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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

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RYAN KARNOSKI, et al.,	)	
	)	
Plaintiffs,	)	No. 2:17-cv-01297-MJP
	)	
vs.	)	Seattle, WA
	)	
DONALD J. TRUMP, et al.,	)	
	)	Motion Hearing
Defendants.	)	July 17, 2018

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JUDGE MARSHA J. PECHMAN  
UNITED STATES DISTRICT COURT

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1 THE CLERK: This is in the matter of Ryan  
2 Karnoski vs. Donald J. Trump, Cause Number C17-1297.

3 Counsel, please make your appearance for the record.

4 MR. PATTON: Your Honor, Steve Patton, on behalf of  
5 the plaintiffs. And with me is my partner Dan Siegfried, Sam  
6 Ikard, and from the State of Washington, Colleen -- I'm sorry.  
7 I've already forgotten your last name.

8 MS. MELODY: Colleen Melody, for the State of  
9 Washington, Your Honor.

10 MR. PATTON: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. CARMICHAEL: Your Honor, Andrew Carmichael,  
13 representing the defendants, from the Department of Justice.  
14 And also with me is my colleague Josh Gardner and my colleague  
15 Ashley Cheung.

16 THE COURT: Good morning.

17 We're here this morning on two different motions. One is  
18 the motion to compel, and the other is the motion for  
19 protective order. I have reviewed the three filings on each of  
20 those motions, for a total of six briefs. I have also called  
21 for additional -- or permitted additional writing on the *Hawaii*  
22 case, and I have reviewed the filings for that as well.

23 Yesterday you should have received a series of questions  
24 that I asked that you address during the course of your  
25 argument at some point, so how you do that is entirely up to

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1 you.

2 And have you discussed how it is that you're going to  
3 divide your time this morning?

4 MR. PATTON: Your Honor, we have not. I will be  
5 arguing the presidential communications privilege, or the, you  
6 know, motion for protective order. Mr. Siegfried will be  
7 arguing the deliberative process privilege. We would like to  
8 use a little bit more of our time for the presidential  
9 communications privilege, subject, as always, to where Your  
10 Honor wants to hear from us and, you know, what you want us to  
11 address.

12 MR. CARMICHAEL: And, Your Honor, I was going to  
13 address the deliberative process privilege as well as the  
14 Court's questions, and my colleague Josh Gardner was going to  
15 address the presidential privilege.

16 THE COURT: Well, I suggest you best confer with your  
17 individual partners and see how much time you're going to  
18 allow. We have an hour for this morning. So --

19 MR. PATTON: Your Honor, for the plaintiffs, we would  
20 like to use 20 minutes for the presidential communications  
21 privilege and 10 minutes for deliberative process. We hope to  
22 address all the questions during the course of the argument.  
23 And to the extent we don't, at the very end, I'll address  
24 whatever we haven't addressed.

25 THE COURT: Okay.

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1 MR. CARMICHAEL: I think we were going to do the  
2 opposite, just speak 20 minutes for me and 10 minutes for my  
3 colleague, just because I was going to address the questions,  
4 but maybe I can try to get the questions answered a little  
5 quicker, and we can spend more time on the presidential  
6 privilege.

7 THE COURT: All right. Well, let's start, then.

8 MR. PATTON: Which would you prefer to hear first,  
9 deliberative process or presidential communications?

10 THE COURT: I'd first like to hear about the  
11 presidential communications. And particularly, the first  
12 question that I ask is that we've all used, in these briefs,  
13 the word "deference." And I'd like to have each of you outline  
14 to me just exactly what that means. It could mean anything  
15 from you must agree with everything the chief of the military  
16 says, or does it mean that you examine what they've done and  
17 give them a presumption, or a leg up, so to speak?

18 Okay. Go ahead, Counsel.

19 MR. GARDNER: Good morning, Your Honor, may it please  
20 the Court. Josh Gardner, on behalf of the United States.

21 I want to address that first question, but I want to do it  
22 in the context of the broader argument about the presidential  
23 communications privilege.

24 Plaintiffs in this case have taken the extraordinary step  
25 of serving extremely broad discovery against a sitting

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1 president, in civil litigation, over official capacity matters  
2 that are non-ministerial in nature. If allowed to stand, such  
3 discovery would implicate important separation of powers  
4 principles and implicate the presidential communications  
5 privilege.

6 Plaintiffs contend that this discovery is routine, but the  
7 Supreme Court has repeatedly said that discovery against the  
8 President is not routine. It is, in fact, extraordinary. For  
9 those reasons, Your Honor, the government respectfully requests  
10 a protective order that would preclude discovery directly from  
11 the sitting president, as well as a protective order that would  
12 require the Court to first consider alternatives to the  
13 President invoking the presidential communications privilege.  
14 And there's at least four alternatives that I wanted to address  
15 with the Court, if I may.

16 As *Cheney* itself recognized, there are serious separation  
17 of powers concerns associated with the President invoking the  
18 presidential communications privilege. And as such, there  
19 ought to be an exploration of alternatives before that serious  
20 invocation. Here, Your Honor, there's at least four  
21 alternatives that this Court could explore before having  
22 coordinate branches of government on a collision course of a  
23 constitutional dimension.

24 First, Your Honor, as we noted in our briefing, under  
25 *McGraw-Hill*, one approach this Court could take is to require

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1 the plaintiffs to pursue all non-privileged discovery first.  
2 At that juncture, the plaintiffs could decide what other  
3 information they need in order to press their case. And at  
4 that point, Your Honor, plaintiffs may move to compel. And,  
5 you know, we could go through the narrowing that *Cheney* talks  
6 about, and the possible invocation of the privilege.

7 THE COURT: Doesn't that immediately lead us into the  
8 question of, all right, if they're supposed to look elsewhere  
9 first, how about you tell me where they start?

10 MR. GARDNER: Well, Your Honor, what the presidential  
11 communications privilege does is, it protects information  
12 related to deliberations and the facts associated with those  
13 with the President's decision-making. It doesn't mean that the  
14 plaintiffs get that same exact discovery from other sources.

15 What we're getting at here is, can plaintiffs make out  
16 their claim without the privileged information? And here, Your  
17 Honor, I think it's important to remember, plaintiffs are  
18 bringing a facial constitutional challenge, where they assert,  
19 on its face, it classifies based on a protected status. The  
20 Supreme Court has repeatedly held that in those circumstances,  
21 if plaintiff is correct, they do not need to show subjective  
22 intent to support that sort of equal protection challenge.

23 Now, obviously, the government disagrees that this is a  
24 facial classification. Our position, Your Honor, is that this  
25 is classified based on a medical condition. But the Court need

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1 not resolve that dispute today. The point is that under  
2 plaintiff's theory of the case, their notion that they need to  
3 show discriminatory intent is unnecessary. And that's what  
4 we're really talking about here, not what is relevant, what is  
5 needed. And that's what all of the cases dealing with  
6 presidential communications privilege talk about, the need, not  
7 the necessary relevancy. And I think that's important, Your  
8 Honor.

9 It's also important to understand that it's not just the  
10 showing of need, but it's also counterbalanced against the  
11 extraordinary burden on the office of the President. And  
12 that's exactly what *Cheney* talks about, is that balance.

13 THE COURT: Let's go back to my question, though.

14 MR. GARDNER: Yes.

15 THE COURT: Where do they start? Give me an example.

16 MR. GARDNER: Sure. So, first of all, the  
17 government's produced, I believe it is, 300,000 documents,  
18 totaling 150,000 pages. We've produced an extensive  
19 administrative record --

20 MR. PATTON: I think it's the opposite of that. I'm  
21 sorry. I think you -- 150,000 documents and 300,000 pages.

22 MR. GARDNER: Sorry. Thank you. Sorry. I did not  
23 mean to reverse that.

24 We've produced extensive administrative record, Your  
25 Honor. We've responded to written discovery from the

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1 Department of Defense, lodging objections as appropriate, and  
2 plaintiffs are pursuing third-party discovery. I think it's  
3 notable, Your Honor, plaintiff's not taken a single deposition  
4 in this case.

5 THE COURT: Okay. Well, you're outlining volume.  
6 Volume doesn't necessarily impress me if it doesn't contain  
7 specifics.

8 One of the questions that I believe that they want to know  
9 is, who did the President talk to? You know, what -- let's  
10 start with the military. What military heads of the Army,  
11 Navy, whatever, did the President speak to before he sent out  
12 his tweet? That's a name.

13 MR. GARDNER: Yes, it is a name, Your Honor. And  
14 that name is protected by the presidential communications  
15 privilege. *In re Sealed Case* makes that clear, that factual  
16 information is covered by the privilege. But I want to address  
17 your point more directly.

18 THE COURT: Okay.

19 MR. GARDNER: They do not need to know the name of  
20 who the President spoke with in order to establish an equal  
21 protection violation, as they have conceived the claim.  
22 Whether the President spoke to a million people or zero people,  
23 plaintiffs are arguing that on the face of the DOD policy, it  
24 is a facial classification, and there is no relationship  
25 between the means and the ends. Again, the government

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1 disagrees with that. But who the President spoke to will not  
2 make that equal protection claim any more or less viable.

3 So, again, when we're talking about need, Your Honor,  
4 there is no need for that information, and certainly not need  
5 sufficient to overcome the privilege, which, of course, we're  
6 not even at yet, because we're still talking about narrowing in  
7 alternatives.

8 THE COURT: So you're telling me that the name of the  
9 military heads is part of the privilege.

10 MR. GARDNER: Absolutely, Your Honor. Under *In re*  
11 *Sealed Case*, the Court has made very clear that the  
12 presidential communications privilege covers factual  
13 information as well as deliberative information. It is broader  
14 than the deliberative process privilege, and here's why --

15 THE COURT: So the name of a person, or who is in  
16 charge of those military units that he may have directed,  
17 that's a fact, as opposed to who? I understand how what they  
18 say might be covered by privilege. But you're saying that the  
19 deliberation -- the deliberation privilege goes to actually who  
20 he spoke to --

21 MR. GARDNER: Correct, Your Honor.

22 THE COURT: -- even with a limitation.

23 MR. GARDNER: The limitation, Your Honor?

24 THE COURT: Even with -- if I were to put a  
25 limitation on it. I know they asked for lots of broad

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1 discovery. But if we were to narrow that to, what military  
2 heads of the Navy, Air Force, whatever, did he speak to? What  
3 members of his cabinet did he speak to? Names, not anything  
4 else. You're telling me that that is part of the privilege.

5 MR. GARDNER: Absolutely, Your Honor.

6 THE COURT: Then is there anything that can be --  
7 that you believe that could be turned over that concerns what  
8 the -- who the President spoke to, or who the President  
9 gathered information from?

10 MR. GARDNER: With respect to those two particular  
11 questions, Your Honor, no, I don't. And there's two real  
12 reasons for that.

13 One, it's simply not relevant. So not only can plaintiffs  
14 not show the heightened need necessary, they can't even show  
15 relevance, Your Honor. And this is one of the ways *Trump vs.*  
16 *Hawaii* really comes into play here. Remember, in *Trump vs.*  
17 *Hawaii*, Your Honor, there was initial executive order, EO1.  
18 And that was enjoined immediately. And EO1 expressly provided  
19 for a study period of 90 days to consider, you know, which  
20 country should be subject to heightened scrutiny, if you will.  
21 That was immediately enjoined, and the President issued a  
22 second executive order, which, again, was immediately  
23 challenged.

24 Ultimately before the Supreme Court was Executive Order  
25 Number 3. And in analyzing Executive Order Number 3, it didn't

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1 go back and look at what Executive Order 1 did, or Executive  
2 Order 2 did. And there was no dispute that there was a direct  
3 line between Executive Order 1 and Executive Order 3.

4 THE COURT: Well, we're already past that, because  
5 I've already ruled that this is a continuation of a single  
6 directive. The *Hawaii* case is different, because each time the  
7 executive order was changed, the other one was withdrawn. And  
8 so each executive order stood on its own merits. We don't have  
9 that here.

10 So let's go back to who the President consulted before he  
11 sent out his original tweet. If the answer is no one, say so.

