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Via CM/ECF and Federal Express February 24, 2018

Chambers of the Honorable Marvin J. Garbis
United States District Judge
U.S. District Court for the District of Maryland
101 West Lombard Street
Chambers 5C
Baltimore, MD 21201

Re: Case-Planning Conference in *Stone, et al. v. Trump, et al.*, Case 1:17-cv-02459-MJG

Dear Judge Garbis:

Plaintiffs oppose Defendants' request to postpone the case-planning conference Your Honor asked us to schedule for shortly after February 21. Plaintiffs respectfully request that a conference be held during the week of February 26, during one of the periods when the Court is available.

Although Defendants assert that the Department of Defense's implementation plan "has not been made publicly available," the Department of Defense has confirmed that the Secretary of Defense conveyed the Department's recommendations to President Trump on Friday morning.[1] If the implementation and recommendations have not been made public, it is because Defendants have unilaterally refused to reveal them.

At this point, the need for a case-planning conference is more urgent than ever. Defendants have caused discovery to grind to a halt by refusing to produce ***any*** discovery regarding any communications involving White House officials or staff and ***any*** discovery regarding the content of deliberations of the Department of Defense in developing a plan for implementing President Trump's order banning service by transgender persons. President Trump's communications with the Department of Defense and the Department of Defense's deliberative process (or lack thereof) are the most important topics for discovery in this case. As explained in the attached deficiency letter Plaintiffs sent to Defendants on February 21, Ex. A, the deliberative-process and presidential-communications privileges are ***qualified*** privileges,

[1] Dominic Holden, *The Pentagon Just Gave Trump Recommendations On Transgender Military Service*, BuzzFeed (Feb. 23, 2018, posted 11:37 a.m.), *available at* https://www.buzzfeed.com/amphtml/dominicholden/heres-why-the-pentagons-new-transgender-military-proposal?utm_term=.uiQR8pEazM&__twitter_impression=true.

which cannot be invoked when the validity of the President's motives and the adequacy of presidential and agency deliberative process are squarely at issue.

Defendants now say they want to meet and confer on the privilege issues on an extended timeline, but this appears to be a delay tactic: Defendants produced in this case essentially the same discovery (including the same privilege logs) as they provided in *Doe v. Trump*, No. 17-1597 (D.D.C.). They have already taken inflexible positions on privilege issues there (for example, declining to provide that court with basic information needed to evaluate their extensive claims of presidential communications privilege). *See* Ex. B at 5:9–16 (*Doe v. Trump*, No. 17-1597 (D.D.C.), Feb. 16, 2018 Hr'g Tr.). In view of their posture in *Doe*, it appears highly unlikely that Defendants will change their position on privilege issues in this case.

Plaintiffs are prepared to file a motion to compel by March 2. We request the following expedited briefing schedule so the Court can resolve the issues promptly and discovery can proceed without further delay.

Plaintiffs' initial memorandum due on March 2.
Defendants' opposition due on March 9.
Plaintiffs' reply due on March 14.

This schedule should not create a hardship for Defendants because they will be filing a motion for protective order in the *Doe* case on February 27 and will be briefing many of the same issues in connection with that motion.

Sincerely,

/s/ Marianne Kies

/s/ Mitch Kamin
(signed by M. Kies,
with permission of M. Kamin)

Attorneys for Plaintiffs

cc: All Counsel of Record, via CM/ECF

EXHIBIT A

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Via Email

February 21, 2018

Ryan B. Parker
United States Department of Justice
Civil Division, Federal Programs Branch
T: (202) 514-4336
ryan.parker@usdoj.gov

Re: *Stone, et al. v. Trump, et al.*,
Case No. 1:17-cv-02459-MJG (D. Md.)

Dear Mr. Parker:

We write regarding Defendants' responses to Plaintiffs' interrogatories and requests for production in the above-captioned litigation.

Defendants have objected to Plaintiffs' interrogatories as seeking privileged information, including information purportedly covered by the deliberative process privilege and the presidential communication privilege, and have withheld information on the basis of such objections. Defendants have similarly withheld allegedly privileged documents that are relevant to this matter and responsive to Plaintiffs' requests for production, including documents Defendants claim are protected by the deliberative process privilege and the presidential communication privilege. As discussed below, neither the deliberative process privilege nor the presidential communications privilege appear to be applicable in this litigation. Plaintiffs request that you promptly withdraw these privilege claims and provide the requested information and documents, or, in the alternate, provide adequate justifications for your claims of privilege.

I. The Deliberative Process Privilege

A. Defendants' Assertion of the Deliberative Process Privilege Is Inappropriate.

Plaintiffs' lawsuit asserts, in part, that Defendants have violated the equal protection and substantive components of the Due Process Clause of the Fifth Amendment through their promulgation and attempted implementation of President Trump's August 25, 2017 Memorandum titled "Military Service by Transgender Individuals" (the "Transgender Service Member Ban"). Plaintiffs assert that President Trump's actions in promulgating the ban are improperly motivated by discriminatory intent and animus against transgender individuals; that the discriminatory intent underlying the ban tainted Defendant's implementation plans; that the implementation study conducted by the "panel of experts" was engineered to reach a pre-determined outcome; and that such actions cannot satisfy examination under a heightened scrutiny standard, which requires a court to examine the actual purpose motivating a policy. To

litigate this issue, Plaintiffs must obtain evidence regarding the intent underlying the Transgender Service Member Ban.

