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BEFORE THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, et al.,	.	
	.	Case Number 17-cv-1597
Plaintiffs,	.	
	.	
vs.	.	Washington, D.C.
	.	Tuesday, February 13, 2018
DONALD J. TRUMP, in his official	.	2:33 p.m.
capacity as President of the	.	
United States, et al.,	.	
	.	
Defendants.	.	

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

APPEARANCES:

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

1 P R O C E E D I N G S

2 THE COURT: This is Judge Kotelly. Good afternoon.

3 MR. WOLFSON: Good afternoon, your Honor. This is  
4 Paul Wolfson, counsel for the plaintiffs, and with me on the  
5 line are Kevin Lamb and Daniel McFadden.

6 THE COURT: Let me call the case, and then defense  
7 counsel can identify themselves. This is Jane Doe, et al.,  
8 versus Donald Trump, et al., 17-cv-1597.

9 So for the plaintiff, we have Paul Wolfson, Kevin Lamb,  
10 Daniel McFadden. And for the defendants, who do we have on the  
11 phone?

12 MR. PARKER: Good afternoon, your Honor. This is Ryan  
13 Parker, and with me I have Andrew Carmichael.

14 THE COURT: Thank you. We've set this up for a  
15 discovery dispute around the issue of the transgender in the  
16 military.

17 Let me indicate that what I am going to do is sort of set  
18 things out as I understand them. I will then call on you. If I  
19 say "plaintiffs' counsel" or "defendants' counsel," please give  
20 me your last name -- we do have a court reporter; so there will  
21 be a record -- so we ascribe the comments to the correct people.

22 What I would ask is that you not talk at the same time.  
23 There may be instances where I've decided that I want to move to  
24 another issue, and I may interrupt you. Please listen to me if  
25 I do that so we can move on. I will let you add additional

1 comments at the end.

2 So this is related to the discovery that plaintiff has  
3 propounded, and I would say it falls into a couple of  
4 categories. One is the -- contours the scope of the  
5 presidential communications privilege, and there are some  
6 subsections to that, and then the other is the deliberative  
7 predecisional privilege.

8 So let me start with the presidential communications  
9 privilege. And before I ask that, I would like to just ask one  
10 comment. In terms of -- let me start with just documents, which  
11 I believe the documents appear to be requests from the Executive  
12 Office of the President. Were any documents actually provided?  
13 And it can be either plaintiff counsel or defendant.

14 MR. PARKER: Your Honor, this is Mr. Parker for  
15 defendants.

16 Discovery requests were served on the White House. The  
17 White House provided objections to the discovery requests and  
18 provided the plaintiffs with a privilege log but did not  
19 actually provide any documents.

20 THE COURT: Okay.

21 MR. WOLFSON: Your Honor, this is Paul Wolfson for the  
22 plaintiffs.

23 If I may just add --

24 THE COURT: Sure.

25 MR. WOLFSON: -- that that's correct. However, in

1 addition, there were document requests and interrogatories sent  
2 to other defendants, including Secretary Mattis at the services.  
3 And that is just some of those. There was also a claim of  
4 presidential communications privilege. And in addition, our  
5 requests as to which there were objections cover  
6 interrogatories, as well as document requests.

7 THE COURT: All right. So let me move back to -- I  
8 think in terms of the White House itself, it sounded as if it  
9 was mostly interrogatories that you were requesting.

10 Is that correct, Mr. Wolfson?

11 MR. WOLFSON: No. I mean, there certainly are  
12 interrogatories, but we also did request documents -- we also  
13 did do request documents, and I believe those document requests  
14 are an exhibit that we supplied.

15 THE COURT: What I was trying to figure out is whether  
16 it's the same as the request to the Executive Office of the  
17 President, or the White House decided to have the Executive  
18 Office of the President answer it, respond to it?

19 MR. WOLFSON: I think maybe the defendants might be  
20 better able to answer that.

21 THE COURT: All right. Mr. Parker, what I'm trying --  
22 I've had an opportunity to look at it, but it's a fairly complex  
23 matter. So I'm just trying to get a sense of whether we're  
24 discussing interrogatories, which in some form -- document  
25 requests, sometimes you do Vaughn-type, or you can do privilege

1 logs. Interrogatories are usually based on just simply  
2 objections.

3 So I was trying to figure out, for the White House, whether  
4 you shifted your document requests to the Executive Office of  
5 the President to respond to these and the White House came back  
6 with the objections to the interrogatories.

7 MR. PARKER: Your Honor, this is Mr. Parker.

8 To answer your question, the plaintiffs served discovery,  
9 both interrogatories, document requests, and also requests for  
10 admission, on the defendant, President Trump.

11 THE COURT: Right.

12 MR. PARKER: And President Trump served objections to  
13 all three of those requests for discovery and also, in response  
14 to the request for the production of documents, provided a  
15 privilege log consistent with this Court's order that the  
16 parties provide a privilege log two days after responding to  
17 requests for the production of documents.

18 And so the president responded with objections to each of  
19 the three sets of discovery the plaintiffs served and also  
20 served a privilege log two days afterwards, two business days  
21 afterwards.

