

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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National Security Archive, et al.,	)	Civil Action
	)	No. 1:20-cv-03500-KBJ
	)	
Plaintiffs,	)	
	)	<b><u>Telephonic Status Conference</u></b>
vs.	)	
	)	
Donald J. Trump, et al.,	)	Washington, D.C.
	)	December 7, 2020
Defendants.	)	Time: 11:00 a.m.

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Transcript of **Telephonic Status Conference**  
Held Before  
The Honorable Ketanji Brown Jackson (via telephone)  
United States District Judge

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A P P E A R A N C E S

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2 Stenographic Official Court Reporter:  
3 (via telephone) Nancy J. Meyer  
4 Registered Diplomate Reporter  
5 Certified Realtime Reporter  
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7 333 Constitution Avenue, Northwest  
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7 **P R O C E E D I N G S**

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9 (REPORTER'S NOTE: This hearing was held during the  
10 COVID-19 pandemic restrictions and is subject to the  
11 limitations of technology associated with the use of  
12 technology, including but not limited to telephone and video  
13 signal interference, static, signal interruptions, and other  
14 restrictions and limitations associated with remote court  
15 reporting via telephone, speakerphone, and/or  
16 videoconferencing.)

13 THE COURT: Good morning. This is Ketanji Jackson.  
14 I understand that all of the parties are on the line.

15 Do we have Ms. Franklin?

16 THE COURT REPORTER: No, Judge. She's not on the  
17 line today.

18 THE COURT: Okay. Thank you very much. Just wanting  
19 to make sure whether I need to call the case. So let me do  
20 that.

21 This is a telephonic scheduling call in Civil Case  
22 No. 20-cv-3500, National Security Archive v. Trump. We do have  
23 our court reporter who is recording this teleconference.

24 So let me start by having the parties please introduce  
25 themselves to the Court, beginning with the plaintiffs.

1 MS. WEISMANN: Good morning, Your Honor. This is  
2 Anne Weismann on behalf of the plaintiffs, and also with me  
3 today is my co-counsel Nikhel Sus.

4 THE COURT: Good morning.  
5 Defense counsel, please.

6 MS. SHAPIRO: Yes. Good morning, Your Honor. This  
7 is Elizabeth Shapiro from the Department of Justice, and with  
8 me is co-counsel Julia Heiman.

9 THE COURT: Good morning to you-all as well.  
10 We are proceeding by teleconference primarily due to the  
11 court's closure status, in general, as a result of the pandemic  
12 emergency, although it is my ordinary practice to schedule a  
13 conference call that pertains to a motion for a temporary  
14 restraining order.

15 In this case, we have a TRO that has come in.  
16 Plaintiffs filed it on Friday afternoon, and the case itself  
17 was brought a week ago today. Let me start, as I ordinarily  
18 do, with respect to these kinds of matters, which is by  
19 attempting to assess whether and to what extent the issues  
20 involved present a true emergency, such that there really is no  
21 time for briefing or thorough consideration of the matter prior  
22 to the Court's imposing some kind of injunctive relief. And,  
23 of course, that evaluation relates to the nature of the claims,  
24 to the alleged claim, and it also pertains to the timing of the  
25 plaintiffs' motion relative to known facts that give rise to

1 their claims.

2 So I have reviewed the complaint and the TRO. Based on  
3 the allegations that are being made, I do have some questions  
4 about the urgency of the plaintiffs' claim in terms of -- of  
5 treating this as a TRO. Let me just put on the table at least  
6 my initial impression, and then I'll turn it over to  
7 plaintiffs.

8 For example, it appears as though the White House's  
9 screenshotting policy, which seems to be at the heart of what  
10 the plaintiffs are complaining about, that policy has been in  
11 effect since 2017, and it, at least from the allegations, was  
12 clear as of March of 2019 that White House officials, and in  
13 particular Jared Kushner, was using the WhatsApp app to create  
14 or send presidential records and that he was preserving such  
15 documents via the screenshotting policy. So what I need to  
16 understand is why this motion is being filed now on an  
17 emergency basis, and, of course, as I said, the answer to that  
18 question has implications for the schedule moving forward.

