IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

Case No. 1:20-mc-00013-UA-JEP

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 WILLIAM F. MORAN, FORMER VICE CHIEF OF NAVAL OPERATIONS

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INTRODUCTION

Plaintiffs do not contest that Admiral William F. Moran, the former Vice Chief of Naval Operations, 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 involvement on the Panel of Experts ("Panel") that developed 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 Admiral Moran, a third-party to the underlying action, squarely conflicts with the apex doctrine.

Despite filing several hundreds of pages of briefing and exhibits (in a not-so-veiled attempt to convince the Court to transfer this motion), the fact remains that Plaintiffs have failed to identify a single case in which a court has permitted the deposition of a high-ranking military official regarding a military policy. Nor have they established either that Admiral Moran, who was one of seventeen Panel members, has unique knowledge of the Panel's deliberations or that he acted in bad faith—the requisite circumstances for overcoming the apex doctrine's protections. For these reasons, explained further below, the Court should quash the deposition subpoena issued to Admiral Moran.

ARGUMENT

Plaintiffs devote two-thirds of their opposition brief and thirty exhibits to attacking the merits of the challenged policy, *see* Pls.' Opp. to Defs.' Mot. to Quash ("Pls.' Opp.") at 4–14, Dkt. 12; accusing Defendants of withholding discovery, *id.* at 14, and muddying the record about what the Ninth Circuit previously held in the underlying case, *see id.* at 14–16. But that is a mere distraction. Notwithstanding the inaccuracy of Plaintiffs' assertions, they are wholly irrelevant to the dispute at issue: whether the apex doctrine bars Admiral Moran's deposition. Plaintiffs do not contest that Admiral Moran is an apex official. *See id.* at 17. But they fail to offer any evidence that "exceptional circumstances" warrant his deposition—that is, either that he possesses unique, first-hand knowledge about the development of the challenged policy, or that he acted in bad faith. Accordingly, Plaintiffs' subpoena should be quashed.

I. Plaintiffs Cannot Establish That Exceptional Circumstances Require Admiral Moran's Deposition.

To overcome the apex doctrine's protections, Plaintiffs bear the burden to show with particularity that Admiral Moran has personal knowledge of non-privileged information relevant to their claims, and that Plaintiffs cannot obtain that information through any other source of discovery. *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 to do so.

A. Plaintiffs Have Failed to Show That Admiral Moran Possesses Unique, First-Hand Knowledge About the Challenged Policy.

As a threshold matter, Plaintiffs imply that Admiral Moran's participation on the Panel, alone, constitutes exceptional circumstances warranting his deposition. *See* Pls.' Opp. at 17–18. That is incorrect. "Although personal involvement in or knowledge of the subject events" is "a necessary prerequisite for deposing a high-ranking government official, it is not sufficient." *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 323 (D.N.J. 2009). Rather, "[a] party must still show that the information cannot be gleaned from other sources or achieved through less burdensome means . . . ." *Id.*; *see also Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999).

Plaintiffs' opposition fails to offer any concrete examples of the Admiral's "unique factual knowledge critical to this litigation." Pls.' Opp. at 21 (capitalization omitted). That is unsurprising. As one of seventeen voting members of the Panel, Admiral Moran's knowledge about what information the Panel considered and its reasons for recommending the policy at issue to then-Secretary of Defense James N. Mattis is co-extensive with the sixteen other Panel members who attended the same meetings, listened to the same presentations, and participated in the same debates and votes.[1] In fact, Admiral Moran has attested—and Plaintiffs do not dispute—that he did not have a specialized role on the Panel. *See* Moran Decl. ¶¶ 9–10, Dkt. 2-5 (stating that he did not serve in a leadership position on

[1] Plaintiffs make much of the fact that Admiral Moran also worked on DoD's former "Carter" policy. *See* Pls.' Opp. at 1, 19. But that has no bearing on whether he has unique, personal knowledge of why the Panel recommended *the current policy*.

the Panel; that he did not chair any of the working groups supporting the Panel; and that he did not have any significant involvement with drafting the recommendations presented to Secretary Mattis). Plaintiffs try to get around this fact by pointing to two e-mails that purportedly reveal the Admiral's unique knowledge. Neither does so.

