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 JULY 21, 2020 STATUS CONFERENCE

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In advance of the July 21, 2020 status hearing, the parties respectfully submit the following Joint Status Report.

PLAINTIFF'S AND PLAINTIFF-INTERVENOR'S STATEMENT

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

1. Status of the Government's motions to quash depositions of military officials and Plaintiffs' motions to transfer those proceedings to this Court; and
2. Updates on depositions and the case schedule.

A. Motions to Quash Depositions of Military Officials

Plaintiffs provide the below updates on each of the four pending motions to quash and motions to transfer, all of which are fully briefed:

1. *Karnoski, et al. v. Trump, et al.*, No. 2:20-mc-00010-RAJ-RJK, Dkt. No. 14 (E.D. Va.) (Re: Subpoena of former Secretary of Defense James N. Mattis)
    - Magistrate Judge Krask granted Plaintiffs' motion to transfer on July 16
    - Case awaits official transfer to W.D. Wash.
2. *Karnoski, et al. v. Trump, et al.*, No. 1:20-mc-0015-LO-TCP, Dkt. No. 12 (E.D. Va.) (Re: Subpoena of former Vice Chairman of the Joint Chiefs of Staff General Paul J. Selva)
    - Motion to transfer granted
    - Motion to quash transferred to this Court on July 13 and assigned Case No. 2:20-mc-00055-MJP
3. *Karnoski, et al. v. Trump, et al.*, No. 1:20-mc-00013-UA-JEP, Dkt. No. 8 (M.D.N.C.) (Re: Subpoena of former Vice Chief of Naval Operations Admiral William F. Moran)
    - Both motions assigned to Magistrate Judge Peake for resolution
4. *Karnoski, et al. v. Trump, et al.*, No. 1:20-mc-00016-LO-IDD, Dkt. No. 15 (E.D. Va.) (Re: Subpoena of Secretary of Veterans Affairs Robert Wilkie Jr.)
    - Motion to transfer granted

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- Motion to quash transferred to this Court on July 13 and assigned Case No. 2:20-mc-00056-MJP

B. Deposition and Case Schedule Update

Plaintiffs' most important consideration in terms of scheduling is developing the fullest and most complete evidentiary record that is reasonably possible for trial, including the documents and the testimony of current and former government officials that will disclose what occurred in the development of what the Government labels the "Mattis Policy," including the role of the President's July 26, 2017 tweets and August 25, 2017 Memorandum and "directives" to the Department of Defense ("DoD"). Therefore, Plaintiffs require time within the case schedule that allows for Plaintiffs to continue pursuing production of the thousands of key documents withheld by the Government on grounds of deliberative process and other privilege claims and the unobstructed testimony of key participants, most of whom are former government employees and/or non-managing agents outside the Court's subpoena range who cannot be compelled to appear at trial and who the Government has made clear it does not intend to call at trial, and whose deposition testimony, therefore, is Plaintiffs' — and the Court's — one and only opportunity to obtain their testimony.

Obtaining this evidence is important not only for trial and this Court's findings and conclusions, but also for resolution of this case on its potential appeal before the Ninth Circuit and, possibly, the Supreme Court. The Government has made clear that its defense that the "Mattis Policy" was developed solely by the military, completely independent from and unrelated to the President's tweets and directives, is based on the "administrative record" that its lawyers subsequently prepared and limited to information presented to the so-called "Panel of Experts" (hereinafter, the "Panel"), and the articles and other materials cited in the *post hoc* February 2018 Report ("DoD Report") Defendants rely upon in the support of that policy, as well as the testimony of former acting Under Secretary for Personnel and Readiness ("P&R") Tony Kurta, who was responsible for leading the Panel. Challenging the Government's defense, and establishing the full and accurate facts of what really occurred, requires obtaining the

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contemporaneous documents and the testimony of participants beyond that which the Government relies on affirmatively.