19 So, Ms. Weismann, maybe I'll start with you and ask  
20 whether there are facts that you're aware of that indicate a  
21 recent change of policy concerning the handling or maintenance  
22 of White House records.

23 MS. WEISMANN: Good morning, Your Honor. This is  
24 Anne Weismann.

25 Not specifically, but there is a changed circumstance

1 which really heightens the need for the relief we are  
2 requesting and, that is, that in less than six and a half  
3 weeks, President Trump will leave office, a new President will  
4 come in, and all of the records of the Trump presidency will be  
5 transferred to NARA for -- they will take over custody, control  
6 over those records. And the concern here is that a lot of the  
7 missing data -- we believe missing data -- is not currently,  
8 you know, in the confines of the White House. A lot of it  
9 resides with individuals who have used nonofficial messaging  
10 apps like WhatsApp to conduct official business.

11 So I submit especially that the timing here is really  
12 driven by the fact that we are on the verge of a new presidency  
13 and that changes everything with respect to the status of and  
14 control over the records of the Trump presidency.

15 THE COURT: Except, Ms. Weismann, with all due  
16 respect, it seems as though the circumstance that you're  
17 indicating is actually more favorable to plaintiffs in the  
18 sense that the circumstance is not that NARA will not have  
19 access to the records. In fact, you say that the circumstance  
20 is that in six weeks they will take custody of them. So,  
21 again, I don't -- I'm not sure it is evident, at least to me,  
22 why I'm dealing with this in the context of a TRO with respect  
23 to practices that have been in place for years now.

24 I mean, the individuals you're talking about have been  
25 preserving records or not pursuant to the White House policy

1 since, you know, 2019 at least. So what is it about this  
2 moment that makes it significant enough that the Court has to  
3 intervene with, by the way, a very limited type of injunctive  
4 relief? I mean, a TRO is a 14-day kind of order. And so I  
5 just don't see where -- where the need for treating this with  
6 that kind of urgency is coming from.

7 MS. WEISMANN: Well, Your Honor, let me -- let me try  
8 to explain a little -- a little better.

9 You're correct that as -- as -- on January 20th at noon,  
10 NARA will be the official custodian of all of the records of  
11 the Trump presidency. The problem lies in the fact that if  
12 those -- whatever records are not preserved will not be  
13 transferred to NARA. And that's really -- with respect to the  
14 screenshotting policy, that's our concern.

15 By adopting an official policy that tells White House  
16 employees if they use nonofficial messaging accounts to conduct  
17 business, all they need to do is to capture -- is to create a  
18 screenshot of the message and that's what will be the official  
19 record that will go to NARA, you know, it means that all of the  
20 valuable metadata, attachments, et cetera, as we've laid out in  
21 our briefs, are not captured, and yet all of that material also  
22 constitutes presidential records material that needs to be  
23 preserved.

24 So our concern, Your Honor, is that on January 20th,  
25 NARA won't have any of that data.

1 THE COURT: Yes. But that concern -- Ms. Weismann,  
2 that concern, I would think, arose in February of 2017 when the  
3 White House issued the memoranda that allowed for its employees  
4 to preserve records in the way that you now claim is  
5 inconsistent with the Presidential Records Act.

6 What's -- what's concerning to me is not necessarily the  
7 substance of your claim. I understand that you think that the  
8 Presidential Records Act requires them to preserve that data in  
9 a more significant way than just a screenshot. My concern is  
10 that that -- it became clear that the White House disagreed  
11 with you in 2017. And it seems as though rushing in 60 days  
12 before the end of the administration to seek a TRO and to  
13 prevent them from continuing to implement a policy that's been  
14 in place for two-plus years now, it seems like this is not sort  
15 of the right timing in terms of how to address this issue.

