UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

JAMES MATTIS, in his official capacity as Secretary of Defense, *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

Defendants move pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure for a protective order to preclude the deposition of Vice Admiral David Kriete, Deputy Commander of U.S. Strategic Command. In addition to their Memorandum of Points and Authorities, Defendants have filed a proposed order with this motion. Pursuant to Local Rule 7(m), Defense counsel has conferred with Plaintiffs' counsel, and Plaintiffs' counsel has indicated that Plaintiffs oppose this motion.

October 9, 2018

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Defendants move pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure for the entry of a protective order to preclude Plaintiffs from deposing Vice Admiral David Kriete, Deputy Commander of U.S. Strategic Command. The Vice Admiral is responsible for an extraordinary array of national security matters, was involved in addressing the issue of military service by transgender individuals only in July and August 2017 when he served as acting senior director for the Defense Directorate of the National Security Council staff, and was not involved in the development of the Department of Defense's ("DoD") new policy concerning military service by transgender individuals. The Court should enter a protective order to preclude his deposition because high-ranking federal officials like the Vice Admiral should not be deposed absent extraordinary circumstances, which Plaintiffs have not established.

BACKGROUND

Plaintiffs filed this action on August 9, 2017, raising constitutional challenges to the President's statements on Twitter concerning military service by transgender individuals. Compl., Dkt. 1. After DoD issued its new policy in March 2018, Plaintiffs filed their second amended complaint. Second Am. Compl., Dkt. 106. Plaintiffs challenge the constitutionality of what they characterize as a "ban on military service by transgender individuals," *id.* ¶ 1, as allegedly "announced in . . . tweets [by the President on July 26, 2017,] promulgated to the Department of Defense in [the Presidential] Memorandum" issued on August 25, 2017 ("2017 Memorandum"), and finalized in DoD's new policy dated February 22, 2018, *id.* ¶ 83; *see also id.* ¶¶ 37, 38, 74, 75, 79, 80, 85. Because Plaintiffs' complaints improperly named the President as a Defendant in this case, *id.* ¶ 37, Defendants moved to dismiss him as a party, *see* Defs.' Mot., Dkt. 90.

The parties engaged in discovery in spring 2018. In addition to producing tens of thousands of responsive documents and responding to written discovery, Defendants made witnesses available for depositions. Plaintiffs requested to depose officials in DoD and the armed forces who served on or supported the Panel of Experts for the Transgender Policy Review (the "Panel").[1] In particular, Plaintiffs requested that Defendants schedule the deposition of Anthony Kurta, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Under Secretary for Personnel and Readiness.[2] Mr. Kurta served as chair of the Panel through late November 2017. Plaintiffs also requested to depose Lernes Hebert, Principal Director, Military Personnel Policy, Office of the Under Secretary for Personnel and Readiness. Defendants scheduled the depositions of Mr. Kurta and Mr. Hebert, but Plaintiffs chose not to depose them last spring and have not requested to reschedule those depositions.

Although Plaintiffs chose not to depose Mr. Kurta or Mr. Hebert, Plaintiffs did depose five Government officials: Colonel Mary Krueger, Assistant Deputy for Health Affairs, Office of the Assistant Secretary of the Army, Manpower and Reserve Affairs; Martha Soper, Assistant

[1] The Panel consisted of the members of senior military leadership who had "the statutory responsibility to organize, train, and equip military forces" and were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." DoD Report and Recommendations at 18, Dkt. 96-2. The Panel's task was to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." *Id.* at 17. The Panel was supported by working groups, which were assigned areas of focus and expertise. *See id.* Additional details of the work of the Panel and its working groups are set forth in Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot. at 5–7, Dkt. 96.

[2] Plaintiffs also requested to schedule the deposition of General Paul Selva, Vice Chairman of the Joint Chiefs of Staff, who attended one meeting of the Panel and was briefed on the Panel's work by Mr. Kurta or another official from the Office of the Under Secretary of Defense for Personnel and Readiness. *See* Dkt. 112-1. Defendants objected to the deposition of the Vice Chairman because he is a high-ranking Government official and Plaintiffs did not establish that the Vice Chairman possessed unique, non-privileged, relevant information that could not be obtained through other means. *See id.* The Court determined that Defendants were not required to schedule the Vice Chairman's deposition at that time. *See* Order, Dkt. 112.

Deputy for Health Policy, Office of the Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness;[3] Robert Chadwick, Commandant of Midshipmen at the United States Naval Academy, Robert Burns, Deputy Chief of Staff, U.S. Army Cadet Command; and Jennifer Hay, who, at the time of her deposition, was employed by DoD as a National Security Fellow at the Harvard Kennedy School.

Ms. Hay's deposition testimony led Plaintiffs to notice the deposition of Vice Admiral Kriete. Ms. Hay served as the Director for Defense Policy and Strategy on the staff of the National Security Council ("NSC") from January 2016 through July 5, 2017.[4] Ex. 2 (Hay Dep. 19:22–20:8, 24:22–25:4). As the Director for Defense Policy and Strategy, Ms. Hay was responsible for military personnel and readiness issues, including the issue of military service by transgender individuals. *See* Ex. 2 (Hay Dep. 27:23–28:12, 108:14–109:4). Ms. Hay testified that Vice Admiral Kriete "worked on the transgender issue after [she] left" the NSC staff in July 2017. Ex. 2 (Hay Dep. 109:2–4).

A few days after Ms. Hay's deposition, and after the parties filed cross-motions for summary judgment, *see* Dkt. 115, 131, Plaintiffs requested that Defendants schedule the deposition of Vice Admiral Kriete.

Vice Admiral Kriete previously served as Director, Strategic Capabilities Policy in the Defense Directorate of the National Security Council from July 6, 2016, to March 23, 2018. Ex. 1 (Kriete Decl. ¶ 7). In this capacity, Vice Admiral Kriete advised the National Security Advisor, the President, and other senior officials, and he was primarily responsible for advising

[3] Both Colonel Krueger and Ms. Soper served on working groups supporting DoD's Panel of Experts.

[4] When Plaintiffs' counsel questioned Ms. Hay about her work and certain communications while she served on the NSC staff, Defense counsel objected on the ground that the information was protected by the presidential communications privilege (among others).

the President and coordinating the views of executive departments and agencies on nuclear weapons-related issues. *Id.* Vice Admiral Kriete also served as the Acting Service Director for the Defense Directorate when that position was vacant from January 2017 to March 2017, and when the senior director was on leave in July 2017 and August 2017. *Id.* In this role, Vice Admiral Kriete supervised all directors in the Defense Directorate and their portfolios. *Id.* As Acting Senior Director, Vice Admiral Kriete reported directly to the National Security Advisor. *Id.*

Vice Admiral Kriete is currently second-in-command at U.S. Strategic Command ("USSTRATCOM"), which is responsible for the global command and control of U.S. strategic forces to meet decisive national security objectives by providing a broad range of strategic capabilities and options for the President and Secretary of Defense. Ex. 1 (Kriete Decl. ¶¶ 1, 3, 6). USSTRATCOM's focus is to deter strategic attacks on the United States and its allies, and it is also responsible for nuclear operations, missile defense, and more. Ex. 1 (Kriete Decl. ¶ 3). As second-in-command, Vice Admiral Kriete leads approximately 162,000 active duty, reserve, and civilian service members supporting the USSTRATCOM mission. Ex. 1 (Kriete Decl. ¶¶ 4, 6). In addition to fulfilling the duties of Commander of USSTRATCOM when the Commander is unavailable, Vice Admiral Kriete is primarily responsible for driving execution of the assigned mission and the Commander's priorities across the entirety of the Command. Ex. 1 (Kriete Decl. ¶ 6).

Vice Admiral Kriete is not involved with the issue of military service by transgender individuals in his current position as Deputy Commander of USSTRATCOM, nor was he involved in that issue prior to his service on the NSC staff. Ex. 1 (Kriete Decl. ¶ 8). Vice Admiral Kriete's only involvement with the issue of military service by transgender individuals

occurred in July and August 2017, when he served as Acting Senior Director for NSC staff and briefly supported senior officials on the issue. Ex. 1 (Kriete Decl. ¶ 8).

Based on Vice Admiral Kriete's significant national security responsibilities and the demands they impose on his time and resources, as well as his lack of non-privileged information, Defendants informed Plaintiffs that the Vice Admiral was a high-ranking Government official who should not be deposed absent extraordinary circumstances. Defendants also requested that Plaintiffs agree to defer the deposition until after the Court ruled on the then-pending cross-motions for summary judgment and Defendants' then-pending motion for a protective order concerning presidential communications and deliberations. Ex. 3 (Carmichael email to McFadden, June 8, 2018). Although Plaintiffs "recognize[d] that Vice Admiral Kriete is a senior military officer," they refused to defer the deposition. Ex. 3 (McFadden email to Carmichael, June 8, 2018). Instead, Plaintiffs issued a notice of deposition for Vice Admiral Kriete and stated that the deposition would go forward absent a protective order. *See id.*

On June 13, 2018, Defendants informed the Court about the discovery dispute. *See* Dkt. 145-1 (Carmichael email to Chambers (June 13, 2018)). Defendants asserted that Vice Admiral Kriete's deposition should not proceed at that time for three reasons. *Id.* First, Defendants argued he would not be able to provide relevant, non-privileged information because the information about the deliberative process within the White House that he learned while serving on the staff of the NSC is protected by the presidential communications privilege (among others). *Id.* Second, Defendants contended that Vice Admiral Kriete is a high-ranking Government official, and that in the D.C. Circuit, there is a presumption against deposing high-ranking officials. Third, Defendants argued that the deposition may not be necessary at all if the Court decides the case based on the then-pending cross-motions for summary judgment. *Id.*

In response, Plaintiffs acknowledged that "Rear Admiral Kriete is a high ranking military officer,"[5] but argued that they should be permitted to take his deposition because he is "uniquely situated to provide key information." Dkt. 145-1 (Milgroom email to Chambers (June 14, 2018)). Plaintiffs alleged that Vice Admiral Kriete possesses knowledge about the following topics:

> the decision-making processes and personnel assignments at the NSC and White House during that time period, whether the decision announced in the tweets was the product of the mandated process, external communications with third parties and personnel outside the Executive branch, and various events that occurred in the aftermath of the tweets[.]

Id. Plaintiffs further contended that "[t]here does not appear to be any alternative, lower ranking witness who is similarly situated," and asserted their desire to take the deposition even if the majority—if not all—of their questions would call for privileged information. *Id.* Finally, Plaintiffs argued that Defendants did not seek a protective order to preclude the deposition of Ms. Hay, who also worked for the NSC staff on the issue of military service by transgender individuals. *Id.*

The Court requested that Defendants respond to Plaintiffs' assertions. Dkt. 145-1 (Chambers email to Carmichael (June 14, 2018)). Defendants responded that it was not possible to identify an alternative witness because the topics identified by Plaintiffs "implicate information that is at the heart of presidential decisionmaking and deliberations." Dkt. 145-1 (Carmichael email to Chambers (June 15, 2018)). Defendants further argued that because Vice Admiral Kriete's "work on the NSC staff was done to advise the National Security Advisor and the President, any information about the deliberative process within the White House is subject

[5] Vice Admiral Kriete was a Rear Admiral when he served on the NSC staff and when the dispute concerning his deposition first arose. *See* Ex. 1 (Kriete Decl. ¶ 1) (stating that he has held the position of Vice Admiral since June 15, 2018); *see also* Ex. 2 (Hay Dep. 109:5–7).

to the presidential communications privilege, and much of this information is also protected by the deliberative process privilege." *Id.* Defendants also argued that although it was possible to attend the deposition and object to the majority—if not all—the questions, it would be "inappropriate and unduly burdensome" for Vice Admiral Kriete to "take time away from his military responsibilities for a deposition in which he cannot answer the majority of the questions." *Id.* Defendants explained that they did not seek to preclude the deposition of Ms. Hay because, unlike Vice Admiral Kriete, "it appeared that Ms. Hay could have relevant, non-privileged information from her work at the Department of Defense on the issues related to this case, including during the prior Administration."[6] *Id.*; *see also* Ex. 2 (Hay Dep. 18:22–19:21) (testifying that when Ms. Hay worked for the front office of the Deputy Secretary of Defense in 2014 and 2015, she worked on, among other things, "personnel and readiness" issues). Finally, Defendants reiterated that the deposition should not occur while cross-motions for summary judgment were pending because resolution of those motions could obviate the need for any additional discovery in this case. Dkt. 145-1 (Carmichael email to Chambers (June 15, 2018)).

After an additional exchange in which Plaintiffs stated that it was their "position that Plaintiffs are entitled to summary judgment on the current record," Dkt. 145-1 (McFadden email to Chambers (June 19, 2018)), the Court issued an Order "hold[ing] this dispute in abeyance," Order, Dkt. 145.[7] The Court found that both parties had filed motions for summary judgment and that "[i]f summary judgment is granted for either party, there will be no need to resolve the questions of privilege that the parties have raised, which implicate serious separation-of-powers

[6] In addition, unlike Vice Admiral Kriete, Ms. Hay is not a high-level Government official.
[7] In summarizing the dispute, the Court noted that "Plaintiffs acknowledge that the Rear Admiral is a high-ranking official." Order, Dkt. 145.

issues and would require additional briefing." Order, Dkt. 145. The Court concluded that it would "not require the Rear Admiral to sit for a deposition at this time." *Id.*

Two months after the resolution of that discovery dispute, the Court ruled on pending dispositive motions. First, the Court granted Defendants' motion to dismiss the President from the case. Order, Dkt. 154. "Because no relief will be granted directly against the President in this case," the Court "dismiss[ed] him as a party to avoid unnecessary constitutional confrontations." Mem. Op. 2, Dkt. 155. Second, the Court denied Defendants' motion to dismiss and motion to dissolve the preliminary injunction. Order, Dkt. 156. Finally, the Court denied the cross-motions for summary judgment. Order, Dkt. 159. The Court found that "genuine disputes of material fact remain" because "[t]he parties dispute the facts related to the process used by Defendants to prepare the current proposed policy on transgender military service." Mem. Op. 9, Dkt. 160.

Upon resolution of the dispositive motions, the Court directed the parties to "meet and confer and file a Joint Status Report" that proposes a "protocol for the efficient resolution of the parties' outstanding discovery disputes." Minute Order, Aug. 27, 2018. During the meet and confer process, Plaintiffs' counsel stated their intent to pursue the deposition of Vice Admiral Kriete. Therefore, in the parties' Joint Status Report, Defendants stated that "Defendants will move for a protective order to preclude the deposition of Vice Admiral David Kriete because all of his relevant testimony would be subject to the presidential communications privilege, and much of his testimony would also be subject to the deliberative process privilege, and because he is a high-ranking Government official." Joint Status Report 2, Dkt. 167. Accordingly, Defendants now move for a protective order to preclude the deposition of Vice Admiral Kriete.

STANDARD OF REVIEW

The Court has wide discretion to control the nature and timing of discovery, and "should not hesitate to exercise appropriate control over the discovery process." *Herbert v. Lando*, 441 U.S. 153, 177 (1979). Rule 26(b) of the Federal Rules of Civil Procedure directs a district court to limit the scope of discovery if "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i). Courts have discretion to issue a protective order under Federal Rule of Civil Procedure 26(c) upon a showing of good cause in order to "protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (stating that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required"); *Watts v. Sec. & Exch. Comm'n*, 482 F.3d 501, 507 (D.C. Cir. 2007) ("Rule 26 'vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.'" (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998))). This discretion includes orders forbidding the requested discovery altogether. Fed. R. Civ. P. 26(c)(1)(A); *see also St. John v. Napolitano*, 274 F.R.D. 12, 16 (D.D.C. 2011) (stating that a protective "order may forbid disclosure altogether").

ARGUMENT

I. Discovery of the Executive Office of the President is Improper Because the President Is Not a Party to this Case.

As an initial matter, any attempt by Plaintiffs to take direct discovery of Vice Admiral Kriete about his work on the National Security Council staff is improper because the Court has dismissed the President from this case. *See* Mem. Op. 3–7, Dkt. 155 ("Defendants' motion

presents sound reasons for dismissing the President based on well-established separation of power principles set forth in United States Supreme Court and D.C. Circuit precedent."). The President himself is the head of the National Security Council, which exists to advise the President and serve at the President's direction.[8] The National Security Council is also part of the Executive Office of the President. *See* 5 U.S.C. app., 1949 Reorg. Plan No. 4, eff. Aug. 20, 1949, 14 F.R. 5227, 63 Stat. 1067 (transferring the National Security Council to the Executive Office of the President); *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 320 F. Supp. 3d 162, 173 (D.D.C. 2018) (stating that "[t]he NSC sits within the Executive Office of the President"). Because the President is not a party to this case, Plaintiffs should not be permitted to take discovery of the President's National Security Council staff.[9]

II. High-Level Officials May Not Be Deposed Except in Extraordinary Circumstances.

Even if the President was a party to this case, deposing Vice Admiral Kriete would be improper because he is a high-ranking Government official. "[I]n the D.C. Circuit, there is a presumption against deposing high-ranking government officials." *Kelley v. FBI*, No. CV 13-0825 (ABJ), 2015 WL 13648073, at *1 (D.D.C. July 16, 2015) (citing *Peoples v. U.S. Dep't of*

[8] The National Security Council was created by the National Security Act of 1947, 61 Stat. 499 (1947) (codified at 50 U.S.C. § 402). The membership of the National Security Council includes the President himself, and the Act provides that "[t]he President of the United States shall preside over meetings of the Council." *Id*. § 402(a). The Council's function is to advise the President and to act at the direction of the President. *Id*.

[9] Moreover, insofar as Vice Admiral Kriete is being called to testify in his capacity as a former employee of the National Security Council staff, then any such discovery of the President's National Security Council staff must now, as a procedural matter, proceed as third party discovery under Rule 45, since neither the President nor his staff in any Executive Office of the President component is a party to this case. *Cf. Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1175 (D.C. Cir. 1985); *Nuskey v. Lambright*, 251 F.R.D. 3, 12 (D.D.C. 2008); *see also Seattle Times Co.*, 467 U.S. at 30 n.16. Following dismissal of the President, no such subpoena has been served to obtain Vice Admiral Kriete's testimony concerning his work at the National Security Council.

Agric., 427 F.2d 561, 567 (D.C. Cir. 1970)); *see also Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions."). Other courts likewise have recognized that high-ranking Government officials should not be deposed absent extraordinary circumstances. *See, e.g.*, *United States v. Morgan*, 313 U.S. 409, 422 (1941); *In re McCarthy*, 636 F. App'x 142, 143 (4th Cir. 2015) (stating that "high-ranking government officials may not be deposed or called to testify about their reasons for taking official actions absent extraordinary circumstances"); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (stating that "exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted").

Two rationales underlie this principle. First, as courts have repeatedly recognized, constitutional separation-of-powers principles are implicated when parties litigating against federal agencies attempt to ascertain the thoughts and mental processes by which high-ranking agency officials exercise their official discretion. *See Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 268 n.18 (1977) ("[J]udicial inquiries into legislative or executive motivation represents a substantial intrusion into the workings of other branches of government."); *Morgan*, 313 U.S. at 422 ("Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected." (internal citations omitted)); *NEC Corp. v. United States*, 151 F.3d 1361, 1375 (Fed. Cir. 1998) (agreeing with the trial court's decision to limit testimony from the Under Secretary of International Trade to written interrogatories in order to "protect the deliberative process from undue interference").

Second, as a practical matter, if high-level Government officials could be subject to deposition in every civil action involving their agency, the officials would be impeded from

exercising their duties. *See In re FDIC*, 58 F.3d at 1060 (noting that "[h]igh ranking government officials have greater duties and time constraints than other witnesses"); *Oliveri v. Rodriguez*, 122 F.3d 406, 409–10 (7th Cir. 1997) (recognizing the burden of discovery to public officials). In *Community Federal Savings & Loan v. Federal Home Loan Bank Board*, the Court explained this well-recognized basis for protecting high-ranking Government officials from depositions:

> [P]ublic policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pre-trial discovery would result in a severe disruption of the government's primary function.

96 F.R.D. 619, 621 (D.D.C. 1983). Absent such limits, there is "a tremendous potential for abuse or harassment." *K.C.R. v. Cnty. of Los Angeles*, No. CV 13-3806 PSG (SSx), 2014 WL 3434257, at *3 (C.D. Cal. July 11, 2014) (quotation omitted); *see also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993); *United States v. Wal-Mart Stores, Inc*., 2002 WL 562301, at *1 (D. Md. Mar. 29, 2002). Moreover, liberal access to high-level officials during discovery would likely exert a chilling effect on such officials, making them less willing during the decision-making process to explore and discuss all available options, including controversial ones. *See Walker v. NCNB Nat'l Bank of Fla.*, 810 F. Supp. 11, 12 (D.D.C. 1993) ("[S]ubjecting officials to interrogation about how they reached particular decisions would impair that decision-making process by making officials less willing to explore and discuss all available options, no matter how controversial."); *Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D. Pa. 1981) ("Should the agency head be subject to deposition in every resulting case and be repeatedly required to explain the various mental steps he took to reach his decision, the decision may be his last."). These practical concerns are heightened when a party requests to depose a high-ranking *military* official, particularly when that official has an operational role that pertains to national security.

Cf. Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008) ("As the Court emphasized just last Term, 'neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.'" (quoting *Boumediene v. Bush*, 553 U.S. 723,797 (2008))).

In light of these concerns, courts have generally precluded the deposition of high-ranking Government officials. The rare and narrow exception to this rule against deposing high-ranking Government officials is when the party seeking the deposition can demonstrate the existence of extraordinary circumstances. *See Simplex Time Recorder Co.*, 766 F.2d at 586. To establish the extraordinary circumstances necessary to justify the deposition of a high-ranking official, the official must have non-privileged, first-hand knowledge related to the claims and the information cannot be obtained elsewhere. *See In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008); *Simplex Time Recorder Co.*, 766 F.2d at 587; *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998); *Cmty. Fed. Sav. & Loan*, 96 F.R.D. at 621–22. The heavy burden of establishing such extraordinary circumstances falls on the party seeking to take the official's testimony. *FDIC v. Galan-Alvarez*, No. 1:15-MC-00752 (CRC), 2015 WL 5602342, at *3 (D.D.C. Sept. 4, 2015).

III. Plaintiffs Have Not Established the Extraordinary Circumstances Necessary to Justify the Deposition of the Vice Admiral.

A. The Vice Admiral is a High-Ranking Government Official.

As Plaintiffs acknowledge, the Vice Admiral qualifies as a high-ranking official whose deposition should be barred absent extraordinary circumstances. *See* Order, Dkt. 145 ("Plaintiffs acknowledge that the Rear Admiral is a high-ranking official . . . ."); Dkt. 145-1 (Milgroom email to Chambers (June 14, 2018)) (stating that "it is true that Rear Admiral Kriete is a high ranking military officer"). "Although no standard has been established for determining if an official is high-ranking," *Byrd v. District of Columbia*, 259 F.R.D. 1, 6 (D.D.C. 2009), courts

determine whether an individual qualifies as a high-ranking official by considering, for example, the individual's title, place in the governmental hierarchy, and job responsibilities, *see, e.g.*, *Alexander*, 186 F.R.D. at 3–4 (determining that three officials classified as "Assistant[s] to the President" qualified as high-ranking officials upon consideration of "the nature of their positions at the White House"); *Low v. Whitman*, 207 F.R.D. 9, 12 (D.D.C. 2002) (concluding that the EPA's Deputy Chief of Staff is a high-ranking official upon finding that "[a]s a member of the Senior Executive Service with responsibility for budget, personnel, and resource issues, it is clear that [the Deputy Chief of Staff] is in a position of substantial authority"); *see also United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 321 (D.N.J. 2009) (stating that the "determination is done on a case-by-case basis").

As set forth above, Vice Admiral Kriete is a three-star Vice Admiral in the U.S. Navy, who serves as the Deputy Commander of USSTRATCOM. Ex. 1 (Kriete Decl. ¶ 1). The President nominated, and the Senate confirmed, Vice Admiral Kriete for this position. *Id.*; 164 Cong. Rec. S2467 (daily ed. Apr. 26, 2018); *see also* 10 U.S.C. § 601. As second-in-command of USSTRATCOM, Vice Admiral Kriete leads nearly 162,000 active duty, reserve, and civilian service members who work to deter strategic attacks on the United States and its allies. Ex. 1 (Kriete Decl. ¶¶ 4, 6). The Commander of USSTRATCOM is responsible for executing the missions of USSTRATCOM, including planning for nuclear operations and, if directed, employing nuclear forces, and Vice Admiral Kriete fulfills the duties of the Commander when the Commander is unavailable. Ex. 1 (Kriete Decl. ¶ 6). Because the Commander travels frequently and is sometimes away from USSTRATCOM's headquarters as much as three weeks out of the month, Vice Admiral Kriete often fulfills the duties of the Commander. *Id.*

In addition to fulfilling the duties of Commander of USSTRATCOM when the Commander is unavailable, Vice Admiral Kriete is primarily responsible for driving execution of the assigned mission and the Commander's priorities across the entirety of the Command. *Id.* He is frequently in contact with and provides advice to other high-ranking military officials, including senior officials and dignitaries from foreign countries. *Id.* Vice Admiral Kriete is responsible for the Command's readiness to transition into the new $1.4 billion USSTRATCOM command and control headquarters facility and is also involved in several efforts with respect to the organization of the Command, including fulfilling higher-level guidance regarding a Space Force. *Id.* In addition, Vice Admiral Kriete serves as USSTRATCOM's representative for several Department of Defense initiatives, including Chairman of the Missile Defense Executive Board and USSTRATCOM representative to the Electronic Warfare Executive Committee. *Id.*

Given his stature and his job responsibilities, the Vice Admiral qualifies as a high-ranking Government official whose deposition should only be allowed upon a showing of extraordinary circumstances.

B. Plaintiffs Have Failed to Meet Their Heavy Burden of Establishing That the Vice Admiral Possesses Non-privileged and Relevant Information.

Plaintiffs have not identified extraordinary circumstances that would justify requiring the Vice Admiral to set aside his numerous and extraordinarily significant national security responsibilities to appear for a deposition in this litigation. Vice Admiral Kriete will not be able to provide any relevant, non-privileged information because his only knowledge of the issue of military service by transgender individuals comes from his service on the NSC staff.

1. The Information Plaintiffs Seek Is Not Relevant.

Plaintiffs contend that Vice Admiral Kriete possesses information about "the decision-making processes and personnel assignments at the NSC and White House" in July and August

2017, "whether the decision announced in the tweets was the product of" the procedures outlined in "National Security Presidential Memoranda Nos. 2 and 4," "external communications with third parties and personnel outside the Executive branch," and "various events that occurred in the aftermath of the tweets." Dkt. 145-1 (Milgroom email to Chambers (June 14, 2018)). Plaintiffs appear to seek this information to probe the basis and intent behind the President's statements on Twitter in July 2017 and the Presidential Memorandum in August 2017. None of this information is relevant to this case.

In the first place, as noted, the President is no longer a Defendant in this case and the August 2017 Memorandum has been revoked. Discovery into the President's statements in 2017 therefore has no relevance on its face. Moreover, as the Supreme Court recently recognized in *Trump v. Hawaii*, the President's purported *intent* in issuing a prior policy that he has expressly revoked is not at issue, and the Court should instead analyze the official objectives of the current policy. *See* 138 S. Ct. 2392, 2420–23 (2018). In *Hawaii*, the Supreme Court assessed the challenged policy on its own terms and rejected the theory that prior statements forever "contaminated" the proclamation with "impermissible discriminatory animus." *Compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J., dissenting). While recognizing that it "may consider plaintiffs' extrinsic evidence," the Court stated that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420 (majority op.). In analyzing whether such a justification existed, the Court focused on the proclamation itself and the "multi-agency review" that supported it. *See id.* at 2417, 2421. The Court also noted that its review of the policy is both "deferential" and "highly constrained." *Id.* 138 S. Ct. at 2419–20; *see also id.* at 2424 (Kennedy, J., concurring) (stating that the court must ensure that "any discovery and other preliminary matters would not themselves intrude on

the foreign affairs power of the Executive"). That targeted inquiry was not influenced by the other executive orders preceding the proclamation, which the President had revoked, or past statements by the President about Muslims and terrorism. *See id.* at 2417–23 (majority op.).

In this case, Plaintiffs' theory is similar to the one adopted by Justice Sotomayor's dissent, arguing that the military's 2018 policy continues an alleged "ban" announced by the President on Twitter last year and is the product of animus. Second Am. Compl. ¶¶ 1, 37, 38, 74, 75, 79, 80, 83, 85, Dkt. 106. To bolster their theory, Plaintiffs seek testimony from Vice Admiral Kriete regarding the process the President undertook before issuing his statements on Twitter in July 2017 and the Presidential Memorandum in August 2017. But *Hawaii* instructs that the Court must assess DoD's 2018 policy on its own terms, not on the purported intent behind the policy, including as to an expressly revoked policy.

Moreover, when the Court denied the parties' cross-motions for summary judgment, the Court determined that "genuine disputes of material fact remain" because "[t]he parties dispute the facts related to the process used by Defendants to prepare the current proposed policy on transgender military service."[10] Mem. Op. 9, Dkt. 160. The only discovery arguably relevant to this inquiry is the process used by the Department of Defense in creating its new policy.

2. The Information Plaintiffs Seek Is Privileged.

The topics on which Plaintiffs seek to question Vice Admiral Kriete implicate information that is at the heart of presidential decisionmaking and deliberations. For example, Plaintiffs indicate that they seek to question Vice Admiral Kriete about "the decision-making

[10] Defendants respectfully disagree with the Court's conclusion that military deference can only be applied once the Court determines that the military followed what the Court deems to be an adequate review process. *See* Mem. Op. 2, 11–15, Dkt. 160; *see also Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Hawaii*, 138 S. Ct. at 2420, 2420 n.5.

processes . . . at the NSC and White House," the "process" behind the President's "decision," and any communications Vice Admiral Kriete may have had with Department of Defense personnel "on this subject." Dkt. 145-1 (Migroom email to Chambers (June 14, 2018)). In short, they seek to question Vice Admiral Kriete, whose work on the National Security Council staff was done to advise the National Security Advisor, the President, and other senior White House officials, Ex. 1 (Kriete Decl. ¶ 7), about the decisionmaking process within the White House and of the President himself. This line of inquiry directly implicates the issues in Defendants' Motion for a Protective Order, filed concurrently with this motion, and in particular puts at issue information that is subject to the presidential communications privilege, as well as the deliberative process privilege. *See Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 320 F. Supp. 3d 162, 174 (D.D.C. 2018) (finding that a legal memorandum solicited "by the staff of a close national security adviser leading up to an important military decision" is protected by the presidential communications privilege). As set forth in Defendants' motion, seeking the same privileged information from another lower-ranking official would not resolve these concerns; instead, Plaintiffs should seek discovery that would not intrude upon presidential communications and deliberations. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 388–90 (2004). In these circumstances, proceeding with the deposition inevitably will lead to objections to the central line of questioning and to potential privilege litigation concerning presidential communications—an outcome that should not be necessary in this case.

* * *

Accordingly, Plaintiffs have failed to show that the Vice Admiral possesses relevant, non-privileged information, and thus have failed to establish the extraordinary circumstances necessary to take the deposition of such a high-ranking Government official.

CONCLUSION

For the foregoing reasons, Defendants' Motion for a Protective Order should be granted, and Plaintiffs should be precluded from deposing Vice Admiral Kriete.[11]

October 9, 2018

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ *Andrew E. Carmichael*
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

[11] In the event that the Vice Admiral is deposed, Defendants respectfully reserve the right to seek a protective order to limit the length of that deposition and for any other appropriate relief.

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018, I electronically filed the foregoing Motion for a Protective Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: October 9, 2018

/s/ *Andrew E. Carmichael*
ANDREW E. CARMICHAEL
Trial Attorney
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Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

JAMES MATTIS, in his official capacity as Secretary of Defense, *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

[PROPOSED] PROTECTIVE ORDER

Upon consideration of Defendants' Motion for a Protective Order, the opposition, and reply thereto, it is hereby ORDERED that the Motion is GRANTED and that Plaintiffs are precluded from deposing Vice Admiral David M. Kriete, Deputy Commander of U.S. Strategic Command.

Dated:

_____
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

Exhibit 1

Declaration of Vice Admiral David M. Kriete,

dated October 9, 2018

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, **Plaintiffs,** **v.** **JAMES MATTIS, in his official capacity as Secretary of Defense, *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

DECLARATION OF DAVID M. KRIETE

I, David M. Kriete, do hereby declare as follows:

1. I am a three-star Vice Admiral in the U.S. Navy, and I currently serve as the Deputy Commander of U.S. Strategic Command ("USSTRATCOM"). I have held this position since June 15, 2018. The President nominated me and the Senate confirmed me for this position.

2. U.S. Strategic Command is one of ten unified combatant commands under the Department of Defense. A unified combatant command is composed of forces from at least two Military Departments and has a broad and continuing mission. These commands are organized either on a geographic basis or on a global/functional basis.

3. U.S. Strategic Command is responsible for the global command and control of U.S. strategic forces to meet decisive national security objectives, providing a broad range of strategic capabilities and options for the President and Secretary of Defense. U.S. Strategic Command's primary mission is to deter strategic attack on the United States and its allies. If deterrence fails, USSTRATCOM is prepared to deliver a decisive response with a resilient, equipped, and combat-ready force. In addition to strategic deterrence, USSTRATCOM is

responsible for nuclear operations, space operations, joint electromagnetic spectrum operations, global strike, missile defense, and analysis and targeting. This includes combatant command of all U.S. nuclear forces, military space forces, missile defense forces, and global strike forces.

4. 162,000 men and women support the USSTRATCOM mission. The men and women of USSTRATCOM come from all four services—Army, Navy, Marines, Air Force—and include Guard and Reserve members, Department of Defense civilians and contractors, and are stationed across the globe.

5. The headquarters of USSTRATCOM is located at Offutt Air Force Base, Nebraska. Thousands of individuals working for USSTRATCOM, including myself, are stationed at the headquarters.

6. As the Deputy Commander of USSTRATCOM, I serve as the second in command to the Commander of USSTRATCOM. The operational chain of command runs from the President to the Secretary of Defense to the Commander of USSTRATCOM. The Commander of USSTRATCOM is a four-star general in the U.S. Air Force and is responsible for maintaining a combat-ready force prepared to deter conflict and deliver decisive capabilities from, in and through all domains wherever and whenever directed. This includes actively demonstrating nuclear, missile defense and other capabilities; engaging with military, government, allied, academic, non-governmental and commercial entities that contribute toward USSTRATCOM objectives; and preparing USSTRATCOM forces to deliver global capabilities when directed. USSTRATCOM is responsible for planning nuclear operations and, if directed, employing nuclear forces. When the Commander is unavailable, as Deputy Commander, I fulfill the duties of the Commander. The Commander of USSTRATCOM travels frequently in the performance of his duties, sometimes being away from Offutt Air Force Base as much as three

weeks out of the month. For example, the Commander has approximately eight trips scheduled between now and the end of the year. I also have my own travel schedule to represent USSTRATCOM at official events within the Department of Defense. Further, USSTRATCOM is preparing for a major annual exercise to be executed later this month. In addition to fulfilling the duties of the Commander when he is unavailable, I am primarily responsible for driving execution of the assigned mission and the Commander's priorities across the entirety of the command. I am frequently in contact with and provide advice to other high-ranking military officials, including senior officials and dignitaries from foreign countries. Additionally, I serve as USSTRATCOM's representative for several Department of Defense initiatives, such as Chairman of the Missile Defense Executive Board and USSTRATCOM representative to the Electronic Warfare Executive Committee. I am also responsible for the command's readiness to transition into the new $1.4 billion USSTRATCOM command and control headquarters facility. I am also involved in several efforts with respect to the organization of the command including fulfilling higher level guidance regarding a Space Force. While I have a relatively small direct staff, I am indirectly responsible for the work of the entire command.

7. Before becoming the Deputy Commander of USSTRATCOM, I served as Director, Strategic Capabilities Policy in the Defense Directorate of the National Security Council ("NSC"). In this capacity, I advised the National Security Advisor, the President and other senior officials. I held this position from July 6, 2016 to March 23, 2018. In this role, I was primarily responsible for advising the President and coordinating the views of executive departments and agencies on nuclear weapons-related issues. Additionally, I served as the Acting Senior Director for the Defense Directorate from January 2017 to March 2017, because an individual had not yet been selected to fill that role, and from July 2017 through August 2017

when the senior director was on leave. In this role, I supervised all directors in the Defense Directorate and their portfolios. As acting senior director, I reported directly to the National Security Advisor.

8. In my capacity as acting senior director for the Defense Directorate, I briefly supported senior officials on the topic of military service by transgender individuals from July to August 2017. I did not have any involvement with this issue either before I worked on the NSC staff or after I left the NSC staff.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 9 day of October 2018, Offutt Air Force Base, Nebraska.

VICE ADMIRAL DAVID M. KRIETE
Deputy Commander of U.S. Strategic Command

Exhibit 2

Excerpts from the deposition of Jennifer Hay,

dated May 11, 2018

UNITED STATES DISTRICT COURT
DISTRICT COURT OF COLUMBIA
Civil Action No. 17-cv-1597(CKK)

- x

JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JANE DOE 6, JANE DOE 7, JOHN DOE 1, JOHN DOE 2, REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER, in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA,

Defendants.

- x

DEPOSITION of JENNIFER K. HAY
May 11, 2018
Boston, Massachusetts

Reporter: Michael D. O'Connor, RMR, CRR, CRC

Friday, May 11, 2018

9:00 a.m.

DEPOSITION of JENNIFER HAY, held at Foley Hoag, LLP, 155 Seaport Lane, Boston, Massachusetts, pursuant to notice, before Michael D. O'Connor, Registered Merit Reporter, Certified Realtime Reporter, Certified Realtime Captioner, and Notary Public in and for the Commonwealth of Massachusetts.

APPEARANCES:

ATTORNEYS FOR PLAINTIFFS:
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, Massachusetts 02210
(617) 832-1000
BY: DANIEL McFADDEN, ESQ.
dmcfadden@foleyhoag.com

ATTORNEYS FOR PLAINTIFFS:
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(617) 526-6000
BY: ADAM M. CAMBIER, ESQ. - via speakerphone

APPEARANCES (Cont'd):

ATTORNEYS FOR DEFENDANTS:

U.S. DEPARTMENT OF JUSTICE
20 Massachusetts Avenue, N.W., Room 7111
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(202) 616-8267
BY: ASHLEY A. CHEUNG, ESQ.
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COURTNEY ENLOW, ESQ.
courtney.d.enlow@usdoj.gov

Also Present: Carolyn M. Wald, Esq.,
Latham & Watkins LLP

Q. Were you working for the at that time Under Secretary of Defense for Intelligence?

A. Not directly. I was working in one of the below offices.

Q. Who was the Under Secretary of Defense for Intelligence at that time?

A. At that time it was Mike Vickers.

Q. Is it correct you stayed in that position until July of 2014?

A. Yes.

Q. These positions that we've just discussed from June of 2002 up through July of 2014, were these all positions where you were employed by the Department of Defense?

A. Yes.

Q. And for these positions we've just discussed from June of 2002 to July of 2014, did you ever have any job responsibilities relating to transgender people?

A. No.

Q. So after you left the Office of the Under Secretary of Defense for Intelligence, where did you go next?

A. The Office of the Under Secretary

of Defense for Intelligence detailed me to the front office of the Deputy Secretary of Defense.

Q. What kind of work were you doing in that office?

A. I was a special assistance. So I had the Under Secretary of Defense for Intelligence in my portfolio. So any issues that were coming up to the Deputy Secretary of Defense went through me related to intelligence.

Also, personnel and readiness, chief information officer, the IG, and the deputy chief management office are all in my portfolio.

Q. How long did you stay at the front office you just referred to?

A. About a year and a half.

Q. Is it correct that you left in December of 2015?

A. Yes.

Q. And where did you go next?

A. I was detailed to the National Security Council staff.

Q. When did you begin working at the

National Security Council staff?

A. January of 2016.

Q. And how long did you stay at the National Security Council staff?

A. About a year and a half.

Q. Do you remember when was your last day at the National Security Council staff?

A. July 5, 2017.

Q. Do you know how you were selected to go to the staff of the National Security Council?

A. Yes.

Q. How was that?

A. The senior director at the time asked the people in the Department of Defense for recommendations. My name was on the list of recommendations. So I interviewed with him, as well as the team, and then through that process was selected.

Q. Having worked at the National Security Council staff for about a year and a half, are you generally familiar with the policies and procedures that were in place at the NSC during that time?

A. Yes.

general terms, what those ranks are?

A. Yes, mostly. So there is the special assistant to the President, which, like my boss at the NSC was a special assistant to the President. Then above that the national security advisor holds the rank of assistant to the President.

Those types of titles are given throughout the White House, and they denote their level of responsibility inside the White House.

Q. So I think I heard you say there's assistant to the President is one, special assistant is another. Is there anything else besides those two?

A. As far as I know, throughout the White House those are White House given titles or ranks as you described. There are various different titles. For example, my title was director. I did not have a White House provided title if that makes sense.

Q. That's fine. I think it's a good segue into my next question, which is, what was your title when you were at the NSC?

A. Director for defense policy and

strategy.

Q. Did you have that same title the whole time you were there?

A. Yes.

Q. And when you were director for defense policy and strategy at the NSC, who did you report to?

A. I reported to the senior director for defense policy and strategy.

Q. Was that the same person the whole time you were there?

A. No.

Q. Could you please tell me the different people who occupied the position of senior director for defense policy and strategy while you were at the NSC?

A. So from January of 2016 to January 20, 2017, I reported to Troy Thomas. Then there was the position of senior director was gapped, and then in March or April Ylber Bajraktari took over as senior director for defense policy and strategy, and I reported to him.

Q. I know this may be a challenge, but are you able to spell Mr. Bajraktari's

name?

A. Y-l-b-e-r, B-a-j-r-a-k-t-a-r-i.

Q. Was Mr. Bajraktari in that position until you left the NSC?

A. Yes.

Q. You mentioned that the position of senior director for defense policy and strategy was gapped for a period of time. Who was fulfilling that job function while it was gapped?

A. When we needed someone to fill the position, it was Rear Admiral David Kriete. K-r-i-e-t-e, is his last name. But he did not have the title of senior director.

Q. You said his name is Kriete?

A. K-r-i-e-t-e.

Q. Did he have a regular position within the Security Council staff?

A. Yes. He was also a director.

Q. What was he director of?

A. I believe his title was also director for defense policy and strategy. He focused on nuclear issues.

Q. If I heard you correctly, is it correct under the senior director for defense

policy and strategy, there's more than one director for defense policy and strategy?

A. Yes, you heard correct.

Q. How many directors of defense policy and strategy are there?

A. I don't think that information is public.

MS. CHEUNG: So I object. The question calls for information that is subject to the Presidential communications privilege, and I instruct the witness not to answer.

Q. Will you follow your attorney's instruction?

A. Yes.

Q. Apart from the number of directors of defense policy and strategy who work under the senior director for defense policy and strategy, are you able to tell me how responsibilities are divided between the different directors?

A. We each have our own portfolio.

Q. And what was your portfolio when you were a director of defense policy and strategy at the NSC?

A. I focused on defense intelligence issues, primarily airborne intelligence surveillance and reconnaissance, as well as readiness issues. Sometimes they are referred to as health of the force.

I also supported the cyber directorate and the Middle East directorate when it pertained to military operations.

Q. When you refer to readiness issues, does that refer to military personnel and readiness?

A. Correct.

Q. Did any of the other directors of defense policy and strategy have within their portfolio military personnel and readiness?

A. No.

Q. If I could direct your attention, please, to Exhibit 2, which is the LinkedIn profile. If you look at your entry for director of defense policy strategy, I think the second paragraph says, "Led the interagency process on personnel and readiness and ISR."

Did I read that correctly?

A. Yes.

Q. Is ISR intelligence surveillance

attorney's advice?

A. Yes.

Q. Who are the people at the National Security Council who temporarily took over parts of your portfolio when you left?

MS. CHEUNG: I'd like to withdraw my last objection and permit the witness to answer in general terms if you'd like to reask it.

MR. McFADDEN: Could we go off the record for one second?

(Off the record at 12:51 p.m. and reconvening at 12:52 p.m.)

Q. When you left the National Security Council, were portions of your portfolio responsibilities assigned temporarily to other people who were there?

A. Yes.

Q. And who were they?

A. So some of the routine tasks related to general officer nominations, were given to Joe Wawro, W-a-w-r-o. I also sponsored visits of the Department of Defense to the National Security Council, and those duties were given to Brian McCullough, as that

was also routine.

And then I'm aware that Dave Kriete worked on the transgender issue after I left.

Q. Correct me if I'm wrong, but is Dave Kriete a naval officer?

A. Yes. He's a rear admiral.

Q. Do you know if Rear Admiral Kriete is still at the National Security Council?

A. He is not.

Q. Do you know where he is now?

A. I do not.

Q. Are you aware of when Rear Admiral Kriete left the National Security Council?

A. Approximately.

Q. When was that?

A. A couple weeks ago.

Q. Do you know if Rear Admiral Kriete is still in the Navy?

A. Yes, he is.

Q. Do you know if anyone ultimately took over your full position at the NSC after you left?

A. Yes.

Q. And who was that?

Exhibit 3

Excerpt from email chain between Andrew Carmichael and Daniel McFadden, dated June 8, 2018

From:	McFadden, Daniel L
To:	Carmichael, Andrew E. (CIV)
Cc:	Enlow, Courtney D. (CIV); Laporte, Claire; Alan Schoenfeld; Norway, Robert M. (CIV); Miller, Matt; Cheung, Ashley (CIV)
Subject:	RE: Doe v. Trump
Date:	Friday, June 08, 2018 5:05:25 PM
Attachments:	FHBOSTON-#4844391-v1-Revised_Kriete_Depo_Notice.pdf

Drew,

Thank you for your email.

We respectfully disagree with your position regarding the deposition of Vice Admiral Kriete. The Court denied the Defendants' motion to stay discovery. *See* Apr. 18, 2018 Order (D.E. 114). In emails on May 24th and 25th, Defendants agreed in writing to proceed with Vice Admiral Kriete's deposition on June 27th. There has been no subsequent change in circumstances that would justify a change in position. Vice Admiral Kriete is uniquely situated with respect to the time period leading up to and immediately following the President's tweets concerning transgender military service on July 26, 2017. Among other things, Vice Admiral Kriete was the person at the National Security Council responsible for issues relating to transgender military policy from the time of Ms. Hay's departure on July 5, 2017, until at least the time of her replacement's arrival in August or September, 2017. We are not aware of any potential substitute witness, and you have not proposed any. Further, we disagree with your implicit suggestion that Ms. Hay's deposition was fruitless. To the contrary, she answered many of my questions, and we learned a great deal. We believe there are similarly legitimate, non-privileged lines of inquiry to be pursued with Vice Admiral Kriete. To the extent privilege may be asserted, we are entitled to use the deposition to test the scope and foundation of such assertion. You will recall that Defendants withdrew or narrowed multiple assertions of privilege even during the course of Ms. Hay's deposition. Accordingly, you will find attached a notice of Vice Admiral Kriete's deposition for the agreed date and location. If you wish to move for a protective order, I believe you have satisfied your obligation to meet and confer with us.

I do recognize that Vice Admiral Kriete is a senior military officer. We have no desire to take any more of his time than is necessary to complete the deposition. In light of the deposition of Ms. Hay, I believe the parties could craft stipulations that would streamline the process. For example, we could stipulate that an objection with instruction not to answer constitutes an invocation of the presidential communications privilege unless otherwise specified (which would avoid the detailed objections that consumed a fair amount of time in the Hay deposition), and we could also perhaps stipulate that the witness intends to follow his counsel's instruction not to answer unless he volunteers otherwise (eliminating the need for the follow-up question after the assertion of privilege). We would be happy to discuss any further ideas you might have to move the deposition along more quickly. For example, if you told us in advance the precise dates during which Vice Admiral Kriete was responsible for, or worked on, the issue of transgender military service at the National Security Council, we could perhaps tailor our inquires.

As to the privilege logs, I appreciate the update. Please confirm that all logs will be produced no later than June 18, 2018.

Lastly, as to Ms. Raymond, I am not sure yet whether we will depose her or not. Given your statement that you have not communicated with her, it appears to us that she cannot have formed an attorney-client relationship with anyone at DOJ. Please provide authority if you assert otherwise. Our present understanding is that she is unrepresented with respect to this case, and that she is not

th

a current government employee. As I noted in my email of June 6 , we will operate under that understanding unless you inform us to the contrary by close of business on Monday, June 11th.
Regards,
Dan McFadden

Daniel McFadden | Associate

FOLEY HOAG LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2600

617 832 1293 phone
617 832 7000 fax

www.foleyhoag.com

From: Carmichael, Andrew E. (CIV)
Sent: Friday, June 8, 2018 11:11 AM
To: McFadden, Daniel L
Cc: Enlow, Courtney D. (CIV) ; Laporte, Claire ; Alan Schoenfeld ; Norway, Robert M. (CIV) ; Miller, Matt ; Cheung, Ashley (CIV)
Subject: RE: Doe v. Trump

Dan,

As we previously discussed, Rear Admiral Dave Kriete is available on June 27 for a deposition in Omaha, Nebraska and we can provide a conference room for that deposition at StratCom HQ on Offutt Air Force Base. However, after speaking with RADM Kriete, we do not believe that this deposition should proceed for several reasons. First, RADM Kriete will not be able to provide any relevant non-privileged information. Since the Court has not yet ruled on our pending motion for a protective order for discovery related to presidential deliberations and communications, Dkt. 89, if this deposition were to go forward, we would object to any questions about the details of RADM Kriete's work on the National Security Council staff that would call for information subject to the presidential communications privilege, and we would instruct the witness not to answer. As was the case with the deposition of Jennifer Hay, this would result in RADM Kriete not being able to answer the majority of your questions. As set forth in our motion for a protective order, Plaintiffs should first, at a minimum, exhaust non-privileged alternatives of discovery. Second, RADM Kriete is in the process of entering a high-ranking position at U.S. Strategic Command, where he will have significant military operational responsibilities related to nuclear weapons. "[I]n the D.C. Circuit, there is a presumption against deposing high-ranking government officials." *Kelley v. FBI*, No. CV 13-0825 (ABJ), 2015 WL 13648073, at *1 (D.D.C. July 16, 2015). We believe that it would be inappropriate for RADM Kriete to have to take time away from his military responsibilities for a deposition in which he cannot answer the majority of the questions. Third, this deposition may not be necessary at all if the Court decides this case based on our cross motions for summary judgment, Dkt. 115, 131.

For these reasons, we ask that Plaintiffs agree to defer the deposition of RADM Kriete until after the Court rules on pending motions that will directly affect whether discovery related to

presidential deliberations and communications may proceed, including dispositive cross-motions for summary judgment, Dkt. 115, 131, and Defendants' motion for a protective order for discovery related to presidential deliberations and communications, Dkt. 89. We believe that it would be in the interest of both parties to avoid devoting time and resources to traveling to Omaha for a deposition at this time.

Please let us know if you agree with this approach. If not, we intend to seek relief from the Court on this issue.

As to your other questions we were a bit delayed on the privilege logs by the briefings that we filed on Wednesday but we have turned back to them in earnest. We expect to have another one out to you today and more to come next week.

We have not yet had the opportunity to speak with **Lacey Raymond. But we represent former government officials in their official capacity to the extent the deposition pertains to government information. Are you seeking to depose her to seek information she learned as a government employee? If so we would represent her.**

Best regards,

Drew
Drew Carmichael
Trial Attorney
Federal Programs Branch, Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, NW, Rm. 7218
Washington, D.C. 20530
(202) 514-3346

Remaining Portion of Email Chain Omitted