

**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 the Department of Defense, *et*  
*al.*,**

**Defendants.**

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

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**

For the reasons set forth in the attached Memorandum of Points and Authorities, Defendants move pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure for a protective order to: (1) preclude Plaintiffs from seeking discovery of documents and information subject to the presidential communications privilege, and (2) preclude Plaintiffs from seeking further deposition testimony from Jennifer Hay.

Defendants file this motion pursuant to the Court's minute order of September 10, 2018, which required the parties "to file opening motions addressing outstanding issues identified during the meet and confer process by OCTOBER 9, 2018." Pursuant to Federal Rule of Civil Procedure 26(c) and Local Rule 7, and as set forth in the parties' Joint Status Report filed September 21, 2018, the Defendants' counsel has met and conferred with Plaintiffs' counsel and has identified the subject matter of this motion as an outstanding discovery issue. Dkt. 167. In addition to their Memorandum of Points and Authorities, Defendants have filed a proposed order with this motion.

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  
Telephone: (202) 514-3346  
Email: andrew.e.carmichael@usdoj.gov

*Counsel for Defendants*

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**MEMORANDUM IN SUPPORT OF**  
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## INTRODUCTION

Although the President is no longer a party to this case, Plaintiffs have not relented in seeking to probe his communications and decisionmaking regarding his Article II functions as Commander-In-Chief. Plaintiffs continue to maintain dozens of discovery requests directed to the remaining Defendants that collectively attempt to reveal what advice they gave the President, when they gave it, who delivered it, and by what means. Nor have Plaintiffs changed course in seeking to re-open the deposition of former National Security Council staff member Jennifer Hay, in an effort to probe her knowledge of the decisionmaking process within the Executive Office of the President and of the President himself. Plaintiffs thus continue to seek detailed information concerning how the President deliberated and was advised on a matter of military personnel policy.

This attempted discovery runs contrary to established separation-of-powers principles and warrants a protective order. It pits co-equal branches against each other, and risks premature conflicts over the invocation of the presidential communications privilege. The Supreme Court's decision in *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 388 (2004), counsels that before Plaintiffs can seek the instant discovery of the President's communications and deliberations, they must first exhaust alternative sources of non-privileged discovery, substantially narrow their sweeping requests, and meet their heavy, initial burden of establishing a heightened, particularized need for the specific information or documents sought. At a minimum, Plaintiffs should not be permitted to seek any discovery of presidential materials pending consideration of Defendants' expedited interlocutory appeal of this Court's denial of Defendants' motion to dissolve the preliminary injunction, *see Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.), which could eliminate the need for any discovery or any discovery of presidential communications.

For these reasons, set forth further below, the Court should grant Defendants' motion for a protective order and preclude discovery of presidential communications and deliberations, including any re-opening of the deposition of Jennifer Hay.

### **BACKGROUND**

In October 2017, this court entered a preliminary injunction against the enforcement of an August 2017 presidential memorandum related to military service by transgender individuals. *See* Order, Dkt. 60; 2017 Presidential Memorandum, Dkt. 13-2, Exh. A. In February 2018, the Secretary of Defense sent to the President a memorandum proposing a new policy on that issue, along with a 44-page report explaining the bases for the policy. *See* Mem. from Secretary of Defense James Mattis (Feb. 22, 2018), Dkt. 96-1; DoD Report and Recommendations, Dkt. 96-2. On March 23, 2018, the President "revoke[d]" his 2017 Memorandum and the Defense Department released its new policy. 2018 Presidential Memorandum, Dkt. 95-1.

Prior to the release of the new policy, Plaintiffs served numerous broad requests for discovery to probe the communications and deliberations of the President and other Defendants.<sup>1</sup> Those discovery requests—25 interrogatories, 25 document requests, and 12 requests for admission—purported to require the President and other Defendants to catalogue and disclose the totality of the President's deliberations concerning his formation of policy concerning military service by transgender individuals. Plaintiffs sought to discover who had advised the President, when they had done so, how they done so, and what advice they had communicated to the

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<sup>1</sup> The other Defendants are the United States of America, the Department of Homeland Security, the Department of the Army, the Department of the Air Force, the Department of the Navy, the Coast Guard, the Defense Health Agency, the Secretary of Defense, the Secretary of Homeland Security, the Chairman of the Joint Chiefs of Staff, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, and the Director of the Defense Health Agency.

President. *See* Pls.' First Set of Interrogs., Dkt. 89-1; Pls.' First Set of Reqs. for Adm., Dkt. 89-2; Pls.' First Set of Reqs. For Prod., Dkt. 89-3.

Plaintiffs sought this information in multiple ways. First, they targeted the President himself by directly requesting that he produce documents, answer interrogatories, and make admissions related to his deliberations. Second, Plaintiffs targeted the other Defendants and their own interactions with, and advising of, the President. For example, Plaintiffs broadly demanded that the individual Defendants (including the Secretary of Defense and the Chairman of the Joint Chiefs of Staff) produce all communications they had with the President regarding military service of transgender persons. Req. for Prod. 7, Dkt. 89-3. Likewise, Plaintiffs requested that each Defendant identify all "assessments, reports, evaluations, studies, or other research concerning military service by transgender people" that they sent to the President, as well as identify who sent them and when. Interrog. 14, Dkt. 89-1. Still more, Plaintiffs requested a catalogue of every meeting attended by any representative of the Executive Office of the President, the Department of Defense, a Service Branch, or the Defense Health Agency where the issue of military service by transgender individuals was discussed, including identification of the date of the meeting, its participants, the topics discussed, any documents considered at the meeting, and any meeting minutes. Interrog. 21, Dkt. 89-1.

Defendants objected to many of Plaintiffs' requests, including on the ground that some of the discovery was subject to the presidential communications privilege. *See, e.g.*, Defs.' Objs. and Resps. To Pls.' First Set of Interrogs. to Sec'y Mattis, Dkt. 89-6. The Court subsequently conducted two telephonic hearings to address the parties' discovery disputes. *See* Transcript, Dkt. 89-9; Transcript, Dkt. 89-10. Following the hearings, Defendants moved for a protective order, seeking to preclude discovery of the President and of presidential communications and

deliberations. *See* Defs.’ Mot. for a Protective Order, Dkt. 89; *see also* Reply in Supp. of Mot. for a Protective Order 7–8, Dkt. 93.

Thereafter, Plaintiffs took several depositions of current or former Government officials. Most pertinent here, despite the absence of any ruling on Defendants’ pending motion for a protective order and despite Defendants’ offer to postpone the deposition until after the Court resolved that motion, Plaintiffs conducted a deposition in Boston, Massachusetts of former National Security Council staff member Jennifer Hay. During Ms. Hay’s deposition, Defendants’ counsel permitted Ms. Hay to testify about the general topics of her work on the National Security Council staff and about other non-privileged topics, including her prior work at the Department of Defense. However, Plaintiffs’ counsel repeatedly questioned Ms. Hay about her role in advising the President and the National Security Advisor and about the decisionmaking process within the White House. Counsel for Defendants properly objected to these questions as calling for information subject to the presidential communications privilege and instructed Ms. Hay not to answer.

Shortly after Ms. Hay’s deposition, the parties filed multiple dispositive motions, including cross-motions for summary judgment, and the Court stated that it would defer ruling on further discovery disputes until after the dispositive motions had been resolved. Order, Dkt. 145; *see* Defs.’ Mot. to Dissolve the Prelim. Injunc., Dkt. 116, Defs.’ Mot. to Dismiss Pls.’ Second Am. Compl., or, in the Alternative, Defs.’ Mot. for Summ. J., Dkt. 115; Pls.’ Cross Mot. For Summ. J., Dkt. 131.

With discovery paused, the Court then issued a series of rulings that impacted the scope of this case. First, the Court granted a motion by Defendants to dismiss the President as a party and to dissolve the preliminary injunction to the extent it ran against him. Order, Dkt. 154. With the President out of the case, the Court also denied as moot Defendants’ earlier-filed motion for a

protective order. *Id.* Second, the Court denied Defendants' motions to dismiss the complaint and to dissolve the preliminary injunction in its entirety, Order, Dkt. 156, and Defendants subsequently filed an expedited interlocutory appeal of the Court's denial of Defendant's motion to dissolve the preliminary injunction. *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.); *see* Order Granting Mot. to Expedite, *id.*, Dkt. 1750252. Third, the Court denied summary judgment to all parties and ordered that discovery could proceed. Order, Dkt. 159.

The Court then ordered the parties to "meet and confer and file a Joint Status Report" that "propose[d] a plan for moving forward toward a timely resolution of this case," including "a proposed protocol for the efficient resolution of the parties' outstanding discovery disputes." Minute Order (August 27, 2018). On September 10, 2018, the parties filed a joint status report indicating that "there remain numerous disputes between the parties regarding the need for and the scope and application of discovery including discovery of materials subject to the presidential communications privilege and the deliberative process privilege." Parties' Joint Status Report 1, Dkt. 165. The parties proposed that by September 17, 2018, they meet and confer to "identify outstanding issues for the Court's resolution," and that by October 9, 2018, they file "opening motions addressing the outstanding issues identified during the meet and confer process, including if necessary . . . Defendants' motion for a protective order concerning presidential communications and deliberations in the possession of Defendants." *Id.* at 2.

