UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

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.

Misc. No. 2:20-mc-00010-RAJ-RJK

Underlying Action: Case No. 2:17-cv-01297-MJP (W.D. Wash.)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO QUASH THIRD-PARTY SUBPOENA ISSUED TO JAMES N. MATTIS, FORMER SECRETARY OF DEFENSE

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INTRODUCTION

Plaintiffs do not contest that the former Secretary of Defense and four-star General James N. Mattis is an official subject to the "apex" doctrine for purposes of securing his deposition testimony. Yet they contend that he should be deposed, as a matter of course, about his reasoning concerning the challenged military personnel policy, without any heightened showing of need or recognition of the separation of powers concerns his deposition would engender. Since the Supreme Court's decision in *United States v. Morgan*, 313 U.S. 409 (1941), "federal courts have consistently held that, absent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, 'including the manner and extent of his study of the record and his consultations with subordinates.'" *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (quoting *Morgan*, 313 U.S. at 422). The discovery that Plaintiffs seek from former Secretary Mattis, a third-party to the underlying action, is extraordinary and squarely conflicts with the apex doctrine.

ARGUMENT

Plaintiffs contend that they intend to depose former Secretary Mattis both on factual issues, *see* Pls.' Opp. at 24 (Plaintiffs will "pose basic, factual questions"), and on his mental impressions, *see id.* at 26 (Plaintiffs will depose Mattis on "the role the President's order and directives played in Secretary Mattis's decision to approve and recommend the 'Mattis Policy.'"). Both are foreclosed by the apex doctrine for the reasons set forth below. In short, Plaintiffs have not met their burden under the apex doctrine of showing that the non-privileged information they seek is both (1) based on Secretary Mattis's personal involvement and also (2) not available from any other source of discovery. Indeed, Plaintiffs have failed on both accounts. Although former Secretary Mattis exercised his independent military judgment in assembling the Panel of Experts

("the Panel"), adopting its final recommendations, and presenting those recommendations to the President, he played no role in the Panel process that actually developed the challenged policy recommended to him. And Defendants have made available eleven other senior DoD and Armed Forces officials with personal knowledge of the challenged policy's development and the recommendation process. Moreover, Defendants have produced over 50,000 documents spanning six years, a 3,075-page unredacted administrative record including minutes of the Panel's meetings and the documents the Panel considered and relied upon in forming its recommendation, and all deliberative communications of Panel members related to their work on the Panel.[1] And Defendants have not moved to quash any deposition for an individual below the level of a Presidential Cabinet official or four-star General or admiral level military leader. Plaintiffs cannot identify *any* factual testimony Secretary Mattis can provide about the development of the policy that cannot be obtained from these sources.

In any event, Plaintiffs' primary argument—that Secretary Mattis's deposition is necessary to determine whether his "approval and recommendation [of the policy] were truly independent of the President's order and directives," Pls.' Opp. to Defs.' Mot. to Quash ("Pls.' Opp."), Dkt. 19 at 20—has no basis in law or fact. On the law, Plaintiffs argue that this issue is "central" to the legal issues in the underlying dispute, *id.*, and even represent that the deposition of a former Secretary of Defense is "mandated by the Ninth Circuit's June 20, 2019 decision," *id.* at 21. This is incorrect. The Ninth Circuit, in fact, found that "a presumption of deference is owed, because the 2018 Policy

[1] Plaintiffs imply that these Panel meeting minutes are somehow untrustworthy. *See* Pls.' Opp. at 9–10 ("After reviewing the minutes for that meeting, at least one Panel member complained that they did 'not provide a balanced recording.'"). However, Plaintiffs fail to disclose to the Court that [redacted]. *See* E-mail from R. Burke to W. Moran re TG Service Panel of Experts (Oct. 19, 2017), attached as Ex. A. And Defendants have made Mr. Dee available to be deposed. *See infra* at 9.

appears to have been the product of independent military judgment." *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019). In a related challenge to the same policy, the D.C. Circuit held the same. *Doe 2 v. Shanahan*, 755 F. App'x 19, 25 (D.C. Cir. 2019) ("[A]ny review must be 'appropriately deferential' [because] . . . the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials.'" (citations omitted)).

In addition, Plaintiffs have failed to provide any basis to question former Secretary Mattis's independent judgment or his motives. The law is clear that professional military judgments, especially those like former Secretary Mattis made concerning personnel policy, are entitled to a high degree of deference and protected from deposition questioning absent a strong showing of bad faith. Plaintiffs do not come close to meeting that bar. All of the evidence in the record demonstrates that former Secretary Mattis exercised his independent judgment and operated in good faith. In his memorandum recommending the disputed policy to the President, Secretary Mattis stated, "In my professional judgment, these policies will place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world." Memorandum from Secretary Mattis to President Trump ("Mattis Mem.") (Feb. 22, 2018) at 3, Mem. in Supp. of Defs.' Mot. to Quash ("Mot."), Dkt. 3 Ex. C. Secretary Mattis later reaffirmed this in his sworn testimony before the United States Senate. There, he testified under oath that the Panel's recommendation along with the Department of Defense's ("DoD") Report represented "my 44-page advice" on DoD's policy regarding military service by transgender individuals and individuals with gender dysphoria ("the Policy"). U.S. Senate Testimony before Senate Comm. on Armed Services (Apr. 26, 2018) at 62:21, attached hereto as Ex. B. All of this is dispositive of whether former Secretary

Mattis exercised his independent and good faith judgment to implement the Policy, and Plaintiffs have offered no basis to believe he would testify otherwise if deposed.

Plaintiffs also spend more than half of their opposition citing hundreds of pages of exhibits discussing the merits of the underlying case and discovery disputes that are irrelevant to the question at hand. This is a mere distraction. Resolution of Defendants' motion to quash turns on a legal question that is distinct from the merits of the underlying case: whether the "apex doctrine" protects General Mattis, the former Secretary of Defense, from testifying about his official decision-making. This inquiry does not require the Court to delve into the procedural history of the underlying case or the parties' various privilege disputes. Rather, the Court need only determine whether Plaintiffs have presented sufficient evidence *before this Court* that exceptional circumstances require his deposition. Plaintiffs fail to actually engage with the apex analysis and identify any case in which a court permitted the deposition of a high-ranking military official to probe decision-making regarding a military policy.

Finally, although the Court need not reach the issue of whether the testimony Plaintiffs seek is privileged, the fact that Plaintiffs seek to probe into privileged matters is yet another reason to require alternative discovery first.

I. Plaintiffs Cannot Establish that Exceptional Circumstances Require Former Secretary Mattis's Deposition.

To overcome the apex doctrine's protections, Plaintiffs bear the burden to show with particularity both that (1) former Secretary Mattis has personal knowledge of non-privileged information relevant to their claims *and* (2) Plaintiffs cannot obtain that information through any

other source of discovery.[2] *See Lederman v. N.Y.C. Dep't of Parks & Rec.*, 731 F.3d 199, 204 (2d Cir. 2013); *Intelligent Verification Sys. LLC v. Microsoft Corp.*, No. 2:12cv525, 2014 WL 12544827, at *2 (E.D. Va. Jan. 9, 2014). They have failed on both elements. Many of the cases they cite in support of their apex doctrine arguments arise in the corporate context or relate to state officials, for whom separation of powers concerns would not be significant.[3] And while they characterize the information they seek as factual, they actually seek to probe Secretary Mattis's mental processes, and any facts are readily obtainable from other sources of discovery.

A. Much of the Information Plaintiffs Seek to Obtain from Former Secretary Mattis Which They Claim is "Factual" is Based on Mental Processes.

As an initial matter, Plaintiffs' argue that they seek only "basic factual testimony" from Secretary Mattis. Pls.' Opp. at 23. But most of the list of "facts" they intend to solicit actually

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[2] Plaintiffs imply at times that *either* personal knowledge *or* unique discovery constitutes exceptional circumstances. *See, e.g.*, Pls.' Opp. at 18. That is wrong. As a case that Plaintiffs selectively quote multiple times actually explains in full,

> [a]lthough personal involvement in or knowledge of the subject events seems to be a necessary prerequisite for deposing a high-ranking government official, it is not sufficient. A party must still show that the information cannot be gleaned from other sources or achieved through less burdensome means. . . . Additionally, the information sought should form a key component of the party's claim or defense.

United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 323 (D.N.J. 2009) (citation omitted).

[3] *See NRA v. Cuomo*, No. 1:18-CV-566, 2019 WL 2918045 (N.D.N.Y. Mar. 20, 2019) (New York Superintendent of Financial Services), *denying reconsideration*, 2020 WL 57296 (N.D.N.Y. Jan. 6, 2020); *Fish v. Kobach*, 320 F.R.D. 566 (D. Kan. 2017) (Kansas Secretary of State); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406 (N.D. Ala. 2017) (Alabama Secretary of State); *Libertarian Party v. Husted*, 33 F. Supp. 3d 914 (S.D. Ohio 2014) (hearing officer and general counsel to Ohio Secretary of State); *United States v. City of New York*, No. 07-cv-2067, 2009 WL 2423307 (E.D.N.Y. Aug. 5, 2009) (New York City mayor); *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118 (D. Md. 2009) (corporate Chairman and CEO); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786 (C.D. Ill. 2007) (Illinois Governor); *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257 (N.D. Fla. 1995) (Florida state legislators); *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1973) (corporate in-house counsel).

relate to the former Secretary's mental impressions, which are clearly protected under *Morgan* and its progeny. *See, e.g.*, *id.* at 24 ("To what extent, if any, did Secretary Mattis obtain input from the 'Panel of Experts' in drafting the Mattis Memorandum and/or the DoD Report?"); *id.* ("Did Secretary Mattis seek any information from outside the Panel . . . ?"). As *Morgan* makes clear, "mental processes in reaching a decision" include the "'manner and extent of [the decision-maker's] study of the record and his consultations with subordinates.'" *Franklin Sav. Ass'n*, 922 F.2d at 211 (quoting *Morgan*, 313 U.S. at 421–22). Plaintiffs have failed to identify what factual information they seek to elicit from Secretary Mattis and why that testimony is necessary for the underlying matter and cannot be obtained through any other source of discovery. *See In re McCarthy*, 636 F. App'x 142, 143 (4th Cir. 2015); *Microsoft Corp.*, 2014 WL 12544827, at *2.

B. Plaintiffs Disregard the Voluminous Discovery Defendants Have Produced to Date.

Even assuming that Plaintiffs' proposed examination of former Secretary Mattis were merely factual, they have not identified a single piece of information that they seek from former Secretary Mattis which they do not already have access to through the myriad of documents Defendants have already produced. In the absence of any specific showing on that point, Plaintiffs instead launch generalized and unsubstantiated attacks on the discovery process. The Court need not consider the discovery process in the underlying case to rule on the straightforward question whether, under the apex doctrine, a former Secretary of Defense should be compelled to testify concerning his decision to adopt a military policy and recommend it to the President. In any event, to the extent pertinent here, Plaintiffs' characterization of the discovery process is wrong.

To begin, Plaintiffs badly misstate the discovery that has occurred. Since Plaintiffs filed their complaint in August 2017, in response to over 100 requests for production and dozens of interrogatories, DoD collected and reviewed over 225,200 documents and has considered anything

related to the Policy, past or present, to be responsive to Plaintiffs' discovery requests. *See* Decl. of Robert E. Easton, ¶¶ 10, 13, ECF 371-1, attached hereto as Ex. C.[4] Defendants have produced over 50,000 documents and timely served detailed interrogatory objections and responses. *See* Joint Status Report (May 13, 2020) ("JSR") at 12, ECF 500, Mot. Ex. E; *see also* ECF 414-1 (noting that at the time the Government filed its second petition for a writ of mandamus, it had already produced nearly 40,000 documents in discovery). In addition, because the plaintiffs in the four underlying cases have a cross-use of discovery agreement, Defendants have produced to Plaintiffs and the State of 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.[5] *See* ECF 183.