First, Plaintiffs allege that Admiral Moran sent an e-mail to Navy officials, which "bears directly on Plaintiffs' contention that the Panel was part of an effort to justify the President's Ban." Pls.' Opp. at 18. Although Plaintiffs did not provide a correct citation to that e-mail or attach it to their brief, Defendants believe they have identified that e-mail and attach it here for the Court's consideration. *See* Navy_00073459, attached hereto as Ex. A. Even if the email suggests that Admiral Moran was critical of some aspects of the Panel's process, that does not mean he is uniquely capable of confirming whether the Panel's recommendation was based on a "*de novo*, evidence-based review." Pls. Opp. at 19. Plaintiffs have already scheduled to depose Mr. Anthony Kurta, who Admiral Moran specifically notes in his e-mail was the chair of the Panel at the time, *see* Ex. A at 2, as well as Mr. Thomas Dee, a Navy official who served as a voting member on the Panel and formally dissented from its recommended policy, *see* Dkt. 14-18 (Sealed Ex. 18 to Pls.' Opp.). Both of these officials can testify regarding the Panel's process.

Second, Plaintiffs attach an e-mail that Admiral Moran sent to Panel members, posing some "questions we would ask if given the opportunity to get additional data . . . ." Dkt. 12-30 at 3 (Ex. 30 to Pls.' Opp). Plaintiffs allege that Admiral Moran "is uniquely positioned to answer" whether this data was ultimately considered by the Panel, and, if so, why it was not cited in the DoD Report. *See* Pls.' Opp. at 19. But that does not follow.

Admiral Moran's proposal of a few follow-up questions for the Panel's consideration has no bearing on whether he is uniquely capable of testifying about the Panel's deliberations on those topics. Again, other Panel members such as Mr. Kurta and Mr. Dee can provide that same testimony. The e-mail also fails to explain why Admiral Moran would have *any* knowledge, let alone unique knowledge, about the DoD Report when he did not participate in its drafting. *See* Pls.' Opp. at 13 (recognizing that "the Panel had no role in writing, reviewing, or editing the DoD Report").

Accordingly, Plaintiffs have offered no evidence that Admiral Moran has unique, first-hand knowledge about the challenged policy.

B. Plaintiffs Have Failed to Justify Why the Information They Seek Cannot Be Obtained from Alternate Sources.

Not only have Plaintiffs failed to identify any unique areas of knowledge that Admiral Moran may have, but they have also neglected to address the alternate sources of information that Defendants have identified in their opening brief. *See* Defs.' Mem. in Support of Motion to Quash ("Defs.' Mem.") at 19–21, Dkt. 2. For example, Defendants point out that the Government has already produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel. *See id.* at 19. Defendants also list several DoD and Armed Forces officials who Plaintiffs intend to depose and explain why those officials have the same—if not superior knowledge—to Admiral Moran about the Panel's process and deliberations. *See id.* at 20–21. Plaintiffs fail to offer any explanation why the "basic factual testimony" they seek from Admiral Moran cannot be obtained these sources. *See* Pls.' Opp. at 21. They instead elide the issue

by accusing Defendants of strategically asserting the apex doctrine to "block" depositions and of "stonewall[ing]" discovery. *See id.* at 14, 22. That is far from sufficient to meet their burden of establishing that there are *no alternative means* of obtaining the factual information they seek.

Although the Court need not delve into the discovery process in the underlying case to rule on the straightforward apex doctrine question here, Plaintiffs' characterization of the discovery process is wrong.

To begin, there is no merit to Plaintiffs' assertion that the Government is "using the 'apex doctrine' as both a sword and a shield" to cherry-pick which witnesses can testify. Pls.' Opp. at 22. Plaintiffs identified the witnesses for deposition—not Defendants. *See* Joint Status Report ("JSR"), Dkt. 500 at 5, *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. May 6, 2020) ("*Karnoski*"), attached hereto as Ex. B. And Defendants have moved to quash on the basis of rank—not strategy. Of the fifteen witnesses Plaintiffs identified, Defendants have only moved to quash the depositions of the four officials who are either current or former Cabinet Secretaries or four-star Generals or Admirals in the military. Nor have Defendants attempted to "block" the depositions of those who "may be more forthright." *See* Pls.' Opp. at 22. In fact, Defendants are not challenging the deposition of Mr. Dee, the sole Panel member who drafted a dissenting opinion. In addition, Defendants are making available ten other DoD and Armed Forces officials—many of whom were Panel members or attendees—to testify.[2] As noted in Defendants'

[2] Plaintiffs did not depose *any* of these officials before subpoenaing Admiral Moran. In fact, in just the past few weeks, Plaintiffs asked Defendants to *delay* the depositions of Mr.

opening brief, these officials include Mr. Kurta, who served as chair of the Panel until November 2017, and Mr. Lernes Hebert, who facilitated Panel meetings from November 2017 onward. *See* Defs.' Mem. at 20. Critically, both of these witnesses presented the Panel's recommendations to the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff in December 2017, and would be able to address the Panel's deliberations following feedback from that briefing.[3] Moreover, nothing has prevented Plaintiffs from seeking to depose other witnesses who Defendants have disclosed as Panel attendees or individuals who contributed to the drafting of the DoD Report.