To date, however, the Government has opposed discovery beyond the "administrative record" and the *post hoc* DoD Report, principally through expansive claims of deliberative process privilege, and when those claims were rejected, seeking mandamus. This has prevented the completion of discovery, at least until (1) the Government's current petition for mandamus is decided, (2) this Court's current *in camera* and any follow-up document reviews or other proceedings are completed, (3) all documents determined not to be privileged or as to which the privilege has been overcome are produced, and (4) depositions of key witnesses can be conducted with the benefit of those documents and without instructions not to answer with respect to key subject matters on the ground they call for privileged information or violate the current administrative stay. This includes the Government's withholding of documents and testimony concerning the subject matters that are the focus of the pending petition for mandamus: (1) communications and other information concerning the "Mattis Policy" and transgender issues outside of the Panel's formal meetings, including the various working groups that "supported" the Panel and determined what information it would — and would not — receive; (2) anything related to the development and preparation of the *post hoc* DoD Report, which Defendants have represented is the principal, if not exclusive, statement of the reasons and justifications for the Ban; and (3) communications and other information concerning the Carter Working Group, which considered the exact same issues and governmental interests the Government relies upon here, but reached the exact opposite conclusions — that open transgender service promotes, rather than detracts from, unit cohesion and military readiness — less than two years before.

Notwithstanding the foregoing limitations and concerns, Plaintiffs have taken, and will continue to take, the depositions of witnesses for whom such limitations are less important, remotely. Plaintiffs have deposed the Government's "hybrid" fact and expert witnesses, Christopher Meyering and Kevin Cron. Plaintiffs had scheduled remote Rule 30(b)(6) depositions on those subject matters that are not unduly impacted by the pending mandamus

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petition and administrative stay, though recently took those depositions off calendar pending the Government's document productions in response to the Court's July 15 Order. Additionally, Plaintiffs are deposing Dr. Jillian Shipherd, a third party witness who testified before the Panel and who is now a Clinical Research Psychologist with the Department of Veterans Affairs, remotely. However, in view of the Government's insistence that it should only produce government witnesses for deposition once, Plaintiffs believe that the depositions of remaining witnesses should be deferred until this Court's and the Special Master's current and any further *in camera* reviews, and any document productions in response to those reviews, are completed.

Depending on future developments with respect to the current coronavirus pandemic, the temporary deferral of these depositions may also have the added benefit of allowing some or all of these depositions to be taken in person, instead of remotely. While Plaintiffs do not intend to rely on this consideration as an independent or additional basis for delaying these depositions after this Court's *in camera* review process is completed, the remote depositions taken to date have demonstrated that remote depositions are not an adequate substitute for in-person depositions, at least in the unique circumstances of this case. These unique circumstances include the fact that (1) these depositions are not simply discovery depositions, but effectively *de bene esse* depositions to record this testimony for use at trial, and (2) due to the Government's refusal to produce these witnesses more than once, their depositions are being taken simultaneously in four separate cases and, therefore, require the participation and coordination and consultation with four separate groups of plaintiffs' lawyers, which is difficult to do remotely. As to (1), and as discussed previously, almost all of these depositions are of current or former officials who cannot be compelled to testify live at trial and the Government has made clear they do not intend to call at trial. This means that these depositions are the one and only chance for Plaintiffs — and the Court — to obtain the testimony of these important witnesses. And, the importance and adversity of these witnesses require the kind of searching examination and follow up that is most likely to reveal the facts, but is more difficult and less effective when conducted remotely. Plaintiffs also expect these depositions to involve a large number of often-lengthy and complex exhibits, with references to specific pages and provisions that the depositions to date show is far

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more time-consuming and challenging to do remotely, where the examiner cannot confirm the witness is looking at the correct page and/or provision and/or physically point to or hand the witness the relevant excerpt. As to (2), the remote depositions taken to date have also demonstrated the practical difficulties of coordinating with other Plaintiffs' counsel remotely during questioning.

