The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

JOINT STATUS REPORT FOR MAY 13, 2020 STATUS CONFERENCE

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In advance of the May 13, 2020 status hearing, the parties respectfully submit the following Joint Status Report.

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S STATEMENT

In this Joint Status Report, Plaintiffs provide the Court an update regarding the following issues:

1. Proposed adjustments to the current May 29 fact discovery cutoff necessitated by delays in completing fact discovery;
2. Deposition scheduling;
3. Scheduling issues arising from the depositions of Plaintiffs' hybrid fact and expert witnesses, former Secretary of the Air Force, Deborah James, and former Secretary of the Navy, Ray Mabus; and
4. Overview of pending discovery motions.

A. Fact Discovery Deadline and Case Schedule

Plaintiffs continue to face roadblocks in completing fact discovery by the current May 29, 2020 deadline. Most of those roadblocks are of the Government's making—filing a mandamus petition and refusing to produce tens of thousands of documents on grounds of deliberative process privilege; extensive objections to Plaintiffs' Rule 30(b)(6) Notice; threatened motions to quash subpoenas directed to military decision-makers at the center of this dispute; and preemptively stating it will refuse to permit witnesses to answer questions at depositions over deliberative process privilege objections. Other roadblocks and delays have resulted from the COVID-19 pandemic. Plaintiffs respectfully request that the Court lift the May 29 fact discovery deadline and order the parties to report on the progress of discovery at the next status conference in June. The reasons for this request are as follows.

First, the Government continues to withhold tens of thousands of documents concerning the decision to impose the Ban, and the circumstances that led to that decision, pursuant to the deliberative process privilege. While the parties await a ruling by the Ninth Circuit on the Government's mandamus petition and motion to stay, Plaintiffs recently filed a LCR 37 motion proposing a framework by which the Special Master would review a random sample of

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documents withheld by the Government pursuant to the deliberative process privilege in order to determine whether the Government has been properly invoking the privilege in the first place, and if not, recommend guidance to the Government as to the types and/or categories of documents to which the privilege does not apply. (*See* Dkt. 497.) The Plaintiffs proposed that the Court would then review the documents and the Special Master's recommendations and, as to any documents it deems the privilege was properly invoked, determine whether the privilege has been overcome, applying the *Warner* factors. If this review confirms that the Government has been improperly invoking the privilege as to documents to which the privilege does not apply, the Court's orders could provide a basis for a further motion (and order) that the Government promptly review its privilege claims as to the remaining documents withheld on the grounds of deliberative process privilege in light of the Court's rulings and, on a rolling basis, produce any documents as to which the privilege is no longer claimed, with the Special Master to conduct an *in camera* review, again on a rolling basis, of any documents as to which the Government continues to claim the privilege. Should the Court decide this process is beneficial in resolving the parties' long-standing dispute over the Government's deliberative process privilege assertions, such further reviews and rolling productions will take time to complete. However, Plaintiffs believe that such a review is likely to result in the production of documents that are highly relevant to their constitutional challenge to the Ban, including the Government's claims that the Ban was unrelated to the ban announced by the President via Twitter on July 27, 2017 and formalized in the August 25, 2017 Presidential Memorandum.

Second, the Government recently informed Plaintiffs that it intends to move to quash Plaintiffs' deposition subpoenas directed to four critical witnesses: former Secretary of Defense James Mattis; former Vice Chairman of the Joint Chiefs of Staff Paul Selva; former Under Secretary of Defense for Personnel and Readiness Robert Wilkie; and former Admiral William Moran. These witnesses are critically important to Plaintiffs' case. The proposed Ban was sent to President Trump under Secretary Mattis' signature, and Defendants maintain that Mattis was personally involved in and responsible for the Ban (which they call the "Mattis policy"), and that it represents his personal and independent military judgment. (*See, e.g.*, Defs.' Pet. to S. Ct. for

