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VIA CM/ECF

November 11, 2020

Ms. Molly C. Dwyer  
Clerk of Court  
United States Court of Appeals  
for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

RE: *In re Trump*, No. 20-70365 (Clifton, Callahan, Friedland, JJ.)  
*In re Trump*, No. 20-72793 (Clifton, Callahan, Friedland, JJ.)

Dear Ms. Dwyer:

We write to inform the Court that, on November 9, the district court issued an order granting in part and denying in part the government's motion to stay discovery pending this Court's disposition of the government's petitions for writs of mandamus. *See* Order, Doc. 634 (attached).

First, the district court confirmed the holding of its prior deposition order that plaintiffs are entitled to depose two Cabinet Secretaries and other high-ranking military officials. *See* Order 4-6. But the court stayed that deposition order pending further discovery and a future order lifting the stay, in light of plaintiffs' "announcement that they do not plan to reissue the subpoenas for the witnesses in the foreseeable future." Order 9. While the stay is welcome, this Court's review remains necessary: the district court has reiterated its mistaken view that plaintiffs are entitled to depose Cabinet officials, and it has effectively placed the keys to undoing the stay in plaintiffs' hands. And as the government has explained, plaintiffs' recognition that the depositions may well be unnecessary vitiates any claim that extraordinary circumstances justify the depositions.

Second, the district court reiterated its view that the remaining discovery in this case—involving documents withheld under recognized executive privileges—was no different from discovery “in run-of-the-mill civil cases.” Order 6. The court dismissed the government’s concern over its “unusually intrusive discovery” orders, which the court justified based on the need for a general “development of a full record.” Order 7. And on that basis, the court denied the government’s request to stay discovery. *See* Order 9. The court’s order confirms that discovery is continuing based only on the court’s incorrect premises regarding the proper scope of discovery in a challenge to military policy, and that this Court should stay further intrusions into the military’s processes pending its decision on the government’s mandamus petitions.

Sincerely,

*s/ Dennis Fan* \_\_\_\_\_  
Dennis Fan  
Attorney

cc: all counsel (via CM/ECF)



1 556), Secretary Robert Wilkie Jr. (Dkt. No. 557), Secretary James N. Mattis (Dkt. No. 558), and  
2 Admiral William F. Moran (Dkt. No. 591). (Dkt. No. 596 (as corrected Dkt. No. 606, Ex. 1).)  
3 Defendants argued that the subpoenas should be quashed under the apex doctrine, which  
4 provides that “[h]eads of government agencies are not normally subject to deposition.” Kyle  
5 Eng’g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979). These officials “enjoy a mental process  
6 privilege.” United States v. Wal-Mart Stores, Inc., No. CIV.A. PJM-01-1521, 2002 WL 562301,  
7 at \*1 (D. Md. Mar. 29, 2002). But the privilege is not absolute. Bogan v. City of Bos., 489 F.3d  
8 417, 423 (1st Cir. 2007). And in the case of the four officials here, the Court found the  
9 depositions justified because each official has “unique first-hand knowledge related to the  
10 litigated claims” that “cannot be obtained through other, less burdensome or intrusive means.”  
11 Lederman v. New York City Dep’t of Parks & Recreation, 731 F.3d 199, 203 (2d Cir. 2013).

12 The Government now moves to stay the Court’s deposition Order and, additionally, “all  
13 discovery in this action” until the Government’s two pending petitions for writs of mandamus are  
14 resolved by the court of appeals. (Dkt. No. 601 at 2.) After the Government filed its Motion to  
15 Stay, Plaintiffs offered to stay the depositions pending further order of the Court, and only then  
16 after providing the Government with a minimum of 30-days’ notice before attempting to depose  
17 any of the witnesses. (Dkt. No. 608, Ex. 1 at 2.) Defendants rejected the stipulation but agreed  
18 not to oppose Plaintiffs’ motion for an extension of time to file their opposition to the  
19 Government’s Motion to Stay. (Id. at 3.) On September 16, 2020, the Court granted Plaintiffs’  
20 unopposed motion for additional time to respond. (Dkt. No. 609.) Two days later, the  
21 Government filed its third Petition for a Writ of Mandamus without waiting for the Plaintiffs’  
22 response brief or the Court’s order on the Motion to Stay. (Dkt. No. 611.) Therefore, the Court  
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1 now considers the Government’s Motion to Stay while the Government’s Petition for a Writ of  
2 Mandamus on the Court’s deposition Order is also pending before the Ninth Circuit.