Additionally, Defendants have produced to all 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, and communications to or from members of the Panel relating to their development of the policy. *See* Decl. of Robert E. Easton ¶¶ 4–6 (Jan. 24, 2020), ECF 405-2, attached hereto as Ex. D. The 3,075-page Administrative Record was exhaustive—not "highly-curated," *see* Pls.' Opp. at 2—as even a cursory review of the index of the administrative record makes clear. *See* Index of the Administrative Record, attached hereto as Ex. E.

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[4] Unless otherwise indicated, all "ECF" citations to the docket refer to the underlying action, *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash.).

[5] At the time Defendants filed this motion to quash, there were five underlying cases. *See* Mot. at 16–17. During the pendency of this motion, the plaintiff in one of those cases voluntarily dismissed the action after Defendants filed their combined motion to dismiss or for summary judgment and opposition to the plaintiff's motion for a preliminary injunction. *See Doe v. Esper*, 1:20-cv-10530-DFS (D. Mass.), ECF 37 (June 5, 2020).

Plaintiffs thus have ample sources of discovery to obtain the same information on which they seek to depose Secretary Mattis and cannot show that extraordinary circumstances warrant his deposition. This Court need not accept Plaintiffs' invitation to consider the many discovery battles proceeding in the underlying *Karnoski* action and elsewhere.[6] Indeed, they have selectively presented those disputes.[7] This underscores why it is unnecessary for this Court to delve into such discovery issues here. The Court need only decide whether Plaintiffs have satisfied the requirements under the apex doctrine for former Secretary Mattis, and it may do so without addressing any underlying discovery disputes.

C. Plaintiffs Disregard the Many Senior Officials Defendants Have Made Available to Testify.

Plaintiffs also argue that they should not have to accept Defendants' "hand-picked witnesses."[8] Pls.' Opp. at 3. But *Plaintiffs* identified these witnesses for deposition—not

[6] The Ninth Circuit has already issued one writ of mandamus limiting the district court's discovery rulings and granted the Government's request for an administrative stay of the *Karnoski* court's discovery order challenged in a second mandamus petition, ECF 415, which is still in place. The Ninth Circuit also recently indicated that Defendants' second discovery-related petition for a writ of mandamus "raises issues that warrant an answer."

[7] For example, Plaintiffs fail to mention that in the related case *Doe v. Esper*, the district court rejected a request for the same material related to the drafting of DoD's Report that Plaintiffs complain about not having access to here. In a telephonic hearing, the *Doe* Court stated that it was "not sure that getting a series of different drafts or what [the report's drafters] want to highlight or not highlight is going to go anywhere . . . as long as it didn't change from what originally was presented from the panel of experts and the briefings." *Doe* Hr'g Tr. at 28:3–7, ECF 405-3. The court thus declined to order production of the drafts and communications of those who worked on the Report. *Id.* at 28:8–9. The *Doe* court also rejected the *Doe* plaintiffs' request for deliberative materials that were never considered by the Panel, finding that seeking this material amounted to "fishing." *Id.* 20:1–5.

[8] Plaintiffs misstate the number of witnesses Defendants have made available. For purposes of opposing this motion to quash, Plaintiffs claim Defendants have offered "one or two" witnesses. In a related motion to transfer this motion to quash, they state that the number is at least five. *See* Mem. of P. & A. in Supp. of Pls.' Rule 45(f) Mot. to Transfer at 9, Dkt. 15 (correctly noting that Defendants have offered "the depositions of Mr. Kurta, Mr. Hebert, Mr. Dee, Dr. Adirim, and Ms.

Defendants. *See* JSR at 5. Of the fifteen witnesses Plaintiffs have identified, only four are either current or former Cabinet Secretaries or four-star Generals or Admirals in the military. Defendants have moved to quash only those four depositions, including that of former Secretary Mattis, pursuant to the apex doctrine. Defendants have said they will not challenge the other eleven depositions, and have explained that these eleven individuals possess the same or even superior information to that which Plaintiffs seek through the depositions of the other four high-ranking officials. Most notably, Anthony M. Kurta served as chair of the Panel until late November 2017 and presented the Panel's recommendations to the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff in December 2017. Mr. Kurta also served in a similar DoD leadership capacity at the time President Trump issued his August 2017 memorandum on which Plaintiffs seek to question Secretary Mattis. Lernes Hebert facilitated Panel meetings from late November 2017 onward and supported Mr. Kurta in his briefings to his superiors. By Plaintiffs' own admission, both Mr. Kurta and Mr. Hebert "assisted in drafting and/or reviewing the DoD Report after the Panel was disbanded," Pls.' Opp. at 13 n.6, yet Plaintiffs ask this Court to permit a deposition of former Secretary Mattis on this same topic, *see id.* at 24. Finally, Thomas P. Dee served on the Panel and drafted the sole dissenting opinion from the Panel's findings that Plaintiffs reference in their opposition as a basis for deposing Secretary Mattis. *See id.* at 11; *see also* Mot. at 18–19.[9]

Nevertheless, Plaintiffs had not conducted depositions of *any* of these eleven individuals the Government has identified as having personal knowledge of the challenged policy's

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Miller"). Defendants have actually offered eleven witnesses, at least five of whom have specific knowledge of the policies at issue.

[9] A court in one of the underlying matters has already ordered that the plaintiffs in that case *must* depose Mr. Kurta *before* the Court would permit them to schedule a deposition of then-Vice Chairman of the Joint Chiefs of Staff Paul J. Selva, one of the four depositions that Defendants

development and the recommendation process before issuing the present subpoena to former Secretary Mattis, and since then, they have only taken two. In fact, in just the past few weeks, Plaintiffs asked Defendants to *delay* the depositions of three of the most relevant witnesses— Ms. Miller, Mr. Hebert, and Mr. Kurta, which had been scheduled to take place on June 4, 5, and 8, respectively, rather than proceed with the deposition remotely due to restrictions on in-person depositions related to the COVID-19 pandemic. *See* JSR at 9. Additionally, just last week, the *Doe* plaintiffs delayed the deposition of Mr. Dee, which had been scheduled to take place on June 11 and in which the *Karnoski* Plaintiffs were expected to participate. *See* E-mail from M. Slachetka to M. Skurnik re Dee Deposition (June 8, 2020), attached hereto as Ex. G. Plaintiffs' insistence on the urgency of the depositions of the four highest-ranking officials they have subpoenaed is entirely incongruent with their scheduling of those other senior military and civilian officials who were actually involved in the day-to-day development of the Policy.

For these reason, at a minimum, the Court should require Plaintiffs to complete their depositions of Mr. Kurta, Mr. Hebert, Mr. Dee, Dr. Adirim, and Ms. Miller before requesting to depose Secretary Mattis.

II. Plaintiffs May Not Depose Former Secretary Mattis on His Mental Impressions.

The Supreme Court made clear in *Morgan* that there is a strong presumption against deposing apex officials on their mental impressions. *See* 313 U.S. at 422 ("[I]t was not the function of the court to probe the mental processes of the Secretary.") (citation omitted); *see also* Mot. at 13–15 (collecting cases). Plaintiffs bear the burden to demonstrate "a strong showing of bad faith

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now move to quash. *See* Order in *Doe*, No. 17-cv-1597 (D.D.C.), ECF 112, attached hereto as Ex. F ("Plaintiffs shall first depose Mr. Kurta. If, after deposing Mr. Kurta, 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."). That court's reasoning applies with even greater force here to the former Secretary of Defense.

or improper behavior" on the part of the individual they seek to depose. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–74 (2019), *remanded*, 2019 WL 3213840 (S.D.N.Y. July 16, 2019); *see also Franklin Sav. Ass'n*, 922 F.2d at 211 ("Only where there is a clear showing of misconduct or wrongdoing is any departure from [the apex doctrine] permitted."). When requesting to depose an apex official on his or her mental processes, the burden is even higher when the deponent is a military official, and that official's decisions are entitled to deference and protected from unnecessary intrusion from the judiciary.

A. Plaintiffs' Accusation that Secretary Mattis Acted in Bad Faith or with Animus Toward Transgender People Is Baseless.

In order to obtain Secretary Mattis's mental impressions, Plaintiffs resort to the novel and spurious accusation that he engaged in misconduct and with "intentional discrimination and animus against transgender people." Pls.' Opp. at 24. This is a baseless accusation to level against former Secretary Mattis, a decorated and highly respected war veteran with a track record of exercising his independent judgment. Plaintiffs' accusation is far from the extraordinary showing of bad faith necessary to depose the former Secretary of Defense. *See In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2019) (Gorsuch, J., concurring in stay of district court's order authorizing the deposition of the Secretary of Commerce) ("Leveling an extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification."); *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir.1999) ("Allegations that a high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result." (citation omitted)); *accord Klay v. Panetta*, 758 F.3d 369, 378 (D.C. Cir. 2014) ("It is no small thing to allege that the Secretary of Defense ignored an act of Congress, and I am troubled by the possibility that plaintiffs' counsel leveled this charge without first carefully reading

the act in question."). Indeed, it is well-established that government officials are entitled to a presumption of good faith, especially in the military context.[10] *Prince v. Sec'y of Air Force*, 30 F.3d 130 (4th Cir. 1994) ("It is presumed that 'administrators of the military like other public officers discharge their duties correctly, lawfully, and in good faith.' More specifically, the Secretary of the Air Force is 'presumed to perform fairly and lawfully in absence of clear and persuasive evidence to the contrary.'" (citations omitted)).

Aside from pointing to two emails out of tens of thousands of pages of discovery that Plaintiffs allege show that Secretary Mattis harbored animus (and they do not), Plaintiffs have failed to make *any* showing of misconduct. That should end the matter. Defendants, nevertheless, correct the record below to eliminate any doubt as to Plaintiffs' specious accusation.

As an initial matter, Plaintiffs selectively quote from the Ninth Circuit opinion in the underlying *Karnoski* matter to imply that the Ninth Circuit has already found misconduct or wrongdoing. *See, e.g.*, Pls.' Opp. at 26. That is certainly not the case. The Ninth Circuit was merely setting the standard of review and ultimately concluded that "the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies." *Karnoski*, 926 F.3d at 1201. The Ninth Circuit did not in any way imply misconduct or wrongdoing on the part of Secretary Mattis or the Government. In fact, in the very next sentence and the following paragraphs, the opinion rejects

[10] *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("[T]he Secretary [of Transportation]'s decision is entitled to a presumption of regularity."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *Roberts v. Harvey*, 441 F. Supp. 2d 111, 118 (D.D.C. 2006) ("[Defendants] seeking review of a board decision bears the burden of overcoming 'the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully and in good faith.'").

this argument from Plaintiffs. *Id.* ("We also reject Plaintiffs' contention that no deference is owed here.").

Next, Plaintiffs point to emails in which Secretary Mattis appears to remind himself of additional sources to check and of communications between DoD and Dr. Paul McHugh, a Johns Hopkins University Distinguished Service Professor of Psychiatry and Behavioral Sciences.[11] This Harvard-trained doctor was the Psychiatrist-in-Chief at The Johns Hopkins Hospital for twenty-six years. In the e-mails, Secretary Mattis's special assistant appears to reach out to some of those named sources such as Dr. McHugh. Plaintiffs argue that because senior DoD officials spoke with a psychiatrist with a different viewpoint from that of the Plaintiff advocacy groups, Secretary Mattis must have been motivated by animus towards transgender individuals. Pls.' Opp. at 27. But DoD's communications with Dr. McHugh simply reflect an effort to consider input from experienced medical professionals with a variety of views as part of the policy process; they offer no support for Plaintiffs' claims.

