The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY DISCOVERY PENDING DISPOSITION OF MANDAMUS PETITIONS

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INTRODUCTION

After months of litigating the deposition subpoenas at issue in the Court's September 2 Order, ECF No. 596, *amended by* ECF No. 606-1, Plaintiffs now argue that a stay of the Order is unwarranted because "they may not decide to take some or all of the depositions at all." Pls.' Opp. at 1, ECF No. 613. But Plaintiffs cannot credibly claim that they are indifferent to deposing these high-ranking officials when they have consistently maintained that their testimony is "critical," "central," and "irreplaceable" to their case. *See, e.g.*, Pls.' Mattis Opp. at 25, ECF No. 586. In any event, Defendants have satisfied the requirements for a stay. The Court's Order permitting the depositions of a sitting Cabinet Secretary, the former Secretary of Defense, and two four-star military officials is extraordinary and unsupported by law, as are its orders requiring disclosure of privileged documents. *See, e.g.*, Order (Sept. 25, 2020), ECF No. 614. Accordingly, the Court should stay all discovery in this case, or, at minimum, stay the depositions of the four apex officials pending the Ninth Circuit's resolution of Defendants' pending mandamus petitions.

ARGUMENT

I. A Stay of All Discovery Pending Disposition of Defendants' Petitions Is Justified.

Plaintiffs characterize the Government's request for a stay of all discovery pending the resolution of Defendants' mandamus petitions as an attempt to limit the Court's review to the "administrative record," *see* Pls.' Opp. at 2, but that is disingenuous. As the Court is well aware, discovery in this case has far exceeded the administrative record. In fact, the Government has produced over 410,000 pages of documents to date, including all deliberative documents sent to, from, or by the Panel. *See* Defs.' Mot. to Stay Discovery ("Defs.' Mot.") at 2–4, ECF No. 601 (describing the Government's productions). Plaintiffs have nevertheless indicated their intent to seek further intrusive discovery, including from the White House. *See* ECF No. 546 at 6. A stay is necessary to avoid further irreparable harm to the Government in complying with unprecedented and extraordinarily burdensome discovery orders before the Ninth Circuit provides further guidance on the appropriate scope of discovery in this case.

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Plaintiffs' only rejoinder is that there is no basis to limit discovery in military cases, *see* Pls.' Opp. at 3, but that is plainly incorrect. The Supreme Court has consistently held that judicial review is highly constrained in similar challenges, and Plaintiffs' attempt to distinguish these cases (e.g., *Hawaii* and *Rostker*) is unavailing when the Ninth Circuit itself relied on them to establish the appropriate scope of review in this very case. *See Karnoski v. Trump*, 926 F.3d 1180, 1202, 1206 n.22 (9th Cir. 2019) (per curiam); *see also* Defs.' Mot. at 4 (collecting cases); Defs.' Mot. to Quash Subpoena Issued to James N. Mattis ("Mattis Mem.") at 13–15, ECF No. 585 (same). Nor does the Ninth Circuit's previous opinion expressly authorize the discovery that has occurred to date, as Plaintiffs claim. *See* Pls.' Opp. at 2 & n.2. While the court noted that "Plaintiffs . . . *may* present additional evidence to support" their theory that the policy is not the product of independent military judgment, *Karnoski*, 926 F.3d at 1202 (emphasis added), it did not hold that Defendants must prove the policy was entirely divorced from its civilian leadership, or that Plaintiffs are "entitled" to open-ended discovery on this point, *see* Pls.' Opp. at 2 & n.2. Quite the opposite. The court concluded: "In short, the district court must apply appropriate military deference to its evaluation of the 2018 Policy." *Karnoski*, 929 F.3d at 1202.

Indeed, Defendants' justification for seeking a stay of all discovery has grown since the Government filed this motion. Since then, the Court has ordered the release of over 100 pages of privileged documents by October 5, 2020. *See* Order (Sept. 25, 2020) at 5, ECF No. 614. Moreover, the Court's Order, which was filed on the public docket, quoted extensively from the deliberative portions of these documents, revealing information that is privileged and that DoD designated as confidential pursuant to the protective order. *See id.* at 7–10 (identifying various officials' viewpoints and recommendations). Therefore, to prevent further irreparable harm to the Government, the Court should stay all discovery—including compliance with its September 25 Order—pending the Ninth Circuit's resolution of Defendants' mandamus petitions.

II. Defendants' Stay Motion Is Timely.

Plaintiffs' assertion that "Defendants' motion to stay discovery" is "premature and potentially unnecessary," Pls' Opp. at 1, also misses the mark. That Plaintiffs have offered to "stipulate to a court order barring them from noticing these depositions pending further order of

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this Court and without first providing at least 30 days' notice to Defendants," *id.*, does not obviate the need for a stay. On the contrary, Plaintiffs' proposal still affords them the unilateral right to choose when to notice the depositions of these high-ranking officials. And, to proceed with taking these depositions, Plaintiffs need only seek permission from this Court, which has already ruled in their favor on this issue. Accordingly, Plaintiffs' proposal does little to mitigate the Government's harm, *see* Defs.' Mot. at 11, nor does it eliminate Defendants' need to seek relief from the Ninth Circuit, because, absent a stay, Plaintiffs may choose to notice the apex depositions at any time.

A stay of the Court's order authorizing the depositions of current and former Cabinet Secretaries and senior military leaders is therefore necessary to ensure that depositions of these high-ranking officials do not proceed before the Ninth Circuit has had a chance to rule on the issue.[1] *See Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (requiring applicant for a stay to show only "a *probability* of irreparable harm if a stay is not granted" (emphasis added)). A stay is further consistent with the balance of equities given that Plaintiffs would face minimal, if any, harm in waiting for the Ninth Circuit's ruling before deposing these officials. *Cf.* Pls.' Opp. at 1 (assuring the Court that there is no "emergency" in deposing these officials). Indeed, if Plaintiffs' dubious claim to be uncertain about taking these depositions is credited, a stay would do them no harm. In contrast, the harm of subjecting these high-ranking officials to depositions about decision-making whenever Plaintiffs choose cannot be undone. *See* Defs.' Mot. at 11–12.

III. At Minimum, a Stay of the Four Apex Officials' Depositions Is Necessary.

Should the Court decline to stay all discovery, a stay of the September 2 Order authorizing the depositions of the four apex officials is nevertheless warranted for the reasons stated above and because Defendants are likely to succeed in demonstrating that the apex doctrine precludes their deposition testimony. Plaintiffs' arguments to the contrary are unavailing.

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[1] The Ninth Circuit has ordered Plaintiffs to file an answer to Defendants' mandamus petition by October 7, 2020. ECF No. 612. If Plaintiffs had no intention of noticing and taking the high-ranking officials' depositions *before* the Ninth Circuit's ruling, they would have no reason to oppose a stay of the Court's Order pending the disposition of Defendants' mandamus petition. Plaintiffs' refusal to do so belies their timeline in seeking to take these depositions.

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A. The Court's Order Permitted Plaintiffs to Probe the Mental Impressions of High-Ranking Officials Without the Requisite Finding of Bad Faith.

Although Plaintiffs steadfastly maintain that they are *not* seeking to depose the four apex officials about their mental impressions, that assertion is undermined by the proposed discovery itself. *See, e.g.*, Pls.' Opp. at 5 (seeking to depose Secretary Wilkie about "his role [in] controlling the flow of information to and from the Panel and his efforts to collect evidence supporting the policy"); *id.* at 6 (seeking to depose Secretary Mattis about "whether the 'Mattis Policy' was the result of [his] following the orders of his Commander-in-chief or the military's exercise of 'independent judgment'"); *id.* at 6–7 (seeking to depose General Selva about "*his* reasons" for allegedly "rejecting the Panel's 'Final Report and Recommendations'"); *id.* at 7 (seeking to depose Admiral Moran about why certain data was not cited in the DoD Report). Such inquiries into the apex officials' roles and their decision-making processes are squarely prohibited by Supreme Court precedent. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (holding that the Secretary's protected "mental processes" included "the manner and extent of his study of the record and his consultation with subordinates").

Accordingly, for the reasons set forth in Defendants' motion, the Court clearly erred in permitting Plaintiffs to probe the officials' mental processes. *See* Defs.' Mot. at 9–10. Nor is there any merit to Plaintiffs' assertion that the Court's unsubstantiated finding that Secretary Mattis acted in bad faith justifies the depositions of the remaining three officials. *See* Pls.' Opp. at 9. Plaintiffs cite *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), but that non-military case is inapposite. Indeed, earlier in that same litigation, the Supreme Court stayed the deposition of the Secretary of Commerce, despite the plaintiffs' allegations of bad faith. *See In re Dep't of Commerce*, 139 S. Ct. 16 (2018). Particularly here, there is simply no basis to allow Plaintiffs to depose a sitting Cabinet Secretary and two four-star military officials about their decision-making concerning military policy when the Court has failed to make *any findings* that those officials engaged in "bad faith or improper behavior" in promulgating the challenged policy. *See Dep't of Commerce*, 139 S. Ct. at 2574–75; *accord United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) ("[W]hen there are allegations that the official acted

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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)).

