

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

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

**PARTIES’ JOINT STATUS REPORT IN RESPONSE  
TO JANUARY 14, 2020 MINUTE ORDER**

The parties appeared for a telephonic conference with the Court on January 14, 2020. During that teleconference, the Court addressed, *inter alia*, Plaintiffs’ requests that Defendants: (i) produce a metadata overlay and (ii) produce specified data. Transcript of Jan. 14, 2020 Conference at 6–7, 21:11–22:16. In the resulting January 14, 2020 Minute Order, this Court directed the parties to “file a Joint Status Report by March 1, 2020<sup>1</sup> indicating that the parties have completed document production. The Joint Status Report shall further set forth a schedule for taking any needed fact depositions.” See January 14, 2020 at 5:10 PM Minute Order.

Defendants served supplemental document productions on January 31, 2020 (10 documents), February 21, 2020 (125 documents, containing data that Plaintiffs had previously requested), and February 25, 2020 (34 documents). Defendants also deposed Plaintiffs’ experts Dr. Mark Eitelberg (on November 20, 2019), General Margaret Wilmoth (on January 22, 2020), and former Under Secretary Brad Carson (on January 28, 2020). Plaintiffs have requested dates

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<sup>1</sup> Because March 1st falls on a Sunday, the parties have filed this joint status report on Monday, March 2nd.

to take the fact depositions of Stephanie Miller and Thomas Dee, and have requested dates to re-open the fact depositions of Colonel Mary Krueger and Martha Soper. Defendants have offered dates for the depositions of these four witnesses. Plaintiffs have also indicated their intention to depose Dr. Terry Adirim, William Bushman, Lernes Herbert, Anthony Kurta, former Secretary James Mattis, General Paul Selva, and Secretary Robert Wilkie. Plaintiffs have not yet requested dates for the remaining depositions, pending completion of Defendants' document production. Plaintiffs have also stated that they intend to make expert disclosures and serve expert reports following fact discovery, in accordance with Fed. R. Civ. P. 26(a)(2).

The parties met and conferred telephonically on February 20, 2020 and February 26, 2020. Defendants indicated to Plaintiffs that they planned to serve a supplemental production by Friday, February 28th. Defendants further indicated that they planned to serve a cross-reference to address, in part, Plaintiffs' request for a metadata overlay, by February 28th.

On February 28, 2020, Defendants produced a supplemental production of three sets of additional documents: (1) Air Force documents that were inadvertently withheld and that are family members of documents produced pursuant to the Court's prior deliberative process order (126 documents); (2) documents collected from the Department of Defense Max.gov intranet site used by members of the Panel of Experts (the "Panel") (42 documents); and (3) documents previously withheld under the deliberative process privilege that Defendants have since determined contain primarily factual information (36 documents).<sup>2</sup> Defendants represented that "[i]n light of the work required to prepare these productions, our ediscovery lab will not be able to

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<sup>2</sup> Defendants identified the third category of documents following their recent supplemental search for underlying data provided to the Panel of Experts. Although the documents are not responsive to that request, Defendants re-reviewed them during their supplemental search for documents responsive to that request and determined that they are primarily factual in nature and may be released.

provide the metadata overlay today that we previously discussed. We anticipate providing that data on Wednesday, March 4.” Defendants also indicated that they would further respond to Plaintiffs’ request for a metadata overlay no later than Wednesday, March 4.

Given that Defendants are still completing their document production and complying with Plaintiffs’ request for a metadata overlay, the parties respectfully request an order to file a Joint Status Report on April 7, 2020, updating the Court on the status of document discovery and setting a schedule for the completion of fact depositions and fact discovery.

