

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' NOTICE OF  
RECENT DEVELOPMENT  
RELATING TO PLAINTIFFS'  
RENEWED MOTION TO COMPEL,  
DKT. 364**

1 Defendants write to provide the Court with new information relevant to its consideration of  
2 Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process  
3 Privilege, Dkt. 364. Although that motion should still be denied for all of the reasons stated in  
4 Defendants' prior opposition brief, Dkt. 380, recent developments reinforce that conclusion by  
5 demonstrating that Plaintiffs will shortly receive the only deliberative documents that are arguably  
6 relevant to these proceedings.

7 On September 13, 2019, the court in another suit challenging the military policy at issue in  
8 this case, *Doe 2 v. Esper*, No. 17-cv-1597 (CKK) (D.D.C.), ruled on plaintiffs' motion to compel,  
9 among other things, deliberative documents. Mem. Op. (Sept. 13, 2019), *Doe 2*, Dkt. 237. The  
10 court concluded, in relevant part, that "Defendants may not assert the deliberative process privilege  
11 over documents that were used or considered in the Panel of Experts for the Transgender Policy  
12 Review's (the 'Panel') development of the Mattis Plan[.]" *Id.* at 2. The *Doe* court also found that  
13 because the "relevant time-period for discovery is the development of the Mattis Plan," further  
14 discovery into the President's 2017 statements on Twitter and the 2017 Presidential Memorandum  
15 was not warranted. *Id.* The court ordered the parties to meet and confer in an attempt to resolve  
16 or narrow remaining disputes and file a Joint Status Report by October 25, 2019. *Id.* at 26.

17 After engaging in that meet and confer process, Defendants have filed a JSR (attached as Ex.  
18 1) in *Doe*, setting forth their agreement to produce, in response to the Order in *Doe*, an unredacted  
19 version of the Administrative Record, as well as unredacted meeting minutes of the Panel of Experts  
20 (which contain a record of the deliberations of the Panel members),<sup>1</sup> by November 1, 2019.  
21 Defendants have also agreed to produce by November 22, 2019, documents and communications  
22 to or from voting members of the Panel dated from September 14, 2017 to March 23, 2018,  
23 previously withheld pursuant to the deliberative process privilege that were used or considered in  
24 the development of the Mattis Plan.<sup>2</sup> While not all discovery disputes are resolved in *Doe*, this

25 <sup>1</sup> Defendants reserve their rights to preserve certain redactions of personally identifiable information  
26 ("PII") in these documents.

27 <sup>2</sup> Defendants respectfully disagree with the *Doe* Court's decision to direct disclosure of the Panel's  
28 deliberative documents, maintain their right to challenge the decision in further proceedings, and  
have complied with the *Doe* order as described herein. In addition, Defendants will continue to

1 production will include all documents actually considered by these Panel members in the  
2 development of the Mattis Plan and their deliberations concerning these documents.

3 These documents will be produced to Plaintiffs in this case as well, *see* Uniform Protective  
4 Order & Cross-Use Agreement, Dkt. 183. Accordingly, Plaintiffs will shortly receive deliberative  
5 documents in three of the categories they seek to compel—Panel Communications; Testimony,  
6 Documents, and Data the Panel Received; and Panel Deliberations and Decisions, *see* Dkt. 364 at 7.  
7 These are the only documents in Plaintiffs’ various categories even arguably relevant to these  
8 proceedings. *See Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019) (“the reasonableness of the  
9 2018 Policy must be evaluated on the record supporting that decision and with the appropriate  
10 deference due to a proffered military decision”); *see also* Dkt. 380 at 8. And if Plaintiffs continue to  
11 be dissatisfied with this production, this Court can consider later disputes about specific documents  
12 or discrete categories of deliberative materials, consistent with the approach taken by the *Doe* court.  
13 The Court should not consider Plaintiffs’ demands for an *en masse* production of myriad deliberative  
14 materials, and certainly need not do so in these circumstances.