### 3 **Discussion**

4 A stay pending appeal “is an intrusion into the ordinary processes of administration and  
5 judicial review.” Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and  
6 citation omitted). As such, it is “not a matter of right, even if irreparable injury might otherwise  
7 result.” Id. at 433 (citation omitted). “It is instead an exercise of judicial discretion, and the  
8 propriety of its issue is dependent upon the circumstances of the particular case.” Id. (internal  
9 quotation marks and citation omitted). “The party requesting a stay bears the burden of showing  
10 that the circumstances justify an exercise of that discretion.” Id. at 433-34.

11 In determining whether to grant a stay, the Court considers: (1) whether Defendants have  
12 made a strong showing that they are likely to succeed on the merits of their Mandamus Petition;  
13 (2) whether Defendants will be irreparably injured absent a stay; (3) whether a stay will  
14 substantially injure Plaintiffs; and (4) whether the public interest supports a stay. Id. at 434.

15 For the reasons discussed below, the Court finds that Defendants are unlikely to succeed  
16 on the merits of their Petition but concludes that the resolution of the Parties’ current discovery  
17 disputes may render some of the contested depositions moot, or conversely, provide additional  
18 support for Plaintiffs’ need to depose the witnesses. The Court therefore stays the deposition  
19 order, but denies Defendant’s motion to stay all remaining discovery.

#### 20 **A. Likelihood of Success on the Merits**

21 Defendants have not made a strong showing that they are likely to prevail on the merits  
22 of their Mandamus Petition, where they ask the Ninth Circuit not only to stay the depositions at  
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1 issue in the Court’s Order, but also to stay all remaining discovery. The Court addresses each  
2 argument in turn.

3 1. Depositions

4 The Government argues it is likely to prevail on the merits of its Petition because the  
5 Court’s deposition Order failed to consider alternative sources of discovery and would allow  
6 Plaintiffs to probe the witnesses’ mental impressions without making a finding of bad faith.  
7 (Dkt. No. 601 at 6-12.) The Government also argues that the Court failed to adequately consider  
8 how military deference applies to the information sought from the officials at issue. (Id. at 11.)  
9 These arguments are not supported by the record.

10 The Court found that each witness had unique first-hand knowledge related to the  
11 litigated claims<sup>1</sup> and that the necessary information could not be obtained through other, less  
12 burdensome means. Lederman, 731 F.3d at 203; (Dkt. No. 606, Ex. 1 at 3-4). This is especially  
13 so considering the long-standing discovery dispute between the Parties that has obscured the  
14 process used to create the Mattis Policy. (See Dkt. No. 606, Ex. 1 at 3-4.) Further, the  
15 Government’s proposed alternatives to each witness—Anthony Kurta, the former Deputy  
16 Assistant Secretary of Defense for Military Personnel Policy, and Lernes Hebert, who followed  
17 Mr. Kurta as Deputy Assistant—could provide only partial, piecemeal testimony on each of the  
18 relevant issues. (Id. at 8-13.) For Secretary Mattis, the Government suggests additional officials  
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20 <sup>1</sup> Strangely, the Government argues the Court failed to find that Secretary Wilkie possesses “any unique knowledge  
21 warranting his deposition” or point “to any evidence that Secretary Wilkie was involved in circumstances outside  
22 the Panel’s official document[ed] meetings.” (Dkt. No. 619 at 6.) To the contrary, the Court found that Secretary  
23 Wilkie had a role in controlling the flow of information to and from the Panel and worked to collect additional  
24 anti-transgender information after the Panel concluded its work. (See Dkt. No. 606, Ex. 1 (citing Dkt. No. 582 at  
25-26, 28; Ex. Nos. 38-39, 42).) The Government also argues that the Court failed to take into account Secretary  
Wilkie’s busy schedule as a sitting Cabinet Secretary, but as Plaintiffs note, “there is no special rule for cabinet  
secretaries, nor do Defendants cite one.” (Dkt. No. 601 at 10; 613 at 11.) Deference to Secretary Wilkie’s time and  
attention is built into the apex doctrine, which shields him from deposition unless he was personally involved in the  
litigated claims and the information cannot be obtained elsewhere.