16 MS. WEISMANN: Well, the problem that we see,  
17 Your Honor, is that if we don't get this kind of immediate  
18 relief and we continue to litigate this issue, on January 20th  
19 our ability to get full relief without a decision of any policy  
20 is essentially, you know, mooted because NARA won't have all of  
21 the metadata, all of the attachments to these screenshots.

22 THE COURT: I understand, but -- but isn't that --  
23 wasn't that based into your decision to wait until now? I -- I  
24 mean, I appreciate that that might be a problem for you in  
25 60 days, but you've known about the basis for this complaint

1 for two-plus years. Let me --

2 MS. WEISMANN: Well, Your Honor --

3 THE COURT: Yes. Go ahead.

4 MS. WEISMANN: Okay. I -- I would just point out --  
5 I'll just point out that we -- we did write -- CREW wrote  
6 several letters, one well over a month ago, to NARA, to the  
7 White House, to Mr. Kushner, asking for assurances that they  
8 would begin this policy, and they refused to provide those  
9 assurances.

10 You know, yes, we wish that we had appreciated the  
11 nature of this problem this -- this created earlier. We did  
12 not fully appreciate the -- the problem of what it meant for  
13 purposes of presidential records until recently, and we acted  
14 as promptly as we could. And at this point, you know, we -- we  
15 do say irreparable loss of records, and that is the sort of  
16 textbook example of the kind of harm that the preservation  
17 order we seek here is designed to prevent.

18 THE COURT: All right. So let me -- let me ask you  
19 in a more granular way what activity of the White House are you  
20 seeking to restrain? And, again, this is not for the purpose  
21 of -- of binding you with respect to -- with respect to the  
22 claims you're making. This is not a hearing on the substance.  
23 I'm just trying to evaluate whether the Court has to move  
24 quickly to prevent the kind of activities that you would like  
25 to have restrained.



1           So what is it that you are asking the Court to do in  
2 terms of the imposition of a TRO?

3           MS. WEISMANN: Well, we're asking for several things,  
4 Your Honor. We're asking, first, the Court to order the  
5 White House defendants to preserve all presidential records.

6           And the second thing we're asking is that as part of  
7 that preservation, the White House is directed to get  
8 possession of, so that it can preserve all of the metadata, the  
9 attachments, all of the presidential record material that's  
10 associated with these messages that were sent or received on  
11 nonofficial accounts that until now have -- have been preserved  
12 only as a screenshot.

13           THE COURT: All right. So with respect to the first  
14 point, preserving all presidential records, that seems to me  
15 like it's just a general follow-the-law kind of injunction  
16 because the statute requires that the White House preserve all  
17 presidential records. So do you have a factual basis that  
18 the -- other than this sort of notion that you believe  
19 screenshots are not enough, is there some practice or policy of  
20 the White House in particular, in addition to the  
21 screenshotting policy, that you are asking the Court to prevent  
22 the White House from engaging in at this time?

23           MS. WEISMANN: Yes, Your Honor. As spelled out in  
24 our complaint, we are also challenging the failure of the  
25 President and others acting at his direction to comply with the

1 notice requirements that the PRA imposes on him before he can  
2 destroy any presidential records. And it is our contention  
3 that he has not complied with that, and as a result, we, the  
4 public, all -- all of the plaintiffs, who are good government  
5 groups and historians, face the risk of irreparably losing  
6 valuable historical records.

7 THE COURT: I understand the risk. What I'm trying  
8 to understand is what my order looks like if, you know -- the  
9 order that you're requesting. So you're also including then a  
10 line about not -- or having to notify the archivists. I don't  
11 see that as a proposed order right now, so I'm trying to  
12 understand.

13 MS. WEISMANN: At this -- yeah, at this juncture we  
14 have not -- we have not moved for a TRO that would be against  
15 the archivists, because the archivists at this point do not  
16 have possession and control of the records. Obviously on  
17 January 20th, whatever preservation order is in place, we would  
18 want to send to the archivists.