Defendants object to Plaintiffs’ intention to proceed with expert discovery. Defendants also object to Plaintiffs’ stated intention to depose former Secretary James Mattis, General Paul Selva, and Secretary Robert Wilkie. The parties’ respective positions on these two issues follow.<sup>3</sup>

## **DEFENDANTS’ POSITION**

### **Expert Testimony and Depositions**

Plaintiffs have designated several expert witnesses and served several expert reports. In addition, Plaintiffs have indicated their intention to serve additional expert reports and possibly designate additional expert witnesses, and to rely on expert testimony at summary judgment. However, Defendants assert that the D.C. Circuit’s prior judgment in this case has foreclosed the use of plaintiff expert testimony in this case. Accordingly, Defendants respectfully request guidance from the Court on this issue prior to the scheduling of expert depositions in order to avoid unnecessary litigation costs for both parties.

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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 this Court’s Individual Rule 8 (Dkt. 5).

In the D.C. Circuit’s prior judgment in this case, the panel relied upon the Supreme Court’s holdings in *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Goldman v. Weinberger*, 475 U.S. 503 (1986), and *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), to hold that “any review must be ‘appropriately deferential’ in recognition of the fact that the Mattis Plan concerned the composition and internal administration of the military.” *Doe v. Shanahan*, 755 F. App’x 19, 24–25 (D.C. Cir. 2019). The Circuit Court noted the Supreme Court’s direction that “when addressing constitutional challenges to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces, . . . while the executive and legislative branches remain ‘subject to the limitations’ of the Constitution, ‘the tests and limitations to be applied may differ because of the military context.” *Id.* (quoting *Rostker*, 453 U.S. at 67). Indeed, the D.C. Circuit explained that “‘courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.’” *Id.* (quoting *Goldman*, 475 U.S. at 507).

Two of the Circuit Judges from the panel further explained their views regarding the Supreme Court’s direction in *Rostker*, *Goldman*, and *Hawaii* to lower courts and “to provide some guidance to the parties and the District Court so that this matter can proceed in an efficient manner.” *Doe v. Shanahan*, 917 F.3d 694, 704–05 (D.C. Cir. 2019) (Wilkins, J. concurring). Judge Williams expressed the view that Plaintiffs should be foreclosed from all further discovery, *id.* at 736–37 (Williams, J., concurring in result), while Judge Wilkins would allow discovery into the “operation and purpose” of the policy including the “government’s justifications” for the policy, *id.* at 705–06 (Wilkins, J. concurring). However, both Judges agreed that the Supreme Court’s precedents foreclosed the use or consideration of plaintiff expert testimony. Citing to *Rostker* and *Goldman*, Judge Wilkins recognized that “the [Supreme] 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.” *Id.* at 706 (Wilkins, J., concurring) (citing *Rostker*, 453 U.S. at 80–81; *Goldman*, 475 U.S. at 509–10). And Judge Williams stated 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.” *Id.* at 728 (Williams, J., concurring in result). Similarly this Court appears to have recognized the restrictions on the use of outside evidence—such as expert testimony from Plaintiffs’ witnesses—established by the D.C. Circuit’s prior judgment in this case. *See* 1/14/20 Hr’g Tr., 30:6–9 (“So I’m cabined to some degree by the Court of Appeals’ opinion which made it pretty clear that going beyond what was considered by the panel, Mattis, or anybody else is a problem.”).

Despite clear direction from both the Supreme Court and the D.C. Circuit in this case, Plaintiffs here have indicated their intention to present the opinions of their own experts regarding the Department’s policy following the completion of fact depositions and to rely on that testimony at summary judgment. But the opinions of Plaintiffs’ experts were never presented to the Panel or Secretary Mattis and therefore it would be improper for this court to consider them. Accordingly, Plaintiffs seek to have this court repeat the errors of the district courts in both *Rostker* and *Goldman* that the Supreme Court and the D.C. Circuit have specifically counselled against. Because the Court’s guidance on the use of expert testimony will directly impact the scheduling of depositions in March and April, 2020 the Government respectfully requests a ruling from the Court regarding the use of plaintiff expert testimony in order to avoid the unnecessary litigation costs and scheduling delays from having to depose Plaintiffs’ putative experts.

### **Depositions of High Ranking Officials**

In 2018, Plaintiffs deposed the following five individuals: Martha Soper, Mary Krueger, Robert Burns, Robert Chadwick, and Jennifer Hay. Because Plaintiffs have already taken five depositions in this case, they are limited to taking ten additional depositions per the scheduling order entered by the Court prior to the issuance of the D.C. Circuit's judgment and concurring opinions. *See* Dkt. 71.

