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' REPLY IN SUPPORT OF
THEIR MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion for a Protective Order demonstrates that the discovery they seek of presidential communications and deliberations is extraordinary and unsupported by law. Plaintiffs acknowledge that they seek to probe the President's decisionmaking process in a military matter. For reasons rooted in fundamental separation-of-powers principles, the Court should preclude the requested discovery of presidential communications and information.

First, Plaintiffs should be required to exhaust alternative sources of non-privileged discovery to support their claims and to narrow their discovery requests before seeking presidential communications or forcing an assertion of the presidential communications privilege. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 390 (2004); Defs.' Br. at 8–14. Even if the Court declines to conclude that discovery of documents and information subject to the privilege should be precluded on separation-of-powers grounds, the Court must first require Plaintiffs to meet their initial burden of establishing a heightened, particularized need for the specific information sought before shifting the burden to the Office of the President to formally invoke the privilege by affidavit. *See Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 659, 660 (2007); Defs.' Br. 14–21.

Next, the Court should reject Plaintiffs' suggestion that Defendants should be required to provide "log-type information" for the sought discovery. Defendants have already provided detailed privilege logs from the Department of Defense ("DoD") and the Services for documents subject to the presidential communications privilege. And in what they trivialize as mere "log-type information" responsive to their interrogatories, Plaintiffs demand to know whom the President conferred with, when he spoke with them, and what topics they discussed before he made statements and decisions on policy—information that falls well within the law protecting presidential communications and deliberations. *See In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997)). Further, *in camera* review would

also implicate the separation-of-powers and is unnecessary to resolve the legal question of whether the type of information at issue would be subject to privilege as a matter of law.

None of Plaintiffs' arguments support such an unprecedented intrusion into the President's deliberations. Contrary to Plaintiffs' suggestion, adherence to the separation-of-powers principles at stake here would not mean that the privilege is "absolute" in the sense that it cannot be overcome in certain circumstances by an adequate showing of need, or in the sense that the Court cannot evaluate whether the privilege would apply. Pls.' Opp. 1, Dkt. 175. Rather, established law sets out a series of considerations that must be overcome before civil discovery of the President's decisionmaking process should even be considered. Indeed, the Supreme Court has made clear that the assertion of Executive Privilege should be the last resort because "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course." *Cheney*, 542 U.S. at 389.

For similar reasons, the Court should issue a protective order precluding Plaintiffs from reopening the deposition of Jennifer Hay, whose work on the National Security Council staff was done to advise the National Security Advisor and the President. Plaintiffs thus seek information that is at the heart of presidential decisionmaking, but Plaintiffs are unable to satisfy the threshold requirements of *Cheney* or meet their initial burden to show a heightened need. Defs.' Br. 22–26.

ARGUMENT

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

A. *Cheney* Plainly Applies To Foreclose Discovery Of Presidential Communication And Deliberations At This Stage.

As set forth in Defendants' motion, the requested discovery into presidential communications and information would implicate fundamental separation-of-powers concerns that must be addressed before the Office of the President is required to formally invoke the presidential communications privilege via affidavit, *see Cheney,* 542 U.S. at 391. *See* Defs.' Br. at 8–14. Plaintiffs do not even attempt to contest that under *Cheney*'s threshold requirements, they must exhaust alternative sources of non-

privileged discovery and narrow their discovery requests to what is absolutely necessary to their case. Indeed, Plaintiffs concede that they could narrow their requests as *Cheney* requires. *See* Pls.' Opp. 23–24 ("Plaintiffs can make more targeted requests for documents and information that minimize the separation-of-powers concerns Defendants raise in their brief."); *see also* Pls.' Reply 1, 8–9, Dkt. 180. This should be the end of the inquiry. There is no reason for the Court to demand a formal assertion of the privilege or to adjudicate the privilege where Plaintiffs themselves concede that their requests could be narrowed.[1] Yet Plaintiffs attempt to avoid grappling with *Cheney*'s threshold requirements by contending that the separation-of-powers concerns are "incorporated into the applicable legal standard" for the privilege itself. Pls.' Opp. 14. That was the position of the Court of Appeals in *Cheney*, and the Supreme Court rejected it. 542 U.S. at 382–83. To be sure, "the presidential [communications] privilege is rooted in constitutional separation of powers principles," *In re Sealed Case*, 121 F.3d at 745, but separation-of-powers concerns also require certain threshold considerations be met before any assertion of privilege is required. Specifically, *Cheney* makes clear that courts must circumscribe discovery requests targeting presidential communications or deliberations and consider whether "other avenues" exist for disposing of discovery demands before the Office of the President is forced to "bear the burden" of formally asserting privilege. 542 U.S. at 388, 390. If that were not the case, *Cheney* would be meaningless.

Plaintiffs contend that by seeking information about presidential communications and deliberations from sources "other than the President or the White House," they are "doing exactly what the government said that Plaintiffs should do." Pls.' Opp. 13. But that is not the kind of alternative source of discovery that *Cheney* contemplates. The core purpose of the holding in *Cheney*

[1] Plaintiffs propose narrowing their requests as the second step of their proposed "phased approach" for discovery into presidential communications. However, because Defendants have already produced detailed privilege logs for documents subject to the privilege, as requested by Plaintiffs as part of the first step of their "phased approach," *see infra* Section III.A, there is no reason why Plaintiffs cannot narrow their requests at this time.

is to avoid discovery that unnecessarily intrudes upon presidential communication and deliberations and to defer and ideally eliminate the need for a privilege assertion over presidential information—that is, to channel discovery away from such information. Thus, *Cheney* does not allow a litigant to seek precisely the same privileged presidential information from a source other than the President. Even as to such discovery, the President's interests and information are at issue and the privilege would still apply. If all that was necessary to avoid separation-of-powers concerns were for a party to seek privileged presidential information from a federal agency, the principles set forth in *Cheney* would be rendered a nullity. Thus, Plaintiffs' theory—that *Cheney* permits them to obtain privileged information concerning presidential communications so long as they do not get it directly from the President—has no basis in logic or the law. The alternative approach to discovery contemplated in *Cheney* is discovery that would not seek, require, or intrude upon presidential communications and deliberations, regardless of where the records or knowledge of those communications may be located.