Finally, Plaintiffs anticipate that, after the document discovery and depositions of DoD witnesses have been completed or are nearing completion, they will seek limited, targeted discovery of witnesses from the Executive Office of the President and/or White House, including the production of documents and, possibly, the depositions of one or more current or former officials or Rule 30(b)(6) witnesses. At this point, Plaintiffs believe this discovery would include determining (1) what, if any, role the military played in recommending or approving the Ban announced by the President via tweet on July 26, 2017 and formalized in the President's August 25, 2017 Memorandum, and (2) what, if any, role the Executive Office of the President and White House played in the subsequent development of the "Mattis Policy" and the DoD Report Defendants rely on in support of that policy. The need for this discovery will depend on the extent to which DoD witnesses are able and allowed to provide this information. Pursuant to the Ninth Circuit's June 2019 Opinion, Plaintiffs are deferring seeking this discovery until after discovery of the DoD is substantially completed and they are able to make a determination of — and demonstrate to the Court — their need for this information and that it is not available from other, alternative sources.

For all of these reasons, Plaintiffs respectfully request that the Court postpone setting a new discovery cutoff at this point. Plaintiffs recognize that this will likely delay trial beyond the current, October 22, 2020 trial. But given the importance of these further documents and testimony, we do not believe it would be in our clients' interests to proceed without them. Plaintiffs also recognize that the Government's anticipated motion for summary judgment will require the current trial date's extension in order for briefing to be completed and this Court to consider the motion in advance of trial. At bottom, Plaintiffs believe it is more important to try this case on a full and complete record than to try this case before it is ready, while the disputes

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over the Government's massive privilege claims are unresolved and Plaintiffs lack the benefit of key documents and the testimony of key participants concerning the myriad subject matters the Government currently claims are privileged.

DEFENDANTS' STATEMENT

I. Motions To Quash Depositions Of High-Level Officials

As Plaintiffs note, three of the four motions to quash the depositions of high-level Government officials—relating to Secretary Wilkie, former-Secretary Mattis, and General Selva—have been transferred, or are in the process of being transferred, to this district. In order to expedite resolution of these disputes and avoid further delay, Defendants propose that this Court decide these motions to quash (1) based on the briefing already submitted by the parties to the transferor courts; and (2) without awaiting a decision on transfer of the fourth motion to quash (concerning Admiral Moran). Defendants propose noting the Secretary Wilkie, Secretary Mattis, and General Selva motions for July 24, 2020, the Friday following the upcoming status conference.

II. Plaintiffs' Refusal To Proceed With Certain Depositions Remotely

During the teleconference on April 2, 2020, this Court addressed how the parties should approach depositions in light of the COVID-19 pandemic. The Court explained that, despite social distancing measures necessary during the pandemic, it saw "no reason why [the parties] can't move forward using teleconferencing and get your depositions done." (4/2/2020 Hr'g Tr. 30:7–8) The Court further instructed the parties "to move forward on [depositions] right away and start using [their] teleconferencing materials and platforms." (4/2/2020 Hr'g Tr. 30:12–13)

Despite the Court's oral rulings, at the later teleconference on June 23, 2020, Defendants explained to the Court that the Plaintiffs in this and the related cases had expressed a desire to take depositions in-person, and that, as a result, certain previously scheduled depositions did not occur. (6/23/2020 Hr'g Tr. 9:15–18) Defendants further stated that, contrary to Plaintiffs' position, if depositions "can't happen in person due to the health environment," then they should proceed remotely. (6/23/2020 Hr'g Tr. 9:20–22)

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Since then, the Plaintiffs have continued their refusal to move forward with certain depositions remotely, except where witnesses or their families possess unique health concerns. For example, the parties found mutually agreeable dates for the depositions of Thomas Dee on July 7 and Dr. Terry Adirim on July 17, but the Plaintiffs in this and the related *Doe* case refused to proceed with those depositions unless they took place in person. Similarly, the Plaintiffs here were scheduled to take the deposition of Col. Steven Pflanz on June 24, but the Plaintiffs postponed that deposition because it could not proceed in person. To date, none of these three witnesses have been deposed.