22 THE COURT: Okay. And that privilege log is the  
23 privilege log that was in Exhibit E, or is it something else?

24 MR. PARKER: Your Honor, I believe that Exhibit E is a  
25 copy of the privilege log that was served by the president, yes.

1           THE COURT: Okay. All right. I was just trying to  
2 figure out in terms of discussing what you actually provided up  
3 front. And some of this may be not all at issue and, I'm  
4 thinking, can be narrowed down some.

5           The first question seems to be, is there a presidential  
6 communications privilege that is absolute, that precludes  
7 providing any information such as the existence of any  
8 communications, parties to the communications, date/time,  
9 subject matter, if it's in answer to an interrogatory, or  
10 documents, identifying the document.

11           Looking at the cases which you have cited, the D.C.  
12 Circuit, U.S. Supreme Court, it's not an absolute privilege, and  
13 there's no rule in these cases that you don't have to give any  
14 information. And it looks like in these cases that, I'll call  
15 it, bare-bones information without any content can be provided  
16 and actually was provided.

17           So it doesn't seem to me there's an absolute privilege. On  
18 the other hand, there's a presumptively privileged, if you  
19 assert it, but it can be tested.

20           So it seems to me that I don't think you can just simply  
21 say this is covered by the presidential communications privilege  
22 and that's the end of it, the discussion. So I think we need to  
23 move the discussion to how does one determine whether or not the  
24 privilege has been appropriately asserted.

25           And, I guess, one of the ways, as far as I can tell, you,

1 the defendant, have simply taken the position of, you know, it's  
2 an absolute privilege, as far as I can tell in terms of the way  
3 you've responded to it.

4 Plaintiff, on the other hand, has requested somewhat of a  
5 Vaughn-type privilege log that would indicate the assertions of  
6 presidential communications privilege.

7 Now, I did look at one of the exhibits in terms of the  
8 documents, and there's really only one set that I could see in  
9 the back where -- hold on. Let me just get this out. So E was  
10 the privilege log as to the documents, and the last page really  
11 gets into what's being asserted as the presidential  
12 communications privilege. The rest of it seems to be other  
13 kinds of work product, deliberative process, et cetera.

14 But let's focus on interrogatories at this point. As far  
15 as I can tell, there's just been objections without any  
16 information that's been provided. It does seem to me that some  
17 information needs to be provided for the Court to determine  
18 whether, you know, the communications you're talking about merit  
19 being called presidential communications and that they're  
20 privileged. I mean, there's a presumption, but it's not an  
21 absolute presumption.

22 And so in terms of the manner in which to test this, I  
23 would be interested in hearing from the parties how you plan --  
24 what you would propose.

25 So let me start with the defendant. As a practical matter,

1 you can't just simply say we're asserting it, that's it.  
2 There's no way for me to determine whether you're right.  
3 Presumptive, yes, but not absolute.

4 So I do have a suggestion as to a method to test this.

5 MR. PARKER: Thank you, your Honor. This is  
6 Mr. Parker for the defendants.

7 Let me address your question with a couple of different  
8 answers. First of all, we think that there are multiple issues  
9 raised by the service of discovery on the president. The first  
10 is that he is not the proper subject of discovery. Under the  
11 Supreme Court's decision in Mississippi v. Johnson and Franklin  
12 versus Massachusetts, we don't think that he is properly subject  
13 to discovery in this case.

14 Moreover, under the Supreme Court's decision in Cheney  
15 versus U.S. District Court, we think that the Court should,  
16 before requiring the executive to assert privilege and before  
17 putting the executive and judicial branches on a collision  
18 course, as the Court in Cheney said, should look for  
19 opportunities to avoid requiring the executive to actually  
20 assert presidential privilege, like the presidential  
21 communications privilege.

22 In this case we think, first of all, that the president is  
23 not a proper defendant, but that there are also other ways that  
24 the Court could avoid requiring the executive from asserting  
25 privilege.

1 First of all, there is discovery ongoing from the other  
2 defendants in the case, from the Department of Defense, from the  
3 Army, the Navy, and the Air Force. And in our view, this  
4 dispute is premature. Plaintiffs should be required to wait  
5 until they receive the discovery from the other defendants to  
6 see whether discovery from the president is even necessary.

7 THE COURT: Okay. Let me stop you there. Hold on.

8 So let me hear from the plaintiffs. Have you received any  
9 discovery from the other defendants, and if you have not, when  
10 do you expect to?

11 MR. WOLFSON: Thank you, your Honor. This is  
12 Mr. Wolfson for the plaintiffs.

13 So we have received some discovery from the plaintiffs --  
14 from the defendants and are receiving some. But for this  
15 particular issue, the defendants have raised the presidential  
16 communications privilege, not just for communications that come  
17 from the Office of the President or the White House, but also  
18 from communications that are in the possession of all the other  
19 defendants, you know, Secretary Mattis of the services.

20 So Mr. Parker says we should exhaust our other avenues.  
21 But we have done. We have gone to the other defendants and have  
22 asked them to provide the same interrogatory answers or, you  
23 know, similar document requests, and they have raised the  
24 privilege and refused to provide the information on those  
25 grounds.