Accordingly, consistent with *Cheney*, Plaintiffs should, at a minimum, be required to seek discovery relevant to their claims that does not concern presidential communications. Defendants have already made an enormous amount of non-privileged discovery available to Plaintiffs, including over 30,000 non-privileged documents and non-privileged responses to interrogatories. Defs.' Br. 12–13. Plaintiffs have also had ample opportunity to take depositions, but have taken only five depositions in this case and have chosen thus far not to depose Mr. Anthony Kurta, who served as the Chair of the Panel of Experts for the transgender policy review and played a key role in the development of DoD's new policy. At a minimum, Plaintiffs should be required to seek non-privileged information, such as through a deposition of Mr. Kurta, before pursuing discovery of presidential communications and deliberations and attempting to force a conflict over the formal invocation of the presidential communications privilege. For example, Plaintiffs contend that they need discovery of presidential communication and deliberations to "test Defendants' assertion that

the process [of the Panel of Experts in developing DoD's new policy] was not constrained by the President's order." Pls.' Opp. 11. But Plaintiffs could simply ask Mr. Kurta if he and the Panel of Experts were free to come to alternative conclusions or if their possible outcomes were constrained in any way. This is the type of alternative, non-privileged discovery that Plaintiffs should pursue before seeking discovery of presidential communication and deliberations.

B. At A Minimum, The Court Should Stay Discovery Of Presidential Communications And Deliberations Pending Final Resolution Of The Interlocutory Appeal Currently Before The D.C. Circuit.

If the Court does not preclude Plaintiffs' requested discovery of presidential deliberations, then, at a minimum, it should stay such discovery pending resolution of Defendants' interlocutory appeal of the denial of Defendants' motion to dissolve the preliminary injunction, which will be heard by the D.C. Circuit on December 10, 2018. *See* Order, *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1755741; Defs.' Br. 13–14. Plaintiffs contend that they need access to presidential communications and deliberations to "test Defendants' assertion that the process [resulting in DoD's new policy and 44-page report] was not constrained by the President's order" because the "purpose and scope of the process" "bear directly on how much deference" is due. *See* Pls.' Opp. 11–12; *see also id.* at 8–9 (noting that the Court held that the facts about the process "go to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case" (citing Mem. Op. 5, 13, Dkt. 160)). But the issues of deference and the proper level of scrutiny under which to review DoD's new policy are among the central issues raised in Defendants' interlocutory appeal. *See* Appellant's Opening Br., 19–23, *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1752076. Defendants' position is that because DoD's new policy arises in the area of military affairs, it should be reviewed under a highly deferential standard that "most closely resembles rational-basis review." *Id.* at 21. If that position prevails, Plaintiffs would be left with no reason to probe the President's decisionmaking process, and discovery of presidential communications and deliberations would be unnecessary.

Even if the interlocutory appeal does not eliminate Plaintiffs' asserted basis for this discovery, it is likely to narrow the scope of relevant discovery. For example, the D.C. Circuit could conclude that Plaintiffs' challenge to the 2017 Presidential Memorandum is moot, or that the substance of DoD's new policy is distinct from the 2017 Presidential Memorandum, which would render irrelevant discovery relating to presidential communications during the summer of 2017. *See, e.g.*, Appellant's Opening Br., 38–41, 46 n.3, *Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1752076. Given the likelihood that a D.C. Circuit ruling will affect the scope of discovery, the Court should stay discovery of presidential communications and deliberations pending resolution of the appeal.[2]

II. Because Plaintiffs Have Failed To Meet Their Initial Burden Of Showing Heightened Need, The Issue Of Whether The Presidential Communications Privilege Can Be Overcome Is Not Before The Court.

The foregoing separation-of-powers considerations should foreclose the requested discovery into presidential communications. But even if the Court declines to conclude that such discovery should be precluded at this stage of the litigation on separation-of-powers grounds, the Court must first require Plaintiffs to meet their initial burden of establishing a heightened, particularized need for the specific information sought before requiring the Office of the President to formally invoke the privilege by affidavit. *See Dairyland*, 79 Fed. Cl. at 660. Plaintiffs' argument that they have already satisfied their ultimate burden to overcome the privilege demonstrates a fundamental misunderstanding of the scope of the presidential communications privilege, as well as the timing of when it must be formally invoked and at what stage it can be overcome. Assuming that Plaintiffs could first meet *Cheney*'s threshold requirements, they would still need to satisfy their initial burden of heightened need, *see infra* Section II.B; the Office of the President would then decide whether to formally invoke the privilege via affidavit, *see infra* p.11; and only at that point should the Court

[2] Defendants recently filed in the D.C. Circuit a letter indicating their intent to file a petition for a writ of certiorari before judgment. *See* Dkt. 178-1.

consider whether Plaintiffs can overcome the privilege by (1) demonstrating "that each discrete group of the [sought] materials likely contains important evidence," and (2) "detail[ing] [their] efforts" "to determine whether sufficient evidence can be obtained elsewhere," and "explain[ing] why [notwithstanding other sources of information,] evidence covered by the presidential communications privilege is still needed." *In re Sealed Case*, 121 F.3d at 753–55; *see also infra* Section II.C.

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

As an initial matter, Plaintiffs erroneously suggest that "[p]rivilege log-type information" about presidential communications is not subject to the presidential communications privilege at all. *See, e.g.*, Pls.' Opp. 17. But 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. Plaintiffs acknowledge that they seek information about the President's decisionmaking process. *See, e.g.*, Pls.' Opp. 10. Because information regarding the President's confidential decisionmaking process clearly "reflect[s] presidential decisionmaking and deliberations," it is plainly protected by the presidential communications privilege. *See In re Sealed Case*, 121 F.3d at 744. Disclosing the kind of comprehensive information that Plaintiffs seek about the participants, timeline, and scope of the President's decisionmaking would reveal the inner workings of the President's decisionmaking process and constitute a substantial intrusion on the Presidency.[3] Thus, while the substance of presidential communications obviously are covered by the privilege, the so-called "log-type" information sought

[3] *See, e.g.*, Interrogatory 19, Dkt. 89-1 (asking Defendants to identify "all Communications requesting or providing information between January 20, 2017, and August 25, 2017, concerning the military service and/or accession of transgender persons between or among the Executive Office of the President and any of the following: the Department of Defense, the Department of Homeland Security, and/or any Service Branch."); Interrogatory 17, Dkt. 89-1 (for "every meeting attended by Presidential Trump, Secretary Mattis, and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed," seeking, *inter alia*, the date, the identities of "all participants," the "topics discussed").

by Plaintiffs is also the type of confidential information that the privilege is intended to protect. *See In re Sealed Case*, 121 F.3d at 744; *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973) (explaining that confidentiality is needed to protect "the effectiveness of the executive decision-making process").

