IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR A PROTECTIVE ORDER
(DKT. 171: PRESIDENTIAL COMMUNICATIONS PRIVILEGE)

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INTRODUCTION

Defendants' motion for a protective order announces an unprecedented theory that would effectively prevent *any* discovery into presidential decisionmaking and convert a qualified privilege into an absolute one. This Court has already explained that its dismissal of the President does not affect Plaintiffs' right to seek discovery regarding the President's decision to ban transgender people from military service, and that such discovery is critical to this case. Plaintiffs have made requests for information about that decision, which they need for two key reasons: First, they need to test the President's assertion that the ban was formulated after "consultation with … generals and military experts," and second, they need to probe the degree to which the White House influenced and directed the development of the Mattis Implementation Plan. The information Plaintiffs request is available nowhere else.

The government, however, has refused to provide even a meaningful log indicating why each document containing this information has been withheld, claiming that the rationales for the presidential communications privilege excuses them from providing even that rudimentary information. Consequently, although the government seeks a sweeping ruling from this Court that all of the information Plaintiffs seek is covered by the presidential communications privilege, the current record does not even permit the Court to definitively adjudicate whether any particular documents are covered by the privilege. Rather, the issue right now before the Court is narrower: May the government withhold privilege log-type information without providing a privilege log or formally invoking the presidential communications privilege as to the log-type information being sought? The presidential communications privilege has never been construed to reach that far, and the Court should not permit the government to use the privilege in that manner.

To minimize burdening the Executive or intruding into sensitive areas, Plaintiffs are willing to engage in a phased approach to discovery of communications between the White House and the remaining Defendants. Defendants should first be required to provide document-by-document privilege logs for the information withheld from their responses to Plaintiffs' document requests and interrogatories. Those logs should provide Plaintiffs and the Court with insight—for the first time—into what has been withheld. Plaintiffs should therefore be able to test the government's claims of privilege and to make revised, narrowly targeted requests for information. This phased process should provide Plaintiffs and the Court with the information they need to litigate and decide this case while minimizing any potential separation-of-powers concerns.

BACKGROUND

A. The President's Announcement And Defendants' Implementation Of The Ban On Transgender Military Service

In June 2016, the Department of Defense ("DOD") adopted a policy permitting transgender persons to serve openly in the military. Dkt. 13-10, Ex. C. That policy represented the culmination of a lengthy process in which senior military and civilian officials evaluated a wide array of evidence and found no reason to exclude qualified personnel from military service simply because they are transgender. Dkt. 13-3 ¶¶ 10-27.

On June 26, 2017, President Trump announced via Twitter that, "[a]fter consultation with … generals and military experts, … the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail." Dkt. 61 at 14 & n.3. In contrast to the careful process preceding the policy that permitted open service, the President's

announcement was made without any evident formal deliberation and caught senior military officials—including the Secretary of Defense and the Chairman of the Joint Chiefs of Staff—by surprise. *Id.* at 67-68; *Karnoski v. Trump*, 2018 WL 1784464, at *13 (W.D. Wash. Apr. 13, 2018) (noting that the Joint Chiefs of Staff were not consulted and that the Secretary of Defense had only one day's notice before the announcement).

The President formalized his decision in a directive to Secretary of Defense Mattis dated August 25, 2017. Dkt. 13-2, Ex. A ("2017 Presidential Memorandum"). The 2017 Presidential Memorandum ordered Secretary Mattis to submit "a plan for implementing" the President's directive by February 21, 2018. *Id.* § 3. On August 29, 2017, Secretary Mattis issued a statement indicating that DOD had "received the [2017] Presidential Memorandum" and would "carry out the president's policy direction." Dkt. 128-21. Secretary Mattis confirmed that DOD would "develop a study and implementation plan." *Id.* To develop that plan, DOD was directed to "establish a panel of experts … to provide advice and recommendations on the implementation of the president's direction," and after that panel issued its recommendations, Secretary Mattis would "provide [his] advice to the president concerning implementation of [the president's] policy direction." *Id.*

About two weeks later, Secretary Mattis issued two other documents—the Interim Guidance and the Terms of Reference—reiterating that DOD would "carry out the President's policy and directives." Dkt. 45-1. The Terms of Reference established a panel to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum." Dkt. 108-6; *see also* Dkt. 128-25 (Acting Under Secretary of Defense for Personnel and Readiness to "chair a Panel of Experts ('Panel') … to

support the … development of an Implementation Plan on military service by transgender individuals").

DOD issued a report and recommendations in February 2018, Dkt. 96-2 (the "DOD Report"), and Secretary Mattis endorsed and delivered the proposal (the "Mattis Implementation Plan") to the President on February 22, 2018, Dkt. 96-1. On March 23, 2018—the effective date for the 2017 Presidential Memorandum's ban on military service by transgender persons, Dkt. 13-2—President Trump issued an order that "revoked" his earlier memorandum and accepted Secretary Mattis's proposal, Dkt. 96-3.