Plaintiffs also badly misstate the discovery that has occurred to date. Far from stonewalling, Defendants have responded to over 100 requests for production and dozens of interrogatories. In so doing, DoD has collected and reviewed over 225,200 documents and has considered anything related to DoD's disputed policy, past or present, to be responsive to Plaintiffs' discovery requests. *See* Decl. of Robert Easton Decl. ¶¶ 10, 13, Dkt. 371-1, *Karnoski*, attached hereto as Ex. C. Additionally, Defendants have produced

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Kurta and Mr. Hebert, which had been scheduled to take place on June 5 and 8, respectively, rather than to proceed with the depositions remotely due to restrictions on in-person depositions related to the COVID-19 pandemic. *See* Ex. B at 9. Plaintiffs' insistence on the urgency of Admiral Moran's deposition is entirely inconsistent with their indifference to the scheduling of these senior military and civilian officials who were more involved in the development of the Policy.

[3] In the related *Doe* litigation, the district court precluded the deposition of General Paul J. Selva, an apex official, precisely because the *Doe* plaintiffs had not exhausted alternate sources of information by first deposing Mr. Kurta. *See* Order in *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 16, 2018), Dkt. 112, attached hereto as Ex. D ("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.").

an unredacted, 3,075-page version of the administrative record containing all of the documents, testimony, and data relied on or considered by the Panel of, 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 Easton ¶¶ 4–6, Dkt. 405-2, *Karnoski*, attached hereto as Ex. E; *see also* Index of the Administrative Record, attached hereto as Ex. F. Plaintiffs thus have ample sources of discovery and witness testimony to obtain the same information about the Panel's deliberations that they seek from Admiral Moran and cannot show that extraordinary circumstances warrant his deposition.

II. Plaintiffs' Baseless Allegation of Bad Faith Does Not Warrant Probing the Admiral's Mental Impressions.

In order to justify deposing Admiral Moran about his mental impressions of the Panel's deliberations, Plaintiffs include one sentence conclusory statement in their opposition: "Plaintiffs are claiming, and have made a showing, of 'misconduct or wrongdoing'—intentional discrimination and animus against transgender persons based on their gender." Pls.' Opp. at 21. That is the full extent of their argument on animus. They do not allege that Admiral Moran, *in particular*, acted in bad faith, nor do they provide any supporting evidence. "[C]onclusory allegations of bad faith are insufficient to demonstrate the necessity of deposing a high-ranking government official." *Freedom From Religion Found., Inc. v. Abbott*, No. A-16-CA-00233-SS, 2017 WL 4582804, at *11 n.24 (W.D. Tex. Oct. 13, 2017); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–74 (2019); *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."). In fact, Plaintiffs actually argue that Admiral Moran was critical of the Panel's process and pushed for more data to justify the challenged policy. *See* Pls.' Opp. at 18–19.

To the extent that Plaintiffs' bad-faith argument is somehow premised, not on the Admiral's actions, but on those of Secretary Mattis, that argument is even further afield. There is no basis to depose an apex official when *another official* is alleged to have acted in bad faith. *Cf. Sensient Colors, Inc.*, 649 F. Supp. 2d at 322 (noting that, "when there are allegations that the official acted with improper motive *or* acted outside the scope of his official duty . . . personal involvement [of the official being deposed] or knowledge is key." (citation omitted)). This is especially the case when Plaintiffs have failed to offer any evidence that Admiral Moran has knowledge of Secretary Mattis's thought processes.[4]

[4] In any event, Plaintiffs' allegation that the challenged policy is the product of animus towards transgender people, not then-Secretary Mattis's independent military judgment, is baseless. Secretary Mattis expressly stated in his memorandum recommending the challenged policy to the President that he was doing so "in [his] professional judgment," *see* Mem. from Secretary Mattis to President Trump ("Mattis Mem.") (Feb. 22, 2018) at 3, Ex. C to Defs' Mot. to Quash, Dkt. 2-3, and reaffirmed this in his sworn testimony before the United States Senate, *see* U.S. Senate Testimony before Senate Comm. on Armed Services (Apr. 26, 2018) at 62:21, attached hereto as Ex. G. Nether the Ninth Circuit nor the D.C. Circuit, both of which considered this exact argument, found it persuasive. *See Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (per curiam) ("[T]he 2018 Policy appears to have been the product of independent military judgment"); *Doe v. Shanahan*, 755 F. App'x 19, 25 (D.C. Cir. 2019) ("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 . . . .'") (citation omitted)).