Plaintiffs' contention that it is routine for the Government to provide identifying information about presidential communications is misplaced. *See* Pls.' Opp. 19–20. The mere fact that a *Vaughn* index or privilege log has been provided in some settings does not necessarily mean that specific information revealing Presidential deliberations was disclosed. Rather, information sufficient to assess the claim of privilege can be provided at a high level of generality. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 736 (noting the Government's argument that "the withheld documents come under the presidential communications privilege because they were generated in response to the President's request for advice on . . . one of the President's core functions under Article II of the Constitution."); *Dairyland*, 79 Fed. Cl at 668 (privilege log described "memorandum from [Department of Energy] officials to the Office of Management and Budget and the White House regarding nuclear waste litigation"); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (finding that the withheld documents "reflect or memorialize communications between senior presidential advisers and other United States government officials and are therefore properly withheld").

Similarly, Plaintiffs' contention that "courts have recognized that the presidential communications privilege protects only the substance of documents or communications" is wrong. *See* Pls.' Opp. 18 (citing *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 127, 132 (D.D.C. 2009) ("*CREW*")). *CREW*, a district court FOIA case about White House visitor logs, did not hold that *only* substantive communications were covered by the privilege—it held that the particular logs at issue there were not covered and carefully reserved any broader holding. *See CREW*, 592 F. Supp. 2d at 132. In the parallel litigation of *Citizens for Responsibility & Ethics in Wash. v. Department of Homeland Security*, 592 F. Supp. 2d 111, 118–19 (D.D.C. 2009), the Court explained that

the White House visitor logs were not privileged because the information contained in the logs "shed[] no light on the content of communications between the visitor and the President or his advisors, whether the communications related to presidential deliberation or decisionmaking, or whether any substantive communications even occurred."[4] *Id.* In contrast, Plaintiffs here specifically demand information that identifies communications (including dates and the identity of the participants) with the President and his immediate advisors and their staff regarding military service by transgender individuals for the express purpose of assessing the process preceding a presidential decision.[5] Indeed, the *CREW* court expressly recognized that in certain circumstances, revealing this sort of factual information about presidential communications "might reveal the substance of presidential deliberations." *Id.* at 119.

Plaintiffs also disregard D.C. Circuit authority indicating that the privilege protects "documents *or other materials* that reflect presidential decisionmaking and deliberations," *In re Sealed Case*, 121 F.3d at 744 (emphasis added), as well as factual information and "sources of information," *see id.* at 745, 750; *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008). Defendants do not contend that the privilege covers "all information related to the President," Pls.' Opp. 18, or that the privilege is "absolute" or that all information is immune from disclosure regardless of a strong showing of need in certain circumstances. But the privilege properly applies to the category of information at

[4] The D.C. Circuit later observed, in holding that the White House visitor logs were not subject to FOIA, that construing FOIA to extend to these visitor logs "could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public" and "render FOIA a potentially serious congressional intrusion into the conduct of the President's daily operations." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 226 (D.C. Cir. 2013).

[5] For example, Interrogatory 20 states: "Identify all Communications between President Trump and Secretary Mattis, the Department of Defense, General Dunford, the Joint Chiefs of Staff, the Department of Homeland Security, and/or any Service Branch from January 20, 2017, to August 25, 2017, concerning military service by transgender individuals, including Communications concerning: (a) any evaluation(s) conducted by [DoD] on the impact of accessions of transgender applicants on readiness or lethality; . . . (d) the President's Twitter Statement; (e) the Presidential Memorandum[.]" Dkt. 89-1; *see also* Pls.' Opp. at 10.

issue here—factual information that would reveal details about confidential presidential communications—which is at the heart of presidential decisionmaking and deliberations.[6]

Plaintiffs also argue that because "[t]he President himself has stated publicly that he consulted multiple military personnel," disclosure of the factual information about presidential communications sought by Plaintiffs would not "disclose sensitive information." Pls.' Opp. 20–21. That argument has no merit. Under Plaintiffs' theory, every time the President indicates that he consulted advisors about a decision, the door would be open to discovery into the President's decisionmaking process and confidential communications. But Plaintiffs concede that "the President would be expected to consult with senior military leaders about changes to *any* major military policy[.]" Pls.' Opp. 21. Plaintiffs' legally unsupported theory thus would permit extraordinary discovery into the President's deliberations every time he publicly references consultations with advisors.

Again, none of these considerations means that the privilege is "absolute." However, the Court should not even begin to evaluate whether the privilege has been overcome until after Plaintiffs (i) have exhausted other avenues of non-privileged discovery, (ii) narrowed their requests, and (iii) met their initial burden of heightened need, *see Cheney*, 542 U.S. at 386, and only then (iv) after the Office of the President decides to formally invoke the privilege through affidavit.

B. Because Plaintiffs Have Not Met Their Initial Burden To Demonstrate Heightened Need, The Burden Has Not Shifted To The Office Of The President To Formally Invoke The Presidential Communications Privilege.

Plaintiffs' Opposition demonstrates a fundamental misunderstanding about the sequence of events that must occur before the Office of the President is required to formally invoke the

[6] Plaintiffs' reliance on cases describing other privileges, such as the attorney-client, clergy-penitent, and psychotherapist-patient privileges, is likewise misplaced. Pls.' Opp. at 19 n.5. The presidential communications privilege is unique, as it is "rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case*, 121 F.3d at 745; *see also Cheney*, 542 U.S. at 382 ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Office of the President] occupies.") (quoting *Clinton v. Jones*, 520 U.S. 681, 698–99 (1997)). Analogies to other privileges are simply inapposite.

presidential communications privilege by affidavit—a necessary prerequisite before the Court can evaluate whether Plaintiffs can overcome the privilege with a "focused demonstration of need." *In re Sealed Case*, 121 F.3d at 746. Plaintiffs contend that "Defendants have *already* asserted the presidential communications privilege." Pls.' Opp. 21–22 n.7. Plaintiffs are wrong, and their argument runs afoul of *Cheney*, 542 U.S. at 389–90, and *In re Sealed Case*, 121 F.3d at 746. In order to formalize a privilege claim, a declaration formally asserting privilege is lodged. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 745 n.16; *Dairyland Power Co-op v. United States*, 2008 WL 8776547, No. 04-106C, at *2 (Fed. Cl. Mar. 17, 2008). This burden is an "important factor" to be considered due to the special deference and "high respect that is owed to the office of the Chief Executive." *Cheney*, 542 U.S. at 385 (citation omitted). Indeed, *Cheney* expressly rejected the notion that the Executive Branch at its highest level shall bear the initial burden of invoking executive privilege with specificity. *Id.* at 383, 388.

