UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

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

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

For the reasons set forth in the attached Memorandum of Points and Authorities, Defendants move pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure for a protective order to: (1) preclude Plaintiffs from seeking discovery from the President of the United States; (2) excuse the President from having to provide substantive information in response to Plaintiffs' interrogatories; (3) excuse the President from having to provide information in responses to Plaintiffs' interrogatories solely for the Court's *in camera* review. In addition to their Memorandum of Points and Authorities, Defendants have filed a proposed order with this motion. Pursuant to Rule 26(c), Defendants' counsel have met and conferred with Plaintiffs' counsel in an effort to resolve the dispute without Court action, but have been unable to do so.

February 27, 2018

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Plaintiffs have issued multiple, burdensome discovery requests directly to the President of the United States seeking information that goes to the heart of presidential deliberations about the formulation of military policy. Specifically, Plaintiffs have served interrogatories, requests for production of documents, and requests for admission on the President that seek not only documents and information that the President considered concerning military service by transgender individuals, but also the identities of individuals within the Department of Defense ("DoD") and the Armed Forces that the President consulted in considering military policy. These discovery requests are extraordinary, as they are directed to the sitting President himself in a civil suit brought against the President in his official capacity. For purposes of this motion, Plaintiffs have sought to put at issue just one aspect of the broad discovery they seek—interrogatory requests directed to the President—and the Court has specifically inquired whether information responsive to those interrogatory requests could be submitted for *in camera* review.[1]

Discovery directed at the President—especially discovery concerning his deliberations as Commander-in-Chief—should not be permitted at this time because it raises serious separation-of-powers concerns. The law is clear that the President cannot be subject to direct injunctive relief, *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866), and that courts should strictly circumscribe discovery directed to the President, *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 388 (2004). These separation-of-powers considerations dictate that, before the Court requires the President to respond to discovery requests or formally assert the

[1] Accordingly, this motion deals solely with the only ripe issue for this Court's consideration—Plaintiffs' challenge to Defendants' objections to the interrogatories, as raised in Plaintiffs' pre-motion letter. *See* Pls.' Letter Br., ECF No. 86-1. Although the arguments set forth below are applicable broadly to all discovery served on the President, Defendants reserve the right to move separately for appropriate relief if Plaintiffs challenge Defendants' objections to the requests for production of documents or requests for admission.

presidential communications privilege, it should narrow the broad scope of these discovery requests and require that Plaintiffs first seek other forms of discovery from alternative sources. *See Cheney*, 542 U.S. at 388. These same separation-of-powers concerns also would be implicated by an order requiring *in camera* review of the President's responses to Plaintiffs' interrogatories. More fundamentally, *in camera* review is unnecessary here because the Court can conclude as a matter of law that the type of substantive information Plaintiffs seek goes to the heart of the presidential communications privilege. And *in camera* review also is premature because Plaintiffs have not yet met their heavy initial burden of demonstrating particularized need for the challenged information.

For all of these reasons, set forth further below, the Court should grant the Defendants' motion for a protective order and preclude discovery directed towards the President.

BACKGROUND

Plaintiffs filed this action on August 9, 2017, raising constitutional challenges to what they contend is a ban on the service of transgender individuals in the military. Compl., ECF No. 1. The complaint named, in their official capacities, the President, the Secretary of Defense, each of the service Secretaries, the Coast Guard, the Secretary of the Department of Homeland Security, and the United States.[2]

On August 25, 2017, the President issued a memorandum to the Secretaries of Defense and Homeland Security regarding military service by transgender individuals. Presidential Memorandum, 82 Fed. Reg. 41,319 (Aug. 25, 2017). The Presidential Memorandum, *inter alia*, directs further study by the Secretary of Defense, in consultation with the Secretary of Homeland

[2] On February 14, 2018, the parties filed a stipulation voluntarily dismissing the Coast Guard and the Secretary of the Department of Homeland Security from the lawsuit. *See* ECF No. 82.

Security, before the implementation of policy changes put in place by the prior administration. *Id.* § 3. In addition, the memorandum directs "the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above." *Id.* § 1(b) (the retention directive). The memorandum further directs the Secretary of Defense to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that [the President finds] convincing." *Id.* § 2(a) (the accession directive). Finally, the memorandum directs the Department of Defense to "halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." *Id.* § 2(b) (the surgery directive).

On August 29, 2017, Secretary of Defense James Mattis announced the establishment of a Department of Defense review process to provide advice and recommendations on the implementation of the President's direction. Plaintiffs amended their complaint on August 31, 2017, ECF No. 9, and moved to preliminarily enjoin "the categorical exclusion of transgender people from the military," Pls.' Mem., ECF No. 13, at 39–40. Defendants opposed Plaintiffs' motion for preliminary injunction and moved to dismiss the amended complaint on the ground that Plaintiffs lacked standing and had failed to state a claim. Defs.' Mot., ECF No. 45.

In an order and memorandum opinion dated October 30, 2017, the Court granted in part Plaintiffs' motion for a preliminary injunction, and partially granted Defendants' motion to

dismiss. Order, ECF No. 60. The Court preliminarily enjoined the Presidential Memorandum's accession and retention directives, finding that Plaintiffs were likely to succeed on their claims that the accession and retention directives violated the equal protection component and Due Process Clause of the Fifth Amendment. Mem. Op., ECF No. 61, at 64–72. The Court dismissed Plaintiffs' claims to the extent they were based on the surgery directive, as well as Plaintiffs' estoppel claim. *Id.* at 75.

Following the Court's rulings, the parties began discovery. Plaintiffs directed extraordinary, broad discovery against the President, including 22 interrogatories, 12 requests for admission, and 25 document production requests. *See, e.g.*, Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017); Ex. 2, Pls.' First Set of Reqs. for Admis. (Dec. 15, 2017); Ex. 3, Pls.' First Set of Reqs. for Produc. (Dec. 15, 2017). Each of Plaintiffs' discovery requests seeks information concerning the President's deliberations and decisionmaking process. Plaintiffs' interrogatories, which are discussed in more detail below, purport to require the President to identify all communications, documents, data, facts, information, and research that the President reviewed, relied upon, or considered in formulating policy regarding military service by transgender individuals. Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017).[3]

[3] Plaintiffs seek directly from the President similar information about his communications in other discovery requests that they have not put at issue in the instant dispute raised with the Court concerning interrogatory responses. For example, their requests for admission request that the President admit that "between January 20, 2017, and July 26, 2017," Secretary Mattis, General Joseph Dunford, and Lieutenant General H.R. McMaster "did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" and admit that he did not inform Secretary Mattis, General Dunford, or Lieutenant General McMaster "that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" prior to the President's statement on July 26, 2017. *See* Ex. 2, Pls.' First Set of Reqs. for Admis. (Dec. 15, 2017), at 4–6. Plaintiffs also issued wide-ranging request for documents to all Defendants, including the President—again, which they have not put at issue in the present dispute before the Court—seeking documents related to presidential communications and deliberations. Ex. 3, Pls.' First Set of Reqs. for Produc. (Dec. 15, 2017).

The President objected to Plaintiffs' requests and did not provide responses to the interrogatory requests. Defendants objected to any discovery directed to the President, on several grounds, including that such discovery should be foreclosed based on separation-of-powers principles and because virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege. Ex. 4, Defs.' Objs. to Pls.' First Set of Interrogs. to Def. Donald J. Trump (Feb. 6, 2018).

Nevertheless, Defendants have collected and reviewed hundreds of thousands of pages of non-privileged records in response to Plaintiffs' document requests, producing to Plaintiffs more than 80,000 pages of documents to date on an expedited, rolling basis from the Department of Defense, Joint Chiefs of Staff, Defense Health Agency, and the Departments of the Army, Air Force, and Navy.

The discovery dispute that is the subject of the instant motion arose from the President's objections to Plaintiffs' interrogatories seeking information concerning the President's deliberations and decisionmaking process.[4] At issue is information responsive to 22

For example, Plaintiffs requested: (1) all "documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs' interrogatories"; (2) all documents "constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any" defendant concerning the policy and policy decisions; (3) all "documents concerning military service by transgender people provided to President Trump"; and (4) all "documents relied on by President Trump." *Id.* at 3, 4, 6, 17. Because Plaintiffs have raised objections solely to the President's interrogatory responses at this stage, this motion focuses on those discovery requests.

[4] The President objected to the requests for admission on the same grounds raised in this motion and on other privilege grounds. Ex. 5, Defs.' Objs. to Pls.' First Set of Reqs. for Admis. to Def. Donald J. Trump (Feb. 6, 2018). In raising the pending discovery dispute with the Court, Plaintiffs have not challenged Defendants' objections to the requests for admission. Additionally, Defendants objected to the interrogatories and requests for admission directed to the President based on the deliberative process privilege, attorney-client privilege, and work product privilege. *See* Ex. 4, Defs.' Objs. to Pls.' First Set of Interrog. To Def. Donald J. Trump (Feb. 6, 2018); Ex. 5, Defs.' Objs. to Pls.' First Set of Reqs. for Admis. To Def. Donald J. Trump (Feb. 6, 2018). Plaintiffs have not challenged Defendants' assertions of those privileges.

interrogatories propounded to the President related to his substantive communications concerning the development of military policy (and interrogatories for the same information related to presidential communications served on the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Secretaries of the Army, Navy, and Air Force). Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017). The interrogatories are intended to elicit information about the President's deliberations and decisionmaking process in formulating military policy. Indeed, Plaintiffs acknowledge that the interrogatories are intended to require the disclosure of deliberative information so that Plaintiffs, and presumably the Court, can "assess[ ] any process" that the President took in making policy decisions related to the military. *See* Pls.' Letter Br., ECF No. 86-1, at 1, 2. The interrogatories purport to require the President and other Defendants to catalog and disclose the totality of the President's deliberations—who was involved, when they were involved, how they were involved, and what advice was communicated to the President—under oath. Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017), at 5–7 (Interrogatories 1 through 10 directed to the President), 7 (Interrogatory 13 directed to Secretary of Defense), 8–9 (Interrogatories 14 through 18 directed to the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff), 9–10 (Interrogatories 19 through 25 directed to all Defendants); *see also* Fed. R. Civ. P. 33(b)(3) ("Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath"). Plaintiffs' interrogatories seek, among other things:

- The disclosure of all communications between the President (or immediate presidential advisors and their staff) and any individual from the Department of Defense, Department of Homeland Security, Armed Forces, Congress, or "any other person," concerning military service by transgender individuals (Interrogatories 4, 5, 17, 18, 19, 20, and 21);

- A catalog of all documents "reviewed, relied upon, and/or considered by" the President (Interrogatories 2, 10, and 14);

- The disclosure of "all information, facts, data, and research reviewed, relied upon, and/or considered by" the President (Interrogatory 3);

- The identification of all individuals involved in drafting the President's Twitter statement (Interrogatory 15); and

- The disclosure of whether the President received advice from any attorney related to military service by transgender individuals, and the dates, subject matter, and communications containing or transmitting such advice (Interrogatory 8).

Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017).

The President objected to Plaintiffs' interrogatories directed to him "on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege." Ex. 4, Defs.' Objs. to Pls.' First Set of Interrogs. to Def. Donald J. Trump (Feb. 6, 2018).[5]

Plaintiffs notified the Court on Friday, February 9, 2018, that the parties were engaged in a discovery dispute concerning "[w]hether the Defendants should be compelled to provide privilege-log type information (*e.g.*, the existence of a communication, its date, and the identity of the participants) for communications with the President and/or the Executive Office of the President about transgender military service (including the identity of the "Generals and military experts" disclosed in the tweets), or whether such disclosure is blocked by the assertion of the qualified presidential communications privilege."[6] Ex. 7, Email from Daniel McFadden to

[5] The remaining Defendants also objected to providing information concerning presidential communications in response to Plaintiffs' interrogatories. *See, e.g.*, Ex. 6, Defs.' Objs. and Resps. to Pls.' First Set of Interrogs. to Secretary Mattis (Feb. 6, 2018).

[6] Plaintiffs also stated that the parties disputed "[w]hether the Defendants should be compelled to produce Department of Defense communications concerning transgender military service between the date the President announced his decision to ban transgender individuals from service, July 26, 2017, and his issuance of implementing guidance in a Presidential Memorandum on August 25, 2017, or whether such disclosure is blocked by the assertion of the qualified deliberative process privilege." Ex. 7, Email from Daniel McFadden to chambers (Feb.

chambers (Feb. 9, 2018). That same day, the Court directed the parties to submit letter briefs "setting forth their positions and any legal support for those positions, by no later than Monday, February 12, 2018 at noon," and scheduled a telephone conference. Ex. 8, Email from chambers to counsel for the parties (Feb. 9, 2018).

Plaintiffs' letter brief put at issue and specifically identified 12 interrogatories directed to the President to which Defendants objected. Pls.' Letter Br., ECF No. 86-1, at 1 (citing Pls.' Interrogs. 2, 4, 5, 8, 10, 14, 15, 17–21). Plaintiffs argued that they propounded interrogatories "to discover what process actually preceded the tweets" and to have "a basis for evaluating any claim of privilege."[7] *Id.*

In their letter brief, Defendants argued that discovery directed at the President should be prohibited on separation-of-powers grounds based on Supreme Court precedent. *See* Defs.' Letter Br., ECF No. 86, at 1 (citing *Mississippi*, 71 U.S. at 501; *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992); *Cheney*, 542 U.S. at 385). Defendants also argued that the specific information sought by Plaintiffs about the President's communications was protected by the presidential communications privilege because that "information plainly 'reflect(s) presidential

9, 2018). Defendants' assertion of deliberative process privilege over communications among DoD personnel is not at issue in this motion. *See* Ex. 10, Tr. of Telephone Conference at 3:12–5:7 (Feb. 16, 2018) (discussing the parties' agreement to have further discussions regarding the documents withheld for deliberative process privilege).

[7] Plaintiffs also asserted that "the Executive Office of the President has provided a privilege log in response to Plaintiffs' document requests that is devoid of any useful information" because "[i]t addresses written communications at such a high level of generality . . . that it is impossible to discern what, if any process resulted in the President's announcement, or whether any privilege applies." Pls.' Letter Br., ECF No. 86-1, at 2. However, the adequacy of the privilege log is not presently at issue because Plaintiffs chose to limit the instant dispute to interrogatory responses. Moreover, any dispute about the privilege log is not ripe because Plaintiffs have not identified the specific entries over which they have objections, and therefore the meet and confer process has not begun, much less been completed, on this issue.

decisionmaking and deliberations,' and disclosure of this information would intrude on presidential deliberations and impede the President's ability to perform his constitutional duty." *Id.* at 2 (citing *In re Sealed Case*, 121 F.3d 729, 744, 751 (D.C. Cir. 1997)). Finally, given the importance of the constitutional and privilege issues addressed in the letter brief, Defendants requested the opportunity to fully brief these matters. *Id.* at 1.

After the parties' submission of letter briefs, the Court held a telephone conference on February 13, 2018. *See* Ex. 9, Tr. of Telephone Conference (Feb. 13, 2018). The Court indicated that Defendants had not provided enough information for the Court to adequately determine whether information about communications responsive to Plaintiffs' interrogatories is properly protected by the presidential communications privilege. *See id.* at 7:14–21. The Court described the President's decision not to provide information about his communications as an assertion of "absolute" privilege.[8] *See id.* at 6:1–8:4. The Court inquired whether the Government would be willing to submit for *in camera* review the substantive responses to Plaintiffs' interrogatory requests, that is, with whom the President or his senior advisors and their staff communicated, when the communication occurred, and the subject of the communication. *See id.* at 15:12–15, 27:2–10. The Court permitted counsel an opportunity to confer with Defendants concerning the Court's proposal, and in lieu of a written response, continued the telephone conference. *See id.* at 28:14–29:6.

The Court reconvened the telephone conference on February 16, 2018. *See* Ex. 10, Tr. of Telephone Conference (Feb. 16, 2018). Defendants advised the Court that they were not amenable to preparing and submitting for *in camera* review the substantive responses to

[8] As discussed below, Defendants do not contend that the presidential communications privilege is an "absolute" privilege that cannot be overcome by a significant showing of need, among other things. *See infra* Section IV.

Plaintiffs' interrogatory requests. *See id.* at 5:11–16. At Defendants' request, the Court set a briefing schedule on whether Plaintiffs are entitled to discovery into substantive information about the communications of the President and his senior advisors concerning military service by transgender individuals. *See id.* at 5:17–6:14.

STANDARD OF REVIEW

Rule 26(b) of the Federal Rules of Civil Procedure allows the parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Rule 26(c) provides that the Court has broad discretion, for good cause shown, to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (stating that "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required"). This discretion includes orders forbidding the requested discovery altogether. Fed. R. Civ. P. 26(c)(1)(A); *see also St. John v. Napolitano*, 274 F.R.D. 12, 16 (D.D.C. 2011) (stating that a protective "order may forbid disclosure altogether").

SUMMARY OF THE ARGUMENT

Plaintiffs have directed burdensome, far-reaching discovery to the President concerning his deliberations on military policy in his role as Commander-in-Chief. The Court should preclude Plaintiffs from requesting such discovery and excuse the President from having to provide substantive information in response to Plaintiffs' interrogatories, even for *in camera* review, based on separation-of-powers principles. The Supreme Court has repeatedly recognized that a court order directed at the President should not be issued because the President, like Congress, is a coequal branch of government, and for the President to be ordered to perform particular official acts could violate the separation of powers. Thus, as a threshold matter, the

Court should find that the President should not be subject to discovery because he cannot be subject to direct injunctive relief for his official, discretionary actions in this case. Moreover, separation-of-powers concerns dictate that before the Court requires the President to formally assert the presidential communications privilege, it must narrow the broad scope of these discovery requests and require Plaintiffs to exhaust other sources of discovery.

In camera submission of information responsive to the interrogatory requests about presidential communications would not adequately resolve these broad separation-of-powers concerns. First, an order compelling the President to submit to discovery in this case, even if limited to *in camera* review, would still conflict with the separation-of-powers principles reflected in *Mississippi*, *Franklin*, and *Cheney*. Further, preparing the requested information for *in camera* review would subject the President and his staff to the same heavy burdens as would producing the information to Plaintiffs, which is clearly the sort of "distract[ion] [] from the energetic performance of [the President's] constitutional duties" that *Cheney* sought to prevent. 542 U.S. at 382. Moreover, even if *in camera* review were appropriate under *Cheney* (which it is not), such review would not assist the Court in resolving the legal question of whether the type of information at issue here—information concerning presidential deliberations—is subject to the presidential communications privilege as a matter of law. The presidential communications privilege applies to factual information that is revelatory of the President's decisionmaking process and confidential communications, such as factual information that would reveal details about presidential communications concerning the development of military policy. Disclosure of such information would intrude on the President's decisionmaking process, disrupt the President's performance of his responsibilities, and undermine the confidentiality needed "to ensure that presidential decisionmaking is of the highest caliber." *In re Sealed Case*, 121 F.3d at 750. While *Cheney* makes clear that the Executive should not be forced to formally assert

privilege at this stage, the Court need not review the actual information at issue to decide that it would be subject to the privilege.

In addition, *in camera* review is premature because Plaintiffs have not yet even attempted to meet their heavy, initial burden of establishing a heightened, particularized need for the specific information sought before requiring the President to formally invoke the privilege. *See Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 659, 660 (2007). Until Plaintiffs have met their initial burden of satisfying the "exacting standards" of "relevancy," "admissibility," and "specificity," pursuant to the Supreme Court's analysis of this issue in *Cheney*, 542 U.S. at 386, the burden does not shift to the White House to undertake the time-consuming process of formally invoking the presidential communications privilege and the Court need not—and should not—engage in *in camera* review of the substantive responses to Plaintiffs' interrogatories.

For all of these reasons, the Court should grant Defendants' motion for a protective order and preclude discovery directed at the President.

ARGUMENT

I. Discovery of the President Should Be Precluded on Separation-of-Powers Grounds.

As a threshold matter, because Plaintiffs may not obtain—and the Court may not order—injunctive or declaratory relief directly against the President for his official conduct, Plaintiffs likewise should not be permitted to request—and the Court should not order—the President to respond to discovery.

