

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' REPLY IN SUPPORT  
OF THEIR MOTION FOR A  
PROTECTIVE ORDER**

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## INTRODUCTION

1  
2 Plaintiffs' contention that the President should be ordered to respond to "routine" civil  
3 discovery like any defendant, as a matter of course, without any heightened showing of need,  
4 cannot be squared with the Supreme Court's pronouncement that the "President occupies a  
5 unique position in the constitutional scheme." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).  
6 The discovery Plaintiffs seek from the President is extraordinary, unprecedented, and  
7 unsupported by law. Plaintiffs acknowledge that they seek this discovery to probe the President's  
8 deliberative process about military policy. As discussed in Defendants' moving brief and below,  
9 the Court should preclude this discovery demanded of the President and of presidential  
10 communications and deliberations and grant Defendants' motion for a protective order.

## ARGUMENT

### **I. Separation-of-Powers Principles Preclude Plaintiffs' Discovery Requests.**

11  
12 Because the "President occupies a unique position in the constitutional scheme," *Fitzgerald*,  
13 457 U.S. at 749, courts must address separation-of-powers objections before the President is  
14 required to either assert privilege or respond to civil discovery, *Cheney v. U.S. Dist. Court for*  
15 *the Dist. of Columbia*, 542 U.S. 367, 391 (2004). *See* Defs.' Br. at 4–9. Contrary to Plaintiffs'  
16 suggestion, adherence to the separation-of-powers principles at stake here would not "completely  
17 immunize" the President from discovery. Pls.' Opp. 1, 5. Rather, Defendants seek what *Cheney*  
18 calls for: that this Court strictly control and circumscribe the scope and the timing of discovery  
19 of presidential deliberations before an assertion of privilege is required. 542 U.S. at 385, 390.

20 Plaintiffs fail to counter these basic principles and instead rely on cases that are  
21 distinguishable. *United States v. Nixon*, 418 U.S. 683, 711–12 (1974), involved a subpoena in a  
22 criminal case. *See Cheney*, 542 U.S. at 384. *Clinton v. Jones*, 520 U.S. 681, 684 (1997), involved  
23 pre-presidential, non-official conduct, and only the question of whether a deposition should be  
24 stayed. Plaintiffs also rely on three cases—all pre-dating *Cheney*—that involved the invocation  
25 of the privilege by a former president. *See Fitzgerald*, 457 U.S. at 733; *Dellums v. Powell*, 561  
26 F.2d 242, 243 (D.C. Cir. 1977); *Sun Oil Co. v. United States*, 206 Ct. Cl. 742, 744 (1975); *see*  
27 *also Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 181 (D.D.C.  
28

1 2005) (former president could assert the privilege over his own records, but such an assertion  
2 carried less weight than an assertion by an incumbent over the incumbent's presidential records).  
3 Finally, *Dairyland Power Cooperative v. United States*, 79 Fed. Cl. 659, 667–68 (2007), did not  
4 involve discovery directed at the President's own communications or deliberations, let alone  
5 discovery directed to the current President.

6 The Court also should reject Plaintiffs' argument that the separation-of-powers concerns  
7 raised by *Mississippi v. Johnson*, 71 U.S. 475 (1866), and *Franklin v. Massachusetts*, 505 U.S.  
8 788, 823 (1992), do not apply because those cases addressed injunctions. An order directing the  
9 President to respond to discovery related to his official actions raises the same kind of separation-  
10 of-powers concerns. Plaintiffs' argument that ordering the President to respond to such discovery  
11 would not constitute "judicial interference" with the exercise of executive discretion, Pls.' Opp.  
12 6, defies logic. *See* Defs.' Br. 4–5; *see also Cheney*, 542 U.S. at 390 (noting that civil discovery  
13 orders against the Vice President could "constitute[] an unwarranted impairment of another  
14 branch in the performance of its constitutional duties").

## 15 **II. Civil Discovery Directed At The President's Communications and Deliberations** 16 **Must Be Strictly Circumscribed To Comply With The Separation Of Powers.**

17 Plaintiffs' argument that Defendants should have formally invoked privilege already, Pls.'  
18 Opp. 7, disregards separation-of-powers concerns that must be addressed before the President is  
19 required to invoke privilege by affidavit. *See Cheney*, 542 U.S. at 380, 390, 391; *Dairyland*, 79  
20 Fed. Cl. at 669. To avoid setting "coequal branches of the Government . . . on a collision course,"  
21 the Court should, at a minimum, require Plaintiffs to exhaust discovery from other sources before  
22 seeking discovery from the President. *Cheney*, 542 U.S. at 389–90; Defs.' Br. 5–9.