Because of the need to safeguard executive functions and maintain the separation of powers, *id.*, Plaintiffs must satisfy their initial burden of demonstrating a heightened, particularized need for the information they seek. Until Plaintiffs have met this initial burden of satisfying the "exacting standards" of "relevancy," "admissibility," and "specificity," pursuant to the Supreme Court's analysis of this issue in *Cheney*, 542 U.S. at 386 (citation omitted), the burden does not shift to the Office of the President to formally invoke the privilege by affidavit. *See Dairyland*, 79 Fed. Cl. at 662.

Here, Plaintiffs cannot satisfy their heavy, initial burden of heightened need in light of the Supreme Court's decision in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018). Defs.' Br. 18–20. Plaintiffs argue that *Hawaii* does not apply here because the policy at issue in *Hawaii* is facially neutral. Pls.' Opp. 12–13. But DoD's policy is equally neutral: it turns on a medical condition (gender dysphoria) and its treatment (gender transition), not on any protected status. Accordingly, DoD's policy is facially neutral, even though plaintiffs allege, as did the plaintiffs in *Hawaii*, that it has discriminatory purposes and effects. *See* 138 S. Ct. at 2417 (discussing allegation that the proclamation "operates as a 'religious

gerrymander'"). Moreover, under *Hawaii*, 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. That is plainly the case here.

Plaintiffs also cannot meet their initial burden of heightened need because the reasoning and evidence behind DoD's new policy is set forth in DoD's 44-page report, DoD Report and Recommendations, Dkt. 96-2, and supported by an administrative record that comprises more than 3,000 pages. That administrative record contains the Panel of Experts' meeting minutes as well as the materials the Panel considered prior to the formulation of its recommendation to the Secretary of Defense. The availability of this evidence strongly undercuts Plaintiffs' ability to meet their initial burden of demonstrating a heightened need for presidential communications and information.

Accordingly, if the Court concludes that discovery of presidential communications is not precluded on separation-of-powers grounds, the Court should require Plaintiffs to meet their initial burden of demonstrating heightened need, which Plaintiffs have not done. Only then should the Office of the President be required to formally invoke the privilege.

C. In Any Event, Plaintiffs Have Not Met Their Ultimate Burden Of Showing A "Focused Demonstration of Need" To Overcome The Privilege.

Because Plaintiffs have not met their initial burden of heightened need, it is premature for the Court to consider whether Plaintiffs have met their ultimate burden to overcome the privilege. In any event, Plaintiffs have not satisfied their ultimate burden to overcome the privilege. Plaintiffs' burden would be especially high in a civil case like this, and they have not demonstrated that the sought discovery contains important evidence directly relevant to the central issues of the case, or detailed their efforts to determine whether sufficient evidence can be obtained elsewhere.

1. There Is A High Burden To Overcome The Privilege In A Civil Case.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is "more difficult to surmount" than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must make a "focused demonstration of need." *Id.*; s*ee also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance "the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753. In the criminal context, the party seeking the privileged communications would have to first demonstrate "that each discrete group of the subpoenaed materials likely contains important evidence"—that is, evidence "directly relevant to issues that are expected to be central to the trial," and not evidence that is "only tangentially relevant or would relate to side issues." *Id.* at 754–55. The party seeking the discovery then must "detail [its] efforts" "to determine whether sufficient evidence can be obtained elsewhere," and "explain why [notwithstanding other sources of information,] evidence covered by the presidential [communications] privilege is still needed." *Id.* at 755 (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

Where privileged material is sought for use in a civil case, the burden to overcome the privilege is even greater. That heavy burden is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 683, 711 (1974)); *see also Dep't of Treasury v. Black*, 719 F. App'x 1, 3 (D.C. Cir. 2017) (faulting district court for failng to "account for how the public interests in this [civil] case differ from those presented in our prior decisions," such as that "'the need for information in the criminal context is much weightier' than the need in the civil context[]" (quoting *Cheney*, 542 U.S. at 384)); *In re Sealed Case*, 121 F.3d at 754

(noting "the [*Nixon*] Court's repeated emphasis on the importance of access to relevant evidence in a criminal proceeding"); *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.) (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the [sought] evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." (emphasis added)).

In this civil case, Plaintiffs would face a significant burden to overcome a valid assertion of the presidential communications privilege. To overcome the privilege, it is incumbent on Plaintiffs to explain in detail what evidence they have obtained in support of their claims and what the privileged material at issue might add—that is, to "explain why evidence covered by the presidential [communications] privilege is still needed." *In re Sealed Case*, 121 F.3d at 755; *Black*, 719 F. App'x at 3 (emphasizing that plaintiffs "bear the burden to demonstrate 'with specificity' 'that each discrete group of the subpoenaed materials likely contains important evidence,'" and that plaintiffs "bear the further burden of demonstrating" that they have "'first'" made diligent efforts "'to determine whether sufficient evidence can be obtained elsewhere'" (quoting *In re Sealed Case*, 121 F.3d at 754–56)). As the D.C. Circuit recently made clear, a district court must "thoroughly analyze" whether plaintiffs have met this burden. *Id.* (vacating and remanding order where district court failed to adequately explain "how [plaintiffs] met their burden to demonstrate a need sufficient to overcome" the privilege).