1           So there's really nowhere else for us to go to obtain the  
2 kind of information that we're seeking, not to mention some of  
3 the communications -- some of the log information may be not  
4 from within the services or the Defense Department but from  
5 outside or members of Congress and the like.

6           THE COURT: Hold on.

7           So Mr. Parker, if they made the effort to get the same  
8 kinds of documents from these other defendants and they are  
9 asserting the same privilege, I don't see how this is going to  
10 work as they're getting the information from alternates. Which  
11 I agree, Cheney says you try and get it from other entities  
12 before you escalate it to the president. But if the  
13 presidential communications privilege is being asserted by all  
14 of the defendants, whether it's President Trump or whether it's  
15 any of the others, so that the same documents are being -- no  
16 matter where the source is, that privilege is being asserted, it  
17 does seem to me that they've taken the first step of doing  
18 alternates.

19           Wouldn't you agree?

20           MR. PARKER: Your Honor, I would not agree in this  
21 instance. So defendants are cooperating in discovery. We have  
22 already produced over 68,000 pages of documents, and we continue  
23 to produce documents. We have provided three witnesses for  
24 depositions. We have dozens of additional witnesses -- or  
25 additional depositions scheduled between the two parties in the

1 coming months, including multiple government officials who are  
2 likely to have relevant information, information relevant to  
3 plaintiffs' claims.

4 And so our position would be that, under Cheney, the  
5 plaintiff should take discovery, should continue reviewing the  
6 documents, should take the depositions, and should exhaust all  
7 other avenues before seeking discovery from the White House.

8 In addition, I would add that the scope of the issues that  
9 plaintiffs are raising here is relatively narrow. What they  
10 have asked for in these interrogatories is the communications  
11 about the military service by transgender individuals that  
12 occurred between individuals at the White House and individuals  
13 at the different defendant offices, the Department of Defense,  
14 the Army, the Air Force.

15 And so they really are asking for substantive conversations  
16 between the defendants and the White House. And that's a very  
17 narrow area, and plaintiffs should have to take all the other  
18 discovery that they can take and then show that they would need  
19 this type of discovery.

20 In addition, as I mentioned --

21 THE COURT: Let's stop there. Excuse me.

22 Plaintiffs, what do you want to respond to that?

23 MR. WOLFSON: Thank you, your Honor. This is  
24 Mr. Wolfson.

25 I guess my response goes back to what we've said before,

1 which is we've already asked for the information, and they've  
2 asserted the privilege. And so I don't know where else we could  
3 go to obtain the kind of information that we are looking at.

4 I mean, our requests here are narrow. We are focusing  
5 on -- you know, this is not like Cheney where the District  
6 Court, at least as the Supreme Court presented the case, allowed  
7 the defendants to take discovery of everything under the sun and  
8 didn't put any bounds on discovery at all and so forth and said,  
9 you know, there should be a more narrow discovery before the  
10 vice president was required to assert privilege.

11 Here, we have presented the defendants with, we think,  
12 pretty focused interrogatories and document requests. And they  
13 have already -- they have asserted privilege. So there's not  
14 really anywhere to go from here, except the next step, from our  
15 perspective, is to get the sort of Vaughn index information, as  
16 the Court said.

17 THE COURT: Let me stop you there. Excuse me.

18 So if I understand your argument, what you're saying is the  
19 narrow area of the focus of the ones that are at issue with the  
20 White House, you've asked for that type of information from the  
21 other defendants, and they have consistently across the board  
22 asserted the presidential communications privilege, step number  
23 1.

24 Number 2, the other discovery they're talking about, the  
25 witness depositions and everything else, do they relate to

1 those -- to that narrow focused material information, or is that  
2 about other types of information?

3 MR. WOLFSON: It's really about other information.  
4 Obviously, we've asked for various kinds of information. But  
5 they haven't provided us with anything that goes to, you know,  
6 this particular question that we are looking at here.

7 THE COURT: Okay. Let me get back to defense counsel.  
8 So you've indicated they've done all this other discovery. If  
9 the other discovery covers other topics and the discovery that  
10 they've narrowly focused on from the period of the tweet to the  
11 memorandum in terms of the information and they've asked the  
12 same question of all of the other defendants and they've all  
13 uniformly asserted the same thing and they're not asking for  
14 that information in the rest of the discovery, from the  
15 depositions or the other document requests, have they not at  
16 that point exhausted it?

17 I mean, you're assuming that the -- obviously, we have a  
18 disagreement here. You're assuming there are other requests  
19 that are going to answer this. It doesn't sound like it.

20 MR. PARKER: Well, your Honor, I'm not assuming that  
21 their other requests are going to provide them with information  
22 regarding White House communications. I think that, as far as  
23 communications between the president -- substantive  
24 conversations that the president has had with individuals, the  
25 defendants have consistently asserted privilege.