The Mattis Implementation Plan effectuates the ban ordered by President Trump. Under the Mattis Implementation Plan, "individuals who require or have undergone gender transition are absolutely disqualified from military service; individuals with a history or diagnosis of gender dysphoria are largely disqualified from military service; and, to the extent that there are any individuals who identify as 'transgender' but do not fall under the first two categories, they may serve, but only 'in their biological sex.'" Dkt. 160 at 6. Thus, "at a fundamental level, the Mattis Implementation Plan is just that—a plan that *implements* the President's directive that transgender people be excluded from the military." Dkt. 157 at 9 (emphasis in original).

B. The Litigation And This Discovery Dispute

Plaintiffs filed suit soon after the President's tweets, alleging that the President's ban on open military service for transgender people violates Plaintiffs' rights to equal protection, liberty, and privacy under the Fifth Amendment. Dkt. 1. Following the issuance of the 2017 Presidential Memorandum, Plaintiffs moved for a preliminary injunction barring enforcement of the ban. Dkt. 13.

The Court granted the preliminary injunction on October 30, 2017, ruling that, because of "the combined effect of a number of unusual factors, the Court finds it likely that Plaintiffs will

succeed on [their equal protection] claim." Dkt. 61 at 65. First, the Court observed that the sweeping ban relied on "unsupported, overbroad generalizations about … transgender people." *Id.* at 66 (internal citation and quotation marks omitted). Second, the Court found that the "reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually *contradicted* by the studies, conclusions and judgment of the military itself"—*i.e.*, the process that led to the 2016 announcement of the policy permitting open service. *Id.* at 67. And third, the Court highlighted the President's "abrupt[]" reversal of the military's carefully studied policy "without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes." *Id.* at 68.[1]

Defendants have repeatedly sought to preclude discovery into the President's initial decision and the role of the White House in the process that led to the Mattis Implementation Plan and accompanying DOD Report. Plaintiffs propounded discovery requests to all Defendants to obtain relevant information about the process surrounding the transgender ban. For example, Plaintiffs sought the production of "[a]ll documents concerning military service by transgender people provided to President Trump before July 26, 2017," Dkt. 108-7 at 4 (Request for Production No. 4), communications between Members of Congress and the White House concerning transgender service in the military prior to the President's tweets, *id.* (Request for Production No. 5), documents relied on by the President or the others responsible for drafting the 2017 Presidential Memorandum for the assertion that "the previous Administration failed to

[1] The government initially appealed but dismissed its appeal after the D.C. Circuit refused to stay the preliminary injunction. *See* Order, *Doe v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017); Notice of Voluntary Dismissal of Appeal, *Doe v. Trump*, No. 17-5267 (D.C. Cir. Dec. 29, 2017).

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," *id.* at 6 (Request for Production No. 17), and communications between Defendants and the "panel of experts," *id.* at 6-7 (Request for Production No. 20). Plaintiffs also propounded interrogatories that sought the kind of information that would appear on any privilege log in civil litigation, such as the existence of an oral or written communication, its date, and the identity of the participants. *See* Dkt. 89-1, at 4 (Definition 16(d)). For example:

- Interrogatory No. 14 asked President Trump, Secretary Mattis, and General Dunford to "Identify all Documents that are assessments, reports, evaluations, studies, or other research concerning military service by transgender people that were transmitted to, received by, or considered by President Trump from January 20, 2017, to July 26, 2017, and, for each such Document, Identify the person or Organization who transmitted it to President Trump and state the date(s) of transmission to and receipt by President Trump."

- Interrogatory No. 15 asked President Trump, Secretary Mattis, and General Dunford to "Identify all persons involved in drafting the Twitter Statement, including all persons who reviewed the statement or any draft thereof prior to its release to the public via Twitter and, for each such person, (a) state their role in drafting the statement; (b) state the date(s) of their participation in drafting the statement; and (c) Identify all Documents memorializing or reflecting such participation."

- Interrogatory No. 17 asked President Trump, Secretary Mattis, and General Dunford that "For every meeting attended by President Trump, Secretary Mattis and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting."

- Interrogatory Nos. 19 and 20 asked all Defendants to identify all communications between either the President or the Executive Office of the President and the other Defendants concerning transgender military service.

Id. at 8-9.

Even though Defendants objected to virtually all of Plaintiffs' discovery requests under the presidential communications privilege, they refused to provide any useful privilege log-type information—and in some cases, any information at all—that would allow Plaintiffs to understand and test the scope of their objections. For example, Defendants objected to numerous discovery requests even when the requests were directed to Defendants other than the President and related to communications to which the President was not a party. Dkt. 83 at 9:13-19, 13:22-25, 17:12-17. In response to Plaintiffs' document requests, Defendants provided privilege logs with single entries that covered dozens of documents spanning multiple months and encompassing exchanges among unidentified people, including nongovernmental parties and Members of Congress. Dkt. 91 at 6; Dkt. 91-9. And in response to Plaintiffs' interrogatories, Defendants refused to provide *any* information—either to Plaintiffs or even to the Court for *in camera* review—to substantiate the privilege, effectively rendering their assertion of the presidential communications privilege absolute. Dkt. 88 at 5:11-16 ("We have conferred with our clients about the prospect of providing information regarding who the president and his advisors met with regarding transgender – military service by transgender individuals and when those meetings occurred. And we are not willing to submit that information to the Court for *in camera* review."); *see also* Dkt. 83 at 19:3-7, 23:23-24:10, 24:21-25:3, 25:20-23. Defendants subsequently moved for a protective order barring Plaintiffs from seeking any discovery from the President and excusing the President from providing material to the Court for *in camera* review. Dkt. 89.