15 In part for these reasons as well, Plaintiffs’ motion to compel should be denied.

16 Dated: October 28, 2019

Respectfully submitted,

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Civil Division

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20 ALEXANDER K. HAAS  
Branch Director

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22 ANTHONY J. COPPOLINO  
Deputy Director

23  
24 /s/ Andrew E. Carmichael  
ANDREW E. CARMICHAEL  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch

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withhold any information protected by other privileges (*e.g.*, the attorney-client privilege, etc.), as  
28 those privileges were not at issue in *Doe* (nor are they at issue here) and reserve their right to preserve  
certain redactions of PII in these documents.

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 2019, I electronically filed the foregoing Notice using the Court’s CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: October 28, 2019

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# Exhibit 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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JANE DOE 2, <i>et al.</i> ,	)	
	)	
	)	Civil Action No. 17-cv-1597 (CKK)
Plaintiffs,	)	
v.	)	
	)	
MARK T. ESPER, in his official capacity as	)	
Secretary of Defense, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

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**PARTIES’ JOINT STATUS REPORT IN RESPONSE  
TO SEPTEMBER 13, 2019 OPINION AND ORDER**

In the September 13, 2019 Memorandum Opinion and Order (Dkt. 237, the “Opinion and Order”), this Court concluded, *inter alia*, that “Defendants may not assert the deliberative process privilege over documents that were used or considered in the Panel of Experts for the Transgender Policy Review’s (the “Panel”) development of the Mattis Plan[.]” *Id.* at 2. The Court acknowledged “that this conclusion will likely still require the Court to determine whether or not certain individual documents fall into this subcategory of documents which is not protected by the deliberative process privilege.” *Id.* The Court further concluded that “the parties need to conduct additional negotiations to determine whether or not Plaintiffs’ narrowed requests for the raw data, personnel files, and field reports supporting the statistical summaries and conclusions of the Mattis Report remain overly burdensome.” *Id.* Accordingly, the Court ordered the parties to meet and confer, directing them to focus on “Plaintiffs’ request for data underlying Defendants’ summary statistics and conclusions,” in light of the Court’s “overarching guidance on the breadth and scope of discovery relevant to this lawsuit.” *Id.* at 2, 25. The Court further ordered the parties to file a joint status report by October 25, 2019, “indicating how they intend to proceed given the findings

and conclusions” in the Opinion and Order, including “whether or not additional briefing on discovery issues is necessary.” *Id.* at 3, 26.

The parties met and conferred telephonically on September 27, 2019, October 8, 2019, and October 22, 2019. At the outset, Defendants preserve their objection for purposes of appeal to the Court’s finding that they may not assert the deliberative process privilege over these documents, but will produce these materials in response to the Opinion and Order at this time.

In response to the Opinion and Order, Defendants have agreed to produce an unredacted version of the Administrative Record and unredacted meeting minutes of the Panel (which contain a record of the deliberations of the Panel members)<sup>1</sup> by November 1, 2019. Defendants have also agreed to produce by November 22, 2019, a majority of the documents included on the five *Vaughn* indices produced to Plaintiffs in May 2019 that are documents and communications to or from voting members of the Panel dated from September 14, 2017 to March 23, 2018, previously withheld pursuant to the deliberative process privilege and that were used or considered in the development of the Mattis Plan.<sup>2</sup>

Defendants will continue to withhold from production documents on the *Vaughn* indices that pertain to “other events” that Defendants believe are not encompassed by the Opinion and Order. *Id.* at 11. As examples of “other events,” Defendants have identified at least two categories of documents which Defendants maintain were inadvertently included on the *Vaughn* indices: (i) documents pertaining to the implementation of the Court’s preliminary injunction, *see* Order of October 30, 2017, Dkt. 60, and (ii) deliberations pertaining to individual service members

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<sup>1</sup> Defendants reserve their rights to preserve certain redactions of personally identifiable information (“PII”) in these documents.

<sup>2</sup> Defendants reserve their rights to preserve certain redactions of PII and any redactions made on the basis of other privileges in these documents (i.e., attorney-client privilege or attorney work product protection).

unrelated to the Panel or the development of the Mattis Plan. Defendants plan to identify on the *Vaughn* indices which documents they believe fall into an “other events” category and provide a list of those documents to Plaintiffs by November 22, 2019. If Plaintiffs disagree with any of Defendants’ designations, the parties will meet and confer before raising any such disputes to the Court.