1           What I am asserting, though, is that the defendants could  
2 receive information and evidence that they could use in place of  
3 that information. And it's not clear to us why they would need  
4 communications between the president and his advisors and why  
5 there isn't other evidence that could be --

6           THE COURT: Okay. Sir, let me stop you there. Tell  
7 me what they've requested. You seem to feel very firmly that  
8 somehow other evidence is going to provide them with the  
9 information that they've requested, which is the information in  
10 terms of what's happened -- it's basically, we're talking about  
11 a log. So we're not talking about actually handing anything  
12 over at this point. We're all talking about identifying the  
13 information that you have.

14           You've indicated -- you've taken the position, it seems to  
15 me, or almost the position that it's an absolute privilege, and  
16 that's not correct. So it's presumptively privileged, I fully  
17 agree, but in terms of -- that presumption can be tested.

18           So what we are talking about is providing enough  
19 information to be able to determine that yes, the presidential  
20 communication privilege does apply to this material and they  
21 simply don't get it. But you're indicating that somehow  
22 questions they've asked about in other parts of the discovery is  
23 going to answer what they've asked for in this. This is very  
24 narrowly focused. I've looked very quickly at some of the rest  
25 of it. It doesn't talk about the same things. They're asking

1 for different things.

2 If you can point to something they've asked for to the  
3 other defendants that would in some way answer the same  
4 question, I would be happy to hear it, since you seem to think  
5 that somehow gathering it from the rest -- because asking the  
6 same type of questions, the same assertion has been made.

7 So if you're claiming somehow lurking in the rest of their  
8 questions they're going to get this information, it doesn't  
9 sound like it. And you can't point to me -- they've indicated  
10 that it's pursuing other discovery avenues, it's not pursuing  
11 this.

12 And as I said, all we are talking about is some sort of a  
13 log of some sort, whether it's in camera for the Court to look  
14 at, narrowly tailored to see whether this presumption appears to  
15 apply or not. In other words, is the presumption -- is it  
16 something that cannot be rebutted or overcome.

17 As I said, we're not talking about handing anything over.  
18 We're talking about having more information than what we have  
19 now, which is basically just a blanket assertion, but to have  
20 something more that could test it.

21 You're claiming, and I agree, Cheney says they have to get  
22 it out of all the other discovery. That's sort of like --  
23 there's three levels of people in Cheney. There's other people  
24 that would have the same information, and you could ask for it.  
25 Here, they've asked for it, and the same privilege has been

1 asserted.

2 And if they're pursuing different avenues of discovery with  
3 everybody else, I don't see how that's going to be helpful or  
4 how that would comply or meet what really Cheney was saying  
5 about pursuing. In other words, if you had somebody less than  
6 the vice president but who would have all of the information,  
7 then you would get it from that person and not the vice  
8 president.

9 Here, we're not talking about that. This privilege is  
10 being asserted across the board for the narrow area that they're  
11 asking for.

12 So I don't see -- you keep saying they should wait until  
13 they get the discovery. If the requests to the discovery to the  
14 other defendants doesn't cover this -- because you've asked for  
15 this, and they've said no -- and the rest of it doesn't relate  
16 to that, I don't see why you would be expecting for them to go  
17 through it and somehow hope that they slip up and provide some  
18 additional information. I mean, it's clear the focus is on  
19 different things. The focus that they did with the  
20 interrogatories to the president, you've asserted it across the  
21 board.

22 So unless you can point out something that they're getting  
23 in their discovery requests because you know what they are that  
24 would somehow answer it in another way and not have it be at  
25 least the presidential communications privilege, I think they've

1 gone as far as they can with that. And we should get back to,  
2 is there some narrow way of providing the Court with some  
3 information to be able narrowly to figure out whether this is  
4 going to be rebutted or not.

5 So Mr. Parker, where is the other evidence? You know what  
6 the requests are, the other discovery requests. Is there  
7 anything in there that's going to give them these answers?

8 MR. PARKER: Thank you, your Honor.

9 Your Honor posed a number of questions there, and I will  
10 try to answer them in order, starting with the one most recently  
11 asked.

12 So the defendants' position is not that plaintiffs are  
13 going to receive information about substantive communications  
14 that the president has had regarding transgender -- military  
15 service by transgender individuals. The defendants have  
16 asserted privilege over that consistently and intend to do so  
17 going forward.

18 The point that I am trying to make is that it's unclear why  
19 plaintiffs need that information and that they won't receive  
20 other information through discovery that could be used in the  
21 place of that information.

22 THE COURT: Such as what?

23 MR. PARKER: The plaintiffs are --

24 THE COURT: You keep saying that, and that's a very  
25 generalized statement. Now, you know what they're looking at.

1 Plaintiffs can articulate it. But you know what they're looking  
2 at and what kind of information that's there.

3 Tell me what you think the rest of this is going to answer  
4 it. You make a generalized statement.

5 MR. PARKER: Your Honor, we are providing a number of  
6 government officials for depositions, and I think -- our  
7 position is that they could provide information that plaintiffs  
8 may be able to use in lieu of information regarding presidential  
9 communications.

10 I do not know specifically how plaintiffs intend to use  
11 that information or what their intent is. And so it's difficult  
12 for me to say, in the abstract, what information they would use.

