IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-MJG Hon. Marvin J. Garbis

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

For the reasons set forth in the attached Memorandum of Points and Authorities, Defendants move pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure for a protective order to preclude all discovery pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, including any interlocutory appeal. In addition to their Memorandum of Points and Authorities, Defendants have filed a proposed order with this motion.

March 23, 2018

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

INTRODUCTION

Defendants move pursuant to Federal Rule of Civil Procedure 26(c) for a protective order to preclude discovery pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot., ECF No. 120. Resolution of that motion, which explains that Plaintiffs' current challenge is moot and that Plaintiffs cannot demonstrate a likelihood of success on the merits, should either obviate the need for any discovery in this case or, at the very least, significantly narrow the issues that remain. Accordingly, it is in the interest of judicial economy to preclude discovery until the motion to dissolve has been resolved, including through any interlocutory appeal. This is particularly so because there is a significant dispute between the parties concerning discovery directed to the President. This Court should therefore exercise its discretion to prevent the unnecessary expenditure of time and resources that would be required to engage in discovery and should enter a protective order precluding discovery until after the litigation involving Defendants' Motion to Dissolve the Preliminary Injunction is complete.

BACKGROUND

I. Procedural History of This Case

Plaintiffs filed this action on August 28, 2017, raising constitutional challenges to what they contend is a ban on the service of transgender individuals in the military. Compl., ECF No. 1. Following the issuance a Presidential Memorandum in August 2017, Plaintiffs amended their complaint, ECF No. 39, and moved to preliminarily enjoin the President's decision to "bar men and women who are transgender from serving in the military," Pls.' Mem. at 17, ECF No. 40. Defendants opposed Plaintiffs' motion for a preliminary injunction and moved to dismiss the amended complaint on the grounds that Plaintiffs lacked standing and had failed to state a claim. Defs.' Mot., ECF No. 52.

On October 30, 2017, the Court granted Plaintiffs' motion for a preliminary injunction and partially granted Defendants' motion to dismiss. Order, ECF No. 85. The Court preliminarily enjoined all defendants from implementing the policies and directives encompassed in the Presidential Memorandum. Prelim. Inj., ECF No. 84. The Court also dismissed without prejudice Plaintiffs' claim that Defendants had violated 10 U.S.C. § 1074. Order, ECF No. 85.

Following the Court's ruling, the Plaintiffs sought extensive discovery against the Government. Plaintiffs have had the opportunity to participate in three depositions of Government officials, and have indicated their intention to seek additional depositions of Government officials. Plaintiffs also have served 21 broad requests for the production of documents, many of which implicate Executive privilege. Defendants have collected and reviewed hundreds of thousands of pages of non-privileged records in response to Plaintiffs' document requests, producing to Plaintiffs more than 80,000 pages of documents to date on a rolling basis. Plaintiffs also have served 24 far-reaching interrogatories.

Plaintiffs' discovery demands directed at the President have led to a significant dispute. Plaintiffs directed broad discovery against the President, comprising 22 interrogatories and 21 document production requests. Plaintiffs' discovery requests seek information concerning the President's deliberations and decisionmaking process. Defendants have objected to any discovery directed to the President on several grounds, including that such discovery should be foreclosed based on separation-of-powers principles and because virtually all of the specific discovery sought is subject to Executive privilege, and in particular, the presidential communications privilege.

Defendants have also filed a partial motion for judgment on the pleadings on all claims against the President, arguing that he is not a proper defendant in this case. *See* Defs.' Partial Mot. for J. on the Pleadings, ECF No. 115. That motion is still pending.

II. Creation of New Policy Concerning Military Service by Transgender Individuals

In February 2018, after considering the recommendations of a Panel of Experts along with additional information, Secretary of Defense James Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum proposing a new policy consistent with the Panel's conclusions.[1] *See* Mattis Memorandum, ECF No. 120-1. The memorandum was accompanied by a 44-page report provided by the Under Secretary of Defense for Personnel and Readiness setting forth in detail the bases for the Department of Defense's recommended new policy. Department of Defense Report and Recommendations on Military Service by Transgender Persons (Feb. 2018), ECF No. 120-2.

On March 23, 2018, the President issued a new memorandum concerning transgender military service. Presidential Memorandum (2018 Memorandum), ECF No. 120-3. The 2018 Memorandum revoked the 2017 Memorandum, thereby allowing the Secretaries of Defense and

[1] Additional details regarding the Department's new policy and the Panel of Experts' work is set forth in Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot. at 4–8.

Homeland Security to "exercise their authority to implement appropriate policies concerning military service by transgender persons." *Id.* Accordingly, the August 2017 Presidential Memorandum that the Court has enjoined has been rescinded.