To maintain the constitutional separation of powers, courts have long recognized that the non-ministerial conduct of the President when he acts in his official capacity cannot be enjoined. In *Mississippi v. Johnson*, the Supreme Court held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties." 71 U.S. at 501. In that case, the State of

Mississippi sought to enjoin President Andrew Johnson from executing the Reconstruction Acts, which Mississippi claimed were unconstitutional. *See id.* at 497. In barring injunctive relief against the President, the Court reasoned that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion." *Id*. at 499. Just as courts cannot enjoin Congress in exercising its legislative function, they cannot enjoin the President in exercising the executive function. *Id*. at 500 ("Neither can be restrained in its action by the judicial department . . . ."). To do so, the Court observed, would be "without a precedent." *Id*.

A "majority of the Justices" in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), reaffirmed these fundamental principles. *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). In *Franklin*, a district court issued an injunction requiring the President to take certain actions related to the census. *See* 505 U.S. at 791. Writing for the plurality, Justice O'Connor explained that "the District Court's grant of injunctive relief against the President himself [was] extraordinary, and should have raised judicial eyebrows." *Id*. at 802 (citation omitted). The plurality reiterated that "in general, '[the] court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" *Id*. at 802–03 (quoting *Mississippi*, 71 U.S. at 501). "At the threshold," it said, "the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803.

Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28. Therefore, just as the President is absolutely immune from official capacity damages suits, so too is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 ("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for

acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions . . . ."). Justice Scalia reasoned that the principle that the President "may not be ordered to perform particular executive . . . acts at the behest of the Judiciary" is "implicit in the separation of powers" and is supported by Supreme Court precedent and historical practice. *Id*. at 827–28. "Permitting declaratory or injunctive relief against the President personally would not only distract him from his constitutional responsibility to 'take Care that the Laws be faithfully executed,'" but also "would produce needless head-on confrontations between district judges and the chief executive." *Id.* at 828 (quoting U.S. Const., Art. II, § 3). Based on these separation-of-powers concerns, Justice Scalia concluded that "[u]nless the other branches are to be entirely subordinated to the Judiciary, [the courts] cannot direct the President to take a specified executive act." *Id.* at 829.

In line with *Mississippi* and *Franklin*, courts in this and other circuits have rejected plaintiffs' demands to enjoin the President in the performance of his official duties, regardless of the claim at issue.[9] For example, in *Swan v. Clinton*, a former member of the National Credit

[9] In *Newdow v. Roberts*, the D.C. Circuit stated that "[w]ith regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief." 603 F.3d 1002, 1013 (D.C. Cir. 2010) (citing *Mississippi*, 71 U.S. at 501; *Franklin*, 505 U.S. at 827–29). Other courts routinely have applied this principle. *See, e.g.*, *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.), *vacated and remanded on other grounds*, 138 S. Ct. 377 (2017); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 557, 605 (4th Cir. 2017), *vacated and remanded on other grounds sub. nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539–40 (N.D. Cal. 2017), *appeal docketed* No. 17-16886 (9th Cir. Sept. 18, 2017); *Settle v. Obama*, No. 3:15-cv-365, 2015 WL 7283105, at *6 (E.D. Tenn. Nov. 17, 2015); *Day v. Obama*, No. 1:15-cv-00671, 2015 WL 2122289, at *1 (D.D.C. May 1, 2015); *Willis v. Dep't of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014); *McMeans v. Obama*, No. 11-cv-891, 2011 WL 6046634, at *3 (D. Del. Dec. 1, 2011); *Shreeve v. Obama*, No. 1:10-cv-71, 2010 WL 4628177, at *5 (E.D. Tenn. Nov. 4, 2010); *Anderson v. Obama*, No. CIV. PJM 10-17, 2010 WL 3000765, at *2 (D. Md. July 28, 2010); *Carlson v. Bush*, No. 6:07CV1129-ORL19UAM, 2007 WL 3047138, at *3 (M.D. Fla.

Union Administration ("NCUA") Board sued the President and two subordinates after the President removed him from his position. 100 F.3d at 975. The plaintiff sought to have his removal and his successor's appointment declared unlawful and to obtain injunctive relief ordering his reinstatement as a member of the NCUA Board. *Id.* In determining whether the plaintiff's injury was redressable, the D.C. Circuit considered "whether a federal court has the power to grant injunctive relief against the President of the United States in the exercise of his official duties." *Id.* at 976. The Court first recognized that the Supreme Court had "'left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely ministerial duty.'"[10] *Id.* at 977 (quoting *Franklin*, 505 U.S. at 802). Although the Court found that the President's duty to comply with the removal restrictions in the NCUA statute was "ministerial and not discretionary," it nonetheless determined that injunctive relief against the President was not appropriate. *Id.* The Court reiterated the Supreme Court's "stern admonition" from *Franklin* that "injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken." *Id.* at 978. The rationale behind this doctrine, the Court found, was "painfully obvious":

Oct. 18, 2007); *Comm. to Establish the Gold Standard v. United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Nat'l Ass'n of Internal Revenue Emps. v. Nixon*, 349 F. Supp. 18, 21–22 (D.D.C. 1972); *Reese v. Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972); *S.F. Redevelopment Agency v. Nixon*, 329 F. Supp. 672, 672 (N.D. Cal. 1971); *Suskin v. Nixon*, 304 F. Supp. 71, 72 (N.D. Ill. 1969).

[10] A ministerial duty is "a simple, definite duty" that is "imposed by law" where "nothing is left to discretion." *Mississippi*, 71 U.S. at 498; *see also Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) ("A ministerial duty is one that admits of no discretion, so that the official in question has no authority to determine whether to perform the duty." (citing *Mississippi*, 71 U.S. at 498)). In contrast, "a duty is discretionary if it involves judgment, planning, or policy decisions." *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (citation omitted). There can be no question here that Plaintiffs seek to enjoin the President from performing a discretionary duty—the formation of military policy—that goes to the heart of his authority as Commander-in-Chief.

> the President, like Congress, is a coequal branch of government, and for the President to 'be ordered to perform particular executive . . . acts at the behest of the Judiciary,' at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers.

Id. (quoting *Franklin*, 505 U.S. at 827 (Scalia, J., concurring in part and concurring in the judgment)). Because the plaintiffs could obtain an injunction against other executive officials, the Court ultimately avoided deciding whether it could order injunctive relief against the President, which "would require [the Court] to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Id.* at 981; *see also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 n.4 (D.C. Cir. 1996) (distinguishing between cases where the court is "reluctan[t] to bring judicial power to bear directly on the President" and cases where the "review of a claim is directed at a subordinate executive official").[11]

The principle derived from the *Mississippi v. Johnson* line of cases that the President himself may not be subject to judicial relief for his official actions underscores that the President should not be subject to discovery in this case. It is undisputed that Plaintiffs brought suit against the President in his official capacity, challenging actions he took concerning military policy in his role as Commander-in-Chief. *See* Am. Compl., ECF No. 9, ¶¶ 1, 41. It is also undisputed that Plaintiffs seek declaratory and injunctive relief against the President. *Id.* ¶ 9. An order directing the President himself to respond to discovery, where he is not properly subject to declaratory or injunctive relief on the merits in this case, raises the same separation-of-powers concerns raised by the Supreme Court and D.C. Circuit in the *Mississippi* line of cases. *See also*

[11] Similarly, in *Newdow v. Bush*, the district court found that "issuing an injunction against the President raises serious separation of powers concerns," and that it would be an "extraordinary measure" to issue an injunction against the President. 355 F. Supp. 2d 265, 280, 282 (D.D.C. 2005).

Fitzgerald, 457 U.S. at 753 (recognizing the "President's constitutional responsibilities and status as factors counseling judicial deference and restraint"). Although the Supreme Court did not categorically foreclose discovery of the President in *United States v. Nixon*, 418 U.S. 683, 711–12 (1974), *Nixon* is distinguishable because it involved a subpoena in a criminal case and this case involves civil discovery. *See Cheney*, 542 U.S. at 384 (explaining that "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case) (quoting *Nixon*, 418 U.S. at 713); *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (subpoena against the President in a criminal case); *see also infra* Subsection IV(D) (contrasting the need for discovery in a civil case as compared to a criminal case). Accordingly, the Court should not order the President to respond to Plaintiffs' discovery requests, including the interrogatory information at issue in the initial dispute raised by Plaintiffs.[12]

[12] This is not to say that Plaintiffs may not obtain discovery from the other Defendants in this case (subject, of course, to applicable privileges and prescribed scope) or that the Court may not enjoin the actions of subordinate officials in the Executive Branch. Therefore, "[i]n most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials." *Swan*, 100 F.3d at 978–79 (citing *Franklin*, 505 U.S. at 803; *Reich*, 74 F.3d at 1328, 1331 n.4; *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)). Of course, as discussed in *infra* Section II and *infra* Section IV(B), where Plaintiffs seek confidential information regarding presidential communications from the other named Defendants, the separation-of-powers principles set forth in *Cheney*, 542 U.S. at 385, and the presidential communications privilege bar this discovery, just as these principles and privilege apply where Plaintiffs seek such confidential information directly from the President himself. However, since Plaintiffs have challenged only the objections to the interrogatories directed to the President in the present dispute before the Court, *see* Pls.' Letter Br., ECF No. 86-1, the interrogatory objections and responses of the remaining named Defendants are not presently ripe for this Court's consideration.

II. Any Civil Discovery Directed At The President Must Be Strictly Circumscribed To Comply With The Separation Of Powers.

The burdensome, far-reaching discovery requests that Plaintiffs have served on the President also should not be permitted for related separation-of-powers reasons, under which the Court should, at a minimum, require Plaintiffs to exhaust other sources of discovery before the President is required to respond to discovery or assert privilege.

Unlike other civil litigants, the President comes to court with unique "constitutional responsibilities and status." *Fitzgerald,* 457 U.S. at 753. The President is "the chief constitutional officer of the Executive Branch," and is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 750. As a result, the Supreme Court "has held, on more than one occasion, that '[t]he highest respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)); *see also Fitzgerald*, 457 U.S. at 753 ("Courts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint."). The President's "communications and activities" also "encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.'" *Cheney,* 542 U.S. at 381 (quoting *Nixon,* 418 U.S. at 715). Indeed, as this Court has recognized, "'special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.'" *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 182 (D.D.C. 2005) (Kollar-Kotelly, J.) (quoting *Cheney*, 542 U.S. at 385).

Accordingly, discovery directed against the President implicates weighty separation-of-powers issues. *Cheney*, 542 U.S. at 383. The Executive has a powerful interest in protecting

confidential information, as well as in shielding itself from litigation demands "that might distract it from the energetic performance of its constitutional duties." *Id.* at 382. Discovery targeting the President threatens these interests, with the potential to upset the balance between the Judicial and Executive branches. *Id.*

In *Cheney*, the Supreme Court addressed how lower courts should handle civil discovery requests directed at the Executive Office of the President or Vice President, given these separation-of-powers concerns. The Court held that when discovery requests are submitted to the Executive, lower courts should not force the Executive to respond by invoking privilege. The Court explained:

> Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These 'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible.

Id. at 389–90 (quoting *Nixon*, 418 U.S. at 692). To prevent such clashes, the Court held that before the Executive is forced to "bear the burden" of formally asserting executive privilege, lower courts must consider whether "other avenues" exist for disposing of the discovery demands. *Cheney*, 542 U.S. at 388, 390; *see also id.* at 391 (rejecting the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections").

The Court suggested that one such avenue was for lower courts to narrow the scope of requested discovery, thereby leaving the Executive with less material over which to consider asserting privilege. *Id.* at 390. The Court cited approvingly to *United States v. Poindexter*, 727 F. Supp. 1501 (D.D.C. 1989), where the district court narrowed significantly a criminal

defendant's subpoena against former President Ronald Reagan, while rejecting the defendant's argument that the former President first had to assert executive privilege. *Id*. at 1503; *Cheney*, 542 U.S. at 390.

Cheney thus stands for the principle that the separation of powers compels lower courts to strictly circumscribe discovery requests made to the Executive Office of the President and Vice President. Such requests should be allowed only when plaintiffs can show that they are absolutely necessary to their case, and any requests should be limited in scope to only the necessary parts. *See Lardner v. U.S. Dep't of Justice*, No. CIV.A.03-0180(JDB), 2005 WL 758267, at *9 (D.D.C. Mar. 31, 2005) (citing *Cheney* for the proposition that "a court must screen a request for presidential documents to ensure that the discovery is essential to the proceedings"); *Citizens for Responsibility & Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 180 (D.D.C. 2008) (Kollar-Kotelly, J.) (describing *Cheney* as "specifically distinguish[ing]" between broad discovery and "more narrow discovery requests that would safeguard against unnecessary intrusion into the operation of the Office of the President" (citation omitted)).

These considerations apply with even greater force with respect to discovery directed to the President himself. Accordingly, the Court should, at a minimum, require Plaintiffs to exhaust discovery from other sources before forcing the President to respond to burdensome discovery or formally assert executive privilege. As set out in detail above, the broad interrogatories Plaintiffs have served on the President would require him personally to identify communications that he had on various topics related to the development of policy concerning transgender military service with various high-level officials, members of Congress, and persons generally, as well as to identify numerous meetings, their participants, their topics, and all documents relating to those meetings, among other requests. *See* Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017). These far-reaching, burdensome interrogatories are similar in breadth to the discovery at issue in

Cheney, which, among other requests to the Vice President, sought "All documents concerning any communication relating to the activities of [a Presidential task force], the activities of any [sub-groups to the task force], or the preparation of the [task force's report]." *Cheney*, 542 U.S. at 387. The Court characterized the requests in *Cheney* as "overly broad," "anything but appropriate," and "unbounded in scope." *Id.* at 387–88. Plaintiffs' interrogatories here likewise seek "everything under the sky." *Id.* at 387.

During the telephone conference, Plaintiffs argued, and the Court appeared to initially accept, that their duty to exhaust alternatives to discovery of the President had been satisfied by Plaintiffs' efforts to seek precisely the *same* privileged information in the possession of other officials at the Department of Defense and in the Armed Forces. Respectfully, that is not the kind of alternative source of discovery that *Cheney* contemplates. The core purpose of the holding in *Cheney* is to avoid discovery that unnecessarily intrudes upon the President and to defer and ideally eliminate the need for a privilege assertion over presidential information—that is, to channel discovery away from such information. Thus, *Cheney* does not allow a litigant to seek precisely the same privileged presidential information from a source other than the President. Even as to such discovery, the President's interests and information would be at issue, and privilege would still apply to the same or similar information concerning presidential communications. If all that was necessary to avoid separation-of-powers concerns were for a party serving an interrogatory to seek such privileged presidential information by serving that same interrogatory on a federal agency, the principles set forth in *Cheney* would be rendered a nullity. Thus, Plaintiffs' apparent theory—that *Cheney* would permit them to obtained privileged information concerning presidential communications so long as it does not come directly from the President—has no basis in logic or the law. Clearly, then, the alternative approach to discovery contemplated in *Cheney* is discovery that would not seek, require, or intrude upon

presidential communications and deliberations, regardless of where the records or knowledge of those communications may be located. *See id*. Instead, consistent with *Cheney*, Plaintiffs should, at a minimum, be required to seek discovery relevant to their claims that does not concern the President's communications and from sources other than the President and his immediate White House advisors and their staff.

In this regard, Plaintiffs have already, and will continue to, receive substantial amounts of non-privileged information related to the merits of their claims from other defendants. Plaintiffs have so far deposed three officials from DoD and the Armed Forces, and currently are scheduled to depose three more, including Anthony Kurta, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Under Secretary for Personnel and Readiness, who served as the Chair of the Panel of Experts for the Transgender Policy Review. Defendants also have produced to Plaintiffs more than 80,000 pages of documents from DoD and the Armed Forces. Only upon exhausting these alternative sources of discovery should the Court consider whether to force the President to invoke executive privilege.[13] *See Cheney*, 542 U.S. at 390.

III. *In Camera* Review of Substantive Interrogatory Responses by the President Fails To Address Separation-of-Powers Concerns.

The Court has raised the prospect of submitting, for *in camera* review, the substantive responses to the interrogatories seeking information about presidential deliberations into the formulation of military policy. Respectfully, this would not adequately resolve the broad separation-of-powers concerns outlined above. Indeed, under the principles established in *Cheney*, the Court should not even reach the issue of *in camera* review until the Court, at a minimum, narrows the discovery at issue. *See id.* at 388, 390.

[13] The Court should also consider that Secretary of Defense Mattis has presented to the President an implementation plan that may alter the issues in this case and obviate any purported need for discovery directed to the President.

First, an order compelling the President to submit to discovery in this case, even if limited to *in camera* review, would still conflict with the separation-of-powers principles reflected in *Mississippi*, *Franklin*, and *Cheney*. Such an order for *in camera* review still directs the President to identify and produce information in response to discovery requests. And given that *Cheney* makes clear that the President should not be forced at this time to respond to discovery requests or formally assert privilege, an order for *in camera* review would provide little relief. This is especially so if the Court's intent is to assess the potential applicability and merits of the presidential communications privilege over such information—precisely what *Cheney* found to be inappropriate. *See* 542 U.S. at 402 (rejecting approach whereby the district court could entertain privilege claims and review allegedly privileged documents *in camera*).[14]

Likewise, preparing the requested information for *in camera* review (which is the substantive responses to the interrogatories) would subject the President and his staff to the same heavy burdens as would producing the information to Plaintiffs. To formulate responses to the interrogatories, the President and his advisors would have to comb through their records, notes, and memories to track down every person the President or other top officials spoke with about the military's transgender polices, to determine every person present at meetings where those policies were discussed, and to identify countless documents and dates. Doing so would require a substantial commitment of time and resources on the part of the President and his staff, and—

[14] As discussed in *infra* Section IV, Defendants do not contend that the presidential communications privilege is "absolute" in the sense that it cannot be subject to judicial review or in the sense that it cannot be overcome by a strong showing of need. But because *Cheney* makes clear that the Executive should not be forced to assert privilege at this stage, *in camera* review also would be inappropriate. In addition, as discussed further below, *in camera* review of the substantive information responsive to the interrogatories at issue here would not aid the Court in resolving the legal question of whether the type of information at issue here—information about presidential communications—is subject to the presidential communications privilege when and if any such assertion becomes ripe for review.

because the requests focus so directly on interactions with the President—of the President himself. This in itself is precisely the sort of "distract[ion] [] from the energetic performance of [the President's] constitutional duties" that *Cheney* sought to prevent. 542 U.S. at 369.[15]

Finally, even if the issue were ripe, *in camera* review would provide no benefit to the Court in determining whether the information would be properly subject to the presidential communications privilege.[16] The substantive information responsive to the interrogatory requests at issue, concerning who communicated with the President and when about the development of military policy, is not needed to resolve whether this type of information is privileged as a matter of law. Whether discovery of the President should proceed, or whether this kind of information is subject to the presidential communications privilege, are purely legal questions for which the Court does not need to review the particular information responsive to the interrogatory requests. For example, independent of whether the President met with ten advisors in the month leading up to a policy decision or whether he met with twenty advisors two months prior, the type of information at issue here either is covered by the presidential communications privilege, as Defendants contend, or is not covered by the privilege, as Plaintiffs contend. *Cf. Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) ("In camera inspection

[15] Although this motion concerns only Plaintiffs' interrogatories, Plaintiffs also have served 25 broad requests for production and 12 requests for admission directed to the President. If the President were obligated to respond to those requests *in camera* as well, the burden on his constitutional functions would be even greater. Ordering the President to provide responses to all of these discovery requests, even for *in camera* review, would require the Executive Office of the President, and often the President himself, to search for thousands of documents and to review in immense detail the specifics of the President's decisionmaking process and deliberations.

[16] Again, as *Cheney* makes clear, a formal assertion of privilege should not be required at this stage. The potential applicability of the presidential communications privilege to the information at issue in this dispute over interrogatory responses is discussed further in *infra* Section IV.

requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'").

The situation at issue here can be distinguished from a discovery dispute about the production of allegedly privileged documents. If the issue is whether a particular document is shielded by the presidential communications privilege, a privilege log or the submission of the document *in camera* potentially could assist the Court in determining relevant factual information, such as whether the document actually "reflect[s] presidential decisionmaking and deliberations," and whether the document was authored or solicited and received by the President or immediate White House advisors in the Executive Office of the President and their staff. *See In re Sealed Case*, 121 F.3d at 744, 754. In contrast, in the case at hand, such information is clear from the face of the interrogatories—which explicitly request information about communications that reflects presidential decisionmaking—and the "privilege-log type information" responsive to the interrogatories would not add anything to the Court's analysis, either before or after a formal invocation of the privilege. *See* Ex. 7, Email from Daniel McFadden to chambers.