13 It's not clear to me -- as we mentioned at the beginning of  
14 the call, our position actually is that the president is not a  
15 proper defendant here and is not subject -- and is not properly  
16 subject to discovery. And so --

17 THE COURT: I know that's -- excuse me. I know that's  
18 your position, but you're going around in circles, and it's not  
19 going to help me.

20 So let me ask Mr. Wolfson, what is the purpose of the  
21 information that you are asking for, and would, say, the  
22 depositions of those that they've offered, would that provide  
23 you with anything that would answer what you're requesting?

24 MR. WOLFSON: Thank you, your Honor.

25 Let me say, the information that we are seeking really has

1 two purposes. The first is, as the Court was already kind of  
2 exploring, is information to test the government's claim of  
3 presidential privilege on these issues, you know. We've  
4 received very little, only the very generalized ones on the  
5 documents and nothing on the interrogatories. And so to test  
6 whether a privilege is covered at all, we need to kind of log  
7 index -- log information that we've discussed.

8 But there is another reason why this information is  
9 independently important to us, which is, it sheds a light on the  
10 process by which the president arrives at his decision to ban  
11 transgender military service as reflected in the tweet.

12 And that's for two reasons. First of all, the government  
13 has defended that decision as a part of a robust and  
14 deliberative process drawing on military expertise, and second,  
15 the president himself said in the tweet that he consulted with  
16 generals and with military experts.

17 So what process occurred before the -- and I'm not talking  
18 about substance. I'm not talking here about -- even talking  
19 about who recommended what to whom. But just what process  
20 occurred and who participated in that process has been placed at  
21 issue in the case and is important to evaluate what -- you know,  
22 what significance should be -- or what deference or what  
23 significance should be owed to the president's sort of statement  
24 that he consulted with experts in issuing the tweet.

25 So there's two aspects of this. In terms of could we get

1 it elsewhere, I mean, I fully expect that if we asked the same  
2 questions that we've asked in the interrogatories and in the  
3 discovery requests at a deposition, you know, did you talk to  
4 the president, who, to your knowledge, communicated with the  
5 president, without even asking what the substance of those  
6 communications would be, I have full confidence that the  
7 government will assert the privilege at those depositions and  
8 will refuse to allow the witnesses to answer. And I wouldn't  
9 expect Mr. Parker to say any differently.

10 THE COURT: Mr. Parker, you've now heard what they're  
11 interested in, which is not the content. What they're  
12 interested in is the process of how the decision was made and  
13 who participated in it, without getting at all into who said  
14 what or who recommended or didn't recommend anything.

15 And they're not going to get it in other discovery. That's  
16 quite clear. Whether it's the president you ask or whether you  
17 ask all these other people, even if you went and decided we will  
18 not ask it of the president, we will ask it of Mattis, Mattis is  
19 going to say exactly the same thing. He's not the president.  
20 He's less than the president. And therefore, sort of like the  
21 Cheney case, it's below the vice president, but he's still going  
22 to assert the same presidential communication privilege.

23 So it seems to me, if he's not the right defendant, even  
24 the other defendants who are there and presumably would have  
25 knowledge of this -- after all, he's in charge of the military,

1 not Trump, our president, but Mattis is. So you would expect  
2 that he would know.

3 Then even if you went down and asked other defendants,  
4 individual defendants who would be expected to know, they're  
5 going to assert the same privilege.

6 So I don't see two arguments working very well, at least at  
7 this point. One, that the president is the wrong one, because  
8 nobody is going to answer the question, in terms of doing  
9 something else, and two, it doesn't seem to me that you're going  
10 to get this information from the other discovery. The other  
11 discovery is focused on other things.

12 What they're interested in is what process was followed and  
13 who participated in it. Did Mattis participate in it? Did  
14 somebody else participate in it? Was it strictly White House  
15 people who participated in it? Who, without getting into  
16 anything further.

17 So I think your argument that he's not the proper  
18 defendant, there are other defendants that are in here who  
19 cannot be in the position of the president, but they're also  
20 asserting it. So you're not getting -- even if you looked at  
21 only Mattis, he still isn't going to provide it.

22 So I think suggesting you can't ask the president, ask  
23 somebody else isn't going to work because they're going to say  
24 the same thing, and you're not going to get it from any other  
25 discovery, which might be true in Cheney and some other cases,

1 but it's not true.

2 I would also indicate that in the cases -- and I don't have  
3 them all right in front of me. But none of the cases -- all of  
4 the cases provided something, even in the presidential  
5 communication privilege context. They provided some sort of  
6 information, bare-bones as it might be in terms of not giving  
7 much information, but certainly enough -- it would have  
8 answered, from the defendants' -- from the plaintiffs'  
9 perspective, the process in terms of who was consulted and when,  
10 without anything else.

11 So you know, you're pushing two things that at least at  
12 this point aren't convincing me. One, we can't ask the  
13 president, but there doesn't appear to be anybody else you can  
14 ask either, because it's all going to be asserted. And two,  
15 somehow it's going to come out in some other -- and answer this  
16 question in some other way. It's not going to, because it  
17 appears that everybody who might have participated in this is  
18 going to assert the same privilege.