On September 10, 2018, the parties filed a second joint status report, indicating, among other things, that Defendants intended to "move for a protective order to preclude the disclosure of documents and information subject to the presidential communications privilege, including documents and information that are in the possession, custody, or control of the remaining Defendants." Parties' Joint Status Report 2, Dkt. 167. Defendants now bring such motion before the Court.

### **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, 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”).

### **SUMMARY OF THE ARGUMENT**

Despite the fact that the Court has dismissed the President from this case, *see* Mem. Op. 3–7, Dkt. 155, Plaintiffs continue to seek intrusive discovery concerning the President’s communications and deliberations on military policy in his role as Commander-in-Chief, discovery far beyond any discovery related to the President reasonably contemplated by the

Court's order.<sup>2</sup> And Plaintiffs seek that discovery even though the merits of this case are currently before the D.C. Circuit in an expedited interlocutory appeal. *See Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.). Given that the appeal has the potential to resolve or significantly narrow the issues in this case, Defendants' position is that any discovery is inappropriate while that appeal is pending. But even if discovery should proceed at this time as a general matter, separation-of-powers principles counsel that, at a minimum, discovery of the President's deliberations and communications should be stayed pending the outcome of that appeal.

In any event, as the Supreme Court has long made clear, separation-of-powers concerns counsel that Plaintiffs must exhaust other sources of non-privileged discovery and substantially narrow the scope of their discovery requests before the Office of the President should be forced to formally assert the presidential communications privilege. *See Cheney*, 542 U.S. at 388. Plaintiffs have not done so. And they have not done so even though it is clear under Supreme Court and D.C. Circuit precedent that the presidential communications privilege applies to at least some of the discovery Plaintiffs seek. That privilege applies not only to the substance of presidential communications and deliberations, but also to factual information about the President's decisionmaking process and confidential communications. Disclosure of such information would intrude on the President's decisionmaking process, disrupt the President's performance of his constitutional responsibilities, and undermine the confidentiality needed "to ensure that presidential decisionmaking is of the highest caliber." *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997).

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<sup>2</sup> *See* Mem. Op. 6, Dkt. 155 ("To the extent that there exists relevant and appropriate discovery related to the President, Plaintiffs will still be able to obtain that discovery despite the President not being a party to the case."); *id.* at 8 ("[T]he Court reiterates that dismissing the President as a party to this case does not mean that Plaintiffs are prevented from pursuing discovery related to the President.").

Moreover, even if Plaintiffs had exhausted other sources of non-privileged discovery and narrowed their requests, Plaintiffs still could not meet their burden under *Cheney* of demonstrating a heightened need for the information sought. 542 U.S. at 383, 388; *see also Dairyland Power Coop. v. United States*, 79 Fed. Cl. 659, 660 (2007). As the Supreme Court explained in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must focus on the stated justifications for the policy—which are set forth in the Memorandum issued by the Secretary of Defense on February 22, 2018 and its accompanying report—not on underlying presidential communications or deliberations, particularly as to prior policy statements.

Finally, Plaintiffs’ attempt to re-open the deposition of Jennifer Hay, whose work on the National Security Council staff was done to advise the National Security Advisor and the President, implicates the same separation-of-powers concerns as their other efforts to probe the decisionmaking process of the President.

For all of these reasons, the Court should grant Defendants’ motion for a protective order.

### **ARGUMENT**

#### **I. In Light Of Core Separation-Of-Powers Principles, This Court Should Preclude Discovery That Seeks To Probe Presidential Communications And Deliberations.**

As described above, Plaintiffs seek to examine the President’s deliberations and confidential communications regarding military policy through the remaining Defendants and through former officials. Plaintiffs have not modified or limited their discovery requests since this Court dismissed the President from the case,<sup>3</sup> even though those requests seek documents and information concerning presidential deliberations and communications.

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<sup>3</sup> As a nonparty, the President has no obligation to provide responses to Plaintiffs’ interrogatories and requests for admission, or to Plaintiffs’ document production requests served pursuant to Rule 34. *See* Fed. R. Civ. P. 33–34, 36.

Discovery into the President’s communications and deliberations on military policy—even when conducted through federal agencies or former officials—implicates fundamental separation-of-powers concerns. These concerns counsel that Plaintiffs must exhaust alternative sources of non-privileged discovery before the Office of the President should be required to formally assert the presidential communications privilege to protect the President’s deliberative process. At a minimum, such discovery into the President’s confidential deliberations should be stayed pending Defendants’ expedited interlocutory appeal before the D.C. Circuit.

**A. Civil Discovery Directed At The President’s Communications And Deliberations Must Be Strictly Circumscribed To Comply With The Separation Of Powers.**

Unlike other government officials, the President maintains unique “constitutional responsibilities and status.” *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). The President is “the chief constitutional officer of the Executive Branch,” and is “entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity.” *Id.* at 750. What is more, the President’s “communications and activities encompass a vastly wider range of sensitive material than would be true of any ‘ordinary individual.’” *Cheney*, 542 U.S. at 381 (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)).

Thus, “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Am. Historical Ass’n v. Nat’l Archives & Records Admin.*, 402 F. Supp. 2d 171, 182 (D.D.C. 2005) (Kollar-Kotelly, J.) (quoting *Cheney*, 542 U.S. at 385). Indeed, the Supreme Court “has held, on more than one occasion, that ‘[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)); *see also Fitzgerald*, 457 U.S. at 753 (“Courts traditionally have

recognized the President’s constitutional responsibilities and status as factors counseling judicial deference and restraint.”).

Discovery directed at the President’s deliberations and communications implicates these weighty separation-of-powers concerns. *Cheney*, 542 U.S. at 383. The Executive has a powerful interest in protecting confidential information, as well as in shielding itself from litigation demands “that might distract it from the energetic performance of its constitutional duties.” *Id.* at 382. Discovery targeting presidential decisionmaking threatens these interests, with the potential to upset the balance between the Judicial and Executive branches. *Id.*

In *Cheney*, the Supreme Court addressed how lower courts should handle civil discovery requests directed at the deliberations of the President or the Vice-President, given these separation-of-powers concerns. The Court held that when faced with such requests, lower courts should not force the Executive to respond by invoking privilege. The Court explained:

Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive’s claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These ‘occasion[s] for constitutional confrontation between the two branches’ should be avoided whenever possible.

*Id.* at 389–90 (quoting *Nixon*, 418 U.S. at 692). To prevent such clashes, the Court held that before the Executive is forced to “bear the burden” of formally asserting executive privilege, lower courts must consider whether “other avenues” exist for disposing of discovery demands. *Cheney*, 542 U.S. at 388, 390; *see also id.* at 391 (rejecting the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections”).

*Cheney* thus compels lower courts to circumscribe discovery requests targeting presidential communications or deliberations. Such requests should be allowed only when plaintiffs can show that they are absolutely necessary to their case by first exhausting alternative sources of non-privileged discovery, and that the requests are limited in scope to those necessary parts. *See Lardner v. U.S. Dep't of Justice*, No. 03-0180, 2005 WL758267, at \*9 (D.D.C. Mar. 31, 2005) (citing *Cheney* for the proposition that “a court must screen a request for presidential documents to ensure that the discovery is essential to the proceedings”).

**B. The Discovery Plaintiffs Seek Of The President’s Deliberations From The Remaining Defendants And Former Officials Implicates The Separation-Of-Powers Concerns Set Forth In *Cheney*.**

The separation-of-powers principles outlined in *Cheney* apply with equal force to the discovery Plaintiffs seek here. As explained above, Plaintiffs seek discovery of the remaining Defendants and a former National Security Council staff member to obtain details regarding the President’s deliberations concerning military policy. Plaintiffs seek to learn who spoke with the President or his advisors on the topic, when they did so, what they said, and what documents they passed along.

If permitted to proceed, such discovery will unavoidably set the Executive and Judicial Branches “on a collision course” through premature adjudications of privilege. *Cheney*, 542 U.S. at 389. When an agency or current or former government official possesses documents or information reflecting the President’s confidential deliberations, it is still the President’s decisionmaking process that is being probed. Courts are still thrust into “the awkward position of evaluating the Executive’s claims of confidentiality and autonomy,” and “difficult questions of separation of powers and checks and balances” are still pushed to the fore. *Cheney*, 542 U.S. at 389. Thus, *Cheney*’s admonition that there is “no support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege” before absolutely necessary

unquestionably applies to the materials Plaintiffs seek here. *Id.* at 388 (citation omitted). If that were not the case, and litigants could simply evade *Cheney*'s protections by seeking presidential communications from the individuals with whom the President communicated, the principles of *Cheney* would soon lose all practical force.