Defendants also agree to conduct a search for and produce documents responsive to all of the specific data requested by Plaintiffs, other than individual service member medical records and personnel records. The parties continue to dispute the scope of documents that must be produced relating to the development of the Mattis Plan, and whether Defendants must produce individual service member medical and personnel files. The parties’ respective positions on these two issues follow.<sup>3</sup>

### **PLAINTIFFS’ POSITION**

As this Court held, Defendants cannot assert the deliberative process privilege to shield documents that were used or considered: (i) by the Panel of Experts or (ii) in the development of the Mattis Plan. *See* Dkt. 237 at 11, 16, 20-21. Defendants narrowly read the Opinion and Order, seeking to limit its scope to communications among members of the Panel rather than documents from and communications among individuals whose work related to the Panel or the development of the Mattis Plan. Defendants request additional briefing to further parse the categories of documents to be produced and continue to delay the progress of this litigation. Plaintiffs respectfully submit that the Court’s guidance is clear, and that the Court can provide any further necessary guidance to the parties in response to this submission without the need for further

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<sup>3</sup> To the extent the Court would find it helpful, the parties respectfully request oral argument on these issues pursuant to Local Civil Rule 7(f) or a teleconference with the Court as contemplated by Your Honor’s Individual Rule 8 (Dkt. 5).

briefing. Accordingly, Plaintiffs seek a reasonable schedule for completing fact discovery so that this matter can be decided on the merits, as set forth below.

### I. Documents Used or Considered in the Development of the Mattis Plan

Defendants agree that an unredacted version of the Administrative Record (which was originally produced in heavily redacted form) must be produced pursuant to the Opinion and Order. Defendants also agree that documents used or considered in the development of the Mattis Plan that were included on the *Vaughn* indices produced to Plaintiffs in May 2019 must be produced.<sup>4</sup> In the course of meeting and conferring, Defendants invited Plaintiffs to propose document custodians—other than members of the Panel—whose communications fall within the scope of the Opinion and Order. Based on unredacted documents produced to date, Plaintiffs identified 41 individuals who attended Panel meetings, presented to the Panel, prepared material for the Panel’s review, or otherwise worked on what ultimately became the Mattis Report. Those individuals are:

*Adirim, Terry	*Arendt, Christopher	*Barna, Stephanie	*Brown, Gary
Burke, Robert	*Bushman, William	Clardy, Herman	Clifford, James C.
Crandle, Darse	Davis, Lisa	Davis, Gary	*DeMartino, Tony
*Findley, Andrew	Friedman, Andrew C.	Gainey, Andrew	*Gearhart, Lee
Georgemiller, Randy J.	Gleishmann, Rachel	Grosso, Gina	*Hebert, Lernes
Hiller Lauby, Melissa D.	Hoffmann, Matt	Kelly, Bill	Kremer, Kyle
Krueger, Mary	*Mattis, James	*Miller, Stephanie	Mulcahy, Patricia
Narvaez-Woods, Dorothy	Nelson, Michael	Nowell, John	Overbeek-Wager, Erika
Rincon-Zahm, Christina M.	Rocco, Michael	Saner, Jennifer J.	Selva, Paul J.
Sitterly, Dan	Soper, Martha	*Sweeney, Kevin	Wellman, Aaron
*Work, Robert			

Plaintiffs note that as reflected in the Declaration of Robert E. Easton dated August 29,

<sup>4</sup> As noted on pages 2-3 *supra*, Defendants take the position that at least two categories of documents regarding “other events” listed on the *Vaughn* indices do not fall within the scope of the Opinion and Order. Plaintiffs reserve their rights to seek relief from the Court with respect to these documents when Defendants specifically identify them.