19 So we're back to is there a way, it seems to me, to provide  
20 some information, bare-bones as it is, that not necessarily  
21 would answer the question but at least would provide some  
22 background or some information to support that this truly is the  
23 presidential communication privilege, it's asserted correctly.

24 If it's asserted correctly, presumptively, then it applies.  
25 But you've set it up in such a way that there's no way to test

1 it, and that's not really supported in the cases.

2 MR. PARKER: Your Honor, this is Mr. Parker. I'm  
3 happy to respond to your questions.

4 Let me just begin by pointing out that plaintiffs' counsel  
5 said that one of the reasons he wants this information is to  
6 shed light on the president's decisionmaking process. That was  
7 also a line from the letter submitted to the Court, that the  
8 plaintiffs are looking to take discovery of the president's  
9 decisionmaking process.

10 But the D.C. Circuit, in in re: Sealed case, 121 F 3rd  
11 729, specifically stated that the presidential privilege applies  
12 to protecting that process. And here's the quote from the  
13 Court: The president can invoke the privilege when asked to  
14 produce documents or other materials that reflect presidential  
15 decisionmaking and deliberations and that the president believes  
16 should remain confidential. Plaintiffs are trying to use  
17 discovery to probe at the very heart of what the presidential  
18 communications privilege protects.

19 And with regard to the second --

20 THE COURT: Let me interrupt you one second. So it's  
21 your view that, for instance, indicating who was consulted, with  
22 nothing more, is covered by it?

23 Because what I'm trying to figure out is, you don't seem to  
24 be disputing with me that it's not absolute. On the other hand,  
25 you don't seem to be indicating that there's any information

1 that you would be willing to give that would at least provide  
2 the Court with an opportunity to see whether this is an  
3 appropriately asserted communication privilege.

4 I mean, you basically have taken the position that it's  
5 absolute, without giving -- it may not be what the plaintiff  
6 wants in terms of what they would like fully, but my question is  
7 whether you're willing to provide any information at all  
8 relating to, you know, who participated, anything without  
9 getting into the actual meat of what this participation  
10 involved, what it was, who said what, or any of the contents.

11 MR. PARKER: Your Honor, this is Mr. Parker.

12 To respond, your Honor, plaintiffs have asked  
13 interrogatories that seek information regarding individuals who  
14 had substantive conversations with the president --

15 THE COURT: Mr. Parker, you're not answering my  
16 question. Okay? What I asked you was not necessarily what the  
17 plaintiff had asked for. What I asked you was, in the context  
18 of who was consulted, would you be willing to indicate who  
19 participated, without anything else?

20 MR. PARKER: Your Honor --

21 THE COURT: Are you asserting that -- I'm trying to  
22 figure out from you, and answer it yes or no and give me an  
23 explanation. Are you willing to provide any information  
24 whatsoever about what might have transpired? And I'm talking  
25 about bare-bones information in terms of who participated in any

1 kind of discussion relating to this, say, or anything else.

2 MR. PARKER: Your Honor, to answer in one word, the  
3 answer is no. We think that the presidential -- sorry.

4 THE COURT: Go ahead.

5 MR. PARKER: Sorry, your Honor.

6 Our position is that the presidential communications  
7 privilege protects not only deliberations but factual material  
8 that the president considers in his decisionmaking process.

9 And I would point your Honor to the case Citizens For  
10 Responsibility and Ethics in Washington --

11 THE COURT: Hold on. The problem that I have with it  
12 is you're asserting it without letting anybody see whether  
13 you're right. Okay? I'm not suggesting giving it to the  
14 plaintiff. I'm suggesting that you provide something to me so I  
15 can look at it and decide whether you're right, that this is  
16 material that should not be provided. And in terms of -- say  
17 you gave the participants and indicated why the president feels  
18 this in some way is privileged information in terms of his  
19 communications about making his decisions.

20 You've decided, as an absolute privilege, you're not going  
21 to provide a scintilla of any information to the Court, forget  
22 the plaintiff, to the Court for me to decide or at least  
23 consider whether or not you, having asserted it, are right.

24 None of these cases have indicated that they -- they don't  
25 require you providing it, but all of them have provided some

1 information. Your position is that you're providing none. So  
2 in essence, it's an absolute privilege you're asserting.

3 MR. PARKER: Your Honor, first off, the president has  
4 provided a privilege log. So that is a response to the request  
5 for production.

6 THE COURT: Okay. Excuse me. I have that, and I will  
7 get to that, if it's worthwhile, in a minute.

8 But in terms of the interrogatories, which is what I'm  
9 talking about, the interrogatories, because that's what I  
10 started off with, since you did provide some information,  
11 although I must admit it's hard to read, but from the Executive  
12 Office of the President. There are document requests, and you  
13 did a privilege log, and I believe you provided nothing, but  
14 they're all deliberative or the presidential assertion, and I  
15 can take a look at those. But I'm asking you about the  
16 interrogatories.

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

19 So the plaintiffs, in their interrogatories, ask  
20 specifically whether defendants, such as Secretary Mattis, had  
21 substantive communications with the president about military  
22 service by transgender individuals and for the dates of those  
23 communications.