Additionally, Defendants also have objected to the interrogatories directed to the President based on the deliberative process privilege, attorney-client privilege, and work product doctrine. *See* Ex. 4, Defs.' Objs. to Pls.' First Set of Interrogs. to Def. Donald J. Trump (Feb. 6, 2018). Therefore, because Plaintiffs are challenging *only* the presidential communications privilege, their challenge and any corresponding *in camera* review of substantive information responsive to the interrogatories would be futile to the extent that other privileges also apply. For this reason as well, even if it were appropriate for the Court to consider the applicability of the presidential communications privilege at this stage, which it is not under *Cheney*, *in camera*

review would not resolve the issue of whether this information is discoverable based on the applicability of other privileges.

Finally, in the event that the Court does order *in camera* review, Defendants must be permitted an opportunity to formally invoke the privilege prior to the provision of any information for the Court's *in camera* review. *See In re Sealed Case*, 121 F.3d at 741 (stating that the White House has no "obligation to formally invoke its privilege in advance of a motion to compel"); *Dairyland Power Co-op.*, 79 Fed. Cl. at 669 (concluding that because plaintiffs had met their initial burden, "the White House must be allowed the opportunity to submit an affidavit formally invoking the privilege and stating the reasons for the invocation, in the context of which the Court can review the subject documents in camera to determine if the privilege actually applies here"). For this reason as well, any *in camera* review at this stage would be improper.

IV. The President Should Not Be Required to Formally Invoke Privilege Until the Court Rules that Plaintiffs Have Met Their Initial, Heavy Burden.

The foregoing considerations should foreclose the requested discovery and *in camera* review of the information about presidential communications concerning the development of military policy that Plaintiffs seek in their interrogatory requests. However, to the extent the Court believes that discovery against the President is potentially available, it should first require Plaintiffs to meet their heavy, initial burden of establishing a heightened, particularized need for the specific information sought before requiring the President to formally invoke the privilege. *See Dairyland Power Co-op*, 79 Fed. Cl. at 660.

A. Background on Presidential Communications Privilege

The presidential communications privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708; *see In re Sealed Case*, 121 F.3d at 743 (describing the privilege's

"constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities," *Nixon*, 418 U.S. at 711, as well as "documents or other materials that reflect presidential decisionmaking and deliberations," *In re Sealed Case*, 121 F.3d at 744. The privilege also extends to communications authored or solicited and received by immediate White House advisors in the Executive Office of the President and their staff. *See id.* at 754. The privilege "covers final and post-decisional material as well as pre-deliberative ones." *Id.* at 745.

In assessing an assertion of presidential communications privilege, the Judiciary must be mindful of the "special considerations" affecting separation of powers that control when "the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Am. Historical Ass'n*, 402 F. Supp. 2d at 182 (quoting *Cheney*, 542 U.S. at 385); *see also Cheney*, 542 U.S. at 382 ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Executive Office of the President] occupies.") (citation omitted); *id.* at 385 ("The [Supreme] Court has held, on more than one occasion, that '[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery,' . . . and that the Executive's 'constitutional responsibilities and status [are] factors counseling judicial deference and restraint' in the conduct of litigation against it . . . .") (citation omitted).

B. The Presidential Communications Privilege Applies to Factual Information About Communications That Would Reveal Presidential Deliberations.

The presidential communications privilege applies to "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d at 744. Unlike the deliberative process

privilege, the presidential communications privilege protects facts and "sources of information," in addition to the substance of deliberations. *See id.* at 745, 750; *Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (contrasting the deliberative process privilege). Plaintiffs' contrary assertion that they are entitled to be informed of the "existence" of such communications, as well as the "content" of such communications, *see* Pls.' Letter Br., ECF No. 86-1, at 2, is, accordingly, without merit. The privilege encompasses factual information that is revelatory of the President's decisionmaking process and confidential communications. The presidential communications privilege is not "absolute" in the sense of being outside the scope of judicial review or in the sense of trumping a strong showing of need.[17] Nonetheless, it applies to the category of information at issue here—factual information that would reveal details about confidential presidential communications—which is at the heart of presidential decisionmaking and deliberations.[18]

Such information is shielded by the presidential communications privilege because it plainly "reflect[s] presidential decisionmaking and deliberations," and disclosure of this information would intrude on presidential deliberations and impede the President's ability to perform his constitutional duty. *See In re Sealed Case*, 121 F.3d at 744, 751. Indeed, Plaintiffs readily admit that they seek the identities of the individuals the President communicated with and

[17] As discussed in *infra* Subsection IV(D), although a formal claim of privilege is not required at this stage, it should be apparent that Plaintiffs could not meet their ultimate burden to show a "focused demonstration of need" to overcome any privilege assertion. *See In re Sealed Case*, 121 F.3d at 746.

[18] The fact that the privilege would apply to this information does not necessarily mean that the President would choose to formally assert it. A decision about whether to formally assert the privilege would be premature at this juncture under *Cheney* and because, as discussed in Subsection IV(C) *infra*, Plaintiffs have not met their initial burden of establishing a heightened, particularized need for the specific information sought before requiring the President to formally invoke the privilege. *See Dairyland Power Co-op*, 79 Fed. Cl. at 660.

the dates of the communications for the purpose of Plaintiffs' "assessment of any process" that the President took in making policy decisions related to national security and the military. *See* Pls.' Letter Br., ECF No. 86-1, at 2; Ex. 9, Telephone Conference (Feb. 13, 2018), at 19:8–11 (Plaintiffs' Counsel: "[T]his information [sought in the interrogatories] is [ ] important to us [because] it sheds a light on the process by which the president arrives at his decision to ban transgender military service as reflected in the tweet.").

Discovery seeking information about the identities of those who communicated with the President would constitute a substantial intrusion on the Presidency. Disclosure of the kind of comprehensive information Plaintiffs seek about the timeline and scope of the President's decisionmaking process—including the intimate details about whom the President decided to meet, whom the President trusted to participate in these meetings, what topics were discussed, which advisors the President chose to consult with and rely on for advice, when each of these meetings and communications took place, as well as whom the President chose *not* to meet with or consult about a decision—would intrude on the President's decisionmaking process. Such discovery into the President's communications and decisionmaking process plainly would be disruptive of the President's performance of his constitutional responsibilities and would undermine the confidentiality needed "to ensure that presidential decisionmaking is of the highest caliber." *In re Sealed Case*, 121 F.3d at 750; *see Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) ("The ability to discuss matters confidentially is surely an important condition to the exercise of executive power. . . . In designing the Constitution, the Framers vested the executive power in one man for the very reason that he might maintain secrecy in executive operations.").

It is readily apparent why this is so. Disclosure of those with whom the President communicated on a particular matter and when, or with whom the President chose not to confer,

would plainly reveal the President's deliberative process—including what sources of advice and information he chose to call upon. As just one example, disclosure of the names of individuals who met with the President about a Supreme Court vacancy would potentially identify the candidates the President is considering. Similarly, disclosure of the President's meeting with a particular economist with well-known views or expertise during a time when the President was known to be considering economic initiatives could reveal the types of economic initiatives under consideration. And disclosure of the identities of national security experts who met with the President or White House advisors at a certain time could expose the kinds of anti-terrorism measures under consideration, by virtue, for example, of an individual's known area of expertise. *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Homeland Sec.*, 592 F. Supp. 2d 111, 119 (D.D.C. 2009) (acknowledging that disclosing the identities of individuals some of these hypothetical situations could "shed some degree of light on the deliberations of the President"). Accordingly, the presidential communications privilege properly shields the President and his immediate advisors and their staff from the discovery of this type of factual information that reflects presidential decisionmaking.

Compelling disclosure of this type of factual information would be especially intrusive in this context, in which the President, acting in his capacity as Commander-in-Chief, was deliberating on an issue involving national security and military concerns. And disclosure of the same privileged information from the individuals with whom the President communicated—instead of obtaining the information from the President himself—would equally implicate the presidential communications privilege. Regardless of who is being asked to disclose the

information, this type of information about presidential communications is protected by privilege.[19]

Additionally, because of the nature of the interrogatories, disclosure of such information would also tend to reveal the substantive content of the communications. The interrogatories seek, for example, information concerning "every meeting attended by President Trump, Secretary Mattis and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed," including the date of the meeting, the identities of all participants in the meeting, the topics discussed, "all [d]ocuments distributed, considered, or discussed at such meeting," and "all [d]ocuments memorializing such meeting." Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017) (Interrogatory No. 17).[20] A response to such

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[19] Analogously, "[t]he attorney-client privilege protects confidential communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services." *In re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998). Communications protected by the attorney-client privilege remain privileged, regardless of whether a party seeks to obtain the privileged information from the attorney or from the client.

[20] *See also* Interrogatory No. 20, which purports to require the President to

> [i]dentify all Communications between President Trump and Secretary Mattis, the Department of Defense, General Dunford, the Joint Chiefs of Staff, the Department of Homeland Security, and/or any Service Branch from January 20, 2017, to August 25, 2017, concerning military service by transgender individuals, including Communications concerning: (a) any evaluation(s) conducted by the Department of Defense on the impact of accessions of transgender applicants on readiness or lethality; (b) the issuance of or assessments or other responses provided in response to Accessions Readiness Memorandum; (c) the decision announced in the Accessions Deferral Memorandum; (d) the President's Twitter Statement; (e) the Presidential Memorandum; and/or (f) the Interim Guidance.

Ex. 1, Pls.' First Set of Interrogs. (Dec. 15, 2017) (Interrogatory No. 20). Further, Plaintiffs' First Set of Requests for Admission to Defendant Donald J. Trump similarly seek admissions of information protected by the presidential communications privilege, including information regarding whether the President received certain policy recommendations from high-level government officials. *See* Ex. 2, Pls.' First Set of Reqs. for Admis. (Dec. 15, 2017) (Request for Admission No. 9) ("Admit that, between January 20, 2017, and July 26, 2017, Secretary Mattis did not recommend that President

interrogatories would necessarily reveal substance about the communications because it would not only identify the individuals involved in the communications and the date of the communication, but it would also reveal the core subject of the communication and how the conversation may fit within the known timeline of events.

Protecting information about presidential communications plainly serves the purpose of the presidential communications privilege. As the D.C. Circuit has recognized, there is a "great public interest" in preserving "the confidentiality of conversations that take place in the President's performance of his official duties" because such confidentiality is needed to protect "the effectiveness of the executive decision-making process." *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973); *see In re Sealed Case*, 121 F.3d at 745–46 (noting the "concern that the President be given sufficient room to operate effectively," and explaining that "limit[ing] the President's ability to communicate . . . privately [would] interfer[e] with his ability to exercise control over the executive branch").

This case is distinguishable from *Citizens for Responsibility & Ethics in Washington v. Department of Homeland Security*, a Freedom of Information Act ("FOIA") case in which the Court determined that the White House visitor logs were not protected by the presidential communications privilege because the information contained in the logs "sheds no light on the content of communications between the visitor and the President or his advisors, whether the communications related to presidential deliberation or decisionmaking, or whether any substantive communications even occurred." 592 F. Supp. 2d at 118–19. In contrast, Plaintiffs here specifically demand information that identifies communications (including dates and the

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Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.").

identity of the participants) with the President and his immediate advisors and their staff regarding military service by transgender individuals for the express purpose of "permitting an assessment of any process that preceded the reversal of the policy." Pls.' Letter Br., ECF No. 86-1, at 1. Indeed, Plaintiffs candidly acknowledge that the purpose of their discovery requests is to "discover the process, if any, that prompted the President's abruptly tweeted reversal of the military policy permitting service by transgender people." *Id.* Unlike in *Citizens for Responsibility & Ethics in Wash.*, disclosing the requested information in this case would reveal information specifically about the President's own deliberations, including details regarding communications between the President and those with whom he spoke. Moreover, it would be clear that the communications related specifically to presidential deliberations and decisionmaking about military service by transgender individuals. *See Citizens for Responsibility & Ethics in Washington*, 592 F. Supp. 2d at 119 (acknowledging that factual circumstances surrounding a visit with the President "might reveal the substance of presidential deliberations.").

Further, the D.C. Circuit later held that FOIA requests for White House visitor logs, such as the one in *Citizens for Responsibility & Ethics in Washington*, 592 F. Supp. 2d at 118, were improper because White House visitor logs belong to the President, not the Secret Service, and thus were not "agency records" within the meaning of FOIA. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 226–227 (D.C. Cir. 2013). Otherwise, the Court reasoned, FOIA would produce an unconstitutional intrusion into the President's decisionmaking. *See id.* (analogizing to the presidential communications privilege and explaining that construing FOIA "to extend to White House visitor logs—regardless of whether they are in the possession of the White House or the Secret Service—could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public. And that could

render FOIA a potentially serious congressional intrusion into the conduct of the President's daily operations.").

For all the foregoing reasons, there should be little doubt that, as a threshold matter, the information responsive to Plaintiffs' interrogatory requests would be subject to an assertion of the presidential communications privilege.

C. Plaintiffs Have Not Met Their Initial Burden to Demonstrate Heightened Need for the Privileged Information, and Thus the Burden Has Not Shifted to the White House to Formally Invoke the Presidential Communications Privilege Through An Affidavit.

Because of the "unique position in the constitutional scheme" that the Executive Office of the President occupies, *Cheney*, 542 U.S. at 382, parties seeking discovery from the President must satisfy an initial burden of demonstrating a heightened, particularized need for the information they seek. Until Plaintiffs have met this initial burden, the burden does not shift to the White House to formally invoke the presidential communications privilege by means of affidavit. *See Dairyland Power Co-op.*, 79 Fed. Cl. at 662 ("The Court agrees with the Government that, in the case of a discovery request aimed at the President and his close advisors, the White House need not formally invoke the presidential communications privilege until the party making the discovery request has shown a heightened need for the information sought. This is the teaching of both *Cheney*[, 542 U.S. at 367] and *In re Sealed Case*[, 121 F.3d at 720]. Therefore, the issue here is whether [Plaintiff's] Statement of Need established such a heightened need."). In this case, Plaintiffs have not attempted to satisfy the "exacting standards" of "relevancy," "admissibility," and "specificity," pursuant to the Supreme Court's analysis of this issue in *Cheney*. *See* 542 U.S. at 386. Only after the Court has found that Plaintiffs have satisfied these standards should the White House be required to undertake the burdensome process of formally invoking the presidential communications privilege, and only then should the

Court balance the public interest served by protecting the President's confidentiality in this context against Plaintiffs' need for the privileged information.[21]

As discussed above, the Supreme Court has recognized that the White House is unlike other litigants and has emphasized the necessity of protecting the Executive Branch at its highest level from vexatious litigation that might distract it from the energetic performance of its constitutional duties. *See id.* at 382. In light of separation-of-powers considerations, which are discussed more fully in Section II *supra*, the Supreme Court in *Cheney* expressly rejected the notion that the Executive Branch at its highest level shall bear the initial burden of invoking executive privilege with specificity or making particular objections to discovery on a line-by-line basis to safeguard executive functions and maintain the separation of powers. *Id.* at 383, 388. The Court noted that the criminal subpoenas at issue in *United States v. Nixon* "were [first] required to satisfy exacting standards of '(1) relevancy; (2) admissibility; [and] (3) specificity.'" *Id.* at 386 (quoting *Nixon*, 418 U.S. at 700). This process served "as an important safeguard against unnecessary intrusion into the operation of the Office of the President," *id.* at 387, and was the means by which "the party requesting the information—the special prosecutor [in *Nixon*, 418 U.S. at 683]—had satisfied his burden of showing the propriety of the [subpoena] requests." *Id.* at 388.

These "exacting standards" apply *a fortiori* in this case where Plaintiffs are seeking *civil* discovery from the Executive Branch at its highest level. As noted by the Supreme Court in *Cheney*, "[t]he need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*." *Id.* at 384.

[21] As discussed in Subsection IV(D) *infra*, the showing of need required to overcome a valid assertion of the presidential communications privilege is higher in a civil case than in the context of a criminal investigation or trial. *In re Sealed Case*, 121 F.3d at 743; *Cheney*, 542 U.S. at 384.

Because it is a "'primary constitutional duty of the Judicial Branch . . . to do justice in criminal prosecutions,'" the withholding of information "from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks 'conflict[s] with the function of the courts under Art[icle] III.'" *Id.* (citations omitted). "Such an impairment of the 'essential functions of [another] branch' . . . is impermissible." *Id.* (citation omitted). In contrast, the withholding of information in a civil case "does not hamper another branch's ability to perform its 'essential functions' in quite the same way." *Id.*

Moreover, "[a] party's need for information is only one facet of the problem." *Id.* at 385. The burden imposed on the White House by discovery orders is an "important factor" to be considered by the courts owing to the special deference and "'[t]he high respect that is owed to the office of the Chief Executive." *Id.* Preparing and executing an affidavit formally invoking the presidential communications privilege with specificity is a burdensome, time-consuming process that would detract from the many constitutional responsibilities of the White House. The Court also must be particularly cognizant of the fact that the Executive Office of the President is, because of its high visibility, an easily identifiable target for civil suits and corresponding discovery orders. *Id.* at 386. In contrast to the criminal justice system, where "there are various constraints, albeit imperfect, to filter out insubstantial legal claims, . . . there are no analogous checks in the civil discovery process." *Id.* Because of these considerations, the Court must hold Plaintiffs to their initial burden before shifting the burden to the White House to formally assert the presidential communications privilege.

Accordingly, if the Court declines to conclude outright that discovery of the President should be precluded on separation-of-powers grounds, *see supra* Section I, the Court should first require Plaintiffs to meet their initial heavy burden of heightened need for the interrogatory information at issue here by satisfying the "exacting standards of '(1) relevancy; (2)

admissibility; [and] (3) specificity.'" *Id.* (quoting *Nixon*, 418 U.S. at 700). Only then should Defendants be required to come forward with a formal invocation of the presidential communications privilege.

D. Even If and When A Formal Claim of Privilege Were Required, Plaintiffs Could Not Meet Their Ultimate Heavy Burden in Showing a "Focused Demonstration of Need" Sufficient to Overcome The Presidential Communications Privilege.

Assuming, *arguendo*, the Court were to conclude that Plaintiffs have met their initial burden of heightened need, it should decline to require the President to formally invoke the presidential communications privilege, because Plaintiffs would not be able to meet their burden to overcome the privilege and compel production of the privileged information.

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

communications privilege is still needed." *Id.* at 755 (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *Nixon*, 418 U.S. at 711); *see also U.S. Dep't of Treasury v. Black*, No. No. 17-5142, 2017 WL 6553628, at *2 (D.C. Cir. Dec. 8, 2017) (faulting district court for failing to "account for how the public interests in this [civil] case differ from those presented in our prior decisions," such as that "'the need for information in the criminal context is much weightier' than the need in the civil context.") (quoting *Cheney*, 542 U.S. at 384); *In re Sealed Case*, 121 F.3d at 754 (noting "the [*Nixon*] Court's repeated emphasis on the importance of access to relevant evidence in a criminal proceeding"); *Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions." (emphasis added)).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to overcome a valid

assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from other sources, including publicly available ones.

To overcome the presidential communications privilege, it is incumbent on Plaintiffs to explain in detail what evidence they have obtained in support of their legal claims and what the privileged material at issue might add—that is, to "explain why evidence covered by the presidential [communications] privilege is still needed." *In re Sealed Case*, 121 F.3d at 755. It is not Defendants' burden to make this showing for Plaintiffs. *See Black*, 2017 WL 6553628, at *2 (emphasizing that plaintiffs "bear the burden to demonstrate 'with specificity' 'that each discrete group of the subpoenaed materials likely contains important evidence,'" and that plaintiffs "bear the further burden of demonstrating" that they have "'first'" made diligent efforts "'to determine whether sufficient evidence can be obtained elsewhere'" (quoting *In re Sealed Case*, 121 F.3d at 754–55)). As the D.C. Circuit recently made clear, a district court must "thoroughly analyze" whether plaintiffs have met this burden. *Id.* (vacating and remanding order granting motion to compel where district court failed to adequately explain "how [plaintiffs] met their burden to demonstrate a need sufficient to overcome" the presidential communications privilege).