2019, filed in the related *Karnoski* litigation, Defendants have already collected and reviewed 13 of these custodians' documents (indicated with asterisks above), whom Defendants characterize as "key individuals." No. 17-cv-01297 (W.D. Wash.) Dkt. 371-1, at 3-4 (Attached hereto as Exhibit A). Defendants do not object to producing these documents on the grounds of undue burden. And Defendants have offered no reason why these documents are not relevant and proportional to Plaintiffs' claims, stating that Defendants believe only documents of "decision makers" should be produced. Accordingly, Plaintiffs respectfully request that the Court order that these 13 custodians' documents,<sup>5</sup> previously withheld on the basis of the deliberative process privilege, be produced.<sup>6</sup>

## II. Data Underlying Defendants' Summary Statistics and Conclusions

Plaintiffs seek discovery into Defendants' proffered justifications for the Mattis Plan, on issues concerning transgender service including the impact on military readiness, medical costs, and unit cohesion. The Court ruled that it requires access to this evidence to determine whether the Mattis Plan "reasonably and evenhandedly regulates the service and accession of transgender military personnel." Dkt. 237 at 22 (citing *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986)).

Accordingly, Plaintiffs seek medical records of service members who have been diagnosed with gender dysphoria since the announcement of the Carter open service policy on June 30, 2016. Plaintiffs seek these documents in order to distinguish between medical or mental health visits that

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<sup>5</sup> Plaintiffs will review the unredacted Administrative Record once it is produced and then continue to meet and confer with Defendants with respect to the remaining 28 proposed custodians. Plaintiffs reserve their rights to seek relief from the Court with respect to these custodians' documents.

<sup>6</sup> By letter dated September 20, 2019, Defendants sought to claw back 29 documents on the basis of privilege, including deliberative process privilege. Defendants have represented that they are re-evaluating that claw-back notice and will advise Plaintiffs by November 22, 2019, which of the identified documents they still seek to claw back.

were administratively required and those that reflect genuine mental health concerns. Plaintiffs request these documents in order to rebut Defendants' assertion that transgender service members are less mentally stable.<sup>7</sup> Plaintiffs also seek the personnel records of these service members, to show that transgender service members do not have a higher rate of nondeployability than do other service members, and to rebut Defendants' argument that transgender service members disrupt unit cohesion.<sup>8</sup> As the population of service members diagnosed with gender dysphoria since June 2016 is discrete (approximately 1500 individuals), Plaintiffs respectfully submit that the burden of collecting and producing these documents is proportional to the needs of the case. And, as this Court has noted, Defendants' concerns for service member privacy<sup>9</sup> can be addressed by redaction or heightened confidentiality designation. Dkt. 237 at 21-22. Plaintiffs offered to accept these documents with a heightened confidentiality designation to eliminate the burden on Defendants of performing redactions of PII.

Plaintiffs have also identified to Defendants specific documents or assertions for which Plaintiffs seek the underlying data. Defendants have agreed to search for and produce documents in each of the categories Plaintiffs have identified except for the personnel files and medical and mental health records of individual service members diagnosed with gender dysphoria. To the extent Defendants conclude that any of this data has already been produced, Plaintiffs respectfully request that Defendants identify it by Bates range. Because of the lack of metadata produced by Defendants, which is the currently the subject of ongoing meet and confers between the parties,

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<sup>7</sup> Plaintiffs also seek these medical records to rebut Defendants' contentions that transgender service members who receive treatment for their gender dysphoria have higher rates of suicide and suicidal ideation.

<sup>8</sup> Defendants have represented that personnel files are unlikely to reflect a complete record of deployments, and may not reflect limited duty status or other potential bases for non-deployability.

<sup>9</sup> Defendants have represented that, by way of example, individual service member social security numbers appear on every page of military medical files.

Plaintiffs are unable to search Defendants' productions by document custodian or isolate documents based on how they were saved in the ordinary course of business. Accordingly, Plaintiffs reserve the right to raise the issues of Defendants' data and metadata production to the Court if the parties are unable to resolve it through the meet and confer process.

