UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*,
Plaintiffs
v.
DONALD J. TRUMP, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(January 9, 2018)

On January 8, 2018, the parties contacted chambers to notify the Court of a discovery dispute. The dispute, in essence, is that Defendants do not want to engage in discovery at this time. Defendants represent that the Department of Defense is scheduled to complete a review of military service by transgender individuals by February 21, 2018, and that by that date the Secretary of Defense will provide an "implementation plan" to the President. In light of these upcoming events, Defendants have asked the Court to stay discovery until February 21, 2018. In fact, this is the third time Defendants have requested a stay of discovery in this case on this basis. *See* ECF Nos. 63, 72. If denied this relief, Defendants ask the Court in the alternative to order that depositions may not begin until March 2, 2018. If denied this relief, Defendants ask the Court to order that Plaintiffs be foreclosed from later reopening any deposition of a witness who is deposed before February 21, 2018. Finally, if nothing else, Defendants request that the Court extend their deadline to respond to Plaintiffs' written discovery requests from January 16, 2018 to February 2, 2018. Plaintiffs oppose all of the relief Defendants request, except that they consent to a brief extension of Defendants' deadline to respond to written discovery.[1]

[1] The parties' letter briefs are attached to this Order as Exhibit A.

The Court held a teleconference on the record on January 9, 2018, during which it had a fulsome conversation with the parties about Defendants' requests. For the reasons explained during that teleconference, the Court will not stay discovery in this case, nor will it grant any of the other forms of relief Defendants have requested. There are four depositions currently scheduled prior to February 21, 2018 (on January 26, 2018, February 7, 2018, February 9, 2018 and February 16, 2018). Plaintiffs represent that these depositions will be primarily focused on issues that are not related to the Department of Defense's ongoing study or the forthcoming "implementation plan." With Plaintiffs' consent, the Court shall allow Defendants to phase their production of documents to Plaintiffs such that only those documents relevant to the January 26, 2018 deposition of Martha "Martie" Soper are produced initially, by no later than **noon** on **January 19, 2018**. The parties have agreed to meet and confer in good faith to determine what documents those may be. Plaintiffs have reasonably requested that the remainder of the documents responsive to their requests be provided by no later than January 26, 2018, so that they can be available in advance of the three other depositions scheduled prior to February 21, 2018. If the parties are unable to successfully meet and confer on what documents need to be produced by January 19 or other dates, they shall contact the Court by no later than **10:30 a.m.** on **January 11, 2018**.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

EXHIBIT A

U.S. Department of Justice
Civil Division, Federal Program Branch

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January 9, 2018

By Electronic Mail

The Honorable Colleen Kollar-Kotelly
United States District Court Judge
Kollar-Kotelly_Chambers@dcd.uscourts.gov

Re: Discovery Dispute in *Doe v. Trump*, Case No. 1:17-cv-01597-CKK

Dear Judge Kollar-Kotelly,

In light of intervening events, Defendants respectfully request a stay of discovery in this case. In particular, Defendants request a modification of the discovery schedule entered by the Court on November 28, 2017. ECF No. 71. The Court should stay discovery, at least until after February 21, 2018, when the Department of Defense ("DoD") is scheduled to complete its review of military service by transgender individuals and the Secretary of Defense is scheduled to provide his implementation plan to the President. This modification will serve the interest of the parties and witnesses and promote the just and efficient conduct of the litigation.

Since the Court entered its discovery order, Defendants have withdrawn their appeal of this Court's October 30, 2017 preliminary injunction order, as well as their appeal of similar orders in *Stone v. Trump*, No. 17-cv-2459 (D. Md.) and *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.). Further, the Plaintiffs in this action have served Defendants with discovery indicating that DoD's review of military service by transgender individuals, which is ongoing but nearing completion, will be a focal point of their discovery efforts, and Defendants' responses to Plaintiffs' discovery requests are currently due on January 16, 2018. Similar discovery has been served on Defendants in both *Stone* and *Karnoski*. Plaintiffs are also scheduled to begin deposing DoD officials on January 26, 2018.

Staying all discovery—at least until after February 21, 2018—would serve at least four important purposes. First, it would prevent the parties from expending their resources on discovery that may no longer be relevant after DoD completes its comprehensive review and the Secretary of Defense submits his implementation plan. Second, it would allow the parties to conduct discovery more efficiently based on the outcome of DoD's comprehensive review. For

example, if Plaintiffs begin deposing DoD officials before Secretary Mattis submits his implementation plan, deponents may be questioned on subjects that will no longer be relevant after the implementation plan has been submitted. Similarly, because DoD officials should not be subject to multiple depositions, proceeding with depositions at this time will necessarily limit the opportunity to question deponents on subjects that may become relevant after Secretary Mattis submits his implementation plan. For these reasons, it is in the interest of both the parties and the witnesses to stay discovery, at least until after Secretary Mattis submits his implementation plan.