Defendants' intent in promulgating and attempting to implement the Transgender Service Member Ban is directly at issue in this litigation. The deliberative process privilege "is not appropriately asserted . . . when a plaintiff's cause of action turns on the government's intent." *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). For example, when a plaintiff has alleged government misconduct – including the promulgation of unconstitutionally discriminatory policies on the basis of animus – the government may not assert deliberative process privilege, and the plaintiff is not obligated to make any further showing of need for the requested discovery. *See Tri–State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005) ("Under the government misconduct exception, there is no need to engage in a balancing test because the privilege does not apply at all."); *Alexander v. F.B.I.*, 186 F.R.D. 154, 163–65 (D.D.C. 1999) (rejecting the government's contention that misconduct is merely a factor to be weighed in connection with the privilege claim); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) ("Moreover, the privilege disappears altogether when there is any reason to believe government misconduct occurred.").

Defendants' invocation of the deliberative process privilege is therefore inappropriate in connection with the present lawsuit. We request that you promptly withdraw all objections on the basis of deliberative process privilege, and promptly produce all documents that you have withheld based on that privilege. In the alternative, and at a minimum, defendants must properly justify their claims of privilege which, as discussed below, are inadequate.

B. Defendants' Privilege Logs are Insufficient.

Even if the deliberative process privilege could be invoked with respect to some documents in this litigation, Defendants fail to assert the privilege in an appropriate manner. Defendants' privilege logs are insufficient in several respects, and fail to meet the standard required to establish that Defendants are entitled to assert the deliberative process privilege.[1]

Under Federal Rule of Civil Procedure 26(b)(5) a party withholding documents on the basis of privilege must provide information that will enable other parties to assess the claim. Defendants have the burden to provide the requisite information to establish that each withheld or redacted document should be shielded by the deliberative process privilege. *See City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253-54 (4th Cir. 1993) ("the burden is on the agency to correlate, with reasonable specificity, materials within a document with applicable exemptions"). A privilege log should provide more than vague, boilerplate descriptions that merely identify a broad policy topic and generally allege the document was related to some deliberative activity. *See Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (the description of a document in a privilege log "should be specific enough to permit the court or opposing counsel to determine whether the privilege asserted applies to that document"). A privilege log should "mirror" the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir.

[1] As explained below, Defendants' logs also fail to meet the standards required to support their other privilege claims.

1973), which holds that a party asserting a privilege must provide sufficient detail to allow the assertions to be fully assessed. *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980). Those requirements are set forth in cases such as *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 368-69 (4th Cir. 2009) (an index that only supplies information on authors, recipients, dates, and "a brief description" is "patently inadequate" to permit a court or opposing counsel to assess whether deliberative process privilege applies to that document); *Coastal States Gas Corp. v. D.O.E.*, 617 F.2d 854, 868 (D.C. Cir. 1980) (the agency claiming deliberative process privilege "has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process"); and *Morley v. C.I.A.*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) ("minimal information" in a privilege log is inadequate for a court to make a privilege determination, the log must enable the court or opposing counsel "to pinpoint an agency decision or policy to which these documents contributed").

Even a cursory look at Defendants' privilege logs reveals multiple entries that fail to meet the required standard. For example:

- Stone v. Trump – Air Force Privilege Log (13 Feb 2018): 16 separate entries, including the entry on row 14 (AF_00000061 - AF_00000064), claim deliberative process privilege based on the justification "Predecisional and deliberative internal Air Force document created for the purpose of preparing for and responding to the President's announcement of the transgender service policy." On the face of it, neither preparing for nor responding to a Presidential announcement is an action related to deliberation about a future policy decision. This entry fails to identify with sufficient specificity any agency policy-making decision it was related to or the deliberative nature of the document, and thus fails to provide sufficient detail.

- Stone v. Trump – Army Privilege Log (13 Feb 2018): 74 separate entries, including the entry on row 3 (ARMY_15-75, 79), claim deliberative process privilege with a description of "Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness." While this description asserts that the document is "Predecisional and deliberative," the rest of the entry reveals that this document relates to implementation of an existing policy and assessment of that policy's impact. There is insufficient information to tie this document to any policy-making deliberative process eligible for deliberative process privilege, and thus these entries fail to provide sufficient detail.

- Stone v. Trump - Navy Production 1 Privilege Log (13 Feb 2018): the entry on row 2 (Navy_00000026) claims deliberative process privilege with a description of "Draft DoD Instruction 6130.03 'Medical Standards for Appointment, Enlistment, or Induction in the Military Services.'" This description fails to provide any information regarding any policy-making decision the document relates to and what deliberative elements it may contain. Thus this entry fails to provide sufficient detail.

- Stone v. Trump - Navy Production 3 Privilege Log (13 Feb 2018): dozens of documents are claimed to be protected by the deliberative process privilege for reasons such as "No signature, so it's a draft document" (rows 25 and 26), "This is not signed so it is a draft document" (row 27), "This is marked draft" (row 155), "This is a draft document" (rows 14, 45, 46, and 136), "Appears to be a draft letter" (row 695), "Much of this is non responsive –" (row 1152), and "Draft; not final" (row 1897). None of these entries provide sufficient detail.

- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018) and Stone v. Trump – DHA – Privilege Log (13 Feb 2018): the 85 separate entries for which Defendants claim privilege in these two logs state the same boilerplate justification for the deliberative process privilege claim: "Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness." Neither implementing an existing policy nor assessing its impact involves a pre-decisional deliberation, and thus these entries fail to provide sufficient detail. As noted below, on the face of the entries some of these documents do not appear to be deliberative or pre-decisional.

Defendants have thus failed to adequately assert the deliberative process privilege under Federal Rule of Civil Procedure 26(b)(5). We request that Defendants promptly provide privilege logs that meet the required standard, or withdraw the privilege claims and produce all withheld documents.

C. Plaintiffs' Need Overcomes Any Deliberative Process Privilege Claims.

Even if the deliberative process privilege could apply here and Defendants had met the standards required to claim the privilege, Plaintiffs' need for the requested discovery would overcome the deliberative process privilege claims. The requested materials are highly relevant to Plaintiffs' lawsuit, are available only from Defendants, are directly tied to Defendants' defenses, and production of the discovery Plaintiffs seek would not hamper future policy discussions.

When a party correctly asserts a claim of deliberative process privilege, courts apply a balancing test to determine if the privilege can be overcome: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Cipollone v. Liggett Grp., Inc.*, 812 F.2d 1400, 1987 WL 36515, at *2 (4th Cir. 1987) (per curiam) (unpublished); *F.T.C. v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Had Defendants correctly presented their deliberative process privilege claims, this balancing test would weigh heavily in favor of requiring production of the evidence Plaintiffs seek.

When the underlying issue in a lawsuit is the process behind a decision, the balancing test weighs heavily in favor of the party seeking discovery. *See United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (holding a party would "probably be able to make a very powerful showing of necessity" in a case where "the decisionmaking process . . . *is* the

case."); *see also Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) (same); *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 639 (S.D. Cal. 2001) (same); *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) (same). In this litigation, the decisionmaking process relating to the Transgender Service Member Ban is a core issue. Plaintiffs allege that the Transgender Service Member Ban was improperly motivated, and the decisionmaking process by which Defendants developed the Transgender Service Member Ban is thus a central issue. Because the evidence Plaintiffs seek is highly relevant to the present lawsuit, the balancing test would weigh in Plaintiffs' favor.

The other elements of the balancing test also weigh in Plaintiffs' favor: the requested evidence is available only from Defendants and there is no alternative source, the government is defending the policy at issue, and it is unlikely that disclosure of this evidence subject to a protective order (where appropriate) would hinder future policy discussions. Even if Defendants had properly asserted deliberative process privilege claims, the balancing test would weigh in favor of requiring production of the requested discovery.

D. Defendants Assert the Privilege for Ineligible Materials.

The deliberative process privilege protects only material that is pre-decisional and deliberative. *See Virginia Beach*, at 1253; *Coastal States*, 617 F.2d at 866. However, many of Defendants' privilege claims are for post-decisional, non-deliberative, or factual materials that are not eligible for protection under the deliberative process privilege.

1. Post-Decisional Materials

Defendants improperly claim deliberative process privilege for post-decisional material. In *Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.), Defendants contended that while President Trump's July 26, 2017 Tweets constituted a decision, "that decision had sort of a ripple effect and required the defendants to make a series of additional decisions based on the tweets and that those decisions themselves can give rise to privileged deliberative material." (Telephone Conf. Tr. at 33:10-15 (Feb 13, 2017)). However, the discussion of how to apply a policy, once promulgated, is not entitled to deliberative process privilege protection. *See Coastal States*, 617 F.2d at 866 (to be "pre-decisional," a document must be "generated before the adoption of an agency policy"); *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (pre-decisional documents are "prepared in order to assist an agency decisionmaker in arriving at [a] decision, rather than to support a decision already made.") (internal quotations omitted); *see also Safeway, Inc. v. I.R.S.*, No. C 05-3182 SBA, 2006 WL 3041079, at *9 (N.D. Cal. Oct. 24, 2006) ("discussion of how to apply established policy and law to [] particular facts" not entitled to deliberative process privilege); *Ford Motor Co. v. U.S. Customs & Border Prot.*, No. 06-13346, 2008 WL 4899402, at *17 (E.D. Mich. Aug. 1, 2008) (magistrate's report and recommendation), adopted in part and rejected in part on other grounds, 2008 WL 4899401 (E.D. Mich. Nov. 12, 2008) ("discussions of how agency policies and decisions are to be enforced are by nature post-decisional").

To the extent that material is being withheld because it relates to "additional decisions," it is Defendants' burden to identify any such decisions and to justify withholding discovery with reference to those decisions. To satisfy Rule 26(b)(5), Defendants must specify what pre-

decisional role a withheld or redacted document played in a particular policy-forming process; they cannot merely allege generally that a document relates to some vague category of policy decisions. *See Animal Legal Def. Fund, Inc. v. Dep't of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (rejecting privilege claim because agency "utterly failed to specify the role played by each withheld document" in policy-formulation process).