Accordingly, the Court should not require a formal claim of privilege at this stage because it should be apparent that Plaintiffs cannot meet their ultimate burden to show a focused demonstration of need to overcome any privilege assertion.

CONCLUSION

For the foregoing reasons, the Court should enter a protective order to: (1) preclude Plaintiffs from seeking discovery from the President of the United States; (2) excuse the President from having to provide substantive information in response to Plaintiffs' interrogatories; (3) excuse the President from having to provide information in responses to Plaintiffs' interrogatories solely for the Court's *in camera* review.

February 27, 2018

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EXHIBIT 1

Doe v. Trump, 17-cv-1597 (CKK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER,[1] in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' FIRST SET OF INTERROGATORIES

[1] Mark T. Esper has been substituted as the Secretary of the Army and Kirstjen Nielsen has been substituted as the Secretary of the Department of Homeland Security pursuant to Federal Rule of Civil Procedure 25(d).

Pursuant to Federal Rules of Civil Procedure 26 and 33, Plaintiffs in the action captioned above hereby request that the Defendants in the action captioned above respond to the following interrogatories within 30 days from the date of service hereof in accordance with Rule 33, the Local Rules of this Court, and the Definitions set forth below.

DEFINITIONS

1. The term "Individual Defendants" shall refer to Defendants Donald J. Trump, James N. Mattis, Joseph F. Dunford, Jr., Mark T. Esper, Richard V. Spencer, Heather A. Wilson, Kirstjen Nielsen, and Raquel C. Bono.

2. The term "President Trump" shall refer to Defendant Donald J. Trump.

3. The term "Secretary Mattis" shall refer to Defendant James N. Mattis.

4. The term "General Dunford" shall refer to Defendant Joseph F. Dunford.

5. The term "Accessions Readiness Memorandum" shall refer to the memorandum issued by Secretary of Defense James Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services" dated May 8, 2017.

6. The term "Accessions Deferral Memorandum" shall refer to the memorandum issued by Secretary of Defense James Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services" dated June 30, 2017.

7. The term "DoD Initiative" shall refer to the request by the Department of Defense, responded to by John Doe 1, to obtain information relating to transgender servicemembers.

8. The term "Twitter Statement" shall refer to the statement issued by President Trump on Twitter on July 26, 2017 that: "After consultation with my Generals and military

experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

9. The term "Presidential Memorandum" shall refer to the memorandum issued by President Trump on August 25, 2017 titled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

10. The term "Interim Guidance" shall mean the memorandum issued by Secretary Mattis titled "Memorandum: Military Service of Transgender Individuals – Interim Guidance" dated September 14, 2017.

11. The term "Service Branch" shall mean any or all of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

12. The "SCCC" shall refer to any and all Service Central Coordination Cells concerning military service and/or accessions by transgender people, including any established pursuant to or consistent with DoD Instruction 1300.28.

13. The term "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Fed. R. Civ. P. 34(a), including without limitation letters, memoranda, articles, notes, email, and electronic files of all kinds. A draft or non-identical copy is a separate document within the meaning of this term.

14. The term "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) by any means, including orally, electronically, or by means of or contained in any Document.

15. The term "Organization" shall refer to a corporation, partnership, business, association, or other private or governmental entity.

16. The terms "Identify", "Identity", and "Identification" mean, at a minimum, and in addition to any other information requested by a particular Interrogatory:

a. when referring to a person, (i) the person's full name and present or last known address, and (ii) the person's last known title and place of employment;

b. when referring to an Organization, the name and address of the Organization;

c. when referring to a Document, (i) the type of Document (e.g., letter, memorandum, email, etc.) and its title or other designation, (ii) its general subject matter, (iii) its date of creation, (iv) if an email, letter, memorandum, written instruction, or other correspondence, its date of transmittal, (v) the Identity of all author(s), addressee(s), and recipient(s) of the Document at any time, and (vi) a statement of whether the Document is unclassified, is classified in part, or is classified in its entirety, and, if the Document is classified, the level(s) of classification (e.g., Confidential, Secret, etc.);

d. when referring to a Communication, (i) the date of the Communication; (ii) the means of the Communication (*e.g.*, telephonic, in person meeting, letter, email, etc.); (iii) the general subject matter; (iv) for any Communication by telephone or in person meeting, the location and Identity of all attendees and participants; (v) for any Communications by means of or contained in a Document, Identification of the Document containing such Communication; and

e. when referring to information, facts, data, and research, the complete substance of the information, facts, data, or research.

17. The term "State the Basis" means that a responding party shall, at a minimum, and in addition to any other information requested by a particular Interrogatory:

a. Identify each and every Document (and, where pertinent, the section, article, or subsection thereof), which forms any part of the source of the party's information regarding the referenced assertions, facts, or legal conclusions;

b. Identify each and every Communication which forms any part of the source of the party's information regarding the referenced assertions, facts or legal conclusions;

c. State separately the acts or omissions to act on the part of any person or Organization (Identifying the acts or omissions to act by stating their nature, time, and place and Identifying the persons involved) which form any part of the party's information regarding the referenced assertions, facts, or legal conclusions; and

d. Identify separately any other information, facts, data, and research which forms the basis of the party's information regarding the referenced assertions, facts, or legal conclusions.

INTERROGATORIES TO BE ANSWERED BY DEFENDANT TRUMP

1. State the date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

2. Identify all Documents reviewed, relied upon, and/or considered by President Trump in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" on or before July 26, 2017.

3. Identify all information, facts, data, and research reviewed, relied upon, and/or considered by President Trump in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" on or before July 26, 2017.

4. Identify the "Generals and military experts" referenced in the Twitter Statement, and, for each such person, Identify all Communications between that person and President Trump concerning military service by transgender people.

5. Identify all Communications between President Trump and any other person concerning President Trump's decision that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" from January 20, 2017, to the present.

6. State the Basis for President Trump's assertion in the Twitter Statement that military service by transgender individuals would entail "tremendous medical costs."

7. State the Basis for President Trump's assertion in the Twitter Statement that military service by transgender individuals would entail "disruption."

8. State whether President Trump received advice or counsel from any attorney in the process of deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military," and for each such attorney (a) state the date the advice was communicated to President Trump; (b) state the subject matter of such advice;

(c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

9. State the "meaningful concerns" referenced in the Presidential Memorandum, and Identify all Documents and Communications relating to those concerns considered by President Trump prior to issuing the Presidential Memorandum and all persons who expressed those concerns to President Trump, including the specific "meaningful concern[]" articulated by each such person.

10. Identify all Documents that are assessments, reports, evaluations, studies, or other research regarding the impact of military service by transgender individuals on military effectiveness and lethality, unit cohesion, or military resources considered by President Trump in preparing and issuing the Presidential Memorandum.

INTERROGATORIES TO BE ANSWERED BY DEFENDANT MATTIS

11. Identify all persons who participated in the drafting of the Accessions Deferral Memorandum, including without limitation all persons who reviewed the memorandum or any draft thereof prior to its release, and, for each such person (1) state their role in drafting the Memorandum; (2) state the date(s) of their participation in drafting the Memorandum; and (3) Identify all Documents memorializing or reflecting such participation.

12. State the Basis for Secretary Mattis' assertion in the Accessions Deferral Memorandum that "it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018]."

13. Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, concerning the Accessions Deferral Memorandum.

INTERROGATORIES TO BE SEPARATELY ANSWERED BY DEFENDANTS TRUMP, MATTIS, AND DUNFORD

14. Identify all Documents that are assessments, reports, evaluations, studies, or other research concerning military service by transgender people that were transmitted to, received by, or considered by President Trump from January 20, 2017, to July 26, 2017, and, for each such Document, Identify the person or Organization who transmitted it to President Trump and state the date(s) of transmission to and receipt by President Trump.

15. Identify all persons involved in drafting the Twitter Statement, including all persons who reviewed the statement or any draft thereof prior to its release to the public via Twitter and, for each such person, (a) state their role in drafting the statement; (b) state the date(s) of their participation in drafting the statement; and (c) Identify all Documents memorializing or reflecting such participation.

16. Identify all persons involved in drafting the Presidential Memorandum, including without limitation all persons who reviewed it or any draft thereof prior to its release to the public, and for each such person, (a) state their role in drafting the Presidential Memorandum; (b) state the date(s) of their participation in drafting the Presidential Memorandum; and (c) Identify all Documents memorializing or reflecting such participation.

17. For every meeting attended by President Trump, Secretary Mattis and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

18. Identify all Communications between a United States Senator or member of the United States House of Representatives, on the one hand, and President Trump or any officer or

employee of the Executive Office of the President, on the other, from January 20, 2017, to July 26, 2017, concerning military service by transgender persons.

INTERROGATORIES TO BE SEPARATELY ANSWERED BY ALL DEFENDANTS

19. Identify all Communications requesting or providing information between January 20, 2017, and August 25, 2017, concerning the military service and/or accession of transgender persons between or among the Executive Office of the President and any of the following: the Department of Defense, the Department of Homeland Security, and/or any Service Branch.

20. Identify all Communications between President Trump and Secretary Mattis, the Department of Defense, General Dunford, the Joint Chiefs of Staff, the Department of Homeland Security, and/or any Service Branch from January 20, 2017, to August 25, 2017, concerning military service by transgender individuals, including Communications concerning: (a) any evaluation(s) conducted by the Department of Defense on the impact of accessions of transgender applicants on readiness or lethality; (b) the issuance of or assessments or other responses provided in response to Accessions Readiness Memorandum; (c) the decision announced in the Accessions Deferral Memorandum; (d) the President's Twitter Statement; (e) the Presidential Memorandum; and/or (f) the Interim Guidance.

21. For every meeting attended by any representative of the Executive Office of the President, the Department of Defense, a Service Branch or the Defense Health Agency between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

22. Identify all Documents that are assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning (a) the impact of transgender individuals serving in the military on military readiness and/or lethality; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

23. Identify all persons employed by or working in an SCCC at any time from June 30, 2016, to the present, and for each such person state the person's dates of employment or work in the SCCC, the person's role and title, and the nature of the person's responsibilities.

24. Describe the DoD Initiative, including, without limitation, the information sought and the manner in which the information was sought, and Identify all persons involved in the dissemination of the request for information pursuant to the DoD Initiative, all persons involved in the collection and reporting of responses to such request, and all persons responsible for reviewing submissions tendered to the Office of the Secretary of Defense in response to the DoD Initiative.

25. Identify all Documents that are (a) responses to any request for information that was part of the DoD Initiative, and/or (b) assessments submitted in response to the memorandum dated May 8, 2017, entitled "Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service."

December 15, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 15, 2017 by e-mail upon the following:

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/s/ Daniel L. McFadden
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EXHIBIT 2

Doe v. Trump, 17-cv-1597 (CKK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER,[1] in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; ELAINE C. DUKE, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION
TO DEFENDANT DONALD J. TRUMP

Pursuant to Federal Rules of Civil Procedure 26 and 36, Plaintiffs, Jane Doe Nos. 1 – 5, John Doe No. 1, Regan V. Kibby and Dylan Kohere hereby request that Defendant, Donald J.

[1] Mark T. Esper has been substituted as the Secretary of the Army pursuant to Federal Rule of Civil Procedure 25(d).

Trump ("President Trump"), answer the following requests for admission ("Requests") within 30 days from the date of service hereof, in accordance with Rule 36, the Local Rules of this Court, and the Definitions and Instructions set forth below.

DEFINITIONS

1. The term "President Trump" shall refer to Defendant Donald J. Trump.

2. The term "Secretary Mattis" shall refer to Defendant James N. Mattis.

3. The terms "Plaintiff" or "Plaintiffs" shall refer to Jane Doe Nos. 1 – 5, John Doe No. 1, Regan V. Kibby and Dylan Kohere.

4. The "Accessions Readiness Memorandum" shall refer to the memorandum issued by Secretary of Defense James Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services" dated May 8, 2017.

5. The "Accessions Deferral Memorandum" shall refer to the memorandum issued by Secretary of Defense James Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services" dated June 30, 2017.

6. The "President's Twitter Statement" shall refer to the statement issued by President Trump on Twitter on July 26, 2017 that: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

7. The "Presidential Memorandum" shall refer to the memorandum issued by President Trump on August 25, 2017 titled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

8. The "Interim Guidance" shall mean the memorandum issued by Secretary Mattis titled "Memorandum: Military Service of Transgender Individuals – Interim Guidance" dated September 14, 2017.

9. The terms "Communication" or "Communications" shall mean, without limitation, any transmittal, conveyance or exchange of a word, statement, fact, thing, idea, Document instruction, information, demand, question or other information by any medium, whether by written, oral or other means, including but not limited to electronic communications and electronic mail.

10. The terms "Document" and "Documents" shall have the broadest meaning ascribed to them by Federal Rule of Civil Procedure 34 and Federal Rule of Evidence 1001.

INSTRUCTIONS

1. If President Trump contends that any Request is objectionable in whole or in part, please state with particularity each objection, the basis for it, and the categories of information to which the objection applies, and respond to the Request insofar as it is not deemed objectionable.

2. If President Trump finds the meaning of any term in these Requests unclear, he shall assume a reasonable meaning, state what the assumed meaning is, and respond to the Request according to the assumed meaning.

3. If President Trump intends to refuse to answer any Request by reason of the attorney-client privilege, work-product doctrine, or other privilege, doctrine, or immunity, please provide a privilege log identifying all bases, factual and legal, upon which such protection from discovery rests. Please provide this log at the time you serve your responses to these Requests.

4. The following Requests shall be deemed continuing so as to require supplemental responses in the event that President Trump obtains additional knowledge or information responsive to the Requests.

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Admit that on July 26, 2017, President Trump stated via Twitter that: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

REQUEST FOR ADMISSION NO. 2:

Admit that on or before July 26, 2017, President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military[.]"

REQUEST FOR ADMISSION NO. 3:

Admit that, prior to the President's Twitter Statement, President Trump did not inform Secretary Mattis that the "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

REQUEST FOR ADMISSION NO. 4:

Admit that, prior to the President's Twitter Statement, President Trump did not inform General Joseph F. Dunford, Jr. that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

REQUEST FOR ADMISSION NO. 5:

Admit that, prior to the President's Twitter Statement, President Trump did not inform Lieutenant General H.R. McMaster that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

REQUEST FOR ADMISSION NO. 6:

Admit that President Trump did not inform Secretary Mattis that he would announce that "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" prior to doing so on July 26, 2017.

REQUEST FOR ADMISSION NO. 7:

Admit that President Trump did not inform General Joseph F. Dunford, Jr. that he would announce that "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" prior to doing so on July 26, 2017.

REQUEST FOR ADMISSION NO. 8:

Admit that President Trump did not inform Lieutenant General H.R. McMaster that he would announce that "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" prior to doing so on July 26, 2017.

REQUEST FOR ADMISSION NO. 9:

Admit that, between January 20, 2017, and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

REQUEST FOR ADMISSION NO. 10:

Admit that, between January 20, 2017, and July 26, 2017, General Joseph F. Dunford did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

REQUEST FOR ADMISSION NO. 11:

Admit that, between January 20, 2017, and July 26, 2017, no member of the Joint Chiefs of Staff recommended that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

REQUEST FOR ADMISSION NO. 12:

Admit that between January 20, 2017, and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

December 15, 2017

Respectfully submitted,

/s/ Daniel L. McFadden
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CERTIFICATE OF SERVICE

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Counsel for Defendants

/s/ Daniel L. McFadden
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EXHIBIT 3

Doe v. Trump, 17-cv-1597 (CKK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER, in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA, Defendants.[1]	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' FIRST SET OF REQUESTS
FOR PRODUCTION TO ALL DEFENDANTS

[1] Mark T. Esper has been substituted as the Secretary of the Army and Kirstjen Nielsen has been substituted as the Secretary of the Department of Homeland Security pursuant to Federal Rule of Civil Procedure 25(d).

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs Jane Doe Nos. 1 – 5, John Doe No. 1, Regan V. Kibby and Dylan Kohere hereby request that Defendants produce for inspection and copying the documents and things set forth in the Requests for Production ("Requests") below at the offices of Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Ave. NW, Washington, DC 20006, within 30 days from the date of service hereof, in accordance with Rule 34, the Local Rules of this Court, the Court's Scheduling and Procedures Order (ECF No. 71), and the Definitions set forth below.

DEFINITIONS

1. The term "Individual Defendants" shall refer to Defendants Donald J. Trump, James N. Mattis, Joseph F. Dunford, Jr., Mark T. Esper, Richard V. Spencer, Heather A. Wilson, Kirstjen Nielsen, and Raquel C. Bono.

2. The "Accessions Readiness Memorandum" shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services," dated May 8, 2017.

3. The "Accessions Deferral Memorandum" shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled "Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services," dated June 30, 2017.

4. The "DoD Initiative" shall refer to the request by the Department of Defense, responded to by John Doe 1, seeking to obtain information relating to transgender servicemembers.

5. The "Twitter Statement" shall refer to the statement issued by President Trump on twitter on July 26, 2017 that: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to

serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

6. The "Presidential Memorandum" shall refer to the memorandum issued by President Trump on August 25, 2017 titled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

7. The "Interim Guidance" shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled "Memorandum: Military Service of Transgender Individuals – Interim Guidance," dated September 14, 2017.

8. "Service Branch" shall refer to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

9. "CCC" shall refer to the Office of the Under Secretary of Defense for Personnel & Readiness Central Coordination Cell or any Central Coordination Cell organized within any Service Branch.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All documents identified in the responses to Plaintiffs' interrogatories.

REQUEST FOR PRODUCTION NO. 2: All documents on which Defendants intend to rely in support of any motion for summary judgment or intend to introduce as evidence in any trial in this matter.

REQUEST FOR PRODUCTION NO. 3: All documents reflecting or memorializing any oral communication identified in the responses to Plaintiffs' interrogatories.

REQUEST FOR PRODUCTION NO. 4: Any documents constituting, summarizing, reflecting, or evidencing communications from, to, between, or among any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 5: All agendas or minutes for any meetings attended by any of the Individual Defendants between July 26, 2017 and the present concerning: (a) the Twitter Statement; (b) the implementation of the Twitter Statement; (c) the drafting, contents, meaning, implications, or implementation of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Interim Guidance, or the Presidential Memorandum; or (d) military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 6: All documents concerning military service by transgender people provided to President Trump before July 26, 2017.

REQUEST FOR PRODUCTION NO. 7: All documents constituting, summarizing, reflecting, or evidencing communications between any member of the United States Congress (or staff member acting on his/her behalf) and President Trump or any individual within the Executive Office of the President concerning military service by transgender people between January 20, 2017 and July 26, 2017.

REQUEST FOR PRODUCTION NO. 8: Any documents generated by the Department of Defense or any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

REQUEST FOR PRODUCTION NO. 9: Any documents generated between June 30, 2016 and July 26, 2017 estimating costs by month or year incurred as a result of military service by transgender persons.

REQUEST FOR PRODUCTION NO. 10: All documents generated by or for any Service Branch(s) constituting or evidencing training sessions or training materials on the provision of health care to transgender servicemembers or servicemembers with gender dysphoria, including but not limited to, any Marine Corps training that occurred in 2016 and any tri-service training in 2016.

REQUEST FOR PRODUCTION NO. 11: Any documents constituting proposed amendments to Department of Defense Instruction 1300.28 issued in October 2016.

REQUEST FOR PRODUCTION NO. 12: Any documents constituting or evidencing any request for information, assessments, or evaluations of military service of transgender persons or of accessions by transgender persons sent by the Department of Defense between June 30, 2016 and the present to any Service Branch, and any documents constituting or evidencing any response to any such request.

REQUEST FOR PRODUCTION NO. 13: Any documents constituting or evidencing the DoD Initiative, including any requests for information, any reports of information, any summary of reports, and any de-identified reports relating to any service member.

REQUEST FOR PRODUCTION NO. 14: Any documents constituting, evidencing, reflecting, or discussing any request made by the Department of Defense to any Service Branch between June 30, 2016 and the present concerning the effect of open service by transgender persons on unit cohesion, readiness, or lethality.

REQUEST FOR PRODUCTION NO. 15: Any documents generated by the Department of Defense or any Service Branch between January 20, 2017 and the present discussing draft or planned policies, practices, or procedures for accessions of transgender applicants into military service, including any documents discussing the possible deferment of the date for beginning accessions of transgender applicants into military service.