Plaintiffs have recently indicated their intention to depose (or, in two cases, re-depose) the following 11 current or former Department of Defense officials:

- Former Secretary of Defense James Mattis
- Current Secretary of Veterans Affairs Robert Wilkie
- Former Vice Chairman of the Joint Chiefs of Staff, General Paul Selva
- Dr. Terry Adirim
- William Bushman
- Lernes Hebert
- Anthony Kurta
- Mary Krueger
- Martha Soper
- Stephanie Miller
- Thomas Dee

Plaintiffs requested dates for the depositions of four of these individuals (Stephanie Miller, Thomas Dee, Mary Krueger, and Martha Soper,), and Defendants have provided dates for the depositions of Ms. Miller and Mr. Dee in March and Ms. Soper and Colonel Krueger in April. Because Plaintiffs have already deposed Ms. Soper and Colonel Krueger, Defendants have informed Plaintiffs that Defendants will agree to reopen their depositions, but Defendants will make these witnesses available only for four hours.

The 11 additional depositions Plaintiffs seek is a much greater discovery burden on the Department of Defense than is necessary to answer questions “about how [the 2018 policy] operate[s] or what interests [it] serve[s].” *Doe*, 917 F.3d at 706 (Wilkins, J., concurring). However, three of the depositions Plaintiffs seek are particularly troubling and implicate the Court’s prior ruling on depositions of high-ranking officials.

In April 2018, Plaintiffs sought to depose then-Vice Chairman of the Joint Chiefs of Staff, General Paul J. Selva, and Defendants objected to that deposition. On April 16, 2018, the Court ruled that Defendants would not have to make General Selva available for deposition because he was a high-ranking official and Defendants had made Anthony Kurta, the then-Deputy Assistant Secretary of Defense for Military Personnel Policy (who chaired the Panel of Experts) available for a deposition, and Mr. Kurta could speak with authority to the topics Plaintiffs had identified as the reason for needing to take General Selva’s deposition.<sup>4</sup> *See* Dkt. No. 112. The Court ruled that before taking the deposition of General Selva, Plaintiffs must first depose Mr. Kurta and “after deposing Mr. Kurta [if] 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.” *Id.*

In addition to again seeking the deposition of General Selva, without following the Court’s Order by first deposing Mr. Kurta or any other Department of Defense official involved in formulation of the Department’s 2018 policy, Plaintiffs also seek the deposition of the current Secretary of Veterans Affairs Robert Wilkie and former Secretary of Defense James Mattis. As

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<sup>4</sup> Contrary to Plaintiffs’ assertion, Mr. Kurta can speak authoritatively of Panel proceedings following Secretary’s Wilkie’s confirmation as USD (P&R) as he continued to be involved in those proceedings. Defendants believe this particular factual dispute can be resolved at Mr. Kurta’s deposition.

we informed Plaintiffs, deposing the Secretary of Veterans Affairs, 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). This is because constitutional separation-of-powers principles are implicated when parties litigating against federal agencies attempt to ascertain the thoughts and mental processes by which high-ranking agency officials exercise their official discretion. *See Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 268 n.18 (1977) (“[J]udicial inquiries into legislative or executive motivation represents a substantial intrusion into the workings of other branches of government.”); *United States v. Morgan*, 313 U.S. 409, 422 (1941) (“Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected.” (internal citations omitted)). And liberal access to high-level officials during discovery would likely exert a chilling effect on such officials, making them less willing during the decision-making process to explore and discuss all available options, including controversial ones. *See Walker v. NCNB Nat’l Bank of Fla.*, 810 F. Supp. 11, 12 (D.D.C. 1993) (“[S]ubjecting officials to interrogation about how they reached particular decisions would impair that decision-making process by making officials less willing to explore and discuss all available options, no matter how controversial.”). Plaintiffs have not shown extraordinary circumstances necessary to overcome that presumption. Specifically, Plaintiffs have not established that the Secretary Wilkie 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). Defendants informed Plaintiffs that, to the extent that Secretary Wilkie 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. Accordingly, because Secretary Wilkie is a current, high-ranking government official with extraordinary demands on his time and focus, he should not be required to submit to depositions in this matter, particularly when other means of discovery of the same information is available.