**C. The Court Should Preclude Plaintiffs From Seeking The Instant Discovery.**

In light of *Cheney*'s plain application to the discovery at issue and its threshold requirement that district courts "explore other avenues" and consider "the choices available" before forcing the Office of the President to invoke privilege, this Court should enter an order precluding Plaintiffs from seeking discovery of the President's communications and deliberations, at least at this time *Id.* at 390.

To be clear, Defendants are not contending that Plaintiffs can *never* seek the instant discovery. Rather, Defendants contend that Plaintiffs must exhaust alternative sources of non-privileged discovery and narrow their requests *first*. Only then can this Court determine Plaintiffs' remaining "need for information" based on appropriately narrow discovery requests, and balance that need against the "burden imposed by the discovery orders." *Cheney*, 542 U.S. at 385; *see id.* at 390 (acknowledging "sound precedent in the District of Columbia itself for district courts to explore other avenues," including "to narrow, on [their] own, the scope of the" requests); *see also infra* Part II (addressing why Plaintiffs have not demonstrated sufficient need).

Significantly, Plaintiffs have not demonstrated that the enormous amount of non-privileged discovery available to them is inadequate to make out their claims. Indeed, Defendants have substantively responded to Plaintiffs' discovery requests, including by collecting and reviewing hundreds of thousands of pages of records and producing to Plaintiffs tens of thousands of non-privileged, responsive documents; by responding to interrogatories that call for non-privileged information; and by making available for deposition numerous civilian and military officials who

possess non-privileged information. Only upon exhausting these alternative sources of non-privileged discovery should the Court consider whether Plaintiffs have demonstrated any compelling need to target the President's communications and deliberations. *See Wagafe v. Trump*, No. C17-94 RAJ, 2017 WL 5990134, at \*3 (W.D. Wash. Oct. 19, 2017) (rejecting request for discovery of presidential materials and instead ordering the parties to meet and confer "to discuss alternative . . . sources of information for any discovery over which the Government asserts [Executive] privilege."). *Cheney* also requires Plaintiffs or this Court to first substantially narrow the scope of Plaintiffs' requests, which sweep broadly in their attempts to reconstruct the President's decisionmaking process. 542 U.S. at 390 (citing approvingly to a district court's decision "to narrow, on its own, the scope of [] subpoenas to allow the Executive to consider whether to invoke executive privilege with respect to . . . a possibly smaller number of documents" (citation omitted)); *Citizens for Responsibility & Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 180 (D.D.C. 2008) (Kollar-Kotelly, J.) (describing *Cheney* as "specifically distinguish[ing]" between broad discovery and "more narrow discovery requests that would safeguard against unnecessary intrusion into the operation of the Office of the President" (citation omitted)).

In any event, if this Court does not preclude outright Plaintiffs' requested discovery of presidential deliberations, then at a minimum it should stay such discovery pending the D.C. Circuit's resolution of Defendants' interlocutory appeal, which is proceeding on an expedited schedule on Defendants' request. *See Order Granting Mot. to Expedite, Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.), Dkt. 1750252. At issue in that appeal are fundamental questions about the merits of Plaintiffs' constitutional claims, including whether the President's actions and deliberations during the summer of 2017 bear any relevance to those claims. *See Defs.' Opening Br. 37-46, Doe 2 v. Trump*, No. 18-5257 (D.C. Cir. Sept. 21, 2018), Dkt. 1752076. Resolution of the appeal could substantially narrow the appropriate scope of discovery in the district court, if not eliminate

the need for discovery entirely. In these circumstances, discovery of the President's communications and decisionmaking process should be stayed until there is no possibility that such discovery could be rendered unnecessary. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested materials); *United States v. McGraw-Hill Cos., Inc.*, No. 13-779, 2014 WL 1647385, at \*13 (C.D. Cal. Apr. 15, 2014) (holding discovery motion in abeyance to the extent it targeted materials subject to the presidential communications privilege and in the meantime requiring only discovery of documents not covered by that privilege).

**II. The Office Of The President Should Not Be Required To Formally Invoke Privilege Until The Court Rules That Plaintiffs Have Met Their Initial, Heavy Burden.**

The foregoing threshold considerations should foreclose Plaintiffs' requested discovery into the President's communications and deliberations over military policy. But, even if Plaintiffs could overcome *Cheney's* threshold requirements, Plaintiffs would still not have met their heavy, initial burden of establishing a heightened, particularized need for the specific information sought before the Office of the President is required to formally invoke the privilege. *See Dairyland Power Co-op*, 79 Fed. Cl. at 660.

**A. The Presidential Communications Privilege Encompasses The Documents And Information Sought By Plaintiffs.**

The presidential communications privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708; *see In re Sealed Case*, 121 F.3d at 743 (describing the privilege's "constitutional origins"). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Nixon*, 418 U.S. at 708. By protecting such communications from disclosure, the

privilege advances “the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.” *Id.* The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities,” *Id.* at 711, as well as “documents or other materials that reflect presidential decisionmaking and deliberations,” *In re Sealed Case*, 121 F.3d at 744. The privilege also extends to communications authored or solicited and received by immediate White House advisors in the Executive Office of the President and their staff. *See id.* at 754. And the privilege “covers final and post-decisional materials as well as pre-deliberative ones.” *Id.* at 745.

The privilege applies to documents and information that reflect presidential decisionmaking and deliberations, regardless of whether the documents and information are in the possession, custody, and control of the President, his advisors and their staff, or other officials at the Department of Defense and in the Armed Forces.<sup>4</sup> If all that were necessary to avoid the presidential communications privilege were for a party to seek discovery of presidential communications and information from the President’s advisors and their staff or from a federal agency, the privilege would be rendered a nullity. Accordingly, many of Plaintiffs’ discovery requests implicate the presidential communications privilege, even though the discovery requests are directed to the Department and the Armed Forces.<sup>5</sup>

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<sup>4</sup> Indeed, in the FOIA context, where much of the case law on the presidential communications privilege has been developed, the records at issue are never in the possession of the President or his immediate advisors because neither the Office of the President nor the National Security Council is an “agency” subject to the FOIA. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Armstrong v. Executive Office of the President*, 90 F.3d 553, 565 (D.C. Cir. 1996); *see, e.g. Judicial Watch, Inc. v. DoD*, 245 F. Supp. 3d 19, 29 (D.D.C. 2017) (pursuant to Exemption Five of the FOIA, presidential communications privilege protects materials from FOIA request directed to federal agency); *Loving*, 550 F.3d at 39 (same); *Amnesty Int’l USA v. C.I.A.*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (same).

<sup>5</sup> For example, Request for Production No. 6 seeks “All documents concerning military service by transgender people provided to President Trump before July 26, 2017.” Req. for Prod.,

**B. The Presidential Communications Privilege Applies To Factual Information About Communications That Would Reveal Presidential Deliberations.**

The presidential communications privilege applies to “documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential.” *In re Sealed Case*, 121 F.3d at 744. In addition to the substance of deliberations and communications, the presidential communications privilege protects “purely factual material,” *id.* at 750, and whether particular “sources of information” were considered by the President and his immediate advisors. *See Id.* at 745, 750; *Loving v. Dep’t of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008) (contrasting the deliberative process privilege). Such information plainly “reflect[s] presidential decisionmaking and deliberations,” and disclosure of this information would intrude on presidential deliberations and impede the President’s ability to perform his constitutional duty. *See In re Sealed Case*, 121 F.3d at 744, 751. Discovery about the nature and scope of the President’s decisionmaking process—including the identities of the particular advisors from whom the President sought advice on particular subjects, or the timing or sequence of those deliberations—would reveal the President’s deliberative process in the performance of his constitutional responsibilities. Disclosure of such information plainly would intrude upon the confidentiality needed “to ensure that presidential decisionmaking is of the highest caliber.” *In re Sealed Case*, 121 F.3d at 750; *see Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (“The ability to discuss matters confidentially is surely an important condition to the exercise of executive power. . . . In designing the Constitution, the Framers vested

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Dkt. 89-3. Request for Production No. 17 seeks “All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the “judgment” that “the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” Req. for Prod., Dkt. 89-3.

the executive power in one man for the very reason that he might maintain secrecy in executive operations.”).