REQUEST FOR PRODUCTION NO. 16: All non-final drafts of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

REQUEST FOR PRODUCTION NO. 17: All documents relied on by President Trump or any other person who participated in the drafting of the Presidential Memorandum to form the "judgment" that "the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."

REQUEST FOR PRODUCTION NO. 18: Documents sufficient to show the amount of "DoD or DHS resources" used to "fund sex reassignment surgical procedures for military personnel" before August 25, 2017.

REQUEST FOR PRODUCTION NO. 19: All documents relied on by any person in connection with the drafting of the Accessions Readiness Memorandum, Accessions Deferral Memorandum, Presidential Memorandum, or Interim Guidance.

REQUEST FOR PRODUCTION NO. 20: Any documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the "panel of experts" or among the "panel of experts" concerning service, inclusion,

or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes.

REQUEST FOR PRODUCTION NO. 21: Any documents provided to, considered by, or generated by the "panel of experts" referenced in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 22: Any documents constituting, describing, reflecting, or evidencing any "appropriate evidence and information" referred to in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 23: All documents specifically concerning each individual Plaintiff, including: (a) any comprehensive service records; (b) any documents evaluating or discussing the training, readiness, lethality, skills, promotion, or discipline of any Plaintiff; (c) any documents estimating, summarizing, or commenting upon costs spent to train any Plaintiff, including, without limitation, tuition bills from colleges or universities; (d) any documents commenting upon, observing, or assessing any Plaintiff's integration into their unit; (e) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for gender dysphoria for any Plaintiff; (f) any documents estimating, summarizing, or commenting upon estimates of the total cost of medical treatment for any Plaintiff for any condition other than gender dysphoria; and (g) any documents commenting upon, observing, or assessing cohesion of any unit in which any Plaintiff has served since June 30, 2016.

REQUEST FOR PRODUCTION NO. 24: Any documents constituting, reflecting, or evidencing any communications from or to a CCC, including between or among a CCC and any Individual Defendant or Service Branch, concerning the Interim Guidance or military service or accessions of transgender people, including any agenda or minutes of any meetings of or with a

CCC concerning or discussing the Interim Guidance or military service or accessions of transgender people.

REQUEST FOR PRODUCTION NO. 25: Any documents provided to, considered or generated by the CCC concerning the military service or accession of transgender persons.

December 15, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on December 15, 2017 by e-mail upon the following:

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Counsel for Defendants

/s/ Daniel L. McFadden
Daniel L. McFadden

EXHIBIT 4

Doe v. Trump, 17-cv-1597 (CKK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1 *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 17-cv-1597 (CKK)
	)	
DONALD J. TRUMP *et al*.,	)	
	)	
Defendants.	)	

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT DONALD J. TRUMP

Pursuant to Federal Rules of Civil Procedure 26 and 33 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served December 15, 2017.[1] In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 7 (of "DoD Initiative") to the extent that it is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information.

2. Defendants object to Plaintiffs' Definition 13 of "Document" as encompassing "without limitation . . . electronic files of all kind," insofar as data collection and translation are

[1] These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections and responses for other Defendants, as per the agreement between the parties.

appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

3. Defendants object to Plaintiffs' Definition 17 (of "State the Basis") to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 17, which applies to Interrogatories Nos. 6 and 7, seeks information related to "each and every Document," "each and every Communication," "the acts or omissions," *and* "any other information, facts, data, and research." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 235 F.R.D. 521, 524 (D.D.C. 2006) (finding that an interrogatory seeking "all facts supporting [a] contention," the identity of "each person who knew," and the identity of "all documents that support the contention" is "more accurately counted as three separate interrogatories"); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004) (An "obvious example" of a discrete subpart "is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred. Thus, a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories.").

General Objection to All Interrogatories

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. "At the threshold," it said, "the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827

("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions"). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was "not a routine discovery dispute." 542 U.S. 367, 385 (2004). The Court emphasized that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 385. The Supreme Court "has held, on more than one occasion, that '[t]he highest respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and

restraint" in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375–76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387–88 ("The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney*

instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege's "constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 ("The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and

deliberations."). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege "covers final and post-decisional material as well as pre-deliberative ones." *In re Sealed Case*, 121 F.3d at 745.

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

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at

384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

Specific Objections to Interrogatories to be Answered by Defendant Trump

Interrogatory No. 1:

State the date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege, or (b) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that "decided" is vague and ambiguous, as well as undefined by Plaintiffs.

Interrogatory No. 2:

Identify all Documents reviewed, relied upon, and/or considered by President Trump in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" on or before July 26, 2017.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 3:

Identify all information, facts, data, and research reviewed, relied upon, and/or considered by President Trump in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" on or before July 26, 2017.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 4:

Identify the "Generals and military experts" referenced in the Twitter Statement, and, for each such person, Identify all Communications between that person and President Trump concerning military service by transgender people.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 4 contains at least two discrete subparts: (1) a request to identify certain individuals, (2) a separate request to identify communications. *See U.S. ex rel. Pogue*, 235 F.R.D. at 527 (an interrogatory seeking facts, people, and documents was more accurately counted as three separate interrogatories).

Interrogatory No. 5:

Identify all Communications between President Trump and any other person concerning President Trump's decision that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" from January 20, 2017, to the present.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 6:

State the Basis for President Trump's assertion in the Twitter Statement that military service by transgender individuals would entail "tremendous medical costs."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the grounds that the basis for the President's decision is set forth in the August 25, 2017 Presidential Memorandum.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 17 of "State the Basis" seeks information related to "each and every Document," "each and every Communication," "the acts or omissions," *and* "any other information, facts, data, and research." Thus, this interrogatory contains four distinct subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an

answer will be counted as two interrogatories"); *U.S. ex rel.*, 235 F.R.D. at 524 (finding that an interrogatory seeking "all facts supporting [a] contention," the identity of "each person who knew," and the identity of "all documents that support the contention" is "more accurately counted as three separate interrogatories"); *Banks*, 222 F.R.D. at 10 (An "obvious example" of a discrete subpart "is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred. Thus, a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories.").

Interrogatory No. 7:

State the Basis for President Trump's assertion in the Twitter Statement that military service by transgender individuals would entail "disruption."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the grounds that the basis for the President's decision is set forth in the August 25, 2017 Presidential Memorandum.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 17 of "State the Basis" seeks information related to "each and every Document," "each and every Communication," "the acts or omissions," *and* "any other information, facts, data, and research." Thus, this interrogatory contains four distinct subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *U.S. ex rel. Pogue*, 235 F.R.D. at 524 (finding that an interrogatory seeking "all facts supporting [a] contention," the identity of "each person who knew," and the identity of "all documents that support the contention" is "more accurately counted as three separate interrogatories"); *Banks*, 222 F.R.D. at 10 (An "obvious example" of a discrete subpart "is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred. Thus, a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories.").

Interrogatory No. 8:

State whether President Trump received advice or counsel from any attorney in the process of deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military," and for each such attorney: (a) state the date the advice was communicated to President Trump; (b) state the subject matter of such

advice; (c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 8 contains at least two discrete subparts: (1) a line of questioning related to whether the President received advice from an attorney, including the date and subject matter of the advice (if any), and any communications containing such advice (if any); and (2) a separate question requesting the identity of all persons to whom the substance of this advice has ever been disclosed. *See In re ULLICO Inc. Litig.*, 2006 WL 2398744, at *2 (D.D.C. June 30, 2006) ("In analyzing whether a subpart is a separate question, the Court looks to whether the subpart introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it.") (citation and internal quotation marks omitted); *Banks*, 222 F.R.D. at 10 (explaining that a line of questioning asking "whether a particular product was tested" and "when the tests occurred, who performed them, how and where they were conducted and the result" would be one interrogatory, but "the moment the interrogatory introduces a new

topic that is a distinct field of inquiry," such as "asking how the results of the tests were used in any advertising about the product's fitness for a particular purpose," this new topic "would have to be viewed as a separate interrogatory").

Interrogatory No. 9:

State the "meaningful concerns" referenced in the Presidential Memorandum, and Identify all Documents and Communications relating to those concerns considered by President Trump prior to issuing the Presidential Memorandum and all persons who expressed those concerns to President Trump, including the specific "meaningful concern[]" articulated by each such person.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 9 contains at least three discrete subparts: (1) a request to identify the "meaningful concerns," (2) a separate request for documents and communications, and (3) a separate request to identify people and the "meaningful concerns" they articulated. *See U.S. ex rel. Pogue*, 235

F.R.D. at 527 (an interrogatory seeking facts, people, and documents was more accurately counted as three separate interrogatories).

Interrogatory No. 10:

Identify all Documents that are assessments, reports, evaluations, studies, or other research regarding the impact of military service by transgender individuals on military effectiveness and lethality, unit cohesion, or military resources considered by President Trump in preparing and issuing the Presidential Memorandum.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

President Trump's Specific Objections to Interrogatories to be Separately Answered by Defendants Trump, Mattis, and Dunford

Interrogatory No. 14:

Identify all Documents that are assessments, reports, evaluations, studies, or other research concerning military service by transgender people that were transmitted to, received by, or considered by President Trump from January 20, 2017, to July 26, 2017, and, for each such Document, Identify the person or Organization who transmitted it to President Trump and state the date(s) of transmission to and receipt by President Trump.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 15:

Identify all persons involved in drafting the Twitter Statement, including all persons who reviewed the statement or any draft thereof prior to its release to the public via Twitter and, for each such person, (a) state their role in drafting the statement; (b) state the date(s) of their participation in drafting the statement; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President further objects to this interrogatory as vague and overbroad to the extent that the phrase "all persons involved" could be construed to apply to individuals with mere

peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 15 contains at least two discrete subparts: (1) questionings relating to all persons involved in drafting the Twitter Statement, including their role in drafting and the date(s) of their participation, and (2) a separate request for documents reflecting such participation. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 16:

Identify all persons involved in drafting the Presidential Memorandum, including without limitation all persons who reviewed it or any draft thereof prior to its release to the public, and for each such person, (a) state their role in drafting the Presidential Memorandum; (b) state the date(s) of their participation in drafting the Presidential Memorandum; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 16 contains at least two discrete subparts: (1) questionings relating to all persons involved in drafting the Presidential Memorandum, including their role in drafting and the date(s) of their participation, and (2) a separate request for documents reflecting such participation. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 17:

For every meeting attended by President Trump, Secretary Mattis and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory as overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the references to "all participants in the meeting," "the topics discussed," "all Documents distributed, considered, or discussed," and "all Documents memorializing such meeting" could be construed to apply to individuals, topics, and documents with mere peripheral connections to the claims and defenses in this case. Any individuals, topics, or documents with mere peripheral connections to this case are not relevant or likely to lead to relevant information, and identifying all such individuals, topics, and documents would be excessively burdensome and disproportionate to the needs of the case.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least two discrete subparts: (1) information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 18:

Identify all Communications between a United States Senator or member of the United States House of Representatives, on the one hand, and President Trump or any officer or

employee of the Executive Office of the President, on the other, from January 20, 2017, to July 26, 2017, concerning military service by transgender persons.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

President Trump's Specific Objections to Interrogatories to be Separately Answered by All Defendants

Interrogatory No. 19:

Identify all Communications requesting or providing information between January 20, 2017, and August 25, 2017, concerning the military service and/or accession of transgender persons between or among the Executive Office of the President and any of the following: the Department of Defense, the Department of Homeland Security, and/or any Service Branch.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 19 contains at least three discrete subparts, as it is requesting information related to the Executive Office of the President's communications with (1) the Department of Defense, (2) Department of Homeland Security, and (3) each of the service branches.

Interrogatory No. 20:

Identify all Communications between President Trump and Secretary Mattis, the Department of Defense, General Dunford, the Joint Chiefs of Staff, the Department of Homeland Security, and/or any Service Branch from January 20, 2017, to August 25, 2017, concerning military service by transgender individuals, including Communications concerning: (a) any evaluation(s) conducted by the Department of Defense on the impact of accessions of transgender applicants on readiness or lethality; (b) the issuance of or assessments or other responses provided in response to Accessions Readiness Memorandum; (c) the decision announced in the Accessions Deferral Memorandum; (d) the President's Twitter Statement; (e) the Presidential Memorandum; and/or (f) the Interim Guidance.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 20 contains at least six discrete subparts, as it is requesting information related to the President's communications with (1) Secretary Mattis, (2) the Department of Defense, (3) General Dunford, (4) the Joint Chiefs of Staff, (5) the Department of Homeland Security, and (6) each of the service branches.

Interrogatory No. 21:

For every meeting attended by any representative of the Executive Office of the President, the Department of Defense, a Service Branch or the Defense Health Agency between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 21 contains at least two discrete subparts: (1) information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 22:

Identify all Documents that are assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning (a) the impact of transgender individuals serving in the military on military readiness and/or lethality; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all Documents" purports to require the President to search for and identify documents in any and all locations, regardless of whether (a) the documents are in his possession, (b) he has personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 22 contains three discrete subparts: (1) documents concerning the impact of transgender individuals serving in the military on military readiness and/or lethality, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See In re ULLICO Inc. Litig.*, 2006 WL 2398744, at *2 ("In analyzing whether a subpart is a separate question, the Court looks to whether the subpart introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it.") (citation and internal quotation marks omitted).

Interrogatory No. 23:

Identify all persons employed by or working in an SCCC at any time from June 30, 2016, to the present, and for each such person state the person's dates of employment or work in the SCCC, the person's role and title, and the nature of the person's responsibilities.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Interrogatory No. 24:

Describe the DoD Initiative, including, without limitation, the information sought and the manner in which the information was sought, and Identify all persons involved in the dissemination of the request for information pursuant to the DoD Initiative, all persons involved in the collection and reporting of responses to such request, and all persons responsible for reviewing submissions tendered to the Office of the Secretary of Defense in response to the DoD Initiative.

Specific Objections:

To the extent that this interrogatory is deemed to be properly directed to the President, the President makes the following objections. The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects on the grounds that Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information.

Interrogatory No. 25:

Identify all Documents that are (a) responses to any request for information that was part of the DoD Initiative, and/or (b) assessments submitted in response to the memorandum dated May 8, 2017, entitled "Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service."

Specific Objections:

To the extent that this interrogatory is deemed to be properly directed to the President, the President makes the following objections. The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects on the grounds that Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 25 contains two discrete subparts: (1) documents that are responses to any request for information that was part of the DoD Initiative, and (2) documents that are assessments submitted in response to the memorandum dated May 8, 2017, entitled "Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service." *See In re ULLICO Inc. Litig.*, 2006 WL 2398744, at *2 ("In analyzing whether a subpart is a separate question, the Court looks to whether the subpart introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it.) (citation and internal quotation marks omitted").

Dated: February 6, 2018

Respectfully submitted,

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Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

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/s/ *Ryan Parker*____
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EXHIBIT 5

Doe v. Trump, 17-cv-1597 (CKK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1 *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 17-cv-1597 (CKK)
	)	
DONALD J. TRUMP *et al*.,	)	
	)	
Defendants.	)	

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANT DONALD J. TRUMP

Pursuant to Federal Rules of Civil Procedure 26 and 36 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Admission to Defendant Donald J. Trump, served December 15, 2017. In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objection to Definitions

Defendants object to Plaintiffs' Definition 10 of "Document" and "Documents" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

General Objection to All Requests for Admission

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. "At the threshold," it said, "the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827

("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions"). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was "not a routine discovery dispute." 542 U.S. 367, 385 (2004). The Court emphasized that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 385. The Supreme Court "has held, on more than one occasion, that '[t]he highest respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and

restraint" in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375–76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387–88 ("The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney*

instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege's "constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 ("The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and

deliberations."). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege "covers final and post-decisional material as well as pre-deliberative ones." *In re Sealed Case*, 121 F.3d at 745.

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

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at

384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

Specific Objections to Requests for Admission

Request for Admission No. 1:

Admit that on July 26, 2017, President Trump stated via Twitter that: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection. The Defendants' answer to the complaint admitted, in paragraphs 80 and 81, that the President posted tweets on July 26, 2017.

Request for Admission No. 2:

Admit that on or before July 26, 2017, President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military[.]"

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) communications or information protected by the attorney-client privilege; (b) communications or information

protected by the deliberative process privilege; or (c) communications or information protected by the presidential communications privilege.

The President also objects on the grounds that "decided" is vague and ambiguous, as well as undefined by Plaintiffs.

Request for Admission No. 3:

Admit that, prior to the President's Twitter Statement, President Trump did not inform Secretary Mattis that the "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 4:

Admit that, prior to the President's Twitter Statement, President Trump did not inform General Joseph F. Dunford, Jr. that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 5:

Admit that, prior to the President's Twitter Statement, President Trump did not inform Lieutenant General H.R. McMaster that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 6:

Admit that President Trump did not inform Secretary Mattis that he would announce that "United States Government will not accept or allow Transgender individuals to serve in any

capacity in the U.S. military" prior to doing so on July 26, 2017.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 7:

Admit that President Trump did not inform General Joseph F. Dunford, Jr. that he would announce that "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" prior to doing so on July 26, 2017.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 8:

Admit that President Trump did not inform Lieutenant General H.R. McMaster that he would announce that "United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military" prior to doing so on July 26, 2017.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 9:

Admit that, between January 20, 2017, and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 10:

Admit that, between January 20, 2017, and July 26, 2017, General Joseph F. Dunford did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 11:

Admit that, between January 20, 2017, and July 26, 2017, no member of the Joint Chiefs of Staff recommended that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 12:

Admit that between January 20, 2017, and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Dated: February 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

EXHIBIT 6

Doe v. Trump, 17-cv-1597 (CKK)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1 *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 17-cv-1597 (CKK)
	)	
DONALD J. TRUMP *et al.*	)	
	)	
Defendants.	)	

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO SECRETARY MATTIS

Pursuant to Federal Rules of Civil Procedure 26 and 33 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to James N. Mattis, in his official capacity as Secretary of Defense, served December 15, 2017.[1] In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 7 (of "DoD Initiative") to the extent that it is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information.

[1] These objections and responses are limited to Secretary Mattis. Defendants will produce, or already have produced, separate objections and responses for other Defendants, as per the agreement between the parties.

2. Defendants object to Plaintiffs' Definition 13 of "Document" as encompassing "without limitation . . . electronic files of all kind," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

3. Defendants object to Plaintiffs' Definition 17 (of "State the Basis") to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 17, which applies to Interrogatory No. 12, seeks information related to "each and every Document," "each and every Communication," "the acts or omissions," *and* "any other information, facts, data, and research." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 235 F.R.D. 521, 524 (D.D.C. 2006) (finding that an interrogatory seeking "all facts supporting [a] contention," the identity of "each person who knew," and the identity of "all documents that support the contention" is "more accurately counted as three separate interrogatories"); *Banks*, 222 F.R.D. at 10 (An "obvious example" of a discrete subpart "is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred. Thus, a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories.").

Specific Objections and Responses to Interrogatories to be Answered by Defendant Mattis

Interrogatory No. 11:

Identify all persons who participated in the drafting of the Accessions Deferral Memorandum, including without limitation all persons who reviewed the memorandum or any draft thereof prior to its release, and, for each such person (1) state their role in drafting the Memorandum; (2) state the date(s) of their participation in drafting the Memorandum; and (3) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 11 contains at least two discrete subparts: (1) questionings relating to all persons involved in drafting the Accessions Deferral Memorandum, including their role in drafting and the date(s) of their participation, and (2) a separate request for documents reflecting such participation. *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 12:

State the Basis for Secretary Mattis' assertion in the Accessions Deferral Memorandum that "it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018]."

Specific Objections:

Secretary Mattis objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 17 of "State the Basis" seeks information related to "each and every Document," "each and every Communication," "the acts or omissions," *and* "any other information, facts, data, and research." Thus, this interrogatory contains four distinct subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 25 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *U.S. ex rel. Pogue*, 235 F.R.D. at 524 (finding that an interrogatory seeking "all facts supporting [a] contention," the identity of "each person who knew," and the identity of "all documents that support the contention" is "more accurately counted as three separate interrogatories"); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004) (An "obvious example" of a discrete subpart "is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred. Thus, a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories.").

