to put in place this new policy, which is the
15 product of months of study, and it is the determination that
16 the Department of Defense has made of a policy that is
17 necessary for military readiness.

18 So we would ask that plaintiffs respond as quickly
19 as possible to the motion to dissolve the injunction.

20 We certainly will review plaintiffs' amended
21 complaint and will determine whether a motion to dismiss is
22 appropriate and will file that, and I think that could be a
23 vehicle to determine whether the case is moot. But as far
24 as whether the injunction should be dissolved, I think
25 there's some real urgency there for the defendants, and I

1 don't think that that issue specifically will be affected by
2 the filing of plaintiffs' amended complaint. So we would
3 ask that they simply file their opposition. We will file a
4 reply and the Court rule on that as quickly as possible so
5 that we can have some clarity on whether the department --
6 when it can put in place it's new policy.

7 THE COURT: Okay. Go ahead.

8 MR. SCHOENFELD: It's Alan Schoenfeld. I was just
9 going to make two quick observations. Well, three,
10 actually.

11 First, the Government has asked for a decision on
12 their motion by May 23rd. That could still be arranged
13 under the schedule that we're proposing.

14 Second, amending the complaint does make sense
15 because the mootness and standing questions that go to the
16 heart of the Government's challenge to plaintiffs'
17 likelihood of success on the merits, you know, is dependent
18 upon precisely the nature of the challenge and the
19 plaintiffs challenging it.

20 And, third, you know, just in terms of fairness
21 here, the Government had the President's -- the memorandum
22 from Secretary Mattis for a month before they filed their
23 motion on Friday night. We've been asking for that
24 recommendation for five weeks, and the Government refused to
25 give it to us. We need more than 14 days to respond to it.

1 I don't think that we could respond to that motion well
2 before April 20th or 27th when the Government is poised
3 to file its renewed motion to vacate under the schedule
4 Your Honor is proposing.

5 So for all of those reasons, I think that the
6 schedule Your Honor is proposing makes a lot more sense.

7 THE COURT: Okay. At this point, I am not
8 prepared, Mr. Parker, to make an assumption that the amended
9 complaint will not address some of the issues that you are
10 raising, and so I'm proceeding, at least at this point, if I
11 find once I get the pleadings I feel differently, it's a
12 different issue. But the amended complaint they will put in
13 on the 6th. My suggestion is if you're going to be
14 opposing it -- I'm not sure what basis there would be, but
15 there might be -- that at that point, to the extent that it
16 changes your motion to dissolve the preliminary injunction,
17 I'm assuming some issues may be addressed in the amended
18 complaint, then I would suggest that you renew the motion at
19 that point, in light of the amended complaint, which may
20 knock out some of the issues.

21 I prefer not to get a supplement now that people
22 can cut and paste so easily. You know, you can lift half of
23 your -- three quarters of your motion if you want, but I
24 would like to have it teed up to the amended complaint and
25 the preliminary injunction that's in place.

1 So the question that I have for you is, they do
2 this on the 6th. Can you do, you know, whatever
3 opposition and whatever renewal or a different date for
4 renewing your motion to vacate?

5 MR. PARKER: Your Honor, thank you. Defendants
6 understand the Court's position. Can I propose a potential
7 hybrid approach that I think would address the Court's
8 concern and allow the motion to be briefed more quickly?

9 Potentially we could have plaintiff amend their
10 complaint on April 6th, as they've said. Defendants could
11 then move to dismiss that complaint, if that's appropriate,
12 on April 20th.

13 After defendants have filed their motion to
14 dismiss on April 20th, perhaps we could have defendants
15 then simply file their motion in opposition -- sorry --
16 plaintiffs' motion in opposition to the motion to dissolve,
17 and then we'll simply reply to the opposition in that case.

18 That would save us the time of having to refile
19 the same motion and then take time for an opposition, and
20 that way the Court would have the benefit of having
21 plaintiffs' amended complaint, and plaintiffs would have the
22 benefit of having filed their amended complaint before they
23 oppose the motion to dissolve.

24 Would the Court be amenable?

25 THE COURT: You're going to have to go through

1 that again. April 6th is the amended complaint, and then
2 what?