While Defendants understand that planned depositions must sometimes be moved to accommodate scheduling conflicts or unforeseen circumstances, Defendants do not believe that a desire to take a particular deposition in-person, rather than by videoconference, is a legitimate ground on which to cancel or postpone a deposition. Defendants thus respectfully request that the Court order that the parties may not cancel or postpone a deposition simply because it can proceed only remotely.

Such an order is warranted for several reasons. As an initial matter, it is consistent with the Court's oral rulings during the April 2, 2020 status conference that the parties should move forward with depositions "right away" and using teleconferencing platforms if necessary. (4/2/2020 Hr'g Tr. 30:7–13)

In addition, Government counsel currently are not permitted to participate in in-person depositions. The Civil Division of the Department of Justice ("DOJ") entered Phase 1 for the National Capital Region on July 13, 2020. Under Phase 1, DOJ encourages extensive telework for its employees, with individual decisions left up to its components. The directors of the Federal Programs Branch (the DOJ component representing Defendants in this action) have determined that its attorneys are not permitted to participate in in-person depositions to protect the health of the attorneys and their families. At this time, Government counsel are unable to estimate when they would be permitted to participate again in in-person depositions.

Even if Government counsel were permitted to participate in in-person depositions, it would not be sensible to do so. The current pandemic appears to be only getting worse, with

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numerous serious ongoing outbreaks across the country. Although Plaintiffs have suggested mitigation measures such as the use of masks during depositions and limiting participants to two attorneys, the witness, and the court reporter, it appears from public health guidance that extended contact in a confined indoor space (such as a deposition room) is one of the activities most likely to foster spread of COVID-19. Plaintiffs in this and the related cases have also represented that at least some of their attorneys would have to travel from out of state to attend in-person depositions, which simply increases the risk to those present in the deposition room.

On the other hand, the parties have already engaged in several remote depositions, which have worked well, and, more importantly, ensured that the attorneys, witnesses, and court reporters were not needlessly exposed to COVID-19. Plaintiffs contend that proceeding with these remote depositions has made it difficult for counsel for the related cases to coordinate during depositions. But this concern would not be alleviated by, as Plaintiffs have suggested, taking depositions in person but having only one attorney for Plaintiffs in the deposition room and attorneys for related cases participating remotely. In any event, Defendants have offered that, if counsel in this and the related cases all wish to be in the same room during depositions, they could assemble together in one room at one of their law offices and remotely join depositions together. This would permit them to coordinate in real time during a remote deposition without potentially exposing the witness, Government counsel, or the court reporter to increased risk. Alternatively, Defendants have proposed other ways to alleviate Plaintiffs' expressed concern about coordination, such as by taking longer breaks during the deposition or splitting depositions over two days.

Although Plaintiffs now state that they "do not intend to rely" on their desire for in-person depositions as an independent basis for delaying depositions "after this Court's *in camera* review process is completed," *supra* at 4, that statement does not address how Plaintiffs will approach depositions *now*. Nor does it address the multiple depositions that Plaintiffs previously represented they would be willing to take in person (such as depositions of Mr. Dee, Dr. Adirim, and Col. Pflanz), but have thus far refused to take remotely.

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The Government is sensitive to the fact that the current pandemic presents unique challenges to litigants and their counsel, and that, in normal circumstances, in-person depositions may be preferable to proceeding remotely. However, the pandemic should not be used as an excuse for Plaintiffs to delay depositions in this case, when proceeding remotely is an available alternative and the Court already has ordered the parties to utilize that option. (4/2/2020 Hr'g Tr. 30:12–13)

Accordingly, Defendants respectfully request that the Court order that the parties may not cancel or postpone depositions simply because such depositions can proceed only remotely.

III. Case Schedule

Plaintiffs' request to vacate the trial date and indefinitely extend discovery should be rejected. Instead, the Court should maintain the current trial date and set a close of discovery deadline for September 1, 2020.

As an initial matter, Plaintiffs' apparent argument that the Government is to blame for delays in this case should not be credited. 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 taking 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 more than a 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

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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 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.