The same reasoning applies to preclude the depositions of Secretary Mattis and General Selva. The apex doctrine “is no less applicable to former officials than to current officials.” *Fed. Deposit Ins. Corp. v. Galan-Alvarez*, No. 1:15-MC-00752 (CRC), 2015 WL 5602342, at \*4 (D.D.C. Sept. 4, 2015). This is so because (1) “[t]he integrity of administrative proceedings and the underlying decisionmaking process of agency officials are just as important where the official to be questioned no longer serves in the same position” and (2) “‘indiscriminate depositions of highranking government officials would . . . likely discourage’ people ‘from accepting positions as public servants’ irrespective of whether those deposed were current or former officials.” *Id.* (citations omitted). As with Secretary Wilkie, Plaintiffs have not demonstrated the extraordinary circumstances necessary to depose Secretary Mattis or General Selva. Because both Secretary Mattis and General Selva left the Government prior to the implementation of DoD’s policy in April 2019, neither can speak to “how [the 2018 policy] operate[s].” *Doe*, 917 F.3d at 706 (Wilkins, J., concurring). And other individuals can provide testimony concerning “what interests [the 2018 policy] serve[s].” *Doe*, 917 F.3d at 706 (Wilkins, J., concurring). Accordingly, because Secretary Mattis and General Selva are former high-ranking government officials, they should not be required to submit to depositions in this matter, particularly when other means of discovery of the same information is available.

Plaintiffs' failure to identify extraordinary circumstances necessary to take the depositions of Secretary Wilkie, Secretary Mattis, and General Selva should preclude those depositions in their entirety. At the very least, before Plaintiffs be permitted to seek the deposition of Secretary Wilkie, Secretary Mattis, or General Selva they should be required to take the depositions of Mr. Kurta or other lower ranking Department of Defense individuals and then follow the procedures previously identified by the Court in its April 16, 2018 Order.

### **PLAINTIFFS' POSITION**

#### **I. Defendants Have No Basis to Preclude Plaintiffs from Serving Expert Reports Following the Close of Fact Discovery.**

Defendants have no basis to ask this Court to preclude Plaintiffs from serving additional expert reports following the close of fact discovery. Nothing in the judgment of the D.C. Circuit (or any other precedent) forecloses expert discovery from proceeding in this case. To the contrary, the D.C. Circuit panel opinion and the concurring opinion set forth by Judge Wilkins that resulted in the dissolution of this Court's preliminary injunction recognized the limitations of the record that was before them, anticipating further development of the record before final resolution of the case. *Doe*, 917 F.3d at 706. Contrary to the government's position, Judge Wilkins did not opine that expert discovery would be inappropriate here. *See id.* Rather, he set forth his analysis of *Rostker* and *Goldman* as a *counterpoint* to Judge Williams' view, concluding that Judge Williams "cites no case that has adopted the astounding rule that the government is immune from all discovery explaining the operation and purpose of its military policies." *Id.* And as this Court has repeatedly held, "[o]n the current record, the level of deference to be applied to the Mattis Plan remains unclear. Additional discovery is needed to determine if the [Mattis] Plan is the product

of considered military decision-making that reasonably and evenhandedly regulates the matter at issue.” Dkt. 237 at 1–2.

This Court’s view is consistent with Judge Wilkins’ guidance that:

our review involves the careful assessment of a number of factors, including whether the policy is facially neutral, whether it targets a suspect class, whether the class is similarly situated to others affected, whether the policy was motivated by animus, whether it infringes upon a fundamental right (and, if so, how), what military purposes are furthered by the policy, whether those purposes are legitimate, and whether Congress or the Executive used considered professional judgment and accommodated the servicemembers’ rights in a reasonable and evenhanded manner, given the rights at issue.