For all materials that post-date President Trump's July 26, 2017 decision to enact the Transgender Military Service Ban, Defendants must withdraw any claims of deliberative process privilege for documents and information that relate to the implementation or assessment of the Transgender Military Service Ban.[2] Please confirm that you will withdraw these claims or, in the alternative, provide updated privilege logs and objections that provide sufficient specificity so that Plaintiffs may fully evaluate such claims, including whether each allegedly privileged document or interrogatory response relates to any policy decisionmaking process.

2. Non-Deliberative Materials

Deliberative process privilege "does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Ethyl Corp. v. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994) ("When material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable."). To be protected under deliberative process privilege, a document must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Defendants repeatedly claim deliberative process privilege protection for documents that appear on their face to be, at most, peripheral to a deliberative process. For example:

- Stone v. Trump – Air Force Privilege Log (13 Feb 2018): documents such as row 708 (AF_00009948 – 967; AFRC Transgender Training for Medics.pptx) relate to training regarding the implementation for current policy, which would not reflect any deliberation about a policy decision.

- Stone v. Trump – Army Privilege Log (13 Feb 2018): documents such as row 7 (ARMY_212-217; Presentation used during SCCC discussions, outlining the Army's readiness to begin accessions) relate to capabilities to implement current policy, which would not reflect any deliberation about a policy decision. Documents such as row 17 (ARMY_322-323; Memorandum from ASD-HA to ASA-M&RA requesting data on transgender Soldiers) and row 21 (ARMY_330-331; Memorandum from DASD-HSP&O to Army DSG requesting data on transgender Soldiers) relate to peripheral information-gathering activities, and do not reflect any deliberation about a policy decision.

[2] To the extent this implementation process required additional policy decisions, please identify those decisions.

- Stone v. Trump - Navy Production 1 Privilege Log (13 Feb 2018): documents such as row 62 (Navy_00002897; Definitions for Medical Accessions.) and row 126 (Navy_00004419; Criteria for Sex Reassignment Surgery Waiver) relate to peripheral activities not related to making recommendations or expressing opinions on legal or policy matters, and are not entitled to deliberative process privilege.

- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018): documents such as row 13 (SOPER DEP RFP_10 00188-00209; Updated Training Slides for AFRC Medics) relate to training for implemented policies, and would not reflect any deliberation about a policy decision. Documents such as row 68 (SOPER DEP RFP_24 01543; E-mail re: No SCC Meeting This Week - 27 July 2017) are one-page emails stating that a meeting will not be held; it is highly unlikely that these short emails contain any deliberative content.

Non-deliberative materials are not entitled to deliberative process privilege just because they are alleged to be peripheral to a deliberative process. We request that Defendants immediately confirm they will withdraw any claim of deliberative process privilege for non-deliberative documents and information.

3. Factual Materials

"[P]urely factual material" does not fall within the deliberative process privilege. *See Virginia Beach*, 995 F.2d at 1253; *see also Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) ("it is beyond dispute" that factual documents such as reports or summaries are not covered by deliberative process privilege, and to be covered a document "must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters"). The deliberative process privilege does not cover factual material simply because it is used in a deliberative context. *Id.*

Defendants repeatedly claim deliberative process privilege protection for factual information. For example:

- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018): the entry on row 45 (SOPER DEP RFP_18 00608-00661) describes the withheld document as "Health Data for Members with Gender Dysphoria," and the entry on row 50 (SOPER DEP RFP_21 00765-00820) describes the withheld document as "PPT slides: 'Health Data on Active Duty Service Members with Gender Dysphoria.'" Health data is factual material.

- Stone v. Trump – Army Privilege Log (13 Feb 2018): the entry on row 28 (ARMY_341) describes the withheld document as "Presentation slide showing TG surgical procedures performed at MTFs," and the entry on row 32 (ARMY_352-383) describes the withheld document as "Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender

dysphoria." Surgery statistics and "health and readiness data" are factual materials.

- Stone v. Trump - Navy Production 3 Privilege Log (13 Feb 2018): there are several entries showing the document title "Transgender Information_27 Dec 17" or a variant thereof. Information is factual material. Additionally, 21 documents withheld solely on deliberative process privilege grounds are identified as "Information supporting draft internal agency document which consists of predecisional and deliberative process information." Information used to support a deliberative process is factual material, and not itself privileged.

Factual material cannot be protected under the deliberative process privilege. At a minimum, documents containing factual material should be redacted and the factual portions produced to Plaintiffs. We request that Defendants immediately confirm they will withdraw any claim of deliberative process privilege for factual documents and information, including when factual material is found within deliberative documents.

II. The Presidential Communications Privilege

The presidential communications privilege is a qualified privilege that can be overcome by a showing of sufficient need. *See In re Sealed Case*, 121 F.3d at 749. This privilege should be construed narrowly, and it applies only to "communications authored or solicited and received by those . . . [with] broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Id.* at 752. For advisers with dual responsibilities, the government bears the burden to show that the communication was "in conjunction with the process of advising the President" on official government matters. *Id.*

Defendants have asserted the presidential communications privilege for 3,664 documents in "Stone v. Trump – POTUS Privilege Log served on 2.13.18". The documents are not individually identified, but instead are grouped into 51[3] categories, some of which cover hundreds of documents within a date range. The privilege log fails to identify any specific individual who authored or received such communications.