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Cert. Before Judgment, *Trump v. Karnoski*, No. 18-676, 2018 WL 6169245, at *8–9 (Nov. 23, 2018) (Ban "reflected 'the exercise of Secretary Mattis's independent judgment"); *18 (seeking "a prompt resolution of the validity of Secretary Mattis's proposed policy"); *24–25 (Ban "reflects the exercise of Secretary Mattis's 'independent judgment'").) Former Vice Chairman of the Joint Chiefs of Staff, Paul Selva, in turn was one of two senior DoD officials that Mattis directed "to lead" DoD "in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives" in the President's August 25, 2017 Memorandum, and, supported by the "Panel of Experts," to recommend to Mattis the policy that would effect the President's directives (what Defendants call the "Mattis policy"). (*See* 9/14/2017 Terms of Reference, Ex. 1.) Wilkie was one of two military officials who chaired the Panel, and according to Defendants, one of the lead authors of the February 2018 Report. And, Moran was a very senior and active member of the Panel who was an author or recipient of a number of the more relevant communications concerning the Panel produced by Defendants. Although Plaintiffs informed the Government on March 2, 2020 that they intended to depose Mattis, Selva, and Wilkie, and on March 27, 2020 requested the deposition of Moran, the Government did not inform Plaintiffs until April 10, 2020 that it will move to quash the subpoenas directed to these four witnesses, all of whom are former Department of Defense officials. Since that time, Plaintiffs determined where these witnesses currently live and work in order to ascertain where the depositions can take place, and identified locations near those localities at which the depositions can be taken. Plaintiffs recently served these subpoenas, but do not expect motion practice concerning the subpoenas to conclude until July at the earliest, given that motion practice will necessarily occur in at least two different jurisdictions (E.D. Va. and M.D.N.C.).

Third, the Government has lodged extensive objections to Plaintiffs' Rule 30(b)(6) Notice, causing delay in scheduling this deposition, which Plaintiffs had noticed as their first deposition in order to obtain information concerning a number of key subject matters that would help them develop and focus their examination of subsequent deponents. While Plaintiffs served the Government with their Rule 30(b)(6) Notice on March 9, 2020, it was not until nearly six weeks

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later, on April 17, 2020, that the Government served a 22-page letter of objections, which are now the subject of Defendants' forthcoming LCR 37 motion for protective order. One common objection across many of the Rule 30(b)(6) topics, which is raised by Defendants' motion, is the Government's intention to instruct witnesses not to answer questions that it believes call for information subject to the deliberative process privilege. This is notwithstanding that the Court already ruled at the February 3, 2020 status conference that "if there is an objection based upon deliberative process, the objection is made, then the question is answered, and you seal the deposition. And if we have to, we will go over line-by-line as to what comes in and what doesn't in terms of public testimony." (2/3/2020 Hr'g Tr., Dkt. No. 412, at 64:14–24.) The Government contends this Order was somehow stayed by the Ninth Circuit's subsequent administrative stay, despite the fact that the Order is nowhere referenced in the Government's mandamus petition. The Government has also asserted numerous other objections that likewise have no basis in law—such as the bizarre proposition that a party cannot take a Rule 30(b)(6) deposition on issues that are also the subject of interrogatories and document requests—all of which must be resolved by this Court and have delayed the Rule 30(b)(6) deposition.

Finally, the COVID-19 pandemic has caused certain depositions of Government witnesses to be delayed into the summer. Plaintiffs had at least five depositions scheduled in March and April that had to be canceled due to the pandemic. Even after the Court urged the parties to use teleconferencing resources to conduct depositions, scheduling depositions in April and May became untenable, in part because of the witnesses' own duties to respond to COVID-19. The parties have confirmed dates for depositions to take place in June should the Court approve extension of the discovery deadline, but some key witnesses may be unavailable for longer than that. For example, the Government has notified Plaintiffs that Colonel Mary Krueger is the Hospital Commander of the Tripler Army Medical Center, which is tasked with leading the military medicine response to COVID-19 in Hawaii. Due to these responsibilities, the Government has advised that it is unable to provide dates for her deposition until the pandemic has stabilized. At the same time, Plaintiff-Intervenor's state agencies are overloaded with requirements in response to the pandemic while other programs are closed or significantly

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inaccessible at this time.

In sum, due to the above delays in completing discovery, Plaintiffs request the May 29, 2020 fact discovery deadline be lifted, and that the parties be ordered to update the Court on the status of discovery at another status conference in early June. Plaintiffs believe these issues are so integral to this case that a further delay of fact discovery is worth the likely impact to the October 2020 trial setting. Plaintiffs are committed to ensuring ensuring that the Court and any reviewing court have the benefit of a full record at trial, even if it requires a later trial date.