12 MR. GARDNER: No one.

13 THE COURT: No one.

14 MR. GARDNER: Oh, if the question is, can they get  
15 discovery on who the President spoke to, if that's your  
16 question, our position is, the presidential communications  
17 privilege covers that information.

18 THE COURT: What if the question is, did he speak to  
19 anybody?

20 MR. GARDNER: Same answer, Your Honor.

21 THE COURT: Okay. Well, if the answer is, no, he  
22 didn't speak to anybody, how in the world do you expect to put  
23 on a trial where you get deference where -- where it is the  
24 President says -- you know, if there -- you're not going to be  
25 putting on any evidence that you don't turn over. So what's

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1 your evidence?

2 MR. GARDNER: I can answer that question directly,  
3 Your Honor.

4 THE COURT: Okay.

5 MR. GARDNER: And I think this gets to your first  
6 question, so hopefully I'm now being responsive to your first  
7 question.

8 Deference applies based on the subject matter of the  
9 decision-making, not the robustness of the decision-making that  
10 is being challenged. *Trump vs. Hawaii* supports that  
11 proposition. *Rostker* supports that proposition. *Goldman*  
12 supports that proposition. And that's because, when we're  
13 applying deference, it's based upon the fact that these are  
14 decisions that are invested in the President under the  
15 Constitution. The Constitution invests in the President the  
16 ability to make decisions about the manning of the military.

17 THE COURT: All right. So --

18 MR. GARDNER: That's -- sorry.

19 THE COURT: So let's assume that the President, you  
20 know, hypothetical, comes out and says, "All blacks are  
21 excluded." You're telling me that that goes unchallenged, and  
22 because it concerns the military and that African-Americans  
23 cannot join, that that would go unexamined?

24 MR. GARDNER: Not at all, Your Honor. And I'm not  
25 even saying that with deference, things go unexamined. I want

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1 to take both of your questions, though, if I could.

2 THE COURT: Okay.

3 MR. GARDNER: There is a very big difference between  
4 an African-American outright ban and restricting those that  
5 have a particular medical condition from enlisting. The fact  
6 is that African-Americans and non-African-Americans are  
7 similarly situated in all respects. And that's why that kind  
8 of ban, on its face, would violate the Constitution. But by  
9 definition, those that have a medical condition are not  
10 similarly situated from those that don't have that medical  
11 condition. And, therefore, it is a completely different  
12 constitutional analysis.

13 Now, I want to get back to the question of deference, and  
14 what does deference do. Deference does a few things, Your  
15 Honor.

16 One -- and I don't even think this is really challenged in  
17 this case. The first thing we have are, the Department of  
18 Defense has articulated four objectives that this medical  
19 policy is intended to cover, so military readiness -- and I  
20 know the Court knows all these things. The courts have  
21 recognized, routinely, that those are legitimate government  
22 objectives. And so the question now is, does this policy  
23 relate to those objectives? And that's one of the ways  
24 deference comes into play, is that we give the benefit of the  
25 doubt to the military because the military is the one that is

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1 exercising the professional judgment. And here, we have a  
2 44-page report from the Secretary of Defense, Mattis, who has  
3 reached conclusions, supported by an extensive administrative  
4 record.

5 You asked the question, Your Honor, what would the  
6 government put on at trial? What the government would put on  
7 at trial is essentially the administrative record. That may  
8 seem unusual, Your Honor, but, frankly, this case is unusual.  
9 Because when a DOD policy is typically challenged, it is done  
10 so under the APA. And, therefore, we typically don't have  
11 trials in APA cases. But accepting the hypothetical, or the  
12 reality, that this would go to trial, we would present that  
13 administrative record.

14 THE COURT: And only that administrative record.

15 MR. GARDNER: Yes, Your Honor. I should back up.  
16 There is -- I know that plaintiffs will be disclosing expert  
17 witnesses. We'll have to make a decision as to whether it's  
18 appropriate to counter those with our experts, or just  
19 cross-examine them. But in the main, yes, we would be relying  
20 almost exclusively on the administrative record in this case.

21 THE COURT: You intend to call no witnesses.

22 MR. GARDNER: Your Honor, we've already made  
23 available for deposition Tony Kurta, who is the head of the  
24 panel of experts. And it is entirely likely we would call Tony  
25 Kurta to present, you know, the administrative record.

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1           But we do think this case could and should go off on  
2 summary judgment, because what this Court would be looking at  
3 is whether or not that administrative record supports the  
4 44-page decision. If the Court concludes it doesn't, it  
5 doesn't. Or if it does, it does. But that's how we would see  
6 this case proceeding, and that the Court would apply deference,  
7 both in terms of giving credit, if you will, to the  
8 Department's means-ends conclusions, but deference also goes to  
9 the ultimate level of scrutiny.

10           And one thing that *Trump vs. Hawaii* also does, that I  
11 think is important here, is, it notes that where you might have  
12 a gender-based classification that is otherwise subject to  
13 greater scrutiny in a different context, in certain contexts,  
14 immigration, national security, and, yes, in the military,  
15 those decisions, when you apply deference, a lesser standard of  
16 scrutiny would apply. That's, in fact, what *Rostker* did, Your  
17 Honor. And so our view is that deference, how it applies, is  
18 in those two fashions.

19           THE COURT: All right. Well, you keep calling it a  
20 medical diagnosis. And, in fact, the tweet didn't call it a  
21 medical diagnosis, nor does the heading of the other report  
22 call it a medical diagnosis. And you also have people who may  
23 not have the medical diagnosis, but still are required to  
24 present themselves in their birth gender.

25           MR. GARDNER: Your Honor, with all due respect, if

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1 someone has never had gender dysphoria, then there are no  
2 restrictions upon their service. That's not right. And the  
3 fact that there may be a heading that says "transgender" tells  
4 you nothing about the substance of the policy. And the  
5 substance of the policy is clearly directed to a medical  
6 condition.

7 And with respect to the tweet, Your Honor, and the 2017  
8 memorandum, remember, Secretary Mattis had to expressly request  
9 that the President revoke those things to put its 44-page plan  
10 into effect. And that's exactly what the President did in  
11 revoking the 2017 memorandum. So, again, just like the travel  
12 ban, even though there was a logical nexus between the first  
13 executive order and the third executive order, the Supreme  
14 Court analyzed the executive order that was in effect. The  
15 2017 memo, the tweet, certainly, are not in effect now. The  
16 2018 memo that the President issued expressly revoked those.  
17 So not only are those prior statements not relevant, they  
18 certainly don't satisfy plaintiff's need for a higher burden in  
19 order to successfully challenge the privilege.

20 I do want to mention one other thing about one of the  
21 questions this Court had, if I could, and that's about whether  
22 we are in compliance with this Court's order.

23 This Court, in the context of a broad motion for a  
24 protective order to stay all discovery, ordered the government  
25 to submit a privilege log under 26(b)(5). And that privilege

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1 log has to expressly make the claim of privilege, as well as  
2 describe the nature of the documents in sufficient detail to  
3 allow the other side to challenge the documents, without  
4 waiving privilege. We have done that, Your Honor, both in  
5 terms of the deliberative process privilege, as well as the  
6 presidential communications privilege. We've provided an  
7 initial log to the plaintiffs. They acknowledge they had that  
8 log at the time they filed the opposition to the motion for  
9 protective order. And we supplemented that log as recently as  
10 yesterday.

11 And so to the extent that the Court is saying that we  
12 haven't complied with the order by not providing a log that  
13 expressly states presidential communications privilege,  
14 deliberative process privilege, we absolutely have done that,  
15 Your Honor. To the extent what the Court is saying that we had  
16 to formally -- not expressly -- but formally invoke the  
17 privilege, through a declaration, Your Honor, we did not read  
18 your Court's order to require that. And, in fact, the Supreme  
19 Court's order in *Cheney* counsels otherwise. So we do believe  
20 we're in full compliance, Your Honor, with this Court's orders  
21 with respect to the privilege logs. And there are many of  
22 them.

23 THE COURT: Let's go back to the issue of whether  
24 this is a medical condition.

25 MR. GARDNER: Yes.

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1 THE COURT: And my orders basically said that this is  
2 an immutable characteristic, and that this is a protected group  
3 and subject to strict scrutiny. You keep harkening back to  
4 making it something else.

5 Right now, that's the law of the case until it's  
6 overturned, so why shouldn't I make you comply with discovery  
7 based upon what the law of the case is?

8 MR. GARDNER: Your Honor, even if the law of the case  
9 is that this is a ban based on a protected status and strict  
10 scrutiny applies, that still tells the Court nothing about why  
11 plaintiffs ostensibly need discovery directly from the  
12 President and the White House to meet their burden, to  
13 establish an equal protection violation.

14 Again, Your Honor, if this is, in fact, a facial  
15 classification -- and we disagree -- but even if it is, they do  
16 not need to show subjective intent on behalf of the President,  
17 or, frankly, the Department of Defense, to prevail on that  
18 claim. They may like that. That may be additional evidence.  
19 But they don't need it.

20 So when we go back to talking about the presidential  
21 communications privilege, and we think about *Cheney*, and we  
22 think about the D.C. circuit's decisions in *Black* and in *In re*  
23 *Sealed Case*, what those cases stand for is the proposition that  
24 there is a heavy burden that plaintiffs have to meet. And it's  
25 broader than just Rule 26 discovery, or proportionality. There

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1 is a heightened showing, and plaintiffs cannot meet that  
2 showing now.

3 I mentioned to Your Honor that there were at least four  
4 alternatives that this Court could consider before having the  
5 coordinate branches of government engage in a constitutional  
6 collision. I mentioned the first one, the *McGraw-Hill* one.  
7 But there's some other options that I want to at least address  
8 for the Court.

9 One of those is exactly what the Court is doing in  
10 *Doe vs. Trump*. That is the case in the D.C. district court.  
11 There, very similar motion for protective order related to  
12 presidential communications privilege. There are also a number  
13 of other challenges to deliberative process privilege. The  
14 Court has concluded that it is not going to address any of  
15 those privilege challenges until after it resolves  
16 cross-motions for summary judgment, with the recognition, Your  
17 Honor, that there are important separation of powers  
18 principles, implicated by the government's privilege claims,  
19 that might be ultimately resolved -- or avoided, I should say,  
20 if it rules one way or the other on cross-motions.

21 So another approach this Court could take, that would be  
22 eminently reasonable, is allow the parties to brief up summary  
23 judgment -- we have a deadline to do so. We could even move  
24 that deadline up -- and see what's left of this case, if  
25 anything, after summary judgment's resolved. And if, in fact,

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1 parts of this case remain, and plaintiffs can show the  
2 compelling need for executive privilege documents, at that  
3 point, the President could, you know, formally invoke the  
4 privilege through declaration.

5 Another approach Your Honor can take, and we are not  
6 asking for a stay of the entire case, but just a recognition  
7 that the merits of this case are currently up on appeal in the  
8 Ninth Circuit. And just as in *Trump vs. Hawaii*, the Supreme  
9 Court issued a decision that greatly influences the further  
10 conduct of that case, so too it is entirely possible -- in  
11 fact, I think, probable -- that the Ninth Circuit and perhaps a  
12 higher court will offer this Court guidance as to how it should  
13 proceed, before, again, we have to formally invoke the  
14 presidential communications privilege.

15 And then, finally, Your Honor --

16 THE COURT: Well, that basically ties back. Would I  
17 have jurisdiction to entertain a summary judgment?

18 MR. GARDNER: Yes. Yes, you would, Your Honor.  
19 Because what is up on appeal right now is the -- your court's  
20 striking of the motion to dissolve the preliminary injunction.  
21 But nothing would prevent this Court from resolving summary  
22 judgment during the pendency of that. In fact, there are a  
23 number of cases where a court retains jurisdiction and  
24 continued the proceedings while a P.I. is up on appeal.