Third, staying discovery until after Secretary Mattis submits his implementation plan may allow Defendants to provide certain documents and other information in response to discovery requests that otherwise may be protected by the deliberative process privilege while the Department's review is presently ongoing. In addition, DoD officials may be able to provide information during depositions taken after the conclusion of the Department's comprehensive review that otherwise would be protected by the deliberative process privilege if depositions are taken beforehand.

Finally, a stay of discovery until after Secretary Mattis submits his implementation plan would significantly facilitate Defendants' efforts coordinate discovery in four related cases. For example, Defendants intend to allow Plaintiffs' counsel in each of the four cases to participate in the depositions of DoD officials. Defendants also plan to provide their discovery responses in each case to Plaintiffs' counsel in all four of the related cases. A stay of discovery would allow Defendants additional time needed to take the steps to coordinate discovery across the four pending cases.

In sum, for the reasons set forth above, a stay would significantly further the just and efficient litigation of this case and the three related cases. Because Defendants are no longer appealing the preliminary injunction in this case or the injunctions that have been entered in the three related cases, Plaintiffs will not be injured by staying discovery, at least until Secretary Mattis submits his implementation plan on February 21, 2018.

If the Court is unwilling to stay all discovery, Defendants respectfully request that the Court extend the start date for depositions until March 2, 2018, so that DoD officials will not be deposed before the parties have had time to consider how the Secretary's implementation plan affects the litigation. If the Court declines to extend the start date for depositions, Defendants respectfully request that Plaintiffs be foreclosed from reopening the deposition of any witness deposed before February 21, 2018, on the grounds that the expected policy announcement is a material change which necessitates a subsequent deposition of that witness.

Finally, if the Court declines to stay discovery in its entirety until after February 21, 2018, Defendants respectfully request that the Court at least extend Defendants' deadline to respond to Plaintiffs' written discovery requests from January 16, 2018 until February 2, 2018. Since the Court entered its discovery order on November 28, 2017, the Plaintiffs in both *Stone* and *Karnoski* have served Defendants with similar written discovery requests. Defendants believe the most efficient way to coordinate the written discovery across the three cases is to synchronize the response dates and release of any materials in all cases. February 2 is the current response date for written discovery in the *Stone* case. Due to the significant volume of the documents at issue and the need to confer with numerous military and civilian officials, Defendants require additional time to respond to Plaintiffs' discovery requests.

The undersigned counsel for Defendants conferred with Plaintiffs' counsel regarding this dispute, and Plaintiffs' counsel declined to agree to stay discovery, delay the depositions of DoD officials, or meaningfully extend Defendants' deadline for responding to Plaintiffs' written discovery requests. Defendants have shown that good cause exists to stay or at least modify the discovery schedule, and respectfully request that the Court grant Defendants' motion and stay discovery, at least until after the Secretary of Defense submits his implementation plan on February 21, 2018, or enter the alternative relief described above.

Sincerely,

Ryan Bradley Parker

Included:

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January 9, 2018

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VIA EMAIL

Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington D.C. 20001

RE: *Doe et al. v. Trump et al.*, Civil Action No. 1:17-cv-1597-CKK

Dear Judge Kollar-Kotelly,

Pursuant to the Court's instructions, Plaintiffs in the above-captioned action respectfully submit this letter setting forth their view regarding the parties' dispute concerning the discovery deadlines in this case.

By way of background: After this Court entered its order granting a preliminary injunction, the parties submitted a joint status report setting forth their respective positions on scheduling and discovery. *See* Dkt. 62. Defendants maintained that the Court should stay discovery for some unspecified period of time because, among other things, "[t]he Court expressly did not enjoin the Defendants from completing the review directed by the Presidential Memorandum, under which the Secretary of Defense shall make a policy recommendation to the President on February 21, 2018." "If the preliminary injunction remains in place until the military adopts a final policy early next year," Defendants maintained, "the issues presented by this case may either become moot or will focus on the policy adopted after that process to the extent it remains applicable to the Plaintiffs." *Id.* In other words, Defendants' position was that discovery ought to be stayed at least until the Secretary made his "policy recommendation" to the President in February. Defendants made that proposal notwithstanding that they had not yet decided whether to appeal the Court's preliminary injunction order. The Court "decline[d] Defendants' invitation to stay the case" (Dkt. 63), and held a case management conference on November 28, 2017.