Plaintiffs argue that this case is "far closer to *Nixon* than *Cheney*" because alleged constitutional violations are at issue here (but not in *Cheney*) and because, as in *Nixon*, the "essential functions" of the court in adjudicating this case are implicated. Pls.' Opp. 16. This argument is meritless. If that

were all there were to distinguish criminal and civil cases for purposes of discovery of presidential deliberations, *Cheney* would have little force. Numerous civil cases involve constitutional claims, and the essential function of the court is at issue in all of them. *Cheney,* relying on *Nixon*, explains the considerations at issue in a criminal setting that do not apply here. For example, the Sixth Amendment provides criminal defendants the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI; *see Nixon*, 418 U.S. at 711–13. The Supreme Court has recognized that "[w]ithholding materials from a tribunal in [a] 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'" because a "'primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions.'" *Cheney*, 542 U.S at 384 (quoting *Nixon*, 418 U.S. at 707). These criminal-case constitutional concerns are not presented in civil cases. Plaintiffs' attempt to analogize this civil case to the kind of criminal proceeding at issue in *Nixon* is thus unavailing.[7]

Additionally, Plaintiffs' assertion that their requests are "narrowly targeted" and thus unlike the sweeping requests in *Cheney*, Pls.' Opp. 16, is without support. Indeed, the requests in *Cheney* were significantly more targeted than Plaintiffs' interrogatory requests. The requests in *Cheney* sought, *inter alia*, documents related to a Presidential task force. 542 U.S. at 387. The breadth of the discovery requests here is vastly more expansive and intrusive: Plaintiffs seek information about the President's decisionmaking. The interrogatories purport to require the President's senior advisors and military officials to identify communications they had with the President on a variety of topics related to

[7] Plaintiffs' reliance on *Dellums v. Powell*, 561 F.2d 242, 248–49, is misplaced. Pls.' Opp. 15. *Dellums* pre-dates *Cheney* and involved the invocation of the privilege by a *former* president, which the Court concluded is entitled to less weight than that assigned to a sitting President's assertion. *Id.* at 247–49; *see also Black*, 719 F. App'x at 3 (distinguishing *Dellums* on this basis). In addition, the court in *Dellums* noted that the document discovery sought was "'central'" evidence to the plaintiffs' case, and that plaintiffs had difficulty obtaining similar evidence from another source. 561 F.2d at 248 (quoting district court decision). As discussed further *infra*, the discovery sought here is hardly "central" to Plaintiffs' challenge to DoD's policy, and they have failed to make any showing of being unable to obtain sufficient evidence from other sources.

decisions about military policy, as well as to identify what documents they transmitted to the President, what meetings they attended with the President, the topics discussed, and all documents relating to those meetings, among other requests. *See* Pls.' First Set of Interrogs., Dkt. 89-1. The notion that this would be less intrusive of the President's interests than the requests in *Cheney* defies common sense.

2. Plaintiffs Have Not Demonstrated that Each Discrete Group of Privileged Materials They Seek Likely Contains Important Evidence Directly Relevant to Central Issues.

Plaintiffs contend that they have satisfied the first step in overcoming the presidential communications privilege because they are seeking information "about the process leading up to the President's July 2017 decision" and "about the White House's role" in DoD's new policy and DoD's 44-page report explaining the bases for the policy. Pls.' Opp. 10–12. Even if the issue of whether the privilege can be overcome were ripe, Plaintiffs' broad assertions would not meet their burden to demonstrate "that each discrete group of the [sought] materials likely contains important evidence"—that is, evidence "directly relevant to issues that are expected to be central to the trial." *In re Sealed Case*, 121 F.3d at 754. Plaintiffs do not even attempt to separately discuss each "discrete group" of privileged material they seek, despite the fact that they have put at issue eleven interrogatories, most of which were served on eight Defendants, as well as hundreds of documents. *See* Pls.' First Set of Interrogs., Dkt. 89-1; Pls.' First Set of Req. for Prod., Dkt. 89-3. Plaintiffs have not addressed—much less with specificity—how the privileged information responsive to each interrogatory and each privileged document contains important evidence directly relevant to the central issues of this case.

Rather, Plaintiffs rely mainly on the notion that information about the White House's role in DoD's new policy "bear[s] directly on how much deference" is due. Pls.' Opp. 11–12. This argument not only fails to satisfy Plaintiffs' burden to overcome the privilege; it also misapprehends the constitutional basis for judicial deference to Executive and Legislative decisions involving the military. As set forth in Defendants' Response to Plaintiffs' Motion to Compel Documents Withheld Under

the Deliberative Process Privilege, Judicial deference to military decisions is not a "defense," as Plaintiffs claim, but a constitutionally mandated standard of review.[8] Defs.' Resp. 12–17, Dkt. 174.

Here, the Court has previously concluded that the degree of military deference to be applied to DoD's policy is a factual question that necessitates further discovery into DoD's decisionmaking process, Mem. Op. 11, Dkt. 160, and Plaintiffs rely on that finding in their attempt to overcome the presidential communications privilege, *see* Pls.' Opp. 12. Defendants respectfully disagree with the Court's prior analysis for the reasons set forth more fully in Defendants' Response brief. Defs.' Resp. 12–17, Dkt. 174. In sum, Supreme Court cases since *Rostker v. Goldberg*, 453 U.S. 57 (1981) have found that application of military deference requires a subject matter inquiry, not a factual inquiry into the decision-making process, just as an application of *Chevron* deference does not require a factual finding of an actual exercise of independent agency "expertise." *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–35 (2010) (Roberts, C. J.) ("It is vital in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.'" (quoting *Rostker*, 453 U.S. at 68, and referring to cases brought in the national security and foreign relations context)); *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." (quoting *Rostker*, 453 U.S. at 70)); *Hawaii*, 138 S. Ct. at 2420, 2420 n.5 (holding that "inquiry into matters of entry and national security is highly constrained[,]" and listing

[8] Plaintiffs' contention that Defendants are using the presidential communications privilege "as a sword and as a shield," Pls.' Opp. 11, is plainly wrong. The "sword/shield" concept applies where a party seeks to *use* privileged information to support its claims while simultaneously attempting to protect that very information from discovery. But in relying on established law recognizing judicial deference to military judgments, Defendants are not relying on information subject to the presidential communications privilege and thus are not waiving privilege over that information. Rather, Defendants are relying on the *outcome* of the policymaking process: DoD's new policy and the accompanying 44-page report, which provides a detailed explanation of why, in the professional judgment of DoD, this policy is necessary to further military interests.

cases involving "immigration policies, diplomatic sanctions, and military actions" as examples when a rational basis review is applied.); *cf. Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984).

It is without question that the Secretary of Defense, in issuing a policy concerning the accession and retention of service members, is acting under statutory authority provided by Congress pursuant to its constitutional authority to raise and support armies. *See* 10 U.S.C. §§ 532, 12201; 10 U.S.C. §§ 505, 12102; *see also* 32 C.F.R. § 66.6(b)(5). No discovery of presidential communication is required to determine whether judicial deference applies to that decision.[9]

Thus, even if the issue of overcoming the privilege were properly before the Court, Plaintiffs have not provided the Court with sufficient detail demonstrating "that each discrete group of the [sought] materials likely contains important evidence," *In re Sealed Case*, 121 F.3d at 754, for the Court to conclude that Plaintiffs have met their heavy, ultimate burden. *See Black*, 719 F. App'x 1, 3.