Plaintiffs also ignore that DoD considered the opinions and studies of multiple experts, including Plaintiffs' own expert, Dr. George Brown, along with military mental health specialists, surgeons, endocrinologists, and general practitioners from the Army, Navy, and Air Force who had collectively advised on more than 250 transgender service member medical treatment plans. *See* Minutes: Transgender Review Panel III (Oct. 26, 2017), attached hereto as Ex. H; Index of the Administrative Record at 2. There is nothing nefarious or indicative of bad faith or animus about receiving input from experts with differing views. *See Gibson v. Collier*, 920 F.3d 212, 220–22 (5th Cir. 2019) (citing Dr. McHugh among many medical experts in finding that "there is robust

[11] *See* "Paul R. McHugh, M.D.," https://www.hopkinsmedicine.org/profiles/results/directory/profile/0003340/paul-mchugh (last accessed June 17, 2020) (noting Dr. McHugh's expertise in adult psychiatry and neuropsychiatry).

and substantial good faith disagreement dividing respected members of the expert medical community" concerning the necessity and efficacy of sex reassignment surgery), *cert. denied*, 140 S. Ct. 653 (2019). Indeed, another one of Plaintiffs' own experts, Major General (Ret.) Margaret Wilmoth, recommended that the Transgender Working Group ("TGWG") convened by former Secretary Carter speak with Dr. McHugh. *See* E-mail from M. Wilmoth to K. Guice re JHU Psychiatrist (Oct. 15, 2015), attached hereto as Ex. I (recommending Dr. McHugh and stating, "I would rather [the TGWG] get to a decision knowing how we got there by hearing from all sides of this important decision rather than just hearing from advocates."). Therefore, the fact that DoD communicated with Dr. McHugh does not support Plaintiffs' speculation that Secretary Mattis's motivations were based on animus rather than genuine military considerations.[12] To the contrary, it shows that Secretary Mattis and the Panel considered all perspectives before settling on final recommendations.

Plaintiffs also point to Secretary Mattis's communications with a retired Marine general, in which that person—not Secretary Mattis—references high "suicide rates and other psychological issues that disrupt cohesion and consume time (and make one non-deployable)." Pls.' Opp. at 27. Plaintiffs claim that these communications are evidence of animus because the purported psychological needs and evidence of high suicide rates within the transgender population are contrary to "medical and scientific consensus." *Id.* But the statement at issue was not that of Secretary Mattis, and Plaintiffs' own experts have recognized the clinical distress associated with gender dysphoria. *See Doe 2 v. Shanahan*, 917 F.3d 694, 726–27 (D.C. Cir. 2019)

[12] If Plaintiffs actually believe that Secretary Mattis's "special assistant" communicated with allegedly anti-transgender advocates, Pls.' Opp. at 26–27, and principally drafted the DoD Report, *id.* at 13, they should depose him—not Secretary Mattis. In any event, this information is not relevant to the underlying dispute, as by Plaintiffs' own admission "[s]uch evidence of animus and anti-transgender views and sources . . . were not considered by the Panel." *Id.* at 27.

(Williams, J. concurring in result) (noting that Plaintiffs' own experts and the American Medical Association have found that "[g]ender dysphoria is undisputedly associated with clinically significant distress . . . and can cause depression, impairment of function, self-mutilation to alter one's genital or secondary sex characteristics, other self-injurious behaviors, and suicide[.]" (internal citations omitted)). There is nothing in this example that would warrant any finding of animus to support permitting a deposition of former Secretary Mattis.

B. Mental Processes Concerning Military Decision-Making Are Entitled to a Higher Level of Deference.

Because Plaintiffs can show neither that exceptional circumstances warrant the Secretary's deposition nor that he acted in bad faith, they cannot justify his deposition, irrespective of the military context. But Plaintiffs' proposed discovery is even more inappropriate because they seek to question and second-guess a former senior military official about his decisions affecting military personnel policy. As one of the "'complex, subtle, and professional decisions as to the composition . . . of a military force,' which are 'essentially professional military judgments,'" DoD's current policy is subject to a highly deferential form of review. *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (citation omitted). Numerous other cases have held the same.[13] In fact, Plaintiffs have not identified a single case in which a military official has been ordered to testify to explain

[13] *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507–08 (1986) ("Judicial deference is at its apogee" in this area because "[n]ot only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." (internal citations and alterations omitted)); *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (Choices about who should serve "are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well." (citation omitted)); *Thomasson v. Perry*, 80 F.3d 915, 926 (4th Cir. 1996) (en banc) ("Parallel to the deference owed Congressional and Presidential policies is deference to the decision-making authority of military personnel who 'have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy'" (quoting *Weinberger*, 475 U.S. at 508)); *see also* Mot. at 13–15 (collecting cases).

his reasoning for a decision on military policy, much less the former Secretary of Defense. And the only case they have identified involving a Cabinet-level official is inapt. *See Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (authorizing depositions of the former Secretary and former General Counsel of the Department of Housing and Urban Development where they "had 'first-hand personal knowledge *that no one else has*'" (citation omitted) (emphasis added)). And in all events, military deference is based on a subject matter inquiry and must be applied here because the challenged policy involves the composition of the military force.[14]

Moreover, as referenced above, in the underlying *Karnoski* case, the Ninth Circuit has already ruled that "a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment." *Karnoski*, 926 F.3d at 1202. Plaintiffs suggest that this remains an open issue, warranting a deposition of former Secretary Mattis on whether the "so-called 'Mattis Policy' is 'an exercise of independent military judgment' or 'nothing more than an implementation of' President Donald Trump's 2017 Tweet-announced ban on transgender service." Pls.' Opp. at 1 (citing *Karnoski*, 926 F.3d at 1201–02). But that issue

[14] *See* Mot. at 13–15; *Doe 2*, 755 F. App'x at 25 ("[A]s in *Rostker* and *Goldman*, any review must be 'appropriately deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administration of the military.") (citing *Rostker*, 453 U.S. at 83). Military deference is not based on a judicial determination of whether military officials acted independently of the President or of Congress. Otherwise, Congress would not have been entitled to deference in *Rostker*, as it departed from the view of military officials in excluding women from selective service registration. *See Rostker*, 453 U.S. at 64–65 ("This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises *in the context of Congress' authority over national defense and military affairs*, and perhaps in no other area has the Court accorded Congress greater deference.") (emphasis added)); *Chappell v. Wallace*, 462 U.S. 296, 301–02 (1983) (same); *see also Winter*, 555 U.S. at 24 (holding that military deference is applied in cases involving the "composition, training, equipping, and control of a military force" (quoting *Morgan*, 313 U.S. at 10)).

was resolved in *Karnoski*: "In short, the district court *must apply appropriate military deference* to its evaluation of the 2018 Policy." *Karnoski*, 926 F.3d at 1202 (emphasis added).[15]

Nor was the D.C. Circuit any more persuaded when the plaintiffs in the related *Doe* action raised that same theory. *See Doe 2*, 755 F. App'x at 25 ("Although today's decision is not a final determination on the merits, we must recognize that the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials.'") (quoting *Goldman*, 475 U.S. at 509); *see also id.* at 23 ("The government took substantial steps to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum. These included the creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the policy on the service of transgender individuals instituted by then-Secretary of Defense Ash Carter . . . , and a reassessment of the priorities of the group that produced the Carter Policy.").[16]

The reason for courts' reluctance to intrude into the military decision-making of apex officials should be apparent: "[J]udicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of other branches of government."). *Vill. of Arlington*

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[15] The Ninth Circuit did not mandate or suggest that a deposition of the former Secretary of Defense or any other high ranking military official would be appropriate in this litigation but rather suggested that the litigation could proceed without any depositions. *See Karnoski*, 926 F.3d at 1206 n.22 ("We note that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409, 201 L. Ed. 2d 775 (2018), the Court held that '[t]he 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions'—was sufficient to allow for judicial review.").

[16] *See also Doe 2*, 917 F.3d at 731 (Williams, J., concurring in result) ("Plaintiffs and the district court may, to be sure, regard the entire decisionmaking record as a Potemkin village, designed to pull the wool over the eyes of simple-minded observers (including reviewing courts). Of course the plausibility of such a scheme tends to unravel as we try to imagine the dozens of participants—the 'Cabinet members and other officials,' *Hawaii*, 138 S. Ct. at 2405—who would have been needed for its realization.").

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977); *see also In re United States ("Jackson")*, 624 F.3d 1368, 1373 (11th Cir. 2010) (noting that "[t]he threat to the separation of powers is more substantial" when the official is "higher-ranking"); Mot. at 10–11 (collecting cases). The Ninth Circuit has recognized that these concerns are especially acute in this underlying case. *See Karnoski*, 926 F.3d at 1200 n.16 (recognizing that courts "should 'give appropriate weight to this separation of powers'" (citation omitted) and directing the district court to consider this concern on remand). Plaintiffs do not respond to any of these concerns.

III. Plaintiffs Seek to Probe Former Secretary Mattis on Privileged Matters.

The Court should quash Plaintiffs' third-party deposition subpoena because it fails under the apex doctrine as set forth above. However, the Court may also consider that the testimony Plaintiffs seek clearly implicates both the presidential communications privilege and the deliberative process privilege. Plaintiffs do not dispute that they seek privileged information from former Secretary Mattis.[17] Rather, their only rejoinder is that, where a deposition subpoena seeks privileged testimony, the correct course of action is to permit the deposition anyway and leave it to counsel to repeatedly object to the questioning and instruct the witness not to answer for the duration of the deposition.[18] *See* Pls.' Opp. at 28–29. But where a party seeks to probe into matters

[17] For example, Plaintiffs state that they intend to question former Secretary Mattis on whether he was "instructed [by the President] to obtain particular information cited in the Mattis Memorandum and/or the DoD Report, but absent from the Panel's prior Final Report." Pls.' Opp. at 24. The answer to that question, and many others they seek to ask, would plainly be protected by the presidential communications privilege. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) (privilege protects the President's ability to obtain candid and informed advice and to make decisions confidentially); *see also* Mot. at 20–22.

[18] The cases that Plaintiffs cite for this proposition do not concern the presidential communications privilege or even federal officials and are thus inapposite. *See Libertarian Party of Ohio v. Husted*, 33 F. Supp. 3d 914, 925 (S.D. Ohio 2014) (permitting the deposition of a local board of elections hearing officer only provided that "Plaintiffs . . . reconsider their intent to depose him unless they have process-related questions to ask, or unless they wish to preserve the record"); *Fla. Ass'n of*

of Executive privilege, the law firmly supports requiring a party to seek alternatives first. *See, e.g., Cheney v. U.S. Dist. Court for the District of Columbia*, 542 U.S. 367, 388 (2004) (Where presidential communications are at issue, "precedent provides no support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections."); *Karnoski*, 926 F.3d at 1205 (holding that the district should have "explor[ed] other avenues, short of forcing the Executive to invoke privilege" (citation omitted)). Accordingly, if more is necessary for the Court to decide whether to allow this deposition to proceed, it may also consider the broad array of potentially privileged subjects at issue, rather than requiring a process that will entail deposition objections and potential instructions not to disclose privileged communications, at least until Plaintiffs have exhausted alternatives to such a proceeding.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Quash should be granted, and Plaintiffs should be precluded from deposing former Secretary of Defense James N. Mattis.

Rehab. Facilities, Inc., 164 F.R.D. at 266 (ruling on "whether a . . . privilege for state legislators exists"); *Scovill Mfg. Co.*, 61 F.R.D. at 600 (arising in the context of corporate in-house counsel).

Dated: June 18, 2020

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2020, I electronically filed the foregoing Defendants' Reply in Support of Their Motion to Quash Third-Party Subpoena Issued to James N. Mattis, Former Secretary of Defense using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ *Dennis C. Barghaan*
DENNIS C. BARGHAAN, JR.
Deputy Chief, Civil Division
Assistant United States Attorney

Exhibit A

FILED UNDER SEAL

Exhibit B

U.S. Senate Testimony before Senate Comm. on Armed Services (Apr. 26, 2018)

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

HEARING TO RECEIVE TESTIMONY ON THE DEPARTMENT OF DEFENSE BUDGET POSTURE IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM

Thursday, April 26, 2018

Washington, D.C.