By refusing to identify the other parties involved in the communications, Defendants have forced Plaintiffs to seek discovery directly from the President. Information about the President's decisionmaking process (including his motivation for acting and the basis for his decision) is critical to multiple issues in this litigation and cannot be obtained from other sources when the identities of such sources are purposefully withheld. Additionally, the presidential communications privilege may not be claimed where communications are unrelated to decisionmaking by the President. And regardless of Defendants' position on the applicability of the presidential communications privilege and whether Plaintiffs' need for the requested

[3] Only a single entry on the privilege log – row 35 – identifies documents that are not claimed to be protected by the presidential communications privilege.

discovery would outweigh the privilege, Defendants must submit a proper privilege log that complies with their obligations under the Federal Rules of Civil Procedure.

A. Presidential Communications Are at the Heart of this Litigation.

The core issues in this litigation are why President Trump decided to promulgate the Transgender Service Member Ban and the basis for such an action. In his July 26, 2017 tweets, President Trump publicly asserted that he decided to promulgate the Transgender Service Member Ban based on communications with others, thereby putting at issue communications he now seeks to withhold. *See* Dkt. No. 40-22 (Sept. 14, 2017) ("After consultation with my Generals and military experts"). Indeed, the President's references to his personal involvement in relevant communications in the tweets strongly evidences Plaintiffs' need for discovery into materials where Defendants have claimed the presidential communications privilege. *See, e.g., Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (denying motion for protective order claiming presidential communications privilege over documents providing advice to President on a particular decision where President publicly admitted to personally making that decision and decision was alleged to be based on impermissible extraneous or political reasons).

Because President Trump's decisions and actions are at the heart of this case and because he has relied on presidential communications to support his decisions, we request that Defendants promptly either withdraw their claims of presidential communications privilege and provide all withheld information and documents or provide adequate justification for their assertions.

B. The Withheld Information is Critical, and there are No Alternative Sources.

The presidential communications privilege may be overcome where "the evidence sought [is] directly relevant to issues that are expected to be central to the trial," and "this evidence is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754. Evidence of unique information possessed only by the President, or top presidential advisors, establishes a strong need for discovery directly from the President. *See Dellums v. Powell*, 561 F.2d 242, 248-49 (D.C. Cir. 1977) ("the substantial violations of constitutional rights" at issue, the evidence "that the Department of Justice played a leading role" in the activity at issue, and "the attendance of a White House aide and briefing of [the] attorney general on these matters" all demonstrated a substantial need for White House recordings "to establish [the attorney general's] responsibility for the violations.").

As explained above, the evidence Plaintiffs seek is critical to both Plaintiffs' claims and Defendants' defenses in this litigation, and is directly relevant to issues that will be central at trial, including whether the Transgender Military Service Ban violates the Fifth Amendment because it was motivated by discriminatory intent and animus. So long as Defendants decline to name the "Generals and military experts" and any other parties who allegedly were involved in developing the Transgender Military Service Ban, the evidence at issue is available only from a single source: the White House. In these circumstances, Defendants must withdraw their claims of presidential communications privilege and provide all withheld information and documents.

C. Defendants Fail to Identify Any Presidential Decisionmaking After July 26, 2017.

As the party asserting the presidential communications privilege, it is Defendants' burden to identify the individuals involved in the communications, that these individuals are responsible for advising the President on the subject at issue, and that the communication was "in conjunction with the process of advising the President" on official government matters, as opposed to "information regarding governmental operations that do not call ultimately for direct decision making by the President." *In re Sealed Case*, 121 F.3d at 752.

Defendants have admitted that President Trump's July 26, 2017 tweets were a decision. *See Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.) (Telephone Conf. Tr. at 33:10-15 (Feb 13, 2017)). They also appear to take the position that the August 25 memorandum was a decision, but that document merely implemented the July 26 decision. Defendants have taken the position in this litigation that there will not be any *further* Presidential decision until February 21, 2018. *See* Order re: Rule 26(a) Compliance, Dkt. No. 107 (Feb. 6, 2018); *see also* Defendants' Amendment Initial Disclosures (Feb. 16, 2018) (indicating that no materials requiring ultimate Presidential decisionmaking will be presented to the President until February 21, 2018). In the absence of a presidential decision, the presidential communications privilege does not apply. Thus, unless Defendants can show that documents related to the Transgender Service Member Ban between July 26, 2017 and February 21, 2018 are related to advising the President on an issue that calls for direct presidential decisionmaking, such documents are presumptively not eligible for protection under the presidential communications privilege, and Defendants must demonstrate that some other privilege provides grounds to withhold such documents.

D. Defendants Claim Privilege for Non-Privileged Material.

Rows 49-52 of the POTUS privilege log claim presidential communications privilege for communications with "outside third parties." Such communications are not protected by the presidential communications privilege, because such communications have not been maintained as confidential. *See In re Sealed Case*, 121 F.3d at 744 (privilege applies only to documents "that the President believes should remain confidential"); *see also id.* at 741-42 (determining that the President's sharing of a communication with counsel for a cabinet secretary waived any privilege claim). All claims of presidential communications privilege related to such documents should be withdrawn.

