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INTRODUCTION

Vice Admiral David Kriete is uniquely situated to testify to important aspects of the basis for and process underlying the President's July 2017 decision to ban transgender people from serving in the military. The Court has already recognized that the "unusual factors" surrounding this decision are highly relevant to Plaintiffs' claims, and the discovery Plaintiffs have thus far obtained suggests that Vice Admiral Kriete was the sole individual responsible for the question of military service by transgender people at the National Security Council at the time of the President's tweets. Nothing in the record suggests that any lower-ranking person can testify to those topics, nor have Defendants indicated that such a person exists.

In recognition of Vice Admiral Kriete's important responsibilities, Plaintiffs are prepared to minimize any burden that deposing him would create. Plaintiffs are willing to travel to Vice Admiral Kriete's location, to limit the time of the deposition to four hours, and to limit the scope of the deposition to the few months the Vice Admiral was responsible for the issues at the heart of this case. Plaintiffs are also willing to defer Vice Admiral Kriete's deposition until after this Court has resolved the parties' disputes over the deliberative process privilege and the presidential communications privilege to minimize the chance that privilege objections would necessitate a second deposition. But Vice Admiral Kriete's unique knowledge of facts highly relevant to this case mean that Defendants' effort to foreclose his deposition entirely should be denied.

BACKGROUND

In the interest of brevity, Plaintiffs incorporate by reference the recitation of facts in their opposition to Defendants' motion for a protective order concerning presidential communications, which details the history of President Trump's announcement and Defendants' implementation

of the ban on transgender military service and the history of this litigation. *See* Dkt. 175 at 2-9. That discussion provides critical context for Plaintiffs' deposition of Vice Admiral Kriete.

Plaintiffs first noticed the deposition of then-Rear Admiral Kriete on May 15, 2018, to occur on May 30, 2018, in Washington, DC. *See* Decl. of Alan E. Schoenfeld in Supp. of Pls.' Opp. to Defs.' Mots. for Prot. Orders ("Schoenfeld Decl."), Ex. A. Following discussion between the parties about the date and location of the deposition, the parties agreed in writing on May 25, 2018, that the deposition would proceed on June 27 in Omaha, Nebraska. Schoenfeld Decl., Ex. B. Then, on June 8, 2018, Defendants suddenly reversed position and refused to proceed with the deposition as scheduled. There were no intervening events to justify Defendants renegeing on their agreement to produce Vice Admiral Kriete for his deposition. Defendants brought this dispute to the Court's attention via e-mail on June 13, 2018, requesting issuance of an order barring Plaintiffs from proceeding with the scheduled deposition. Dkt. 145-1. On June 19, 2018, the Court ordered that the parties' dispute concerning the deposition be held in abeyance pending the Court's decisions on the parties' cross-motions for summary judgment. Dkt. 145.

The Court denied the parties' cross-motions for summary judgment on August 24, 2018. Dkt. 159. In so doing, 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 "nature of the process that resulted in the challenged policies" was "clearly material" because it goes "to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." Dkt. 160 at 2, 5, 13.

Following its denial of the motions for summary judgment, the Court ordered the parties to propose a process for the efficient resolution of the case. *See* Minute Order (Aug. 27, 2018). In light of Defendants’ position that Vice Admiral Kriete’s testimony would implicate the parties’ broader dispute over the deliberative process privilege and presidential communications privilege, the parties agreed that the Court should resolve the dispute over this deposition before resuming discovery. Dkts. 165, 167.

ARGUMENT

A. Vice Admiral Kriete Has First-Hand Knowledge Of Information Central To The Claims And Defenses In This Case That Is Not Available From Any Other Source

This Court has already recognized that the basis for and process underlying the President’s July 2017 decision to ban transgender people from the military are central to this case. Specifically, the Court has indicated that the abrupt announcement of that major policy change—one that revoked rights previously given and was contradicted by the military’s own judgment—without any evident formal deliberation or evidence-gathering strongly suggests that Plaintiffs are likely to succeed on their equal protection claim. Dkt. 61 at 65-68; *see also* Dkt. 157 at 32 (noting that the same “unusual factors” remain “relevant” to Plaintiffs’ claims even after the development of the Mattis Implementation Plan).