**C. Plaintiffs Have Not Met Their Initial Burden To Demonstrate Heightened Need For The Privileged Information, And Thus the Burden Has Not Shifted To The Office Of The President To Formally Invoke The Presidential Communications Privilege Through An Affidavit.**

In light of separation-of-powers considerations discussed above, the Supreme Court in *Cheney* expressly rejected the notion that the Executive Branch at its highest level shall bear the initial burden of invoking executive privilege with specificity or making particular objections to discovery on a line-by-line basis to safeguard executive functions and maintain the separation of powers. 542 U.S. at 383, 388; *see also id.* at 389 (“Executive privilege is an extraordinary assertion of power ‘not to be lightly invoked.’” (citation omitted)). The Court noted that even in a criminal case, a court must find a specific “need” for information that implicates presidential deliberations before it undertakes to balance the competing needs of the Executive Branch. *Id.* at 388. Specifically, the Court explained that the criminal subpoenas at issue in *United States v. Nixon* “were [first] required to satisfy exacting standards of ‘(1) relevancy; (2) admissibility; [and] (3) specificity.’” *Id.* at 386 (quoting *Nixon*, 418 U.S. at 700). This process served “as an important safeguard against unnecessary intrusion into the operation of the Office of the President,” *id.* at 387, and was the means by which “the party requesting the information—the special prosecutor [in *Nixon*, 418 U.S. at 683]—had satisfied his burden of showing the propriety of the [subpoena] requests.” *Id.* at 388.

In this case, where Plaintiffs are seeking civil discovery from the Executive Branch at its highest level, Plaintiffs’ initial burden is even greater. As noted by the Supreme Court in *Cheney*, “[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*.” *Id.* at 384. Because it is a

“primary constitutional duty of the Judicial Branch . . . to do justice in criminal prosecutions,” the withholding of information “from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks ‘conflict[s] with the function of the courts under Art[icle] III.’” *Id.* (citations omitted). “Such an impairment of the ‘essential functions of [another] branch’ . . . is impermissible.” *Id.* (citation omitted). In contrast, the withholding of information in a civil case “does not hamper another branch’s ability to perform its ‘essential functions’ in quite the same way.” *Id.*

Plaintiffs have not attempted to satisfy the “exacting standards” of “relevancy,” “admissibility,” and “specificity,” pursuant to the Supreme Court’s analysis of this issue in *Cheney*. *See* 542 U.S. at 386. In the first place, as noted, the President is no longer a Defendant in this case and the August 2017 Presidential Memorandum concerning military service by transgender individuals was revoked in March 2018 when the Department of Defense issued the current policy. *See* 2018 Presidential Memorandum, Dkt. 95-1; Mem. from Secretary of Defense James Mattis (Feb. 22, 2018), Dkt. 96-1; DoD Report and Recommendations, Dkt. 96-2. Discovery into the President’s communications and deliberations therefore has no relevance on its face. Moreover, under the *Hawaii* decision, when the Government acts in the areas of national security, military or foreign affairs, its prior statements and deliberations are irrelevant so long as the Government’s action, reviewed solely on its face, “can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* at 2420. Thus, in reviewing the Department’s new policy, this Court must consider the Department’s 44-page report that sets out the military justifications supporting its policy and determine whether or not those justifications are rationally related to the policy itself. *See* DoD Report and Recommendations, Dkt. 96-2. That standard is easily met by the Department’s thorough report, which explains in detail the concerns about military lethality and readiness that shaped its recommendation. *See id.* Properly applied,

*Hawaii* thus provides that discovery into presidential communications and deliberations is neither necessary nor appropriate in this case.

*Hawaii* illustrates the type of review appropriate here. There, the Supreme Court rejected an Establishment Clause challenge to a presidential proclamation concerning the entry to the United States of certain foreign nationals. 138 S. Ct. at 2403. In doing so, the Supreme Court applied a form of “rational basis review,” stressing that judicial “inquiry into matters of . . . national security is highly constrained.” *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)); *see also id.* at 2420 n.5 (underscoring that deferential review applies to “military actions”). The Court explained that this deferential review may apply “across different contexts and constitutional claims,” even when evaluating a “‘categorical’ [] classification that discriminate[s] on the basis of sex.” *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)). The central consideration for this deferential form of review is whether the policy at issue is “plausibly related to the Government’s stated objective.” *Id.* at 2420 (citation omitted). Indeed, 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.* Although the Court stated that it could “consider plaintiffs’ extrinsic evidence” of previously revoked executive orders and past statements by the President about Muslims, *id.*, it rejected the theory that past statements could forever “contaminate[]” the proclamation with “impermissible discriminatory animus,” *compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J., dissenting). Instead, in analyzing whether a sufficient justification for the policy existed, the Court focused on the proclamation itself and the “multi-agency review” that supported it. *See id.* at 2417, 2421 (majority op.).

Applied to the case at hand, *Hawaii* instructs that this Court must assess the Department’s 2018 policy on its own terms, rather than scrutinize presidential communication and deliberations. Because the Court’s review of the policy is both “deferential” and “highly constrained,” *id.* at

2419–20, any discovery in this case should be significantly curtailed, and, in particular, any discovery concerning presidential communications and deliberations about military policy should be precluded. In light of that deferential form of review, Plaintiffs have not demonstrated a heightened showing of need for information about the President’s deliberations and communications and thus cannot shift the burden to the Office of the President to formally invoke the privilege.<sup>6</sup>

Moreover, in considering potential discovery of presidential communication and deliberations, “[a] party’s need for information is only one facet of the problem.” *Cheney*, 542 U.S. at 385. The burden imposed on the White House by discovery orders is an “important factor” to be considered by the courts owing to the special deference and “[t]he high respect that is owed to the office of the Chief Executive.” *Id.* Preparing and executing an affidavit formally invoking the presidential communications privilege with specificity is a burdensome, time-consuming process that would detract from the many constitutional responsibilities of the President and his staff. Further, in contrast to the criminal justice system, where “there are various constraints, albeit imperfect, to filter out insubstantial legal claims, . . . there are no analogous checks in the civil discovery process.” *Id.* at 386. Because of these considerations, the Court must hold Plaintiffs to

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<sup>6</sup> This Court previously concluded 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. Respectfully, *Rostker v. Goldberg*, 453 U.S. 57 (1981), *Goldman v. Weinberger*, 475 U.S. 503 (1986), and *Hawaii*, 138 S. Ct. at 2392, do not support that proposition. In *Rostker*, the Supreme Court specifically stated that it applied a lower standard of review because “[t]he case ar[ose] in the context of Congress’ authority over national defense and military affairs,” and found that deference to such judgments was “unquestionably due.” 453 U.S. at 64–65. Likewise, the Supreme Court in *Goldman* applied deference based on the “military context” of the case, not based on any review of the sufficiency of the decisionmaking process. 475 U.S. at 507. And in *Hawaii*, the Supreme Court rejected the invitation to import “the *de novo* ‘reasonable observer’ inquiry” into “the national security and foreign affairs context,” including cases that involve review of “military actions.” 138 S. Ct. at 2420 n.5. Instead, based on deference principles, the Court applied “rational basis review” and stressed that judicial “inquiry into matters of . . . national security is highly constrained.” *Id.* at 2420 (citing *Mathews*, 426 U.S. at 81–82).

their initial, heavy burdens before shifting the burden to the President to formally assert the presidential communications privilege.

In sum, if the Court declines to conclude outright that discovery of documents and information subject to the presidential communications privilege should be precluded on separation-of-powers grounds, *see supra* Section I, the Court should first require Plaintiffs to demonstrate a heightened, particularized need for the information they seek, through showing relevancy, admissibility and specificity. That demonstration would entail, among other things, showing particular inadequacies in the current record by referencing other sources of discovery (including the entire administrative record, depositions, and tens of thousands of documents). *See U.S. Dep't of Treasury v. Black*, 719 F. App'x 1, 3 (D.C. Cir. 2017) (holding that plaintiffs “bear the burden to demonstrate with specificity that each discrete group of the subpoenaed materials likely contains important evidence,” and “bear the further burden of demonstrating” that they have “first” made diligent efforts “to determine whether sufficient evidence can be obtained elsewhere” (citations omitted)); *cf. In re Sealed Case*, 121 F.3d at 746 (requiring a “focused demonstration of need”). Until Plaintiffs have met this initial burden, the burden does not shift to the Office of the President to formally invoke the presidential communications privilege by means of affidavit. *See Dairyland Power Co-op.*, 79 Fed. Cl. at 662 (“The Court agrees with the Government that . . . the White House need not formally invoke the presidential communications privilege until the party making the discovery request has shown a heightened need for the information sought. This is the teaching of both *Cheney* [542 U.S. 367] and [*In re*] *Sealed Case* [121 F.3d 729].”). Only after the Court has found that Plaintiffs have properly satisfied the requirements of relevance, admissibility, and specificity—which Plaintiffs will not be able to do in this case, *see Hawaii*, 138 S. Ct. at 2420—should the Office of the President be required to undertake the burdensome process of formally invoking the presidential communications privilege.

**III. The Court Should Grant A Protective Order Precluding Plaintiffs From Seeking Further Deposition Testimony From Jennifer Hay**

Plaintiffs have indicated their intent to re-open the deposition of Jennifer Hay, who Plaintiffs deposed on May 11, 2018. However, because Plaintiffs would re-question Ms. Hay to seek information that is at the heart of presidential decisionmaking and deliberations, this request too implicates separation-of-powers concerns. Because Plaintiffs are unable to satisfy the threshold requirements of *Cheney* or meet their initial burden of heightened need, the Court should enter a protective order precluding Plaintiffs from seeking further deposition testimony from Jennifer Hay.