ALDERSON COURT REPORTING
1155 CONNECTICUT AVENUE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 289-2260
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look at what they are doing with their support for terrorism from Bahrain to Yemen, from Syria to Lebanon and elsewhere, their maritime threat, their cyber threat. We have got to look at all these things, sir, as a whole, but at the same time focus on this imperfect arms control agreement and determine if that is in our best interest.

Senator Sullivan: Trust factor?

Secretary Mattis: I think trust but verify would be an exaggeration. I think it is distrust and verify.

Senator Sullivan: Thank you.

Senator Inhofe: Thank you, Senator Sullivan.

Senator Gillibrand: Thank you, Mr. Chairman.

General Dunford, your fellow chiefs have told me that they are not aware of any instances of issues with unit cohesion, morale, and discipline as a result of open transgender service. Have you heard of any such incidents?

General Dunford: Senator, thanks. I would not typically hear of individual cases of cohesion or discipline issues.

And maybe just a comment on transgender. For me, the issue with transgender has never been about cohesion or discipline anyway. It was just about any individual, regardless of circumstances, being able to meet the physical and mental qualifications of being worldwide deployable. So if an individual is serving without accommodation, then I do

not think I would expect to see discipline or cohesion issues in that unit.

Senator Gillibrand: During our last discussion on this topic, you said that you would treat all service members, including transgender service members, with dignity and respect.

The recommendations on transgender service and the accompanying panel report were released as part of the DOJ's filing on Friday night. Service members found out in the news that the Department had submitted a report that cast dispersions on their fitness to serve, implied they could harm the lethality of the force, and left their futures in the military up in the air.

Do you think this rollout accords transgender service members with the dignity and respect they deserve?

General Dunford: Senator, one thing we have tried to clarify for our men and women that are current serving is that -- and I cannot talk about any changes in the policy. But one thing that did not change was the status of the men and women that are currently serving.

Senator Gillibrand: That is not the impression the report leaves.

Do you know whether this has created anxiety among these troops? Have you met with any transgender troops given this report?

General Dunford: I have not since the report was released, Senator.

Senator Gillibrand: I recommend that you do so so you are more informed.

Secretary Mattis, one of the things that struck me about your panel's report was its claim that, quote, unlike past reviews, the panel's analysis was informed by the Department's own data and experience obtained since the Carter policy took effect. That is why I have been asking the chiefs about unit cohesion. In fact, General Milley put it with regard to the Army as precisely zero instances of units with less unit cohesion, morale, and discipline.

I am very concerned about this report because it says that there is, quote, scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria. Yet, the American Medical, Psychological, and Psychiatric Associations have all said the report misrepresents what is the scientific consensus when it comes to gender dysphoria and transition. In fact, despite the report's stated concerns about deployability of transgender service members because of gender dysphoria or associated medical care, a report being issued today by the Palm Center here, which I am going to give to you so you can read in full, says that, quote, out of 994 service members diagnosed with gender dysphoria in 2016 and the first half of 2017, 40

percent deployed in support of Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn, and only one had an issue during that deployment.

It appears that this report that your Department has issued is not based on the Department's data or science but rather, quote, potential risks that the authors cannot back up. And in fact, this seems to me to be the same uninformed and unfounded concerns that led to the opposition of repealing don't ask/don't tell, integrating women into the military, integrating African Americans into the military. And I think you need to do a lot more work on this topic to inform yourselves.

What is so different about transgender service that makes you think that though the data and medical science do not justify it, transgender service will harm the readiness and lethality of our force?

Secretary Mattis: Well, Senator, I regret the way you characterize it. I would remind you that when I came into this job, I said I do not come in with a preordained or agenda to change something. I am in to carry three lines of effort forward. One of them was to create a more lethal military. And I believe that service in the military is a touchstone for patriotic Americans. The military protects all Americans' freedom and liberty to live as they choose, and we are proud of that.

71 percent of 18 to 24-year-old men and women in this country do not qualify for medical, legal, behavioral, intellectual reasons to enlist as a private in the U.S. Army. 71 percent.

In this case, I was meeting with the service chiefs and the Chairman -- not the Joint Chiefs, the service chiefs -- last spring, and they were asking me questions because we were coming up on the advent of the induction of transgender. And they wanted to know how they were going to deal with certain issues about basic training, about deployability. I said, did you not get all of this when the policy came out? The Carter policy we call it. They said no. And I said, well, did you have input? They said no, they did not.

So I convened that panel. That panel was made up of combat veterans, the vice chiefs of the services, and the under secretaries. And they called together transgender troops. They brought in commanders of transgender troops, and they brought in and listened to civilian and military medical experts who have provided care for transgenders both in the military and outside. And I gave my 44-page advice. I would like to have it entered, Chairman, for the record.

[The information referred to follows:]

[COMMITTEE INSERT]

Senator Gillibrand: And a list of all experts you consulted, please.

Secretary Mattis: Pardon?

Senator Gillibrand: I would like a list of all the experts, medical experts, that were consulted for that report, please.

Secretary Mattis: Right now, this is under litigation. I will see what I can provide or when I can provide it. I will do that, Senator.

But at the same time, basically my responsibility is to give the best advice I can for making a lethal force. And I think that right now the Carter policy is still in effect, and we have the four cases being litigated.

Why these issues like this would not come to the service chief level during this was a very, very, I would call it, newsworthy situation. And the reason is that under the Carter policy, the reporting is opaque. We cannot report that a problem emanated from a transgender. We cannot under the Carter policy do that. So the question you have asked the service chiefs and the Chairman are ones that right now the Carter policy prohibited that very information from coming up because it is private information. And it is specifically called out in his policy statement. So it is impossible for them to have responded to you.

And I would just say that right now we look at medical

conditions. If gender dysphoria has anxiety or it has some kind of depression, we do not allow anyone in with that. I would have to make a special category that said you can have these disqualifying factors only if you are transgender, and then we can bring you in. I think you understand why we have not chosen to do that.

Senator Inhofe: Thank you.

Senator Fischer?

Senator Fischer: Thank you, Mr. Chairman.

Secretary Mattis, in last year's NDAA, Congress required the Department to evaluate whether existing cruise missile systems could be converted into a ground-launched version as part of our response to Russia's violation to the INF Treaty. The Department's response, which was a letter from Under Secretary Lord, was sent to the committee 2 weeks ago. And it states that DOD is in the early stages of identifying the system requirements and is therefore unable to conduct an assessment at this time.

I know the Department is moving forward on a broader effort beyond just a ground-launched cruise missile, but I am concerned about the urgency of our response because, as we both know, we can spend the next 3 years defining requirements and analyzing alternatives and not conduct any actual research and development.

So I would just ask, what is your expected timeline for

Exhibit C

Declaration of Robert E. Easton in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. Aug. 29, 2019), ECF 371-1

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

No. 17-cv-01297 (MJP)

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL (ECF 358)

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel ("OGC"). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Response to Plaintiffs' Motion to Compel (ECF No. 358). I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

DoD Search and Review Process

4. In their motion, Plaintiffs seek to compel Defendants to "(1) provide individualized objections to each request rather than the boiler-plate objections that were initially provided, and (2) identify whether any documents are being withheld pursuant to an individualized objection and, if so, sufficiently identify the documents withheld pursuant to that objection."

5. In response to this and the three other lawsuits challenging DoD's policies regarding military service by transgender individuals and individuals with gender dysphoria, DoD conducted an expansive search, collection, and production of files and documents potentially relevant to the claims and defenses in the four cases. DoD's search and review efforts were focused on material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria.

6. DoD began this process by identifying the key individuals who were involved in this policy making process going back to former Secretary of Defense Ashton Carter's announcement. DoD OGC identified and searched the accounts of the following key personnel:[1]

Exec. Sec. Officials	Title
Bushman, William	Special Assistant to the Secretary of Defense
Walsh, Laurel	Special Assistant to the Chief of Staff
Verga, Peter	Special Assistant to Secretary of Defense
Faller, Craig	Senior Military Assistant to the Secretary of Defense
Carter, Ashton	25th Secretary of Defense
Work, Robert	Deputy Secretary of Defense
Mattis, James	26th Secretary of Defense
Mohler, Hallock	Executive Secretary
Sweeney, Kevin	Chief of Staff to the Secretary of Defense
DeMartino, Tony	Chief of Staff to the Deputy Secretary of Defense
DoD P-R	
Kurta, Anthony	Under Secretary of Defense for Personnel and Readiness
Barna, Stephanie	Acting Assistant Secretary of Defense for Manpower and Readiness
Hebert, Lernes	Acting Deputy Assistant Secretary of Defense for Military Personnel Policy and Principal Director
Miller, Stephanie	Director, Accessions Policy
Gearhart, Lee COL	Assistant Director, Reserve Accessions
Brown, Gary LTC	Assistant Director, Reserve and Medical Manpower
Adirim, Terry Dr.	Principal Deputy Assistant Secretary of Defense for Health Affairs
Findley, Andrew Dr.	Program Manager - Quality, Graduate Medical Education, and Medical Accession and Retention Incentives
Chan, Edmund	Health Affairs - Health Services Policy and Oversight
Ribeiro, Elizabeth	Contractor Employee Supporting the Office of Health Services Policy and Oversight
Arendt, Christopher	Director, Accessions Policy
DoD OGC	

[1] In addition to the DoD officials listed in the table *infra*, other individuals involved in the development of the DoD transgender policy were identified in our Response to Plaintiff's Second Set of Interrogatories Nos. 18 and 19, filed under seal on August 21, 2019 (ECF No. 363).

Koffsky, Paul	Acting General Counsel and Senior Deputy General Counsel, Personnel and Health Policy
Casciotti, John	Senior Associate Deputy General Counsel
Gruber, David	Associate Deputy General Counsel
Easton, Robert	Director, Office of Litigation Counsel
Hatch, Richard	Associate Deputy General Counsel
Hecker, Karen	Associate Deputy General Counsel
Newman, Ryan	Deputy General Counsel, Legal Counsel

7. While the key custodian list was being finalized, DoD OGC attorneys simultaneously developed broad search terms and determined the relevant date range based on the assumption that DoD needed to gather and process all data not only potentially relevant to this case, but to any future cases and Freedom of Information Act requests on this topic. To that end, comprehensive search terms were selected to gather data from DoD Exchange servers on three different DoD networks. The search terms that were used were:

Term	Operator
transgend*	June 30, 2016 to March 23, 2018
"trans gender"	June 30, 2016 to March 23, 2018
gender /4 stab*	June 30, 2016 to March 23, 2018
"genital reconstruction" OR "gender transition" OR "gender marker" OR "gender transition plan"	June 30, 2016 to March 23, 2018
"gender dysphoria"	June 30, 2016 to March 23, 2018
"TG" /3 ("service member" OR "care" OR "working group" OR "individual")	June 30, 2016 to March 23, 2018
"transition surgery"	June 30, 2016 to March 23, 2018
("sex change" OR "sex-change") /3 surgery OR "sex change surgery"	June 30, 2016 to March 23, 2018
reassignment AND ("surgery" OR "procedure")	June 30, 2016 to March 23, 2018

"sex reassignment" /2 surgery OR "sex reassignment surgery"	June 30, 2016 to March 23, 2018
("cross sex" OR "cross-sex") AND ("hormone treatment" OR "hormone therapy")	June 30, 2016 to March 23, 2018
gender AND confirm* AND surgery	June 30, 2016 to March 23, 2018
"Join" OR SERV* /3 gender	June 30, 2016 to March 23, 2018
"vaginoplasty"	June 30, 2016 to March 23, 2018
"Penile amputation"	June 30, 2016 to March 23, 2018
Department of Defense Instruction OR DODI /2 "1300.28"	June 30, 2016 to March 23, 2018
("Directive Type Memo" OR "DTM") AND "16-005"	June 30, 2016 to March 23, 2018

8. The DoD search terms and the relevant date range were then transmitted by Microsoft Excel spreadsheet to DoD Information Technology ("IT") personnel to begin the digital search.