3. Plaintiffs Have Not Detailed Their Efforts to Determine Whether Sufficient Evidence Can Be Obtained Elsewhere Or Explained Why Privileged Information Is Still Needed.

In addition, even if the issue of overcoming the privilege were properly before the Court, Plaintiffs have not met their burden to demonstrate the unavailability of sufficient evidence. Plaintiffs argue that the information they seek "cannot be obtained from any other source." Pls.' Opp. 13. However, Plaintiffs misunderstand the heavy burden to overcome the privilege. To do so, Plaintiffs must "first" make efforts to determine whether "sufficient evidence can be obtained elsewhere," and then must "detail these efforts and explain why," notwithstanding these other sources of information,

[9] Nor should the Court be distracted by Plaintiffs' baseless contention that DoD's development of the new policy was not independent because "news report suggest that the Vice President" was involved in the creation of DoD's report. Pls.' Opp. 11. Plaintiffs can point to no support in the record for these assertions, and the internet news article they cite is based entirely on anonymous sources, see *id.*, and therefore unreliable. *See In re Neustar Sec.*, 83 F. Supp. 3d 671, 686 (E.D. Va. 2015) (refusing to rely on anonymously sourced news article because the court had "no way to assess the credibility of anonymous sources quoted in the article, whether the sources have personal knowledge of the events described, and whether the sources were in a position to learn of such events personally").

discovery of presidential communications and deliberations is still needed." *In re Sealed Case*, 121 F.3d at 755. As outlined above, *see supra* p.3–4, the issue is not whether Plaintiffs can obtain the same privileged information from other sources, but whether such information is necessary to their claims.

Here, Plaintiffs have not explained in detail what evidence they have already obtained, nor why this evidence is insufficient and why privileged information is still needed. *See id.*; *Black*, 719 F. App'x at 3. Again, Defendants have produced to Plaintiffs over 30,000 documents and provided non-privileged interrogatory responses. Defs.' Br. 12–13. Plaintiffs have taken five depositions but have thus far elected not to depose Mr. Kurta, despite his key role as chair of the Panel of Experts. See *Carl Zeiss Stiftung v. V.E.B. Carl Zeis, Jena*, 40 F.R.D. 318, 328 (D.D.C. 1966) ("Necessity for production is sharply reduced where an available alternative for obtaining the desired evidence has not been explored."). Additionally, Plaintiffs have moved to compel information withheld under the deliberative process privilege. Pls.' Mot., Dkt. 169. At a minimum, the Court should resolve Plaintiffs' motion to compel before evaluating whether Plaintiffs can overcome the presidential communications privilege. If Plaintiffs succeed in their motion, they would be required to explain in detail what evidence they have obtained through the deliberative information and why this evidence is still insufficient, before attempting to overcome the presidential communications privilege. Plaintiffs speculate that even if they succeed on their motion to compel, the compelled documents and information "may not shed any light on the President's initial decision." Pls.' Opp. 14. Speculation regarding what evidence they may or may not obtain is clearly insufficient to overcome the presidential communications privilege. Thus, even if the issue of overcoming the privilege were ripe, Plaintiffs have not provided the Court with the requisite detail to overcome the privilege.

III. The Court Should Reject Plaintiffs' "Phased Approach" For Discovery Into Presidential Communications.

Plaintiffs propose a "phased approach" for discovery into presidential communications, under which Defendants would first be required to provide, either to Plaintiffs or *in camera*, "log-type

information" for documents responsive to Plaintiffs' requests for production and responses to Plaintiffs' interrogatories; and as a second step, Plaintiffs propose that "Defendants should produce the underlying documents and Plaintiffs should be permitted to re-open the deposition of Jennifer Hay." Pls.' Opp. 16–23. The Court should reject this approach for the reasons described below.

A. Defendants Have Already Provided Privilege Logs For Documents Subject To The Presidential Communications Privilege.

Plaintiffs' proposed approach rests on incorrect assertions that "Defendants have refused to provide even the most basic materials that would allow Plaintiffs to test the assertion of the presidential communications privilege," and that "the privilege logs [Defendants] provided in response to document requests lump together numerous documents." Pls.' Opp. 17. In fact, Defendants have provided Plaintiffs with document-by-document privilege logs from DoD and the Services, which provide detailed information and explain why each document is subject to privilege. These privilege logs include documents that are subject to the presidential communications privilege (noted on the privilege logs as "Executive Privilege"). *See, e.g.*, Exh. A, Excerpt of DoD Privilege Log for Production 5, March 7, 2018.[10] Although Defendants maintain their position that the privilege applies to factual information that would reveal presidential deliberations, the Office of the President is not required to assert the presidential communications privilege each and every time the privilege could be applied.[11]

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[10] For example, the privilege log entry for DoD00004950 indicates that it is an "email chain concerning WH TG info memo" from June 19, 2017, from Kevin Sweeney to Lacey Raymond, Ylber Bajraktari, Ryan Farris, Anthony Kurta, Sally Donnelly, and Pettis Sims. (Ylber Bajraktari served as Senior Director for Defense Policy and Strategy on the National Security Council staff at this time. *See* Exh. B, Excerpts from Deposition of Jennifer Hay, May 11, 2018, 25:13–26:5.) The privilege log entry indicates that the document was withheld on the basis of the deliberative process privilege and "Executive Privilege," and that it contains "Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy." Exh. A.

[11] Defendants also previously produced a White House privilege log, which covered 9,000 documents grouped into 66 categories and described the documents in a manner that avoided revealing privileged information. Defendants produced this privilege log while maintaining their position that under *Cheney*, 542 U.S. at 385, the President was not required to provide such a log. The Court subsequently dismissed the President as a party to the case. Dkt. 154. Accordingly, any suggestion by Plaintiffs that the White House must now provide a document-by-document privilege log is improper.

Plaintiffs' unfamiliarity with the discovery Defendants have already provided, as demonstrated by their demand for privilege log information that they already have, further supports the conclusion that discovery of presidential communication and information is inappropriate at this stage.

B. *In Camera* Review Of Interrogatory Responses Fails To Address Separation-Of-Powers Concerns And Is Unnecessary For The Court To Decide Whether The Type Of Information Would Be Subject To Privilege As A Matter Of Law.