Vice Admiral Kriete has unique knowledge regarding those “unusual factors.” Deposition testimony from Jennifer Hay, a former director at the NSC and current employee at the Department of Defense, indicates that Vice Admiral Kriete was the sole person responsible for the issue of military service by transgender persons at the National Security Council between July 5, 2017 and approximately August or September 2017—the period immediately preceding

and following the President's tweets on July 26, 2017.¹ As the only person responsible for transgender issues at the NSC during that period, Vice Admiral Kriete is singularly situated to testify about the basis for and process surrounding the President's tweets. For example, he is likely to be the key person with knowledge about (a) whether the NSC played a role either before or after the decision to ban transgender people from military service; (b) whether procedures ordered by the President for developing interagency security policy² were followed with respect to this issue; (c) whether third parties and/or government personnel outside the Executive Branch had communications with the NSC or the White House about transgender military service; and (d) what communications the NSC or the White House had with personnel at the Department of Defense in the wake of the President's tweets. Nothing in the record suggests that any alternative, lower-ranking witness could provide comparable testimony, and Defendants have never indicated that any such alternative witness exists.

None of Defendants' arguments undercuts the importance of Vice Admiral Kriete's testimony. They invoke (at 16-17) *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), for the notion that the Court may not examine the basis for the President's decision. But as Plaintiffs have explained in their brief on the presidential communications privilege, that argument fails because

¹ See Schoenfeld Decl., Ex. C (Dep. Tr. of Jennifer Hay ("Hay Dep.)) at 27:23-28:16, 72:21-73:8 (Jennifer Hay testified she was the sole official responsible for military readiness issues, including military service by transgender people, while at the NSC); *id.* at 20:6-8 (Hay testified she left the NSC on July 5, 2017); *id.* at 108:14-110:7 (following her departure, Hay testified her portfolio responsibilities were assigned to other NSC directors until her formal successor began work in August or September 2017, and that during that period "Dave Kriete worked on the transgender issue after [Hay] left").

² See, e.g., Hay Dep. at 38:16-40:13, 41:25-42:19, 66:18-67:3, 82:24-83:5 (identifying National Security Presidential Memoranda Nos. 2 and 4 as the operative procedures governing the organization of the NSC during the Trump administration); *id.* at 73:14-74:4, 77:7-12, 88:2-8 (describing procedures and documentation for NSC decisionmaking); *id.* at 78:22-79:9, 93:16-25 (describing role of NSC in "interagency national security process").

Hawaii's reasoning hinges on the fact that the policy at issue there was facially neutral. Here, the Court has already recognized that the ban on transgender people serving in the military (in both the President's initial decision and the Mattis Implementation Plan) is facially discriminatory. *See* Dkt. 175 at 12-13. Nor is it relevant that the President has been dismissed from the case; as discussed in that brief as well, the President's dismissal does not deprive Plaintiffs of the ability to seek discovery concerning (or the Court's ability to adjudicate the legality of) the President's actions.³ *See id.* at 10-11, 13. Vice Admiral Kriete thus has knowledge and information that is of paramount importance to this case and that Plaintiffs cannot obtain elsewhere.

B. Vice Admiral Kriete Has Relevant Information That Is Plainly Not Privileged

Plaintiffs recognize that some of the subjects on which they seek to depose Vice Admiral Kriete concern matters over which Defendants have invoked the deliberative process privilege and presidential communications privilege. Accordingly, to avoid having to depose Vice Admiral Kriete twice in this matter, Plaintiffs are willing to defer his deposition in abeyance until the Court resolves the parties' disputes over those privileges.

But in any event, Vice Admiral Kriete's deposition should go forward, because Plaintiffs also seek to depose him about information that is not within the scope of either the deliberative process privilege or presidential communications privilege. For instance, Plaintiffs intend to ask Vice Admiral Kriete about the *existence* of presidential communications and documents relating to the transgender ban. That information is outside the scope of the presidential communications

³ Similarly, the President's dismissal does not require Plaintiffs to follow third-party procedures to depose Vice Admiral Kriete for the reasons described in Plaintiffs' opposition to Defendants' motion for a protective order concerning the presidential communications privilege. *See* Dkt. 175 at 13 n.2.

privilege, which only protects the *substance* of documents or communications. *See id.* at 17-20. Given that the President is no longer a party to the case, and thus not subject to written interrogatories under Rule 33, a deposition of Vice Admiral Kriete appears to be the only way that Plaintiffs can determine who, if anyone, the President consulted as part of his decision to ban transgender individuals from the military.

In addition to being relevant to Plaintiffs' claims of animus and lack of process, information about the existence of presidential communications (such as the identity of the individuals involved in the communication) is necessary to provide Plaintiffs the basis to challenge any overbroad assertions of either privilege.