Plaintiffs have likewise stretched this case out by choosing to pursue the extraordinary depositions of, among others, a sitting Cabinet Secretary and a former Secretary of Defense about their mental processes, and waiting until more than two years into this case to do so. The fact that these proposed depositions of high-level officials have resulted in motions practice should be unsurprising, and Plaintiffs plainly should have pursued them much earlier.

With respect to depositions of other senior officials, Plaintiffs have delayed this case significantly by repeatedly scheduling and, often at the last minute, re-scheduling or cancelling, such depositions. As just a few examples, Plaintiffs recently scheduled Rule 30(b)(6) depositions of DoD Officials Lernes Hebert and Stephanie Miller to take place on separate days in July, but a week before Mr. Hebert's deposition, decided to take both depositions "off calendar." This is after Ms. Miller's scheduled individual-capacity deposition had already been canceled by the *Doe* plaintiffs—with whom the Plaintiffs here coordinate. The Plaintiffs here similarly scheduled, and inexplicably canceled, the individual-capacity depositions of Mr. Hebert and Anthony Kurta. *See* Joint Status Report 9, Dkt 500. As mentioned above, the Plaintiffs canceled the deposition of Col. Steven Pflanz—just three business days before its scheduled date in June. And, as noted, the Plaintiffs here and in the related cases refused to proceed with the depositions of Thomas Dee and Dr. Terry Adirim, despite concurring on mutually agreeable dates. Thus, notwithstanding this Court's instruction to proceed with depositions "right away" (4/2/2020 Hr'g Tr. 30:12–13.), many of the Government's witnesses have had to provide dates and block out their schedules multiple times as Plaintiffs repeatedly schedule, and then reschedule or cancel, depositions.

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Engendering likely further delay, Plaintiffs now inform the Court that they intend again to pursue discovery of the Executive Office of the President and/or the White House, and suggest that such discovery may even take the form of a Rule 30(b)(6) deposition. Such discovery is not proper here,[1] and indeed the Ninth Circuit specifically questioned whether the President's memorandum in 2017 is still relevant now that the Mattis policy has been adopted. *Karnoski*, 926 F.3d at 1206. What is more, this Court itself recently concluded that documents from the timeframe of the 2017 presidential memorandum are not "pre-decisional" to the 2018 policy. Dkt. 545. While Defendants respectfully disagree with that ruling as it relates to the application of the deliberative process privilege, the Court is correct that "because the President's March 23, 2018 Presidential Memorandum revoked his 2017 Memorandum and because the Ninth Circuit determined that 'the 2018 Policy is a significant change from the 2017 Memorandum,'" the "focus" of this case is the Mattis policy, not the President's 2017 memorandum. *Id.* at 8–9 (quoting *Karnoski*, 926 F.3d at 1189–92). Accordingly, any attempt to seek discovery of the Executive Office of the President and/or the White House is not relevant and simply sets the stage for more litigation in this district and circuit and continued delay of this case.

Plaintiffs respond that Defendants have stonewalled discovery, noting that Defendants opposed discovery beyond the administrative record and DoD's Report and Recommendation. *Supra* at 3. Yet Plaintiffs fail to mention that, in addition to the 3,070-page administrative record, Defendants have produced approximately 50,000 documents in discovery—including thousands of pages of documents previously withheld pursuant to the deliberative process privilege—and have offered numerous DoD and military officials for deposition.

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

[1] Defendants note that Plaintiffs' description of the applicable standard for seeking such discovery—that they "need" the information and that it "is not available from other, alternative sources," *supra* at 5—does not describe in full the Supreme Court's or Ninth Circuit's requirements for seeking civil discovery from the Office of the President or Vice President. *See Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004); *Karnoski v. Trump*, 926 F.3d at 1204–06.

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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.

Because the delays in this case have been of Plaintiffs' own making, the Court should retain the October 22, 2020 trial date, and set a close of discovery date for September 1, 2020.

Dated: July 17, 2020

Respectfully submitted,

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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 July 17, 2020.

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