9. DoD IT personnel applied the designated search parameters while conducting digital searches as directed by DoD OGC attorneys. The only parameters applied were date range, search term(s), and custodian email address. No additional filters were applied by DoD IT at the server collection stage, and servers that contained service member medical records were not searched. Once the relevant native data were gathered by DoD IT personnel, the data collection was provided by CD to DoD OGC attorneys who then transferred it to DOJ attorneys for processing in their eDiscovery software, Relativity.

10. After DOJ processed this native data set, DoD was informed that there were more than 138,900 unique DoD documents based on the custodian list, search terms, and date range. Including the additional data gathered by the Military Services, who separately identified their own key custodians, more than 225,200 documents were collected. Documents were then

maintained and organized within the eDiscovery database as they were collected and as they would appear in the ordinary course of business—by DoD or Military Service component and custodian.

11. Supplemental self-collections were also executed with assistance from DoD OGC attorneys for select key custodians as a result of expedited discovery deadlines set in this case. Military Service attorneys directed similar self-collections from their key personnel. The decision to conduct supplemental self-collections was based on: the need to produce documents quickly, an understanding that a digital search by DoD IT personnel would take time to complete, and the fact that the identified key custodians were the relevant DoD policy makers for the Secretary Carter transgender policy. To that end, DoD OGC attorneys instructed Stephanie Miller, Anthony Kurta, Lernes Hebert, Dr. Terry Adirim, and Dr. Andrew Findley to create a folder on each of their desktops, copy all potentially relevant documents from organizational shared drives and Outlook accounts using search terms similar to those used for the digital search, and place any results in the newly created desktop folder. Once this was complete, the key custodians were instructed to send these folders to DoD OGC so that they could be transferred to DOJ for processing, review, and production. These additional self-collections were also maintained and organized within the eDiscovery database as they were collected—by DoD or Military Service component and custodian—and as they would appear in the ordinary course of business.

12. Once the data were uploaded to Relativity, duplicate documents were segregated from the corpus of documents for review. Thereafter, DOJ divided the remaining documents into batches of 250, and DoD OGC counsel for this case assigned a reviewer to each batch. No

documents were excluded from batching due to the possibility that a document contained privileged information.

13. The DoD document review was conducted by a team of DoD OGC staff. Prior to the review, DoD OGC counsel provided the team detailed instructions on the mechanics and criteria for the review. Reviewers received training on how to determine whether a document was responsive, to note whether the document was a "key" document because it contained information especially relevant to the claims or defenses at issue in this and the related litigation, to review the document for any applicable privileges and code the document appropriately, and finally to provide a description of the privileged information for the privilege log. The review team was also instructed to mark a document as "responsive" if the document was remotely related to DoD's transgender policy, past or present, and further instructed to err on the side of finding responsiveness. In light of the 218 RFPs in this and the three related cases challenging DoD's transgender policy, DoD did not further review and categorize documents as responsive to particular RFPs. Rather, documents were categorized and produced as they were maintained and collected in the ordinary course of business—by DoD or Military Service component and custodian. Efforts to reorganize the documents by RFPs in this and the related litigation would have added substantial burdens to DoD's review efforts by requiring DoD attorneys to compare the content of each document reviewed to the list of the 218 RFPs across the four cases. This task would be further complicated by the fact that many responsive documents would be specifically responsive to numerous RFPs.

14. Beyond determining whether a document was responsive, as described above, DoD did not apply non-privilege objections to exclude reviewed documents from production.

15. The review team was also instructed on various privileges including the Deliberative Process Privilege, the Attorney-Client Privilege, Work Product privilege, and the Presidential Communications Privilege so that team members had a working knowledge of the applicable privileges they were likely to encounter as they reviewed the documents. They were further asked to code a document as "needs further review" if they were unsure about the content, had questions on whether a specific code was warranted, or encountered a document with a close privilege call so that an attorney could later locate and review the document to make the appropriate privilege determination. Finally, at the beginning of the review project DoD OGC hosted daily teleconferences among members of the review team to ensure uniformity across the review and to offer the team an opportunity to discuss any unique documents encountered as they worked through the batches.

16. Privilege determinations were generally made at the same time as responsiveness determinations. Reviewers would read an entire document and consider the content, the title, the author, the recipients, and the date of the document's creation as they contemplated whether the document was privileged. If a document contained privileged material, it was appropriately coded in Relativity, and the reviewer moved on to the next document. These privilege determinations were made only after a document was determined to be responsive, and there were no custodians, documents, or batches that were excluded from review because they contained privileged information.

17. Once the documents were coded as privileged, DoD OGC notified DOJ, and DOJ created and provided DoD OGC privilege logs for several batches of documents. These logs were generated from Relativity by the eDiscovery software and sent to my office in Microsoft Excel format. They were created using a combination of metadata from a document and the

reviewer's coding in Relativity. The logs included the following metadata: author of the email or creator of the document, recipient of any email, date of creation or date the email was sent, title of the document, a privilege determination, and basis for the privilege determination. This information was provided for every document that DoD withheld as privileged in this case. Accordingly, Defendants have long since provided Plaintiffs with the "individualized [privilege] objections" and a description of the documents "being withheld pursuant" to those individualized privilege objections that they seek through this motion. *See* ECF 358 at 2.

18. While Plaintiffs' motion is unclear on this point, it appears that in addition to seeking the individualized privilege objections that Defendants have already provided, Plaintiffs seek to have Defendants reorganize its productions and privilege objections by Plaintiffs' RFPs. Unsurprisingly, neither DoD nor the Military Services organize their files by Plaintiffs' RFPs. Therefore, to reorganize Defendant's production and privilege objections from how those documents were kept in the ordinary course of business to conform to Plaintiffs' desired organizational scheme, DoD and the Military Services would need to re-review the more than 42,000 privileged documents and simultaneously consult with Plaintiffs' RFPs to identify and re-categorize the information per Plaintiffs' specific request. In addition, because DoD and the Military Services conducted separate reviews of their documents and have differing command structures, reorganizing the data according to Plaintiffs' requests would require a coordinated, months-long re-review to group the privileged documents according to each of Plaintiffs' 68 RFPs.

19. Moreover, Plaintiffs' proposed organizational scheme would be unwieldy and virtually unusable as documents from primary custodians involved in the development of these polices for nearly three years could be simultaneously categorized into more than a dozen of

Plaintiffs' 68 RFPs. If required to reorganize the database this way, not only would DoD be providing Plaintiffs with the same information they currently possess (organized in a manner inconsistent with how it was collected or kept in the ordinary course of business), but the new database would be unmanageable due to the large number of duplicate entries Plaintiffs' proposed organization would create.

20. Finally, Plaintiffs' proposed reorganization will net them no new information. DoD OGC privilege logs already include the metadata needed to locate when a document was sent, created, or received by any particular custodian. Given that there are three related cases, and 218 total RFPs across the four cases, if DoD OGC had to reorganize the entire production and the privilege logs six separate times to accommodate each Plaintiffs' (including the State Plaintiffs) organizational preferences, the entire project could take a year to accomplish and in each instance the final product would be less manageable than what DoD and the Military Services have already provided.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 29th day of August 2019, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

Exhibit D

Declaration of Robert E. Easton in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. Jan 24, 2020), ECF 405-2

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

No. 17-cv-01297 (MJP)

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' MOTION FOR CLARIFICATION AND MOTION FOR STAY

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel ("OGC"). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Motion for Clarification and Motion for Stay. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

DoD Production in Response to *Doe* Order

4. Following the September 13, 2019 decision in *Doe v. Esper*, No. 17-cv-1597 (CKK) (D.D.C.), Dkt. 237, DoD has produced or committed to producing, under protective order as appropriate, the following categories of documents: (i) an unredacted version of the Administrative Record; (ii) unredacted meeting minutes of the Panel of Experts; (iii) all documents, testimony, and data reviewed by voting members of the Panel along with the deliberations on those materials; and (iv) all documents and communications that related to the work of the Panel and that were sent to or from voting members of the Panel dated from September 14, 2017, to March 23, 2018. In accord with the *Doe* order, DoD is no longer withholding documents within these categories under the deliberative process privilege. DoD continues to withhold certain materials on the basis of other privileges or because they contain personally identifying information.

5. In response to the *Doe* order, DoD has endeavored to produce any document or communication falling within the categories described in paragraph 4 even where generated by or sent to a person who is not a voting member of the Panel of Experts. Thus, for the date range of September 14, 2017 to March 23, 2018, DoD is only withholding documents under the

deliberative process privilege where the document is unrelated to the work of the Panel or was not provided to any voting member of the Panel of Experts.

6. DoD's and the Military Services' productions in response to the *Doe* order occurred on October 31, 2019; November 22, 2019; and December 19, 2019. Collectively, these productions consisted of 1,257 documents, comprising 9,584 pages.[1]

Compliance with and Interpretation of this Court's December 18, 2019 Order

7. Pursuant to this Court's Order of December 18, 2019, DoD is currently processing for release the documents of Secretary of Veterans Affairs (and former Under Secretary of Defense for Personnel and Readiness) Robert Wilkie. Mr. Wilkie was the only non-voting member of the Panel of Experts. A small number of documents fall within the date range of September 14, 2017, to February 22, 2018, and will be produced before January 31, 2020. In processing Mr. Wilkie's documents, DoD is determining whether they should be redacted or withheld pursuant to a privilege other than the deliberative process privilege, or whether they should be redacted or withheld as deliberative because they are not subject to the Court's Order.

8. If the Court's Order encompasses all documents responsive to RFP No. 29, DoD believes the only practicable method of compliance would be to re-review all documents previously withheld under the deliberative process and/or other privileges for the date range of September 14, 2017, to February 22, 2018. This would be necessary to determine whether documents should be released in full, whether they should be redacted or withheld pursuant to a privilege other than the deliberative process privilege, or whether they should be redacted or withheld as deliberative because they are not subject to the Court's Order.

[1]These totals also include certain documents unrelated to the deliberative process dispute in *Doe* that were reviewed and produced in the same productions.

9. Preliminary estimates indicate that approximately 10,869 DoD documents and approximately 5,256 Army documents generated between September 14, 2017, and February 22, 2018, were withheld as privileged under the deliberative process privilege. The Navy and Air Force withheld privileged documents as well, which will require re-review by those Services. At this time, I have been advised that the Navy estimates 4,209 documents will need to be re-reviewed, and the Air Force estimates it will need to re-review an additional 2,114 documents.

10. Accordingly, if the Court's Order is construed to require release of all deliberative documents responsive to RFP No. 29, this will require the re-review and potential release of at least 22,000 documents.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 24th day of January 2020, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

Exhibit E

Administrative Record Index in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash.)