E. Defendants Must Serve a Proper Privilege Log.

The POTUS privilege log fails to meet the standards set forth in the Federal Rules of Civil Procedure. The log identifies only broad categories of documents and communications, does not describe the individual nature of withheld documents and communications, and fails to provide information sufficient to enable Plaintiffs to assess Defendants' privilege claims.

Unless Defendants are prepared to abandon their claims of presidential communications privilege, we request that they promptly produce a privilege log that meets the requirements of the Federal Rules of Civil Procedure, setting forth individual entries for each document withheld with enough detailed information to enable Plaintiffs to assess Defendants' claims.

III. Other Privilege Issues

While the focus of this letter is the flaws in Defendants' claims of deliberative process privilege and presidential communications privilege, we note that Defendants' privilege logs are deficient in other respects as well. Plaintiffs reserve the right to identify further issues in future correspondence. However, we make the following points to identify some of the numerous errors we have seen.

A. Failure to Identify Attorneys in Some Logs

The privilege logs provided by the President, the U.S. Air Force, the U.S. Navy, and the Department of Defense fail to indicate who, if anyone, is the attorney that received or sent a particular document for which Defendants claim the attorney-client communications privilege.[4] Please promptly serve new logs that provide this information, so that Plaintiffs can assess Defendants' privilege claims.

B. Failure to Correctly Assert Attorney-Client Privilege

"A party asserting privilege has the burden of demonstrating its applicability." *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011) (citing *United States. v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam). To claim attorney-client privilege, a party must, among other things, show that the document or communication was provided for the purpose of obtaining or providing legal advice, and that the advice was maintained in confidence. *Id*. at 501-02; *see also id*. at 502 ("[T]he attorney-client privilege does not apply simply because documents were sent to an attorney.") (citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987). Defendants' logs fail to provide this required level of detail. For example, the "Stone v. Trump – Navy Production 3 Privilege Log (13 Feb 2018)" state the basis for withholding 61 documents solely on the grounds of "Attorney-Client Privilege" as "Communication between client and attorney" or some variant thereof. This description fails to state whether such documents were obtaining or providing legal advice on any issue, and fail to show that the document was maintained in confidence.

C. Failure to Identify Individuals on Many Logs

Many of Defendants' privilege logs fail to identify the individuals who authored, sent, or received the withheld documents. For example, the Department of Defense and the POTUS privilege logs do not include specific author, sender, or recipient information; and the privilege log for the Chairman of the Joint Chiefs of Staff frequently identifies groups as authors, senders,

[4] Defendants presumably are aware of the requirement to identify attorneys. The privilege logs for the U.S. Army and the Chairman of the Joint Chiefs of Staff identified the names of attorneys with asterisks.

and recipients, often using an acronym, without specifying which individuals were involved.[5] Please promptly serve new logs that provide this information, so that Plaintiffs can assess Defendants' privilege claims.

D. Asserting Privilege over Non-Confidential Communications

An examination of Defendants' privilege logs shows that several withheld documents have not been maintained as confidential documents, and thus are not entitled to privilege. For example, rows 18, 25, 26, and 38 of the DHA's privilege log claim privilege for documents that were shared with external addresses (dodmerb1@gmail.com and thebohreffect@gmail.com).

E. Deficient Descriptions

Defendants' failure to meet the standards established by the Federal Rules are not limited to the deliberative process and presidential communications privileges. Their entries for other privileges are similarly deficient. For example, the privilege log for the U.S. Air Force states the basis for withholding 31 documents as attorney-client communications as "Attorney Client privileged confidential communications," and the privilege log for the Chairman of the Joint Chiefs of Staff states the basis for withholding 18 documents as attorney-client communications – alongside other privileges – as "Predecisional and deliverative [sic] document created for the purose [sic] of analyzing proposed regulatory changes." These descriptions fail to provide sufficient information for Plaintiffs to test Defendants' claims.

* * * * *

With respect to Defendants' privilege logs, it would be unduly burdensome for Plaintiffs to identify every flaw in the thousands of entries, particularly in light of the number of systematic errors that pervade the logs. If Defendants continue to claim privilege in the face of the arguments presented in this letter, we request that they promptly serve corrected privilege logs.

[5] *See* Stone v. Trump – CJCS Privilege and Redaction Log (13 Feb 2018) rows 25-85 (recipient is "Panel of Experts"), 92 (author is "DOJ"), 95-97 (one recipient is "Transgender Senior Implementation Working Group"), 161 (author is "U.S. Department of Defense"), and 168 (same).

We are available to further discuss the above issues. Please either confirm that Defendants will take the steps we have requested or explain your reasons for failing to do so by Friday, February 23, 2018. If we cannot resolve these matters promptly, we may be forced to seek the assistance of the Court. We look forward to hearing from you soon.