The Court should also reject Plaintiffs' contention that Defendants must provide—either to Plaintiffs or *in camera*—"privilege-log type information" (*e.g.*, the existence of a communication, its date, the identity of the participants, and the subject matter) in response to Plaintiffs' interrogatories seeking information from DoD and the Services that would be subject to privilege. Although framed as "privilege-log type information," the information sought constitutes substantive responses to Plaintiffs' interrogatories. And this factual information would be subject to the presidential communications privilege. *See supra* p.7–10. Providing this information for *in camera* review fails to address separation-of-powers concerns and is unnecessary for the Court to resolve the legal question of whether the type of information at issue here would be subject to privilege as a matter of law.

First, under the above-discussed principles established in *Cheney*, 542 U.S. at 388, 390, the Court should not even reach the issue of *in camera* review until the Court, at a minimum, narrows the discovery at issue. If the Court were to order *in camera* review, Defendants must be permitted an opportunity to formally invoke the privilege via affidavit prior to the provision of any information. *See In re Sealed Case*, 121 F.3d at 741; *Dairyland*, 79 Fed. Cl. at 669.[12] Forcing the Office of the President into a premature formal invocation of the privilege would implicate weighty separation-of-powers concerns outlined above. Moreover, preparing and executing an affidavit formally invoking the

[12] As explained above, because Plaintiffs have not yet met their initial burden to demonstrate heightened need, the burden has not yet shifted to the Office of the President to formally invoke the privilege via affidavit. For this reason as well, any *in camera* review at this stage would be improper.

privilege with specificity is a burdensome, time-consuming process that would detract from "the energetic performance of [the Executive Branch's] constitutional duties." *Cheney*, 542 U.S. at 382.

Plaintiffs do not explain *why* the separation-of-powers principles in *Cheney* would apply any differently to their request for *in camera* review. In recognition of those principles, the Court in *Cheney* held that Plaintiffs must exhaust alternative sources of discovery before forcing the President to assert privilege. The possibility of *in camera* review does little to address or mitigate this concern. The Court is still placed "in the awkward position of evaluating the Executive's claims of confidentiality and autonomy." *Cheney*, 542 U.S. at 389. Indeed, the Court of Appeals in *Cheney* had explicitly permitted the district court to entertain claims of privilege and review allegedly privileged documents *in camera*, and the Supreme Court rejected that approach. *See id.* at 402.

Even if the issue were ripe, *in camera* review would provide no benefit to the Court. Whether discovery of presidential communications should proceed, and whether this kind of information would be subject to privilege, are purely legal questions for which the Court does not need to review the information responsive to the interrogatories. For example, independent of whether the President met with ten advisors in the month leading up to a policy decision or whether he met with twenty advisors two months prior, the type of information at issue here either is subject to privilege, as Defendants contend, or is not, as Plaintiffs contend. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 48–49 (D.D.C. 2007) (rejecting plaintiff's position that defendants must name the White House advisors participating in communications to invoke the presidential communications privilege and explaining that the Court could evaluate whether the privilege applied based on "the nature of the adviser's responsibilities; not his or her name"); *In re United States*, 678 F. App'x 981, 991–92 (Fed. Cir. 2017). The privileged nature of the information sought is clear from the face of the interrogatories—which request information about communications reflecting presidential decisionmaking—and the "privilege-log type information"

responsive to the interrogatories would not add to the Court's analysis.[13] Plaintiffs thus fail to explain why *in camera* review would be necessary or appropriate, and there is no basis for requiring it. *See Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'")).[14]

Finally, declining to submit information responsive to the interrogatories for *in camera* review here does not render the presidential communications privilege an "absolute" privilege. *See* Pls.' Opp. at 7. As Defendants have explained, the presidential communications privilege would be subject to judicial review if that became necessary: once Plaintiffs have exhausted alternative sources of non-privileged discovery, narrowed their requests, and made the requisite heightened, particularized showing of need (assuming the Office of the President then formally asserts the privilege via affidavit), it would be ripe for the Court to decide whether Plaintiffs have made a "focused demonstration of need" sufficient to overcome the privilege. *See In re Sealed Case*, 121 F.3d at 746. The privilege thus includes a mechanism through which Plaintiffs can show entitlement to disclosure. At this stage, however, *in camera* review fails to address separation-of-powers concerns and is unnecessary to decide whether the information sought would be subject to the presidential communications privilege.[15]

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[13] Plaintiffs also contend that they have overcome the privilege for the "log-type information" information they seek because this information 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." Pls.' Opp. at 22. However, Plaintiffs do not explain how responses to the interrogatories would indicate "whether other important evidence is being withheld." And Plaintiffs' claim that they can overcome the privilege because they need the privileged information "to test Defendants' sweeping assertion of privilege," *id.*, is a tautology and should be summarily rejected. Finally, Plaintiffs do not explain how "log-type information" would assist them in narrowing their requests or why they cannot do so without this privileged information.

[14] Defendants have also objected to the interrogatories at issue based on the deliberative process privilege, attorney-client privilege, and work product doctrine. *See* Defs.' Obj. and Resp. to Pls.' First Set of Interogs. To Sect. Mattis, Dkt. 89-6. Because Plaintiffs are challenging only the presidential communications privilege here, their challenge and any corresponding *in camera* review would be futile to the extent that other privileges also apply. For this reason as well, *in camera* review would not resolve the issue of whether this information is discoverable based on the applicability of other privileges.

[15] Defendants have objected to the interrogatories on the basis that many of the interrogatories contain multiple discrete subparts, thus Plaintiffs have exceeded the number of interrogatories, inclusive of

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

Finally, Plaintiffs seek to re-question Jennifer Hay, whose work on the National Security Council staff was done to advise the National Security Advisor and the President, in order to seek information that is at the heart of presidential decisionmaking and deliberations. But 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 Ms. Hay. Defs.' Br. 22–26. Plaintiffs briefly argue that they "have already satisfied their burden to overcome the presidential communications privilege with regard to the deposition testimony of Jennifer Hay." Pls.' Opp. 24. It is not apparent how that could be so. Plaintiffs have not addressed—much less with specificity—how the privileged information responsive to each question to which Defendants objected based on the presidential communications privilege contains important evidence directly relevant to the central issues of this case. *See In re Sealed Case*, 121 F.3d at 755. Nor have they met their burden of demonstrating that they have first made diligent efforts to determine whether sufficient evidence can be obtained elsewhere. *See id.*