19 THE COURT: I'm sorry. I wasn't clear. I'm talking  
20 about the notice point that you just made. You say in your  
21 complaint --

22 MS. WEISMANN: Oh.

23 THE COURT: -- you claim that the President will  
24 not --

25 MS. WEISMANN: I'm sorry.

1 THE COURT: -- is not complying with the notice. Is  
2 that a part of the TRO or not?

3 MS. WEISMANN: Yes, it is, Your Honor. And I'm  
4 sorry. I -- I misunderstood the Court's point.

5 Yes, the TRO and our motion and our complaint complains  
6 about the fact that the President has failed to comply with the  
7 mandatory notice that the statute requires him to give to the  
8 archivists before he destroys any presidential records.

9 THE COURT: All right. So would -- would your TRO be  
10 mooted in a sense if the White House were to agree to just not  
11 destroy anything moving forward? Can we litigate this in the  
12 ordinary fashion if you had those sorts of assurances?

13 MS. WEISMANN: If they were advised in the Court  
14 order, yes. I'm still not sure that would address the  
15 screenshotting issue, but as to the counts against the  
16 President and EOP, with respect to their failure to give the  
17 required notice, yes, that would go far enough.

18 THE COURT: Why would that not address the  
19 screenshotting issue? I mean, if they're only now preserving  
20 things by screenshot, if, instead, the White House said, you  
21 know, even if we're screenshotting things, we're not going to  
22 destroy anything, we'll just hold the electronic records, why  
23 wouldn't that moot the TRO aspect of this?

24 MS. WEISMANN: Because, at present, it's our  
25 understanding that the White House, in fact, does not have all

1 of that associated metadata, attachments, et cetera. All they  
2 have in their records systems, all they have -- all that's been  
3 preserved are the -- the screenshots. And so there's still  
4 very significant valuable data that qualifies, we submit, as a  
5 presidential record material that is -- they don't have and  
6 they're not preserving. When I say "they," I mean EOP doesn't  
7 have it in its record keeping system.

8 THE COURT: Right. But I guess I'm not being clear.

9 So if the White House were to agree to not destroy --  
10 you're -- what -- I guess -- are you saying that that data  
11 cannot be preserved or just that they're not doing so and they  
12 can't agree to do so during the pendency of this litigation?

13 MS. WEISMANN: I'm not saying it cannot be preserved.  
14 I'm saying at this point I believe that a lot of the data  
15 likely still resides with individual White House employees to  
16 the extent that they have used phone -- their personal phones,  
17 for example, to send WhatsApp messages, as we understand Jared  
18 Kushner has. All of that data, if it has not been forwarded to  
19 the White House to be placed in an official record keeping  
20 file, then it is still with Mr. Kushner. And that would be  
21 true for other White House employees as well.

22 THE COURT: All right. So let me turn to Ms. Shapiro  
23 to ask about whether Ms. Weismann's representations concerning  
24 records being in individual employee files and custody and not  
25 in White House files and custody, is she right about that,

1 Ms. Shapiro?

2 MS. SHAPIRO: Good morning, Your Honor. This is  
3 Elizabeth Shapiro.

4 I think we can make this much easier on the Court and on  
5 everybody, because there are three very strong reasons why this  
6 TRO needs to be denied. And the first is that preservation  
7 instructions were already conveyed to the White House before  
8 plaintiffs ever filed their TRO. A formal litigation hold went  
9 to all components and individuals affected by this litigation,  
10 and that's all individuals within the White House office, so  
11 including Jared Kushner.

12 Every litigant is under a duty to preserve records.  
13 We've already done that. And there's absolutely no need for a  
14 preservation order because we have complied with our litigation  
15 obligations and issued an order after we got the complaint  
16 and -- and were able to get that instruction and before the  
17 TRO.