23 Plaintiffs cannot satisfy this duty by seeking the *same* presidential information in the  
24 possession of others. *Contra* Pls.' Opp. 9, 11–12. That is not the kind of alternative source of  
25 discovery that *Cheney* contemplates. The core purpose of *Cheney's* holding is to avoid discovery  
26 that unnecessarily intrudes upon the President and to thereby defer (and ideally eliminate) the  
27 need for a privilege assertion over presidential information. Although these concerns are most  
28 acute where the President must personally respond to discovery, *Cheney* makes clear that

1 separation-of-powers concerns are not so limited, but rather “afford Presidential confidentiality  
2 the greatest protection consistent with the fair administration of justice.” 542 U.S. at 382; *see*  
3 *also id.* at 385. The protections offered by *Cheney* would quickly become a nullity if litigants  
4 could easily evade them by seeking presidential communications from the individuals with whom  
5 the President communicates. Instead, Plaintiffs should first be required to seek discovery that  
6 does not concern presidential communications and from sources other than the President.<sup>1</sup>

### 7 **III. The Issue of Whether the Presidential Communications Privilege Can Be** 8 **Overcome Is Not Before the Court.**

9 Before requiring the President to formally invoke the privilege by affidavit, the Court must  
10 first require Plaintiffs to meet their initial burden of establishing a heightened, particularized need  
11 for the specific information sought. *See Dairyland*, 79 Fed. Cl. at 662. Plaintiffs’ arguments that  
12 no initial showing of need is required and that they already have satisfied their ultimate burden  
13 to overcome the privilege, Pls.’ Opp. 7–12, demonstrate a fundamental misunderstanding about  
14 the sequence of events that must occur before the President is required to formally invoke the  
15 privilege by affidavit. *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).

#### 16 **A. Plaintiffs Have Not Met Their Initial, Heavy Burden.**

17 Plaintiffs’ argument that they do not need to make any heightened showing of need, Pls.’  
18 Opp. 7–10, is contradicted by *Cheney*, which rejected the notion that the President shall bear the  
19 initial burden of invoking executive privilege with specificity or making objections to discovery  
20 on a line-by-line basis to safeguard executive functions and maintain the separation of powers.  
21 542 U.S. at 383, 388. Plaintiffs argue that the initial burden of heightened need only applies in  
22 the context of quashing criminal subpoenas, Pls.’ Opp. 7, but that is clearly wrong. *Cheney*  
23 applied the “exacting standards of ‘(1) relevancy; (2) admissibility; [and] (3) specificity’” from  
24 *Nixon*, 418 U.S. at 700, to the civil discovery context, 542 U.S. at 386; *see also Am. Historical*  
25 *Ass’n*, 402 F. Supp. 2d at 182, and specifically observed that “[t]he need for information for use

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26  
27 <sup>1</sup> Further, Plaintiffs’ argument that Defendants must provide a privilege log for the President, Pls.’ Opp. 9–10, is  
28 misplaced, as Defendants already have provided them such a log and informed Plaintiffs that Defendants plan to  
supplement that log. *See* Decl. of Andrew E. Carmichael (June 13, 2018). Plaintiffs’ real dispute is that this privilege  
log is allegedly deficient, but that issue is not before the Court in this motion.

1 in civil cases, while far from negligible, does not share the urgency or significance of the criminal  
2 subpoena requests in *Nixon*,” 542 U.S. at 384; *see also Dairyland*, 79 Fed. Cl. at 662.

3 Plaintiffs also argue that *Cheney* is limited to the circumstances in that case, where the Court  
4 concluded that the discovery requests were overbroad. But the requests here are at least as  
5 overbroad as the ones at issue in *Cheney*, if not more so. For example, the plaintiffs in *Cheney*  
6 sought all documents related to personnel involved with a presidential task force, sub-groups of  
7 the task force, and communications concerning the activities of the task force. 542 U.S. at 387.  
8 The requests here ask the President to personally identify his communications related to the  
9 development of military policy with, *inter alia*, high-level officials and members of Congress,  
10 and to identify and produce “[a]ll documents and communications” in his possession related to  
11 the military’s policies regarding servicemembers who are transgender, and more. Defs.’ Br. 2–3.  
12 The notion that discovery *from the President about presidential deliberations* would be less  
13 intrusive of the President’s interests than the discovery requested in *Cheney* again defies common  
14 sense. In any event, *Cheney*’s application of the initial burden of heightened need was not tied to  
15 the scope of the requests. Rather, the Court’s discussion of the breadth of the requests was an  
16 application of the requirement of “specificity.” 542 U.S. at 387–88.

17 Next, Plaintiffs argue that this case has “much more in common” with *Nixon* because  
18 constitutional claims are at issue, and as in *Nixon*, the “basic function of the courts” in  
19 adjudicating this case are implicated. Pls.’ Opp. 8. But the *criminal* nature of the proceeding in  
20 *Nixon* was critical to the decision directing the production of presidential materials, and *Cheney*  
21 explains at length why greater protection is afforded the President in a *civil* case. Numerous civil  
22 cases involve constitutional claims, and Plaintiffs’ argument would render *Cheney* a nullity.