Index for Administrative Record

Page	Document
000001-000011	Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces" (Apr. 2016)
000012-000022	*The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, p. 93 (Richard Posner, ed., Univ. of Chicago Press 1992)
000023-000031	Johnathan Shay, *Achilles in Vietnam*, p. 61, 198 (Atheneum 1994)
000032-000033	Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018)
000034-000092	The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report" (Sept. 2016)
000093-000192	RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel To Serve Openly* (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf ("RAND Study")
000193-000198	Human Rights Campaign, "Understanding the Transgender Community," https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018)
000199-000209	*Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), p. 453 (5th ed. 2013)
000210-000261	Department of Defense Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), incorporating Change 1, (Sept. 13, 2011)
000262-000269	Department of Defense Instruction (DoDI) 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (Jun. 7, 2013)
000270-000284	American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, pp. 261-264 (3rd ed. 1980)
000285-000298	American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, pp. 76-77 (3rd ed. Revised 1987)
000299-000309	American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, pp. 532-538 (4th ed. 1994)
000310-000313	Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 1 (May 15, 2014)
000314-000318	Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181 (2016)
000319	Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015)
000320-000325	Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members'" (June 30, 2016)

Page	**Document**
000326	Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017)
000327-000329	Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017)
000330-000331	Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference -- Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (Sept. 14, 2017)
000332-000351	Deployment Health Clinical Center, "Mental Health Disorder Prevalence Among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017)
000352-000356	American Psychiatric Association, "Expert Q&A: Gender Dysphoria," available at https://www.psychiatry.org/patients-familites/gender-dysphoria/expert-qa (last visited Feb. 14, 2018)
000357-000378	M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service, Armed Forces & Society (Mar. 2014)
000379-000393	Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," International Review of Psychiatry, Vol. 28 (2016)
000394-000405	George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," LGBT Health, Vol. 3 (Apr. 2016)
000406-000423	Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* (American Foundation for Suicide Prevention and the Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf
000424-000429	H.G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, "Suicide and Suicidal Behavior Among Transgender Persons," *Indian Journal of Psychological Medicine*, Vol. 38 (2016)
000430-000437	Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," *Suicide and Life Threatening Behavior*, Vol. 47, (Aug. 2017)
000438-000449	Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," *Suicide and Life Threatening Behavior* DOI: 10.1111/sltb.12432 (epub ahead of print) (2018)

Page	**Document**
000450-000457	Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," *Comprehensive Psychiatry*, Vol. 55 (2014)
000458-000462	Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," (May 19, 2014).
000463-000497	Wylie C. Hembree, Peggy Cohen-Kettenis, Louis Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102 (Nov 2017)
000498-000505	Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6 (Feb. 2011)
000506-000520	Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017; Apr. 12, 2016; May 11, 2015)
000521-000526	Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017)
000527-000725	University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018)
000726-001027	Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality 2016), available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF
001028-001177	Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services (Aug. 30, 2016) ("CMS Report")
001178-001195	Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," *Clinical Endocrinology*, Vol. 72 (2010)
001196-001215	*United States v. Virginia*, 518 U.S. 515 (1996)

Page	Document
001216-001283	Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration" (Mar. 20, 2017)
001284-001289	Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management" (Jan. 29, 2016)
001290-001291	Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012)
001292-001333	Department of the Army, Army Regulation 600-9, "The Army Body Composition Program" (June 28, 2013)
001334-001392	Department of the Navy, Office of the Chief of Navy Operations Instruction 6110.1J, "Physical Readiness Program" (July 11, 2011)
001393-001539	Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program" (Aug. 27, 2015)
001540-001603	Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program" (Aug. 1, 2008)
001604-001608	Department of the Navy, Marine Corps Order 6110.3A, "Marine Corps Body Composition and Military Appearance Program" (Oct. 12, 2017)
001609-001661	Department of the Navy, Marine Corps Order 6110.3A CH-1, "Marine Corps Body Composition and Military Appearance Program" (Dec. 15, 2016)
001662-001693	United States Military Academy, Office of the Commandant of Cadets, "Physical Program Whitebook AY 16-17," p. 13
001694-002099	Headquarters, Department of the Army, TC 3-25.150, "Combatives" (Feb. 2017)
002100-002109	Major Alex Bedard, Major Robert Peterson & Ray Barone, "Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," Association of the United States Army (Nov. 16, 2017), https://www.ausa.rg/articles/punching-through-barriers-female-cadets-boxing-west-point
002110-002112	International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf
002113-002150	NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf
002151-002153	Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 15665I, "Uniform Regulations," Art. 2101.1, (modified 12/21/2017)
002154-002221	Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia" (Mar. 31, 2014)

Page	**Document**
002222-002329	Department of the Air Force, Air Force Instruction 36-2903, "Dress and Personal Appearance of Air Force Personnel" (Feb. 9, 2017)
002330-002413	Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations" (Mar. 31, 2003)
002414-002431	Department of Defense Instruction 1300.28, *In-Service Transition for Service Members Identifying as Transgender* (June 30, 2016)
002432-002583	Institute for Defense Analyses, "Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment" Draft Final (January 2016)
002584-002614	Modification Thirteen to U.S. Central Command Individual Protection and Individual-Unit Deployment Policy, Tab A (Mar. 2017)
002615-002619	Memorandum from the Assistant Secretary of Defense for Health Affairs, "Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications" (Oct. 7, 2013)
002620-002624	National Institute of Mental Health, "Bipolar Disorder" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml
002625-002627	National Institute of Mental Health, "Schizophrenia" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/schizophrenia.shtm
002628	Douglas MacAurthur, *Respectuflly Quoted: A Dictionary of Quotations* (1989), available at http://www.bartleby.com/73/1874.html
002629-002781	Nathaniel Frank, "Gays in Foreign Militaries 2010: A Global Primer" (*The Palm Center*, Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf
002782-002802	Anne Speckhard & Reuven Paz, "Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service" (2014), http://www.researchgate.net/publication/280093066
002803-002816	Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," *Armed Forces and Society*, Vol. 41 (2014)
002817-002820	Leo Shane III, "Poll: Active-duty troops worry about military's transgender policies," *Military Times* (July 27, 2017), available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/
002821-002824	Minutes, POE Meeting 1 (Oct. 13, 2017)
002825-002829	Minutes, POE Meeting 2 (Oct. 19, 2017)
002830-002835	Minutes, POE Meeting 3 (Oct. 26, 2017)
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002848	Agenda, POE Meeting 1 (Oct. 13, 2017)
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002857	Agenda, POE Meeting 2 (Oct. 19, 2017)
002858-002866	Transgender Policy Panel Meeting Background Information Slides (Oct. 19, 2017)
002867-002880	DoD Transgender Service in the U.S. Military, Implementation Handbook (excerpts) (Sept. 30, 2016)
002881	Agenda, POE Meeting 3 (Oct. 26, 2017)
002882	Agenda, POE Meeting 4 (Nov. 2, 2017)
002883-002904	Health Data for Service Members with Gender Dysphoria (Nov. 2, 2017)
002905	Agenda, POE Meeting 5 (Nov. 9, 2017)
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002911-002940	Medical and Surgical Treatment for Gender Dysphoria (Nov. 7, 2017)
002941	Comparison of Civilian Insurers and MHS
002942	Agenda, POE Meeting 7 (Nov. 21, 2017)
002943-002963	2015 Transgender Survey (December 2016) and Additional Administrative Data (Nov. 21, 2017)
002964	Reasons for Separation (table)
002965	Agenda, POE Meeting 8 (Nov. 30, 2017)
002966-002976	Admin Data Presented During Panel Meetings
002977	Agenda, POE Meeting 9 (Dec. 7, 2017)
002978-002981	The Federal Aviation Administration (FAA) and Gender Dysphoria (Dec. 4, 2017)
002982-002985	Time To Return to Full Duty After Transition Surgery in MTFs (slide deck)
002986-002997	Admin Data Presented During Panel Meetings (version 2)
002998	Agenda, POE Meeting 10 (Dec. 13, 2017)
002999-003010	Data Extracts: Key information used by the Panel to make recommendations
003011-003042	Health Data on Active Duty Service Members with Gender Dysphoria (Dec. 13, 2017)
003043-003055	Admin Data Presented During Panel Meeting (version 3)
003056	Agenda, POE Meeting 11 (Dec. 22, 2017)
003057	Agenda, POE Meeting 12 (Jan. 4, 2018)
003058	Agenda, POE Meeting 13 (Jan. 11, 2018)
003059-003067	Action Memo from Under Secretary of Defense (Personnel and Readiness) to the Secretary of Defense re: Recommendations by the Transgender Review Panel of Experts (Jan. 11, 2018)
003068-003075	Hormone Therapy White Paper

Exhibit F

Order in *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 16, 2018), ECF 112

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,
Plaintiffs
v.
DONALD J. TRUMP, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(April 16, 2018)

On April 11, 2018, Defendants contacted chambers via e-mail to notify the Court of a discovery dispute.[1] Plaintiffs would like to schedule the deposition of the Vice Chairman of the Joint Chiefs of Staff, General Paul J. Selva. Defendants argue that they should not have to make the Vice Chairman (who is the second highest ranking uniformed military official in the armed forces) available for a deposition at this point in this litigation. They offer instead to make available Anthony Kurta, the Deputy Assistant Secretary of Defense for Military Personnel Policy. Plaintiffs would agree to depose the Vice Chairman only after deposing Mr. Kurta, but would like to at least schedule the Vice Chairman's deposition now. Plaintiffs contend that such a deposition will eventually be necessary even after they depose Mr. Kurta, because "Mr. Kurta cannot speak to the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups." Defendants oppose the scheduling of the Vice Chairman's deposition. They represent to the Court that Mr. Kurta can speak with authority to the topics quoted above.

The Court will accept Defendants' representation and, based thereon, not order Defendants to schedule the Vice Chairman's deposition at this point. Plaintiffs shall first depose Mr. Kurta. If, after deposing Mr. Kurta, 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. If the parties cannot reach an agreement, they may contact the Court again.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

[1] The parties' e-mails are attached to this Order as Exhibit A.

Exhibit A

RE: Doe v. Trump, Case No. 17-01597: Discovery Dispute
Parker, Ryan (CIV)
to:
Kollar-Kotelly_Chambers@dcd.uscourts.gov, Laporte, Claire
04/16/2018 09:59 AM
Cc:
Alan Schoenfeld, "Carmichael, Andrew E. (CIV)", "Enlow, Courtney D. (CIV)", "Wolfson, Paul"
Hide Details
From: "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>
To: "Kollar-Kotelly_Chambers@dcd.uscourts.gov" <Kollar-Kotelly_Chambers@dcd.uscourts.gov>, "Laporte, Claire" <CLL@foleyhoag.com>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carmichael@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>, "Wolfson, Paul" <Paul.Wolfson@wilmerhale.com>

Dear Chambers of Judge Kollar-Kotelly,

In response to the Court's email, Defendants have confirmed that Mr. Anthony Kurta, who is the Deputy Assistant Secretary of Defense for Military Personnel Policy, was the Chair of the Panel of Experts, and was personally involved throughout the policy-making process, can speak with authority on the subjects identified by Plaintiffs. Specifically, Mr. Kurta can speak authoritatively to "the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups."

Civilian officials in the Office of the Under Secretary for Personnel and Readiness are primarily responsible for personnel issues, such as the DoD policy at issue in this case. As a result, Mr. Kurta performed the lead role coordinating matters concerning transgender individuals, not the Vice Chairman of the Joint Chiefs of Staff. We are advised that the Vice Chairman attended only one meeting of the Panel as an observer and did not vote in any proceedings. Mr. Kurta or another official from the Office of the Under Secretary of Defense for Personnel and Readiness ran the Panel meetings and briefed the Vice Chairman approximately six times regarding the Panel's work. Upon the conclusion of the Panel's work, the Vice Chairman was briefed on the findings of the Panel by Mr. Kurta. Therefore, Mr. Kurta is best positioned to speak authoritatively about the process and timeline that resulted in the position set forth in DoD's new policy.

Defendants note, however, that information related to these subjects may be privileged. As Plaintiffs have not established that General Selva possesses unique, non-privileged, relevant information that cannot be obtained through other means, Defendants should not be required to schedule his deposition. To the extent the Court is inclined to order Defendants to schedule General Selva's deposition, Defendants respectfully request an opportunity to fully brief the issue.