18 And plaintiffs would know that if they had conferred  
19 with us on this motion, which brings me to the second point why  
20 this motion has to be denied, which is because this motion for  
21 preservation is really a nondispositive motion for preservation  
22 that was subject to Local Rule 7(m). Had they conferred with  
23 us, the plaintiffs, they would have learned there was no need  
24 to bring a motion, particularly an emergency motion, because  
25 preservation measures are in place.

1           And, Your Honor, as -- as Your Honor well knows,  
2           Your Honor's chamber rules make crystal clear any motion that  
3           does not comply with Local 7(m) will be denied. I think the  
4           Court's exact words are: The Court will summarily deny motions  
5           that are subject to Local Civil Rule 7(m) but do not contain  
6           the requisite statements, unquote.

7           And plaintiffs knew precisely with whom to confer about  
8           this motion because they sent me a copy of their ready-to-file  
9           motion on Friday at 11:30 in the morning. They filed the TRO  
10          nine minutes later. I responded to Ms. Weismann at 12:30  
11          saying I had received her email and I would get back to her  
12          soon. When I went on the docket, the TRO motion had already  
13          been filed. So there was no discussion before this motion was  
14          prepared and filed, and -- and had there been, I think we could  
15          have obviated the entire need to have this conversation.

16          But, in any event, the third reason why the motion  
17          should be denied is because on its face the plaintiffs cannot  
18          make out the elements of the TRO. They cannot establish  
19          irreparable harm because they claim that the harm flows from  
20          the absence of a preservation order, but, in fact, preservation  
21          instructions and measures are in place.

22          They are also unlikely to succeed on the merits of their  
23          claim because, as they essentially recognize in their papers,  
24          the *Armstrong* decision from the D.C. Circuit prevents this  
25          Court from asserting jurisdiction over virtually all aspects of

1 PRA claims with very limited exceptions. One of those claims  
2 that are precluded are compliance claims. So the notion that  
3 there should be a TRO to enjoin the President from compliance  
4 with the PRA is -- is not something that's within this Court's  
5 jurisdiction to order.

6 So on -- the two most significant elements of the TRO  
7 casts irreparable harm and likelihood of success on the merits,  
8 plaintiffs cannot succeed on this motion. But what we can do,  
9 and what we would have told plaintiffs if they had conferred  
10 with us, is that we are willing to enter into an expedited  
11 briefing schedule to resolve this matter. We're prepared to  
12 file a motion to dismiss on the merits by December 15th, which  
13 is, I think, eight days from now, so that we should be able  
14 to quickly litigate and resolve this in advance of the  
15 transition.

16 THE COURT: All right. Let me then turn it back to  
17 Ms. Weismann. Why shouldn't the Court proceed as defendants  
18 have proposed, especially in light of the lack -- alleged lack  
19 of plaintiffs having complied with the local rules concerning  
20 consultation?

21 MS. WEISMANN: First of all, at no time after we  
22 filed our complaint, between that time and when we filed the  
23 motion for TRO, did anyone from the government enter their  
24 appearance, and so I very much take issue with the idea that we  
25 have failed to comply with our notice requirements.

1           And I would also point out that as we said in our  
2 papers, yes, this -- this motion could have been avoided had  
3 the White House or NARA had the courtesy to respond to any of  
4 our letters that we sent over the last month and a half asking  
5 for precisely the kind of assurance that they now -- that  
6 defendants now claim they're willing to give.

7           THE COURT: All right. Well, in light of their  
8 representations that -- in light of their representations --

9           MS. WEISMANN: Yes.

10          THE COURT: -- that --

11          (Indiscernible simultaneous cross-talk.)

12          THE COURT: What is your view of whether the motion  
13 is still needed?

14          MS. WEISMANN: Well, I think it still does not  
15 address the concern I raised with respect to the data that has  
16 not been preserved by the screenshots. And so I still think  
17 there is a need to address that component of it, because come  
18 January 20th, all of those White House employees will no longer  
19 be employees of the White House and no longer under the  
20 direction of the White House Counsel and EOP. And so we still  
21 think that there needs to be --

22          THE COURT: Ms. Weismann, what I understood defense  
23 counsel to be representing is that at present the White House  
24 has notified all such persons that they are not to destroy any  
25 documents or any records, electronic or otherwise. So that



1 right now the -- the data that you're concerned about is being  
2 preserved. Why doesn't that obviate the need for emergency  
3 relief in the way that you have moved?