Response:

Considering the responses from the Secretaries of the Military Departments and Chiefs of the Military Services to the Deputy Secretary of Defense's May 8, 2017 directive to assess their readiness to begin accessing transgender applicants into military service on July 1, 2017, *see* Response to Interrogatory No. 25, *below*, and after consulting with the Service Chiefs and Secretaries, Secretary Mattis concluded it was necessary to defer the July 1, 2017 accessions date for six months in order to evaluate more carefully the impact of transgender accessions on readiness and lethality and to ensure that he personally had the benefit of the views of the military leadership and senior civilian officials who were then arriving in the Department of Defense.

Interrogatory No. 13:

Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, concerning the Accessions Deferral Memorandum.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks

(a) communications or information protected by the attorney-client privilege;

(b) communications or information protected by the deliberative process privilege; or

(c) communications or information protected by the presidential communications privilege.

Secretary Mattis's Specific Objections and Responses to Interrogatories to be Separately Answered by Defendants Trump, Mattis, and Dunford

Interrogatory No. 14:

Identify all Documents that are assessments, reports, evaluations, studies, or other research concerning military service by transgender people that were transmitted to, received by, or considered by President Trump from January 20, 2017, to July 26, 2017, and, for each such Document, Identify the person or Organization who transmitted it to President Trump and state the date(s) of transmission to and receipt by President Trump.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 15:

Identify all persons involved in drafting the Twitter Statement, including all persons who reviewed the statement or any draft thereof prior to its release to the public via Twitter and, for each such person, (a) state their role in drafting the statement; (b) state the date(s) of their participation in drafting the statement; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis further objects to this interrogatory as vague and overbroad to the extent that the phrase "all persons involved" could be construed to apply to individuals with mere peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case.

Secretary Mattis objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 15 contains at least two discrete subparts: (1) questionings relating to all persons involved in drafting the Twitter Statement, including their role in drafting and the date(s) of their participation, and (2) a separate request for documents reflecting such participation. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 16:

Identify all persons involved in drafting the Presidential Memorandum, including without limitation all persons who reviewed it or any draft thereof prior to its release to the public, and for each such person, (a) state their role in drafting the Presidential Memorandum; (b) state the date(s) of their participation in drafting the Presidential Memorandum; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 16 contains at least two discrete subparts: (1) questionings relating to all persons involved in drafting the Presidential Memorandum, including their role in drafting and the date(s) of their participation, and (2) a separate request for documents reflecting such participation. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 17:

For every meeting attended by President Trump, Secretary Mattis and/or General Dunford between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory as overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the references to "all participants in the meeting," "the topics discussed," "all Documents distributed, considered, or discussed," and "all Documents memorializing such meeting" could be construed to apply to individuals, topics, and documents with mere peripheral connections to the claims and defenses in this case. Any individuals, topics, or documents with mere peripheral connections to this case are not relevant or likely to lead to relevant information, and identifying all such individuals, topics, and documents would be excessively burdensome and disproportionate to the needs of the case.

Secretary Mattis objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least two discrete subparts: (1) information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 18:

Identify all Communications between a United States Senator or member of the United States House of Representatives, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017, to July 26, 2017, concerning military service by transgender persons.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Secretary Mattis's Specific Objections and Responses to Interrogatories to be Separately Answered by All Defendants

Interrogatory No. 19:

Identify all Communications requesting or providing information between January 20, 2017, and August 25, 2017, concerning the military service and/or accession of transgender persons between or among the Executive Office of the President and any of the following: the Department of Defense, the Department of Homeland Security, and/or any Service Branch.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 19 contains at least three discrete subparts, as it is requesting information related to the Executive Office of the President's communications with (1) the Department of Defense, (2) Department of Homeland Security, and (3) each of the service branches.

Interrogatory No. 20:

Identify all Communications between President Trump and Secretary Mattis, the Department of Defense, General Dunford, the Joint Chiefs of Staff, the Department of Homeland Security, and/or any Service Branch from January 20, 2017, to August 25, 2017, concerning military service by transgender individuals, including Communications concerning: (a) any evaluation(s) conducted by the Department of Defense on the impact of accessions of transgender applicants on readiness or lethality; (b) the issuance of or assessments or other responses provided in response to Accessions Readiness Memorandum; (c) the decision announced in the Accessions Deferral Memorandum; (d) the President's Twitter Statement; (e) the Presidential Memorandum; and/or (f) the Interim Guidance.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 20 contains at least six discrete subparts, as it is requesting information related to the President's communications with (1) Secretary Mattis, (2) the Department of Defense, (3) General Dunford, (4) the Joint Chiefs of Staff, (5) the Department of Homeland Security, and (6) each of the service branches.

Interrogatory No. 21:

For every meeting attended by any representative of the Executive Office of the President, the Department of Defense, a Service Branch or the Defense Health Agency between January 20, 2017, and August 25, 2017, at which military service by transgender people was discussed, (a) state the date of the meeting; (b) Identify all participants in the meeting; (c) state the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis further objects to this interrogatory on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. During the relevant period, the Department of Defense and its components have conducted countless meetings throughout its various components and organizations ranging from informal meetings involving the leadership of particular units to high level policy meetings by Department of Defense leadership. For example, the military services conducted training of all of their uniformed and civilian employees regarding military service by transgender individuals and much of that training occurred during the date range provided in this interrogatory. Collecting the requested information for each meeting and each training session that occurred at facilities across the world would potentially require tens of thousands of hours of work from Department of Defense personnel. Moreover, information regarding the vast majority of these meetings is not relevant to Plaintiffs' claims, let alone proportionate to the needs of the case.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 21 contains at least two discrete subparts: (1) information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an

upcoming document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 22:

Identify all Documents that are assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning (a) the impact of transgender individuals serving in the military on military readiness and/or lethality; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all Documents" purports to require Secretary Mattis to search for and identify documents in any and all locations, regardless of whether (a) the documents are in his possession, (b) he has personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

Secretary Mattis objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of

discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 22 contains three discrete subparts: (1) documents concerning the impact of transgender individuals serving in the military on military readiness and/or lethality, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See In re ULLICO Inc. Litig.*, 2006 WL 2398744, at *2 (D.D.C. June 30, 2006) ("In analyzing whether a subpart is a separate question, the Court looks to whether the subpart introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it.") (citation and internal quotation marks omitted).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 23:

Identify all persons employed by or working in an SCCC at any time from June 30, 2016, to the present, and for each such person state the person's dates of employment or work in the SCCC, the person's role and title, and the nature of the person's responsibilities.

Response:

DoD Instruction 1300.28, paragraph 2.2., directs the Secretaries of the Military Departments and the Commandant, United States Coast Guard to establish a Service Central Coordination Cell (SCCC) to provide multi-disciplinary (e.g., medical, legal, military personnel

management) expert advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military and to assist commanders in the execution of Department of Defense, Military Department, and Service policies and procedures. The Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)) also established a Central Coordination Cell (OSD CCC) to provide expert advice and assistance to the Military Services as they stood up their coordination cells and to address policy questions and concerns that could not be resolved at the Military Services' level. The following individuals have supported the OSD CCC during the specified time frame:

Name	Role/Title	Dates	Responsibilities
Stephanie P. Miller	Director, Accession Policy, OUSD(P&R)	June 30, 2016 - present	Review questions and provide responses based on DoD policies and procedures
COL Lee Gearhart	Asst Dir, Reserve Accessions, Accession Policy, OUSD(P&R)	June 30, 2016 - July 2017	Review questions and provide responses based on DoD policies and procedures
LTC Aaron Wellman	Dep Dir, Reserve Accessions, Accession Policy, OUSD(P&R)	June 30, 2016 - Present	Review questions and provide responses based on DoD policies and procedures
LTC Gary Brown	Asst Dir, Res and Medical Manpower, Accession Policy, OUSD(P&R)	June 30, 2016 - Present	Review questions and provide responses based on DoD policies and procedures
Mr. Dave Gruber	Associate Dep GC, OUSD(P&R)	June 30, 2016 - Present	Review questions and provide responses based on DoD policies and procedures
Dr. Terry Adirim	Acting PDASD-Health Affairs, OUSD(P&R)	April 2017 - Present	Review questions and provide responses based on DoD policies and procedures
Dr. Andrew Findley	Program Manager – Health Affairs, OUSD(P&R)	May 2017 - Present	Review questions and provide responses based on DoD policies and procedures

Interrogatory No. 24:

Describe the DoD Initiative, including, without limitation, the information sought and the manner in which the information was sought, and Identify all persons involved in the dissemination of the request for information pursuant to the DoD Initiative, all persons involved in the collection and reporting of responses to such request, and all persons responsible for reviewing submissions tendered to the Office of the Secretary of Defense in response to the DoD Initiative.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects on the grounds that Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information.

Interrogatory No. 25:

Identify all Documents that are (a) responses to any request for information that was part of the DoD Initiative, and/or (b) assessments submitted in response to the memorandum dated May 8, 2017, entitled "Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service."

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects on the grounds that Plaintiffs' Definition of the term "DoD Initiative" is vague, not confined to any specific time period, and presumes that DoD had a formal "initiative" to solicit information.

Secretary Mattis objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 25 contains two discrete subparts: (1) documents that are responses to any request for information that was part of the DoD Initiative, and (2) documents that are assessments submitted in response to the memorandum dated May 8, 2017, entitled "Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service." *See In re ULLICO Inc. Litig.*, 2006 WL 2398744, at *2 ("In analyzing whether a subpart is a separate question, the Court looks to whether the subpart introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it.") (citation and internal quotation marks omitted).

Response:

The information responsive to subpart (b) of this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs

in an upcoming document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Dated: February 6, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker
RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

ATTACHMENT A

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: 2 Feb. 2018

Signature: Stephanie P. Miller

STEPHANIE P. MILLER

CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2018, a copy of the document above was served by email on the following:

Alan E. Schoenfeld
WILMER CUTLER PICKERING
HALE &DORR LLP
7 World Trade Center
250 Greenwich St.
New York, New York 10007
Telephone: 212-230-8800
Fax: 212-230-8888
Email: Alan.Schoenfeld@wilmerhale.com

Claire Laporte
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Telephone: 617-832-1000
Fax: 617-832-7000
Email: CLL@foleyhoag.com

/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

EXHIBIT 7

Doe v. Trump, 17-cv-1597 (CKK)

From: McFadden, Daniel L
To: [redacted]
Cc: Alan Schoenfeld; Laporte, Claire; Enlow, Courtney D. (CIV); Parker, Ryan (CIV)
Subject: RE: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597
Date: Friday, February 09, 2018 4:18:59 PM

Chambers of Judge Kollar-Kotelly,
Plaintiffs believe the two issues in dispute are, in summary:
(1) Whether the Defendants should be compelled to provide privilege-log type information (*e.g.*, the existence of a communication, its date, and the identity of the participants) for communications with the President and/or the Executive Office of the President about transgender military service (including the identity of the "Generals and military experts" disclosed in the tweets), or whether such disclosure is blocked by the assertion of the qualified presidential communications privilege; and
(2) Whether the Defendants should be compelled to produce Department of Defense communications concerning transgender military service between the date the President announced his decision to ban transgender individuals from service, July 26, 2017, and his issuance of implementing guidance in a Presidential Memorandum on August 25, 2017, or whether such disclosure is blocked by the assertion of the qualified deliberative process privilege. Plaintiffs contend that such communications are post-decisional.
Respectfully submitted,
Dan McFadden

Daniel McFadden | Associate

FOLEY HOAG LLP
Seaport World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210-2600

617 832 1293 phone
617 832 7000 fax

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From: [redacted] **On Behalf Of** Kollar-[redacted]
Sent: Friday, February 9, 2018 3:36 PM
To: McFadden, Daniel L
Cc: Alan Schoenfeld ; Laporte, Claire ; Enlow, Courtney D. (CIV) ; Parker, Ryan (CIV)
Subject: Re: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597

Counsel,

The Court will set up a teleconference about the discovery dispute, and will ask that letter briefs be submitted prior to the conference. Before setting a schedule, however, can you very briefly identify the topic of the dispute(s)?

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
[redacted]

From: "McFadden, Daniel L" <DMcFadden@foleyhoag.com>
To: [redacted]>
Cc: Alan Schoenfeld <Alan.Schoenfeld@wilmerhale.com>, "Laporte, Claire" <CLL@foleyhoag.com>, "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>

Date: 02/09/2018 01:54 PM
Subject: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597

Chambers of Judge Kollar-Kotelly,

I am counsel for the Plaintiffs in *Doe v. Trump*, Case No. 1:17-cv-01597, and have included Defendants' counsel on this email. A dispute has arisen in our case regarding certain discovery matters. The parties have conferred in good faith but have not been able to resolve the dispute. Pursuant to the instructions in the Scheduling and Procedures Order entered in this case, ECF No. 71, I am contacting chambers to request a telephone conference with the Court.

Plaintiffs are prepared to submit a letter in advance of such conference outlining the issues in dispute, if the Court so orders.

Respectfully submitted,
Dan McFadden

Daniel McFadden | Associate

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EXHIBIT 8

Doe v. Trump, 17-cv-1597 (CKK)

From: [redacted] on behalf of [redacted]
To: McFadden, Daniel L
Cc: Alan Schoenfeld; Laporte, Claire; Courtney.D.Enlow@usdoj.govCourtney.D.Enlow
Subject: RE: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597
Date: Friday, February 09, 2018 4:45:38 PM

Counsel,

The Court will hold a teleconference with the parties on the record on **Tuesday, February 13, 2018** at **2:30 pm** to discuss this discovery dispute. The parties shall jointly call chambers at the number below. In order to be able to have an informed discussion, each party shall e-mail the Court a brief (no more than 2-3 pages) letter setting forth their positions and any legal support for those positions, by no later than **Monday, February 12, 2018** at **noon**.

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
[redacted]

From: "McFadden, Daniel L"
To: [redacted]
Cc: Alan Schoenfeld , "Laporte, Claire" , "Enlow, Courtney D. (CIV)" , "Parker, Ryan (CIV)"
Date: 02/09/2018 04:18 PM
Subject: RE: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597

Chambers of Judge Kollar-Kotelly,

Plaintiffs believe the two issues in dispute are, in summary:

(1) Whether the Defendants should be compelled to provide privilege-log type information (*e.g.*, the existence of a communication, its date, and the identity of the participants) for communications with the President and/or the Executive Office of the President about transgender military service (including the identity of the "Generals and military experts" disclosed in the tweets), or whether such disclosure is blocked by the assertion of the qualified presidential communications privilege; and

(2) Whether the Defendants should be compelled to produce Department of Defense communications concerning transgender military service between the date the President announced his decision to ban transgender individuals from service, July 26, 2017, and his issuance of implementing guidance in a Presidential Memorandum on August 25, 2017, or whether such disclosure is blocked by the assertion of the qualified deliberative process privilege. Plaintiffs contend that such communications are post-decisional.

Respectfully submitted,
Dan McFadden

Daniel McFadden | Associate

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From: [redacted] **On Behalf O** [redacted]
[redacted]
Sent: Friday, February 9, 2018 3:36 PM
To: McFadden, Daniel L
Cc: Alan Schoenfeld ; Laporte, Claire ; Enlow, Courtney D. (CIV) ; Parker, Ryan (CIV)
Subject: Re: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597

Counsel,

The Court will set up a teleconference about the discovery dispute, and will ask that letter briefs be submitted prior to the conference. Before setting a schedule, however, can you very briefly identify the topic of the dispute(s)?

Thank you.

Chambers of the Hon. Colleen Kollar-Kotelly
United States District Judge
United States District Court for the District of Columbia
[redacted]

From: "McFadden, Daniel L" <DMcFadden@foleyhoag.com>
To: [redacted]
Cc: Alan Schoenfeld <Alan.Schoenfeld@wi merhale.com>, "Laporte, Claire" <CLL@foleyhoag.com>, "Parker, Ryan (CIV)" <Ryan.Parker@usdoj.gov>, "Enlow, Courtney D. (CIV)" <Courtney.D.Enlow@usdoj.gov>
Date: 02/09/2018 01:54 PM
Subject: Discovery Dispute in Doe v. Trump, Case No. 1:17-01597

Chambers of Judge Kollar-Kotelly,

I am counsel for the Plaintiffs in *Doe v. Trump*, Case No. 1:17-cv-01597, and have included Defendants' counsel on this email. A dispute has arisen in our case regarding certain discovery matters. The parties have conferred in good faith but have not been able to resolve the dispute. Pursuant to the instructions in the Scheduling and Procedures Order entered in this case, ECF No. 71, I am contacting chambers to request a telephone conference with the Court.

Plaintiffs are prepared to submit a letter in advance of such conference outlining the issues in dispute, if the Court

so orders.

Respectfully submitted,
Dan McFadden

Daniel McFadden | Associate

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EXHIBIT 9

Doe v. Trump, 17-cv-1597 (CKK)

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, et al., Plaintiffs, vs. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants.	Case Number 17-cv-1597 Washington, D.C. Tuesday, February 13, 2018 2:33 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	PAUL WOLFSON, ESQ. KEVIN LAMB, ESQ. Wilmer, Cutler, Pickering, Hale & Dorr, LLP 1875 Pennsylvania Avenue Northwest Washington, D.C. 20006 202-663-6000
	DANIEL McFADDEN, ESQ. Foley Hoag, LLP 155 Seaport Boulevard Boston, Massachusetts 02210
For the Defendants:	RYAN PARKER, ESQ. ANDREW CARMICHAEL, ESQ. U.S. Department of Justice P.O. Box 883 Washington, D.C. 20044 202-514-4336
Official Court Reporter:	SARA A. WICK, RPR, CRR U.S. Courthouse, Room 4704-B 333 Constitution Avenue Northwest Washington, D.C. 20001 202-354-3284

Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURT: This is Judge Kotelly. Good afternoon.

MR. WOLFSON: Good afternoon, your Honor. This is Paul Wolfson, counsel for the plaintiffs, and with me on the line are Kevin Lamb and Daniel McFadden.

THE COURT: Let me call the case, and then defense counsel can identify themselves. This is Jane Doe, et al., versus Donald Trump, et al., 17-cv-1597.

So for the plaintiff, we have Paul Wolfson, Kevin Lamb, Daniel McFadden. And for the defendants, who do we have on the phone?

MR. PARKER: Good afternoon, your Honor. This is Ryan Parker, and with me I have Andrew Carmichael.

THE COURT: Thank you. We've set this up for a discovery dispute around the issue of the transgender in the military.

Let me indicate that what I am going to do is sort of set things out as I understand them. I will then call on you. If I say "plaintiffs' counsel" or "defendants' counsel," please give me your last name -- we do have a court reporter; so there will be a record -- so we ascribe the comments to the correct people.

What I would ask is that you not talk at the same time. There may be instances where I've decided that I want to move to another issue, and I may interrupt you. Please listen to me if I do that so we can move on. I will let you add additional

comments at the end.

So this is related to the discovery that plaintiff has propounded, and I would say it falls into a couple of categories. One is the -- contours the scope of the presidential communications privilege, and there are some subsections to that, and then the other is the deliberative predecisional privilege.

So let me start with the presidential communications privilege. And before I ask that, I would like to just ask one comment. In terms of -- let me start with just documents, which I believe the documents appear to be requests from the Executive Office of the President. Were any documents actually provided? And it can be either plaintiff counsel or defendant.

MR. PARKER: Your Honor, this is Mr. Parker for defendants.

Discovery requests were served on the White House. The White House provided objections to the discovery requests and provided the plaintiffs with a privilege log but did not actually provide any documents.

THE COURT: Okay.

MR. WOLFSON: Your Honor, this is Paul Wolfson for the plaintiffs.

If I may just add --

THE COURT: Sure.

MR. WOLFSON: -- that that's correct. However, in

addition, there were document requests and interrogatories sent to other defendants, including Secretary Mattis at the services. And that is just some of those. There was also a claim of presidential communications privilege. And in addition, our requests as to which there were objections cover interrogatories, as well as document requests.

THE COURT: All right. So let me move back to -- I think in terms of the White House itself, it sounded as if it was mostly interrogatories that you were requesting.

Is that correct, Mr. Wolfson?

MR. WOLFSON: No. I mean, there certainly are interrogatories, but we also did request documents -- we also did do request documents, and I believe those document requests are an exhibit that we supplied.

THE COURT: What I was trying to figure out is whether it's the same as the request to the Executive Office of the President, or the White House decided to have the Executive Office of the President answer it, respond to it?

MR. WOLFSON: I think maybe the defendants might be better able to answer that.