*Doe*, 917 F.3d at 704 (Wilkins, J., concurring).

Plaintiffs intend to offer expert opinions on the factors articulated in Judge Wilkins’ concurrence. And, once this Court determines the level of deference and the standard of review that will apply to Plaintiffs’ claims, the Court can apply that lens to Plaintiffs’ expert opinions and weigh them accordingly. Contrary to Defendants’ contention, nothing in the D.C. Circuit panel opinion or Judge Wilkins’ concurrence says—or even implies—that Plaintiffs should be precluded from offering relevant expert testimony. It would be extraordinary and unprecedented for the Court to foreclose all expert testimony and related discovery at this juncture, given the issues that the D.C. Circuit has identified as unresolved.

Finally, this Joint Status Report is not a proper vehicle for putting this issue before the Court. There is no bar to Plaintiffs serving Defendants with expert reports. If Defendants elect not to depose Plaintiffs’ designated experts, they do so at their own risk. This Court will have the opportunity to consider the weight and relevance of Plaintiffs’ proffered expert testimony, when

dispositive motions are filed or at trial. It would be premature to preclude Plaintiffs now from relying on their own experts to support their claims at some future point in time.<sup>5</sup>

## **II. Defendants' Objections Regarding Fact Depositions Are Improper And, In Any Event, Are Not Yet Ripe.**

Defendants selectively quote the judgment of the D.C. Circuit to argue that depositions of three key witnesses—former Secretary James Mattis, former Vice Chairman of the Joint Chiefs of Staff Paul Selva, and current Secretary of Veterans Affairs Robert Wilkie—should not proceed. The government ignores Judge Wilkins' guidance, discussing the Mattis Plan's requirement that servicemembers remain in their birth sex, that “[c]ompelling military or executive officials to explain the operation and purpose of this requirement would not improperly intrude upon such mental processes.” *Doe*, 917 F.3d at 705 (Wilkins, J., concurring). Defendants acknowledge, as they must, that Plaintiffs are entitled to examine witnesses “about how the [Mattis] policy operates or what military purposes it serves,” *id.* at 705–06, but maintain that deposing Anthony Kurta, who chaired the Panel, will fully satisfy that line of inquiry. The government's position is flawed for several reasons.

*First*, Mr. Kurta served as the Acting Under Secretary of Defense for Personnel and Readiness only until November 30, 2017, when Robert Wilkie's nomination to that post was confirmed by the Senate and he replaced Mr. Kurta in that position and as Chair of the Panel. The Panel of Experts continued meeting throughout December 2017 and January 2018, producing a briefing to Secretary Mattis during the week of January 15, 2018. Notably, Defendants have confirmed that no minutes were created for the final four Panel meetings in December and January, and documents produced by Defendants reflect that attendance at later Panel meetings, unlike prior

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<sup>5</sup> To the extent the Court considers issuing a ruling on this issue, Plaintiffs respectfully request the opportunity for formal briefing.

ones, was restricted to members of the Panel during deliberations. Mr. Kurta cannot testify as to the discussions during any of those final meetings because Mr. Wilkie had replaced him as Chair of the Panel.

*Second*, Secretary Mattis' September 14, 2017 memorandum directed then-Deputy Secretary of Defense Patrick Shanahan and General Selva to "develop an Implementation Plan on military service by transgender individuals" and propose for Secretary Mattis' review "recommendations" concerning such implementation. Consistent with that direction, Defendants have produced documents evidencing a December 15, 2017 briefing prepared by the Panel for Deputy Secretary Shanahan and General Selva. An email from Panel member Thomas Dee that the government has produced since this Court's ruling on deliberative process privilege, Dkt. 237, reflects that Deputy Secretary Shanahan and General Selva "did not accept the panel's recommendations based on the data that was presented." USDOE\_00065524\_0001. Mr. Dee also wrote that General Selva "doesn't believe [Secretary Mattis] can defend the recommendations on the Hill or before the press." *Id.* Plaintiffs may need to depose General Selva, now retired, to explore his views of that briefing and his opinion of the "operation and purpose" of the Mattis Plan, without infringing on deliberative process. *Doe*, 917 F.3d at 705 (Wilkins, J., concurring).