Accordingly, Plaintiffs cannot justifying obtaining either the factual knowledge or mental impressions of Admiral Moran.[5]

III. Plaintiffs Completely Ignore the Military Context of This Case.

This Court need not resolve the issue of military deference in order to conclude that Admiral Moran's deposition is prohibited by the apex doctrine. Nevertheless, the fact that the underlying case involves a challenge to military personnel policy renders the Admiral's deposition especially inappropriate. *See Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *Thomasson v. Perry*, 80 F.3d 915, 926 (4th Cir. 1996) ("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'" (citation omitted)); *see also* Defs.' Mem. at 15–17 (collecting cases). In fact, Plaintiffs have not identified a *single case* in which a military official has been ordered to testify on a military decision, much less a four-star Admiral. And, as noted above, neither the Ninth Circuit nor the D.C. Circuit was convinced by Plaintiffs' argument that the challenged policy is not entitled to deference because it was not the product of independent military judgment. *See supra* at 9 n.4. Plaintiffs completely

[5] Because Admiral Moran's deposition is prohibited by the apex doctrine, the Court may quash the subpoena on that basis alone. But if more were needed, it is clear, for the reasons set forth in Defendants' opening brief, *see* Defs.' Mem. at 23, that *any* testimony Plaintiffs seek outside of the Panel's development of the current policy—for instance, questions about the Carter Policy—would be subject to claims of privilege. *See, e.g.*, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367 (2004) ("[P]recedent 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 . . . . [T]he Executive Branch [does not] . . . bear the onus of critiquing the unacceptable discovery requests line by line.").

ignore these substantial separation-of-powers concerns Admiral Moran's deposition would engender.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, *see* Dkt. 2, Defendants' motion to quash the Rule 45 subpoena issued to Admiral William F. Moran should be granted.

Dated: June 18, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this Brief complies with the word count limit set forth in L.R. 7.3(d). The number of words in this Brief, exclusive of the caption, signature lines, certificate of service, and any cover page or index, according to the word count feature of the word processing software used to prepare the Brief, does not exceed 3,125 words.

Dated: June 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered users.

Dated: June 18, 2020

Respectfully submitted,

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Exhibit A

Navy_00073459

From: Sender Unspecified
Sent: 11/3/2017 3:14:12 AM
Subject: FW: Transgender Panel
Attachments: smime.p7s

Good Evening Steve,

Forwarding the below note from CNO. He is asking for the SG's comments. Let's work this with RADM Gillingham and then circle back to the CNO as appropriate on behalf of the SG.

Thanks.

v/r John

John W. Le Favour, PhD, FACHE
CAPT, MSC, USN
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NIPR: John.w.lefavour.mil@mail.mil
SIPR: John.w.lefavour.mil@mail.smil.mil

-----Original Message-----
From: Richardson, John M ADM CNO [mailto:john.m.richardson@navy.mil]
Sent: Thursday, November 02, 2017 9:37 PM
To: Burke, Robert P VADM USN CNO (US); Moran, William F ADM USN VCNO (US)
Cc: Crawford, James W III VADM USN (US); Faison, C Forrest (Forrest) VADM USN BUMED FCH VA (US); Nowell, John B Jr RADM USN (US); Renshaw, Curt A CAPT USN VCNO (US)
Subject: RE: Transgender Panel

Thanks all. We can likely quickly resolve our way ahead tomorrow morning - it's not changed much.

VR/ John

-----Original Message-----
From: Burke, Robert P VADM CNP, N1
Sent: Thursday, November 02, 2017 9:21 PM
To: Moran, William F ADM, OPNAV, VCNO; Richardson, John M ADM CNO
Cc: Crawford, James W VADM JAG; Faison, Clinton F RADM OPNAV; Nowell, John RADM OPNAV N1, WASH DC, N13; Renshaw, Curt CAPT OPNAV, VCNO
Subject: RE: Transgender Panel

CNO,

John Nowell and I think Vice Chief has this exactly right.