1 who could “testify regarding the development of the challenged policy.” (Dkt. No. 601 at  
2 18-19.) However, none of these witnesses can provide complete testimony on Secretary Mattis’s  
3 role in drafting the Mattis Memorandum and the DoD Report, the extent to which he obtained  
4 input from the Panel, whether he sought information from sources outside the Panel, or whether  
5 he was instructed to obtain particular information that was absent from the Panel’s Final Report.  
6 (Dkt. No. 606, Ex. 1 at 11.)

7         Additionally, Plaintiffs intend to question General Selva, Secretary Wilkie, and Admiral  
8 Moran about actions they took in delaying the Carter Policy or creating the Mattis Policy, not  
9 probe their mental processes. (*Id.* at 8-10, 12-13.) Plaintiffs were therefore not required to make  
10 a showing of animus before questioning these witnesses. *See, e.g., Franklin Sav. Ass’n v. Ryan*,  
11 922 F.2d 209, 210-11 (4th Cir. 1991) (absent a showing of bad faith, a high-ranking official was  
12 only required to answer factual questions, not questions going to his mental process).

13         On the other hand, where Plaintiffs’ proposed questions concerned Secretary Mattis’s  
14 mental impressions, including “the manner and extent of his study of the record and his  
15 consultations with subordinates,” *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Court  
16 found that Plaintiffs made the requisite showing of bad faith. This included Secretary Mattis’s  
17 intent to solicit opinions from several anti-transgender activists, acknowledging that he would  
18 need to keep those discussions secret. (*See* Dkt. No. 587, Ex. 40.) This was done outside the  
19 Panel’s “independent multi-disciplinary review and study of relevant data” and there is no  
20 evidence Secretary Mattis similarly attempted to discuss the Policy with individuals supportive  
21 of transgender rights. (Dkt. No. 224, Ex. 1 (“Mattis Memorandum”) at 19 (citing Mattis, Terms  
22 of Reference—Implementation of Presidential Memorandum on Military Service by Transgender  
23 Individuals (Sep. 14, 2017)).) The Government’s contention that certain uncited studies suggest  
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1 “that individuals diagnosed with gender dysphoria have higher than normal associated rates of  
2 depression and suicide” is irrelevant to the Court’s finding of animus based on Secretary Mattis  
3 secretly soliciting information from those with anti-transgender views in support of a facially  
4 discriminatory policy. (See Dkt. No. 601 at 11 n. 7 (citing Dkt. No. 602, Ex. C, ¶ 10).)

5 Finally, the Court addressed the Government’s arguments on military deference at length  
6 in its Order, but noted that “‘deference does not mean abdication,’” especially where  
7 “Defendants bear the burden of establishing that they reasonably determined the policy  
8 ‘significantly furthers’ the government’s important interests, [which][ ] is not a trivial burden.”  
9 (Dkt. No. 606, Ex. 1 at 7 (citing Karnoski v. Trump, 926 F.3d 1180, 1202 (9th Cir. 2019)  
10 (additional citation omitted)).) The Court once again declines to equate military deference with a  
11 prohibition on civil discovery in cases involving the military.

## 12 2. Discovery

13 The Government also seeks to stay all discovery, arguing that Plaintiffs have conducted  
14 enough discovery for the Court to resolve this matter on the current record. Specifically, the  
15 Government argues that it has produced 60,000 documents, responded to 95 interrogatories, and  
16 permitted the depositions of three witnesses. (Dkt. No. 601 at 3.) But these numbers alone fail  
17 to demonstrate a burdensome discovery process; much larger volumes of materials are routinely  
18 produced in run-of-the-mill civil cases over the course of several months. (Dkt. No. 412 at  
19 26:15-23.) Here, four district courts and dozens of lawyers have been proceeding in tandem to  
20 evaluate the Government’s privilege claims for several years. See Doe 1 v. Trump, 275 F. Supp.  
21 3d 167, 177 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747, 769 (D. Md. 2017); Stockman  
22 v. Trump, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, at \*16 (C.D. Cal. Dec. 22, 2017).

1 And the volume of documents the Government has produced says nothing about quality, or  
2 whether these documents were responsive to Plaintiffs’ requests.