24 That information, a response to that interrogatory would,  
25 in essence, provide the substance of conversations that the

1 president had with the White House.

2 THE COURT: Excuse me a minute. What is substantive?  
3 All it does is it indicates date, time, and then Mattis had a  
4 conversation with the president, period. It doesn't say  
5 anything about the content of the conversation. It doesn't say  
6 anything about whether it's -- one question is, did they even  
7 have a conversation. I mean, some of this may be that there  
8 isn't any conversation. I don't know, frankly, the answer. But  
9 you have not provided enough information to be able to tell.

10 And I am perfectly happy to get this information, you know,  
11 in camera, if that's what you want to do. But you've asserted  
12 it in terms of the answers to the interrogatories and, to some  
13 degree, in terms of the documents, but I will look at the  
14 documents more carefully. Just across the board, absolutely,  
15 you're providing nothing.

16 And I still think that if you look at the cases, they all  
17 provided some information that was then able to be looked at.  
18 So I'm not talking about giving it to the plaintiffs. You keep  
19 going back to the plaintiffs. I am talking about giving it to  
20 the Court so the Court can make a decision as to whether or not  
21 this actually falls into the presidential communications  
22 privilege. Which true, if you assert it, it's presumptively so,  
23 but that is not the end of the inquiry. And the problem that  
24 I'm having is, you're not willing to have the rest of the  
25 inquiry with me.

1           We're going around a mulberry bush. If you're not willing  
2 to do anything else, then my conclusion is that, at least in the  
3 answers to interrogatories, you've decided to assert an absolute  
4 privilege. I don't buy the idea that you can get it from other  
5 evidence, and it's obvious that, no matter whom the plaintiff  
6 requests this information of the defendants or anything else,  
7 they're going to get the same blank wall.

8           So unless you have something else to add, I will figure out  
9 how I want to proceed with this, but this is not a good way to  
10 go about this.

11           Okay. Let me put you on hold for a second to see what I  
12 want to do next. Hold on.

13                   (Off the record.)

14           THE COURT: All right. In terms of finishing up the  
15 issue of the interrogatories, Mr. Parker, let me just ask,  
16 whether it's the president or Mattis or one of the other  
17 defendants that has been asked the exact same question and has  
18 asserted the presidential communications privilege, is there any  
19 information that you are willing to provide in camera to the  
20 Court for me to review to decide whether or not it's been  
21 appropriately asserted?

22           MR. PARKER: Your Honor, this is Mr. Parker.

23           To respond to your question, we appreciate the suggestion.  
24 We would have to take that back to our client and confer  
25 internally. If we could have some time to consider that issue

1 and get back to the Court, we would greatly appreciate it.

2 THE COURT: All right. When do you want to get back  
3 to me?

4 MR. PARKER: Could we get back to the Court this  
5 coming Friday, your Honor?

6 THE COURT: Okay. That's the 16th. Do you want to  
7 put something in writing, or do you want to have a conversation  
8 on the phone?

9 It may be easier to have a conversation on the phone. Hold  
10 on one second. I can do it from 2:00 after that. Are people  
11 available? Probably 2:30 would be better. I have a three  
12 co-defendant case earlier than that.

13 MR. WOLFSON: Your Honor, this is Paul Wolfson for  
14 plaintiffs. 2:30 to 4:00 is clear for us.

15 THE COURT: Mr. Parker, how about you?

16 MR. PARKER: 2:30 to 4:00 on Friday afternoon is also  
17 clear for me, your Honor.

18 THE COURT: Okay. Then let's do it at 2:30. Let's  
19 have a discussion at that point instead of putting things in  
20 writing, which always takes longer and makes things more  
21 complicated. So we can just discuss the answer to that.

22 In terms of the deliberative predecisional issue, the  
23 privilege and that, I need from the plaintiff for you to  
24 identify which documents that you think -- based on the  
25 description, that you don't think it applies. And I will look

1 at that, if you identify them from the log they have provided,  
2 and I will consider requesting some or all of those documents  
3 for in camera review.

4 MR. WOLFSON: Okay, your Honor. Thank you.

5 We will need to follow up on that, though, with you. There  
6 are not just documents that have been withheld in their  
7 entirety, but also redactions from documents, and we've provided  
8 the Court with basically a couple of examples of where the  
9 redactions were done, Exhibits F and G. But you know, those are  
10 not the entirety of -- those are certainly not the entirety of  
11 where they claim the deliberative process privilege.

12 And our basic position is -- at least from what we can tell  
13 is that, you know, these redactions at least -- obviously, we  
14 can't tell with the withheld documents in their entirety, but  
15 the redactions at least appear to be about matters that are  
16 postdecisional, not predecisional.

17 THE COURT: Okay. Let me suggest this. I realize  
18 that there seems to be a dispute as to whether the tweet was the  
19 decision or the memorandum was the decision or whether he  
20 changed -- however you want to word it.

21 It seems to me, without regard to which was the final  
22 decision, I think that the documents themselves in terms of --  
23 should describe sufficiently to be able to figure out whether  
24 the privilege would be asserted in the typical, you know -- the  
25 kinds of content that would be considered predecisional.

1           In other words, you can make a decision, have it be final,  
2           and then decide maybe that wasn't a great decision. So you're  
3           then thinking it over, and you're planning on coming back and  
4           making another decision, but then you don't change your mind.

5           So instead of going off on whether the tweet is the final  
6           decision or his memorandum is the final decision, instead of  
7           having that be the focus of what you're deciding is  
8           predecisional deliberative, it seems to me that enough -- if  
9           they give you enough of a description as to be able to decide  
10          that this sounds like it is not -- doesn't fit that, that it's  
11          not predecisional, it's not that kind of -- I mean, this is a  
12          privilege that's been around for a long time, and there's lots  
13          of cases about it.

14                 MR. WOLFSON: No, thank you, your Honor. This is Paul  
15          Wolfson.

16                 That's fair enough. I think part of the problem -- one can  
17          debate which is the decision. I think our view is that the  
18          tweet, insofar as what we're talking about, is the decision to  
19          restrict transgender people from serving. The tweet is the  
20          decision.

21                 Now, it is possible that the presidential memorandum, you  
22          know, it does do more than that. So we're not excluding the  
23          possibility that there might have been other decisions that  
24          followed after that.

25                 But the problem is, the government's submissions to us,

1 they don't really say -- they don't allow us to identify what  
2 decision it is that they're arguing these are predecisional to,  
3 if I could put it that way, and just say it's predecisional. I  
4 don't think it's enough just to say, as the government does in  
5 its letter, that the decisionmakers can constantly sort of  
6 rethink and rethink and rethink, you know.

7 You have to be more particularized than that and have to  
8 identify or you have to explain what is the decision so that the  
9 parties and the Court can evaluate is it predecisional to that  
10 or is it really just people reacting to a decision that was  
11 already made, which would make it postdecisional.

12 THE COURT: Okay. But I think part of it would be, is  
13 to take a look at their description. If it turns out that more  
14 information is needed in terms of the description of what they  
15 have set out, it seems to me that you can then, you know,  
16 request that they do it more specifically by document instead of  
17 grouping some of the documents together or give you a slightly  
18 better description of it.

19 I think we may be conferring about it a little bit more,  
20 but I would like to get, if there's very specific documents that  
21 you think -- they may not be all of them, but that you think  
22 which identify that it doesn't appear to support it, that it  
23 seems to be, as you said, more of a reactionary aspect to it,  
24 then I'm more than happy to take a look at it.

25 MR. WOLFSON: We can certainly provide that

1 information to the Court.

2 THE COURT: If I could just ask Mr. Parker, in this  
3 context, is the position of the government that the tweet was  
4 not a final decision and only the memorandum or that it was a  
5 decision but he was considering -- or could consider making  
6 another decision? I'm not putting it too eloquently, but I know  
7 you get my point.

8 MR. PARKER: Right. Your Honor, this is Mr. Parker.  
9 I definitely understand the question.

10 Our position is that the tweet was a decision and that that  
11 decision itself gave rise to a series of additional decisions,  
12 that that decision had sort of a ripple effect and required the  
13 defendants to make a series of additional decisions based on the  
14 tweets and that those decisions themselves can give rise to  
15 privileged deliberative material.

16 And so there are decisions, I think, between the tweet and  
17 the memorandum that themselves can give rise to deliberative  
18 material.

19 Let me just add one more thing, your Honor. We would be  
20 happy to rereview documents that plaintiffs specifically  
21 identify that they believe -- where they believe deliberative  
22 material has been inappropriately withheld. We believe that we  
23 have appropriately withheld deliberative material, but we are  
24 happy to rereview the documents and to look at whether we may be  
25 able to narrow the issues in dispute by voluntarily disclosing

1 the information or at least looking to see whether that is a  
2 possibility.

3 And so we would appreciate the opportunity, if plaintiffs  
4 would give us the specific Bates numbers of the documents, to  
5 rereview those documents to attempt to narrow any dispute that  
6 would come before the Court.

7 THE COURT: Okay. Are you willing to do that,  
8 Mr. Wolfson?

9 MR. WOLFSON: We are, your Honor.

10 THE COURT: Okay. So why don't I -- I won't set a  
11 time frame on this. Let me let you have discussions and see how  
12 this works out. And then on the 16th, you can tell me where you  
13 are with it. So I won't put an arbitrary, you know, you have to  
14 get back to me by X date. Let me let you have the opportunity  
15 to confer and see if you can come to some approach or resolve it  
16 or whatever, and we will talk about it on the 16th at 2:30.

17 MR. WOLFSON: Thank you.

18 THE COURT: All right. Is there anything else, either  
19 side?

20 MR. PARKER: Nothing, your Honor.

21 MR. WOLFSON: Not for the plaintiffs. Thank you, your  
22 Honor.

23 THE COURT: Mr. Parker?

24 MR. PARKER: Not from defendants, your Honor. Thank  
25 you.

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THE COURT: All right. The parties are excused.  
Thank you.

(Proceedings adjourned at 3:29 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

2/15/2018

SIGNATURE OF COURT REPORTER

DATE