V/r, Bob

-----Original Message-----
From: Moran, William F ADM, OPNAV, VCNO
Sent: Thursday, November 2, 2017 7:45 PM
To: Richardson, John M ADM CNO <john.m.richardson@navy.mil>
Cc: Burke, Robert P VADM CNP, N1 <Robert.P.Burke@navy.mil>; Crawford, James W VADM JAG <james.w.crawford1@navy.mil>; Faison, Clinton F RADM OPNAV <clinton.f.faison.mil@mail.mil>; Nowell, John RADM OPNAV N1, WASH DC, N13 <john.nowell@navy.mil>; Renshaw, Curt CAPT OPNAV, VCNO

<curt.renshaw@navy.mil>
Subject: Transgender Panel
Importance: High

CNO,

Intend to circle up the team early next week to re-set exactly where we want to head from a Navy perspective on transgender. Have a growing sense that this really isn't a yes/no discussion and TG service is fait accompli (based on legal opinion and recent court action, medical opinion, and general overall political climate). If our team believes that this is not about yes/no, then we really should be talking about who/how/when...i.e. if there are subsets of TG population incompatible with service/deployment, how we implement policy and under what timeline - Navy was there before the tweet. We are tying up a lot of time and resources on an issue that involves a very small component of our population (and potential military population)...would be good to focus efforts on tasks with real outcomes vice emotional discussions about a very politicized topic.

Have reached this line of thinking based on attendance at today's weekly Transgender Panel (4th one)...attended by Vice Chiefs and Under Secretaries (chaired by Tony Kurta). Meetings have been very long and progress to date has been very slow toward developing a recommendation by mid-December. This panel is backed by both a medical working group and a personnel working group which are also FOGO level.

Spent the first part of today's meeting revisiting definitions of transgender and gender dysphoria based on SME's input...will not belabor this, but former is more about identity and latter is about the stress/anxiety produced (the treatment for which might include hormone therapy/surgery). The basic definitions have evolved through the past few weeks, but we are at least getting close to consensus.

Most of the meeting was spent on whether the charter of the panel is to give the Secretary our best military advice on recommended policy with respect to impact on lethality/readiness, or if this is a medical discussion about what might be disqualifying (or not). The panel is unanimous in the opinion that the data is so poor that it is nearly impossible to take a purely analytic approach -- data can be used to support opinions either for or against. Additionally, physical accommodation requirements do not place appear to place substantial bills on the services. So, for the most part, any policy discussion on excluding TG from service are based on morals and/or morale (in good order and discipline sense)...and regardless of what our military opinions might be, from a legal standpoint, these have for the most part already been considered and ruled as not a basis for a blanket policy.

With those factors considered, any policy discussion tends to result in arguing against any sort of ban; in which case we would take the Medical point of view in terms of treatment requirements and impacts on military medicine...but for the most part, it appears costs associated with medical treatment for most cases are relatively small and probably not a justification for a general policy banning TG service.

And, all of this discussion may already be moot...the recent Doe vs Trump case which temporarily enjoins POTUS policy will put the burden on DoD to provide new evidence/information that would refute the evidence provided (by DoD) to justify SECDEF Carter's original policy. On 01 January that previous policy automatically goes back into effect if SD has not issued a new policy...and if SD does issue a new policy without new evidence, it seems likely to be overturned by the court.

After sitting through hours of this discussion, it feels like we are circling old ground and coming back to right where we started last summer (am sure Bob and John would agree).

Will let you know what the team comes up with, but wanted to ensure that we are aligned on the way forward. Comments from Forrest and Bob welcome.

Exhibit B

Joint Status Report in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. May 6, 2020)

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

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

JOINT STATUS REPORT FOR MAY 13, 2020 STATUS CONFERENCE

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

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S STATEMENT

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

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

A. Fact Discovery Deadline and Case Schedule

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

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

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

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

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

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

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

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

inaccessible at this time.

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

B. Deposition Scheduling

The parties have confirmed the following depositions:

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

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

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

C. Depositions of Plaintiffs' Expert Witnesses Mabus AND James

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

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

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

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

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to reschedule his deposition . . . .

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

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

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

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

D. Pending Discovery Motions

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

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

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

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

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

DEFENDANTS' STATEMENT

I. Discovery Motions

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

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

II. Currently Scheduled Depositions

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

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

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

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

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

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

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

III. Depositions of Plaintiffs' Witnesses

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

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

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

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

IV. Case Schedule

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

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

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

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

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

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

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

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

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

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

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

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

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Respectfully submitted, May 6, 2020

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CERTIFICATE OF SERVICE

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

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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

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

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Boston, Massachusetts 02210-2600

617 832 1210 phone
617 832 7000 fax
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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 E

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 F

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)
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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)
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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)

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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)
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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)
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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")
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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
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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)
002836-002839	Minutes, POE Meeting 4 (Nov. 2, 2017)
002840-002847	Minutes, POE Meeting 5 (Nov. 9, 2017)
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002853-002856	Slides With Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members (Survey Results)
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)
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002906	Agenda, POE Meeting 6 (Nov. 16, 2017)
002907-002910	Non-deployable Working Group Information Briefing (Nov. 16, 2017)
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 G

Excerpt of Secretary Mattis's Testimony before the 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.

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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