3 The Government’s three examples of the “unusually intrusive discovery” in this matter  
4 demonstrate how the Government’s intransigent discovery posture has slowed the process and  
5 prevented the development of a full record. (Dkt. No. 601 at 4 (citing (Dkt. No. 455 at 4.) The  
6 Government first objects to the Court’s order requiring the production of documents about the  
7 cost of gender transition surgeries, but these documents were reviewed by Panel members and  
8 are necessary to evaluate Defendants’ argument that transition-related care is “disproportionately  
9 costly on a per capita basis.” (Dkt. No. 601 at 4 (citing Dkt. No. 455 at 5); (Dkt. No. 224, Ex. 2  
10 (“Report and Recommendations”) at 43.) The Government’s next example misstates the record,  
11 asserting that the Court required production of “[a]ll deliberative communications with third  
12 parties withheld under the deliberative process privilege’s consultant corollary.” (Dkt. No. 454  
13 at 5.) In fact, when the Court ordered the Government to submit these privilege-claimed  
14 documents for *in camera* review, the Government immediately withdrew its privilege claims  
15 over 97% of the documents. (Dkt. No. 509 at 9.) And after conducting an *in camera* review of  
16 the remaining 14 documents, the Court could find no basis for the Government’s privilege  
17 assertions as to 13 of those documents.

18 The Government’s third example also misstates the record—thereby exaggerating the  
19 threat associated with further discovery—by asserting that the Court has ordered production of  
20 “[a]ll deliberative communications within the government outside [two] narrow periods.” (Dkt.  
21 No. 601 at 4.) In reality, the Court’s Order concerns only those documents that are relevant to  
22 this case. Further, the Government is permitted to submit any privilege-claimed documents  
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1 outside these timeframes for *in camera* review without separate motion practice. (Dkt. No. 566  
2 at 11.)

3 The Government also takes issue with the “exceedingly narrow timeframes” by which the  
4 Government has been ordered to produce documents, citing two examples where the Court  
5 ordered the Government to produce documents within two to three weeks. (Dkt. No. 601 at 4.)  
6 The timeframes provided by the Court are based on the Government’s repeated representations  
7 that these materials were collected, segregated, and reviewed before the Government withheld  
8 the materials as privileged. (See, e.g., Dkt. No. 371, Ex. A, Declaration of Robert E. Easton.)  
9 Using the same discovery management software as the Government, Plaintiffs can quickly pull  
10 up lists of thousands of documents within a matter of hours. (Dkt. No. 537 at 25:9-11.) The  
11 Government fails to explain why it requires “two dozen people” (Dkt. No. 630 at 5:8-9) and  
12 several weeks to print documents that have already been reviewed and segregated as described in  
13 the Government’s declarations to this Court.

#### 14 **B. Irreparable Harm**

15 Because the Court stays the deposition Order until the Parties’ remaining discovery  
16 disputes are resolved, the question is whether Defendants will be irreparably injured absent a  
17 stay of all remaining discovery in this matter. Since the Government has a fail-safe option of  
18 submitting privilege-claimed documents to the Court for *in camera* review, and the Government  
19 has been over-asserting privileges as determined by both the Court and the Government, the  
20 Court finds that the Government has not shown that irreparable harm will result if discovery  
21 proceeds as planned.

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### C. Injury to Plaintiffs and Impact on the Public Interest

As the Court has previously written, delays in this matter affect “hundreds if not thousands” of servicemembers and potentially prevent countless potential servicemembers from “fulfilling a dream they have had their entire lives.” (Dkt. No. 565 at 24:14-16, 22-23.) The public also has a strong interest in the timely determination of the issues of national and constitutional importance involved in this matter. But the Court weighs this urgency against Plaintiffs’ announcement that they do not plan to reissue the subpoenas for the witnesses in the foreseeable future, in addition to the likelihood that obtaining additional discovery materials before deposing the witnesses will likely allow Plaintiffs to conduct better depositions. The Court therefore concludes that a stay in this matter until the completion of discovery will not cause injury to the Plaintiffs or the public interest.

### Conclusion

Accordingly, the Court ORDERS as follows:

(1) The Court GRANTS in part, DENIES in part Defendants’ Motion for a Stay (Dkt. No. 601):

- a. The Court GRANTS the Government’s Motion to Stay the Court’s Order denying Defendants’ Motions to Quash the Third-Party Subpoenas (Dkt. Nos. 596, 606, Ex. 1). The Order is STAYED until the Parties’ remaining discovery disputes are resolved and the Court issues an Order lifting the stay;
- b. The Court DENIES Defendants’ Motion to Stay all remaining discovery in this matter.

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The clerk is ordered to provide copies of this order to all counsel.

Dated November 9, 2020.



Marsha J. Pechman  
United States Senior District Judge