3 MR. PARKER: And then on April 20th, defendants
4 would file a motion to dismiss.

5 THE COURT: Okay.

6 MR. PARKER: On April 27th, plaintiffs would
7 file their opposition to defendants' motion to dissolve the
8 preliminary injunction. Then two weeks later -- and I don't
9 have the date in front of me -- defendants would file their
10 reply in support of their motion to dissolve the preliminary
11 injunction.

12 THE COURT: So you're making an assumption the
13 amended complaint isn't going to make a difference, which I
14 think is the concern that I would have.

15 Let me do April 27th. That would be May 11th.

16 So May 11th would be -- I'm sorry -- the two
17 weeks after it. April 6th, amended complaint by the
18 plaintiff.

19 April 20th, the defendant files their motion to
20 dismiss.

21 April 27th, the plaintiff opposes the motion to
22 dismiss and opposes the motion to dissolve the preliminary
23 injunction.

24 And May 11th does what?

25 MR. PARKER: That would be just simply defendants'

1 reply in support of both their motion to dissolve the
2 preliminary injunction and their motion to dismiss the
3 amended or supplemental complaint.

4 THE COURT: Okay. Plaintiff, Mr. Schoenfeld?

5 MR. SCHOENFELD: So a couple things. I think your
6 proposal, Your Honor, makes more sense to have the
7 Government file a renewed motion to vacate so that we are
8 not opposing a motion to dissolve their preliminary
9 injunction that is not keyed to the current state of
10 affairs. So for that reason, I agree with Your Honor's
11 position.

12 With respect to the schedule, you know, as to
13 opposing the motion to dissolve a preliminary injunction,
14 April 27th works for us. I think we need more time than
15 that to oppose a motion to dismiss filed on April 20th.
16 So I think we would request at least another week.

17 THE COURT: And that's May 4th.

18 MR. SCHOENFELD: Okay.

19 THE COURT: Okay. And April 27th, you would be
20 opposing the renewed motion for preliminary injunction.

21 I am going to request, Mr. Parker, that we not
22 make an assumption today, that your dissolution motion that
23 you have now is necessarily going to be pertinent on all of
24 the aspects of an amended complaint. It may knock out some
25 issues. So I prefer to do the April 6th amended

1 complaint.

2 April 20th, you can file your motion to dismiss.
3 And you should indicate whether you're renewing it as is or
4 whether you're making any kind of changes; and if you're
5 making a change, then file something new, not some
6 supplement that I have to figure out what applies and what
7 doesn't. I mean, the standing issues and some of the
8 mootness issues may disappear. So we need to -- I would ask
9 you to do that.

10 The April 27th, plaintiff will oppose the motion
11 to -- on the preliminary injunction.

12 And May 4th, they will oppose the motion to
13 dismiss.

14 We probably could need some additional dates after
15 that in terms of replies. I don't know whether you want to
16 then leave May 11th as your reply to the motion to dismiss
17 and the dissolution of the preliminary injunction.

18 MR. PARKER: We could combine both of those
19 replies, Your Honor, if we wanted to on -- May 17th I
20 think would work well for defendants, and we could file both
21 replies.

22 THE COURT: Okay. The last thing -- okay. I'm
23 sorry to keep going over these dates, but I want to make
24 sure we've got this right.

25 April 6th, amended complaint.

1 20th, motion to dismiss by the defendant and
2 renewed preliminary injunction, dissolution, or whatever you
3 want to do with that.

4 The 27th of April, the opposition by the
5 plaintiff to the dissolution of the preliminary injunction.

6 May 4th, they would file their opposition to the
7 motion to dismiss.

8 Then you're suggesting May 17th as the combined
9 response to the motion to dismiss and dissolution of the
10 preliminary injunction; is that correct?

11 MR. PARKER: Yes. I think we'll probably file
12 separate documents just to make sure that we're clear on
13 what the arguments are, but we'll file both of those on
14 May 17th.

15 THE COURT: Okay. That would be very helpful to
16 do that.

17 Now, the other question that I have is, in the
18 meantime --

19 MR. SCHOENFELD: Your Honor, I apologize. Could I
20 make one small request?

21 THE COURT: Who is this?

22 MR. SCHOENFELD: This is Alan Schoenfeld. I
23 apologize.

24 Since it's possible that the Government is going
25 to file a renewed motion to vacate the preliminary

1 injunction on April 20th, could we respond to both the
2 motion to dismiss filed that day and the renewed motion to
3 vacate the preliminary injunction on May 4th? That way
4 everything is on the same track.