23 **B. The Burden Has Not Shifted to the President to Formally Invoke Privilege.**

24 Plaintiffs’ contention that they have met their *initial* burden of heightened need, which is  
25 required to shift the burden to the White House to formally invoke the privilege, *see* Defs.’ Br.  
26 9–12, is meritless. Plaintiffs have not met *Cheney*’s threshold requirements of “relevancy,”  
27 “admissibility,” and “specificity,” 542 U.S. at 386. Plaintiffs’ arguments about the relevance of  
28 discovery related to the President’s 2017 Memorandum rest on the Court’s conclusion that the

1 Department of Defense’s new policy merely implements the 2017 Presidential Memorandum.  
2 Order 12, Dkt. 233. Respectfully, this is incorrect; the new policy is substantially different from  
3 the 2017 Memorandum, which ordered the military to “return” to its “longstanding policy” of  
4 generally disqualifying individuals from military service on the basis of their “transgender”  
5 status. In contrast, the new policy differs from that framework because (1) it turns on a medical  
6 condition (gender dysphoria) and a related medical treatment (transition), and (2) it categorically  
7 permits some individuals with a history of gender dysphoria to serve in their preferred gender.  
8 As a result, Secretary Mattis had to recommend that the President “revoke” his 2017  
9 Memorandum in order to “allow[]” the military to implement its preferred framework. Mattis  
10 Mem. 3, Dkt. 216-1. Discovery related to the 2017 Memorandum and related statements is  
11 therefore irrelevant. Plaintiffs also offer only a conclusory statement about admissibility and  
12 attempt to incorrectly shift the burden to Defendants to show inadmissibility. Pls. Opp. 11.  
13 Beyond this, Plaintiffs’ discovery requests have not “‘precisely identified’ and ‘specific[ally] . . .  
14 enumerated’ the relevant materials,” and instead seek broad brush discovery of all presidential  
15 deliberations. *Cheney*, 542 U.S. at 387; *see* Defs.’ Br. 2–3.

16 Moreover, “[a] party’s need for information is only one facet of the problem.” *Cheney*, 542  
17 U.S. at 385. The burden imposed on the President by discovery is an “important factor” to be  
18 considered by the courts owing to the special deference and “[t]he high respect that is owed to  
19 the office of the Chief Executive.” *Id.* (citation omitted). Responding to broad discovery, and  
20 preparing and executing an affidavit formally invoking the privilege, is a burdensome, time-  
21 consuming process that plainly would detract from the President’s constitutional responsibilities.

22 **C. In Any Event, Plaintiffs Could Not Meet Their Ultimate Burden of Showing a**  
23 **“Focused Demonstration of Need” to Overcome the Privilege.**

24 Because Plaintiffs have not met their initial burden of need to shift the burden to the President  
25 to formally invoke the privilege, it is entirely premature for the Court to consider whether  
26 Plaintiffs have met their *ultimate* burden to overcome the privilege. But even if and when a formal  
27 claim of privilege were required, the bar to overcome the privilege is high. *See In re Sealed Case*,

1 121 F.3d at 746. A party seeking privileged presidential material must show a “focused  
2 demonstration of need.” *Id.*

3 Plaintiffs’ burden would be especially high in this civil case, as “the right to production of  
4 relevant evidence in civil proceedings does not have the same constitutional dimensions” as it  
5 does in criminal proceedings. *Cheney*, 542 U.S. at 384 (citation omitted). Plaintiffs’ broad  
6 assertion that the discovery they seek is “at the very core of their constitutional claims,” Pls.’  
7 Opp. 10, would be insufficient to meet their burden to demonstrate “that *each discrete group*” of  
8 material they seek contains important evidence directly relevant to the central issues of the case.  
9 *In re Sealed Case*, 121 F.3d at 754 (emphasis added). In addition, Plaintiffs could not meet their  
10 burden to demonstrate the unavailability of sufficient evidence, as they have not explained what  
11 other evidence they have sought, obtained, or considered, nor why this evidence is not sufficient  
12 and why evidence covered by the privilege is still needed. *See In re Sealed Case*, 121 F.3d at  
13 755; *U.S. Dep’t of the Treasury v. Black*, 719 F. App’x 1 (D.C. Cir. 2017).<sup>2</sup>

14 In sum, the Court should conclude outright that discovery of the President is precluded on  
15 separation-of-powers grounds. In the alternative, the Court should require Plaintiffs to exhaust  
16 non-privileged discovery from alternative sources, should require Plaintiffs to meet their initial  
17 heavy burden of heightened need for the discovery of presidential information, and, at a  
18 minimum, should substantially narrow the broad requests at issue. Only then might Defendants  
19 be required to come forward with a formal invocation of the presidential communications  
20 privilege to protect information concerning presidential deliberations and communications.

### 21 CONCLUSION

22 For the foregoing reasons, the Court should enter a protective order to preclude Plaintiffs  
23 from seeking discovery from the President of the United States and discovery from other sources  
24 that seeks information concerning presidential communications and deliberations.

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26  
27 <sup>2</sup> Plaintiffs have received over 150,000 pages of document production, a 3,000-page administrative record, responses  
28 to interrogatories, and the opportunity to participate in depositions of multiple government witnesses. Plaintiffs have failed to make any showing of being unable to obtain substitute evidence from these other sources.

1 Dated: June 13, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2018, I electronically filed the foregoing document, causing a notice of filing to be served upon all counsel of record.

Dated: June 13, 2018

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