Ms. Hay served as Director for Defense Policy and Strategy on the National Security Council staff from January 2016 through July 5, 2017. Exh. 1, Deposition of Jennifer Hay, 19:23-25, 20:1-8, 24:22-25:1. She testified that the National Security Council is part of the Executive Office of the President and includes positions such as Special Assistant to the President, and above that, the National Security Advisor, who is an Assistant to the President. *Id.* at 21:10-13, 23:18-24:11. During her time on the National Security Council staff, Ms. Hay's portfolio included defense intelligence issues, such as airborne intelligence, surveillance, and reconnaissance, as well as military personnel and readiness or "health of the force" issues. *Id.* at 27:23-28:12.

As an initial matter, any attempt by Plaintiffs to take direct discovery of Ms. Hay or anyone else about their work on the National Security Council staff or elsewhere in the Executive Office of the President 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.<sup>7</sup> 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.<sup>8</sup>

In any event, Ms. Hay already testified about the information she possessed that was not potentially subject to the presidential communications privilege. Ms. Hay testified about the dates she worked on the National Security Council staff, Deposition of Jennifer Hay 19:23-25, 20:1-8, 24:22-25:1, the general topics on which she worked, *id.* at 27:23-28:12, the general structure of the National Security Council, *id.* at 21:1-22:23, 37:3-45:17, and the general organization of the National Security Council system and subcommittees, as outlined in Presidential Policy Directive-1, National Security Presidential Memorandum-2, and National Security Presidential Memorandum-4, *id.* at 37:3-45:17. Ms. Hay also testified about whether or not she had any knowledge of certain issues, including whether the National Security Council, the Principals Committee or Deputies

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<sup>7</sup> 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.*

<sup>8</sup> Moreover, insofar as Ms. Hay is being recalled to testify in her 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 Ms. Hay's testimony concerning her work at the National Security Council.

Committee of the National Security Council, or the Department of Defense made certain recommendations to the President, *see id.* at 118:15–122:5 (testifying that she was aware of whether or not recommendations were made prior to her departure from the National Security Council staff, but that she was not aware of whether or not recommendations were made after her departure from the National Security Council staff), and the identities of third parties and members of Congress and their staff who communicated with White House staff, *see id.* at 123:8–127:6 (testifying that she did not know the identities of such third parties or members of Congress and their staff).

But Plaintiffs’ counsel also questioned Ms. Hay about information that is at the heart of presidential decisionmaking and deliberations. For example, Plaintiffs’ counsel asked Ms. Hay whether she discussed transgender military service with the President; prepared any briefs, memoranda, or written documents for the President regarding transgender military service; or communicated with the National Security Council or the Principals Committee or Deputies Committee of the National Security Council regarding transgender military service. *Id.* at 99:10–101:23. Plaintiffs’ counsel also asked Ms. Hay whether the National Security Council had any meetings or took any action with respect to the subject of transgender military service, and whether the Principals Committee or Deputies Committee of the National Security Council reached any conclusions or decisions regarding transgender military service during her time on the National Security Council staff. *See id.* at 104:3–106:6. Additionally, Plaintiffs’ counsel asked Ms. Hay whether the National Security Council, the Principals Committee or Deputies Committee of the National Security Council, or the Department of Defense recommended to the President “that the United States will not accept or allow transgender individuals to serve in any capacity in the U.S. military[.]” *Id.* at 118:15–122:5. In short, Plaintiffs’ counsel questioned Ms. Hay, whose work on

the National Security Council staff was done to advise the National Security Advisor and the President, about the decisionmaking process within the White House and of the President himself.

Because this line of inquiry directly implicated the presidential communications privilege, as well as the deliberative process privilege, Defendants properly objected to these questions regarding communications, meetings, decisions, and recommendations within the Executive Office of the President. *See Protect Democracy Project, Inc.*, 320 F. Supp. 3d at 174 (holding that where a communication was solicited “by the staff of a close national security adviser leading up to an important military decision,” its purpose was to advise the President on a military decision, and thus it is protected by the presidential communications privilege). Disclosure of those with whom the President or his immediate advisors and their staff communicated on a particular matter, or with whom the President chose not to confer, as well as what recommendations were or were not provided to the President, would plainly reveal the President’s deliberative process. The presidential communications privilege properly would preclude disclosure of such information, which plainly reflects presidential decisionmaking. Disclosure of this information would be especially intrusive here, where the President, acting in his capacity as Commander-in-Chief, was deliberating on an issue involving national security and military concerns. In this field, the concerns about the “confidentiality of Presidential communications in performance of the President’s responsibilities,” *Nixon*, 418 U.S. at 711, are at their zenith. And the presidential communications privilege is equally implicated by disclosure of this information from individuals with whom the President may have communicated or individuals who may have knowledge of communications and deliberations of the President and the National Security Council as it is from the President himself. Regardless of who is being asked to disclose it, information about presidential communications is protected by privilege.

As the D.C. Circuit has recognized, there is a “great public interest” in preserving “the confidentiality of conversations that take place in the President’s performance of his official duties” because such confidentiality is needed to protect “the effectiveness of the executive decision-making process.” *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973); see *In re Sealed Case*, 121 F.3d at 745–46 (noting the “concern that the President be given sufficient room to operate effectively,” and explaining that “limit[ing] the President’s ability to communicate . . . privately [would] interfer[e] with his ability to exercise control over the executive branch”).

Accordingly, because any further questioning of Ms. Hay about presidential communications and deliberations would plainly implicate privileged presidential communications, where Plaintiffs have failed to satisfy the threshold requirements of *Cheney* or met their initial burdens to show heightened need, re-opening that deposition would be both improper as a matter of law and pointless. For these reasons, the Court should enter a protective order precluding Plaintiffs from seeking further deposition testimony from Jennifer Hay.

### **CONCLUSION**

For the foregoing reasons, the Court should enter a protective order to: (1) preclude Plaintiffs from seeking discovery of documents and information subject to the presidential communications privilege; (2) preclude Plaintiffs from seeking further deposition testimony from Jennifer Hay.

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

Telephone: (202) 514-3346

Email: [andrew.e.carmichael@usdoj.gov](mailto:andrew.e.carmichael@usdoj.gov)

**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  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Telephone: (202) 514-3346  
Email: andrew.e.carmichael@usdoj.gov

**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 the Department 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:

(1) Plaintiffs are precluded from seeking discovery of documents and information subject to the presidential communications privilege;

(2) Plaintiffs are precluded from seeking further deposition testimony from Jennifer Hay.

Dated:

\_\_\_\_\_  
COLLEEN KOLLAR-KOTELLY  
UNITED STATES DISTRICT JUDGE

# Exhibit 1

Excerpts from Deposition of Jennifer Hay,  
May 11, 2018

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

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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.

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

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

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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.

1 APPEARANCES :

2

3 ATTORNEYS FOR PLAINTIFFS :

4 FOLEY HOAG LLP

5 155 Seaport Boulevard

6 Boston, Massachusetts 02210

7 (617) 832-1000

8 BY: DANIEL McFADDEN, ESQ.

9 dmcfadden@foleyhoag.com

10

11 ATTORNEYS FOR PLAINTIFFS :

12 WILMER CUTLER PICKERING HALE & DORR LLP

13 60 State Street

14 Boston, Massachusetts 02109

15 (617) 526-6000

16 BY: ADAM M. CAMBIER, ESQ. - via

17 speakerphone

18

19

20

21

22

23

24

25

1 APPEARANCES (Cont'd):

2

3 ATTORNEYS FOR DEFENDANTS:

4 U.S. DEPARTMENT OF JUSTICE

5 20 Massachusetts Avenue, N.W., Room 7111

6 Washington, D.C. 20530

7 (202) 616-8267

8 BY: ASHLEY A. CHEUNG, ESQ.

9 ashley.cheung@usdoj.gov

10 COURTNEY ENLOW, ESQ.

11 courtney.d.enlow@usdoj.gov

12

13 Also Present: Carolyn M. Wald, Esq.,

14 Latham & Watkins LLP

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

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

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

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

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

18 A. About a year and a half.

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

21 A. Yes.

22 Q. And where did you go next?

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

25 Q. When did you begin working at the

1 National Security Council staff?

2 A. January of 2016.

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

5 A. About a year and a half.

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

8 A. July 5, 2017.

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

12 A. Yes.

13 Q. How was that?

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

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

25 A. Yes.

1 Q. And having worked at the National  
2 Security Council staff for about a year and a  
3 half, are you generally familiar with the  
4 organizational structure of the NSC during the  
5 time you worked there?