Sincerely,

/s/ Augustus Golden

Augustus Golden

EXHIBIT B

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, et al., Plaintiffs, vs. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants.	Case Number 17-cv-1597 Washington, D.C. Friday, February 16, 2018 2:42 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	PAUL WOLFSON, ESQ. KEVIN LAMB, ESQ. Wilmer, Cutler, Pickering, Hale & Dorr, LLP 1875 Pennsylvania Avenue Northwest Washington, D.C. 20006 202-663-6000
	DANIEL McFADDEN, ESQ. Foley Hoag, LLP 155 Seaport Boulevard Boston, Massachusetts 02210
For the Defendants:	RYAN PARKER, ESQ. ANDREW CARMICHAEL, ESQ. U.S. Department of Justice P.O. Box 883 Washington, D.C. 20044 202-514-4336
Official Court Reporter:	SARA A. WICK, RPR, CRR U.S. Courthouse, Room 4704-B 333 Constitution Avenue Northwest Washington, D.C. 20001 202-354-3284

Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURT: Good afternoon. This is Judge Kotelly. Let me call the case. This is the case of Jane Doe, et al., versus Donald Trump, 17-cv-1597. I am sorry about being late for the phone call, but I was still in court with a criminal case.

So if we could have plaintiffs' counsel identify themselves.

MR. WOLFSON: Good afternoon, your Honor. This is Paul Wolfson with the plaintiffs. With me on the line are Daniel McFadden and Kevin Lamb. There's a little bit of static on the line. I apologize for that. I hope it will be okay.

THE COURT: It's fine on my end, but it may be a problem on yours. Let me know if it is a problem. We can have you call in again.

MR. WOLFSON: Okay.

THE COURT: And who is on for the defense?

MR. PARKER: Your Honor, this is Ryan Parker for the defense, and with me is my colleague, Drew Carmichael.

THE COURT: Okay. So we are resuming our discussion that we had on Tuesday, and we left two issues to be discussed initially here.

And you were, Mr. Parker, going back to your clients to see whether there was a proposal that could be made for the Court to review in camera the documents or some way in terms of deciding

on the presidential communications privilege that would not leave the posture of the case in it being, in essence, an absolute privilege, but to set something up so that the Court could make an independent decision.

They also were to -- the parties were to meet and confer to resolve or narrow about the deliberative process privilege. If you weren't able to resolve it, then I requested plaintiffs identify documents that they would request that I review in camera to make some decisions.

So let me start with you, Mr. Parker. Where are we?

MR. PARKER: Thank you, your Honor.

Let me start with the deliberative process privilege. Plaintiffs provided us with a list of the documents that they allege contain information that has been inappropriately withheld under the deliberative process privilege. There were approximately 300 documents.

We have provided the lists to the different services, offices, and components that have produced documents. We've asked them to look at the documents and specifically the withholdings, and we intend to get back to the plaintiffs next week with our decision regarding the documents and the withholdings at issue.

We have also, before this call, had a call with plaintiffs' counsel to discuss how we wanted to proceed with the deliberative process privilege, and I think our plan is to call

them next week and let them know the results of our review of the documents that they've identified.

We would then like to discuss with them whether providing additional information about the documents themselves might be a pathway to resolving some of the documents that remain at issue so that we can try to narrow the issue as much as possible before bringing it back to the Court, if necessary.

And I would propose that that's the way that we proceed, but I'm happy to let plaintiffs' counsel interject and confirm that that is consistent with our discussion.

THE COURT: Okay. So why don't we deal with this issue first.

Mr. Wolfson, I assume you're the spokesperson.

MR. WOLFSON: Yes. Thank you, your Honor.

That's right. We did speak about that, and we are willing to -- we are, you know, appreciative that Mr. Parker and his clients are taking another look at these documents, and we're happy to talk to them next week after they've done a further review.

We are hopeful that they will be able to provide us with, I will say, more robust information about the documents beyond what we've received so that we will be in a better position to test whether -- to evaluate whether we think we should test whether they really are predecisional. And we're willing to sort of do, you know, a couple of more steps on those lines but

reserving the right to go back to the Court, obviously, and ask the Court to review in camera if we can't reach a resolution.

THE COURT: All right. So it sounds like you are both on the same page, and that seems to me to be a perfectly sensible way of trying to resolve it or, if nothing else, trying to narrow it so what, if anything, is brought back to me will be a much more limited issue.

Where are we on the presidential communication privilege?

MR. PARKER: Thank you, your Honor. This is Mr. Parker.

We have conferred with our clients about the prospect of providing information regarding who the president and his advisors met with regarding transgender -- military service by transgender individuals and when those meetings occurred. And we are not willing to submit that information to the Court for in camera review.

Because this is an issue of great importance, we would respectfully request that the Court allow us to fully and adequately brief it before the Court issues a decision, and if your Honor would like, I would be happy to lay out sort of the reasoning behind our decision, or we could put that in briefing, if that would be better for the Court.

THE COURT: Okay. I think you should just put it in briefing. We had a discussion -- you know my position. It sounds as if it's tantamount to being an absolute privilege, and

it's not, and therefore, if you don't want to do this -- I mean, I felt that this was one prospect. I left it to you as to whether there is something else that could be provided to the Court that would give me some idea of how it's actually being applied in terms of the documents at issue. It sounds as if you've decided that there's nothing that can be given to the Court in camera.

Is that correct?

MR. PARKER: Your Honor, that is correct.

THE COURT: Okay.

MR. PARKER: And we would like an opportunity -- excuse me. I'm sorry.