25 THE COURT: Including discovery.

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1 MR. GARDNER: Yes, including discovery, should the  
2 Court think that that's appropriate. And, again --

3 THE COURT: I'm making a rhetorical point that, yes,  
4 I have the power to do that.

5 MR. GARDNER: Yes. And we don't dispute that you  
6 have the power, Your Honor, to control the conduct of  
7 litigation in this courtroom. We've never suggested otherwise.  
8 But as a prudential matter, and as a separation of powers  
9 concerns, before we have that constitutional collision,  
10 alternatives ought to be considered. And here, there are ready  
11 alternatives available, Your Honor.

12 I know I'm really cutting into my colleague's time. So if  
13 there are other questions with respect to the motion for  
14 protective order, I want to be responsive and answer them.  
15 Otherwise, I would defer the rest of my time -- I guess, first  
16 of all, to having them respond to the arguments we have made,  
17 and then turning the remainder of my time over to my colleague.

18 THE COURT: You haven't mentioned in camera review.

19 MR. GARDNER: I haven't, Your Honor, because I don't  
20 think we're there yet. I think before we get to in camera  
21 review, which the courts have recognized may be appropriate  
22 under circumstances, we have to first engage in the  
23 alternatives analysis that *Cheney* recognized. *Cheney*  
24 recognized that there needs to be some sort of narrowing or  
25 avoidance before we get into things like in camera review and

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1 the formal invocation of the privilege through a declaration.

2 But, certainly, at some juncture, Your Honor, depending on  
3 how this case proceeds, it very well may be appropriate for the  
4 Court to consider in camera, in conjunction with a formal  
5 invocation of privilege. But we're just simply not there yet  
6 in this case.

7 THE COURT: Thank you.

8 MR. GARDNER: Thank you, Your Honor.

9 MR. PATTON: May it please the Court, Steve Patton,  
10 on behalf of the plaintiffs.

11 Judge, I want to start by just doing a little bit of  
12 level-setting, and to answer one of your questions: What's the  
13 status of discovery? Because I'm not sure it's clear from the  
14 record how extreme their invocation of privilege has been here,  
15 and how little, in reality, has been produced.

16 As to the President and his advisers, not a single  
17 document has been produced, not a single piece of information  
18 provided. And their invocation of privilege transcends White  
19 House documents and includes the position that any defendant,  
20 any person, that happens to have documents that may reflect  
21 what the President was actually thinking, deliberating, or his  
22 communications in entering the ban, is verboten. We can't  
23 receive it.

24 And I want to mention, they said they'd logged the  
25 documents. I want to hand you, Your Honor -- with your

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1 permission, approach the bench -- a copy of the log he's  
2 referring to. And I'll give you two copies. Now, this was  
3 supplemented yesterday, the only time it's been supplemented,  
4 but it didn't change the nature.

5 This is, quite frankly, laughable. It doesn't identify  
6 any specific documents. It has broad ranges. And they've  
7 expanded those ranges. And when you look at what -- the  
8 invocation, they have a standard report that includes every  
9 privilege under the sun. There's no way that one could assess,  
10 from this log, what's been withheld, let alone challenge it.  
11 And for counsel -- and I give, you know, great deference to --  
12 wide latitude in making arguments. But to argue that this log  
13 complies with this Court's order, or 26(b)(5), is just, quite  
14 frankly, incredible and wrong.

15 Now, let me go back to the broader context. Nothing from  
16 the President or any of his advisers. As to the other  
17 defendants, 44,000 documents have been withheld, in part, or  
18 redacted, out of a total of 75,000. Fifty-eight percent of the  
19 documents that they've identified as being responsive, they've  
20 refused to turn over. And it's not just the volume. It's by  
21 nature what they've withheld is anything that might bear on the  
22 issues that this Court is constitutionally required to examine  
23 under heightened scrutiny.

24 I don't know where he's getting his law. Heightened  
25 scrutiny says that it requires a searching, factual-based

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1 inquiry -- that's the Ninth Circuit description -- that looks  
2 at the actual reasons. He's talking about rational basis  
3 review, that they can come up with some report -- we don't even  
4 know who drafted it -- after the fact to try to put some  
5 justifications. That's rational basis review.

6 The constitutionally required review here is to look at  
7 what really motivated this. What drove it? What are the real  
8 reasons? Who was consulted? Was the military even involved,  
9 so that there's even a question of military deference? And  
10 were there important governmental interests that are really,  
11 actually furthered by this broad proscription on open service  
12 by transgenders, let alone was there the narrow tailoring  
13 required to make sure that the ban was really required in order  
14 to advance the governmental interests? So anything and  
15 everything that relates to what this Court is constitutionally  
16 required to do, they have withheld.

17 Now, I expect, on rebuttal, my able adversary to say,  
18 Well, but, yeah, we've produced 75,000, less 44,000, 30,000  
19 documents, and we're still producing them. It's all junk, Your  
20 Honor. I've asked our folks to pull together -- I like to  
21 review documents in my cases -- every single document that has  
22 really any relevance, and I got one Bankers Box. And that  
23 doesn't tell us anything about what led to this ban, who  
24 consulted. For him to stand up today and say, You can't even  
25 find out, Judge, who the President talked to, or if he talked

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1 to anyone, that's not heightened scrutiny.

2 THE COURT: Well, let's get practical about it, then.  
3 They just told you exactly what they're going to do. They're  
4 going to put down the 44-page report. They're going to tell  
5 you that there isn't anybody that will be put forward as to  
6 being consulted.

7 How are they going to win?

8 MR. PATTON: They can't win. And that's the answer  
9 to one of your questions. They can't win. But we're still  
10 entitled to have a record of what's relevant. And you still  
11 have to, even if they have this unrealistic view of -- and they  
12 want to save it for appeal -- they did that on some, like,  
13 "don't ask, don't tell," and it didn't work out so well for  
14 them. They took the same unrealistic position, that it was  
15 rational basis review. That was *Witt* and another case in the  
16 central district, called *Log Cabin Republicans*. That doesn't  
17 change the fact that this Court has to do, and is required to  
18 do, and should do, the constitutionally required analysis,  
19 order the discovery we need, so that you can make sustainable  
20 findings, as to whichever way you come out, and that we can  
21 present the evidence to the Court. They can't just, by putting  
22 blinders on, require that the entire world abide by their  
23 blinders, when they're correctly refuted by the case law.

24 Your Honor, what -- if this Court were to sanction what  
25 they're trying to do here today -- and this motion is not only

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1 to let them get away with it, but make it permanent law of this  
2 case, that we can never find out anything that reflects what  
3 the President's deliberations were, or what the actual  
4 considerations were. And it goes broader than that. They say,  
5 well, but there's this whole new policy -- which Your Honor has  
6 properly found, under undisputed facts, is actually the  
7 implementation of the old policy. But let them have their  
8 theory. They won't even tell us what led to that, what the  
9 actual considerations are, only a sanitized administrative  
10 record, that they've prepared after the fact, only to include  
11 what they think is helpful, and this 44-page report, which we  
12 now know was not prepared by the so-called panel of experts.  
13 Their report, as my counsel -- or colleague is going to show  
14 you, was totally withheld. Somebody else -- we don't know  
15 who -- wrote that 44-page report they announced with great  
16 fanfare on March 23.

17 So it's not just that they are thumbing their nose at all  
18 precedent about heightened scrutiny and discovery, they are  
19 preventing this Court from applying heightened scrutiny. Under  
20 the approach that they're taking with privilege, there couldn't  
21 be a heightened scrutiny analysis. All you could look at is  
22 the after-the-fact justifications that they provide. You don't  
23 have the evidence, we don't have the evidence, to determine  
24 whether the ban passes constitutional scrutiny.

25 But it's worse than that. They're interfering with the --

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1 a coequal branch of government. And the obligation of us as  
2 advocates, and Your Honor as a judge, and the courts is to  
3 decide constitutional claims. Their view of the law, executive  
4 power, executive fiat, executive directives could never be  
5 challenged. Because not only is he the king, whose word can go  
6 unchallenged, you can't even discover the fact that might  
7 provide for a constitutional inquiry. And even though the law  
8 is settled, that a searching, fact-based inquiry is required,  
9 where you overtly target and discriminate against a minority  
10 group -- and it's the same whether it would be race, or women,  
11 or transgender people -- that they're saying you can't find out  
12 anything about that. Well, that means the courts can't do  
13 their job. That is a violation of separation of powers, and  
14 the cases hold that. This extreme view, they don't cite a  
15 single case in support of this notion that some threshold  
16 showing is required. They rely on two cases. If you actually  
17 read the cases, *Cheney* and *Dairyland Cooperative*, they refute  
18 their argument. They take the exact opposite approach.

19 First of all, *Cheney* didn't purport to establish a general  
20 rule. It was a one-off. And it was a very distinguishable  
21 case, where it related to the applicability of a statute, not a  
22 constitutional right, not the Article III powers of court to  
23 decide cases before them with the relevant facts, a statute  
24 that called for disclosure. And it so happened that the  
25 discovery would have given the plaintiffs all the disclosure

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1 they claimed to be entitled to under the statute and, as the  
2 majority opinion put it, much more. And in that situation, the  
3 Court said, quote: In these circumstances -- plainly limited  
4 it to the unique facts there -- that the only thing that was at  
5 stake there was whether Congress's policy objective on  
6 disclosure would be fully realized. The meat of the analysis  
7 of the decision is at Pages 784 and 785.

8 And what the Court did there, the *Cheney* court said, you  
9 know, the controlling principle in this is *Nixon*, which  
10 required disclosure, and we're going to go through and analyze  
11 the key parts of the *Nixon* case, because our case is very  
12 different. Well, if you look at the guts of that *Cheney*  
13 decision, and the seven factors that the Court looked at, each  
14 of it, each of those factors, applies with equal force here,  
15 just as it did in *Nixon*. In *Nixon*, although it was in a  
16 criminal context, the findings and the factors it looked at  
17 apply equally where you've got important constitutional  
18 questions at stake. And I'm going to be brief, because I've  
19 got a lot to cover.

20 But, first, in this case, as in *Nixon*, the nation's,  
21 quote, historical commitment to the rule of law is directly at  
22 issue. They say that a president, without any effective  
23 review, can, on a whim, on a tweet, exclude a complete class of  
24 people from the military, and nobody can discover what they  
25 have to do about it. So make no mistake about it, we've got

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1 rule of law directly at issue, important constitutional rights.

2 Second, as in *Nixon*, quote, the Court's ability to fulfill  
3 its constitutional responsibility to resolve cases and  
4 controversies within its jurisdiction hinges on the  
5 availability of certain indispensable information, on all fours  
6 with our case.

7 Third, in such cases, privilege claims, quote, are not to  
8 be expansively construed, for they are in derogation of the  
9 search of truth. Indeed, as I've pointed out, here, they would  
10 completely frustrate this Court from performing its Article III  
11 role in applying heightened scrutiny to decide important  
12 constitutional claims.

13 Fourth, here, as in *Nixon*, the President's privilege  
14 claims would thereby, quote, conflict with the function of the  
15 courts under Article III. Such an impairment of the essential  
16 functions of another branch is impermissible. That's *Cheney*,  
17 at 384, quoting the *Nixon* decision at 707.

18 And finally, here, as in *Nixon*, quote, there are various  
19 constraints to filter out insubstantial legal claims that  
20 might, quote, disrupt the functioning of the executive branch.

21 Here, we're not asking for a rule that says, in any civil  
22 case, the privilege is overcome. This is a case where the ban  
23 was, number one, ordered directly by the President. He was  
24 directly involved. We think solely on his own. Two, on its  
25 face, the ban expressly discriminates against a minority group,

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1 a protected class, which is, therefore, bringing important  
2 constitutional guarantees that they're trying to vindicate.  
3 Three, the President's actual reasons and justifications for  
4 ordering the ban are not merely relevant, but they're  
5 indispensable under settled law concerning heightened scrutiny.

6 So, in short, this is a unique case where discovery of the  
7 President's communications and deliberations on this one issue,  
8 open service by transgender individuals and the ban, is not  
9 merely directly relevant, but actually indispensable.

10 THE COURT: Let's talk a little bit about the  
11 privilege itself.

12 MR. PATTON: Yes.

13 THE COURT: You just heard counsel say that even  
14 who -- let's assume I decide that your request is way too  
15 broad. You basically asked for every single person that the  
16 President may have spoken to.