4 MS. WEISMANN: If that is, in fact, the case, I would  
5 agree that we don't need the emergency relief. But in order to  
6 be able to know that's the case, we would need to see the terms  
7 of the preservation order because --

8 (Indiscernible simultaneous cross-talk.)

9 THE COURT: I -- I take -- I take government counsel  
10 at her word as an officer of the court that a litigation hold  
11 preservation order has been issued. I don't know whether or  
12 not -- you know, I don't feel that it is necessary for the  
13 Court to scrutinize the details of that to the extent that she  
14 is representing, as has been represented in prior cases, by the  
15 way, that the government is preserving this data and  
16 information. I'm not aware of a circumstance in which the  
17 Court then says prove it before they determine whether or not  
18 to proceed to litigate the claims in a less emergent fashion,  
19 which is really all that I'm concerned about right now.

20 I'm trying to figure out the right schedule by which to  
21 assess the claims that you've made in your complaint.  
22 Defendant has said that there is a litigation hold that none of  
23 the data -- that the data that you're concerned about is being  
24 destroyed and that they're prepared to file a motion to dismiss  
25 and litigate this, essentially, on expedited motions for

1 cross -- for summary judgment as of December 15th.

2 What is your view of that proposal?

3 MS. WEISMANN: Your Honor, as long as it is clear --  
4 and I apologize. It's not clear to me that for purposes of  
5 what they've ordered be preserved, it includes all -- a  
6 complete copy of any electronic presidential records, and that  
7 would include all of the metadata, attachments, and  
8 functionality associated with the original record. As long as  
9 the preservation order expressly includes that information, we  
10 would agree that there is no need to rule on an emergency  
11 motion, but I did not hear that expressly from counsel. And if  
12 she said it, I apologize.

13 THE COURT: Ms. Shapiro, is it the White House's  
14 position they have ordered the preservation of all records and  
15 data associated with those records in the manner that  
16 Ms. Weismann indicates?

17 MS. SHAPIRO: Yes, Your Honor. This is Elizabeth  
18 Shapiro.

19 The litigation hold, which is privileged -- but I can  
20 represent that it directs individuals to maintain the record in  
21 its original form, in its native format with all the  
22 functionality.

23 THE COURT: All right. So, Ms. Weismann, given that,  
24 do you want to withdraw your motion for a TRO? Do you want the  
25 Court to deny it as moot?

1 I think we should turn now to a discussion of the  
2 schedule concerning the -- the claims that you've made in this  
3 case.

4 MS. SHAPIRO: So, Your Honor, this is -- I wasn't  
5 sure who you were directing your question to, but we are  
6 prepared, as I mentioned, to move to dismiss under Rule 12 by  
7 December 15th.

8 THE COURT: Yes.

9 MS. SHAPIRO: And --

10 (Indiscernible simultaneous cross-talk.)

11 THE COURT: Yes, I was trying to ask Ms. Weismann  
12 whether in light of your representation now that everything has  
13 been preserved, how -- how should the Court treat the pending  
14 TRO.

15 MS. WEISMANN: Your Honor --

16 THE COURT: Happy to deny it as moot, or I can allow  
17 you to withdraw it, and we can move into the briefing phase of  
18 this.

19 MS. WEISMANN: Your Honor, this is Anne Weismann.

20 I do have a further issue that needs to be addressed  
21 and, that is, that we are facing the end of a -- of a  
22 presidential term, which means that, as is starting to be  
23 reported almost daily in the newspaper, employees will leave.  
24 To the extent that employees have any of the, you know,  
25 original form of these messages, including all of the metadata

1 and attachments, we want to make sure that those records are  
2 placed in the custody of the White House before they leave.