*Third*, former Secretary Mattis was the ultimate decision-maker of the final policy and Plan that bear his name. Defendants have withheld the overwhelming majority of his communications on the basis of deliberative process privilege. Depending on the information Plaintiffs can secure through other depositions, Plaintiffs may need to explore Secretary Mattis' own views of the operation of the policy and the "military purpose" that it serves. *Id.* at 705–06; *Byrd v. District of Columbia*, 259 F.R.D.1, 6–8 (D.D.C. 2009) (holding depositions of senior officials appropriate when they "likely have information that no other source could provide since only they can testify

to their own motives”). As Judge Wilkins wrote, “[i]t is one thing to defer to the government’s justification for military policy; it is quite another not to require the government to explain fully, under oath, that justification. The former custom of deference is reasonable, but the latter is imprudent.” *Id.* at 706.

There is no controlling precedent that precludes the fact depositions Plaintiffs seek. *See Waldie v. Schlesinger*, 509 F.2d 508, 510 n.1 (D.C. Cir. 1974) (denying summary judgment where affidavits of government witnesses were “ambiguous” and “conclusory” in explaining military policies); *Byrd*, 259 F.R.D. at 6–8; *see also* Brief for Respondents, *Goldman v. Weinberger*, 475 U.S. 503 (1986), 1985 WL 669077, at \*4–5 (“At trial, Air Force witnesses explained why the extraordinarily detailed regulation of the official uniform worn by its personnel is deemed essential to the accomplishment of the Air Force’s mission.”); Brief for Appellant, *Rostker v. Goldberg*, 453 U.S. 57 (1981), 1981 WL 390367, at \*30 (“[H]igh level military personnel who testified in this case were of the view . . . that developing methods of warfare employed by the United States and its allies would require more combat intensive forces than those that had been required during past military conflicts.” (citing deposition testimony)). Defendants recite black letter law regarding the apex doctrine, but the cases upon which they rely are distinguishable because the depositions sought therein were of senior officials not responsible for the challenged decisions, and information regarding those claims could be obtained from other more knowledgeable sources within the defendant agencies.<sup>6</sup> Nor were plaintiffs in those cases bringing claims of

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<sup>6</sup> *In re Cheney*, 544 F.3d at 314 (claims regarding the Vice President’s misclassification of documents under the Presidential Records Act); *Simplex Time Recorder Co.*, 766 F.2d at 586 (appeal of OSHA order); *Galan-Alvarez*, 2015 WL 5602342 at \*4 (subpoenas to senior FDIC officials in suit against former directors and officers of failed Puerto Rican bank); *Kelley*, 2015 WL 13648073, at \*1 (Privacy Act claims against DOD and the FBI); *Alexander*, 186 F.R.D. at 4 (claims for alleged misuse of FBI files); *Walker*, 810 F. Supp. at 12 (subpoena to EEOC regarding a determination of reasonable cause of employment discrimination).

unconstitutional discrimination requiring discovery into the intent of senior governmental decision-makers. *Cf. In re Subpoena Duces Tecum Served on the Off. of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (holding that the “deliberative process privilege is not appropriately asserted . . . when a plaintiff’s cause of action turns on the government’s intent.”).

In any case, the government’s request for relief from the Court on this issue is unripe and premature. Given the seniority of these three witnesses, and the fact that Defendants continue to produce documents, Plaintiffs have yet to notice any of these depositions. Plaintiffs intend, consistent with this Court’s direction, not to notice any of the depositions of General Selva, Secretary Wilkie, or former Secretary Mattis, before completing Mr. Kurta’s deposition. Dkt 112. Following Mr. Kurta’s deposition, the parties can again meet and confer and Defendants can determine whether to seek a protective order from this Court at that time.<sup>7</sup>

March 2, 2020

Respectfully Submitted,

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<sup>7</sup> To the extent the Court considers issuing a protective order on this issue, Plaintiffs respectfully request the opportunity for formal briefing.

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