17 If I were to limit that, and say, who in the military did  
18 he speak to, who in his cabinet did he speak to, who in  
19 Congress did he speak to, is the names of those individuals  
20 covered by this privilege?

21 MR. PATTON: If the privilege applied, then its scope  
22 is to include all deliberations and communications. Our point  
23 is that it doesn't apply. And I don't think there's any  
24 dispute among the parties that the controlling case there is *In*  
25 *re Sealed Case*. And it has a two-part standard for overcoming

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1 the presumption.

2 The answer to your question is, none of that's privileged  
3 here. But nothing is privileged here, because the showing of  
4 need that's required to overcome the privilege is clearly met  
5 here. And *In re Sealed Case* -- and I don't think there's any  
6 dispute about this. They have come up with this threshold  
7 showing that they pull out of context from the *Nixon* case. And  
8 I'll talk about in a minute why, even if it applies, it's  
9 plainly satisfied.

10 But what we all agree the real issue here is, the  
11 President invokes a privilege -- and by the way, the *Sealed*  
12 *Case* totally refutes their position that there is some  
13 threshold showing required, or that the presidential privilege  
14 is any different than any other privilege. The President has  
15 to claim it. He has to provide a log that is document-specific  
16 and satisfies Rule 26(b)(5), as this Court ordered. And then  
17 the burden is on us to overcome that privilege. And we have to  
18 do two things to satisfy that burden. And there could be no  
19 serious dispute that we satisfied both of those here.

20 THE COURT: All right. Let me go back again, because  
21 I'm not sure -- I asked one question, and I think I got an  
22 answer to another one.

23 MR. PATTON: Yes.

24 THE COURT: If the privilege applies, does it apply  
25 to names, not necessarily what they said, but to who was

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1 consulted?

2 MR. PATTON: If -- no. I don't think they would,  
3 Your Honor, because I don't think that the mere names of people  
4 would reveal the nature of the deliberations or the  
5 communications themselves.

6 But I guess what I was trying to point out is, these  
7 discovery requests are not overly broad, and they're not  
8 routine. They ask for information that is directly relevant to  
9 heightened scrutiny. And they haven't even -- they make these  
10 broad generalizations. Oh, we asked for everything under the  
11 sun. If you look at the actual discovery request, to the  
12 extent they repeat them -- and I invite the Court to look at  
13 all of them. And they include them at, I think, Page 2, some  
14 of them -- they're limited to information directly relevant,  
15 but also necessary, to evaluate a heightened scrutiny.

16 So, again, the standard here, because we are asking Your  
17 Honor not only reject this claim of privilege, find out that  
18 we've over -- find that we've overcome it, which we have,  
19 under, I believe, undisputed record facts, and order these  
20 documents produced. And there is a role for in camera review.  
21 How the privilege works is laid out in *In Sealed Case -- In re*  
22 *Sealed Case*. They have to produce the documents.

23 And what I'm going to propose to you here, because we're  
24 trying to minimize the number of documents Your Honor has to  
25 review -- and by the way, the review is not to determine

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1 whether the privilege applies. The review is to make sure that  
2 the documents that are actually released are limited to those  
3 that bear directly on open service by transgender individuals.  
4 In other words -- take a wacky hypothetical. If there was some  
5 document that includes about whether the President should bomb  
6 Syria, but it also includes open service by transgender, the  
7 purpose of your review, under *Sealed Case* and the law -- not  
8 what they would have the law be, but the law -- is to go  
9 through and look and make sure that only those portions of the  
10 information that are relevant are turned over. That's the  
11 process that ought to apply here.

12 The standard. The discovery plaintiffs seek here -- first  
13 of all, the first requirement is that the requested documents  
14 and information likely contain evidence that is directly  
15 relevant to the issues that are expected to be central to the  
16 trial. That's a verbatim quote, the first element. The  
17 discovery that we seek here, which includes the actual reasons  
18 for the ban -- who, if anyone, the President consulted;  
19 whether, in fact, there was any input from, or involvement of,  
20 the military -- is directly relevant to whether the ban passes  
21 heightened scrutiny and whether military deference even applies  
22 or plays in a role here.

23 And, likewise, what we've asked for about the subsequent  
24 February 2018 report, in the Mattis memorandum, that they claim  
25 is a, quote, new policy, what we seek there is the same thing.

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1 What process was followed? Was it a military-run process?  
2 What's the purpose of the review? Who was involved? What  
3 evidence was considered? Did the evidence that was considered  
4 support the governmental reasons they assert? Do they show it  
5 was narrowly tailored? All of this is directly relevant.

6 We would ask that the Court not try to pick and choose.  
7 We're only asking for things that are clearly relevant under  
8 heightened review. And if in your in camera review there are  
9 other things that don't meet that need, then you can cull those  
10 out, Your Honor.

11 I want to, briefly -- I don't want to take all of my  
12 colleague's time --

13 THE COURT: Well, I've peppered you both with a fair  
14 amount of questions.

15 MR. PATTON: Okay. Well, Your Honor, then I would  
16 like to just make a few more points --

17 THE COURT: Let me backtrack a little bit.

18 MR. PATTON: Absolutely.

19 THE COURT: Talk to me about the orders from the  
20 judge in Maryland. Apparently, the judge in Maryland has  
21 halted discovery --

22 MR. PATTON: No, no. Wrong. And I'm sorry.

23 So what has happened, the other cases, same position we're  
24 in with documents. They're taking a one-size-fits-all.  
25 They're producing it, all the same people.

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1           Our case has historically been farther along. They say:  
2 Oh, wait until summary judgment. I'm not sure my able counsel  
3 knows, we've already been through summary judgment. The other  
4 cases are just now briefing and arguing summary judgment. And  
5 what one judge held was: Well, let me wait. If what you say  
6 is right, that you win as a matter of law, then I don't need to  
7 get in this discovery situation. We're way beyond that here.

8           And then they say: Well, we haven't taken any  
9 depositions. One of the plaintiffs -- I believe it's *Doe* --  
10 has taken a handful of depositions. And guess what --  
11 number one, they don't have the documents to ask the witness  
12 any really meaningful questions. And guess what they've done,  
13 repeatedly, in those depositions? Anything of substance, they  
14 invoke the privilege, presidential communications privilege or  
15 deliberative process. Those -- all due respect, those  
16 transcripts are junk.

17           So we've taken the position, we don't want to waste  
18 anybody's time. We want the documents first, and then we'll  
19 take our depositions. But we are at an impasse here, Judge.  
20 Because of this overly broad and extreme invocation of  
21 privilege, we don't have, really, anything to work with. And  
22 the notion that somehow we're confined to the face of the  
23 statute -- or the ban here, I haven't heard any authority for  
24 that, and there is none.

25           We're entitled, and the Court has to look at, what were

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1 those actual reasons? Maybe they support a ban. Probably  
2 unlikely, given the position that the government's taken, but  
3 that's not optional. That's not icing on the cake. That's  
4 essential to conducting a heightened scrutiny review.

5 THE COURT: All right. Let's go back and talk a  
6 little bit about *Hawaii*. And *Hawaii*, basically, is telling me  
7 that the President's comments outside of his authority  
8 shouldn't count.

9 MR. PATTON: So, Your Honor, *Hawaii* didn't purport to  
10 talk about privilege or discovery. *Hawaii* was a case where you  
11 had three things that we don't have here. You had a facially  
12 neutral proclamation, which Chief Justice Roberts and the Court  
13 repeatedly emphasized did not reference religion at all, let  
14 alone Islam. Two, you had a well-settled body of authority,  
15 unique to that area of immigration law, that said the  
16 President's express statutory authority to make the decisions  
17 about who to exclude from coming into the country, if it was  
18 facially neutral, a court wouldn't probe behind that. We have  
19 the exact opposite law here. And three, as a result of all  
20 that, you had rational basis review.

21 The case really couldn't be more different, and trying to  
22 analogize it couldn't be more of a stretch. Number one, we  
23 have a ban that facially targets a suspect class. Two, we  
24 don't have the spotty law that says whatever the President  
25 does, we're not going to probe behind it. And even if there

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1 was such law, in our context, it wouldn't apply, because we  
2 don't have a facially neutral ban here. We have an expressly  
3 targeted ban. And third, this is not a rational basis review  
4 case. This is a strict scrutiny case. So *Hawaii* has no  
5 relevance here.

6 Your Honor, any other questions? But I would like to hit  
7 military deference, because I think that's important. And I  
8 appreciate Your Honor raising that issue and asking the  
9 question. And let me --

10 THE COURT: I just have one more on this issue.

11 MR. PATTON: Absolutely.

12 THE COURT: This is the -- you know, in this briefing  
13 for today, this is the first time I've heard that this is a  
14 medical condition that is being banned. And --

15 MR. PATTON: It's just -- it's not true. And, Your  
16 Honor, it's simply not true. And I don't make that lightly.

17 Look at Mattis's memorandum. Look at our briefing about  
18 it. And Your Honor did consider this, the same documents. The  
19 ban had -- the ban that was announced by tweet, and was  
20 formalized and effectuated by the President's August 25, 2017,  
21 memorandum, did three things: Set a ban on extensions. If  
22 you're openly transgender, you can't even join the military.  
23 That's part of this, quote, new policy. You're openly  
24 transgender, you can't even join the military.

25 Two, if you're transgender, you can't serve openly

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1 transgender, but the President said, study those people -- the  
2 so-called grandfathered class -- who came out during the period  
3 when the Ashton Carter policy was in effect to tell us what to  
4 do about. Well, lo and behold, Mattis comes back and says:  
5 Yeah, unless you're part of that grandfathered group, you can't  
6 serve if you're openly transgender. And they say -- and Your  
7 Honor did consider this before, and rejected it -- oh, no, we  
8 have a consideration. Anybody can serve, if you do so quietly  
9 and in your birth gender. Well, that doesn't have anything to  
10 do with medical condition. That's just dressing it up. The  
11 effect of the ban is no open service by transgenders.

12 And then the third ban, in the original tweet and  
13 memorandum, was a ban on any surgically related transition.  
14 And, of course, you'd never get to that here. Because if you  
15 need a gender transition, or if you are -- transition genders,  
16 you can't even join the military in the first place.

17 So, effectively, you know, what -- where I grew up, they  
18 had a saying, "You can put lipstick on a pig, but it's still a  
19 pig." The "lipstick" they put on here is: Oh, this is all  
20 about a medical condition. That's some lawyer, after the fact,  
21 spin on what is, in reality, a continuation and effectuation of  
22 all three of the bans that the President initially ordered.

23 THE COURT: All right. Let's talk about the military  
24 deference, please.

25 MR. PATTON: I have three points on that, Your Honor.

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1           The first is, factually, highly disputed whether there  
2 could be any deference here. Because we think, if we could  
3 ever find out what the facts are, the facts will show that this  
4 was not driven by the military. The military didn't say:  
5 Mr. President, can you please reverse that bad Carter policy?  
6 It doesn't work.

7           We know from what we -- what was publicly reported that  
8 the Joint Chiefs of Staff was taken totally by surprise. Joint  
9 Chief Chairman Dunford sent an e-mail to the other chiefs,  
10 said: Hey, I didn't have a heads up. I didn't know about this  
11 any more than you did. And Mattis, who was on vacation,  
12 apparently claimed he only had one day's notice. This  
13 wasn't -- factually, I think when we find out the facts, we'll  
14 show that the military wasn't involved. In fact, this guy  
15 didn't even attempt to get their input before he ordered and  
16 excluded an entire class of people from our military.

17           But secondly, legally, it's not clear at all that military  
18 deference even applies in cases of strict scrutiny. I went  
19 back and checked again last night -- and counsel should correct  
20 me if I'm wrong. I don't think they've cited a case where  
21 deference was applied to strict scrutiny. In fact, in their  
22 briefing on preliminary injunction, the government conceded  
23 that, quote, No amount of deference could save the military's  
24 decision to exclude a race or religion from being considered,  
25 under the strict scrutiny standard. And that's at Docket 69,

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1 Page 30. Hey, we're in -- they didn't know it then, because  
2 you ruled that strict scrutiny applied, although they should  
3 have seen it coming. They've already conceded that when you've  
4 got strict scrutiny, no amount of deference can justify an  
5 overtly targeted discrimination against a suspect class. Okay?  
6 You just don't change the legal requirements for that.