In anticipation of that conference, the parties again met and conferred and submitted a joint report of their respective positions on discovery and scheduling. Defendants reiterated their position that "[d]iscovery in this matter should be delayed until at least March 2018." Dkt. 65. Defendants again explained that, "[u]nder the terms of the President's August 25, 2017 Memorandum, the Secretary of Defense, in consultation with the Secretary of Homeland Security, is scheduled to submit an Implementation Plan to the President by February 21, 2018, which will include the Secretary's determination regarding how to address transgender individuals currently serving in the United States military." Because "[t]he Secretary's Implementation Plan could have a dramatic effect on the appropriate scope of discovery,"

Defendants submitted that the Court should "wait for the Secretary to issue his Implementation Plan before setting a discovery schedule and permitting any discovery." *Id.*

The Court again rejected Defendants' invitation to stay the case. On November 28, 2017, this Court entered a scheduling order providing for the parties to serve their initial discovery requests no later than December 15, 2017 with responses due 30 days thereafter and to submit a joint status report by December 15, 2017, including identifying "precise dates for any and all depositions and the exchange of written discovery, documents, and other materials," and for discovery to be completed no later than March 30, 2018. Dkt. 71. Pursuant to that order, the parties jointly submitted a status report on December 15, 2017 (Dkt. 76) and a supplemental report on December 22, 2017 (Dkt. 77) setting dates for depositions of the witnesses identified by the parties. Also on December 15, the parties also exchanged written discovery requests, responses to which are due January 16, 2018.

The current discovery dispute arises from Defendants' attempt—yet again—to persuade this Court to defer discovery until after the Secretary of Defense's February 21, 2018 release of his Implementation Plan. In particular, Defendants now seek to either stay discovery until after February 21, 2018 or, at a minimum, to postpone all depositions until after that date. The Court has already twice rejected Defendants' proposal, and no new facts or changed circumstances warrant reconsideration or delay. The Court was fully apprised of the significance of the February 21, 2018 date when it set the current schedule, and the parties were fully aware of that date when they set the deposition schedule reflected in their joint status reports.

Indeed, the only new circumstance that Defendants can point to is that, after this Court entered its preliminary injunction and both this Court and the D.C. Circuit rejected Defendants' request for a stay of that injunction (Dkt. 75; *Doe v. Trump*, D.C. Circuit No. 17-5267, Dkt. #1710359), Defendants dismissed their appeal (Dkt. 79). That changes nothing. Notwithstanding this Court's preliminary order, Plaintiffs continue to serve honorably in the military under the pall and stigma inflicted by the President's discriminatory and unconstitutional directive. Until this case is definitively resolved, each will face uncertainty regarding their career prospects and continued service. Only a conclusive determination that the announced policy is unconstitutional and cannot be implemented—ever—will alleviate these harms. There is no cause to stay or delay discovery in this proceeding or to delay an ultimate adjudication on the merits.

There is thus no good cause to stay discovery until after the Secretary's release of his implementation plan. Nor is there good cause to modify the schedule as Defendants propose. Of the twenty depositions scheduled in this case, only four are scheduled to take place before February 21, 2018. Conducting those depositions on their mutually agreed upon dates over the next five weeks imposes no hardship on Defendants, whereas deferring them until after February

21 would make an already challenging schedule for conducting sixteen depositions even more taxing.[1]

We will be prepared to discuss these and any other matters during tomorrow's conference.

Respectfully submitted,

/s/ Alan Schoenfeld
Alan Schoenfeld

[1] Under Defendants' alternative proposal, the parties would exchange written discovery responses on February 2, 2018, rather than the current deadline of January 16. As Plaintiffs explained to Defendants, that extension was not feasible because under that schedule Defendants would be producing documents and written discovery responses after the first deposition is scheduled to be conducted. As a compromise, Plaintiffs agreed to a modest extension. Specifically, Plaintiffs proposed that if Defendants intend to actually produce documents and information responsive to Plaintiffs' requests, Plaintiffs were prepared to extend their deadline until noon on January 19 to serve their responses, giving Plaintiffs one week to prepare for the first deposition. Plaintiffs explained, however, that if Defendants intended to serve only objections, Plaintiffs intended to maintain the original schedule. Defendants rejected this proposal without indicating whether they intend to serve substantive responses or only objections. For purposes of determining precisely how the remainder of discovery will play out, it would be useful to understand Defendants' intentions with respect to their discovery responses.