### **III. Plaintiffs' Proposed Schedule**

Plaintiffs propose the following schedule:

- December 20, 2019: Defendants complete document production
- March 6, 2020: Parties complete fact depositions
- March 20, 2020: Parties file any discovery motions
- March 27, 2020: Parties exchange affirmative expert reports
- April 24, 2020: Parties exchange rebuttal expert reports
- May 14, 2020: Parties complete expert depositions
- May 15, 2020: Fact discovery ends
- June 5, 2020: Parties file dispositive motions
- August 7, 2020: Parties file motions in limine
- October 5, 2020: Trial

## **DEFENDANTS' POSITION**

### **I. Defendants' Deliberative Documents**

As an initial matter, the scope of the documents Defendants have agreed to produce pursuant to the Court's order is broader than Plaintiffs describe. Defendants have agreed to produce deliberative documents to, from, or presented to voting Panel members in relation to the development of the Mattis plan. Defendants do not intend to limit this production just to communications "among" Panel members, and the forthcoming production will specifically

include all the documents actually considered by the Panel in development of the Mattis plan. However, because the Court specifically found that “Defendants may not assert the deliberative process privilege over documents that were used or considered in the Panel of Experts for Transgender Policy Review’s (the ‘Panel’) development of the Mattis Plan[,],” *see* Dkt. 237 at 2; *see also id.* at 7, 12, 13, 15, Defendants believe that the Court, at least at this time, did not intend to extend its ruling to the deliberative documents of non-Panel members—documents that were not even on Defendants’ *Vaughn* indices or the subject of Plaintiffs’ motion to compel—that were never seen or considered by the Panel.

Plaintiffs originally requested that Defendants expand their forthcoming production beyond the documents on the *Vaughn* indices that were the subject of Plaintiffs’ motion to compel, Dkt. 216, to 41 additional individuals, some of whom played such minor and peripheral roles in the development of the Mattis Plan that they were not even identified by DoD as custodians. Plaintiffs have now narrowed their request to 13 additional individuals, all of whom DoD identified as custodians. However, these individuals still had varying levels of participation with the Panel, and none were voting members of the Panel (although the list does include Secretary Mattis, who was the ultimate decision-maker). For example, only one individual on Plaintiffs’ list was present at the Panel’s final two meetings, where the majority of deliberations took place.

Plaintiffs incorrectly assert that the only consideration for determining whether to add the deliberative documents of these 13 individuals should be the burden on Defendants. In fact, further consideration of the deliberative process privilege would still be required for these materials. Here, Plaintiffs are asking the Court to overrule Defendants’ assertion of the deliberative process privilege as to deliberative documents to and from these 13 additional DoD custodians. This would require the Court to conduct a similar balancing of Plaintiffs’ need for these materials with the

military's countervailing interests in maintaining full and frank discussions regarding contemplated policies and decisions in the future. *See* Dkt. 237 at 17-20. However, these additional deliberative documents, which would not have been seen by voting members of the Panel, are significantly less relevant than documents regarding deliberations and communications of the Panel itself. The deliberative materials to and from the 13 additional individuals Plaintiffs have identified and voting Panel members will already be produced in the November 22, 2019 production, because a voting Panel member would have been either be a recipient or sender of such material. Accordingly, the only additional documents encompassed by Plaintiffs' request are deliberative materials to or from a non-voting attendee of Panel meetings and individuals who were *not* voting members of the Panel. Therefore, the same balancing cannot be applied to the deliberations of these 13 individuals as to the deliberations of Panel members. Further, the balancing test would not be the same among all 13 custodians based on their varying degrees of involvement with the Panel.

Defendants agree that rather than submit briefs to the Court on the meaning of its own Order, the parties would benefit from a telephone conference with the Court for guidance on this issue before Defendants evaluate Plaintiffs' new list of 13 additional individuals.

## **II. Plaintiffs' Request for Approximately 1500 Medical and Personnel Records from Non-Party Service Members**

Plaintiffs seek to compel the production of mental health records and personnel records from approximately 1500 non-party military service members diagnosed with gender dysphoria. Defendants propose further briefing on this topic and suggest the following schedule:

Plaintiffs' motion to compel due by November 15, 2019;

Defendants' opposition due by December 6, 2019;

Plaintiffs' reply due by December 20, 2019.