7 And the principal case that they rely on is this *Goldman*  
8 case. Remember this yarmulke case? Boy, it couldn't be more  
9 different than our case. That was a case where it concerned a  
10 First Amendment challenge to a facially neutral rule generally  
11 barring headgear, because it's bad for military discipline,  
12 which incidentally burdened the ability to wear a yarmulke, and  
13 where there was a background of a lot of case law that said, in  
14 that specific area, free expression claims in the military,  
15 part of what you give up, when you join a military, in a  
16 top-down organization, is your rights to self-expression.  
17 Couldn't be more different than our case, where you've got  
18 express targeting and then exclusion of an entire suspect  
19 class.

20 My third and final point, Your Honor, is, to the extent  
21 deference could apply at all here, if it -- there was a factual  
22 basis for it, and if legally it could be applied in a strict  
23 scrutiny setting, which we don't think it should be, the  
24 authority in the Ninth Circuit makes clear that it would be  
25 limited to only one of the three prongs of what they have to

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1 show to their burden under heightened scrutiny, which is, is  
2 there an important governmental interest. And the cases on  
3 point on that are the *Witt* case, Ninth Circuit, and the Central  
4 District of California case in *Log Cabin Republicans*. Both  
5 were challenges to "don't ask, don't tell," you know, 10, 15,  
6 20 years ago.

7 And at that point, in those cases, the Court was applying  
8 a type of intermediate scrutiny in which you look at three  
9 requirements: Has the government shown that there's an  
10 important governmental interest at stake? Have they shown that  
11 the intrusion, or the discrimination, furthers that important  
12 interest? And then, third, is it narrowly tailored? Is it  
13 necessary? Can they further that governmental interest in a  
14 less intrusive way?

15 And if you look at the analysis -- well, first of all, in  
16 *Witt*, the Court -- both courts said: Yeah, we've got military  
17 deference. And they cite *Rostker*, and they cite *Goldman*. But  
18 they said: We're only going to apply that -- and then they  
19 only applied it -- to the first of those three requirements.  
20 In *Witt*, the Ninth Circuit said: We need more of a record.  
21 And they remanded to the trial court for a determination as to  
22 whether the government had met its burden on the second and  
23 third prongs.

24 And in the Central District case, *Log Cabin Republicans*,  
25 the Court had a bench trial, heard evidence, and painstakingly

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1 goes through the evidence in finding that the government did  
2 not meet their burden as to those interests. So it said: Hey,  
3 important government interests. And lo and behold, guess what  
4 they were? Unit cohesion and military effectiveness. The  
5 Court said: Defer to you. Those are important. Wait a  
6 minute. Does having "don't ask, don't tell" really further  
7 those? No. The evidence shows the opposite, just like we  
8 think it does here and will here. Third, is this narrowly  
9 tailored, so that it doesn't sweep with two -- no, it's not.  
10 But the Court made that analysis, on its own.

11 So if deference applies at all here -- which we think is  
12 really doubtful, but we need discovery. We can see. Give the  
13 government a chance to show that it does -- its role in  
14 deciding the important constitutional questions under  
15 heightened scrutiny is going to be pretty limited, which you  
16 would expect it to be. I mean, you know, when you're  
17 discriminating against a suspect class, overtly, and saying you  
18 can't serve in your military because you happen to be a  
19 transgender individual, even though you satisfy every other  
20 requirement -- you are fit, able, ready, willing to put your  
21 life on the line for your country -- simply because the  
22 President says it's so, you know, we don't defer to overt  
23 discrimination against suspect classes. That's where the Ninth  
24 Circuit says you have a factual -- a searching, factual review.  
25 And they can't change that by just invoking, you know,

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1 nomenclature like military deference.

2       So, Your Honor, what we would urge you to do here is,  
3 first of all, any legitimate concerns about separation of  
4 powers here is clearly resolved by *Nixon* and those seven  
5 factors I mentioned, applied with equal force in our case. And  
6 when it comes to how the privilege works, and what the standard  
7 is for overcoming it, *Sealed Case*, which I think both sides  
8 agree is the leading case on that, tells us that the privilege,  
9 just like any other privilege, they have to invoke it, and they  
10 have to log those documents. And then the burden is on us to  
11 overcome that presumptive privilege, but it's not an absolute  
12 privilege. We have to do two things. We have to show that the  
13 information we're seeking is directly relevant to issues that  
14 we all expect will be central in the trial. And we would say,  
15 on their face, all of our requests do that. But if they were  
16 to show that a particular request is overbroad, or Your Honor  
17 were to find that it doesn't meet that standard, then we would  
18 abide by that. I don't think they're going to be able to do  
19 that, and they haven't purported to.

20       But then the question is, have we shown that we can't get  
21 this someplace else? And we can't. And when you asked them  
22 that question, two or three times, he never told you where  
23 else -- where are we supposed to go? He just says: Wait.  
24 Wait until summary judgment. You know, wait until you get done  
25 with discovery. Where are we going to go to find out who the

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1 President talked to, what he was told, whether he consulted  
2 with the military? That only is with the President. If it  
3 existed someplace else, they say, well, the privilege  
4 forecloses that as well, if Secretary Mattis, or Tony Kurta,  
5 this fellow they mentioned, happens to know, you can't get it  
6 from him either.

7 And in terms of the subsequent report and recommendations,  
8 and Mattis memorandum, the stuff that they released in March,  
9 same thing. We can't get that information from anyone other  
10 than the defendants in this case. And it's absolutely, quote,  
11 indispensable and critical to this Court's making the findings  
12 it needs to make, under the law, to determine whether their ban  
13 satisfies heightened scrutiny.

14 THE COURT: That leads me to one question. I perhaps  
15 should ask opposing counsel this.

16 But explain to me that the 44-page document isn't written  
17 by the military?

18 MR. PATTON: Yeah, I just -- well, we don't know. We  
19 don't know. And we'll never find out, if you grant their  
20 motion.

21 What I have learned recently, and, in fact -- sorry to  
22 take my partner's thunder here. But, you know, they've tried  
23 to dress this up with this panel of experts, right, and kind of  
24 make it look like other major policy changes that really were  
25 driven by the military, you know, like the Carter Ashton [sic]

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1 policy. But we've learned now that the final report and  
2 recommendations of that panel, they totally withheld. So this  
3 was done in January.

4 May I approach the bench?

5 THE COURT: You may.

6 MR. PATTON: I'm sorry, Your Honor, and an extra  
7 copy.

8 When you look, the whole thing is redacted. It's  
9 deliberative process. What we understand happened is, the  
10 panel of experts did this report. They've totally withheld it.  
11 And then from sometime in mid-January until February, somebody  
12 else came in and wrote the report. We don't know who. We  
13 don't know what was relied on.

14 What we do know is that there was one dissenting member of  
15 the panel of experts, a fellow by the name of Thomas Dee. And  
16 I think they inadvertently probably produced more of that  
17 dissenting opinion than they intended to. But according to  
18 that, this dissenting person said, even this report -- even  
19 this report didn't represent the evidence that the military  
20 actually heard and the consideration --

21 THE COURT: I can't see what you're holding up.

22 MR. PATTON: Oh, this -- the report I handed up to  
23 Your Honor.

24 THE COURT: The final report, okay.

25 MR. PATTON: Yeah, the one that they haven't provided

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1 us. Even that report, whatever it said, was not true to what  
2 at least this member thought the evidence showed, during the  
3 panel's meetings.

4 So, I mean, this is just a good illustration. What  
5 they're doing here is not trying to protect, you know, the  
6 executive from, you know, harassment, or frivolous suits, or  
7 avoid interference with the chief executive. They envision a  
8 world -- and I'm not aware of any other case where they've  
9 tried this, although we're going to increasingly see this -- a  
10 world where you have a chief executive who has no coequal  
11 branches, who can do whatever he or she pleases, without any  
12 effective review by the Court. And the privilege is absolutely  
13 instrumental to that strategy, and to that frustration of  
14 courts' Article III power.

15 Because if, in fact, their world were right, well, you  
16 have to defer to the military, and it's whatever we say it is,  
17 we could never -- well, let me put it this way. They could  
18 always meet their burden, because they'll just design the  
19 record -- and, boy, look at that administrative record. I  
20 mean, you know, I think after the preliminary injunctions, we  
21 got -- and I am going to speculate a little bit here, but, you  
22 know, I've been around the track a few times -- that they had  
23 some lawyers involved, and said, you know, the way you dress  
24 this up, and what you do to try to overcome the kind of  
25 scrutiny that's going to come, is, you now do this study,

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1 appoint this panel of experts. And then somebody came and  
2 wrote the report, and wrote it in a way that it really reads  
3 like a rebuttal expert report, as opposed to a military-driven  
4 report. That's my read of the report and recommendations.

5 And then they say, all you can look at, in judging the  
6 constitutionality of our ban, is what we say you can look at,  
7 and it's what we came up with, after the fact. And that just  
8 totally undermines everything, you know, heightened scrutiny,  
9 the role of courts. And if they can do it with transgender  
10 people, they could do it, if they were to choose to, with  
11 Muslims next year; with people with disabilities that are still  
12 able to meet requirements for service the year after that;  
13 people that have had some bout with mental illness, at some  
14 point, even though they're totally recovered from that.  
15 There's no limit to what they can do. And we ask the Court to,  
16 on this small piece of it, but nevertheless critical, shut it  
17 down. Find that the privilege is overcome here, but supervise  
18 the process, so that you know what is being turned over.

19 And one thing that I would propose, again, just in the  
20 event it might be helpful, is, so you already ordered that they  
21 prepare a log. And they blew that off. I think they blew it  
22 off. You can be your own judge. Give them a date certain now.  
23 I think that discipline will force them to get a little more  
24 realistic about what they withhold and log. Deliberative  
25 process privilege accounts for the overwhelming bulk of what

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1 they're withholding, not the presidential communications  
2 privilege. As we pointed out in our brief, there's no basis  
3 for that privilege to apply here at all. You ought to grant  
4 our motion to compel on that.

5 And then have them provide us a log of what is remaining  
6 that's privileged, which will include the presidential  
7 communications privilege. We will work with them. We will  
8 review it, work with them in good faith to limit what then is  
9 required to be provided to Your Honor for in camera review.  
10 Some of the stuff might be relevant, but it's clear, from the  
11 description, is not that important to us. Some of it may be  
12 presidential communications, but it's pretty clear it's work  
13 product or attorney-client privilege. We're not going to waste  
14 your time having you review those kinds of documents, and the  
15 parties work together to try to restrict the volume that is  
16 left for in camera review. And then at that point, it's a  
17 matter of the Court determining which of those documents and  
18 those materials are, in fact, directly relevant to issues that  
19 are going to be central in a trial of this case.

20 THE COURT: All right. So let me ask you a couple  
21 questions.

22 You handed up the log that they did.

23 MR. PATTON: Yes.

24 THE COURT: And I can see that there are multiple  
25 reasons that they've withheld.

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1 MR. PATTON: Yeah. And it's not document by  
2 document. They put a whole range. You know, like, there are  
3 hundreds of pages, and so we don't know what the documents are.

4 THE COURT: So you're suggesting that they do a log  
5 where that is the only objection, the deliberation.

6 MR. PATTON: No. They owe us -- Your Honor, they owe  
7 us a real privilege log for any document they withhold. There  
8 are other logs that we're working with them on, that actually  
9 are document by document. I mean, you know, the Justice  
10 Department knows how to do a log when they want to do it.

11 This is the one, the one that relates to communications  
12 with the White House, where I guess because of their  
13 presidential communications claim, just this subset, they've  
14 refused -- or failed to -- do a document by document. They  
15 have these generic categories and this generic description,  
16 well, it could be deliberative process, could be  
17 attorney-client privilege, it could be -- and it could be  
18 presidential communications. And we're saying, as to that  
19 subset, also give us a log that complies with Rule 26(b)(5) and  
20 this Court's prior order, and do so promptly.