B. The Court Ignored Alternate Sources of Discovery.

Even where the Court correctly concluded that Plaintiffs seek factual testimony, it nevertheless misapplied the "exceptional circumstances" analysis. *See* Defs.' Mot. at 5–8. And Plaintiffs' opposition repeats the same errors. As an initial matter, Plaintiffs plainly misrepresent that "Defendants do not dispute" each apex official has "unique personal knowledge" warranting his deposition. Pls.' Opp. at 4. In fact, Defendants have painstakingly identified alternate sources of discovery for each official.[2] That Plaintiffs dismiss these sources as "cherry-picked," and not precisely "co-extensive" with the apex officials' knowledge, Pls.' Opp. at 4, is irrelevant.[3] The burden is not on *Defendants* to identify a carbon-copy alternate source. Rather, the apex doctrine requires *Plaintiffs* to specify what unique, factual knowledge each official possesses that is necessary to the litigation and why they cannot obtain those facts through less burdensome means. *See Lederman v. NYC Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013). The Court erred in concluding that Plaintiffs have satisfied their burden with respect to each official:

Secretary Wilkie. The Order offers no basis for finding that Secretary Wilkie possesses any unique knowledge warranting his deposition. Indeed, neither the Court nor Plaintiffs have pointed to any evidence that Secretary Wilkie was involved in "circumstances outside the Panel's official document meetings," or that Secretary Wilkie ever had "conversations . . . with General Selva and Deputy Secretary Shanahan" regarding the Panel's initial recommendations, *see* Pls.' Opp. at 5 (quoting Order at 10), apart from the December 17 meeting, which Mr. Kurta and Mr. Hebert also attended. And, while Mr. Wilkie did participate in drafting the DoD Report, Plaintiffs acknowledge that he was only "one of its principal authors," *id.*, and do not dispute that

[2] *See* Defs.' Mot. at 5–8; Mattis Mem. at 17–20; Mattis Reply at 4–8, ECF No. 588; Wilkie Mem. at 20–25, ECF No. 580; Wilkie Reply at 4–11, ECF No. 583; Selva Mem. at 18–24, ECF No. 575; Selva Reply at 4–11, ECF No. 579; Moran Mem. at 17–19; ECF No. 591; Moran Reply at 3–8, ECF No. 597.

[3] As previously explained, *Plaintiffs* selected the witnesses (including Mr. Herbert and Mr. Kurta) to depose, not Defendants. *See* Wilkie Reply at 9. And, in fact, Defendants have made available 11 other witnesses for depositions. *Id*.

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Defendants have made available two of its other principal authors—Mr. Kurta and Mr. Hebert—as well as others involved.

Secretary Mattis. Plaintiffs' effectively acknowledge that they seek to probe Secretary Mattis's decision-making. *See* Pls.' Opp. at 6; *see also* Order at 11 (noting, *inter alia*, that "Plaintiffs will ask Secretary Mattis about his role in drafting the Mattis Memorandum and the DoD Report, [and] the extent to which he obtained input from the Panel"). Accordingly, in addition to its erroneous bad faith determination, the Court clearly erred in finding that Plaintiffs' proposed questions solely concern "the facts surrounding the creation of the Mattis Policy." *See* Order at 11.

General Selva. The only topics of which Plaintiffs claim the Court found General Selva to have unique knowledge plainly relate to his mental processes and are therefore squarely foreclosed by the apex doctrine. *See* Pls.' Opp. at 6 (specifying that Plaintiffs seek "*his* reasons" for allegedly "rejecting the Panel's recommendations" and "his role in delaying the Carter Policy"). But even assuming Plaintiffs seek only General Selva's "factual" recollections, they are wrong as a matter of law that they are free to depose him when multiple deponents attended those same events. *See In re Cheney*, 544 F.3d at 311, 314 (D.C. Cir. 2008).

Admiral Moran. To the extent Plaintiffs seek to probe Admiral Moran's "concerns" about the Panel process, *see* Pls.' Opp. at 7, those mental impressions are privileged. *See supra* at 4. Otherwise, neither the Court nor Plaintiffs have offered any justification why Mr. Herbert, Mr. Kurta, or other Panel members cannot offer the same factual testimony about what data the Panel considered or the operations of the Carter Working Group. *See* Moran Reply at 3–8. The apex doctrine does not permit Plaintiffs to obtain Admiral Moran's testimony simply because they do not wish to credit the recollection or testimony of other Panel attendees.

CONCLUSION

For the foregoing reasons, the Court should stay all discovery in this matter, or at a minimum, stay its September 2 Order, as amended on September 14, *see* ECF No. 606-1, pending resolution of Defendants' pending petitions for writ of mandamus.

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Respectfully submitted,

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