6 A. Yes.

7 Q. I'm hoping you can help me  
8 understand a little bit about that, because  
9 it's new to me.

10 First of all, is the National  
11 Security Council part of the Executive Office  
12 of the President?

13 A. Yes.

14 Q. Okay. And I understand the  
15 National Security Council has a staff. About  
16 how big is that staff?

17 A. There's approximately 400 people.

18 Q. And where are the offices of the  
19 National Security Council staff located?

20 A. The staff are in the Eisenhower  
21 Executive Office Building.

22 Q. Where is that building in relation  
23 to the White House?

24 A. It's next door.

25 Q. Could you explain to me how the

1 staff of the National Security Council is  
2 organized?

3 A. Yes. There are various different  
4 offices broken up between region and function.  
5 The actual org chart is not made public, but  
6 the split is regional and functional.

7 Q. So just to make sure I understand,  
8 so the National Security Council staff, you  
9 said, is split between certain regional topics  
10 and certain functional topics; is that right?

11 A. Yes. Region as in Europe, Latin  
12 America, and then various functional topics.

13 Q. So when we're talking about  
14 regional, we're talking about geographical  
15 regions?

16 A. Correct.

17 Q. For the functional topics, are you  
18 able to give me any examples of what some of  
19 those are?

20 A. The defense policy, and strategy  
21 office is a functional topic. Counterterrorism  
22 is also another function we work on. Cyber as  
23 well.

24 Q. Are you able to tell me roughly  
25 how many of those functional topics there are

1 without necessarily disclosing what they all  
2 are?

3 MS. CHEUNG: I'm going to object  
4 to the extent that information is asking  
5 about the details of the NSC. That  
6 information is subject to the  
7 Presidential communications privilege,  
8 and I will instruct the witness not to  
9 answer. To the extent the question is  
10 asking for facts that are publicly  
11 available, the witness may answer.

12 A. I don't know what's public or  
13 honestly how many. I'd have to sit down and  
14 count.

15 Q. Okay. Do you think it's more than  
16 ten functional areas?

17 A. I don't know.

18 Q. Do people in the National Security  
19 Council get like a rank? In other words, I've  
20 heard terms assistant to President, immediate  
21 assistant to President. Do people in the  
22 National Security Council get a rank like that?

23 A. Those are titles, but, yes, that  
24 denote certain responsibilities. But, yes.

25 Q. Are you able to describe, just in

1 general terms, what those ranks are?

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

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

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

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

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

25 A. Director for defense policy and

1 strategy.

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

4 A. Yes.

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

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

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

12 A. No.

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

17 A. So from January of 2016 to January  
18 20, 2017, I reported to Troy Thomas. Then  
19 there was the position of senior director was  
20 gapped, and then in March or April Ylber  
21 Bajraktari took over as senior director for  
22 defense policy and strategy, and I reported to  
23 him.

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

1 name?

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

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

5 A. Yes.

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

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

15 Q. You said his name is Kriete?

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

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

19 A. Yes. He was also a director.

20 Q. What was he director of?

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

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

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

3 A. Yes, you heard correct.

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

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

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

13 Q. Will you follow your attorney's  
14 instruction?

15 A. Yes.

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

22 A. We each have our own portfolio.

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

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

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

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

12          A.       Correct.

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

16          A.       No.

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

23                   Did I read that correctly?

24          A.       Yes.

25          Q.       Is ISR intelligence surveillance

1 anyone who reported to you?

2 A. No.

3 Q. So, Ms. Hay, I'm going to mark a  
4 few documents, which I think you've already  
5 referred to.

6 (Document marked as Exhibit 3  
7 for identification)

8 (Document marked as Exhibit 4  
9 for identification)

10 (Document marked as Exhibit 5  
11 for identification)

12 Q. So, Ms. Hay, you've just been  
13 handed three documents marked Exhibits 3, 4 and  
14 5. If you could please review those documents,  
15 and let me know when you're ready to discuss  
16 them.

17 A. Okay.

18 Q. So, Ms. Hay, I'm just going to  
19 start with the document that's marked Exhibit  
20 3. Do you recognize the document that's marked  
21 Exhibit 3?

22 A. I do.

23 Q. And what is Exhibit 3?

24 A. It is Presidential Policy  
25 Directive-1, the organization of the National

1 Security Council system.

2 Q. Do you see it's dated February 13,  
3 2009?

4 A. Yes.

5 Q. And does this appear to be a true  
6 and accurate copy of this document?

7 A. Yes.

8 Q. As I think we already discussed,  
9 President Trump was inaugurated on January 20,  
10 2017; is that right?

11 A. Yes.

12 Q. Directing your attention to what  
13 was marked Exhibit 4, do you recognize this  
14 document, Exhibit 4?

15 A. Yes.

16 Q. And what is Exhibit 4?

17 A. It is National Security  
18 Presidential Memorandum to the organization of  
19 the National Security Council and the Homeland  
20 Security Council.

21 Q. Do you see it's dated January 28,  
22 2017?

23 A. Yes.

24 Q. Does this appear to be a true and  
25 accurate copy of this document?

1 A. Yes.

2 Q. And do you understand Exhibit 4,  
3 National Security Presidential Memorandum-2, to  
4 replace Exhibit 3, which was Presidential  
5 Policy Directive-1?

6 A. Yes.

7 Q. Directing your attention to  
8 Exhibit 5, do you recognize the document that  
9 is Exhibit 5?

10 A. Yes.

11 Q. And what is Exhibit 5?

12 A. National Security Presidential  
13 Memorandum-4, the organization of the National  
14 Security Council, the Homeland Security Council  
15 and subcommittees.

16 Q. Do you see this document is dated  
17 April 4th of 2017?

18 A. Yes.

19 Q. Does this appear to be a true and  
20 accurate copy of this document?

21 A. Yes.

22 Q. And this document, Exhibit 4,  
23 which is National Security Presidential  
24 Memorandum-4, do you understand that it  
25 replaced the document marked Exhibit 4, which

1 was National Security Presidential  
2 Memorandum-2?

3 A. Yes.

4 Q. I think I misstated my question  
5 just then. Let me just ask that question  
6 again, because I think I got the exhibit number  
7 wrong.

8 This document that is Exhibit 5,  
9 which is National Security Presidential  
10 Memorandum-4, do you understand that it  
11 replaced Exhibit 4, which was National Security  
12 Presidential Memorandum-2?

13 A. Yes.

14 Q. Okay. Thank you. I appreciate  
15 your patience.

16 If we're going to refer to these,  
17 could we refer to Presidential Policy  
18 Directive-1 as PPD-1?

19 A. Yes.

20 Q. And could we refer to National  
21 Security Presidential Memorandum-2 as NSPM-2?

22 A. Yes.

23 Q. And could we refer to National  
24 Security Presidential Memorandum-4 as NSPM-4?

25 A. Yes.

1 Q. Was NSPM-4 in effect until the  
2 time you left the National Security Council?

3 A. Yes.

4 MR. McFADDEN: Do you want to take  
5 our first break?

6 MS. CHEUNG: Sure.

7 (Recess taken at 9:55 a.m. and  
8 reconvening at 10:10 a.m.)

9 BY MR. McFADDEN:

10 Q. We're back on the record. Ms.  
11 Hay, we just took a break. Did you have a  
12 chance to think about your testimony during  
13 that break?

14 A. Yes.

15 Q. Having thought about it, is there  
16 anything you'd like to change our correct from  
17 your testimony this morning?

18 A. No.

19 Q. Before we took our break, we  
20 marked three documents, Exhibits 3, 4 and 5.  
21 I'd like to direct your attention first to  
22 Exhibit 3, which we previously discussed is  
23 PPD-1?

24 A. Yes.

25 Q. And I think we previously

1 discussed this, but it's correct that PPD-1 was  
2 in place from February 13, 2009 until it was  
3 replaced by NSPM-2 on January 28 of 2017; is  
4 that right?

5 A. This one may have been rescinded.  
6 I'm not sure, but the President did rescind a  
7 series of PPDs of President Obama upon leaving  
8 office. This one may have been one of them.  
9 I'm not sure. I'm not sure when it ended.

10 Q. I see. So what you're saying is  
11 that PPD-1 may have been rescinded on January  
12 20 of 2017 when President Obama left office; is  
13 that right?

14 A. Yes.

15 Q. And then I suppose if that had  
16 happened, there would have been an eight-day  
17 day gap before the NSPM-2 came in to play; is  
18 that right?

19 A. Yes.

20 Q. Looking at Exhibit 3, which is  
21 PPD-1, if I could direct your attention to Part  
22 A entitled "The National Security Council." Do  
23 you see that?

24 A. Yes.

25 Q. And do you see that the first

1 sentence in Part A is, "The National Security  
2 Council (NSC) shall be with principal forum for  
3 consideration of national security policy  
4 issues requiring Presidential determination."

5 Did I read that correctly?

6 A. Yes.

7 Q. And do national security policy  
8 issues include military personnel and readiness  
9 issues?

10 A. Yes.

11 Q. Ms. Hay, I'd like to direct your  
12 attention now to Page 2 of PPD-1. The middle  
13 paragraph on Page 2 starting, "The NSC shall  
14 have as its members."