21 THE COURT: Okay. Thank you.

22 MR. PATTON: Thank you, Your Honor.

23 THE COURT: Who's next?

24 MR. SIEGFRIED: Good morning, Your Honor. Dan  
25 Siegfried, on behalf of the plaintiffs.

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1           As my colleague mentioned, the defendants have asserted  
2 the deliberative process privilege in more than half of the  
3 documents they've identified as responsive to our discovery  
4 requests. In about three quarters of those, deliberative  
5 process is the only basis for shielding the documents. And  
6 these documents go to a core issue in this case, which is  
7 whether the President's exclusion of transgender service  
8 members from the military was actually motivated by compelling  
9 state interests.

10           The Court should reject the government's attempt to shield  
11 those documents -- these documents central to that inquiry,  
12 based on a qualified privilege that has no place in this case  
13 at all. And that's true whether the Court follows the majority  
14 rule and finds the privilege inapplicable because the case  
15 turns on the government's intent, or whether the Court applies  
16 a balancing test. The result would be the same either way.

17           So the majority of courts recognize that --

18           THE COURT: Counsel, you need to slow down.

19           MR. SIEGFRIED: I apologize, Your Honor.

20           THE COURT: I can see the steam coming out of the  
21 court reporter's ears.

22           MR. SIEGFRIED: I will take it easy. I apologize.

23           The majority of courts recognize this privilege is not  
24 appropriately asserted when a plaintiff's claim turns on the  
25 government's intent. And that's the only -- the only court of

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1 appeals to address the question and courts throughout the Ninth  
2 Circuit, including in this district.

3 It's black-letter law that deliberative process is a  
4 qualified privilege, and so is overcome when a party's need for  
5 the materials overrides the government's interests in  
6 nondisclosure. And that's separate from whether the privilege  
7 applies. That's assuming it's pre-decisional, it's  
8 deliberative, and the privilege applies.

9 The privilege still -- there's an exception when need  
10 outweighs the government's interest in disclosure. And court  
11 after court has found that's necessarily true for claims  
12 directed at the government's intent. As the D.C. circuit  
13 explained, this privilege was fashioned in cases where  
14 government decision-making is collateral to the plaintiff's  
15 suit. So if the plaintiff's claim is directed at the  
16 government's process and intent, it makes no sense to let the  
17 government use the privilege as a shield.

18 And the typical example the court gives, and what the D.C.  
19 circuit in the *In re Subpoena Case* described as, quote, an  
20 obvious case, is that the privilege has no place in a  
21 constitutional claim for discrimination. And the idea is, when  
22 the government's intent to discriminate is at issue, the  
23 privilege just doesn't enter the picture at all. And here, as  
24 my colleague went through, and as Your Honor knows, the Court  
25 has already held that the government's deliberative process is

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1 the issue in this case. And it's impossible to determine the  
2 adequacy of the government's motivations without actually  
3 examining the deliberative process. And so it follows that,  
4 here, the privilege must yield.

5 Now, the government's only response to these courts'  
6 analysis of this issue is, well, the Ninth Circuit hasn't  
7 addressed the question yet, so you need to do a balancing test,  
8 and can't just apply the majority rule here. Now, nowhere in  
9 their brief do they explain why this isn't a completely  
10 sensible rule, as a matter of first principles, or, in fact,  
11 why it isn't the only logical application, and appropriate  
12 application, of the Ninth Circuit's rule that the qualified  
13 privilege yields when need overcomes the government's interest.

14 And, in fact, you know, the distinction between the  
15 categorical rule and the balancing test rings hollow when  
16 government intent is at issue. And that's because even under  
17 the balancing test, the government always loses when intent is  
18 directly implicated. And that's true in every single case the  
19 government cites in their brief. Where claims turned on  
20 intent, every single time, the Court found in favor of  
21 disclosure. And the government's cases actually point out,  
22 there's no practical difference between the two tests, under  
23 these circumstances.

24 And I draw Your Honor's attention to the *In re Delphi*  
25 case, from the Southern District of New York, which they cite

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1 on Page 4, in support of a balancing test. Well, what that  
2 court said was, quote: The difference between whether the  
3 privilege is categorically inapplicable or dependent upon a  
4 balancing of factors is more stylistic than substantive. And  
5 it described the categorical rule as, quote, a logical  
6 application of the balancing test. Where the deliberative or  
7 decision-making process is the central issue in the case, the  
8 need for the deliberative documents will outweigh the  
9 possibility that disclosure will inhibit future candid debate  
10 among agency decision-makers.

11 And sure enough, in every case where that's true, that  
12 they cite in their brief on Page 4, the Court found the  
13 plaintiff's claim -- the Court found in favor of the plaintiffs  
14 on the balancing test. And I'd point out that none of those  
15 cases involved the heightened scrutiny that the Court will  
16 apply here. And the balance favored disclosure, again,  
17 precisely because the decision-making process was central to  
18 those claims. And the same would be true here, Your Honor, if  
19 you were to apply that balancing test. And while we don't  
20 think that's the appropriate rule, and the Court should follow  
21 the majority rule, ticking through those factors, any balance  
22 would favor disclosure.

23 And so if you look at the factors, relevance is the first.  
24 Well, evidence of the government's motivations is obviously  
25 relevant to claims turning on the government's motivations.

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1 That's the point of heightened scrutiny. No other available  
2 evidence; my colleague walked through, you know, why we don't  
3 have access to any other evidence on these issues. The  
4 government's role as a party; no one disputes that favors  
5 disclosure. The case has substantial public importance. There  
6 are constitutional rights at stake. And so the cases say the  
7 interest in accurate fact-finding is heightened under those  
8 circumstances.

9 Now, finally, the fact that the government rests on is  
10 whether disclosure will chill frank discussion. And the  
11 government just offers a generalized argument that disclosure  
12 will chill future policy discussions, without any actual  
13 explanation why, in this case, that would be true.

14 But even if you credit that argument, Your Honor, it's not  
15 enough, because all of the other factors would still weigh in  
16 our favor. And it's just like all of the cases that favor  
17 disclosure, which, for instance, the *Vietnam Veterans vs. CIA*  
18 case they cite, from, I believe, the Northern District of  
19 California, said this one factor is not dispositive and, sure  
20 enough, found in favor of disclosure.

21 And the cases also show that platitudes aren't enough on  
22 this factor. And the government, in fact, made the same  
23 generic argument about chilling agency discussions in every one  
24 of these cases that allowed disclosure, and it didn't tip the  
25 balance in their favor. You know, in fact, if that were

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1 enough, the exception would become a nullity, because one of  
2 the factors that makes something deliberative in the first  
3 place is this idea that it might chill agency decision-making,  
4 going forward.

5 But here, specifically to this case, there's no logical  
6 reason, Your Honor, why disclosure of the motivations behind  
7 this policy would chill future discussion. And I'd actually  
8 submit that the risk here is less than in those other cases,  
9 because this isn't a situation where the government wants to  
10 prohibit a plaintiff from looking at the different options that  
11 were considered by the agency. Here, those views, the opposing  
12 view, the countervailing view, was publicly aired, publicly  
13 endorsed, publicly debated, and, in fact, adopted in the Carter  
14 policy. So if really the internal deliberations here were just  
15 an agency considering the Carter policy versus the ban, there's  
16 no reason why disclosure would chill agency discussion, going  
17 forward. The only views that that would chill are  
18 discriminatory ones, and that's a good reason to order  
19 disclosure, and not to prevent it. So even under the balancing  
20 test, we believe disclosure would be proper.

21 So the Court need not go any further, and should hold the  
22 deliberative process privilege is not applicable to the  
23 plaintiff's claims in this case. But independently -- and this  
24 relates to one of the questions Your Honor asked -- many of the  
25 defendant's privilege claims fail on their own merit. Now, the

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1 government claimed, in its opposition to our motion, that our  
2 motion to compel was limited to whether the privilege applied  
3 as a per se matter. And that's only partially true. It's  
4 true, we didn't want to force the Court to work through tens of  
5 thousands of privilege log entries, when we believe there are  
6 dispositive legal issues that can be decided first and would  
7 render a lot of that work unnecessary, in fact, all of that  
8 work unnecessary. But our motion did present a couple of  
9 categories where we believe, for other reasons, because of  
10 other limits on the deliberative process privilege, a ruling  
11 would apply to thousands of documents at a time. And so as I  
12 mentioned, to qualify for the privilege, evidence must be both  
13 pre-decisional and deliberative, and the privilege is narrowly  
14 construed. And, now, these limits are separate from the  
15 need-based limits I've been discussing to this point.

16 Now, one key category we talked about in our motion is all  
17 documents after July 2017, which is in the President's tweet,  
18 which are post-decisional. And the Court has already concluded  
19 that the decision to ban transgender people from the military  
20 was made in that tweet, in July of 2017. And the President, in  
21 that tweet, not only laid out the ban, but all of the  
22 justifications, unit cohesion, lethality, and all of the  
23 justifications defendants continue to press to this day. So  
24 that's the key date, for purposes of the decision for the  
25 deliberative process privilege.

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1           And I draw Your Honor's attention to the *Ensco vs. Salazar*  
2 case we cited in our brief, reply brief, at Page 3, which is  
3 particularly instructive on this point. And so that case  
4 involved a moratorium on drilling after the Deepwater Horizon  
5 disaster. The Department of Interior issued a moratorium, that  
6 was challenged and ultimately enjoined. Well, the same day it  
7 was enjoined, on June 22, 2010, the Secretary of the Interior  
8 announced he would issue a new moratorium that would eliminate  
9 any doubt that a moratorium was necessary.

10           And so the Court, when there was a challenge to  
11 deliberative process, ultimately held that that announcement of  
12 June 22, even though the policy did not come for weeks later,  
13 was the cutoff date when the decision was made, and all  
14 documents and communications after that point were  
15 post-decisional. And what the Court did was, it compared the  
16 announcement, and what was said in the announcement, "I'll  
17 issue a new moratorium in the coming days" -- and that would  
18 eliminate any doubt that there will be a moratorium -- to the  
19 ultimate policy that issued, which substantively mirrored it  
20 and came three weeks later. The Court said the Secretary had  
21 already arrived at his decision on June 22 and settled on  
22 agency policy. So everything after that was post-decisional  
23 rationalization and justification, not pre-decisional  
24 deliberation.

25           And what the Court focused on was that the final decision

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1 had been made by the ultimate decision-maker, and so any  
2 subsequent deliberative discussions within the agency, among  
3 his subordinates, would only serve to buttress that fait  
4 accompli. And we submit, Your Honor, that's exactly the same  
5 here. Just like in *Enesco*, every document, after the President  
6 announced the ban on Twitter, was post-decisional, and served  
7 only to buttress the fait accompli announced in July 2017.

8 And finally, Your Honor, you asked, specifically about  
9 factual material, in your e-mail yesterday. So in addition to  
10 the pre-decisional requirement, the other requirement to assert  
11 the privilege in the first instance is that materials have to  
12 be deliberative. And the law is settled that factual materials  
13 do not qualify as deliberative. The privilege, instead, is  
14 limited to policy-oriented opinions, and deliberations that  
15 would reveal mental processes of the decision-maker.

16 THE COURT: So it's your opinion identities don't  
17 count.

18 MR. SIEGFRIED: Certainly not for deliberative  
19 process privilege. Now, I think Mr. Patton answered that with  
20 respect to presidential communications. But, no, I think it's  
21 very settled that factual material would not qualify. And, in  
22 fact, I'd point the Court to the *Seafirst vs. Jenkins* case,  
23 from this district, that noted that expert interpretations of  
24 facts are still ultimately factual. And I think that's  
25 important for this panel of experts in all this, which not only

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1 postdated the July 2017 tweet, but is, we think, expert  
2 interpretations of facts that would not qualify under the  
3 deliberative prong, and would be a straightforward application  
4 of the *Seafirst* case.

5 And there are lots of other examples, Your Honor, that we  
6 don't need to get to, from their privilege log, that has  
7 entries that are clearly factual, things like health data,  
8 surgical procedures. But like I said at the outset, the Court  
9 need not undertake that work because of the settled law saying,  
10 look, even if the privilege applied, this would fall within the  
11 exception, where government intent is squarely implicated, and  
12 the privilege has no place in this case at all.