Even if the Court were to conclude that Plaintiffs can overcome the presidential communications privilege for specific information—*i.e.*, particular documents or information responsive to particular interrogatories—the Court still should not permit Plaintiffs to re-open the deposition of Ms. Hay. Plaintiffs have already deposed Ms. Hay and have made their record as to questions they seek to ask. If the Court is inclined to permit Plaintiffs to re-open Ms. Hay's deposition, Plaintiffs should identify specific questions in the transcript that they would like to re-pose to Ms. Hay, and the Government can consider whether to formally assert privilege over that information

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discrete subparts, that they may serve. *See* Fed. R. Civ. P. 33(a)(1); Defs.' Obj. and Resp., Dkt. 89-6; *Smith v. Café Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009). If the Court is inclined to require *in camera* review of substantive responses to the interrogatories, it should not do so for all of the interrogatories.

before the deposition resumes. Under no circumstances should Plaintiffs be permitted to explore topics that they did not cover in the first deposition of Ms. Hay.

Plaintiffs point to several questions for which they contend Defendants' invocation of the privilege was overly broad. Pls.' Opp. 24. However, for some of these questions, it is clear that the information sought is irrelevant to this case. *See, e.g.*, *id.* at 25 ("where NSC Policy Coordination Committees met"). For other questions, despite Plaintiffs' characterization of the responsive information as "basic," *id.* at 24, the questions clearly target information at the heart of the presidential communications privilege. *See, e.g.*, *id.* at 25 ("whether Ms. Hay 'ever communicate[d] with President Trump in any fashion regarding transgender military service'" and "whether there were 'any meetings of the National Security Council concerning the subject of transgender military service'"). If these are the questions or the types of questions for which Plaintiffs seek to re-open Ms. Hay's deposition, a protective order precluding Plaintiffs from doing so is plainly warranted.[16]

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.

[16] To the extent Plaintiffs are suggesting that Defendants should provide "privilege-log type information" responsive to the questions Plaintiffs asked Ms. Hay, the Court should reject this proposition for several reasons. First, as discussed above, factual information about presidential communications is subject to privilege, *see supra* Section II.A., and producing this information for *in camera* review would fail to address separation-of-powers concerns and is unnecessary for the Court to determine whether the type of information at issue would be subject to privilege as a matter of law, *see supra* Section III.B. Further, the remaining Defendants would not have access to the information responsive to the questions Plaintiffs asked Ms. Hay. Any information Ms. Hay possesses from her work on the National Security Council staff belongs to the National Security Council, which is part of the Executive Office of the President, and the President has been dismissed from this case. Defs.' Br. 22–23. For this reason as well, Plaintiffs should not be permitted to take direct discovery of Ms. Hay.

November 13, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, I electronically filed the foregoing Reply in Support of Defendants' 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: November 13, 2018

/s/ Andrew E. Carmichael

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Exhibit A

Excerpt of DoD Privilege Log for Production 5,

March 7, 2018

Doe v. Trump,
1:17-cv-01597-CKK
Department of Defense Privilege Log for Production No. 5

DOD BEGIN BATES	PROD005 BEGIN BATES	PROD005 END BATES	DATE	AUTHOR	RECIPIENT(S)	TITLE/DESCRIPTION	PRIVILEGE(S)	PRIVILEGE BASIS
DoD00004950	USDOE00083478	USDOE00083478	6/19/17	Sweeney, Kevin SES SD <Kevin.Sweeney@sd.mil>	Raymond, Lacey D CIV (US) <lacey.raymond@sd.mil>Bajraktari, Yll CIV OSD OSD (US) <yll.bajraktari@sd.mil>; Farris, Ryan CDR SD <Ryan.Farris@sd.mil>; Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>; Donnelly, Sally B SES (US) <sally.donnelly@sd.mil>; Sims, Pettis N LCDR USN OSD OUSD P-R (US) <pettis.n.sims.mil@mail.mil>	Email chain concerning WH TG info memo	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy
DoD00004951	USDOE00083479	USDOE00083479	6/19/17	Kurta, Anthony M SES OSD OUSD P-R (US) </o=easf/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=anthony.m.kurta.civ2be>	<terry.a.adirim.civ@mail.mil>; Smith, David J SES OSD OUSD P-R (US) <david.j.smith152.civ@mail.mil>; Rychalski, Jon J SES OSD HA (US) <jon.j.rychalski.civ@mail.mil>Barna, Stephanie A SES OSD OUSD P-R (US) <stephanie.a.barna.civ@mail.mil>; MILLER, Stephanie P SES OSD OUSD P-R (US) <stephanie.p.miller.civ@mail.mil>; Hebert, Lernes J SES OSD OUSD P-R (US) <lernes.j.hebert.civ@mail.mil>; Sims, Pettis N LCDR USN OSD OUSD P-R (US) <pettis.n.sims.mil@mail.mil>; Jarrett, Michael R (Rich) CDR USN OSD OUSD P-R (US) <michael.r.jarrett2.mil@mail.mil>	Email chain concerning [Non-DoD Source] Fwd: Air Force hormone standard / DADT (UNCLASSIFIED)	DP - Deliberative Process	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy
DoD00004952	USDOE00083480	USDOE00083480	6/19/17	Raymond, Lacey CIV SD <Lacey.Raymond@sd.mil>	Sweeney, Kevin M SES (US) <kevin.sweeney@sd.mil>Bajraktari, Yll CIV OSD OSD (US) <yll.bajraktari@sd.mil>; Farris, Ryan CDR SD <Ryan.Farris@sd.mil>; Kurta, Anthony M SES OSD OUSD P-R (US) <anthony.m.kurta.civ@mail.mil>; Donnelly, Sally B SES (US) <sally.donnelly@sd.mil>; Sims, Pettis N LCDR USN OSD OUSD P-R (US) <pettis.n.sims.mil@mail.mil>	Email chain concerning WH TG info memo	DP - Deliberative Process; EP - Executive Privilege	Deliberations regarding the formulation of the transgender policy; Deliberations regarding the implementation of the transgender policy

Exhibit B

Excerpts from the deposition of Jennifer Hay,

dated May 11, 2018

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

- x

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

Plaintiffs,

v.

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

Defendants.

- x

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

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

strategy.

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

A. Yes.

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

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

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

A. No.

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

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

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

name?

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

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

A. Yes.

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

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

Q. You said his name is Kriete?

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

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

A. Yes. He was also a director.

Q. What was he director of?

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

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