The Court previously suggested that “[b]efore the Court enters any Order on whether or not the discovery of such information should be permitted, the Court requires additional information pertaining to the burdensomeness of such discovery.” Dkt 237 at 25. Defendants request the opportunity to present the Court with further information regarding the burdens of obtaining approximately 1500 non-party service member medical records from Military Treatment Facilities throughout the world and approximately 1500 military personnel files. *See, e.g.*, Decl. of Terry Adirim, Ex. 5, Dkt. 218-5, ¶ 10; *see also St. John v. Napolitano*, 274 F.R.D. 12, 15-17 (D.D.C. 2011) (noting that before ordering the release of medical records both the burden of producing such records and the harm to privacy interests from disclosure of such records should be weighed against the relevance of the records to the litigation).

Further, in addition to burden and relevancy arguments<sup>10</sup> Defendants request to brief the Court on the application of the psychotherapist-patient privilege to the non-party service member medical records, as Plaintiffs specifically seek mental health records. Plaintiffs’ proposed use of these service member medical records is to “differentiate visits required administratively from visits that reflect actual mental health issues[.]” Pls.’ Reply, Dkt. 222 at 9, but this use would likely necessitate release of mental health communications subject to the psychotherapist-patient privilege.

The psychotherapist-patient privilege protects “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment,” *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996), from compelled production under Rule 501 of the Federal Rules of Evidence, “including from compelled production pursuant to pretrial discovery,” *In re Sealed*

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<sup>10</sup> As acknowledged by Plaintiffs, Defendants would explain in a potential brief why non-party military personnel files are unlikely to contain the information Plaintiffs seek regarding deployability and unit cohesion.

*Case (Medical Records)*, 381 F.3d 1205, 1213 (D.C. Cir. 2004). This privilege is not subject to balancing due to the confidential nature of a patient and psychotherapist’s relationship. In order for the therapist to provide effective treatment, the patient must feel a sense of trust in order to speak candidly. *Jaffee*, 518 U.S. at 10. Because “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege,” *id.* at 17, the D.C. Circuit has “squarely rejected the position that a court should balance the need for relevant information in the particular case before it against the invasion of a patient’s privacy,” *Koch v. Cox*, 489 F.3d 384, 388-89 (D.C. Cir. 2007).

#### **IV. Defendants Proposed Schedule**

Defendants propose the following schedule:

- February 28, 2020: Discovery cut-off;
- April 10, 2020: Deadline to file for Summary Judgment.

Following the production of the Panel’s deliberative materials that Defendants have agreed to produce by November 22, 2019, Defendants believe that the parties can finally conclude the document production phase of discovery, which has already lasted for nearly two years. Defendants assert that an additional three months from that final document production is more than enough time to conduct the remaining fact depositions.

As to expert reports and depositions, the D.C. Circuit recently affirmed, in this case, that “when addressing constitutional challenges to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces...‘the tests and limitations to be applied may differ because of the military context[.]’” *Doe v. Shanahan*, 755 F. App’x 19, 24 (D.C. Cir. 2019) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981), and citing

*Goldman v. Weinberger*, 475 U.S. 503 (1986)). Further, both concurring opinions in *Doe* found that one way in which military cases differ from ordinary civil litigation is a prohibition on outside expert testimony. *Doe v. Shanahan*, 917 F.3d 694, 706 (D.C. Cir. 2019) (Wilkins, J., concurring) (“[T]he Court noted that it was improper for lower courts to consider plaintiff expert testimony that contradicted the military experts about whether the policies at issue were justified under the circumstances.”) (citing *Rostker*, 453 U.S. at 80–81; *Goldman*, 475 U.S. at 509–10); *id.* at 728 (Williams, J., concurring in result) (noting that the Supreme Court in “*Goldman* dismissed plaintiff’s ‘expert testimony’ as ‘quite beside the point,’ 475 U.S. at 509, and in *Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony,’ 453 U.S. at 81.”). Accordingly, there scheduling deadlines for expert reports and depositions are not necessary or proper. Moreover, Defendants assert that this case should be decided on summary judgment and thus it is unnecessary to set a trial date.

October 25, 2019

Respectfully Submitted,

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