13 And so unless Your Honor has any questions, I defer the  
14 rest of my time.

15 THE COURT: I do not. Thank you.

16 MR. SIEGFRIED: Thank you, Your Honor.

17 MR. CARMICHAEL: Good morning, Your Honor. Peter  
18 Carmichael, for the government.

19 I think for the deliberative process motion, it's  
20 important to keep in mind what the plaintiffs here are asking.  
21 They're not asking document by document, or category. They're  
22 asking just as a categorical matter, as a matter of law,  
23 deliberative process does not apply. And that's quite a  
24 stretch. Even if the Court doesn't agree with us on the merits  
25 or anything else, that's a real stretch, and that's importing

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1 something that hasn't ever been done, particularly in a  
2 military case. So it's not done in the Ninth Circuit that --  
3 they cite the D.C. circuit case where when intent is an issue,  
4 it can be done, and a couple district cases that have followed  
5 that, but no military. So it would be quite a stretch to do  
6 that in a military case.

7 I think one of the questions that we -- that you've posed  
8 helps this a bit. Why is a military case a bit different? You  
9 asked, for deference, how does deference work, and how might it  
10 affect -- how might it affect your review. There's a lot of  
11 military cases that actually sort of walk through this. None  
12 are absolutely crystal clear, but there's a couple things that  
13 sort of illustrate it.

14 I think, first, the main one is -- that says when it  
15 applies, I've always used *Gilligan vs. Morgan*, because it  
16 specifically says when it's the composition, training,  
17 equipping, or control of the armed forces. So that's sort of  
18 when it would apply.

19 And then what does deference look like? I think we got a  
20 lot clearer from that with *Hawaii*, but we've always had some  
21 idea of how it affects the actual review, with *Rostker vs.*  
22 *Goldberg*, *Goldman vs. Weinberger*, *Winter*, and *Winter vs. NRDC*.  
23 And there's really two parts to that, that I've seen. It's  
24 military justifications are usually accepted on their face, and  
25 then it's something akin to rational basis review. So given

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1 that as generally the standard, it doesn't make sense to  
2 completely import this case law, where we're talking about a  
3 statute that makes intent the primary issue, into a military --  
4 into a military case.

5 I think the -- that brings to the second point, where they  
6 argue that because the defendants have put military deference,  
7 and use military deference, as a justification, essentially we  
8 can't use the deliberative process. That sort of turns  
9 military deference on its head. And all of a sudden, we would  
10 have -- the military would have less deference than another  
11 agency, if you had to give up deference to -- essentially to  
12 get it. Military deference comes from the role of the  
13 constitution, as *Rostker* said, that that's -- the Constitution  
14 itself mandates it, when we're talking about one of those  
15 factors.

16 THE COURT: Well, what do we do with military  
17 deference when it clashes -- back to the hypothetical -- that  
18 no blacks need apply, or that, you know, women are not going to  
19 be admitted, or that gays cannot be in the military. We have a  
20 whole series of those things, all involved in the military.

21 Do we still give military deference when we have a  
22 constitutional challenge?

23 MR. CARMICHAEL: We apply the military rules. It's  
24 just as sort of my colleague explained, the rules are overcome.  
25 And no amount of deference could overcome those in those

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1 situations. And I think the way that it -- that it's best to  
2 be described is, what the military does in these circumstances  
3 is -- and I think *Hawaii* does a good job of clarifying this a  
4 little bit for us, by saying -- they present a legitimate and  
5 bona fide reason and then something to support that reason. In  
6 our case, we would say it's the principles that the Secretary  
7 of Defense laid out of unit readiness, deployment, unit  
8 cohesion, good order and discipline. And then does that  
9 report, does -- those justifications, do they rationally relate  
10 to those reports?

11 THE COURT: But isn't the key in *Hawaii* is that they  
12 found the pronouncement neutral? If I find, and have already  
13 found, that this pronouncement isn't neutral, and that there is  
14 a protected class here, then what kind of military deference is  
15 given when that's the case?

16 MR. CARMICHAEL: I think that -- I'll answer that in  
17 two parts.

18 First, *Hawaii*, when they set the standard, if you read --  
19 going through the opinion, it doesn't depend on whether or not  
20 it's facially neutral. That's when they're going through the  
21 actual merits discussion. It's one of the points. And they  
22 actually, specifically, when they're quoting the case of  
23 *Fiallo*, I think, in *Hawaii*, which was a gender-based case, they  
24 specifically refer to a lower standard being set in that case.  
25 So -- and they specifically say: We applied rational basis

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1 review, and inquiry into matters of national security is highly  
2 constrained, even when evaluating a categorical classification  
3 that discriminated on the basis of sex. So, specifically, they  
4 said, even when you're evaluating that, we apply a highly  
5 constrained review, and the inquiry is limited.

6 And I think that's actually consistent with *Rostker*,  
7 although that actually went a little farther than *Rostker*. In  
8 our prior briefs, we said there hadn't been a label. It was  
9 somewhere in between heightened scrutiny, because it couldn't  
10 be heightened scrutiny, but it wasn't quite rational basis,  
11 because that's what *Rostker* said, in a gender-based case.  
12 *Hawaii* makes it pretty clear that it still is -- it is rational  
13 basis. It's not this sort of in between heightened scrutiny  
14 and rational basis. They do say, later -- they do say, as  
15 they're evaluating the merits of it, "facially neutral" a few  
16 times. But I think when they're setting the actual standard,  
17 they don't rely on that aspect of it.

18 THE COURT: All right. I'm not sure I understand  
19 your distinction as to when they're explaining it, as opposed  
20 to when they're announcing it, whether that makes much  
21 difference. But go ahead.

22 MR. CARMICHAEL: In any event, I think *Rostker*  
23 clearly does it, because *Rostker* was, again, was a sex-based  
24 standard, one, and they did apply military deference. And they  
25 did apply a lower standard of review. So if there was doubt, I

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1 think there was *Rostker*.

2 And on that point, many of the arguments that my colleague  
3 was making on the -- when doing the presidential privilege, on  
4 that point, were the arguments that were actually rejected in  
5 *Hawaii*. They were -- it was -- many of them were the same  
6 arguments offered by Justice Sotomayor, in the dissent, almost  
7 exactly. That was the same criticisms that Justice Sotomayor  
8 was levying against the majority, in *Hawaii*, as when they were  
9 applying this lower standard. So the majority in that decision  
10 still controls, even though there were some criticisms offered,  
11 which are the same criticisms that my colleague offered.

12 To -- I think when -- going to the second point, on the  
13 deliberative process privilege, their argument, this is sort of  
14 the sword and the shield, I think that misunderstands what the  
15 sort of sword-and-the-shield argument is for deliberative  
16 process. The sword and the shield would be if we were  
17 selectively going through and revealing -- and only doing  
18 deliberative things that help our case, while at the same time  
19 withholding things that don't help our case. We applied it  
20 across the board to anything that is deliberations, whether or  
21 not it's the Carter policy, or whether or not it's the --  
22 Secretary Mattis's decision to pause the accessions program, or  
23 whether or not it's the actual panel of experts. It's applied  
24 evenly, so it's not really a sword-and-the-shield argument.

25 And I think what the -- the one that the -- the example my

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1 colleague used as the final report and recommendations of  
2 transgender panel, that's dated December 13, 2017. It's a  
3 draft. That's why -- I mean, it's a simple answer. That's why  
4 it is.

5 And I think that that's exactly why --

6 THE COURT: Why is it called "final," if it's a  
7 draft? On its face, it says "final."

8 MR. CARMICHAEL: It does. But if you look at the  
9 date, it actually was before -- I mean, and we explain it in  
10 the privilege log that is a draft version of it. It has  
11 recommendations.

12 THE COURT: And they're supposed to accept that.

13 MR. CARMICHAEL: So -- not necessarily. They can  
14 bring this -- that's exactly why you wouldn't have this  
15 clear-cut -- this per se rule eviscerating the deliberative  
16 process. You would come to us with this document and say: We  
17 don't think that deliberative process applies. We'd talk about  
18 it and decide whether or not we want to go forward with a  
19 declaration from a high-level employee, that explains that this  
20 is a draft, or whether or not we would just let it go. And  
21 that's happened several times in the *Doe* and *Stone* case  
22 already. They've come to us with specific questions. Some we  
23 have litigated, and many we have actually let go. So -- and I  
24 think the question -- they're saying, "We don't know where this  
25 report, this recommendation from the panel of experts, comes

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1 from." That's in the memo from Secretary Mattis, itself. It  
2 comes from the undersecretary of defense for personnel and  
3 readiness.

4 THE COURT: I want to back up and talk a moment -- in  
5 the majority opinion, one of the things in *Hawaii* that they go  
6 through, and I'll quote: After consulting with multiple  
7 cabinet members and other officials, the President adopted the  
8 acting secretary's recommendations and issued the proclamation.  
9 Well, right in the beginning, it lists the things that the  
10 President did.

11 How did they get that information if -- how are we  
12 supposed to get that information here, if you don't identify  
13 who they consulted with?

14 MR. CARMICHAEL: Well, in this case, we've already  
15 identified a lot -- we identified all the members of the panel  
16 of experts and who they consulted with, who presented to the  
17 panel of experts. The report comes from Secretary -- the memo  
18 comes from Secretary Mattis. The report comes from the  
19 undersecretary of defense.

20 THE COURT: Who actually wrote the report?

21 MR. CARMICHAEL: Well, it comes from the secretary of  
22 defense. How the undersecretary of defense, how these --  
23 military policies, in a report like this, are quite complex.  
24 Almost every single DOD instruction that involves personnel  
25 comes from the undersecretary of defense. He is the signer of

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1 that, but doesn't necessarily write it. The staff -- a staff  
2 writes it, and he writes -- I mean, these are 40-, 50-page  
3 documents all the time, and there's hundreds of them. So even  
4 though he's the person with the military authority to issue  
5 that report, and that's who it comes from, whether or not he's  
6 the scrivener of it, usually would not be, and wouldn't have  
7 time. There's not enough hours in the day.

8 THE COURT: Right. But in *Hawaii*, it basically says  
9 that the President consulted with cabinet members.

10 The simple question that's being asked here is, were there  
11 cabinet members that were consulted? Why can't you answer  
12 that? If -- and in *Hawaii*, if you think that this is  
13 instructive, obviously, in *Hawaii* -- although I don't think it  
14 touches on discovery. But, obviously, those were the things  
15 that the court was justifying the actions with, by going  
16 through -- I know Justice Sotomayor attacks it, because it's  
17 only 17 pages. But the point of the majority was is, they said  
18 it was done, and they could see what was done. Went through a  
19 worldwide analysis. And that's one of the reasons why they  
20 accepted that this was an appropriate decision.

21 Don't we have a similar situation here, that the Court  
22 can't review what it is that's being done, like they did in  
23 *Hawaii*, if I can't tell who it is that he spoke to, or that he  
24 did any analysis ahead of time at all?

25 MR. CARMICHAEL: I think -- and so it did actually

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1 use that as one of the factors. It's certainly not a deciding  
2 factor. I think how they --

3 THE COURT: Well, it's in Section A. It's right off  
4 the top. In other words, that's how they're framing the issue.

5 How am I supposed to frame this issue, when we come to the  
6 time of trial, if you're not going to tell me some of the basic  
7 things that he did prior to sending out the tweet?

8 MR. CARMICHAEL: I think in doing -- generally, what  
9 *Hawaii* does is, it looks at the factors of what are these --  
10 what are these reasons, and we've given them, and -- those  
11 reasons from the secretary of defense. A lot of those reasons  
12 are actually in the tweet. And then you take the report, and  
13 do those reports further those reasons? Do they rationally  
14 relate to those reasons? If they don't, then -- you know, I  
15 think what Justice Kennedy said is, there is some room between  
16 the two decisions there -- then it could be inexplicable by  
17 anything other than animus.