B. Deposition Scheduling

The parties have confirmed the following depositions:

- **June 3: Dr. Terry Adirim**, former Principal Deputy Assistant Secretary of Defense Health Affairs
- **June 4: Stephanie Miller**, Director of Military Accession Policy
- **June 10: Kevin Cron**, Defendants' hybrid fact/expert witness, Preventive Medicine Officer for United States Central Command
- **June 11: Thomas Dee**, Panel member and Undersecretary of the Navy
- **June 12: Martha Soper**, Assistant Deputy for Health Policy Office of the Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness
- **June 17: Christopher Meyering**, Defendants' hybrid fact/expert witness, Command Surgeon and the Waiver Surgeon, U.S. Army Recruiting Command
- **June 23: Dr. George Brown**, Plaintiffs' expert witness
- **June 24: Stephen Pflanz**, Defendants' hybrid fact/expert witness, Director of Psychological Health, Air Force Medical Support Agency

Plaintiffs have also requested the depositions of former Secretary of Defense James Mattis, former Vice Chair of the Joint Chiefs Paul Selva, former Undersecretary Robert Wilkie, Admiral William Moran, former Undersecretary Anthony Kurta, Commander Mary Krueger, William Bushman, and Assistant Secretary Lernes Hebert. As described above, the Government is moving to quash the subpoenas issued to Mattis, Selva, Wilkie, and Moran, and is deferring setting a date for Krueger given her pandemic response duties. The parties had previously set

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dates for Kurta and Hebert, but given the above delays, Plaintiffs wish to defer those depositions until later in the summer, along with the Bushman deposition, to permit the Ninth Circuit additional time to rule on the pending mandamus petition and the Special Master to review withheld documents, if so ordered.

C. Depositions of Plaintiffs' Expert Witnesses Mabus AND James

In their Joint Status Report and during the February 3, 2020 hearing, Plaintiffs flagged that one issue resulting from the Government's refusal to produce Carter Working Group documents was the Government's attempt to impugn the conclusions of, and the process used by, the Carter Working Group during the depositions of Plaintiffs' experts General Margaret Wilmoth and former Acting Under Secretary of Defense Brad Carson, without having first provided all relevant Carter Working Group documents. (*See, e.g.*, Dkt. No. 408 at 4–5; 2/3/2020 Hr'g Tr., Dkt. No. 412, at 27:2–41:25.) Plaintiffs expressed concern that the Government would again attempt to undermine the Carter Working Group during the depositions of former Secretary of the U.S. Navy Raymond Mabus and former Secretary of the U.S. Air Force Deborah James, both of whom have submitted expert reports on behalf of Plaintiffs. (2/3/2020 Hr'g Tr., Dkt. No. 412, at 28:3–7 ("Your Honor, it's just fairness. We can't respond to these arguments attacking the credibility of the Carter working group that came to the opposite conclusion than the panel did just two years before, unless they give us the documents.").) After hearing the parties' arguments regarding whether these depositions may proceed before all ordered Carter Working Group documents are produced, the Court stated:

> [Defendants] can decide that you're not going to take the deposition. But if you're going to take the deposition and talk to them about what they remember, or say that's not what this document says, you've got to give them a full set of documents so that they can prepare.

(*Id*. at 36:15–19.) On February 5, 2020, counsel for the Government sent an email memorializing the Government's understanding of the Court's order:

> During a hearing this past Monday in Karnoski, the court stated that Defendants would not be permitted to take further depositions of Plaintiffs' witnesses in that case until Defendants had produced certain additional deliberative materials related to the development of the Carter policy. As a result, and to avoid having to depose Mr. Mabus more than once, we will need

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> to reschedule his deposition . . . .

Thereafter, the Government sought mandamus review by the Ninth Circuit of this Court's orders to produce Carter Working Group documents, and also requested an administrative stay of the Court's Order, which the Ninth Circuit granted. By requesting a stay of the production of Carter Working Group documents, and in turn having its request for an administrative stay granted, the Government necessarily delayed its ability to take the depositions of Secretaries Mabus and James until the Ninth Circuit has ruled, and, if the Government's mandamus petition is denied, the Carter Working Group documents are produced.

Undeterred, on April 20, 2020, counsel for the Government requested that Plaintiffs make Secretaries Mabus and James available for a deposition prior to the Ninth Circuit's decision on the mandamus petition:

> [P]lease let us know Plaintiffs' position on whether Defendants can take the depositions of Secretary Mabus and Secretary James without disclosing the Carter policy documents that are currently subject to the mandamus petition pending with the Ninth Circuit. Defendants' position is that the Ninth Circuit has stayed the district court's February 3, 2020 Order in its entirety, including the order that Defendants may not take further depositions prior to production of additional Carter policy deliberative documents. *See* ECF No. 415. If Plaintiffs disagree, please let us know so we can raise this issue with the district court and then possibly with the Ninth Circuit.