THE COURT: That's okay. That's why I think it's useless to have further discussion. You need to file it. I think you need to figure out how to get around the fact that what you're saying is that it's an absolute privilege, and it's not.

So if you want to have briefing and the Court to decide in that posture, give careful thought. I, of course, will as well. But this is something that, however it comes out, will go to the Court of Appeals and the Supreme Court, and you will have case law, good or bad.

So let me set out a briefing schedule for you. When can you -- it seems to me, since you're asserting it, that you should go first.

MR. PARKER: Okay, your Honor. That works for us. We would ask for 10 business days. Could we have until March 5th to brief this issue for the Court?

THE COURT: Okay. Mr. Wolfson, it seems to me that this is an important enough issue that we should get a full briefing. Do you have a problem?

MR. WOLFSON: I think that's a little slow, your Honor. Let me just look at the calendar a minute.

THE COURT: Sure. You said, what, March 5th?

MR. PARKER: Yes, your Honor. I asked just for 10 business days, until March 5th.

MR. WOLFSON: Your Honor, I think we would prefer to compress that a little bit, just because we have depositions that are coming up, and, you know, we're going to need this information to be able to take at least some of those depositions. Maybe 10 calendar days instead of 10 business days, you know, something like have the defendants file their brief on the 26th or 27th of February. That's more like 11 or 12. But otherwise, I think this won't get -- we won't be fully briefed until the end of March.

THE COURT: Well, if you propose to do it February 26th, when would you respond? Obviously, you need to respond quickly, too.

MR. WOLFSON: All right. So I would say also 10 calendar days. So March 9th. I think that's 11 and 11. Sorry.

Go ahead, Ryan.

MR. PARKER: I was just going to say, because we are working with a federal holiday on Monday, could we have until the 27th, which would be Tuesday, the 27th of February?

THE COURT: Yes; that's fine.

MR. WOLFSON: Your Honor, if we could have, let's say, March 12th.

THE COURT: All right. And when do you want to file your reply?

MR. PARKER: Can we say March 23rd, your Honor?

MR. WOLFSON: Your Honor, that seems like --

THE COURT: That's too long; that's too long. This is an issue that you are pushing in terms of coming up with it, and you're going to have to figure out how this is not an absolute privilege and how, by not letting me look at anything, somehow this is not an absolute privilege.

So I assume you've thought it through and, therefore, had a consultation and that you figured out a strategy of how you're going to do that. It seems to me it's a fairly narrow issue. The documents are broader, but the issue of the Court not being able to look at anything -- I mean, I'm open to any proposal, whether it's the president or, I had mentioned, some of the other people that would -- are asserting it that are not the president, such as Mattis or some of the other people. I was open to considering that. But if it's a blanket no to all of

it, it seems to me you need to move a little faster.

I think by March 19th, we get the reply, so that we can -- this is not going to -- so that the Court has enough time to get an opinion out without dragging everything else. Obviously, even with the schedule, it's going to affect how you proceed with the rest of the discovery.

MR. PARKER: Thank you, your Honor.

THE COURT: All right. Hang on one second. Let me just look at my notes for a minute and see if there's anything else I want to bring up. Hold on.

(Pause.)

THE COURT: All right. I've looked over my notes, and there's nothing else. So I will simply await on the deliberative process privilege for you to -- and the process you've laid out, which sounds reasonable. And plaintiffs, you can get back to me if there's anything else for the Court to do.

MR. WOLFSON: Thank you very much.

THE COURT: I won't set a date. I will leave it to you to come back to me when you need to.

And we will proceed -- this is going to be a motion that is styled what, Mr. Parker?

MR. PARKER: Your Honor, I think we will style it as a motion for a protective order, if that seems appropriate to the Court.

THE COURT: I will leave it to you how you want to do

it.

Keep in mind that what I asked for was any proposal, I would consider, that would allow me to see how it's being tested and also that it can not necessarily be the president, it can be some of the other people who are less than the president but who are also asserting it, since it's being asserted across the board.

I will say only one other thing. I sincerely hope this is not just a dilatory tactic, because you're going to wind up with a decision on this. I know you don't make the decision; somebody else does.

So if there's nothing else -- Mr. Wolfson?

MR. WOLFSON: Your Honor, one final thing. This is Paul Wolfson.

We had e-mailed the Court a request that the Court file in docket the e-mail correspondence.

THE COURT: I'm sorry. I didn't mean to interrupt.

Yes, we are doing that. They require scanning. So it takes a little bit of time to do that. But they have it, and they should, hopefully, be getting it up today, including the exhibits that were attached to it.

MR. WOLFSON: Thank you very much.

THE COURT: But scanning does take more time.

MR. PARKER: Your Honor, could I just note for the Court very briefly that the documents that plaintiff provided to

the Court in its most recent e-mail were the documents that the parties would like to have put on the docket. There were some documents that were initially sent to the Court that contained office telephone numbers --

THE COURT: No, no, no, we're not doing that. This is strictly going to be the letters that set out your -- it's not going to be with any phone numbers or anything else.

MR. PARKER: Okay. Thank you, your Honor.

THE COURT: All right. If there's nothing else, the parties are excused.

(Proceedings adjourned at 2:56 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick February 20, 2018

SIGNATURE OF COURT REPORTER DATE