15 Do you see that?

16 A. Yes.

17 Q. Do you see one of the members  
18 listed is the "assistant to the President and  
19 Chief of Staff (Chief of Staff to the  
20 president)"?

21 A. Yes.

22 Q. And I think, as we discussed,  
23 assistant to the President is a nomenclature  
24 similar to a rank, indicating the seniority of  
25 the person within the White House; is that

1 right?

2 A. Yes.

3 Q. And then the actual job  
4 description for that person would be Chief of  
5 Staff; is that right?

6 A. Yes.

7 Q. During your time at the NSC, while  
8 PPD-1 was in effect, who was the Chief of  
9 Staff?

10 A. Dennis McDonough.

11 Q. I'm sorry, just to be clear, was  
12 Mr. McDonough the Chief of Staff at the NSC or  
13 the Chief of Staff to the President?

14 A. My apologies. This position is  
15 the White House Chief of Staff that you're  
16 referring to, that position, that was Dennis  
17 McDonough. The NSC Chief of Staff, based on  
18 this, does not have a seat at the National  
19 Security Council.

20 Q. Thank you.

21 A. Sorry. I misunderstood the  
22 original question.

23 Q. No, no, I think I was looking for  
24 the White House Chief of Staff. I appreciate  
25 that.

1           Then if you go down a few lines on  
2 Page 2 of PPD-1, which is Exhibit 3, you'll see  
3 it says, "The counsel to the President shall be  
4 invited to attend every NSC meeting, and the  
5 assistant to the President and deputy national  
6 security advisor shall attend every meeting and  
7 serve as secretary."

8           Did I read that correctly?

9           A.       Yes.

10          Q.       So during the time when you were  
11 at the NSC and PPD-1 was in place, who was the  
12 deputy national security advisor?

13          A.       Avril Haines.

14          Q.       I'm sorry, could you please spell  
15 that name?

16          A.       A-v-r-i-l. Her last name is  
17 spelled H-a-i-n-e-s.

18          Q.       When it says here that "the deputy  
19 national security advisor shall attend every  
20 meeting, and serve as secretary," is it correct  
21 that that means that the deputy national  
22 security advisor would make a written record of  
23 each meeting of the National Security Council?

24                 MS. CHEUNG: I'm going to object  
25                 to the extent the question calls for

1 Q. Did you ever do work on  
2 transgender military service while you were at  
3 the NSC?

4 A. Yes, I did.

5 Q. So, Ms. Hay, before we take our  
6 lunch -- actually, let me ask you this. Let's  
7 go off the record for a second.

8 (Off the record at 11:50 a.m. and  
9 reconvening at 11:51 a.m.)

10 Q. Ms. Hay, have you ever met  
11 President Trump?

12 A. Yes, I have.

13 Q. When was that?

14 A. I don't remember the exact dates,  
15 but I escorted two military groups visiting the  
16 President before I left. I don't remember the  
17 dates.

18 Q. Other than escorting those two  
19 military groups, had you ever met with the  
20 President in any other context?

21 A. No, I have not.

22 Q. I assume during that meeting you  
23 just mentioned with the two military groups you  
24 did not discuss transgender military service  
25 with the President at that time?

1 MS. CHEUNG: Objection. The  
2 question calls for information that is  
3 subject to the Presidential  
4 communications privilege. I instruct  
5 the witness not to answer.

6 Q. Will you follow that instruction,  
7 Ms. Hay?

8 A. Yes.

9 Q. Did you ever communicate with  
10 President Trump in any fashion regarding  
11 transgender military service?

12 MS. CHEUNG: Objection. The  
13 question calls for information that is  
14 subject to the Presidential  
15 communications privilege. I instruct  
16 the witness not to answer.

17 Q. Will you follow that instruction?

18 A. Yes.

19 Q. Did you ever prepare any briefs or  
20 memoranda or other written documents for  
21 President Trump regarding transgender military  
22 service?

23 MS. CHEUNG: Objection. The  
24 question calls for information that is  
25 subject to the Presidential

1           communications privilege, and I instruct  
2           the witness not to answer.

3           Q.           Will you follow that instruction?

4           A.           Yes.

5           Q.           While you were at the NSC, did you  
6           ever communicate in any fashion with the  
7           National Security Council concerning  
8           transgender military service?

9                       MS. CHEUNG:  Objection.  The  
10           question calls for information that is  
11           subject to the Presidential  
12           communications privilege.  I will  
13           instruct the witness not to answer.

14          Q.           While you were at the NSC, did you  
15          ever communicate with the Principals Committee  
16          or the Deputies Committee of the National  
17          Security Council regarding transgender military  
18          service?

19                      MS. CHEUNG:  Objection.  The  
20           question calls for information that is  
21           subject to the Presidential  
22           communications privilege, and I will  
23           instruct the witness not to answer.

24          Q.           Are you aware of whether or not  
25          the NSC, the Principals Committee or the

1 Deputies Committee ever had a meeting where  
2 transgender military service was an item listed  
3 on the agenda?

4 MS. CHEUNG: I object. To the  
5 extent the question is asking for  
6 substantive information about meetings  
7 at the NSC, that information is subject  
8 to the Presidential communications  
9 privilege, and I instruct the witness  
10 not to answer.

11 To the extent the question is only  
12 asking whether or not the witness is  
13 aware -- just to pick up where I left  
14 off. To the extent -- I'm sorry if I'm  
15 repeating what I already said.

16 To the extent the question is  
17 asking for substantive information about  
18 meetings at the NSC, that information is  
19 subject to the Presidential  
20 communications privilege, and I instruct  
21 the witness not to answer.

22 I also object because the question  
23 is calling for speculation as the  
24 witness has not testified that she was  
25 part of these meetings or aware of them.

1 Q. In light of those objections, are  
2 you able to provide an answer to the question?

3 A. No.

4 Q. And is that because of the  
5 instructions from your counsel?

6 A. Yes.

7 Q. Are you aware of whether or not  
8 the National Security Council ever took any  
9 counsel actions, as referred to in NSPM-4,  
10 regarding transgender military service during  
11 your time at the NSC?

12 MS. CHEUNG: I object to the  
13 extent the question is asking for the  
14 substance of the NSC's process, that  
15 information is subject to the  
16 Presidential communications privilege,  
17 and I instruct the witness not to  
18 answer.

19 To the extent the question is only  
20 asking yes or no about the witness'  
21 awareness, the witness may answer.

22 A. I am aware of whether or not there  
23 were any meetings while I was at the NSC.

24 Q. Are you referring to meetings of  
25 the National Security Council concerning

1 transgender military service?

2 A. Yes.

3 Q. And while you were at the NSC,  
4 were there any meetings of the National  
5 Security Council concerning the subject of  
6 transgender military service?

7 MS. CHEUNG: Objection. The  
8 question calls for information that is  
9 subject to the Presidential  
10 communications privilege and the  
11 deliberative process privilege, and I  
12 instruct the witness not to answer.

13 Q. Will you follow that advice?

14 A. Yes.

15 Q. And did the NSC ever take any  
16 council actions with respect to the subject of  
17 transgender military service while you were at  
18 the NSC?

19 MS. CHEUNG: Objection. The  
20 question calls for information that is  
21 subject to the Presidential  
22 communications privilege. I instruct  
23 the witness not to answer.

24 Q. Will you follow that instruction?

25 A. Yes.

1 Q. Do you know the information in  
2 your own mind whether or not such actions were  
3 taken, without telling me whether or not they  
4 were?

5 A. I do know.

6 Q. While you were at the National  
7 Security Council, are you aware of whether the  
8 Principals Committee or the Deputies Committee  
9 reached any conclusions or decisions as  
10 referred to in NSPM-4 regarding transgender  
11 military service?

12 MS. CHEUNG: Objection. I object  
13 to the extent the question is calling  
14 for information that is subject to the  
15 Presidential communications privilege.  
16 To the extent the question is asking yes  
17 or no whether the witness is aware, the  
18 witness may answer.

19 A. Yes, I am aware.

20 Q. And did the Principals Committee  
21 or the Deputies Committee of the National  
22 Security Council reach any conclusions or  
23 decisions regarding transgender military  
24 service while you were at the NSC?

25 MS. CHEUNG: Objection. The

1 question calls for information that is  
2 subject to the Presidential  
3 communications privilege. I will  
4 instruct the witness not to answer.

5 Q. Will you follow that advice?

6 A. Yes.

7 MR. McFADDEN: I think now may be  
8 a decent time to take our lunch.

9 MS. CHEUNG: Okay.

10 (Luncheon recess at 12:01 p.m. and  
11 reconvening at 12:48 p.m.)

12 BY MR. McFADDEN:

13 Q. Ms. Hay, we're back on the record  
14 now. I wanted to ask you first, you've had  
15 some time to have lunch, and having had some  
16 time to think about your answers, do you have  
17 anything you want to correct or change from  
18 your prior testimony?