18 THE COURT: I'm not talking about animus.

19 How does the Supreme Court know that there were cabinet  
20 members that were consulted, if that wasn't something that was  
21 identified ahead of time?

22 MR. CARMICHAEL: I don't know, specifically, the  
23 facts of that one. I imagine that that was something that the  
24 government chose to put out.

25 THE COURT: So sometimes you invoke this privilege

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1 when the President is decision-making, and sometimes you don't.

2 MR. CARMICHAEL: I don't know, specifically, how that  
3 particular one came out. My colleague actually might. I don't  
4 know if -- you didn't work on *Hawaii*; did you?

5 MR. GARDNER: I can answer that question, Your Honor.  
6 Thank you, Your Honor. May it please the Court.

7 First, *Trump vs. Hawaii* went up on a TRO/PI. There was no  
8 discovery in that case. It was decided on the record, before  
9 the Court. So I think that's the first proposition --

10 THE COURT: But somebody had to give up the record.

11 MR. GARDNER: Sure. Second, it is always the case,  
12 with every privilege, including common law privileges and  
13 executive privilege, that the holder of that privilege always  
14 has the prerogative as to whether to invoke the privilege or  
15 not invoke the privilege. There's nothing extraordinary about  
16 that.

17 Third point, though, Your Honor, is, my recollection --  
18 and subject to check. My office obviously handled this  
19 litigation below -- was that the memorandum indicated that, in  
20 consultation with my cabinet secretaries, including the  
21 Department of Homeland Security -- because, remember, the first  
22 EO directed the Department of Homeland Security to do that  
23 90-day study. So we know that, just like in this case, the  
24 2017 presidential memo directed the Secretary -- the cabinet  
25 and secretary of defense, Jim Mattis, to also go back and

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1 conduct a study. So that is the exact same type of  
2 identification in both cases.

3 And I hope that was responsive to your question, Your  
4 Honor.

5 THE COURT: Well, it's responsive to my question, but  
6 it doesn't make much sense that if you're trying to argue to me  
7 that I should give the President military deference, but you're  
8 not going to tell me what -- who in the military he consulted  
9 with. It makes it really hard for me to grant you that  
10 deference, if there's nothing in the record whatsoever.

11 At least in this record, the Supreme Court was able to  
12 say: This is what the President did. Or the President, as you  
13 pointed out, made reference, in his own decision-making, as to  
14 who it is he did. We don't have anything here.

15 MR. GARDNER: Respectfully, Your Honor, we disagree.  
16 The 2017 memo expressly asks the secretary of the Department of  
17 Defense to go out and conduct a study --

18 THE COURT: We're talking about two different things,  
19 Counsel. I asked you about the tweet, okay? I'm not asking  
20 you about the report. I'm asking you about the tweet. Because  
21 that's what opposing counsel is looking for.

22 MR. GARDNER: I understand. Your Honor, I understand  
23 that.

24 And, again, not to rehash things, but I think the way to  
25 cut through this coordinated knot is as follows. We do not

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1 believe that who the President spoke with, with respect to a  
2 tweet, has any relevance in this litigation. But let's assume,  
3 for the sake of argument, that we're wrong. And let's assume,  
4 for the sake of argument, the government has some sort of  
5 burden that hinges upon the identification of those  
6 individuals. The government takes the position that that  
7 information is privileged. If the government cannot --

8 THE COURT: Well, haven't you taken the position that  
9 the tweets do -- are presidential orders, in litigation?

10 MR. GARDNER: Your Honor, we've taken the position  
11 they've been expressly revoked. The 2018 presidential memo  
12 could not be clearer about that revocation.

13 THE COURT: All right.

14 MR. GARDNER: Just to finish the point, though, if  
15 the government is incorrect, that somehow it must rely upon  
16 these generals to support whatever level of scrutiny this Court  
17 ultimately concludes is appropriate at the end of the day, then  
18 that just means the government has not met its burden. But we  
19 are not going to sacrifice, though, that executive privilege at  
20 the expense of that burden. That's the judgment the executive  
21 makes with respect to these constitutional privileges.

22 THE COURT: Well, you're actually making opposing  
23 counsel's point here. Because you keep describing a lawsuit  
24 that I don't recognize, because I've already made some of these  
25 rulings. Like it or not, Counsel, that's the law of the case

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1 until the Ninth Circuit says otherwise.

2 So given that that's where we are, okay --

3 MR. GARDNER: Yes.

4 THE COURT: -- then I don't understand why you're  
5 trying to justify, on some other standard, when I've already  
6 said that the -- this is -- this is one decision-making  
7 process. This is not like *Hawaii*, where the proclamations were  
8 revoked and different ones put out.

9 MR. GARDNER: I understand this Court's view of  
10 things. And I'm not here to re-litigate that. My point was  
11 slightly different, that if the Court believes that this  
12 information of who the President spoke to goes to the  
13 government's burden, the government's position is that we are  
14 asserting -- or it is subject to executive privilege. And if  
15 that means that the government cannot justify the decision, we  
16 understand the consequence of that, Your Honor. We made that  
17 question clear earlier in this litigation.

18 THE COURT: Well, you're certainly asking me to give  
19 you military deference.

20 MR. GARDNER: Correct. And that's based on subject  
21 matter.

22 THE COURT: Okay. So that's something that you want  
23 from me. I'm trying to tell you, the way to get that is to  
24 show me that the military had anything to do with it.

25 MR. GARDNER: Your Honor, and we respectfully

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1 disagree. Because even in *Trump vs. Hawaii* -- and, again, I'm  
2 not trying to reargue what I previously stated. But deference  
3 is triggered by subject matter, not the robustness of the  
4 process. And in *Trump vs. Hawaii*, it expressly says, in  
5 matters of immigration, in matters of national security, in  
6 matters of the military, we give deference.

7 And, you know, my colleague mentioned the fact that, you  
8 know, you will not see a case with strict scrutiny and military  
9 deference. I completely agree with him. And that's because,  
10 when you apply military deference in a case that's challenging  
11 the military, you don't apply strict scrutiny. I mean, *Rostker*  
12 makes that clear with respect to gender-based classifications.  
13 And if gender-based classifications are not subject to  
14 heightened scrutiny, like they would be outside the military  
15 context, that's a function of military deference, Your Honor.

16 I hope that answered the Court's questions.

17 MR. CARMICHAEL: Your Honor, briefly, I'd just like  
18 to hit the last two arguments on deliberative process.

19 For the *Warner* factors, I think the *Warner* factors  
20 specifically show why this can't be done on a per-se basis, why  
21 deliberative process has to be -- at least has to be document  
22 by document, or at least categorical, because the relevance of  
23 the documents is different, depending on what the document is.  
24 So if it -- and depending on the category. So maybe the  
25 deliberative process part of the minutes of the meetings of the

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1 panel of experts, maybe those have a higher relevance than  
2 e-mail that talks about Secretary Mattis's decision to pause  
3 the accessions of new people with gender dysphoria. So I think  
4 that just shows it can't be done that way. It can't be done  
5 categorically, across the board. It has to be looked at, one  
6 issue at a time, and brought -- and through the normal process  
7 that the Ninth Circuit has had.

8       And then for the -- I'd like to say for the fourth part,  
9 the post-decisional, you know, we accept that the law of the  
10 case is that the decision is the tweet. But that doesn't  
11 actually make everything after it post-decisional, for the  
12 purpose of the deliberative process. How military decisions  
13 are done, and how they were done in this case too, is, they --  
14 a general guidance is put out, and then it has to get  
15 implemented to two million people. So there's several  
16 decisions that go after this. And the plaintiffs have even  
17 conceded, in their Ninth Circuit brief, that the -- that the  
18 memo, the August memo from the President, gave the secretary  
19 discretion as to what to do with current service members. That  
20 is a decision that postdates it.

21       So all the things that have to do with current service  
22 members in the reliance, some of those decisions kept being  
23 made, and there's deliberation before them. Some still have to  
24 be made. Because there's a lot of things -- it says there's a  
25 reliance exemption, but that -- we don't know exactly how broad

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1 that would be. That would be in a Department of Defense  
2 instruction that would say, okay, does it apply to enlistment?  
3 Is there a grace period at the end? Does it apply to -- does  
4 it apply to service academies? Does it apply to ROTC? Does it  
5 apply to people transferring services? That's all things that  
6 have to get decided after the fact.

7 So just because it's post-decisional of one decision  
8 doesn't mean that it's not still pre-decisional of other  
9 decisions. So that's, again, why it can't be done on a  
10 categorical basis. It has to be done one at a time, or a  
11 category at a time, and we need to explain, with a declaration,  
12 why that is post-decisional.

13 THE COURT: If the decision-making power is handed  
14 off, does it become the President's decision any longer? In  
15 other words, would the same privilege apply if it's Secretary  
16 Mattis that makes these decisions, or some other general down  
17 the line? Does that change the privilege, because then it  
18 isn't the President's deliberation any longer?

19 MR. CARMICHAEL: I was talking just for deliberative  
20 process. If it is just Secretary Mattis's decision, and he's  
21 talking with the undersecretary, I don't think that that's  
22 covered by the presidential privilege. So that one would just  
23 be deliberative process, which is why the logs look different.  
24 The logs -- the DOD logs look very different than they do for  
25 the President's logs, because the privilege is broader. The

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1 presidential communications privilege is broader than the  
2 deliberative process privilege.

3 THE COURT: All right.

4 MR. CARMICHAEL: Thank you.

5 MR. SIEGFRIED: Your Honor, may I clarify just a  
6 couple points?

7 THE COURT: Yes.

8 MR. SIEGFRIED: Thank you, Your Honor.

9 So to begin, you know, like I said, you don't need to  
10 reach the post-decisional issues, because you can apply the  
11 privilege categorially. And just in response to opposing  
12 counsel's point that courts don't do this, I draw your  
13 attention to two cases from the Ninth Circuit, within the Ninth  
14 Circuit, the *Arizona Dream Act Coalition vs. Brewer* case, that  
15 says, quote: The qualified privilege should not be applied in  
16 this case. And then, again, *Academy of Our Lady of Peace vs.*  
17 *San Diego*, from the Southern District of California, quote:  
18 The qualified deliberative process privilege is overcome in  
19 this case. So courts do do this all the time.

20 Regarding this issue of military deference, none of that  
21 has anything to do with the deliberative process privilege.  
22 That's a merits issue, and doesn't go -- the question here is  
23 just about what evidence we can discover that will ultimately  
24 bear on, you know, whatever decision Your Honor makes on  
25 military deference.

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1           Now, there actually are cases, that we cite in the briefs,  
2 that involve the deliberative process privilege in the military  
3 national security context. And those cases make very clear the  
4 test is not different at all. The first is *Vietnam Veterans*  
5 *vs. CIA*. And that relates to military. The defendants were  
6 the Department of Defense, the CIA, and the Department of  
7 Veterans Affairs. And it applied absolutely the same test as  
8 it would under any circumstances. And then the other, Your  
9 Honor, is *Lahr vs. the NTSB*, from the Ninth Circuit, also  
10 involved the CIA, and in no way suggested the test for  
11 deliberative process privilege is any different outside, you  
12 know, in the military or national security context.

13           And then, finally, I just wanted to correct -- we looked  
14 at the privilege log for this final report. And what the log  
15 entry there says -- this is a quote: Final report with data  
16 and options. So I don't see any indication that this is any  
17 sort of draft.

18           And so unless Your Honor has any further questions.

19           THE COURT: Thank you.

20           MR. SIEGFRIED: Thank you, Your Honor.

21           THE COURT: Counsel, thank you very much for your  
22 arguments. I'm intending to get you an order a week from  
23 Friday. So if there's a delay in that, I will let you know,  
24 but that's what I'm shooting for at this time.

25           Anything else I can help you with?

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1 MR. GARDNER: Not from the government, Your Honor.

2 THE COURT: All right. Thank you very much. We'll  
3 be at recess.

4 (Recessed.)

5 C E R T I F I C A T E

6  
7 I certify that the foregoing is a correct transcript from  
8 the record of proceedings in the above-entitled matter.

9 /s/ *Andrea Ramirez*

10 ANDREA RAMIREZ  
11 COURT REPORTER

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