THE COURT: All right. Mr. Parker, what I'm trying -- I've had an opportunity to look at it, but it's a fairly complex matter. So I'm just trying to get a sense of whether we're discussing interrogatories, which in some form -- document requests, sometimes you do Vaughn-type, or you can do privilege

logs. Interrogatories are usually based on just simply objections.

So I was trying to figure out, for the White House, whether you shifted your document requests to the Executive Office of the President to respond to these and the White House came back with the objections to the interrogatories.

MR. PARKER: Your Honor, this is Mr. Parker.

To answer your question, the plaintiffs served discovery, both interrogatories, document requests, and also requests for admission, on the defendant, President Trump.

THE COURT: Right.

MR. PARKER: And President Trump served objections to all three of those requests for discovery and also, in response to the request for the production of documents, provided a privilege log consistent with this Court's order that the parties provide a privilege log two days after responding to requests for the production of documents.

And so the president responded with objections to each of the three sets of discovery the plaintiffs served and also served a privilege log two days afterwards, two business days afterwards.

THE COURT: Okay. And that privilege log is the privilege log that was in Exhibit E, or is it something else?

MR. PARKER: Your Honor, I believe that Exhibit E is a copy of the privilege log that was served by the president, yes.

THE COURT: Okay. All right. I was just trying to figure out in terms of discussing what you actually provided up front. And some of this may be not all at issue and, I'm thinking, can be narrowed down some.

The first question seems to be, is there a presidential communications privilege that is absolute, that precludes providing any information such as the existence of any communications, parties to the communications, date/time, subject matter, if it's in answer to an interrogatory, or documents, identifying the document.

Looking at the cases which you have cited, the D.C. Circuit, U.S. Supreme Court, it's not an absolute privilege, and there's no rule in these cases that you don't have to give any information. And it looks like in these cases that, I'll call it, bare-bones information without any content can be provided and actually was provided.

So it doesn't seem to me there's an absolute privilege. On the other hand, there's a presumptively privileged, if you assert it, but it can be tested.

So it seems to me that I don't think you can just simply say this is covered by the presidential communications privilege and that's the end of it, the discussion. So I think we need to move the discussion to how does one determine whether or not the privilege has been appropriately asserted.

And, I guess, one of the ways, as far as I can tell, you,

the defendant, have simply taken the position of, you know, it's an absolute privilege, as far as I can tell in terms of the way you've responded to it.

Plaintiff, on the other hand, has requested somewhat of a Vaughn-type privilege log that would indicate the assertions of presidential communications privilege.

Now, I did look at one of the exhibits in terms of the documents, and there's really only one set that I could see in the back where -- hold on. Let me just get this out. So E was the privilege log as to the documents, and the last page really gets into what's being asserted as the presidential communications privilege. The rest of it seems to be other kinds of work product, deliberative process, et cetera.

But let's focus on interrogatories at this point. As far as I can tell, there's just been objections without any information that's been provided. It does seem to me that some information needs to be provided for the Court to determine whether, you know, the communications you're talking about merit being called presidential communications and that they're privileged. I mean, there's a presumption, but it's not an absolute presumption.

And so in terms of the manner in which to test this, I would be interested in hearing from the parties how you plan -- what you would propose.

So let me start with the defendant. As a practical matter,

you can't just simply say we're asserting it, that's it. There's no way for me to determine whether you're right. Presumptive, yes, but not absolute.

So I do have a suggestion as to a method to test this.

MR. PARKER: Thank you, your Honor. This is Mr. Parker for the defendants.

Let me address your question with a couple of different answers. First of all, we think that there are multiple issues raised by the service of discovery on the president. The first is that he is not the proper subject of discovery. Under the Supreme Court's decision in Mississippi v. Johnson and Franklin versus Massachusetts, we don't think that he is properly subject to discovery in this case.

Moreover, under the Supreme Court's decision in Cheney versus U.S. District Court, we think that the Court should, before requiring the executive to assert privilege and before putting the executive and judicial branches on a collision course, as the Court in Cheney said, should look for opportunities to avoid requiring the executive to actually assert presidential privilege, like the presidential communications privilege.

In this case we think, first of all, that the president is not a proper defendant, but that there are also other ways that the Court could avoid requiring the executive from asserting privilege.

First of all, there is discovery ongoing from the other defendants in the case, from the Department of Defense, from the Army, the Navy, and the Air Force. And in our view, this dispute is premature. Plaintiffs should be required to wait until they receive the discovery from the other defendants to see whether discovery from the president is even necessary.

THE COURT: Okay. Let me stop you there. Hold on.

So let me hear from the plaintiffs. Have you received any discovery from the other defendants, and if you have not, when do you expect to?

MR. WOLFSON: Thank you, your Honor. This is Mr. Wolfson for the plaintiffs.

So we have received some discovery from the plaintiffs -- from the defendants and are receiving some. But for this particular issue, the defendants have raised the presidential communications privilege, not just for communications that come from the Office of the President or the White House, but also from communications that are in the possession of all the other defendants, you know, Secretary Mattis of the services.

So Mr. Parker says we should exhaust our other avenues. But we have done. We have gone to the other defendants and have asked them to provide the same interrogatory answers or, you know, similar document requests, and they have raised the privilege and refused to provide the information on those grounds.

So there's really nowhere else for us to go to obtain the kind of information that we're seeking, not to mention some of the communications -- some of the log information may be not from within the services or the Defense Department but from outside or members of Congress and the like.

THE COURT: Hold on.

So Mr. Parker, if they made the effort to get the same kinds of documents from these other defendants and they are asserting the same privilege, I don't see how this is going to work as they're getting the information from alternates. Which I agree, Cheney says you try and get it from other entities before you escalate it to the president. But if the presidential communications privilege is being asserted by all of the defendants, whether it's President Trump or whether it's any of the others, so that the same documents are being -- no matter where the source is, that privilege is being asserted, it does seem to me that they've taken the first step of doing alternates.

Wouldn't you agree?

MR. PARKER: Your Honor, I would not agree in this instance. So defendants are cooperating in discovery. We have already produced over 68,000 pages of documents, and we continue to produce documents. We have provided three witnesses for depositions. We have dozens of additional witnesses -- or additional depositions scheduled between the two parties in the

coming months, including multiple government officials who are likely to have relevant information, information relevant to plaintiffs' claims.

And so our position would be that, under Cheney, the plaintiff should take discovery, should continue reviewing the documents, should take the depositions, and should exhaust all other avenues before seeking discovery from the White House.

In addition, I would add that the scope of the issues that plaintiffs are raising here is relatively narrow. What they have asked for in these interrogatories is the communications about the military service by transgender individuals that occurred between individuals at the White House and individuals at the different defendant offices, the Department of Defense, the Army, the Air Force.

And so they really are asking for substantive conversations between the defendants and the White House. And that's a very narrow area, and plaintiffs should have to take all the other discovery that they can take and then show that they would need this type of discovery.

In addition, as I mentioned --

THE COURT: Let's stop there. Excuse me.

Plaintiffs, what do you want to respond to that?

MR. WOLFSON: Thank you, your Honor. This is Mr. Wolfson.

I guess my response goes back to what we've said before,

which is we've already asked for the information, and they've asserted the privilege. And so I don't know where else we could go to obtain the kind of information that we are looking at.

I mean, our requests here are narrow. We are focusing on -- you know, this is not like Cheney where the District Court, at least as the Supreme Court presented the case, allowed the defendants to take discovery of everything under the sun and didn't put any bounds on discovery at all and so forth and said, you know, there should be a more narrow discovery before the vice president was required to assert privilege.

Here, we have presented the defendants with, we think, pretty focused interrogatories and document requests. And they have already -- they have asserted privilege. So there's not really anywhere to go from here, except the next step, from our perspective, is to get the sort of Vaughn index information, as the Court said.

THE COURT: Let me stop you there. Excuse me.

So if I understand your argument, what you're saying is the narrow area of the focus of the ones that are at issue with the White House, you've asked for that type of information from the other defendants, and they have consistently across the board asserted the presidential communications privilege, step number 1.

Number 2, the other discovery they're talking about, the witness depositions and everything else, do they relate to

those -- to that narrow focused material information, or is that about other types of information?

MR. WOLFSON: It's really about other information. Obviously, we've asked for various kinds of information. But they haven't provided us with anything that goes to, you know, this particular question that we are looking at here.

THE COURT: Okay. Let me get back to defense counsel. So you've indicated they've done all this other discovery. If the other discovery covers other topics and the discovery that they've narrowly focused on from the period of the tweet to the memorandum in terms of the information and they've asked the same question of all of the other defendants and they've all uniformly asserted the same thing and they're not asking for that information in the rest of the discovery, from the depositions or the other document requests, have they not at that point exhausted it?

I mean, you're assuming that the -- obviously, we have a disagreement here. You're assuming there are other requests that are going to answer this. It doesn't sound like it.

MR. PARKER: Well, your Honor, I'm not assuming that their other requests are going to provide them with information regarding White House communications. I think that, as far as communications between the president -- substantive conversations that the president has had with individuals, the defendants have consistently asserted privilege.

What I am asserting, though, is that the defendants could receive information and evidence that they could use in place of that information. And it's not clear to us why they would need communications between the president and his advisors and why there isn't other evidence that could be --

THE COURT: Okay. Sir, let me stop you there. Tell me what they've requested. You seem to feel very firmly that somehow other evidence is going to provide them with the information that they've requested, which is the information in terms of what's happened -- it's basically, we're talking about a log. So we're not talking about actually handing anything over at this point. We're all talking about identifying the information that you have.

You've indicated -- you've taken the position, it seems to me, or almost the position that it's an absolute privilege, and that's not correct. So it's presumptively privileged, I fully agree, but in terms of -- that presumption can be tested.

So what we are talking about is providing enough information to be able to determine that yes, the presidential communication privilege does apply to this material and they simply don't get it. But you're indicating that somehow questions they've asked about in other parts of the discovery is going to answer what they've asked for in this. This is very narrowly focused. I've looked very quickly at some of the rest of it. It doesn't talk about the same things. They're asking

for different things.

If you can point to something they've asked for to the other defendants that would in some way answer the same question, I would be happy to hear it, since you seem to think that somehow gathering it from the rest -- because asking the same type of questions, the same assertion has been made.

So if you're claiming somehow lurking in the rest of their questions they're going to get this information, it doesn't sound like it. And you can't point to me -- they've indicated that it's pursuing other discovery avenues, it's not pursuing this.

And as I said, all we are talking about is some sort of a log of some sort, whether it's in camera for the Court to look at, narrowly tailored to see whether this presumption appears to apply or not. In other words, is the presumption -- is it something that cannot be rebutted or overcome.

As I said, we're not talking about handing anything over. We're talking about having more information than what we have now, which is basically just a blanket assertion, but to have something more that could test it.

You're claiming, and I agree, Cheney says they have to get it out of all the other discovery. That's sort of like -- there's three levels of people in Cheney. There's other people that would have the same information, and you could ask for it. Here, they've asked for it, and the same privilege has been

asserted.

And if they're pursuing different avenues of discovery with everybody else, I don't see how that's going to be helpful or how that would comply or meet what really Cheney was saying about pursuing. In other words, if you had somebody less than the vice president but who would have all of the information, then you would get it from that person and not the vice president.

Here, we're not talking about that. This privilege is being asserted across the board for the narrow area that they're asking for.

So I don't see -- you keep saying they should wait until they get the discovery. If the requests to the discovery to the other defendants doesn't cover this -- because you've asked for this, and they've said no -- and the rest of it doesn't relate to that, I don't see why you would be expecting for them to go through it and somehow hope that they slip up and provide some additional information. I mean, it's clear the focus is on different things. The focus that they did with the interrogatories to the president, you've asserted it across the board.

So unless you can point out something that they're getting in their discovery requests because you know what they are that would somehow answer it in another way and not have it be at least the presidential communications privilege, I think they've

gone as far as they can with that. And we should get back to, is there some narrow way of providing the Court with some information to be able narrowly to figure out whether this is going to be rebutted or not.

So Mr. Parker, where is the other evidence? You know what the requests are, the other discovery requests. Is there anything in there that's going to give them these answers?

MR. PARKER: Thank you, your Honor.

Your Honor posed a number of questions there, and I will try to answer them in order, starting with the one most recently asked.

So the defendants' position is not that plaintiffs are going to receive information about substantive communications that the president has had regarding transgender -- military service by transgender individuals. The defendants have asserted privilege over that consistently and intend to do so going forward.

The point that I am trying to make is that it's unclear why plaintiffs need that information and that they won't receive other information through discovery that could be used in the place of that information.

THE COURT: Such as what?

MR. PARKER: The plaintiffs are --

THE COURT: You keep saying that, and that's a very generalized statement. Now, you know what they're looking at.

Plaintiffs can articulate it. But you know what they're looking at and what kind of information that's there.

Tell me what you think the rest of this is going to answer it. You make a generalized statement.

MR. PARKER: Your Honor, we are providing a number of government officials for depositions, and I think -- our position is that they could provide information that plaintiffs may be able to use in lieu of information regarding presidential communications.

I do not know specifically how plaintiffs intend to use that information or what their intent is. And so it's difficult for me to say, in the abstract, what information they would use.

It's not clear to me -- as we mentioned at the beginning of the call, our position actually is that the president is not a proper defendant here and is not subject -- and is not properly subject to discovery. And so --

THE COURT: I know that's -- excuse me. I know that's your position, but you're going around in circles, and it's not going to help me.

So let me ask Mr. Wolfson, what is the purpose of the information that you are asking for, and would, say, the depositions of those that they've offered, would that provide you with anything that would answer what you're requesting?

MR. WOLFSON: Thank you, your Honor.

Let me say, the information that we are seeking really has

two purposes. The first is, as the Court was already kind of exploring, is information to test the government's claim of presidential privilege on these issues, you know. We've received very little, only the very generalized ones on the documents and nothing on the interrogatories. And so to test whether a privilege is covered at all, we need to kind of log index -- log information that we've discussed.

But there is another reason why this information is independently important to us, which is, it sheds a light on the process by which the president arrives at his decision to ban transgender military service as reflected in the tweet.

And that's for two reasons. First of all, the government has defended that decision as a part of a robust and deliberative process drawing on military expertise, and second, the president himself said in the tweet that he consulted with generals and with military experts.

So what process occurred before the -- and I'm not talking about substance. I'm not talking here about -- even talking about who recommended what to whom. But just what process occurred and who participated in that process has been placed at issue in the case and is important to evaluate what -- you know, what significance should be -- or what deference or what significance should be owed to the president's sort of statement that he consulted with experts in issuing the tweet.

So there's two aspects of this. In terms of could we get

it elsewhere, I mean, I fully expect that if we asked the same questions that we've asked in the interrogatories and in the discovery requests at a deposition, you know, did you talk to the president, who, to your knowledge, communicated with the president, without even asking what the substance of those communications would be, I have full confidence that the government will assert the privilege at those depositions and will refuse to allow the witnesses to answer. And I wouldn't expect Mr. Parker to say any differently.

THE COURT: Mr. Parker, you've now heard what they're interested in, which is not the content. What they're interested in is the process of how the decision was made and who participated in it, without getting at all into who said what or who recommended or didn't recommend anything.

And they're not going to get it in other discovery. That's quite clear. Whether it's the president you ask or whether you ask all these other people, even if you went and decided we will not ask it of the president, we will ask it of Mattis, Mattis is going to say exactly the same thing. He's not the president. He's less than the president. And therefore, sort of like the Cheney case, it's below the vice president, but he's still going to assert the same presidential communication privilege.

So it seems to me, if he's not the right defendant, even the other defendants who are there and presumably would have knowledge of this -- after all, he's in charge of the military,

not Trump, our president, but Mattis is. So you would expect that he would know.

Then even if you went down and asked other defendants, individual defendants who would be expected to know, they're going to assert the same privilege.

So I don't see two arguments working very well, at least at this point. One, that the president is the wrong one, because nobody is going to answer the question, in terms of doing something else, and two, it doesn't seem to me that you're going to get this information from the other discovery. The other discovery is focused on other things.

What they're interested in is what process was followed and who participated in it. Did Mattis participate in it? Did somebody else participate in it? Was it strictly White House people who participated in it? Who, without getting into anything further.

So I think your argument that he's not the proper defendant, there are other defendants that are in here who cannot be in the position of the president, but they're also asserting it. So you're not getting -- even if you looked at only Mattis, he still isn't going to provide it.

So I think suggesting you can't ask the president, ask somebody else isn't going to work because they're going to say the same thing, and you're not going to get it from any other discovery, which might be true in Cheney and some other cases,

but it's not true.

I would also indicate that in the cases -- and I don't have them all right in front of me. But none of the cases -- all of the cases provided something, even in the presidential communication privilege context. They provided some sort of information, bare-bones as it might be in terms of not giving much information, but certainly enough -- it would have answered, from the defendants' -- from the plaintiffs' perspective, the process in terms of who was consulted and when, without anything else.

So you know, you're pushing two things that at least at this point aren't convincing me. One, we can't ask the president, but there doesn't appear to be anybody else you can ask either, because it's all going to be asserted. And two, somehow it's going to come out in some other -- and answer this question in some other way. It's not going to, because it appears that everybody who might have participated in this is going to assert the same privilege.

So we're back to is there a way, it seems to me, to provide some information, bare-bones as it is, that not necessarily would answer the question but at least would provide some background or some information to support that this truly is the presidential communication privilege, it's asserted correctly.

If it's asserted correctly, presumptively, then it applies. But you've set it up in such a way that there's no way to test

it, and that's not really supported in the cases.

MR. PARKER: Your Honor, this is Mr. Parker. I'm happy to respond to your questions.

Let me just begin by pointing out that plaintiffs' counsel said that one of the reasons he wants this information is to shed light on the president's decisionmaking process. That was also a line from the letter submitted to the Court, that the plaintiffs are looking to take discovery of the president's decisionmaking process.

But the D.C. Circuit, in in re: Sealed case, 121 F 3rd 729, specifically stated that the presidential privilege applies to protecting that process. And here's the quote from the Court: The president can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations and that the president believes should remain confidential. Plaintiffs are trying to use discovery to probe at the very heart of what the presidential communications privilege protects.

And with regard to the second --

THE COURT: Let me interrupt you one second. So it's your view that, for instance, indicating who was consulted, with nothing more, is covered by it?

Because what I'm trying to figure out is, you don't seem to be disputing with me that it's not absolute. On the other hand, you don't seem to be indicating that there's any information

that you would be willing to give that would at least provide the Court with an opportunity to see whether this is an appropriately asserted communication privilege.

I mean, you basically have taken the position that it's absolute, without giving -- it may not be what the plaintiff wants in terms of what they would like fully, but my question is whether you're willing to provide any information at all relating to, you know, who participated, anything without getting into the actual meat of what this participation involved, what it was, who said what, or any of the contents.

MR. PARKER: Your Honor, this is Mr. Parker.

To respond, your Honor, plaintiffs have asked interrogatories that seek information regarding individuals who had substantive conversations with the president --

THE COURT: Mr. Parker, you're not answering my question. Okay? What I asked you was not necessarily what the plaintiff had asked for. What I asked you was, in the context of who was consulted, would you be willing to indicate who participated, without anything else?

MR. PARKER: Your Honor --

THE COURT: Are you asserting that -- I'm trying to figure out from you, and answer it yes or no and give me an explanation. Are you willing to provide any information whatsoever about what might have transpired? And I'm talking about bare-bones information in terms of who participated in any

kind of discussion relating to this, say, or anything else.

MR. PARKER: Your Honor, to answer in one word, the answer is no. We think that the presidential -- sorry.

THE COURT: Go ahead.

MR. PARKER: Sorry, your Honor.

Our position is that the presidential communications privilege protects not only deliberations but factual material that the president considers in his decisionmaking process.

And I would point your Honor to the case Citizens For Responsibility and Ethics in Washington --

THE COURT: Hold on. The problem that I have with it is you're asserting it without letting anybody see whether you're right. Okay? I'm not suggesting giving it to the plaintiff. I'm suggesting that you provide something to me so I can look at it and decide whether you're right, that this is material that should not be provided. And in terms of -- say you gave the participants and indicated why the president feels this in some way is privileged information in terms of his communications about making his decisions.

You've decided, as an absolute privilege, you're not going to provide a scintilla of any information to the Court, forget the plaintiff, to the Court for me to decide or at least consider whether or not you, having asserted it, are right.