3 THE COURT: I -- I fully understand and appreciate  
4 your interest. I will ask Ms. Shapiro whether that is what the  
5 arrangement that the White House has made, but I -- I do also  
6 want to indicate my awareness that the D.C. Circuit has in this  
7 area of presidential records issued many times rulings that  
8 indicate that the Court has limited subject-matter  
9 jurisdiction.

10 So just because the plaintiffs have brought this as an  
11 emergency motion at the end of a presidential term and have  
12 expressed what they believe to be legitimate concerns about the  
13 presidential -- the preservation of records, doesn't permit  
14 this Court to suddenly become a tribunal that can order the  
15 President to do various things in this regard when the  
16 D.C. Circuit has said that the Court has limited subject-matter  
17 jurisdiction.

18 So I'm -- I'm happy to ask Ms. Shapiro in the context of  
19 this call whether or not the instructions that the White House  
20 has given include the instruction to individuals who might be  
21 leaving to hand over all their records in the original form to  
22 the White House.

23 Ms. Shapiro, is that happening or not?

24 MS. SHAPIRO: So the litigation hold does not  
25 expressly address what happens when employees leave, but there

1 are elaborate procedures when anybody leaves the White House  
2 about their records. So I have to imagine that all of that is  
3 accounted for, particularly when these individuals are all now  
4 subject to a litigation hold.

5 And, in any event, I agree that is not the appropriate  
6 subject of an order. But I'm certainly willing to work with  
7 Ms. Weismann to make sure that, you know, she is satisfied with  
8 those procedures; but there shouldn't be any doubt that the  
9 office of records management is extremely vigilant about  
10 managing departing employees' records, and they're aware of  
11 this litigation hold.

12 THE COURT: All right. So we have on the table the  
13 proposal that the defendants file a motion to dismiss as of  
14 December 15th. Let me get my calendar out.

15 Ms. Weismann, again, with respect to your existing TRO,  
16 are you in a position now to say that you would like for it to  
17 be withdrawn? Do you want it converted into some sort of  
18 motion for summary judgment? How do you propose we proceed  
19 from a procedural standpoint given the representations of  
20 defense counsel?

21 MS. WEISMANN: Your Honor, this is Anne Weismann.

22 Given the --

23 THE COURT: Sorry. I just got a little -- can you  
24 try again.

25 MS. WEISMANN: Can you hear me now?

1 THE COURT: Yes. Go ahead.

2 MS. WEISMANN: Sorry. Your Honor, Anne Weismann.

3 Given the representations of counsel and the  
4 willingness -- their express willingness to work with us so  
5 that we understand and are reassured about the procedures they  
6 have in place to capture records of departing employees, we are  
7 willing -- we can either withdraw our motion or the Court can  
8 treat it as moot, and we are willing then to talk about  
9 scheduling for a motion to dismiss.

10 THE COURT: All right. I'll enter a minute order  
11 that denies the motion as moot in light of the representations  
12 of defense counsel in the context of today's teleconference.  
13 And given that, we would have the complaint. The defendant is  
14 seeking to file a motion to dismiss by next Tuesday. The  
15 question is should we just proceed in motion-to-dismiss world  
16 given what I take defense counsel's primary argument, or at  
17 least one of the arguments, will have to do with the Court's  
18 subject-matter jurisdiction, which is certainly a threshold  
19 consideration, or do we want to have some -- you know,  
20 cross-motions for summary judgment? How should we go about  
21 evaluating the remaining claims?

22 MS. WEISMANN: Well, Your Honor, this is  
23 Anne Weismann.

24 Speaking for the plaintiffs, we wouldn't be in a  
25 position to cross-move summary judgment because we wouldn't

1 have access to all of the facts we would need.

2 THE COURT: All right. So it sounds like then we  
3 should have the -- just sort of processing what you just said  
4 in terms of the facts that you would need. So what sort of  
5 facts do you need, Ms. Weismann?