The Government therefore appears to be arguing that although its mandamus petition and motion to stay only requested relief with respect to the Court's Orders to produce certain documents (RFP Nos. 15 and 29), the Ninth Circuit administratively stayed ***all*** orders and directives made by this Court at the February 3, 2020 status conference, including the Order regarding the depositions of Plaintiffs' experts Mabus and James. Plaintiffs respectfully disagree, and contend that the depositions of Secretaries Mabus and James should be deferred until the Ninth Circuit decides Defendants' mandamus petition, and if that petition is denied, the Government produces the Carter Working Group documents.

D. Pending Discovery Motions

For the Court's convenience, Plaintiffs provide the following summary of pending discovery motions:

a. the Government's motion to extend time to respond to this Court's Order regarding Plaintiffs' RFP 44 (Dkt. No. 485);

b. Plaintiffs and Plaintiff-Intervenor's LCR 37 motion to extend the deadline to file discovery-related motions (Dkt. No. 490);

c. Plaintiffs' LCR 37 motion requesting review of the Government's deliberative process privilege claims (Dkt. No. 497); and

d. the Government's forthcoming LCR 37 motion for protective order regarding Plaintiffs' 30(b)(6) Notice.

DEFENDANTS' STATEMENT

I. Discovery Motions

As Plaintiffs point out, there are several discovery motions currently pending before the Court. *See* Dkts. 485, 490, 497. Defendants also anticipate filing this week an LCR 37 motion for protective order related to Plaintiffs' proposed Rule 30(b)(6) deposition of the Department of Defense. Defendants respectfully refer the Court to Defendants' briefing on these motions for statements of Defendants' positions and arguments.

In addition, Defendants anticipate filing motions to quash the depositions of current Secretary of Veterans Affairs Robert Wilkie,[1] former Secretary of Defense James Mattis, former Vice Chief of Naval Operations William Moran, and former Vice Chairman of the Joint Chiefs of Staff Paul Selva. Defendants disagree with Plaintiffs' assertion that these individuals are "critical witnesses" or that it is proper to depose such high-ranking current and former government officials. However, because these witnesses are not located in the Western District of Washington, Defendants anticipate filing motions to quash in other districts and this Court need not address these issues. *See* Fed. R. Civ. P. 45 (d)(3)(A) (authorizing "the court for the district where compliance is required" to "quash or modify a subpoena").

II. Currently Scheduled Depositions

Many of Plaintiffs' and Defendants' witnesses in this case are also witnesses in the related

[1] Plaintiffs describe Mr. Wilkie as the "former Under Secretary of Defense for Personnel and Readiness," Pls.' Statement 2, but that is not his current position. He is now a Cabinet Secretary.

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cases around the country. Accordingly, in an effort to prevent witnesses from unnecessarily facing multiple depositions, Defendants have coordinated with the Plaintiffs across all four related cases in scheduling depositions.[2] Using this process, Defendants have scheduled the following depositions.

- **June 3: Dr. Terry Adirim**, former Principal Deputy Assistant Secretary of Defense Health Affairs
- **June 4: Stephanie Miller**, Director of Military Accession Policy
- **June 10: Kevin Cron**, Defendants' hybrid fact/expert witness
- **June 11: Thomas Dee**, Panel member and Undersecretary of the Navy
- **June 12: Martha Soper**, Assistant Deputy for Health Policy Office of the Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness
- **June 17: Christopher Meyering**, Defendants' hybrid fact/expert witness,
- **June 23: Dr. George Brown**, Plaintiffs' expert witness
- **June 24: Stephen Pflanz**, Defendants' hybrid fact/expert witness

In addition, within the past few weeks the parties in the various cases scheduled depositions of Anthony Kurta, formerly performing the duties of Deputy Under Secretary of Defense (Personnel & Readiness), and Lernes Hebert, Deputy Assistant Secretary of Defense for Military Personnel Policy, to take place on June 5 and June 8, respectively. However, Plaintiffs now state that they do not intend to proceed with these scheduled depositions. It is unclear what has changed. Plaintiffs state that they would like to first see whether they can obtain further deliberative documents in light of the mandamus petition and the special master's appointment. But Plaintiffs were aware of both the mandamus petition and the special master when they scheduled these depositions just a few weeks ago. Moreover, Plaintiffs have already received every deliberative document in the possession of Panel of Experts members that relate to the Panel's deliberations, including Mr. Kurta's documents. It is unclear why Plaintiffs now think they cannot proceed with Mr. Kurta's deposition at least.