19 A. No.

20 Q. I think you testified earlier that  
21 your last day at the National Security Council  
22 was July 5th of 2017; is that correct?

23 A. Yes.

24 Q. Did somebody else take over your  
25 job at the National Security Council when you

1                   However, to the extent the  
2                   question is only asking yes or no  
3                   whether the witness knows, the witness  
4                   may answer.

5                   I also object to the extent the  
6                   question is calling for information  
7                   subject to the deliberative process  
8                   privilege, and I instruct the witness  
9                   not to answer.

10                   To be clear --

11                   MR. McFADDEN: I'm sorry, can she  
12                   answer yes or no?

13                   MS. CHEUNG: Yes.

14                   A. Can you repeat the question?

15                   Q. Yes. Prior to the time that you  
16                   left the National Security Council on July 5th  
17                   of 2017, do you know if the NSC or the  
18                   Principals Committee or the Deputies Committee  
19                   of the NSC ever recommended to President Trump  
20                   that the United States will not accept or allow  
21                   transgender individuals to serve in any  
22                   capacity in the U.S. military?

23                   A. Yes, I do know.

24                   Q. And prior to July 5th of 2017, was  
25                   such a recommendation ever transmitted to

1 President Trump by the NSC or the Principals  
2 Committee or the Deputies Committee?

3 MS. CHEUNG: Objection. The  
4 question is subject to the Presidential  
5 communications privilege and the  
6 deliberative process privilege, and I  
7 instruct the witness not to answer.

8 Q. Will you follow your attorney's  
9 advice?

10 A. Yes.

11 Q. Do you know if any such  
12 recommendation was transmitted to President  
13 Trump by the NSC or the Principals Committee or  
14 the Deputies Committee after your departure on  
15 July 5th of 2017?

16 MS. CHEUNG: Objection. The  
17 question calls for speculation. I also  
18 object to the extent the question calls  
19 for information that is subject to the  
20 Presidential communications privilege  
21 and the deliberative process privilege,  
22 and I instruct the witness not to  
23 answer.

24 However, to the extent the  
25 question is asking yes or no whether the

1 witness may have knowledge, the witness  
2 may answer.

3 A. No, I don't know.

4 Q. And will you otherwise follow your  
5 attorney's advice?

6 A. Yes.

7 Q. Are you aware of whether or not,  
8 prior to your departure from the NSC on July  
9 5th of 2017, the Department of Defense ever  
10 recommended to President Trump that the United  
11 States Government will not accept or allow  
12 transgender individuals to serve in any  
13 capacity in the U.S. military?

14 MS. CHEUNG: Objection to the  
15 extent the question is asking about  
16 recommendations, that information is  
17 subject to the Presidential  
18 communications privilege and the  
19 deliberative process privilege, and I  
20 instruct the witness not to answer.

21 However, to the extent the  
22 question is asking yes or no whether or  
23 not the witness may have knowledge, the  
24 witness may answer.

25 A. Yes, I am aware.

1 Q. Okay. And before July 5th of  
2 2017, your departure from the NSC, did the  
3 Department of Defense ever recommend to  
4 President Trump that the United States  
5 Government will not accept or allow transgender  
6 individuals to serve in any capacity in the  
7 U.S. military?

8 MS. CHEUNG: Objection. The  
9 question calls for information that is  
10 subject to the Presidential  
11 communications privilege and the  
12 deliberative process privilege. I  
13 instruct the witness not to answer.

14 Q. Do you know if any such  
15 recommendation was transmitted by the  
16 Department of Defense to President Trump after  
17 you left on July 5th of 2017?

18 MS. CHEUNG: Objection. The  
19 question calls for speculation. I also  
20 object to the extent the question calls  
21 for information that is subject to the  
22 Presidential communications privilege  
23 and the deliberative process privilege,  
24 and I instruct the witness not to  
25 answer.

1                   However, to the extent the  
2                   question is asking yes or no about the  
3                   witness' awareness, the witness may  
4                   answer.

5                   A.           No, I do not know.

6                   Q.           When was the first time that you  
7                   saw these tweets?

8                   A.           The afternoon of July 26th.

9                   Q.           And where were you at that time?

10                  A.           In my apartment.

11                  Q.           How did you feel when you saw  
12                  these tweets?

13                  A.           I was disappointed.

14                  Q.           Are you able to explain why you  
15                  felt disappointed when you saw the tweets?

16                  A.           My personal opinion, why I was  
17                  disappointed, was that President Trump was  
18                  rolling back the previous policy on transgender  
19                  military service.

20                               MR. McFADDEN: I'd like to mark  
21                               another exhibit.

22                                       (Document marked as Exhibit 6  
23                                       for identification)

24                  Q.           This document has been marked as  
25                  Exhibit 6. Ms. Hay, I'm going to represent to

1 you that this document I've just provided is a  
2 copy of a privilege log that was provided to us  
3 from the Executive Office of the President, and  
4 I'm sure your counsel will correct me if they  
5 think that's wrong, but that's our  
6 understanding of what this is.

7 A. Okay.

8 Q. So, Ms. Hay, I'd like to direct  
9 your attention to the last page of Exhibit 6.  
10 Actually, before we go there, I'm sorry, let's  
11 go back to the first page of Exhibit 6. I just  
12 wanted to point out the headings at the top of  
13 the columns.

14 Do you see there's a column for a  
15 description of a document, and numbers of  
16 documents, to, from, and so on?

17 A. Yes.

18 Q. So unfortunately that header does  
19 not repeat on every page, so hopefully you can  
20 keep that in your mind.

21 A. Okay.

22 Q. So if you go to the last page, I'd  
23 like to direct your attention to the fourth  
24 line down the page.

25 A. Okay. It starts with the number

1 50?

2 Q. Yes. Do you see that under the  
3 description, it says, "Predecisional e-mails  
4 and documents drafted by White House  
5 legislative affairs staff and outside parties  
6 from whom they solicited information for use in  
7 advising the President."

8 Did I read that correctly?

9 A. Yes.

10 Q. Do you see in the next column over  
11 it has got the date range of January 20, 2017  
12 to July 25, 2017?

13 A. Yes.

14 Q. And then do you see again in the  
15 "To" and "From," it references members of  
16 Congress and their staffs and outside third  
17 parties?

18 A. Yes.

19 Q. Do you have any knowledge of who  
20 the outside third parties referenced here may  
21 be?

22 MS. CHEUNG: Objection. To the  
23 extent the question is calling for a  
24 substantive answer, that information is  
25 subject to the Presidential

1           communications privilege, and I instruct  
2           the witness not to answer.

3                         However, to the extent the  
4           question is asking whether or not the  
5           witness may have knowledge, the witness  
6           may answer.

7                         I also object because the question  
8           calls for speculation.

9           Q.           You can answer.

10          A.           Honestly, I don't have enough  
11         information to be able to answer that, to be  
12         able to confidently say whether or not I know  
13         that they may be.

14          Q.           Okay. And the same question  
15         regarding the members of Congress and their  
16         staffs, do you know who those may be?

17                         MS. CHEUNG: Objection. To the  
18           extent the question is calling for a  
19           substantive answer, that information is  
20           subject to the Presidential  
21           communications privilege, and I instruct  
22           the witness not to answer. I also  
23           object as the question calls for  
24           speculation.

25                         However, to the extent the

1 question is asking yes or no whether the  
2 witness may have knowledge, the witness  
3 may answer.

4 A. No, I don't know.

5 Q. Okay. If you look down to the  
6 second to last row from the bottom, do you see  
7 that that row relates to "Predecisional e-mails  
8 and documents drafted by White House policy  
9 staff and outside parties from whom they  
10 solicited information for use in advising the  
11 President"?

12 A. Yes.

13 Q. Again, if you look over to the  
14 "To" and "From," it talks about outside third  
15 parties?

16 A. Yes.

17 Q. Do you know who those outside  
18 third parties may be?

19 MS. CHEUNG: Objection. To the  
20 extent the question calls for a  
21 substantive answer, that information is  
22 subject to the Presidential  
23 communications privilege, and I instruct  
24 the witness not to answer.

25 To the extent the question is only

1 asking whether or not the witness may  
2 have knowledge, the witness may answer.

3 A. Again, I don't have enough  
4 information here to be able to confidently say  
5 whether or not I know who the outside parties  
6 are.

7 Q. While you were at the NSC during  
8 the Trump administration, did you ever  
9 communicate with outside third parties  
10 regarding transgender military service?

11 MS. CHEUNG: Objection. The  
12 question calls for information that is  
13 subject to the Presidential  
14 communications privilege, and I'm going  
15 to instruct the witness not to answer.

16 Q. Are you going to follow that  
17 instruction?

18 A. Yes.

19 Q. While you were at the NSC during  
20 the Trump administration, did you ever receive  
21 communications from outside third parties  
22 concerning transgender military service?

23 MS. CHEUNG: Objection. The  
24 question calls for information that is  
25 subject to the Presidential