IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER TO PRECLUDE THE DEPOSITION OF VICE ADMIRAL DAVID KRIETE

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INTRODUCTION

Plaintiffs concede that Vice Admiral David Kriete, Deputy Commander of U.S. Strategic Command ("USSTRATCOM"), is a high-ranking Government official. *See* Pls.' Opp'n 1, 7, Dkt. 176. As such, he should only be deposed in extraordinary circumstances, which Plaintiffs have not established. As Plaintiffs admit, they seek to question Vice Admiral Kriete only about information he has from his work on the staff of the National Security Council ("NSC") to advise the National Security Advisor, the President, and other senior White House officials. *See id.* at 3–4. But this information is not relevant to this case and, in any event, is at the heart of presidential decisionmaking and deliberations and thus protected from disclosure under the presidential communications privilege. Because Plaintiffs have failed to show that the Vice Admiral possesses relevant, non-privileged information, they have failed to establish the extraordinary circumstances necessary to take the deposition of such a high-ranking Government official, and the deposition should be precluded in its entirety.

In the event the Court is not inclined to preclude the deposition in its entirety at this stage in the litigation, the parties agree that the Court should defer ruling on the dispute, but disagree on when the Court should rule. "In recognition of the Vice Admiral's important responsibilities," Plaintiffs now propose "defer[ring] 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 obligations would necessitate a second deposition." Pls.' Opp'n 1. While Defendants appreciate Plaintiffs' willingness to defer the deposition pending the Court's consideration of the parties' other discovery motions, both the Vice Admiral's status as a high-ranking Government official and the fact that the only information he has related to military service by transgender individuals is protected by the presidential communications privilege at a minimum counsel the Court to preclude the Vice Admiral's deposition pending final resolution of Defendants'

expedited interlocutory appeal of this Court's denial of Defendants' motion to dissolve the preliminary injunction, *see Doe 2 v. Trump*, No. 18-5257 (D.C. Cir.). That appeal could eliminate the need for any discovery of presidential communications. Precluding the deposition is warranted given that *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 389 (2004), makes clear that discovery of presidential communications and deliberations should be a last resort.

ARGUMENT

Plaintiffs first argue that "[t]he government fails to acknowledge" that the policy interests underlying the presumptive prohibition of depositions of high-ranking Government officials "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." Pls.' Opp'n 8. But Defendants did acknowledge these interests. *See* Defs.' Mot. 13, Dkt. 170. Indeed, as Defendants explained, "[t]he rare and narrow exception to this rule against deposing high-ranking Government officials is when the party seeking the deposition can demonstrate the existence of extraordinary circumstances," which can only be shown if the official has "non-privileged, first-hand knowledge related to the claims and the information cannot be obtained elsewhere." *Id.* (citing *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586–87 (D.C. Cir. 1985); *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998); *Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621–22 (D.D.C. 1983)).

Plaintiffs have failed to meet this heavy burden. *See FDIC v. Galan-Alvarez*, No. 1:15-MC-00752 (CRC), 2015 WL 5602342, at *3 (D.D.C. Sept. 4, 2015); *In re F.D.I.C.*, 58 F.3d 1055, 1061 (5th Cir. 1995) (stating that a "strong showing [is] necessary for a finding of exceptional circumstances"). Plaintiffs argue that they have shown the extraordinary circumstances necessary to depose a high-ranking Government official because "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." Pls.' Opp'n

3. But the only topics on which Plaintiffs plan to depose the Vice Admiral are the "basis for and process surrounding the President's tweets." *Id.* at 4. Discovery concerning the "basis for and process surrounding" the President's statements on Twitter in July 2017 relates only to the President's purported intent in issuing a policy that he has now expressly revoked. As set forth in Defendants' motion, the Supreme Court made clear in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), that the President's purported intent in issuing a prior policy that he has expressly revoked is not at issue, and the Court should instead analyze the official objectives of the current policy. *See* Defs.' Mot. 16–17, Dkt. 170. Plaintiffs argue that *Hawaii* is distinguishable because the policy at issue in that case was facially neutral. Pls.' Opp'n 4–5. But, as set forth in Defendants' Reply in Support of Their Motion for a Protective Order, the Department of Defense's ("DoD") policy is also facially neutral because it turns on a medical condition (gender dysphoria) and its associated treatment (gender transition). Defs.' Reply at 11-12, Dkt. 181. And *Hawaii* did not turn solely on whether the policy was facially neutral, but rather whether the policy related to "national security." *See* 138 S. Ct. at 2420. 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 challenged Government action, reviewed solely on its face, "can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420, 2420 n.5. Plaintiffs make no attempt to argue that a military personnel policy concerning the composition of the fighting force is not a "military action" under *Hawaii*. *See id.* at 2420 n.5. The principles of *Hawaii* thus apply to the Court's review of DoD's new policy, and any discovery of any revoked policy—which is the only information the Vice Admiral possesses, *see* Kriete Decl. ¶ 8—is irrelevant.

Moreover, the relevance of the President's statements on Twitter and the impact of *Hawaii* on this Court's analysis of DoD's current policy are before the D.C. Circuit on interlocutory appeal of the denial of Defendants' motion to dissolve the preliminary injunction, to be heard on December 10,

2018. Order, *Doe v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1755741. Among other things, the Government argues on appeal that DoD's new policy should be reviewed on its own terms, without regard to any alleged subjective intent behind it or prior rescinded presidential directives. Appellant's Opening Br., 46, *Doe v. Trump*, No. 18-5257 (D.C. Cir.), Doc. #1752076. Should the Government's position prevail, discovery related to the President's statements on Twitter in July 2017 and the Presidential Memorandum issued in August 2017 would be irrelevant and unnecessary to resolve this litigation. Such a ruling would counsel that this Court should preclude the deposition of the Vice Admiral. But if the Court is not inclined to preclude the deposition outright at this point, it should defer ruling until after final resolution of the interlocutory appeal, including any *en banc* or Supreme Court review.[1] *See In re Dep't of Commerce*, 586 U.S. ___ (2018) (Gorsuch, J., concurring) (in precluding the deposition of the Secretary of Commerce, arguing that the Court should stay all extra-record discovery because, among other reasons, "the plaintiffs would suffer no hardship from being temporarily denied that which they very likely have no right to at all").

Deferring ruling until after final resolution of the interlocutory appeal is especially warranted because the information Plaintiffs seek from Vice Admiral Kriete concerning the "basis for and process underlying the President's July 2017 decision," Pls.' Opp'n 3, is plainly privileged. Indeed, "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 the presidential communications privilege." *Id.* at 5. Although Plaintiffs argue that the deposition should go forward because they "also seek to depose him about information that is not within the scope of either the deliberative process privilege or presidential communications privilege," *id.*, Plaintiffs'

[1] As Defendants informed the Court, "the Solicitor General has determined that the government will file a petition for a writ of certiorari before judgment in this case by November 23." Dkt. 178-1.

examples of questions they would ask Vice Admiral Kriete call for privileged information,[2] *see id.* at 6. For example, Plaintiffs "intend to ask Vice Admiral Kriete about the *existence* of presidential communications and documents relating to the transgender ban." *Id.* at 5. But, as set forth in Defendants' Reply in Support of Their Motion for a Protective Order, Plaintiffs' contention that the presidential communications privilege "only protects the *substance* of documents or communications" is wrong. *See* Defs.' Reply at 8, Dkt. 181; *see also In re Sealed Case*, 121 F.3d 729, 745, 750 (D.C. Cir. 1997) (finding that the privilege protects factual information and "sources of information"). Plaintiffs also intend to ask the Vice Admiral "who, if anyone, the President consulted as part of his decision to ban transgender individuals from the military" and "when President Trump decided on the ban." Pls.' Opp'n 6. But information concerning the participants, timeline, and scope of the President's decisionmaking would reveal the inner workings of the President's decisionmaking process and is precisely the type of confidential information that the privilege is intended to protect. *See In re Sealed Case*, 121 F.3d at 744 (stating that the privilege protects "documents *or other materials* that reflect presidential decisionmaking and deliberations" (emphasis added)); *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").

[2] Other examples of questions Plaintiffs intend to ask Vice Admiral Kriete relate to information that they already have or is irrelevant to this case. For example, Plaintiffs state that they would ask the Vice Admiral whether he worked on transgender military service issues while he served on the NSC staff. Pls.' Opp'n 6. But Plaintiffs already know that Vice Admiral Kriete "briefly supported senior officials on the topic of military service by transgender individuals from July to August 2017" while he served on the NSC staff. Kriete Decl. ¶ 8. As another example, Plaintiffs assert that Jennifer Hay testified that "the ban constituted a 'rolling back the previous policy on transgender service'" and that they would pursue a similar line of questioning with Vice Admiral Kriete. Pls.' Opp'n 6 (quoting Hay Dep. 122:14–19, Dkt. 177-3). But a review of the transcript shows that Ms. Hay was offering her personal opinion as to why she was disappointed in the President's statements on Twitter, Hay Dep. 122:14–19, Dkt. 177-3 ("Q. Are you able to explain why you felt disappointed when you saw the tweets? A. My personal opinion, why I was disappointed, was that President Trump was rolling back the previous policy on transgender military service."), and Vice Admiral Kriete's personal opinion of the President's statements on Twitter is entirely irrelevant to this case.

Plaintiffs cite *Sherrod v. Breitbart*, 304 F.R.D. 73, 75 (D.D.C. 2014), *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1997), and *Judicial Watch v. Department of State*, 2016 WL 10770466, at *3 (D.D.C. Aug. 19, 2016), to show that courts have allowed depositions of high-ranking government officials when officials have had personal knowledge about the matter and the information could not be obtained elsewhere. Pls.' Opp'n 7. But Plaintiffs' reliance on those cases is misplaced, as none of those cases involved depositions of high-ranking officials whose information was protected from disclosure by the presidential communications privilege.

Plaintiffs also argue that it is not "relevant that the President has been dismissed from the case" because "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." Pls.' Opp'n 5. But, as set forth in Defendants' Reply in Support of Defendants' Motion for a Protective Order, the extent to which Plaintiffs are entitled to discovery from the President is constrained by the principles set forth in *Cheney*. *See* Defs.' Reply 2-4, 13-15, Dkt. 181.

Consistent with the Supreme Court's direction in *Cheney*, before Plaintiffs are permitted to depose Vice Admiral Kriete concerning presidential communications and deliberations, Plaintiffs should, at a minimum, be required to seek non-privileged discovery relevant to their claims. For example, Plaintiffs have chosen thus far not to seek non-privileged testimony from Mr. Anthony Kurta, who served as the Chair of the panel of experts for the transgender policy review and thus played a key role in the process surrounding the development of DoD's new policy. Plaintiffs should be required, at a minimum, to depose Mr. Kurta before pursuing discovery of presidential communications and deliberations to ask whether and to what extent DoD's decisionmaking process was constrained by the President's statements on Twitter in July 2017 or the August 2017 Presidential Memorandum. The Supreme Court has made clear that discovery of presidential communications and an assertion of Executive Privilege should be the last resort, not the first, because "[o]nce

executive privilege is asserted, coequal branches of the Government are set on a collision course." *Cheney*, 542 U.S. at 389.

Defendants appreciate that Plaintiffs have proposed certain limits to the time, location, and scope of the deposition to minimize the burden on the Vice Admiral.[3] If the deposition goes forward, Defendants agree that the time, location, and scope should be limited and would work with Plaintiffs to find a mutually agreeable time for the deposition at Offutt Air Force Base. But, as shown above, because discovery of information from the Executive Office of the President should be a last resort, *Cheney*, 542 U.S. at 389, the Court should not order Vice Admiral Kriete to sit for a deposition at this time, especially when key issues that could obviate any purported need for such discovery are pending

[3] Plaintiffs assert that when the parties were discussing the Vice Admiral's deposition in May and June 2018, Defendants "reneg[ed] on their agreement to produce Vice Admiral Kriete for his deposition." Pls' Opp'n 2. But that is not the case. As Defendants informed the Court in June 2018,

> Counsel for Defendants did not agree in writing that the deposition of Rear Admiral Kriete should go forward, and Defendants have not waived their objection to proceeding with the deposition. Plaintiffs noticed the deposition of Rear Admiral Kriete for a date chosen by Plaintiffs, giving Rear Admiral Kriete, a two-star admiral at the time, only two weeks of advance notice. Rear Admiral Kriete was unavailable on the noticed date. Because Plaintiffs indicated that they would withdraw the deposition notice only upon selecting a new date, Defendants worked with Plaintiffs to coordinate scheduling and logistics in case the deposition were to go forward. Defendants indicated that Rear Admiral Kriete would be available on June 27, 2018 in Omaha, NE, where Rear Admiral Kriete is second in command at U.S. Strategic Command (USSTRATCOM), but Defendants did not agree to the deposition going forward without objection. The scheduling of a revised date for a noticed deposition does not foreclose a party from seeking a protective order. Accordingly, on June 13, 2018, Counsel for Defendants emailed Plaintiffs stating: "After consulting with the team we have decided to seek relief from the Court regarding RADM Kriete's deposition." Exh. A. Defendants did not "refuse[] to proceed with the deposition," as Plaintiffs contend. In that same June 13 email, Defendants stated that "we will continue to make all preparations for his deposition on June 27, unless the Court decides to defer that deposition at our request." Exh. A. In sum, until relief from the deposition is granted, Defendants will continue to work on scheduling logistics and have indicated as much to Plaintiffs' counsel.

Email from Andrew Carmichael to Chambers of Judge Kollar-Kotelly (June 15, 2018), Dkt. 145-1.

before the D.C. Circuit. Given that possibility, there is no reason to have the Vice Admiral sit for a deposition until after final resolution of the interlocutory appeal, including any *en banc* or Supreme Court review.

Accordingly, even if the Court were to conclude that Vice Admiral Kriete's testimony were relevant, and even if the application of *Hawaii* here were uncertain, given the Vice Admiral's highly limited involvement in the matter, the fact that the only information he has that is related to military service by transgender individuals is privileged, and weighing his high-ranking status, the Court still should preclude his deposition. As second-in-command of USSTRATCOM, Vice Admiral Kriete is responsible for planning for nuclear operations, he leads nearly 162,000 service members who work to deter strategic attacks on the United States and its allies, and, if directed, employing nuclear forces when the Commander of USSTRATCOM is unavailable. Kriete Decl. ¶¶ 4, 6. The Vice Admiral should not have to take time away from these crucial responsibilities to sit for a deposition where he would not be permitted to answer the majority (if not all) of the questions because they would call for privileged information, especially given the Supreme Court's stern admonition that discovery of information from the Executive Office of the President should be a last resort. *See Cheney*, 542 U.S. at 389.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' Motion, Defendants' Motion for a Protective Order should be granted, and the Court should preclude Plaintiffs from deposing Vice Admiral Kriete.

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 to Preclude the Deposition of Vice Admiral David Kriete using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: November 13, 2018

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