After the announcement of the Mattis Implementation Plan, Plaintiffs filed a second amended complaint, which added plaintiffs and specifically challenged the Mattis Implementation Plan (as well as the earlier actions taken by the government to ban transgender

military service). Dkt. 106. In subsequent briefing seeking to dismiss the second amended complaint and dissolve the preliminary injunction, Defendants argued that the process leading up to the Mattis Implementation Plan constituted "independent military judgment" "begun without any direction from the President" and separate from his July 2017 decision. Dkt. 115 at 4, 23, 39, 43; Dkt. 116 at 1, 4-6, 11-12, 35. In response, Plaintiffs argued that the Mattis Implementation Plan was constrained by the President's order to ban transgender persons from military service and thus warrants no more deference than the President's initial decision. *See* Dkt. 130 at 28-29; Dkt. 132 at 17-22. While those dispositive motions were pending, Plaintiffs attempted to take the deposition of Jennifer Hay, a DOD official who worked at the National Security Council in the months prior to the President's tweets in July 2017, but Defendants instructed the witness not to answer numerous questions on the basis of the presidential communications privilege. *See, e.g.*, Decl. of Alan E. Schoenfeld in Supp. of Pls.' Opp. to Defs.' Mots. for Prot. Orders, Ex. C ("Hay Dep.") at 29:3-30:2, 30:21-31:3, 50:8-51:7, 95:25-96:11, 100:9-16, 104:3-12, 127:19-128:2.

On August 6, 2018, the Court denied the government's motion to dismiss and motion to dissolve the preliminary injunction. Dkt. 156. The same day, the Court granted Defendants' motion to dismiss the President as a party and denied as moot their motion for a protective order excusing the President from responding to discovery. Dkt. 154. In denying the motion for a protective order, the Court "reiterate[d] that dismissing the President as a party to this case does not mean that Plaintiffs are prevented from pursuing discovery related to the President." Dkt. 155 at 8.

On August 24, 2018, the Court denied the parties' cross-motions for summary judgment. The Court noted that "[d]espite the Court's orders, discovery remains unfinished because

Defendants have asserted that a substantial portion of the documents and information sought by Plaintiffs are privileged," and it held that the dispute over the independence of the process underlying the Mattis Implementation Plan was "material [because it] go[es] to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." Dkt. 160 at 5, 13. Recognizing that the parties disputed the degree to which the "Panel of Experts" and DOD Report were independent of White House influence, *see id.* at 14, the Court thus stated that "genuine disputes of material fact exist and Plaintiffs are entitled to continue pursuing discovery of those facts," *id.* at 15.

The Court ordered the parties to propose a process for the efficient resolution of the case. *See* Minute Order (Aug. 27, 2018). Because the government maintained its position that even log-type information could be withheld without a formal invocation of the presidential communications privilege, and recognizing that this was an issue likely to arise in remaining document discovery and depositions, the government moved for a protective order to preclude discovery into information essential to the remaining claims and defenses in this case, including the defense of military deference that they have put at issue. Dkts. 170, 171.

ARGUMENT

I. PLAINTIFFS HAVE SATISFIED ANY BURDEN TO OVERCOME THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The presidential communications privilege is a qualified one, and Plaintiffs have more than fully demonstrated that the privilege should be overcome. To overcome the privilege through a showing of "specific need," a plaintiff must demonstrate that (1) the requested material contains "important evidence," meaning evidence that is "directly relevant to issues that are expected to be central to the trial" rather than "only tangentially relevant or … relate[d] to side

issues," and (2) "this evidence is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d 729, 754-55 (D.C. Cir. 1997). Plaintiffs have satisfied both parts of this test.

A. The Requested Information Contains Two Categories Of Important Evidence

Plaintiffs' requests fall into two categories of evidence that this Court has already determined are central to this case. Plaintiffs therefore satisfy the first condition for overcoming the qualified presidential communications privilege.

First, Plaintiffs seek information about the process leading up to the President's July 2017 decision to ban transgender people from military service. The President asserted in his tweets that he decided to institute the ban "[a]fter consultation with … generals and military experts." Dkt. 61 at 14. But no evidence thus far produced supports that assertion; indeed, it appears that the Secretary of Defense and the Joint Chiefs of Staff were not involved in the decision at all. *See Karnoski*, 2018 WL 1784464, at *13. This Court already recognized in issuing the preliminary injunction that the President's decision was made "without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes" and was *contradicted* by the military's own judgment. Dkt. 61 at 67-68. The apparently irregular process leading up to the announcement of the ban is highly relevant to Plaintiffs' equal protection claims. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (stressing that "departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role").

At a minimum, Plaintiffs should be allowed to test the assertion that the President's decision was made after consultation with military experts and to show that it resulted from a process that dramatically departed from the ordinary. *See Recycling Sols., Inc. v. District of*

Columbia, 175 F.R.D. 407, 408 (D.D.C. 1997) ("privilege cannot be used both as a sword and as a shield"); *In re Kellogg Brown & Root, Inc*., 796 F.3d 137, 145 (D.C. Cir. 2015) ("[A] party may not use privilege 'as a tool for manipulation of the truth-seeking process.'" (internal citation omitted)). The fact that the President is no longer a defendant does nothing to change the centrality of that information. The Court dismissed the President not because the basis of his decision was irrelevant to the case, but because it would not enter declaratory or injunctive relief against him. Dkt. 155 at 2. And in ordering dismissal, the Court emphasized that "the acts of the President himself are central to this case" and that "the Court is still able to review the legality of the President's actions." *Id.* at 2, 5. The President's dismissal thus does not foreclose judicial inquiry or discovery into his actions. *Id.* at 5 (noting that "Plaintiffs can still obtain all of the relief that they seek from the other Defendants").

Second, Plaintiffs seek information about the White House's role in the Mattis Implementation Plan and DOD Report. Defendants have argued that the Court must afford great deference to the Mattis Implementation Plan and DOD Report because the policy they recommend and seek to justify reflects the "professional, independent judgment of the Defense Department." Dkt. 116 at 1. But Defendants' own official documentation of the process strongly suggests otherwise, as this Court has already noted. In addition, news reports suggest that the Vice President "played a leading role in the creation of" the DOD Report to ensure that it reflected and supported the President's order to reinstate a transgender military ban. Mark Joseph Stern, *Trump's Trans Troops Ban Will Never Take Effect*, Slate (Mar. 24, 2018), https://slate.com/news-and-politics/2018/03/trumps-new-trans-troops-ban-is-still-unconstitutional.html. Plaintiffs should be permitted to test Defendants' assertion that the process was not constrained by the President's order. By seeking to bar discovery into the extent

to which the White House sought to ensure compliance with the President's order, Defendants are depriving Plaintiffs—and the Court—of any basis to evaluate their claim that, notwithstanding the official documents repeatedly stating that the purpose of the process was to implement the President's order to reinstate and justify a ban, the process was in fact "independent" and unconstrained by that order.

The government's position is untenable. The purpose and scope of the process underlying the Mattis Implementation Plan bear directly on how much deference that Plan is due from the Court, and the Court has already recognized that it cannot decide that issue without full discovery. Dkt. 160 at 12-13 (noting that Defendants argued that "even if deference was not owed to the President's original directives … the Court must now engage in a 'highly deferential form of review' because, after the President's 2017 directives, the military conducted an 'independent reexamination' of the issue" and reached a decision that rested not on White House policy directives but on "'the considered professional judgment of multiple military experts'"); *id.* at 14 (noting that Defendants argue for deference because of the "'independent' nature of the process and the fact that the[] 'review' was not affected by 'external factors'"); *id.* at 14-15 (noting that the invocation of deference is one of Defendants' "*main defenses*" and denying summary judgment pending further discovery into the process underlying the Mattis Implementation Plan).

Defendants' reliance (at 18-20) on *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), to argue that the Court may not look at the actual (as opposed to purported) justifications for the ban, misses the mark. The Supreme Court upheld the policy at issue in *Hawaii* because it was "facially neutral toward religion," *id.* at 2418, and the Court went to great pains to distinguish between that "facially neutral policy denying certain foreign nationals the privilege of admission" and the

order based "explicitly … on race" erroneously upheld in *Korematsu v. United States*, 323 U.S. 214 (1944), which the Court characterized as "objectively unlawful," *id.* at 2423. Here, this Court has already held that the Mattis Plan facially discriminates against transgender people, Dkt. 157 at 5-6, and that such classifications are subject to heightened scrutiny, Dkt. 61 at 60-63. Plaintiffs are not attempting to look behind a facially neutral policy; rather, they are attempting to discover what justifications were actually considered in adopting a *facial* ban on military service by transgender people.

B. The Requested Information Is Not Available From Any Other Source

The important and highly relevant information that Plaintiffs seek cannot be obtained from any other source. Defendants do not suggest that any of that information could be obtained outside the government. Moreover, at this point, Plaintiffs are seeking discovery only from the remaining Defendants and their employees, not the President (although Plaintiffs reserve the right to seek such discovery later if necessary). Plaintiffs are therefore doing exactly what the government said that Plaintiffs should do in its original motion for a protective order: pursuing alternative sources of discovery other than the President or White House. *See* Dkt. 89 at 21-22. Moreover, the Court has already stated that "dismissing the President as a party to this case does not mean that Plaintiffs are prevented from pursuing discovery related to the President." Dkt. 155 at 8.[2]

[2] Defendants contend that the President's dismissal means that Plaintiffs must serve third-party subpoenas to take the depositions of Jennifer Hay and Vice Admiral David Kriete, who worked at the National Security Council (*i.e.*, in the Executive Office of the President) in the months surrounding the President's July 2017 decision to ban transgender people from military service. Dkt. 170 at 10 & n.9; Dkt. 171 at 23 & n.8. The President's dismissal is irrelevant, however, because neither Hay nor Vice Admiral Kriete presently works in the Executive Office of the President. Rather, Hay has worked at the Department of Defense since August 2017, *see* Hay Dep. at 9:12-10:13, and Vice Admiral Kriete is currently the deputy commander of a combatant command within the Department of Defense, Dkt. 170-2 ¶¶ 1-2. DOD, of course, remains a defendant in this case; as employees of a party, neither Hay nor Vice Admiral Kriete

Even if Plaintiffs succeed on their motion to compel information withheld under the deliberative process privilege, Dkt. 169, they would still need the information for which Defendants have made broad claims of the presidential communications privilege. First, it is very likely that Defendants would continue to withhold information about the White House's role in the development of the Mattis Implementation Plan, thus depriving Plaintiffs of information critical to their ability test whether that Plan was independent of the President's directive to reinstate a ban. In addition, the production of agency documents and information thus far withheld under the deliberative process privilege may not shed any light on the President's initial decision to ban transgender people from military service. Only by receiving information on those contacts—or on the lack of such contacts—can Plaintiffs and the Court properly analyze the constitutionality of the President's decision.

C. Defendants Misstate The Standard For Overcoming The Presidential Communications Privilege

Defendants argue at length (at 8-14) that separation-of-powers concerns call for broad application of the presidential communications privilege. But those concerns are incorporated into the applicable legal standard, which "is rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case*, 121 F.3d at 745.

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are third parties, and both may be deposed about matters within their knowledge without resort to third-party procedures.

None of the cases cited by Defendants suggests otherwise: Two discuss depositions of former government officials who were not employed by a present party, *see Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1170-71 (D.C. Cir. 1985) (discussing the deposition of former CIA director in libel suit between retired general and television broadcaster); *Nuskey v. Lambright*, 251 F.R.D. 3, 12 (D.D.C. 2008) (noting that plaintiff in suit against the Export-Import Bank would need to serve a third-party subpoena in order to depose a former Bank official who had subsequently become Ambassador to Hungary), and the other stands for the uncontroversial position that third-party deposition testimony may be compelled by subpoena, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 n.16 (1984).

That standard, and the showing of need it requires, "balance[s] the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure," and so the court's "task is not to weigh anew the public interest in preserving confidentiality against the public interest in assuring fair trials and enforcing the law." *Id.* at 753.

Defendants also argue (at 17-21) that *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), requires a more demanding version of the test set forth in *In re Sealed Case* because this is a civil rather than a criminal case. But the D.C. Circuit has held that in civil cases raising substantial constitutional claims against the federal government, the same relevance standard applies as in a criminal case. *Dellums v. Powell*, 561 F.2d 242, 248-249 (D.C. Cir. 1977). Under *Dellums*, "an adequate showing of need in a civil trial would defeat the president's invocation of constitutional privilege where the civil action involved allegations that government officials had conspired to deprive citizens of constitutional rights, and there had been a sufficient evidentiary showing to overcome any concern that the request for materials was frivolous." *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 182 (D.D.C. 2005) (Kollar-Kotelly, J.). Although *Dellums* predates *Cheney*, it is consistent with that decision, has been cited with approval since *Cheney*, and has not been overturned. *See In re Sealed Case*, 121 F.3d at 744 (discussing *Dellums*); *Am. Historical Ass'n*, 402 F. Supp. 2d at 182 (describing *Dellums* as requiring the same showing of "demonstrated, specific need" described in *Cheney* and *United States v. Nixon*, 418 U.S. 683 (1974) ("*Nixon*")).

Defendants' argument overreads *Cheney*. The Court in *Cheney* did not intend to draw "formalis[tic]" distinctions between civil and criminal cases. *Cheney*, 542 U.S. at 384. Instead,

in distinguishing *Nixon*, the Court looked to various factors, including (1) whether the case has "constitutional dimensions," (2) whether it implicates "essential functions" of Article III courts, (3) whether the claim is "meritless," and (4) the breadth of the requests. *Id*. at 384-86. This case, and Plaintiffs' targeted requests, are far closer to *Nixon* than *Cheney*. First, this case has obvious constitutional dimensions. Second, depriving the Court of critical information necessary to evaluate Plaintiffs' claims of discrimination would undermine one of the "essential functions" of the judiciary—protecting individual rights. *See McKoy v. Spencer*, 271 F. Supp. 3d 25, 36 (D.D.C. 2017) (Kollar-Kotelly, J.) ("'The military has not been exempted from constitutional provisions that protect the rights of individuals' and, indeed, '[i]t is precisely the role of the courts to determine whether those rights have been violated.'" (quoting *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987))). Third, there is no danger that the discovery requests are based on "insubstantial" or "meritless" claims, as this Court has already found that Plaintiffs are likely to prevail on the merits. Fourth, the two categories of information Plaintiffs seek are narrowly targeted to support Plaintiffs' claims and to test the defenses of independence and military deference that Defendants raised and injected into the case.

In short, none of the reasons for distinguishing between the criminal proceedings in *Nixon* and the civil claims in *Cheney* applies here. Under *Nixon*, *Dellums*, and *In re Sealed Case*, Plaintiffs' demonstrated need is sufficient to overcome the privilege.

II. PLAINTIFFS ARE WILLING TO TAKE A PHASED APPROACH TO PRESIDENTIAL COMMUNICATIONS TO FOCUS THEIR REQUESTS

Although Plaintiffs do not agree that their discovery requests pose any threat of unduly burdening the Executive and intruding into sensitive communications, they do not demand that the government hand over every document reflecting communications with (or within) the White House in one fell swoop. Rather, Plaintiffs propose a phased approach to enable them to make

more targeted requests where possible. To date, Defendants have refused to provide even the most basic materials that would allow Plaintiffs to test the assertion of the presidential communications privilege. The privilege logs they provided in response to document requests lump together numerous documents among unidentified people over the span of months, and they have not provided *any* information to substantiate their claim of privilege in response to interrogatories. Dkt. 91 at 6; Dkt. 91-9. Consequently, not only do Plaintiffs not know the contents of the documents or information that have been withheld or the people who sent or received those documents, they do not even know *how many* documents have been withheld. Defendants have similarly refused to provide this data to the Court for *in camera* review, so the Court similarly has no information about the volume, contents, or recipients of what has been withheld.[3]

A. As A First Step, Defendants Must Provide Privilege Log-Type Information

1. Privilege log-type information is not privileged

Plaintiffs propose that Defendants be directed to first provide only privilege log-type information for the communications over which they assert the presidential communications privilege—*i.e.*, identification of the date, means, general subject matter, and participants for each relevant communication. That kind of information—which relates only to the *existence* of a communication, not its *content*—is outside the scope of the presidential communications privilege. Defendants' continued refusal to provide such information is untenable.

[3] Defendants' argument (at 13-14) that the Court should stay discovery pending their appeal to the D.C. Circuit is meritless. Defendants have appealed only the Court's denial of their motion to dissolve the preliminary injunction; Plaintiffs' claims (which have survived a motion for summary judgment) remain live and Plaintiffs are entitled to discovery to support those claims.

Like other evidentiary privileges, the presidential communications privilege has a defined and limited scope. The privilege does not cover all information related to the President, but instead reaches "documents or other materials that reflect presidential decisionmaking and deliberations." *In re Sealed Case*, 121 F.3d at 744; *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (presidential communications privilege applies "to communications 'in performance of (a President's) responsibilities,' ... and made 'in the process of shaping policies and making decisions'" (internal citation omitted)). And, like all privileges, it imposes a serious cost on the truth-seeking function of litigation. *Nixon*, 418 U.S. at 710 ("[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").[4]

For those reasons, courts have recognized that the presidential communications privilege protects only the substance of documents or communications—and only then if part of a presidential decision-making process. The privilege does not extend to information about the fact of the communication itself. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 127, 132 (D.D.C. 2009) ("[T]he bottom line is that the presidential communications privilege protects only communications; the bits of information contained in the sought records—names of visitors, dates of visits, and in some case who was visited—do not rise to the level of protection under the presidential communications privilege.").

[4] *See also Trammel v. United States*, 445 U.S. 40, 50 (1980) ("Testimonial exclusionary rules and privileges … must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" (internal citation omitted)); *Herbert v. Lando*, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.").

That approach comports with how courts have treated other privileges, even unqualified privileges like the attorney-client privilege.[5]

The government previously has recognized that only the substance of a communication, and not its subject matter or identifying characteristics, is covered by the presidential communications privilege. In prior cases, the government has disclosed identifying information about presidential communications, just as it does when claiming application of the attorney-client and other privileges. *See, e.g.*, *Loving v. Dep't of Def.*, 550 F.3d 32, 36 (D.C. Cir. 2008) (government provided Vaughn index, including "documents reflect[ing] the sequential transmission of Loving's case—and recommendations on it—to the President"); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1110-11 (D.C. Cir. 2004) (government provided Vaughn index of 4,341 documents concerning individual pardon petition, including letters and reports from the Deputy Attorney General to the President); *In re Sealed Case*, 121 F.3d at 735 ("[T]he White House produced a privilege log identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld.").[6] Moreover, where, as here, the

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[5] *See, e.g.*, *United States v. Legal Servs. for New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001) ("Courts have consistently held that the general subject matters of clients' representations are not privileged."); *United States v. Dillard*, 989 F. Supp. 2d 1155, 1168 (D. Kan. 2013) (with respect to clergy-penitent privilege, "information such as the date and number of prison visits simply provide a necessary threshold for the court to examine the claim of privilege"); *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 471 (N.D. Tex. 2005) ("[The] psychotherapist-patient privilege … protects only communications between the therapist and patient …. The names of mental health care providers, including psychiatrists, psychologists, counselors, and therapists, and dates of treatment are not subject to the privilege."); *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 304 (S.D.N.Y. 1982) (rejecting claim that "questions designed to elicit the existence or identity of documents or the parties to a communication" intrude upon grand jury secrecy).

[6] *See also Amnesty Int'l USA v. Cent. Intelligence Agency*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) ("[T]he index and declarations set forth in sufficient detail how presidential advisors solicited and received information or recommendations in the course of gathering information related to detainee policies, including the CIA terrorist detention and interrogation

government has refused to provide such log-type information, it has been ordered to produce it, based on the recognition that such information is necessary for courts and opposing parties to evaluate the validity of the claimed privilege. *See U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 45 (D.D.C. 2016) (ordering privilege log where presidential communications privilege was asserted).

Departing from its own longstanding position and practice, the government now advocates for a dramatic expansion of the presidential communications privilege to cover purely "factual information" about presidential communications, including the timing, means, and participants in those communications. Mem. 2, 7, 16. But that bald assertion is undercut by the very authorities Defendants cite in its support. In contrast to Defendants' current position, in *In re Sealed Case*, the government *did* produce a privilege log. 121 F.3d at 735. Similarly, in *Loving*, on which Defendants also rely (Mem. 16), the government again provided log-type information about the communications over which it asserted the presidential communications privilege that, among other things, disclosed the "sequential transmission" of key information to the President. 550 F.3d at 36.

To be sure, there may be extraordinary instances in which the mere fact of a communication cannot be disclosed. *See Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (agency seeking to "neither confirm nor deny the existence" of requested records on basis of national security required to provide "in as much detail as is possible the basis for its claim"). But there are no such concerns here. The President himself has stated

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program[.]"); *Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 659, 667 (2007) (government provided privilege log identifying specific memoranda "reflect[ing] communications between the President's staff and various high-ranking [Department of Energy] or other Executive Branch officials" related to nuclear waste storage facility).

publicly that he consulted multiple military personnel before announcing the ban; this is not a case, therefore, where the mere fact of a consultation would disclose sensitive information. And the general subject—whether to impose a ban on service by transgender people—has already been disclosed by the President as well. The government posits that revealing the "identities of the particular advisors from whom the President sought advice … or the timing or sequence of those deliberations" would likely reveal the content of the communication or the President's deliberative process. Mem. 16. But the President would be expected to consult with senior military leaders about changes to *any* major military policy, and the substance of the advice given cannot be discerned simply by disclosing the fact of the communication. The government does not explain how the "timing" or "sequence" of those communications would reveal anything sensitive about presidential decision-making that the President himself has not already made public.

The government's extreme position would make the presidential communication privilege unique in our legal system. Even the attorney-client privilege—which is unqualified, in the sense that it cannot be overcome by a showing of need—does not relieve a party from the obligation to provide log-type information to an opposing party or to submit documents *in camera* to a court to resolve contested claims of privilege. *See United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980); *see also* Fed. R. Civ. P. 26(b)(5)(A).

2. In any event, Plaintiffs have met their burden to overcome the privilege with respect to log-type information

Even if privilege log-type information were privileged—which it is not—Plaintiffs have met their burden to show a specific need sufficient to overcome the privilege.[7] Plaintiffs have

[7] The government devotes a large portion of its brief to the issue of *when* Plaintiffs must show their need for the privileged materials, arguing that an initial showing is required before Defendants are even required to assert the privilege. *See* Mem. 17-21. That argument falls wide

shown that (1) the materials sought are likely to contain "important evidence," and (2) "this evidence is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 753. To the extent there were any public interest served by protecting the confidentiality of purely factual information concerning the President's communications in this context—setting aside that there is no legitimate public interest in shielding a likely unconstitutional decision of the President from judicial scrutiny—that interest is outweighed by Plaintiffs' need for the information. *See id.*

The log-type information called for under the first phase of Plaintiffs' proposal is central to this case because it would enable Plaintiffs to assess whether other important evidence is being withheld and to test Defendants' sweeping assertion of privilege as to that evidence. As already discussed, without log-type information, there is no way for Plaintiffs to evaluate Defendants' privilege assertions. In prior cases, the government has regularly disclosed such basic identifying information about presidential communications, just as it does when claiming application of other privileges. *See supra* pp. 19-20 & n.6; *see also, e.g.*, *Loving*, 550 F.3d at 36. In addition, log-type information will enable Plaintiffs to further narrow the set of underlying communications they pursue in the second phase of the proposed approach, minimizing the potential distraction to the Executive's conduct of its constitutional powers and mitigating to the maximum extent possible any separation-of-powers concerns flowing from the requested discovery.

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of the mark in several respects. Unlike the situation in *Cheney*, where the Supreme Court faulted the district court for putting in place a sweeping discovery plan that might lead to the needless assertion of executive privilege, *see* 542 U.S. at 390, here Defendants have *already* asserted the presidential communications privilege in response to Plaintiffs' interrogatories and document requests. It is unclear what else Defendants believe they must do to perfect their claim of privilege, and Defendants do not suggest that they would provide the Court with any additional information that would bear on the Court's evaluation of their privilege claim. In any event, the question is largely academic in this case. As explained above, regardless of when the issue is considered, Plaintiffs have demonstrated adequate need to overcome the privilege with respect to the log-type information at issue in this dispute. *See supra* Part I.

3. Defendants should at least be required to provide privilege log-type information to the Court for in camera review

At a minimum, the Court should require Defendants to produce privilege log-type information for those presidential communications they refuse to produce for *in camera* review so that the Court may assess the legitimacy of their claims of privilege. Without *in camera* review, the Court cannot test the merit of Defendants' contention that even log-type information would reveal the contents of assertedly privileged communications or ascertain whether Defendants are asserting the privilege overbroadly.

In camera review likewise would not impermissibly impinge on legitimate assertions of the privilege or the separation-of-powers concerns identified in *Cheney*. Both the Supreme Court and D.C. Circuit have recognized that "*in camera* inspection is a necessary and appropriate method" for reconciling the Executive's interest in maintaining the confidentiality of presidential communications with the Judiciary's obligation to evaluate the propriety of claims of executive privilege. *Nixon v. Sirica*, 487 F.2d 700, 719 (D.C. Cir. 1973). The Supreme Court in *Nixon* specifically remanded the case for *in camera* review of the tapes at issue, entrusting the district court to isolate relevant and admissible evidence while preserving the confidentiality of non-relevant material. *Nixon*, 418 U.S. at 714-16 & n.21. The D.C. Circuit has likewise approved *in camera* review, in both criminal and civil cases, as an effective means to reconcile the respective obligations of the coordinate branches. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 743-45, 759; *Dellums*, 561 F.2d at 251.

B. As A Second Step, Defendants Should Produce The Underlying Documents And Plaintiffs Should Be Permitted To Re-Open The Deposition Of Jennifer Hay

After Plaintiffs (or the Court) have had the opportunity to review the log-type information discussed above, Plaintiffs can make more targeted requests for documents and

information that minimize the separation-of-powers concerns Defendants raise in their brief. If Defendants continue to withhold information, they may then provide information to substantiate their narrower claims of privilege.

Plaintiffs have already satisfied their burden to overcome the presidential communications privilege with regard to the deposition testimony of Jennifer Hay. While at the NSC, Ms. Hay's portfolio of responsibilities as a Director of Defense Policy and Strategy included leading the interagency process for issues of military personnel and readiness, including work on issues relating to transgender military service. Apart from her supervisor (a Senior Director who reported directly to the National Security Advisor), Ms. Hay had exclusive responsibility on the NSC staff for issues of military personnel and readiness during her time there. This places her in a unique position to know how the White House considered issues of transgender military service up until her departure from the NSC on July 5, 2017. As discussed in Part I, *supra*, information about the process is important to Plaintiffs' claims and ability to test the President's assertion that the ban was informed by consultation with military generals and experts.

Reopening the deposition of Ms. Hay is particularly appropriate given Defendants' grossly overbroad invocations of the presidential communications privilege. Defendants not only objected to revealing the substance of advice being given to the President, but also basic information including:

- the nature of the "interagency process on personnel and readiness," Hay Dep. 29:3-30:2;
- whether Ms. Hay ever worked on issues involving the Department of Defense and the Department of Homeland Security, Hay Dep. 30:21-31:3;
- whether "agendas were prepared for NSC meetings" during her time at the NSC, Hay Dep. 50:8-51:7;

- where NSC Policy Coordination Committees met, Hay Dep. 95:25-96:11;
- whether Ms. Hay "ever communicate[d] with President Trump in any fashion regarding transgender military service," Hay Dep. 100:9-16;
- whether there were "any meetings of the National Security Council concerning the subject of transgender military service," Hay Dep. 104:3-12; and
- whether Ms. Hay "ever receive[d] communications from outside third parties concerning transgender military service," Hay Dep. 127:19-128:2.

Defendants' effort to bar *any* inquiry into Ms. Hay's knowledge about the process leading up to the President's ban are meritless. Nevertheless, to avoid the need for a third deposition of Ms. Hay, Plaintiffs are willing to defer reopening her deposition until Defendants provide privilege-log type information about the relevant presidential communication and the Court rules on whether the substance of those communications must be disclosed, at which point a properly limited deposition can be held.[8]

CONCLUSION

Defendants' motion for a protective order, Dkt. 171, should be denied.

[8] Defendants argue (at 22-23 & n.8) that discovery of Ms. Hay, as a former NSC staff member, is inappropriate now that the President has been dismissed, and that Plaintiffs must proceed by Rule 45 subpoena to obtain Ms. Hay's testimony. For the reasons discussed above, *see supra* p. 13 n.2, those arguments fail.

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Respectfully submitted,

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