6 MS. WEISMANN: Well, we -- you know, if we proceeded  
7 in the normal course, we would -- you know, we would be  
8 entitled, I think, to certain discovery. So we're not willing  
9 to concede that there's no discovery that we would be entitled  
10 to that would shed further light on the practices --

11 THE COURT: So here's --

12 MS. WEISMANN: -- of the White House.

13 THE COURT: -- what I think needs to happen. Given  
14 that the parties have not consulted yet concerning this matter,  
15 I think you-all should talk, figure out what the form of motion  
16 should be, whether -- and that may have to do with whatever  
17 facts you think you need and what the defendant is in a  
18 position to provide to you quickly -- and propose a schedule  
19 regarding further proceedings concerning the claims in this  
20 case.

21 The Court is certainly willing to do so in an expedited  
22 fashion, whether it is motion to dismiss and opposition or  
23 cross-motions for summary judgment, but I think it would be  
24 best if the two of you -- or the two sides were to confer and  
25 then, let's say, by noon tomorrow file a proposed -- a joint

1 proposed schedule for further proceedings, if there is an  
2 agreement. If there's not an agreement, then you file  
3 something that indicates what the two sides' positions are  
4 on how we should proceed to litigate the claims in this  
5 matter.

6 Does that make sense?

7 MS. WEISMANN: Your Honor, this is Anne --

8 THE COURT: Sorry. Let me have Ms. Weismann.

9 MS. WEISMANN: This is Anne Weismann. Yes, that  
10 makes sense to us, Your Honor.

11 THE COURT: All right. Ms. Shapiro?

12 MS. SHAPIRO: Your Honor, I can tell you now that our  
13 position is that the Court lacks subject-matter jurisdiction  
14 over the entirety of this complaint. So we would not agree to  
15 any discovery. We would want to move for a complete dismissal  
16 under Rule 12. So while I'm happy to confer with -- with  
17 counsel, you know, that will be our position. And I think we  
18 would be entitled to make that motion.

19 THE COURT: And you'd be willing -- and you'd be  
20 available to do so by next Tuesday?

21 MS. SHAPIRO: Correct.

22 THE COURT: All right. And that may well be how it  
23 shakes out, but why don't I have you-all -- give you until  
24 tomorrow to pin down your relevant submissions. Maybe the  
25 plaintiffs will agree we should do this threshold briefing on



1 subject-matter jurisdiction or they will have a list of facts  
2 and evidence that they would like to procure; and then I will  
3 resolve which set of -- which schedule we're going to follow in  
4 terms of getting the claims resolved.

5 All right. So I'll set noon tomorrow as a deadline for  
6 a proposed schedule. I understand defendants' position, and,  
7 you know, you can begin your briefing as to your view as to how  
8 this should play out, but I will decide once I get your  
9 relevant positions and issue an order tomorrow after I reviewed  
10 what you have put forward concerning how we're going to  
11 proceed. All right?

12 MS. SHAPIRO: Thank you.

13 MS. WEISMANN: Thank you, Your Honor.

14 THE COURT: Anything else?

15 All right. So I'll issue an order that moots the TRO  
16 and that requires you to issue a proposed schedule by tomorrow  
17 at noon. Thank you.

18 MS. WEISMANN: Your Honor, I'm sorry. This is  
19 Anne Weismann. I just want to know in the order that you issue  
20 on mootness, will you note that it is based on representations  
21 of counsel with respect to document preservation?

22 THE COURT: I will.

23 MS. WEISMANN: Thank you, Your Honor.

24 THE COURT: All right. Thank you. Have a good day.

25 (The proceedings concluded at 11:40 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter,  
Certified Realtime Reporter, do hereby certify that the above  
and foregoing constitutes a true and accurate transcript of my  
stenograph notes and is a full, true, and complete transcript  
of the proceedings to the best of my ability.

Dated this 7th day of December, 2020.

/s/ Nancy J. Meyer  
Nancy J. Meyer  
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