5 So we have complaint on April 6th, Government's
6 motions on April 20th, plaintiffs' oppositions on
7 May 4th, and Government's replies on May 17th.

8 THE COURT: I don't have a problem with that.

9 Now, the only question I have here is we're back
10 to the -- so that sets out in terms of the amended
11 complaint, any motion to dismiss, and the dissolution of the
12 request to dissolve the preliminary instruction.

13 We're back to the motion for the protective order
14 in relation to the discovery, which -- and I will consider
15 the motions in terms of the President along with all of
16 this.

17 So are we back to April 6th for you to file a
18 response to that?

19 MR. SCHOENFELD: We are. That's fine. That
20 schedule is fine with us.

21 THE COURT: And the opposition would be the
22 13th? April 13th?

23 Mr. Parker?

24 MR. PARKER: Yes, Your Honor. This is Mr. Parker.

25 That will be our reply date on that motion,

1 Your Honor.

2 THE COURT: Okay. All right. Anything else that
3 we need to discuss at this point?

4 I'll put this all in an order.

5 MR. SCHOENFELD: Just one question, Your Honor.

6 THE COURT: This is?

7 MR. SCHOENFELD: This is Alan Schoenfeld. I
8 apologize.

9 THE COURT: Okay.

10 MR. SCHOENFELD: While the motion for a protective
11 order is pending, I just want to clarify the status of
12 discovery. Under the Court's original scheduling order,
13 discovery is meant to end this Friday. Notwithstanding the
14 Government's production to date, they have been slow rolling
15 an enormous amount of discovery and have committed to
16 produce some of the remaining discovery by the end of March,
17 meaning this Friday as well as, you know, promises to
18 continue work on other things.

19 Our position is that the Government should
20 continue to produce documents and information that they had
21 previously committed to produce while the Court is deciding
22 the motion for a protective order.

23 I understand that, depending upon the outcome of
24 that motion, the parties may need to discuss further
25 discovery. But at this point, you know, our view is that

1 the Government is under a continuing obligation to produce
2 that discovery.

3 THE COURT: Okay. Mr. Parker -- and we're talking
4 about what you've previously committed to produce. Are you
5 willing to go forward with that?

6 MR. PARKER: Your Honor, we have already gone well
7 down the road in preparation for a production this Friday.
8 We're happy to make that production.

9 We would ask that the Court consider, you know,
10 the motion for a protective order. We think it's especially
11 appropriate in light of the fact that we're planning to move
12 to dismiss, and that fundamental issues of standing and
13 mootness will be resolved by the Court. But we're happy to
14 go forward with the productions that we have already
15 prepared and we're planning to make this Friday, and it's a
16 substantial production, I think, of over 20,000 pages of
17 documents.

18 THE COURT: All right. Does that answer your
19 question, Mr. Schoenfeld?

20 MR. SCHOENFELD: It doesn't, unfortunately. The
21 Government has unilaterally told us that they are going to
22 make a rolling production of Department of Defense
23 documents, which they started making in February. They told
24 us for the first time last week that there are 90,000
25 Department of Defense documents that are potentially

1 responsive that they haven't produced. We're entitled to
2 those documents, and they should've been produced months
3 ago.

4 THE COURT: Mr. Parker, does it include the DOD
5 90,000 pages or documents?

6 MR. PARKER: Your Honor, the production this
7 Friday does not include those documents. The Department of
8 Defense is processing those documents as quickly as
9 possible, and we will continue to process and produce those
10 documents on a rolling basis.

11 THE COURT: Okay. So you are going to be
12 producing those?

13 MR. PARKER: That's correct, Your Honor, up until
14 the Court decides -- we think that the motion for a
15 protective order should be entered. This is why we moved
16 for that order, and we've asked for it to be briefed on an
17 expedited basis. But until the Court rules on that motion,
18 we will continue processing and producing documents.

19 THE COURT: Okay. But the concern, obviously,
20 Mr. Schoenfeld has, as do I, is that while you're waiting
21 around for this stay to occur, that you would slow up the
22 production. You're giving them something this Friday, but
23 is there any guarantee that you won't just drag your feet
24 about the 90,000 documents that DOD is supposedly
25 processing? Because those things -- I think those documents

1 should be provided.