[2] Defendants have not coordinated depositions with the Plaintiff in the newly filed case in the District of Massachusetts, *Doe v. Esper*, No. 20-cv-10530 (D. Mass.), because that case is not in discovery.

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Finally, as Defendants stated during the April 2, 2020 hearing, Colonel Mary Krueger is unable to provide dates for a deposition during the current COVID-19 crisis. (4/2/2020 Hr'g Tr. 31:5–13.) Colonel Krueger is Hospital Commander of the Tripler Army Medical Center, and is tasked with leading the military medicine response to COVID-19 in the state of Hawaii. Colonel Krueger has in fact already been deposed in these cases, in April 2018. However, Defendants have agreed that she may sit for an additional deposition, once she is available.

III. Depositions of Plaintiffs' Witnesses

During the February 3, 2020 status conference, the Court issued an oral ruling that Defendants were required to produce certain deliberative material responsive to Plaintiffs' RFP 15 related to the development of the Carter policy. (2/3/2020 Hr'g Tr. 40:8–11.) The Court then ruled further: "And I suggest that they [Defendants] don't get to take anybody's deposition further until they do turn over the material." (*Id.* at 40:8–10.)

Defendants subsequently filed a petition for a writ of mandamus with the Ninth Circuit, and the Ninth Circuit issued an order staying the "[t]he district court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in this petition." Order, Dkt. 415. Plaintiffs now split hairs by arguing that the mandamus petition challenged only the Court's February 3 order to produce Carter-era deliberative documents, and not the February 3 order to refrain from further depositions until those documents are produced. But those oral rulings are inextricably linked: a ruling to refrain from taking depositions until Defendants complete a production makes little sense unless Defendants are also required to complete the production. Moreover, under Plaintiffs' interpretation, Defendants would not be permitted to take *any* depositions until the mandamus petition is resolved—seemingly at odds with the Court's recent instruction to proceed with depositions "right away" and by videoconference if necessary. (4/2/2020 Hr'g Tr. 30:12–13.)

As a way forward, Defendants propose the following: If Plaintiffs wish to defer depositions of certain witnesses who served as government officials during the development of the Carter policy—such as the depositions of former Secretaries Mabus and James—until after the Ninth Circuit rules on the mandamus petition, Plaintiffs should be permitted to do so. In the

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meantime, however, Defendants should be permitted to move forward with depositions of other witnesses who were not involved in the development of the Carter policy, such as Plaintiffs' experts Dr. George Brown and Dr. Jody Herman. Dr. Brown's deposition is already scheduled for June 24. And on April 10, 2020, Defendants requested that Washington provide dates when Dr. Herman is available for deposition, but Washington has not done so.[3]

IV. Case Schedule

Plaintiffs' request for an indefinite extension of all fact discovery should be rejected. While Defendants would consent to a limited extension of time to complete currently scheduled depositions (including motion practice related to those depositions), Plaintiffs provide no compelling reason why additional time to serve written discovery is required, nor have they identified any further written discovery they intend to propound.

Since Plaintiffs filed their complaint in August 2017, Plaintiffs and Washington have served over 100 requests for production and dozens of interrogatories. Defendants have produced tens of thousands of documents and timely served detailed interrogatory objections and responses.[4] Plaintiffs have not explained why these many written discovery requests are insufficient, nor have they identified what additional discovery requests they contend they still need to serve.

Plaintiffs also fail to explain why they could not have served any additional written discovery requests during the more than two and a half years this lawsuit has been pending. The individual Plaintiffs sporadically served discovery requests during these years, and Washington did not serve any discovery at all until July 2019, nearly two years after this case was filed. *See*

[3] It is possible that, due to case schedules in the related cases, Defendants may have to move forward with depositions of former Secretaries Mabus and James in the related cases prior to the Ninth Circuit's ruling on the mandamus petition. In that circumstance, Defendants would notice the depositions in the related cases, but not in this case, and may subsequently have to notice additional depositions of Secretaries Mabus and James in this case once the Ninth Circuit has ruled.

[4] In addition, because of the cross-use agreement, Defendants have produced to Plaintiffs and Washington documents responsive to the numerous discovery requests that have been served by plaintiffs in the related cases, as well as documents responsive to court orders issued in other cases. See Dkt. 183. Most notably, in response to an order issued by the court in the related Doe v. Esper case in the District of Columbia, Defendants produced to all of the plaintiffs in the related cases a complete, unredacted Administrative Record of the documents, testimony, and data relied on or considered by the Panel of Experts charged with developing the challenged policy, along with the Panel's deliberations on those materials, as well as communications to or from members of the Panel relating to their development of the policy. See Decl. of Robert Easton ¶¶ 4–6 (Jan. 24, 2020), Dkt. 405-2.

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ECF Nos. 483-1, 483-2. Notably, when Plaintiffs moved for summary judgment in February 2018, and Defendants requested an opportunity to take discovery pursuant to Rule 56(d), Dkt. 178, Plaintiffs opposed Defendants' request, arguing that Defendants "have failed to exercise reasonable diligence to pursue any of the discovery they suddenly claim they need." Dkt. 185 at 1. The Court agreed and denied Defendants' request to take discovery, noting that "[t]his case has been pending for nearly six months," and finding that Defendants "have failed to show that they were diligent in seeking the discovery they now claim to need." Dkt. 189 at 4. More than two years after the Court found the Defendants "failed to show that they were diligent," Plaintiffs are now moving for more time, the very position they opposed initially. Plaintiffs cannot have it both ways.

Moreover, Plaintiffs' argument that the Government is to blame for delays in this case is unpersuasive. If permitted, Defendants are prepared now to have this case proceed to summary judgment so that their policy may be "evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019). Discovery is only still proceeding due to Plaintiffs' strategic decisions to delay for years taking any depositions and their refusal to grapple with the Ninth Circuit's prior holdings in this case.

For more than two and a half years, Plaintiffs and Washington steadfastly refused to take even a single deposition until the deliberative process privilege was set aside as to all documents in the Government's production. This position had no merit to begin with, and certainly has not had merit for the nearly one year since the Ninth Circuit granted the Government's initial petition for a writ of mandamus. In the face of that ruling, it was misguided for Plaintiffs again to insist on an order overruling all of Defendants' deliberative process privilege assertions *en masse*, *see* Dkt. 365 at 5, or an order overruling the deliberative process privilege as to all documents "related" to the formation of DoD's 2018 policy and the Carter policy. *See* Dkt 408 at 2-6. Yet Plaintiffs sought just that, and the Government, accordingly, was forced to file a second petition for writ of mandamus. Dkt. 414-1. Thereafter, the Ninth Circuit recognized that the Government's second petition "raises issues that warrant an answer[,]" *see* Dkt. 416, and granted

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the Government's request for a "temporary administrative stay[,]" Dkt. 415, which is still in place. Plaintiffs' actual grievance is with the Ninth Circuit—both for granting the original writ of mandamus and for issuing the current administrative stay. But both Defendants and Plaintiffs are bound by these decisions even if Plaintiffs find them incompatible with their chosen case strategy.

Similarly, Plaintiffs cannot seriously hold Defendants responsible for not acquiescing to their attempt to circumvent the Ninth Circuit's review of Defendants' mandamus petition, as well as the Ninth Circuit's administrative stay, through a Rule 30(b)(6) deposition seeking the same privileged information through testimony that is currently at issue before the Ninth Circuit. The weakness of Plaintiffs' position is highlighted by their request to have the district court—rather than the Ninth Circuit—adjudicate the bounds of the Ninth Circuit's own stay order.

Perhaps most fundamentally, Plaintiffs have delayed this case because they refuse to accept that the role of this Court is not to "substitute its 'own evaluation of evidence for a reasonable evaluation' by the military," but to test whether the decision the military made, in light of the evidence that it actually considered, is justifiable, *Karnoski*, 926 F.3d at 1202 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). Instead, Plaintiffs have repeatedly insisted on overbroad and intrusive discovery that has no precedent in a case involving the military, and little, if any, relation to the core questions before the Court. Indeed, discovery recently has been sidetracked into such far-flung topics as outlook "delivery notifications" and "journaling reports," Dkt. 455, and confidential service member medical information that was never even considered by Government decisionmakers, Dkt. 485. And Plaintiffs now insist that even the October 2020 trial date may have to be moved in service of their improper approach to discovery, even though that trial date was set just a few months ago. These are delays of Plaintiffs' making, not Defendants'.

In short, while Defendants would consent to a limited extension of time to conduct currently scheduled depositions (including motions related to those depositions), Plaintiffs' request for an indefinite extension of all discovery should be rejected.

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Respectfully submitted, May 6, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 6, 2020.

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