Best,

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-514-4336 | ryan.parker@usdoj.gov

From: Alec_Levy@dcd.uscourts.gov [mailto:Alec_Levy@dcd.uscourts.gov] **On Behalf Of** Kollar-Kotelly_Chambers@dcd.uscourts.gov
Sent: Thursday, April 12, 2018 3:09 PM
To: Laporte, Claire <CLL@foleyhoag.com>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Wolfson, Paul <Paul.Wolfson@wilmerhale.com>; Parker, Ryan (CIV) <ryparker@CIV.USDOJ.GOV>
Subject: RE: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Government Counsel,

Plaintiffs have proffered that Mr. Anthony Kurta will not be able to speak with authority to "the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups." Plaintiffs assert that only Vice Chairman Selva (or Deputy Secretary of Defense Shanahan) would be able to speak to those issues. Please respond briefly to this assertion by no later than **10:00 a.m.** on **Monday, April 16, 2018**. Specifically, indicate whether Mr. Kurta is or is not able to speak with authority on the issues identified by Plaintiffs.

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
202-354-3340

From: "Laporte, Claire" <CLL@foleyhoag.com>
To: "Kollar-Kotelly_Chambers@dcd.uscourts.gov" <Kollar-Kotelly_Chambers@dcd.uscourts.gov>, "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carmichael@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>, "Wolfson, Paul" <Paul.Wolfson@wilmerhale.com>
Date: 04/11/2018 04:15 PM
Subject: RE: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Dear Chambers of Judge Kollar-Kotelly:

Defendants are correct that Plaintiffs intend to notice the deposition of General Selva, Vice Chairman of the Joint Chiefs of Staff, although the notice has not yet been served. The Vice Chairman is likely to have important information regarding the implementation plan that other deponents do not. Plaintiffs are willing to accommodate the Vice Chairman's schedule and to propose dates for after the deposition of Mr. Kurta, but that is not a basis to defer scheduling the deposition. And there is every reason for the parties to set a mutually agreeable time for this deposition sooner rather than later to avoid further delays in discovery.

Plaintiffs believe that Vice Chairman Selva is uniquely situated to illuminate how the actual decision makers charged with presenting an implementation plan to Secretary Mattis did (or did not) incorporate material from the so-called panel of experts. Pursuant to Secretary Mattis's September 14, 2017 memorandum entitled "Terms of Reference – Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (attached), Vice Chairman Selva is one of only two officials (the other being Deputy Secretary of Defense Shanahan) who were personally responsible for "developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum, Military Service by Transgender Individuals, dated August 25, 2017" and for "propos[ing] for [Secretary Mattis's] consideration recommendations" concerning such implementation. The Defendants have placed the origins and substance of this recommendation directly at issue in the litigation, including by asserting (against all evidence) that it was the product of "professional, independent judgment" rather than an "implementation" of the President's policy. *See, e.g.*, Mot. to Dissolve Inj. (Docket No. 96) at 1. The purported "Panel of Experts," which Mr. Kurta evidently chaired, is relevant in that it was tasked with "support[ing]" the Vice Chairman and Deputy Secretary in developing their recommendation, but ultimately Mr. Kurta cannot speak to the totality of the timeline or process that resulted in the position set forth in the Mattis report, including whether or to what extent that position reflected additional or different factors not previously considered by the panel of experts and whether or to what extent that position reflected the input or influence of additional military or non-military individuals or groups. *See, e.g.*, Mot. to Dissolve Inj. (Docket No. 96) at 7 (purported "new policy" was the product of the Panel's recommendations "along with additional information"). Accordingly, a deposition of Vice Chairman Selva (or, alternatively, Deputy Secretary Shanahan) is necessary and appropriate. *See, e.g.*, *Byrd v. District of Columbia*, 259 F.R.D. 1, 6-8 (D.D.C. 2009) (explaining that deposition of high ranking officials is appropriate where those officials are "likely have information that no other source could provide since only they can testify to their own motives").

For the efficient use of both the litigants' and the Court's resources, Plaintiffs are willing—and indeed intend—to depose the Vice Chairman only after the deposition of Mr. Kurta. Plaintiffs expect to pursue more targeted questioning of the Vice Chairman in light of testimony from others, including Mr. Kurta. But Plaintiffs do not believe that they should defer scheduling the Vice Chairman's deposition simply because other deponents have knowledge that overlaps with his if he is likely to have additional knowledge unavailable through those other sources. In particular, as explained, Plaintiffs expect that Mr. Kurta will be unable to testify to important aspects of the decision-making process (outside the panel of experts) that led to the implementation plan, thereby necessitating the Vice Chairman's deposition. Plaintiffs believe the appropriate course at this stage is for the parties to schedule a mutually agreeable date and time for the Vice Chairman's deposition in order to avoid further delays in resolving this litigation fully and fairly on the merits.

Respectfully,

Claire Laporte

Claire Laporte | Partner

Seaport World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2600

617 832 1210 phone
617 832 7000 fax
www.foleyhoag.com

From: Alec_Levy@dcd.uscourts.gov <Alec_Levy@dcd.uscourts.gov> **On Behalf Of** Kollar-

Kotelly_Chambers@dcd.uscourts.gov
Sent: Wednesday, April 11, 2018 11:23 AM
To: Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Laporte, Claire <CLL@foleyhoag.com>; Enlow, Courtney D. (CIV) <Courtney.D.Enlow@usdoj.gov>; Wolfson, Paul <Paul.Wolfson@wilmerhale.com>
Subject: Re: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Plaintiffs' Counsel,

Please briefly respond, by no later than **5:00 p.m. today**, to the Government's statement of this discovery dispute. Specifically, assuming that Mr. Anthony Kurta has information that Plaintiffs seek from the Vice Chairman, indicate Plaintiffs' willingness to take Mr. Kurta's deposition before the Vice Chairman's.

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
202-354-3340

From: "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>
To: "Kollar-Kotelly_Chambers@dcd.uscourts.gov" <Kollar-Kotelly_Chambers@dcd.uscourts.gov>
Cc: "Schoenfeld, Alan E" <Alan.Schoenfeld@wilmerhale.com>, "CLL@foleyhoag.com" <CLL@foleyhoag.com>, "Wolfson, Paul" <Paul.Wolfson@wilmerhale.com>, "Carmichael, Andrew E. (CIV)" <Andrew.E.Carmichael@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>
Date: 04/11/2018 10:13 AM
Subject: Doe v. Trump, Case No. 17-01597: Discovery Dispute

Chambers of Judge Kollar-Kotelly,

I am counsel for Defendants in *Doe v. Trump*, Case No. 17-01597, and have included Plaintiffs' counsel on this email. Plaintiffs have asked to depose the Vice Chairman of the Joint Chiefs of Staff, General Paul J. Selva. The Vice Chairman is the second highest ranking uniformed military official in the armed forces. He has significant military operational responsibilities which include serving as a voting member of the Joint Chiefs of Staff, serving as the head of numerous DoD and interagency national security committees, and serving in the role of acting Chairman during the Chairman's absence. *See*, e.g, 10. U.S.C. § 154. As we informed Plaintiffs, deposing the Vice Chairman, 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), and Plaintiffs have not shown extraordinary circumstances necessary to overcome that presumption. Specifically, Plaintiffs have not established that the Vice Chairman 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). We informed Plaintiffs that, to the extent that the Vice Chairman 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.

Mr. Kurta previously served for 32 years on active duty as a Surface Warfare Officer, and thus has a similar operational background to the Vice Chairman. His current duties as Deputy Assistant Secretary of Defense for Military Personnel Policy, however, are not operational in nature and thus Defendants have agreed to make him available for a deposition. We

requested that Plaintiffs, at a minimum, take Mr. Kurta's deposition (scheduled for April 20, 2018) before seeking to depose the Vice Chairman of the Joint Chiefs of Staff. As Plaintiffs have refused to withdraw their request to schedule the Vice Chairman's deposition, Defendants respectfully request a telephone conference to discuss this matter with the Court.

Respectfully,

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-514-4336 | ryan.parker@usdoj.gov

Exhibit G

E-mail from M. Slachetka to M. Skurnik
re Dee Deposition (June 8, 2020)

From: Slachetka, Meg
To: Skurnik, Matthew (CIV); Barsanti, Vanessa; Gerardi, Michael J. (CIV); Powers, James R. (CIV); Redburn Jr., Thomas E.; *jlevi@glad.org; *sminter@nclrights.org; Heinz, Jordan M.; Rosenberg, Michael E.; Buenviaje, Megan; *Dixie.Tauber@lw.com; *Chloe.Korban@lw.com; *nlampros@cov.com; *PKomorowski@cov.com; Kaplan, Sydney; "Stallings-Ala'ilima, Chalia (ATG)"; *Lara.Haddad@doj.ca.gov; Buenviaje, Megan; Ginsburg, Maya; Siegfried, Daniel I.
Cc: Enlow, Courtney D. (CIV); Carmichael, Andrew E. (CIV); Zhou, Grace X. (CIV); Edelman, Christopher (CIV); *Rachel@newmanlaw.com; *jason@newmanlaw.com
Subject: RE: Karnoski, Doe, Stockman, Stone - Stephanie Miller Deposition
Date: Monday, June 1, 2020 6:47:20 PM

Drew/Matt –

Thanks for the call earlier. Plaintiffs have conferred among themselves concerning the Miller and Dee depositions. Given that the Civil Division is currently subject to a teleworking restriction and you are unsure when such restriction will be lifted, but that Mayor Bowser lifted the "stay-at-home" order on May 29th such that D.C. has now entered "Phase One" of reopening, we are optimistic that in-person depositions will be possible in D.C. later this month. Accordingly, Plaintiffs request Ms. Miller's availability to be deposed later this month and next month. As to Mr. Dee, we wish to keep his deposition on for now in case the June 11th date is feasible for an in-person deposition. If circumstances are unchanged next week, we will similarly ask for his availability to be deposed later this month and next month.

Although we recognize it may take you more time to obtain dates from these witnesses, we would appreciate a response tomorrow with your position.

Best,
Meg

Meg Slachetka
Counsel
Lowenstein Sandler LLP

T: 212.419.5856
F: 973.422.6783

Bio

From: Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>
Sent: Friday, May 29, 2020 2:38 PM
To: Slachetka, Meg <MSlachetka@lowenstein.com>; Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Redburn Jr., Thomas E. <tredburn@lowenstein.com>; *jlevi@glad.org <jlevi@glad.org>; *sminter@nclrights.org <sminter@nclrights.org>; Heinz, Jordan M. <jheinz@kirkland.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Buenviaje, Megan <megan.buenviaje@kirkland.com>; *Dixie.Tauber@lw.com <Dixie.Tauber@lw.com>; *Chloe.Korban@lw.com <Chloe.Korban@lw.com>; *nlampros@cov.com <nlampros@cov.com>; *PKomorowski@cov.com <PKomorowski@cov.com>; Kaplan, Sydney <SKaplan@lowenstein.com>; 'Stallings-Ala'ilima, Chalia (ATG)' <Chalia.SA@atg.wa.gov>; *Lara.Haddad@doj.ca.gov <Lara.Haddad@doj.ca.gov>; Buenviaje, Megan <megan.buenviaje@kirkland.com>; Ginsburg, Maya

Exhibit H

Minutes: Transgender Review Panel III
(Oct. 26, 2017)

MINUTES: TRANSGENDER REVIEW PANEL III
THURSDAY, OCTOBER 26, 2017 1500-1730
P&R CONFERENCE ROOM, 3D1063
1400 DEFENSE PENTAGON WASHINGTON, DC 20301

Welcome: [redacted]

Review of minutes from previous meeting: [redacted]

Gender Relations Survey Methodology: [redacted] presented the methodology used in the 2016 Gender Relations Survey. [redacted]

Policy development roadmap: [redacted]

Military Medical Professionals: A panel of seven military medical professionals joined the meeting to share their insights, experiences and advice to the Panel. The group consisted of mental health specialists, surgeons, endocrinologists as well as general practitioners. Representing the Army, Navy and Air Force, the collective group had personally seen or advised on more than 250 transgender Service member medical treatment plans.