2 MR. PARKER: Your Honor, those documents are
3 actually being processed as we speak. It takes some time
4 for the Department to process them and for them to be put
5 through our system and Bates stamped and the like. That
6 processing is ongoing, and we anticipate being able to make
7 additional productions the following Friday. We've been
8 making rolling productions every Friday. I think by this
9 Friday, we will have produced over 140,000 pages of
10 documents.

11 We have not been delinquent in our production.
12 Plaintiffs have asked for a large number of documents, and
13 we will continue to process those at the pace that -- as
14 quickly as we can until the Court decides the motion for a
15 protective order.

16 THE COURT: All right. Mr. Schoenfeld.

17 MR. SCHOENFELD: That's fine, Your Honor.

18 I have one final question at the risk of wearing
19 out our welcome.

20 The parties have agreed to a deposition schedule.
21 Delays in depositions were necessitated by the Government's
22 delay in producing documents.

23 As the Government completes its document
24 production, we would like to put those depositions back on
25 the calendar understanding that the Court, you know, may

1 well rule at any time on the motion for a protective order.

2 We would like an understanding that depositions
3 are going to go forward in their ordinary course. I think
4 the parties share an understanding about which depositions
5 were contingent on the production of which documents. And
6 so as the Government completes its document production, we
7 would like to schedule depositions in the ordinary course.

8 THE COURT: Okay. Mr. Parker.

9 MR. PARKER: Your Honor, this case has shifted
10 fundamentally with the issuance of a new policy that, in our
11 view, renders plaintiffs' challenges, the complaints that
12 are currently on file, moot, and really calls into question
13 whether the documents and the discovery they have served is
14 still even relevant.

15 As Your Honor noted, the new policy is the result
16 of a decision by Secretary Mattis following a study by the
17 Department of Defense. Defendants' position as set forth in
18 the motion for a protective order is that this case should
19 be governed by the APA; that this is an administrative
20 decision made by the Department of Defense, and that the
21 proper mode of review provided by Congress is an APA review.
22 So we would ask that the Court decide the motion to dissolve
23 and our motion for a protective order before we are required
24 to block off the time and prepare witnesses, DOD officials
25 and other high ranking DOD individuals, for depositions at

1 this point given the issues that are currently before the
2 Court.

3 THE COURT: Mr. Schoenfeld.

4 MR. SCHOENFELD: Sure. Very quickly.

5 This is not an APA case. This has never been an
6 APA case. This is a constitutional challenge under the
7 Fifth Amendment to the policy that the President announced
8 and the military has now chosen to implement.

9 The Government can recharacterize our claim in the
10 hopes of making this record review. We're entitled to
11 discovery under the claim that is now pending and subject to
12 the Court's injunction.

13 THE COURT: All right. I think the way I'm going
14 to do this, at least at the present time, I'll wait until I
15 get the briefing on the materials that we've set the dates
16 for, is that the discovery should proceed until I rule. So
17 you should continue to put out the documents. You should
18 schedule the depositions. They could always be canceled.
19 Or, you know, I have not ruled or am making a different
20 ruling, then you should go forward with them.

21 MR. PARKER: Thank you, Your Honor.

22 THE COURT: All right. Anything else,
23 Mr. Schoenfeld?

24 MR. SCHOENFELD: Nothing from plaintiffs. Thank
25 you.

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THE COURT: Mr. Parker, anything from you?

MR. PARKER: No, Your Honor. Thank you.

THE COURT: All right. I'll put an order out setting out all those dates, and we'll proceed.

Thank you for taking the time. I appreciate it.
Bye.

(Telephonic conference concluded.)

1 CERTIFICATE OF REPORTER

2
3 I, Richard D. Ehrlich, a Registered Merit Reporter
4 and Certified Realtime Reporter, certify that the foregoing
5 is a true, complete, and accurate transcript of the
6 proceedings ordered to be transcribed in the above-entitled
7 case before the Honorable Colleen Kollar-Kotelly, in
8 Washington, D.C., on March 28, 2018.

9
10 s/Richard D. Ehrlich March 28, 2018

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Richard D. Ehrlich, Official Court Reporter
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