III. Defendants' Pending Motion to Dissolve the Preliminary Injunction

Following the issuance of the 2018 Presidential Memorandum, Defendants filed a Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot., ECF No. 120. In that motion, Defendants argue, among other things, that Plaintiffs cannot demonstrate a likelihood of success on the merits for two reasons. *See id.* at 9–33. First, Plaintiffs' current challenge to the 2017 Presidential Memorandum is moot because that Memorandum was revoked by the 2018 Presidential Memorandum and because military service by transgender individuals will be governed by the Department's new policy if it is implemented, rather than by the 2017 Presidential Memorandum. *See id.* at 9–11. Second, even if Plaintiffs' case were not moot, the Department's new policy withstands constitutional scrutiny. *See id.* at 12–33. With respect to this second argument, the motion to dissolve raises controlling issues of law that impact all further proceedings. *See id.* Defendants' motion to dissolve is pending before the Court.

STANDARD OF REVIEW

The Court has wide discretion to control the nature and timing of discovery, and "should not hesitate to exercise appropriate control over the discovery process." *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." (citation omitted)). Courts have discretion to issue a protective order under Federal Rule of Civil Procedure 26(c) upon a showing of good cause in order to "protect a party from annoyance, embarrassment, oppression or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (stating that "Rule 26(c) confers broad discretion on the trial court

to decide when a protective order is appropriate and what degree of protection is required"); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery."). This discretion includes orders forbidding the requested discovery altogether. Fed. R. Civ. P. 26(c)(1)(A); *see also CineTel Films, Inc. v. Does 1-1,052*, 853 F. Supp. 2d 545, 557 (D. Md. 2012) (stating that "protective orders may forbid disclosure altogether").

ARGUMENT

The Court should preclude discovery until resolution of Defendants' pending Motion to Dissolve the Preliminary Injunction, including any interlocutory appeal, for four reasons.

1. Plaintiffs' challenge to the 2017 Presidential Memorandum is moot. *See* Defs.' Mot. at 9–11. The President has withdrawn that Memorandum, which formed the basis for the Plaintiffs' Amended Complaint and was central to the Court's preliminary injunction. Yet Plaintiffs have served numerous, burdensome discovery requests directly related to the President's statements on Twitter on July 26, 2017, and the Presidential Memorandum issued on August 25, 2017.[2] Because Plaintiffs' challenge to the 2017 Presidential Memorandum is moot, any discovery related to that Memorandum or to the President's preceding statements on Twitter is irrelevant and, in any event, disproportionate to the needs of the case. Fed. R. Civ. P. 26(b). In these circumstances, good cause exists for the Court to preclude discovery until resolution of the Motion to Dissolve.

2. Further litigation should be confined to the administrative record provided by the agency. Because the new policy resulted from an administrative process by the Department of Defense, any challenge to that new policy should be subject to the Administrative Procedure Act ("APA"),

[2] In addition, Plaintiffs served discovery requests that do not explicitly mention the President's statements on Twitter or the 2017 Presidential Memorandum, but that implicate the statements or the Memorandum by requesting documents or information before July 26, 2017 (the date of the President's statements on Twitter), or August 25, 2017 (the date of the Presidential Memorandum).

including the requirement that review of any challenge be based upon the administrative record. *Fort Sumter Tours, Inc. v. Babbitt*, 66 F.3d 1324, 1335 (4th Cir. 1995). Even a constitutional challenge to the Department's new policy would be constrained to record review. *See Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 162–63 (D.D.C. 2017); *Trudeau v. Fed. Trade Comm'n*, 384 F. Supp. 2d 281, 293–94 (D.D.C. 2005), *aff'd*, 456 F.3d 178 (D.C. Cir. 2006) (concluding that discovery was not permitted where plaintiff brought claims under the APA and the First Amendment and explaining that a private party could not "root through the files of a federal agency to determine the motivation" behind agency action). Because this case should be reviewed on the administrative record, there is a strong presumption against discovery. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

3. If implemented, the Department's new policy will be the operative policy governing military service by transgender individuals. In demonstrating that the Department's new policy withstands constitutional scrutiny, Defendants' motion presents controlling questions of law that should be resolved before allowing discovery to continue. *See* Defs.' Mot. at 12–33.

4. A protective order would serve the interests of judicial economy because the Court could avoid addressing constitutional separation-of-powers issues. Plaintiffs' have requested discovery directly from the President concerning his deliberations and decisionmaking process. In response, Defendants have objected on several grounds, including that such discovery intrudes on the separation of powers, and that virtually all of the discovery sought is subject to Executive privilege, including the presidential communications privilege. If the Court enters a protective order for the reasons explained above, then the Court would not need to address the parties' current discovery dispute. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 389–90 (2004) (stating

that "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible" (quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974))); *cf. Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). Therefore, it is in the interest of judicial economy to enter a protective order to preclude the Court from having to address these delicate constitutional issues.

CONCLUSION

For the foregoing reasons, the Court should stay all discovery deadlines and preclude the parties from engaging in discovery until a final ruling on Defendants' pending Motion to Dissolve the Preliminary Injunction, including through any interlocutory appeal.

March 23, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2018, I electronically filed the foregoing Motion for a Protective Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 23, 2018

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