Highlights of the panel discussion:

- One medical panelist with significant experience in the field provided these definitions for transgender and gender dysphoria: "an individual who does not identify with their birth gender is considered transgender." When that dissonance causes the individual distress, they become gender dysphoric. Furthermore, gender dysphoria is ultimately a social phenomenon brought about by social pressure – and in a society that is all-welcoming and non-discriminatory, gender dysphoria would not exist because individuals would feel free to be who they identify with.
- When asked if gender dysphoria can be 'cured,' a panelist remarked that they shied away from using the term 'cured,' and instead stated that it is treatable and resolvable – potentially without any medical treatment whatsoever.
- The panel expressed their concern that many young Service members may be rushing to surgery, feeling that their window for open service may be closing soon.
- When asked if current policies are adequate, a panelist remarked that they were 'challenging.' The current policy presents both commands and medical practitioners with challenges, the most obvious challenge being achieving a gender marker change. Under current policy, without an exception to policy, the gender marker

change cannot occur without completion of the medical treatment plan. With an uncomplicated plan (e.g. hormones only), that is a relatively quick process. With a complicated plan (e.g. surgeries), that can be a long period – and with a requirement for a year of 24/7 real life experience prior to any surgeries, the gender marker change cannot be accomplished quickly. Additionally, without an exception to policy, the Service member cannot perform their real life experience (RLE) while on duty.

- Individuals with untreated gender dysphoria have roughly a 25 times higher risk of suicide, but that studies indicated it is largely due to an inability to transition or treat gender dysphoria. With treatment, suicidal ideation can significantly decrease.
- The panel cautioned that if DoD closes the door on transgender service, it would stigmatize and marginalize those that are still serving which could translate into increased suicide rates or harassment amongst the population.
- The panel expressed that the better support structure the transgender Service member has, the smoother the transition is for them.
- One panelist remarked that she is seeing approximately 4-5 new transgender Service members per month.

Developing a Medical Treatment Plan:

- Receiving a diagnosis of gender dysphoria takes approximately 6 months of counseling.
- The panel was asked what the first step in transition is after a diagnosis of gender dysphoria is given and the answer was mental or behavioral health treatment.
- The panel widely expressed the sentiment that commands across all Services were supportive of their Service member's transitions.
- When asked about how many Service members changed their plan while in the midst of it, the answer was relatively small. Since many plans are originally written broadly with words like "may consider" for certain surgeries, they are flexible enough to allow for adjustments when the Service member decides to enact that portion or not.
- One panelist with experience on more than 150 transgender Service members stated that their medical plans ran the gamut from full surgeries, partial surgeries to no surgeries. When asked about the average length of time to complete a transition, the panel stated that it depended on the amount of procedures the individual Service member desired or were recommended by their health care provider.

Cross-sex hormones:

- When asked what happens if an individual on cross-sex hormones was unable to take them for a period of time, the panel stated that the answer depended on the specific situation. In short, side effects of cross-sex hormone withdrawal include increased fatigue, mood swings and decreased libido – and these symptoms are

similar to those of a cisgender individual that stopped taking hormone supplements. The longer an individual was on cross-sex hormones when they had to stop, the more intense those symptoms would be because the cross-sex hormones suppress the body's natural production of hormones and the body might not resume production after a long course of cross-sex hormones. If the individual was on a short course of cross-sex hormones prior to stopping, the body would likely be able to begin production of natural hormones again. The panelist also pointed out that cross sex hormones could conceivably be provided in multiple ways – topical creams, injections or pills – so it would be unlikely that an individual would be unable to take cross-sex hormones anywhere in the world. The same panelist remarked that there would likely be a decrease in combat ability for an individual who stopped taking their cross-sex hormones.

- When asked about why an individual is nondeployable for 12 months after beginning cross-sex hormones, the endocrinologist stated that it was due to prevailing medical guidelines (e.g. endocrine society), though his experience was that a Service member could feasibly deploy after six months of hormonal stability. The prevailing medical guidelines require laboratory work to be conducted every 90 days, making access to labs the driving factor for deployability in the first 12 months. That is the same standard applied to individuals provided hormone supplements due to low natural hormones (e.g. low testosterone).
- When asked about the long-term effects of cross-sex hormones, the endocrinologist stated that the hormone regimen is tailored to the individual and while there is an increased risk of clots, strokes, or bad lipid profiles, the risks are very small. Birth control pills generally contain more hormones than cross-sex hormones. Having treated more than 150 Service members on cross-sex hormones, none of his patients experienced any adverse side effects.
- When asked about the FAA requirement for 5 years of hormonal stability for pilots or air traffic controllers, the endocrinologist stated that it was due to the effects of hormones on red blood cells – in the cockpit, certain conditions can increase the nitrogen content in blood and cross-sex hormones could exacerbate this phenomenon.
- In the endocrinologist's experience, roughly three times more cisgender men want testosterone supplements than transgender patients.
- One panelist has seen more than 20 transgender Service members and has approved the deployment of several of them to non-austere environments like Poland and Kosovo. Most of the individuals work their transitions around operational requirements.

Surgical Procedures:

- A plastic surgeon brought up the difference between medically necessary procedures and those that are considered to be cosmetic. Based on guidelines similar to civilian insurance, breast reduction surgery for a female-to-male (FtM)

transition is considered medically necessary, in a male-to-female (MtF) transition, breast augmentation is considered cosmetic. Other procedures considered to be cosmetic include facial feminization, Adam's apple reduction surgery and voice augmentation surgery. According to the panelist's experience, roughly 25% of transgender individuals requires some sort of surgery, with breast reduction being the most common. Only 10-15% of MtF transitions have genital reassignment surgery.

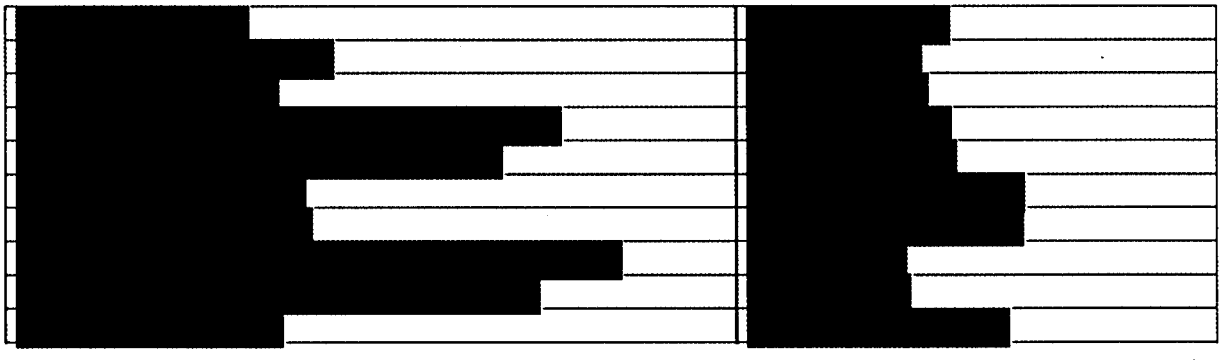
- When asked about the probability of successful transitions, one panelist remarked that the complication rate for procedures associated with transition are 5-20%. He also remarked that a MtF transition is medically easier than a FtM.
- One panelist stated that the surgical portion of a complete gender reassignment, would generally be scheduled as five or six surgeries over a 15-month period. A MtF transition, including counseling, 12 months of hormonal stability and surgeries could easily take up the bulk of an entire 4-year enlistment.
- The University of Oregon is the only medical treatment facility on the west coast that accepts Tricare or the DoD's direct pay system and therefore the singular west coast facility currently seeing DoD sex reassignment consults.

Future Considerations:

- Some individuals do not come to terms with their issues until their mid-40's, so even if transgender service is disallowed, DoD medical facilities will continue to have to provide support in the future.
- According to one panelist, the DoD must retain certain transition-related skills, because 10-15% of his transgender patients are family members or retirees, so regardless of the eventual policy decision, the military treatment facilities will continue to support transitions.

Conclusion: Mr. Kurta closed the meeting at 1730 and thanked the medical panel for their openness and frank comments.

Other attendees:



MINUTES: TRANSGENDER REVIEW PANEL III
THURSDAY, OCTOBER 26, 2017 1500-1730
P&R CONFERENCE ROOM, 3D1063
1400 DEFENSE PENTAGON WASHINGTON, DC 20301

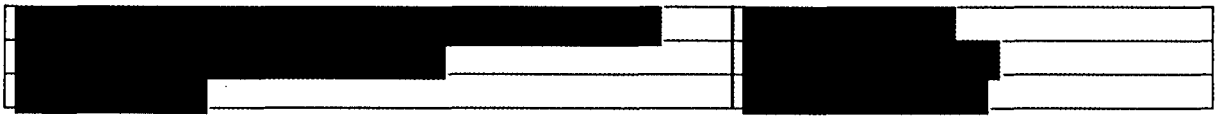


Exhibit I

E-mail from M. Wilmoth to K. Guice re JHU Psychiatrist (Oct. 15, 2015)

From: Krueger, Mary V COL USARMY HQDA ASA MRA (US)
To: Biggerstaff, William C (Casey) MAJ USARMY 3 ID (USA)
Subject: FW: JHU Psychiatrist (UNCLASSIFIED)
Date:

CLASSIFICATION: UNCLASSIFIED

Casey,

v/r
MVK

-----Original Message-----
From: Guice, Karen S SES (US)
Sent: Friday, October 16, 2015 10:23 AM
To: Wilmoth, Margaret C MG USARMY (US) <margaret.c.wilmoth.mil@mail.mil>; Allen, Roosevelt Jr Maj Gen USAF AF-SG (US) <roosevelt.allen4.mil@mail.mil>; Iverson, Kenneth J RDML USN BUMED FCH VA (US) <kenneth.j.iverson.mil@mail.mil>
Cc: Krueger, Mary V COL USARMY HQDA ASA MRA (US) <mary.v.krueger.mil@mail.mil>
Subject: RE: JHU Psychiatrist (UNCLASSIFIED)

Peggy:

Thank you for the reference. I do not believe the prior experts were advocates; rather they were experienced specialists who provide care to this population. Sec. Carson has asked me to vet each expert prior to inviting them to the WG. I have identified some behavioral health experts and will put your referred individual in the mix for my interview.

-----Original Message-----
From: Wilmoth, Margaret C MG USARMY (US)
Sent: Thursday, October 15, 2015 7:58 PM
To: Guice, Karen S SES (US); Allen, Roosevelt Jr Maj Gen USAF AF-SG (US); Iverson, Kenneth J RDML USN BUMED FCH VA (US)
Cc: Krueger, Mary V COL USARMY HQDA ASA MRA (US)
Subject: JHU Psychiatrist (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Dr. Guice and colleagues,

I understand that a BH expert will be coming to one of the TG Work group meetings. All of the speakers we have had speak come from an advocacy perspective.

I have learned of a Johns Hopkins psychiatrist, Dr. Paul R. McHugh, who might view the BH aspects of TG from the opposite perspective which I believe might help us in providing the Senior leader group with the opportunity to have hear from all sides of the issue. Using the "Abilene" analogy, I would rather we get to a decision knowing how we got there by hearing from all sides of this important decision rather than just hearing from advocates.

He is an Emeritus professor at Hopkins; his contact info can be found at:
www.hopkinsmedicine.org/profiles/results/directory/profile/0003340/paul-mchugh
I am happy to contact him on behalf of the group.
Thoughts?

v/r
Peggy

Margaret C. Wilmoth, PhD, MSS, RN, FAAN
Major General
Deputy Surgeon General for Mobilization, Readiness and
Army Reserve Affairs
Office of the Surgeon General

Cell: [redacted]
Office: 703-681-8151/6298
Email: Margaret.C.Wilmoth.mil@mail.mil

Classification: UNCLASSIFIED
Caveats: FOUO

CLASSIFICATION: UNCLASSIFIED