As shown by the Hay deposition, even with the extraordinarily broad assertions of privilege made by Defendants, Plaintiffs were able to obtain helpful testimony about the processes followed by the National Security Council in the time period leading up to the ban. For example, Hay testified that (a) she worked on transgender military service issues while at the NSC, *see* Hay Dep. at 99:1-4; (b) certain individuals took over her responsibility for military transgender issues (a topic that Defendants initially objected to on the basis of privilege, before withdrawing the objection), *id.* at 107:8-110:7; (c) she had no knowledge of when President Trump decided on the ban, *id.* at 115:4-17; (d) the ban constituted a "rolling back the previous policy on transgender military service," *id.* at 122:14-19; and (e) she was unaware of communications from outside groups including the Family Research Council and the Heritage Foundation, *id.* at 130:10-132:18. Plaintiffs would pursue similar lines of non-privileged inquiry with Vice Admiral Kriete, who has knowledge about a critical time period—July and August 2017—as to which Hay had no knowledge.

C. A Tailored Deposition of Vice Admiral Kriete Is Warranted

Given his unique, personal knowledge about the genesis, justification, and early implementation of the government’s ban on transgender military service, and the lack of any alternative sources for that information, *see supra* Part A, Vice Admiral Kriete’s current responsibilities should not immunize him from being deposed in this litigation. Plaintiffs nonetheless are willing to undertake reasonable measures to minimize distraction from Vice Admiral Kriete’s duties, including by narrowing the scope and duration of any such deposition.

The presumption against deposing high-ranking government officials identified by Defendants, Mem. 10-13—sometimes referred to as the “apex doctrine”—yields upon a showing of “extraordinary circumstances” justifying the deposition. *See Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). Courts have found sufficient justification for such a deposition when the high-ranking official has ““some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere.”” *Sherrod v. Breitbart*, 304 F.R.D. 73, 75 (D.D.C. 2014) (internal citation omitted). Thus, for example, the district court in *Sherrod v. Breitbart* allowed a deposition of the Secretary of Agriculture to proceed where Secretary Vilsack had personal knowledge about the factors influencing the decision to request the plaintiff’s resignation that could not be obtained from another witness. *Id.* at 76; *see also In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1997) (affirming on other grounds decision by district court to permit deposition of Commissioner of the Food and Drug Administration); *Judicial Watch v. U.S. Dep’t of State*, 2016 WL 10770466, at *3 (D.D.C. Aug. 19, 2016) (permitting deposition of former Secretary of State Clinton).⁴

⁴ The Supreme Court’s recent decision to stay the deposition of Secretary of Commerce Wilbur Ross in *New York Immigration Coalition v. U.S. Department of Commerce*, No. 18-cv-05025 (S.D.N.Y.), does not provide grounds to bar Plaintiffs from deposing Vice Admiral Kriete. *See In re Dep’t of Commerce*, No. 18A375, 2018 WL 5259090 (U.S. Oct. 22, 2018).

Defendants' recitation of the policy justifications underlying the "apex doctrine" is incomplete. Mem. 11-13. The government fails to acknowledge that the interests they identify must be weighed against Plaintiffs' countervailing "'legitimate and important interests in trial preparation,'" including their need to elicit relevant, non-privileged information through oral depositions of key witnesses. *Byrd v. District of Columbia*, 259 F.R.D. 1, 7 (D.D.C. 2009) (quoting *Alexander v. FBI*, 186 F.R.D. 1, 3 (D.D.C. 1998)). Nonetheless, to minimize any burden on Vice Admiral Kriete, Plaintiffs are willing to travel to Offutt Air Force Base in Nebraska (or another convenient location) for the deposition, to limit the deposition's duration to four hours, and, in reliance on the veracity of Vice Admiral Kriete's declaration, to confine their questioning to the two-month time period during which he represents he "supported senior officials on the topic of military service by transgender individuals." Dkt. 170-2 at 4. Plaintiffs also will consider any additional measures suggested by Defendants to minimize the burden of this deposition, provided such measures are reasonable and will not undermine Plaintiffs' ability to take discovery of information relevant to their claims.

CONCLUSION

Defendants' motion for a protective order, Dkt. 170, should be denied.

Indeed, the Court has reached no determination as to whether the deposition of Secretary Ross would ultimately proceed, and it expressly permitted the depositions of other high-level government officials to proceed over the government's objection, including that of the acting Assistant Attorney General in charge of the Department of Justice's Civil Rights Division.

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