None of these cases have indicated that they -- they don't require you providing it, but all of them have provided some

information. Your position is that you're providing none. So in essence, it's an absolute privilege you're asserting.

MR. PARKER: Your Honor, first off, the president has provided a privilege log. So that is a response to the request for production.

THE COURT: Okay. Excuse me. I have that, and I will get to that, if it's worthwhile, in a minute.

But in terms of the interrogatories, which is what I'm talking about, the interrogatories, because that's what I started off with, since you did provide some information, although I must admit it's hard to read, but from the Executive Office of the President. There are document requests, and you did a privilege log, and I believe you provided nothing, but they're all deliberative or the presidential assertion, and I can take a look at those. But I'm asking you about the interrogatories.

MR. PARKER: Thank you, your Honor. This is Mr. Parker.

So the plaintiffs, in their interrogatories, ask specifically whether defendants, such as Secretary Mattis, had substantive communications with the president about military service by transgender individuals and for the dates of those communications.

That information, a response to that interrogatory would, in essence, provide the substance of conversations that the

president had with the White House.

THE COURT: Excuse me a minute. What is substantive? All it does is it indicates date, time, and then Mattis had a conversation with the president, period. It doesn't say anything about the content of the conversation. It doesn't say anything about whether it's -- one question is, did they even have a conversation. I mean, some of this may be that there isn't any conversation. I don't know, frankly, the answer. But you have not provided enough information to be able to tell.

And I am perfectly happy to get this information, you know, in camera, if that's what you want to do. But you've asserted it in terms of the answers to the interrogatories and, to some degree, in terms of the documents, but I will look at the documents more carefully. Just across the board, absolutely, you're providing nothing.

And I still think that if you look at the cases, they all provided some information that was then able to be looked at. So I'm not talking about giving it to the plaintiffs. You keep going back to the plaintiffs. I am talking about giving it to the Court so the Court can make a decision as to whether or not this actually falls into the presidential communications privilege. Which true, if you assert it, it's presumptively so, but that is not the end of the inquiry. And the problem that I'm having is, you're not willing to have the rest of the inquiry with me.

We're going around a mulberry bush. If you're not willing to do anything else, then my conclusion is that, at least in the answers to interrogatories, you've decided to assert an absolute privilege. I don't buy the idea that you can get it from other evidence, and it's obvious that, no matter whom the plaintiff requests this information of the defendants or anything else, they're going to get the same blank wall.

So unless you have something else to add, I will figure out how I want to proceed with this, but this is not a good way to go about this.

Okay. Let me put you on hold for a second to see what I want to do next. Hold on.

(Off the record.)

THE COURT: All right. In terms of finishing up the issue of the interrogatories, Mr. Parker, let me just ask, whether it's the president or Mattis or one of the other defendants that has been asked the exact same question and has asserted the presidential communications privilege, is there any information that you are willing to provide in camera to the Court for me to review to decide whether or not it's been appropriately asserted?

MR. PARKER: Your Honor, this is Mr. Parker.

To respond to your question, we appreciate the suggestion. We would have to take that back to our client and confer internally. If we could have some time to consider that issue

and get back to the Court, we would greatly appreciate it.

THE COURT: All right. When do you want to get back to me?

MR. PARKER: Could we get back to the Court this coming Friday, your Honor?

THE COURT: Okay. That's the 16th. Do you want to put something in writing, or do you want to have a conversation on the phone?

It may be easier to have a conversation on the phone. Hold on one second. I can do it from 2:00 after that. Are people available? Probably 2:30 would be better. I have a three co-defendant case earlier than that.

MR. WOLFSON: Your Honor, this is Paul Wolfson for plaintiffs. 2:30 to 4:00 is clear for us.

THE COURT: Mr. Parker, how about you?

MR. PARKER: 2:30 to 4:00 on Friday afternoon is also clear for me, your Honor.

THE COURT: Okay. Then let's do it at 2:30. Let's have a discussion at that point instead of putting things in writing, which always takes longer and makes things more complicated. So we can just discuss the answer to that.

In terms of the deliberative predecisional issue, the privilege and that, I need from the plaintiff for you to identify which documents that you think -- based on the description, that you don't think it applies. And I will look

at that, if you identify them from the log they have provided, and I will consider requesting some or all of those documents for in camera review.

MR. WOLFSON: Okay, your Honor. Thank you.

We will need to follow up on that, though, with you. There are not just documents that have been withheld in their entirety, but also redactions from documents, and we've provided the Court with basically a couple of examples of where the redactions were done, Exhibits F and G. But you know, those are not the entirety of -- those are certainly not the entirety of where they claim the deliberative process privilege.

And our basic position is -- at least from what we can tell is that, you know, these redactions at least -- obviously, we can't tell with the withheld documents in their entirety, but the redactions at least appear to be about matters that are postdecisional, not predecisional.

THE COURT: Okay. Let me suggest this. I realize that there seems to be a dispute as to whether the tweet was the decision or the memorandum was the decision or whether he changed -- however you want to word it.

It seems to me, without regard to which was the final decision, I think that the documents themselves in terms of -- should describe sufficiently to be able to figure out whether the privilege would be asserted in the typical, you know -- the kinds of content that would be considered predecisional.

In other words, you can make a decision, have it be final, and then decide maybe that wasn't a great decision. So you're then thinking it over, and you're planning on coming back and making another decision, but then you don't change your mind.

So instead of going off on whether the tweet is the final decision or his memorandum is the final decision, instead of having that be the focus of what you're deciding is predecisional deliberative, it seems to me that enough -- if they give you enough of a description as to be able to decide that this sounds like it is not -- doesn't fit that, that it's not predecisional, it's not that kind of -- I mean, this is a privilege that's been around for a long time, and there's lots of cases about it.

MR. WOLFSON: No, thank you, your Honor. This is Paul Wolfson.

That's fair enough. I think part of the problem -- one can debate which is the decision. I think our view is that the tweet, insofar as what we're talking about, is the decision to restrict transgender people from serving. The tweet is the decision.

Now, it is possible that the presidential memorandum, you know, it does do more than that. So we're not excluding the possibility that there might have been other decisions that followed after that.

But the problem is, the government's submissions to us,

they don't really say -- they don't allow us to identify what decision it is that they're arguing these are predecisional to, if I could put it that way, and just say it's predecisional. I don't think it's enough just to say, as the government does in its letter, that the decisionmakers can constantly sort of rethink and rethink and rethink, you know.

You have to be more particularized than that and have to identify or you have to explain what is the decision so that the parties and the Court can evaluate is it predecisional to that or is it really just people reacting to a decision that was already made, which would make it postdecisional.

THE COURT: Okay. But I think part of it would be, is to take a look at their description. If it turns out that more information is needed in terms of the description of what they have set out, it seems to me that you can then, you know, request that they do it more specifically by document instead of grouping some of the documents together or give you a slightly better description of it.

I think we may be conferring about it a little bit more, but I would like to get, if there's very specific documents that you think -- they may not be all of them, but that you think which identify that it doesn't appear to support it, that it seems to be, as you said, more of a reactionary aspect to it, then I'm more than happy to take a look at it.

MR. WOLFSON: We can certainly provide that

information to the Court.

THE COURT: If I could just ask Mr. Parker, in this context, is the position of the government that the tweet was not a final decision and only the memorandum or that it was a decision but he was considering -- or could consider making another decision? I'm not putting it too eloquently, but I know you get my point.

MR. PARKER: Right. Your Honor, this is Mr. Parker. I definitely understand the question.

Our position is that the tweet was a decision and that that decision itself gave rise to a series of additional decisions, that that decision had sort of a ripple effect and required the defendants to make a series of additional decisions based on the tweets and that those decisions themselves can give rise to privileged deliberative material.

And so there are decisions, I think, between the tweet and the memorandum that themselves can give rise to deliberative material.

Let me just add one more thing, your Honor. We would be happy to rereview documents that plaintiffs specifically identify that they believe -- where they believe deliberative material has been inappropriately withheld. We believe that we have appropriately withheld deliberative material, but we are happy to rereview the documents and to look at whether we may be able to narrow the issues in dispute by voluntarily disclosing

the information or at least looking to see whether that is a possibility.

And so we would appreciate the opportunity, if plaintiffs would give us the specific Bates numbers of the documents, to rereview those documents to attempt to narrow any dispute that would come before the Court.

THE COURT: Okay. Are you willing to do that, Mr. Wolfson?

MR. WOLFSON: We are, your Honor.

THE COURT: Okay. So why don't I -- I won't set a time frame on this. Let me let you have discussions and see how this works out. And then on the 16th, you can tell me where you are with it. So I won't put an arbitrary, you know, you have to get back to me by X date. Let me let you have the opportunity to confer and see if you can come to some approach or resolve it or whatever, and we will talk about it on the 16th at 2:30.

MR. WOLFSON: Thank you.

THE COURT: All right. Is there anything else, either side?

MR. PARKER: Nothing, your Honor.

MR. WOLFSON: Not for the plaintiffs. Thank you, your Honor.

THE COURT: Mr. Parker?

MR. PARKER: Not from defendants, your Honor. Thank you.

THE COURT: All right. The parties are excused. Thank you.

(Proceedings adjourned at 3:29 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick _____ 2/15/2018 _____

SIGNATURE OF COURT REPORTER DATE

EXHIBIT 10

Doe v. Trump, 17-cv-1597 (CKK)

BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, et al., Plaintiffs, vs. DONALD J. TRUMP, in his official capacity as President of the United States, et al., Defendants.	Case Number 17-cv-1597 Washington, D.C. Friday, February 16, 2018 2:42 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	PAUL WOLFSON, ESQ. KEVIN LAMB, ESQ. Wilmer, Cutler, Pickering, Hale & Dorr, LLP 1875 Pennsylvania Avenue Northwest Washington, D.C. 20006 202-663-6000
	DANIEL McFADDEN, ESQ. Foley Hoag, LLP 155 Seaport Boulevard Boston, Massachusetts 02210
For the Defendants:	RYAN PARKER, ESQ. ANDREW CARMICHAEL, ESQ. U.S. Department of Justice P.O. Box 883 Washington, D.C. 20044 202-514-4336
Official Court Reporter:	SARA A. WICK, RPR, CRR U.S. Courthouse, Room 4704-B 333 Constitution Avenue Northwest Washington, D.C. 20001 202-354-3284

Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURT: Good afternoon. This is Judge Kotelly. Let me call the case. This is the case of Jane Doe, et al., versus Donald Trump, 17-cv-1597. I am sorry about being late for the phone call, but I was still in court with a criminal case.

So if we could have plaintiffs' counsel identify themselves.

MR. WOLFSON: Good afternoon, your Honor. This is Paul Wolfson with the plaintiffs. With me on the line are Daniel McFadden and Kevin Lamb. There's a little bit of static on the line. I apologize for that. I hope it will be okay.

THE COURT: It's fine on my end, but it may be a problem on yours. Let me know if it is a problem. We can have you call in again.

MR. WOLFSON: Okay.

THE COURT: And who is on for the defense?

MR. PARKER: Your Honor, this is Ryan Parker for the defense, and with me is my colleague, Drew Carmichael.

THE COURT: Okay. So we are resuming our discussion that we had on Tuesday, and we left two issues to be discussed initially here.

And you were, Mr. Parker, going back to your clients to see whether there was a proposal that could be made for the Court to review in camera the documents or some way in terms of deciding

on the presidential communications privilege that would not leave the posture of the case in it being, in essence, an absolute privilege, but to set something up so that the Court could make an independent decision.

They also were to -- the parties were to meet and confer to resolve or narrow about the deliberative process privilege. If you weren't able to resolve it, then I requested plaintiffs identify documents that they would request that I review in camera to make some decisions.

So let me start with you, Mr. Parker. Where are we?

MR. PARKER: Thank you, your Honor.

Let me start with the deliberative process privilege. Plaintiffs provided us with a list of the documents that they allege contain information that has been inappropriately withheld under the deliberative process privilege. There were approximately 300 documents.

We have provided the lists to the different services, offices, and components that have produced documents. We've asked them to look at the documents and specifically the withholdings, and we intend to get back to the plaintiffs next week with our decision regarding the documents and the withholdings at issue.

We have also, before this call, had a call with plaintiffs' counsel to discuss how we wanted to proceed with the deliberative process privilege, and I think our plan is to call

them next week and let them know the results of our review of the documents that they've identified.

We would then like to discuss with them whether providing additional information about the documents themselves might be a pathway to resolving some of the documents that remain at issue so that we can try to narrow the issue as much as possible before bringing it back to the Court, if necessary.

And I would propose that that's the way that we proceed, but I'm happy to let plaintiffs' counsel interject and confirm that that is consistent with our discussion.

THE COURT: Okay. So why don't we deal with this issue first.

Mr. Wolfson, I assume you're the spokesperson.

MR. WOLFSON: Yes. Thank you, your Honor.

That's right. We did speak about that, and we are willing to -- we are, you know, appreciative that Mr. Parker and his clients are taking another look at these documents, and we're happy to talk to them next week after they've done a further review.

We are hopeful that they will be able to provide us with, I will say, more robust information about the documents beyond what we've received so that we will be in a better position to test whether -- to evaluate whether we think we should test whether they really are predecisional. And we're willing to sort of do, you know, a couple of more steps on those lines but

reserving the right to go back to the Court, obviously, and ask the Court to review in camera if we can't reach a resolution.

THE COURT: All right. So it sounds like you are both on the same page, and that seems to me to be a perfectly sensible way of trying to resolve it or, if nothing else, trying to narrow it so what, if anything, is brought back to me will be a much more limited issue.

Where are we on the presidential communication privilege?

MR. PARKER: Thank you, your Honor. This is Mr. Parker.

We have conferred with our clients about the prospect of providing information regarding who the president and his advisors met with regarding transgender -- military service by transgender individuals and when those meetings occurred. And we are not willing to submit that information to the Court for in camera review.

Because this is an issue of great importance, we would respectfully request that the Court allow us to fully and adequately brief it before the Court issues a decision, and if your Honor would like, I would be happy to lay out sort of the reasoning behind our decision, or we could put that in briefing, if that would be better for the Court.

THE COURT: Okay. I think you should just put it in briefing. We had a discussion -- you know my position. It sounds as if it's tantamount to being an absolute privilege, and

it's not, and therefore, if you don't want to do this -- I mean, I felt that this was one prospect. I left it to you as to whether there is something else that could be provided to the Court that would give me some idea of how it's actually being applied in terms of the documents at issue. It sounds as if you've decided that there's nothing that can be given to the Court in camera.

Is that correct?

MR. PARKER: Your Honor, that is correct.

THE COURT: Okay.

MR. PARKER: And we would like an opportunity -- excuse me. I'm sorry.

THE COURT: That's okay. That's why I think it's useless to have further discussion. You need to file it. I think you need to figure out how to get around the fact that what you're saying is that it's an absolute privilege, and it's not.

So if you want to have briefing and the Court to decide in that posture, give careful thought. I, of course, will as well. But this is something that, however it comes out, will go to the Court of Appeals and the Supreme Court, and you will have case law, good or bad.

So let me set out a briefing schedule for you. When can you -- it seems to me, since you're asserting it, that you should go first.

MR. PARKER: Okay, your Honor. That works for us. We would ask for 10 business days. Could we have until March 5th to brief this issue for the Court?

THE COURT: Okay. Mr. Wolfson, it seems to me that this is an important enough issue that we should get a full briefing. Do you have a problem?

MR. WOLFSON: I think that's a little slow, your Honor. Let me just look at the calendar a minute.

THE COURT: Sure. You said, what, March 5th?

MR. PARKER: Yes, your Honor. I asked just for 10 business days, until March 5th.

MR. WOLFSON: Your Honor, I think we would prefer to compress that a little bit, just because we have depositions that are coming up, and, you know, we're going to need this information to be able to take at least some of those depositions. Maybe 10 calendar days instead of 10 business days, you know, something like have the defendants file their brief on the 26th or 27th of February. That's more like 11 or 12. But otherwise, I think this won't get -- we won't be fully briefed until the end of March.

THE COURT: Well, if you propose to do it February 26th, when would you respond? Obviously, you need to respond quickly, too.

MR. WOLFSON: All right. So I would say also 10 calendar days. So March 9th. I think that's 11 and 11. Sorry.

Go ahead, Ryan.

MR. PARKER: I was just going to say, because we are working with a federal holiday on Monday, could we have until the 27th, which would be Tuesday, the 27th of February?

THE COURT: Yes; that's fine.

MR. WOLFSON: Your Honor, if we could have, let's say, March 12th.

THE COURT: All right. And when do you want to file your reply?

MR. PARKER: Can we say March 23rd, your Honor?

MR. WOLFSON: Your Honor, that seems like --

THE COURT: That's too long; that's too long. This is an issue that you are pushing in terms of coming up with it, and you're going to have to figure out how this is not an absolute privilege and how, by not letting me look at anything, somehow this is not an absolute privilege.

So I assume you've thought it through and, therefore, had a consultation and that you figured out a strategy of how you're going to do that. It seems to me it's a fairly narrow issue. The documents are broader, but the issue of the Court not being able to look at anything -- I mean, I'm open to any proposal, whether it's the president or, I had mentioned, some of the other people that would -- are asserting it that are not the president, such as Mattis or some of the other people. I was open to considering that. But if it's a blanket no to all of

it, it seems to me you need to move a little faster.

I think by March 19th, we get the reply, so that we can -- this is not going to -- so that the Court has enough time to get an opinion out without dragging everything else. Obviously, even with the schedule, it's going to affect how you proceed with the rest of the discovery.

MR. PARKER: Thank you, your Honor.

THE COURT: All right. Hang on one second. Let me just look at my notes for a minute and see if there's anything else I want to bring up. Hold on.

(Pause.)

THE COURT: All right. I've looked over my notes, and there's nothing else. So I will simply await on the deliberative process privilege for you to -- and the process you've laid out, which sounds reasonable. And plaintiffs, you can get back to me if there's anything else for the Court to do.

MR. WOLFSON: Thank you very much.

THE COURT: I won't set a date. I will leave it to you to come back to me when you need to.

And we will proceed -- this is going to be a motion that is styled what, Mr. Parker?

MR. PARKER: Your Honor, I think we will style it as a motion for a protective order, if that seems appropriate to the Court.

THE COURT: I will leave it to you how you want to do

it.

Keep in mind that what I asked for was any proposal, I would consider, that would allow me to see how it's being tested and also that it can not necessarily be the president, it can be some of the other people who are less than the president but who are also asserting it, since it's being asserted across the board.

I will say only one other thing. I sincerely hope this is not just a dilatory tactic, because you're going to wind up with a decision on this. I know you don't make the decision; somebody else does.

So if there's nothing else -- Mr. Wolfson?

MR. WOLFSON: Your Honor, one final thing. This is Paul Wolfson.

We had e-mailed the Court a request that the Court file in docket the e-mail correspondence.

THE COURT: I'm sorry. I didn't mean to interrupt.

Yes, we are doing that. They require scanning. So it takes a little bit of time to do that. But they have it, and they should, hopefully, be getting it up today, including the exhibits that were attached to it.

MR. WOLFSON: Thank you very much.

THE COURT: But scanning does take more time.

MR. PARKER: Your Honor, could I just note for the Court very briefly that the documents that plaintiff provided to

the Court in its most recent e-mail were the documents that the parties would like to have put on the docket. There were some documents that were initially sent to the Court that contained office telephone numbers --

THE COURT: No, no, no, we're not doing that. This is strictly going to be the letters that set out your -- it's not going to be with any phone numbers or anything else.

MR. PARKER: Okay. Thank you, your Honor.

THE COURT: All right. If there's nothing else, the parties are excused.

(Proceedings adjourned at 2:56 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Sara A. Wick, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sara A. Wick — February 20, 2018

SIGNATURE OF COURT REPORTER — DATE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

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

[PROPOSED] PROTECTIVE ORDER

Upon consideration of Defendants' Motion for a Protective Order, the opposition, and reply thereto, it is hereby ORDERED that the Motion is GRANTED and that:

(1) Plaintiffs are precluded from seeking discovery from the President;

(2) the President does not have to provide substantive information in response to Plaintiffs' interrogatories;

(3) the President does not have to provide information in response to Plaintiffs' interrogatories for the Court's *in camera* review.

Dated:

_____
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE