IN THE 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 M. 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' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES AND REGULATIONS

INTRODUCTION

Defendants' motion for a protective order advances novel and sweeping theories that would immunize the President from discovery and effectively convert the presidential communications privilege into an absolute privilege. Plaintiffs sought narrowly focused information about the *process* preceding the President's decision to ban military service by transgender persons. Plaintiffs need that information for two purposes. *First*, Defendants have defended the ban as a decision involving "professional military judgments" to which deference is due under such cases as *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Goldman v. Weinberger*, 475 U.S. 503 (1986). Dkt. 45, at 28. The President's statement announcing the ban asserted that the President had reached his decision after "consult[ing] with [his] Generals and military experts." Dkt. 61, at 14. Plaintiffs are entitled to test those assertions to respond to the government's defense of the ban based on military deference. *Second*, Plaintiffs need this discovery to assess the validity of Defendants' sweeping claims of privilege and to determine whether their need for information should overcome the privilege. Without *any* information—even basic facts about with whom and when the White House communicated about the ban—Plaintiffs cannot make informed decisions about whether to press for particular communications or to accede to the government's across-the-board assertion of privilege.

Plaintiffs' discovery requests do not seek the *substance* of communications with the President. Accordingly, despite the many pages of briefing the government has devoted to shielding the *substance* of presidential communications from discovery—and even from *in camera* review—that issue is not presented at this time. The only issue for this Court's immediate consideration is whether basic log-type information—the kind of information that is routinely provided in litigation whenever a party asserts a privilege, and that is essential to allow

the opposing party to test the assertion—is itself categorically shielded from discovery and even from *in camera* review.

Defendants' position on that question is breathtakingly broad: They contend that separation of powers prevents not only Plaintiffs but the Court, *in camera*, from receiving *any* information, even the basic log-type information in dispute here. None of Defendants' cases stands for that proposition—which, as this Court has recognized, would effectively make the presidential communications privilege absolute, with no allowance for judicial review. Moreover, although the government has insisted in its motion that the Court should consider only Plaintiffs' discovery requests to the President, and not the other Defendants, it has asserted the same presidential communications privilege objections in response to discovery requests sent to the other Defendants. Were the government's position correct, Plaintiffs could not receive, and this Court could not review *in camera,* discovery responses by any of the Defendants as to which the government has asserted this privilege.

Defendants' motion should be denied, and Defendants should be ordered to respond to Plaintiffs' Interrogatories Nos. 2, 4, 5, 8, 10, 14, 15, 17, 18, 19, 20, and 21 (the "Subject Interrogatories") or, at a minimum, to submit those responses to the Court *in camera*.

BACKGROUND

A. The Government's Defense Of The Ban

The policy permitting open service by transgender people announced in June 2016 was the culmination of an extensive deliberative process within the Department of Defense. *See* Dkt. 61, at 6-10. On July 26, 2017, however, President Trump abruptly announced, via Twitter, that he had decided to ban transgender people from military service "*[a]fter consult[ing] with [his] Generals and military experts*" because of the "tremendous medical costs and disruption that

transgender [individuals] in the military would entail." *Id*. at 14 (emphasis added).[1] Plaintiffs filed suit on August 9, alleging that the President's ban on service by transgender individuals violated their constitutional rights to equal protection and due process. *See* Dkt. 1. The President then issued an August 25 memorandum directing the Departments of Defense and Homeland Security to take steps implementing the announced ban. 82 Fed. Reg. 41,319 (Aug. 30, 2017).[2] Plaintiffs amended their complaint, *see* Dkt. 9, and sought a preliminary injunction, *see* Dkt. 13, which the Court granted, *see* Dkt. 61.

In opposing Plaintiffs' application for a preliminary injunction, the government argued that the President's decision barring transgender individuals from military service is entitled to deference as a "professional decision[] as to the composition of [the] military" representing "essentially professional military judgments." Dkt. 45, at 28 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65-66 (1981), among other decisions) (internal quotation marks and ellipses omitted). Indeed, the government has contended that the Court should ignore "contrary evidence" that refutes the rationales for the ban because "military officials are under no constitutional mandate to abandon their considered professional judgment," and courts should not substitute their judgment for "military opinion, backed by extensive study." *Id.* at 29 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986), and *Rostker*, 453 U.S. at 63) (internal quotation marks and ellipses omitted). The government made the same arguments to the D.C. Circuit in seeking a stay of the injunction granted by this Court. *See* Defs.' Emergency Stay Mot. 16-18, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 11, 2017).

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[1] The government has conceded that the "tweet was a decision." Dkt. 89-9, at 33:10.

[2] The President's memorandum required that the Secretary of Defense, no later than February 21, 2018, prepare an implementation plan—which Defendants have confirmed exists but have refused to produce, even though it is responsive to several document requests. *See* Declaration of Daniel McFadden ("McFadden Decl.") Ex. A.

The government has thus placed the involvement of the military in the President's decision squarely at issue, defending the ban on the ground that it is the product of "consultation with … Generals and military experts" and their considered "professional military judgments."

B. The Subject Interrogatories

There are good reasons to doubt—and to investigate—whether the ban originated from, or was even vetted by, the Nation's military professionals. As the Court has found, the asserted rationales for the ban "were not merely unsupported, but were actually contradicted by the … conclusions and judgment of the military itself." Dkt. 61, at 67. In fact, the day after the ban was announced, General Joseph Dunford, Chairman of the Joint Chiefs of Staff and the President's most senior uniformed military adviser, wrote to the Joint Chiefs that the President's announcement was "unexpected" and that, contrary to the President's tweet, he was "not consulted." McFadden Decl. Ex. B (USDOE00037695).

Accordingly, Plaintiffs propounded interrogatories to all Defendants to discover what process, if any, preceded the President's tweets. The requests sought the kind of information that would ordinarily appear on any privilege log in civil litigation—information such as the existence of an oral or written communication, its date, and the identity of the participants. *See* Dkt. 89-1, at 4 (Definition 16(d)). In addition to permitting an assessment of any process that preceded the reversal of the open service policy, that information would provide Plaintiffs with a basis for evaluating claims of privilege over the communications themselves—many of which may also be responsive to document requests. For example:

- Interrogatory No. 4 asked President Trump to "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."

- Interrogatory No. 14 asked President Trump, Secretary Mattis, and General Dunford to "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."

- Interrogatory No. 15 asked President Trump, Secretary Mattis, and General Dunford to "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."

- Interrogatory No. 17 asked President Trump, Secretary Mattis, and General Dunford that "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."

- Interrogatory Nos. 19 and 20 asked all Defendants to identify all communications between either the President or the Executive Office of the President and the other Defendants concerning transgender military service.

Id. at 6, 8-9. Each Defendant was asked to answer separately, to the extent of his or her personal and institutional knowledge.

C. Defendants' Across-The-Board Assertion Of The Presidential Communications Privilege

In their responses to the Subject Interrogatories, Defendants took the position that the presidential communications privilege shields not only the content of a communication, but its very existence. The President asserted the privilege in response to all of the Subject Interrogatories and refused to answer any of them. Dkt. 89-4. Secretary Mattis and General Dunford also asserted the privilege and, in the rare instances where they provided a response, the responses omitted any communications with the President or the Executive Office of the President. Dkt. 89-6; McFadden Decl. Ex. C. Similarly, the Departments of the Army, Navy,

and Air Force and the Defense Health Agency asserted the privilege and provided no information about any communications with the White House in response to the three Subject Interrogatories directed to them (Nos. 19, 20, and 21). *See* McFadden Decl. Exs. D, E, F, G.

That extraordinary position is not confined to the Subject Interrogatories. The Executive Office of the President also provided a privilege log in response to Plaintiffs' document requests that is devoid of any useful information. Single entries cover dozens of documents spanning multiple months and exchanged between unidentified people, including unspecified "outside third parties" and "Members of Congress and their staffs" who would not fall within any privilege. McFadden Decl. Ex. H. It is impossible to discern what specific communications occurred or whether any privilege applies to any given communication. Similarly, the other Defendants produced privilege logs that appear to omit the communications with the White House over which Defendants are asserting the presidential communications privilege; that information appears to have been intentionally omitted.[3] *See, e.g.*, McFadden Decl. Ex. I. Thus, even though the President publicly justified the ban based on his consultations with "Generals and military experts," and even though Defendants are insisting on deference to the ban based upon such consultations, Defendants refuse to produce any information about with whom the President consulted, or when, or even whether such consultations really occurred.

D. The Present Dispute

Defendants' claim of privilege effectively prevents Plaintiffs from testing the assertion that the President's decision to impose the ban reflected "professional military judgments."

[3] To date, Plaintiffs have been able to locate only one entry in the other Defendants' voluminous privilege logs showing a communication with the Executive Office of the President over which "executive privilege" is asserted. There are a small number of additional entries (about 13) that assert other privileges, but not the presidential communications privilege. Many communications between the Department of Defense and the White House that Defendants claim are covered by the presidential communications privilege appear not to have been logged.

Accordingly, on February 9, 2018, Plaintiffs emailed chambers pursuant to the Court's instructions to seek a discovery conference regarding Defendants' deficient responses. As Plaintiffs explained, the issue presented was:

> Whether *the Defendants* [including but not limited to the President] 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.

Dkt. 89-7 (emphasis added). On February 12, at the Court's direction, Plaintiffs submitted a letter explaining in further detail the deficiencies in *all* Defendants' responses—not just the President's. *See* Dkt. 86-1, at 1-2 (citing responses of Secretary of Defense and Air Force); Dkts. 86-4, 86-5.

On February 13, the Court held a telephone conference at which it asked Defendants' counsel:

> In terms of finishing up the issue of the interrogatories, … *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?

Dkt. 89-9, at 28:14-21 (emphasis added). Defendants' counsel asked to confer with his clients. *Id.* at 28:24-29:1. The Court therefore scheduled a second telephone conference, and ordered "[t]he parties [to] be prepared … to discuss what information *Defendants* contend is covered by the presidential communications privilege that the Court can review in camera." Minute Order (Feb. 13, 2018) (emphasis added).

On February 16, at that next hearing, the Court asked, "Where are we on the presidential communications privilege?" Dkt. 89-10, at 5:8. Defendants' counsel responded:

> 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.

Id. at 5:11-16 (emphasis added). Defendants' counsel asked for an opportunity to brief the issue in a motion for protective order, *id.* at 5:17-22, 9:22-24, and the Court agreed.

In setting a briefing schedule, the Court stated that because Defendants were asserting a blanket privilege over *all* of their separate discovery responses (not just the President's), briefing should proceed rapidly. As the Court explained:

> [I]t'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.

Id. at 8:19-9:1 (emphasis added); *see also id.* at 10:2-7 ("Keep in mind that what I asked for was any proposal, … and also that *it [need] 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*."). Accordingly, because "Defendants refuse[d] to provide any information to the Court for it to review in camera in order to adjudicate the legality of Defendants' assertion of privilege," the Court ordered "Defendants … to file a motion for a protective order on this particular presidential communications privilege issue." Minute Order (Feb. 16, 2018). Nothing in the Court's statements or orders limited this dispute to the President's responses alone or excluded deficient discovery responses by the other Defendants from consideration for *in camera* review—quite the opposite.

Defendants filed a motion for protective order on February 27. Even though the parties and the Court discussed at length the fact that all Defendants, not just the President, asserted the

presidential communications privilege, Defendants' motion seeks an order specifically "preclud[ing] Plaintiffs from seeking discovery from the President" and "excus[ing] the President" from responding to interrogatories (both in general and for *in camera* review). Dkt. 89 ("Mem."), at 40; *see also* Dkt. 89-11. It also tries to reshape the dispute artificially by arguing in a footnote that "Plaintiffs have challenged only the objection to the interrogatories directed to the President." Mem. 17 n.12. Defendants' tactic of bringing that motion only to validate privilege claims asserted in response to discovery requests to the President and not the other Defendants—even while refusing to produce discovery from all Defendants—appears designed to forestall consideration of the other Defendants' privilege claims and to force duplicative motion practice. The dispute here, while narrow, concerns *all* Defendants' responses to the Subject Interrogatories.

ARGUMENT

I. THE LOG-TYPE INFORMATION THAT PLAINTIFFS ARE SEEKING IS NOT PRIVILEGED

Plaintiffs drafted the Subject Interrogatories to target privilege log-type information, *i.e.*, identification of the date, means, general subject matter, and participants for each relevant communication. *See* Dkt. 89-1, at 4 (Definition 16(d)). That kind of information—which relates only to the *existence* of a communication, not its *content*—is outside the scope of the presidential communications privilege. Defendants' sweeping and novel assertions of privilege over such information should be rejected.

Just like other judicially recognized privileges, the presidential communications privilege has a defined and limited scope. The privilege does not cover all information related to the President, but instead reaches "documents or other materials that reflect presidential decisionmaking and deliberations." *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997); *see also Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977) (presidential

communications privilege applies "to communications 'in performance of (a President's) responsibilities,' ... and made 'in the process of shaping policies and making decisions'"). And, like all privileges, it imposes a serious cost on the truth-seeking function of litigation. *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").[4] For those reasons, courts have recognized that the privilege protects only the substance of documents or communications—and only then if part of a presidential decision-making process; it does not extend to other information regarding interactions with the President or his advisers. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 127, 132 (D.D.C. 2009) ("[T]he bottom line is that the presidential communications privilege protects only communications; the bits of information contained in the sought records—names of visitors, dates of visits, and in some case who was visited—do not rise to the level of protection under the presidential communications privilege.").

That approach comports with how courts have treated other privileges, even unqualified privileges like the attorney-client privilege: The privilege covers only the substance, not the fact of the communication or its general subject matter. *See, e.g.*, *United States v. Legal Servs. for New York City*, 249 F.3d 1077, 1081 (D.C. Cir. 2001) ("Courts have consistently held that the general subject matters of clients' representations are not privileged."); *United States v. Dillard*, 989 F. Supp. 2d 1155, 1168 (D. Kan. 2013) (with respect to clergy-penitent privilege, "information such as the date and number of prison visits simply provide a necessary threshold

[4] *See also Trammel v. United States*, 445 U.S. 40, 50 (1980) ("Testimonial exclusionary rules and privileges … must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"); *Herbert v. Lando*, 441 U.S. 153, 175 (1979) ("Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.").

for the court to examine the claim of privilege"); *Merrill v. Waffle House, Inc*., 227 F.R.D. 467, 471 (N.D. Tex. 2005) ("[The] psychotherapist-patient privilege … protects only communications between the therapist and patient …. The names of mental health care providers, including psychiatrists, psychologists, counselors, and therapists, and dates of treatment are not subject to the privilege."); *In re Shopping Carts Antitrust Litig*., 95 F.R.D. 299, 304 (S.D.N.Y. 1982) (rejecting claim that "questions designed to elicit the existence or identity of documents or the parties to a communication" intrude upon grand jury secrecy).

Indeed, the government has previously recognized that only the substance of a communication, and not its subject matter or identifying characteristics, is covered by the presidential communications privilege. Thus, in prior cases the government has disclosed identifying information about presidential communications, just as it does when claiming application of the attorney-client and other privileges. *See, e.g.*, *Loving v. Department of Def.*, 550 F.3d 32, 36 (D.C. Cir. 2008) (government provided Vaughn index, including "documents reflect[ing] the sequential transmission of Loving's case—and recommendations on it—to the President"); *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108, 1110-1111 (D.C. Cir. 2004) (government provided Vaughn index of 4,341 documents concerning individual pardon petition, including letters and reports from the Deputy Attorney General to the President); *In re Sealed Case*, 121 F.3d at 735 ("[T]he White House produced a privilege log identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld."); *Amnesty Int'l USA v. Central Intelligence Agency*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) ("[T]he index and declarations set forth in sufficient detail how presidential advisors solicited and received information or recommendations in the course of gathering information related to

detainee policies, including the CIA terrorist detention and interrogation program[.]"); *Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 659, 667 (2007) (government provided privilege log identifying specific memoranda "reflect[ing] communications between the President's staff and various high-ranking [Department of Energy] or other Executive Branch officials" related to nuclear waste storage facility). When the government has not provided such log-type information, it has been ordered to produce it, based on the recognition that such information is necessary for courts and opposing parties to evaluate the validity of the claimed privilege. *See U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 45 (D.D.C. 2016) (ordering privilege log where presidential communications privilege was asserted).

To be sure, there may be extraordinary instances in which the mere fact of a communication cannot be disclosed. *See Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (agency seeking to "neither confirm nor deny the existence" of requested records on basis of national security required to provide "in as much detail as is possible the basis for its claim"). But there are no such concerns here. The government's hypotheticals all involve situations in which the identity of the individual consulted would likely reveal the *content* of the communication—for example, specific "anti-terrorism measures under consideration." Mem. 30. Here, however, disclosing that the President communicated with "Generals and military experts" about military service by transgender individuals reveals nothing about what they said; the President would be expected to consult with senior military leaders about changes to *any* major military policy, and the substance of the advice given cannot be discerned simply by disclosing the fact of the communication.

The government argues (at 33) that disclosure of log-type information would "necessarily reveal substance about the communications because it would … reveal the core subject of the

communication and how the conversation may fit within the known timeline of events." But the President himself has stated publicly that he consulted broadly before announcing the ban; this is not a case, therefore, where the mere fact of a consultation would disclose sensitive information. And the general subject—whether to impose a ban on service by transgender people—has already been disclosed by the President as well. The government does not explain how the ability to fit a communication "within the known timeline of events" would reveal anything sensitive about presidential decision-making that the President himself has not already made public. The timeline of communications is no doubt relevant to illuminating the *process* followed by the President—indeed, that is one of the main reasons why Plaintiffs have sought that information—but the privilege covers only the substance of the communications, and not their existence, date, or participants.

Nor is Defendants' expansive approach justified by the purpose of the privilege, which is to "preserve[] the President's ability to obtain candid and informed opinions from his advisors and to make decisions confidentially." *Loving*, 550 F.3d at 37; *see In re Sealed Case*, 121 F.3d at 750 ("Confidentiality is what ensures the expression of 'candid, objective, and even blunt or harsh opinions' and the comprehensive exploration of all policy alternatives before a presidential course of action is selected."). Any suggestion that disclosure of basic log-type information would chill the willingness of advisers to offer the President their candid viewpoints is pure speculation. Such speculation is particularly unjustified here, where the President would be *expected* to consult broadly, including with military advisers, and already said as much.

Under the government's view, the presidential communications privilege—unlike every other privilege—automatically shields *all* information about communications or documents, and no court may therefore even evaluate whether the privilege applies. The government's position

that *no* information about presidential communications may be disclosed, even to the Court *in camera*, conflicts with longstanding precedent that the presidential communications privilege is not absolute and may be overcome by a showing of sufficient need to be assessed by the courts. *See, e.g.*, *Nixon*, 418 U.S. at 707; *In re Sealed Case*, 121 F.3d at 755; *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977); *Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975).

The government's extreme position would make the presidential communication privilege unique in our legal system: Even the attorney-client privilege—which is unqualified, in the sense that it cannot be overcome by a showing of need—does not relieve a party from the obligation to provide log-type information to an opposing party or to submit documents *in camera* to a court to resolve contested claims of privilege. *See United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980) ("To ensure the proper invocation of the attorney-client privilege, the court will order, as with the deliberative privilege, the preparation of [a] *Vaughn*-like index. This index should reveal the source of the information, whether the communication occurred in confidence, and whether the source was a lawyer working as an attorney for the [government]."); *see also* Fed. R. Civ. P. 26(b)(5)(A) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must … describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."). The presidential communications privilege, which is qualified and *may* be overcome by an adequate showing of need, does not extend so broadly that neither Plaintiffs nor the Court may evaluate whether the privilege was legitimately invoked.

The Court should reject the government's absolutist argument and order Defendants to provide responses to the Subject Interrogatories or, at a minimum, to submit to this Court for *in camera* review any specific responses they maintain are protected.

II. *IN CAMERA* REVIEW IS FULLY CONSISTENT WITH THE PRESIDENTIAL COMMUNICATIONS PRIVILEGE

The government argues (at 22-26) that Defendants should not be required to provide log-type information even for *in camera* review because doing so would not "adequately resolve the broad separation-of-powers concerns" underlying the privilege. The government offers no authority for this remarkable proposition, which would effectively immunize the President from civil discovery. The government relies on "the principles established in *Cheney* [*v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004)]." Mem. 22. But neither *Cheney* nor any other case the government cites suggests that the President, much less any of the other Defendants here, has such blanket immunity from civil discovery.

Nor does *in camera* review impermissibly impinge on legitimate assertions of the privilege. Both the Supreme Court and D.C. Circuit have recognized that "*in camera* inspection is a necessary and appropriate method" for reconciling the Executive's interest in maintaining the confidentiality of presidential communications with the Judiciary's obligation to evaluate the propriety of claims of executive privilege. *Nixon v. Sirica*, 487 F.2d 700, 719 (D.C. Cir. 1973). The Supreme Court in *Nixon* specifically remanded the case for *in camera* review of the tapes at issue, entrusting the district court to isolate relevant and admissible evidence while preserving the confidentiality of non-relevant material. *Nixon*, 418 U.S. at 714-716 & n.21. The D.C. Circuit has likewise approved *in camera* review, in both criminal and civil cases, as an effective means to reconcile the competing obligations of the coordinate branches. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 743-745, 759; *Dellums*, 561 F.2d at 251.

In the face of this binding precedent, the government advances two meritless arguments why the President's discovery responses should not be subject to *in camera* review. *First*, the government asserts (at 23-24) that requiring the President to submit even limited log-type information for *in camera* review would impose the same burden on him as producing the information to Plaintiffs by potentially "distract[ing] [him] from the energetic performance of [his] constitutional duties." *Cheney*, 542 U.S. at 382. But the narrow information Plaintiffs have sought in the Subject Interrogatories is nothing like the sweeping discovery plan that the district court ordered in *Cheney*—discovery the Supreme Court deemed overbroad and unjustified in light of the marginal nature of the claims. The Court expressed concern with compelling the Executive to respond to "vexatious litigation," *id.*, and "meritless claims," *id.* at 386, when "the only consequence of [plaintiffs'] inability to obtain the discovery they [were] seek[ing] [was] that it would be more difficult for private complainants to vindicate Congress' policy objectives" under the Federal Advisory Committee Act, *id.* at 384-385. The Court also stressed that the discovery granted there was tantamount to prevailing in the litigation—"and much more besides." *Id.* at 388; *see id.* at 393 (Stevens, J., concurring).

Plaintiffs here, far from having brought "vexatious" or "meritless" litigation, assert Fifth Amendment claims that this Court has already determined are likely to succeed. *See* Dkt. 61, at 64-72. And unlike the "overly broad discovery requests" in *Cheney*, which "ask[ed] for everything under the sky" and were "unbounded in scope," 542 U.S. at 387-388, the targeted log-type information at issue is "very narrowly focused," as the Court has recognized, Dkt. 89-9, at 14:6-17:7. Moreover, in *Cheney*, the discovery plan essentially handed a victory on the merits to the plaintiffs. Defendants' responses to the Subject Interrogatories may help Plaintiffs here in developing their case, but they would not dispose of this litigation or preordain its outcome. Any

slight burden in responding to the Subject Interrogatories thus cannot be compared to the fishing expedition in *Cheney*, nor does *Cheney* speak to the far weightier constitutional justification for requiring responses in this case. Furthermore, Plaintiffs sought that same information from *all* Defendants, not just the President, and *Cheney* offers no reason why *they* cannot submit that information to the Court.

Second, the government argues (at 24) that *in camera* review would be of "no benefit" to the Court in determining whether the privilege applies to log-type information. But short of ordering production, *in camera* review is the only way the Court can test the merit of Defendants' contention that even log-type information would reveal the contents of assertedly privileged communications. Without *in camera* review, the Court cannot ascertain whether Defendants are asserting the privilege overbroadly—for example, with respect to communications that are too far removed from the President to be privileged. *See Judicial Watch, Inc.*, 365 F.3d at 1114-1115 (recognizing "a hierarchy of presidential advisers such that the demands of the privilege become more attenuated the further away the advisers are from the President operationally"); *In re Sealed Case*, 121 F.3d at 752 (emphasizing that the privilege "should be construed as narrowly as is consistent with ensuring" the confidentiality of the President's decisionmaking process, and that the privilege applies only to those with "broad and significant responsibility for investigating and formulating the advice to be given the President" on a particular matter). Finally, *in camera* review may assist the Court in evaluating whether any particular claim of privilege is overcome by Plaintiffs' demonstrated need. *See infra* Part III.

In sum, Defendants' contentions that *in camera* review of the log-type information in dispute would impermissibly interfere with the Executive's performance of its constitutional

duties are meritless, and there is no separation-of-powers obstacle to ordering such review if that review would assist the Court in resolving the parties' dispute over the Subject Interrogatories.

III. PLAINTIFFS HAVE SATISFIED ANY BURDEN TO OVERCOME THE PRIVILEGE

Even if the log-type information at issue were privileged—which it is not—Plaintiffs have a specific need sufficient to overcome the privilege. *See In re Sealed Case*, 121 F.3d at 753 (citing *Nixon*, 418 U.S. at 713). The need is sufficient to overcome the privilege because (1) the materials sought are likely to contain "important evidence," and (2) "this evidence is not available with due diligence elsewhere." *Id.* at 754-755. Further, because there is no public interest in shielding a likely unconstitutional decision that the President has publicly claimed he reached in consultation with military advisers, Plaintiffs' need for the information outweighs any public interest that could be served by protecting the President's confidentiality in this context. *Id.* at 753.[5]

A. The Log-Type Information Is Likely To Contain Important Evidence

To satisfy the first element of the test—that privileged materials are "likely [to] contain[] important evidence"—Plaintiffs need only show that "the evidence sought [is] directly relevant to issues that are expected to be central to the trial," as opposed to "evidence that would be only

[5] The government devotes a large portion of its brief to the issue of *when* Plaintiffs must show their need for the privileged materials, arguing that an initial showing is required before Defendants are even required to assert the privilege. *See* Mem. 34-37. That argument falls wide of the mark in several respects. Unlike the situation in *Cheney*, where the Supreme Court faulted the district court for putting in place a sweeping discovery plan that might lead to the needless assertion of executive privilege, *see* 542 U.S. at 390, here Defendants have *already* asserted the presidential communications privilege in response to the Subject Interrogatories. It is unclear what else Defendants believe they must do to perfect their claim of privilege, and Defendants do not suggest that they would provide the Court with any additional information that would bear on the Court's evaluation of their privilege claim. In any event, the question is largely academic in this case. As explained below, regardless of when the issue is considered, Plaintiffs have demonstrated adequate need to overcome the privilege with respect to the log-type information at issue in this dispute. *See infra* pp. 19-23.

tangentially relevant or would relate to side issues." *In re Sealed Case*, 121 F.3d at 754-755; *see also id.* (noting that "[i]n practice, this component can be expected to have limited impact"). The information Plaintiffs have sought is directly relevant to core issues in this case in at least three respects.

First, the information is itself "important evidence" that is necessary to test Defendants' assertions about the character of the President's decision-making process. Not only did the President's tweets represent that he adopted the ban "[a]fter consultation with" unspecified "Generals and military experts," Dkt. 61, at 14, but the government has also defended that ban as "based on judgments concerning military operations and needs," Dkt. 45, at 28 (internal quotation marks omitted); *see supra* pp. 2-4. Indeed, the government has argued that this Court should ignore "contrary evidence" rebutting the President's asserted rationales for the ban because "military officials are under no constitutional mandate to abandon their considered professional judgment," and courts should not substitute their opinions for reasoned military judgments. Dkt. 45, at 29 (internal quotation marks omitted).

Defendants have thus repeatedly injected the nature of the President's decision-making process into this case by invoking military deference. Having done so, they should not be allowed to block Plaintiffs from testing the factual predicates for that defense. *See infra* pp. 30-31; *see also Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007). The log-type information at issue would allow Plaintiffs to test whether the President in fact "consult[ed] with" any generals or military experts before announcing the ban, and thus could negate that asserted factual ground for deference.[6]

[6] This is not a case where a party is merely speculating that presidential communications are relevant to its case. As noted above, documents in this case establish that the President's chief military adviser, the Chairman of the Joint Chiefs of Staff, was "not consulted" about a

Second, this information is directly relevant to Plaintiffs' claim that the President's decision was not rationally related to a legitimate purpose, but rather was the product of unconstitutional animus. As the Supreme Court has explained, "[i]n determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration." *United States v. Windsor*, 570 U.S. 744, 770 (2013); *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (stressing that "departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role"). In awarding a preliminary injunction, this Court likewise acknowledged the relevance of the fact that the President abruptly announced a major change in military policy "without any of the formality or deliberative processes that generally accompany" such decisions. Dkt. 61, at 68. The log-type information that Plaintiffs seek will shed further light on whether, and to what extent, the President's decision-making process was anomalous and suggestive of unconstitutional animus.

Finally, the log-type information sought is independently relevant because it would enable Plaintiffs to assess whether other important evidence is being withheld and to test Defendants' sweeping assertion of privilege as to that evidence. As already discussed, without log-type information, there is no way for Plaintiffs to evaluate Defendants' privilege assertions. In prior cases, the government has regularly disclosed such basic identifying information about presidential communications, just as it does when claiming application of other privileges. *See supra* pp. 11-12; *see also, e.g., Loving*, 550 F.3d at 36. Defendants' extraordinary refusal to do

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possible decision to institute a ban on service transgender individuals. *Supra* p. 4. Discovery in this case has thus given Plaintiffs strong reason to believe that the facts are quite different from Defendants' assertions and warrant further exploration.

so here deprives Plaintiffs and the Court of information that is essential to assessing whether evidence is legitimately privileged.

B. The Evidence Sought Is Not Available From Any Non-Privileged Source

In the second step of the privilege inquiry, courts examine whether the requested in formation "is not available with due diligence elsewhere." *In re Sealed Case*, 121 F.3d at 754. That requirement is "easily" satisfied in cases like this one, focused on the actions of an individual whose communications are directly covered by the privilege. *Id.* at 755. Here—where the evidence relates directly to the President's own decision to ban service by transgender individuals, and *all* Defendants have asserted the presidential communications privilege as to that information—it is impossible to obtain the evidence from other sources.

The government argues (at 21-22) that Plaintiffs should be required to seek other information "that does not concern the President's communications and from sources other than the President." That argument has no merit.

First, information unrelated to the President's communications will not establish whether the President ever consulted with anyone in the military and, if so, with whom. The fact that "Plaintiffs have already receive[d] substantial amounts of non-privileged information," Mem. 22, is beside the point. None of the information disclosed has answered those questions—nor could it. Responses to the Subject Interrogatories are important precisely because log-type information regarding presidential communications is directly relevant to the issues of military deference and unconstitutional animus and is unavailable from other sources. In a case where Defendants have made affirmative representations about the nature of the President's decision-making process, and where the constitutionality of that decision is at issue based in part on the irregularity of the process, other evidence not involving the President is no substitute for the information Plaintiffs are seeking here.

Second, Plaintiffs cannot obtain the log-type information being withheld by the President from others because *all* Defendants have asserted the presidential communications privilege with respect to that information. Although the government now tries to bracket the other Defendants' identical privilege objections, *see, e.g.*, Mem. 17 n.12, the dispute that Plaintiffs brought to this Court was squarely framed around the assertions of the presidential communications privilege by *all* Defendants, not just the President. *See supra* pp. 7-9. No one other than the Defendants can provide the information in the Subject Interrogatories, and the government has prevented all Defendants from doing so by asserting the presidential communications privilege.

C. The Balance Of Plaintiffs' Demonstrated Need And The Public Interest Underlying The Privilege Warrants Allowing Discovery

The log-type information Plaintiffs seek is not privileged. *See supra* Part I. But even if it were, the President's interest in confidentiality would be weak for much the same reasons: This information does not reveal the *substance* of any communication, but merely reports its existence and other basic facts—such as the date, participants, and means of communication—that would appear on a log for every other privilege. The risk is thus slight that discovery of that information will interfere in any way with "the President's ability to obtain candid, informed advice." *Judicial Watch*, 365 F.3d at 1112.

Moreover, Defendants and the President have repeatedly made public representations about the nature of the President's communications with his advisers leading up to his tweets. The tweets themselves claim that the President "consult[ed] with [his] Generals and military experts" before issuing his decision. Having already publicly alleged the existence of such communications, the President has a reduced interest in shielding from discovery the identity of the persons with whom he communicated and the precise timing of those communications. *Cf. Center for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 26 (D.D.C. 2013) ("[T]he

widely publicized nature of the [privileged document] is important in considering the confidentiality interest implicated by the directive's disclosure under FOIA.").

On the other side of the ledger, the "twin values of transparency and accountability of the executive branch" counsel in favor of allowing discovery. *Judicial Watch*, 365 F.3d at 1112. "The very reason that presidential communications deserve special protection, namely the President's unique powers and profound responsibilities, is simultaneously the very reason why securing as much public knowledge of presidential actions as is consistent with the needs of governing is of paramount importance." *In re Sealed Case*, 121 F.3d at 749. That need to "secur[e] … public knowledge of presidential actions" is at its strongest here, where Plaintiffs have alleged constitutional violations. *Id*.; *cf. id.* at 746 (noting that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred"). The public's interest in ensuring that the President does not act unconstitutionally in executing his duties must weigh heavily in the balance.

To the extent that the presidential communications privilege applies at all to the basic log-type information at issue, Plaintiffs have overcome the privilege. Accordingly, the Court should order Defendants to submit this information at a minimum for *in camera* review, and "[o]n *in camera* review, the [C]ourt should isolate and release all evidence that might reasonably be relevant" to Plaintiffs' claims. *In re Sealed Case*, 121 F.3d at 761-762.

D. The Government's Arguments For Application Of A Heightened Test Are Meritless

Although the government does not contest that the inquiry set forth in *In re Sealed Case* governs whether Plaintiffs can overcome the presidential privilege, it argues (at 38) that *Cheney* and *Nixon* require a more demanding version of that test because this is a civil, rather than criminal, case. That argument misreads those cases and ignores binding circuit precedent.

The D.C. Circuit has long held that civil cases raising substantial constitutional claims against the federal government are subject to the same relevance standard as a criminal case. *See Dellums*, 561 F.2d at 248-249. Under *Dellums*, "an adequate showing of need in a civil trial would defeat the president's invocation of constitutional privilege where the civil action involved allegations that government officials had conspired to deprive citizens of constitutional rights, and there had been a sufficient evidentiary showing to overcome any concern that the request for materials was frivolous." *American Historical Ass'n v. National Archives & Records Admin.*, 402 F. Supp. 2d 171, 182 (D.D.C. 2005) (Kollar-Kotelly, J.). Although *Dellums* predates *Cheney*, it is consistent with that decision, has been cited with approval since *Cheney*, and has never been overturned. *See In re Sealed Case*, 121 F.3d at 744 (discussing *Dellums*); *Am. Historical Ass'n*, 402 F. Supp. 2d at 182 (describing *Dellums* as requiring the same showing of "demonstrated, specific need" described in *Cheney* and *Nixon*).

The government's argument that *Cheney* categorically imposes a higher standard on all civil cases springs from a selective (and mistaken) understanding of *why* that decision distinguished *Nixon.* As explained above, the Court in *Cheney* was presented with a civil case that raised no constitutional issues, and where the plaintiffs merely sought "to vindicate Congress' policy objectives" in a federal statute without any concrete benefit to themselves, and without redressing any serious injury they had suffered. *See* 542 U.S. at 384-385. The Court contrasted that situation with the facts of *Nixon*, which involved "the 'constitutional need for production of relevant evidence in a criminal proceeding.'" *Id*. at 383.

The Court made clear, however, that it was not drawing a "formalis[tic]" distinction between "criminal and civil proceedings." *Cheney*, 542 U.S. at 384. Rather, it highlighted four features of *Nixon* that were absent in *Cheney*. First, criminal proceedings have "constitutional

dimensions" because of the defendant's constitutional rights. *Id*. Second, *Nixon* implicated the "essential functions" of Article III courts because in that case the Judiciary's "ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinge[d] on the availability of certain indispensable information." *Id.* at 385. Third, the Court noted that "in the criminal justice system," unlike in the civil context, "there are various constraints, albeit imperfect, to filter out insubstantial legal claims," whereas in civil cases there is a risk the claims against the Executive will be "meritless." *Id.* at 386. Finally, the Court contrasted the "narrow subpoena orders in [*Nixon*]" with the discovery requests in *Cheney*, which "ask[ed] for everything under the sky." *Id.* at 386-387.

This case is closer to *Nixon* than *Cheney* in each respect. First, a civil case that alleges significant constitutional violations has "constitutional dimensions," *Cheney*, 542 U.S. at 384, and there is a strong public interest in ensuring that the Constitution is vindicated, *see Dellums*, 561 F.2d at 247 ("[T]here is also a strong constitutional value in the need for disclosure in order to provide the kind of enforcement of constitutional rights that is presented by a civil action for damages[.]"). Second, as with a criminal case, "[w]ithholding materials from a tribunal" in constitutional litigation "when the information is necessary to the court in carrying out its tasks 'conflict[s] with the function of the courts under Art. III.'" *Cheney*, 542 U.S. at 384 (quoting *Nixon*, 418 U.S. at 707) (second alteration in original). Third, there is no danger that the President could be required to respond to discovery based on "insubstantial" or "meritless" claims here, as this Court has already found that Plaintiffs are likely to prevail on the merits. Finally, Plaintiffs' carefully tailored request for basic log-type information stands in stark contrast to the overly broad discovery requests the Court faced in *Cheney*.

In short, none of the reasons for distinguishing between the criminal proceedings in *Nixon* and the civil claims in *Cheney* applies here. Under *Nixon*, *Dellums*, and *Sealed Case*, Plaintiffs' demonstrated need is sufficient to compel disclosure of the log-type information at issue—even if it is privileged.

IV. SEPARATION-OF-POWERS PRINCIPLES DO NOT CREATE A BLANKET PRESIDENTIAL IMMUNITY FROM DISCOVERY

In addition to the presidential communications privilege, the government invokes broader "separation-of-powers principles" to argue (at 12-26) that any discovery of the President—and even *in camera* review—is entirely precluded here. Such a blanket immunity has no basis in the law—not for the President, and certainly not for other Defendants.

A. The President Is Not Constitutionally Immune From Discovery

The government argues (at 14-16) that the President may not be subject to an injunction affecting his discretionary duties and therefore, as a matter of separation of powers, also may not be required to answer discovery requests in a civil case. Even assuming the premise were correct, the conclusion does not follow. No case cited by the government holds that separation of powers immunizes the President from responding to proper discovery requests. *Nixon* held, to the contrary, that the President may be required by a court to produce evidence. Even *Cheney*, on which the government principally relies, reasons from that starting point in *Nixon*. *Cheney* does not mention either of the other two cases to which the government points—*Mississippi v. Johnson*, 71 U.S. 475, 501 (1866), and *Franklin v. Massachusetts*, 505 U.S. 788 (1992)—nor does it suggest that any judicial concerns about ordering specific relief against the President may confer on the President a constitutional immunity from civil discovery.[7]

[7] Defendants have moved for judgment on the pleadings, arguing that cases like *Johnson* and *Franklin* require dismissal of the President as a party. *See* Dkt. 90. Plaintiffs incorporate by reference the arguments in the brief that they will file separately in opposition to that motion.

Whether this Court may enjoin a party, including the President, is an entirely distinct question from whether that party must respond to narrowly focused civil discovery requests. Contrary to the government's argument, courts have long recognized that separation of powers does not deprive courts of the power to order the Executive to answer appropriately tailored discovery requests. *See Dellums*, 561 F.2d at 249 (in civil suit alleging deprivation of civil rights in connection with anti-war demonstrations, former President required to respond to subpoena); *Sun Oil*, 514 F.2d at 1025 (in civil suit alleging breach of contract by the United States related to construction of an oil drilling platform, government required to provide for *in camera* inspection briefing papers and memoranda prepared for the former President); *Dairyland Power*, 79 Fed. Cl. at 668 (in civil suit alleging breach of contract by Department of Energy related to storage of spent nuclear fuel, government required to provide for *in camera* inspection, and ultimately produce, documents reflecting communications with President's staff and senior DOE officials); *Halperin v. Kissinger*, 401 F. Supp. 272, 275 (D.D.C. 1975) (in civil suit by former member of National Security Council staff seeking damages for wiretapping of home telephone, allowing deposition of former President); *cf. Clinton v. Jones*, 520 U.S. 681, 704 (1997) (citing example of President Monroe responding to written interrogatories in court-martial of naval surgeon regarding the propriety of his appointment to the Philadelphia Naval Hospital).

Citing *Cheney*, Defendants claim (at 18) that the President should not be "required to respond to discovery or assert privilege" until Plaintiffs have exhausted "other sources of discovery." That argument both misreads *Cheney* and ignores what has already occurred in this case. In *Cheney*, the President formed a policy development group chaired by the Vice President, and two organizations brought suit alleging violations of the Federal Advisory Committee Act's procedural and disclosure requirements. *See* 542 U.S. at 373. The district

court entered a plan authorizing discovery of "far more than the limited items" the organizations would have been entitled to receive even if the group was "ultimately" held to be subject to the disclosure requirements. *Id.* at 376-377 (internal quotation marks omitted). The Vice President sought a writ of mandamus, among other things, to vacate or modify the discovery plan, and the court of appeals refused the writ, holding that any separation-of-powers challenge was premature because the defendants "must first assert privilege" under *Nixon*. *Id*. The Supreme Court disagreed, ruling that the court of appeals "prematurely terminated its inquiry … without even reaching the weighty separation-of-powers objections." *Id*. at 391-392. The Court thus remanded the case for further consideration. *Id*. at 392.

Nothing in *Cheney* immunizes the President from discovery. Had the Supreme Court believed that an Article III court may not, consistent with separation of powers, order the Executive to respond to civil discovery requests, it could have straightforwardly resolved the case on that basis. But it did not. Rather, the Court held only that when the Executive challenges a discovery plan as overbroad—including because it may force the Executive to invoke the presidential communications privilege—the reviewing court should consider separation-of-powers concerns in deciding whether clashes over the privilege may be avoided by tailoring or modifying the plan. *See* 542 U.S. at 383, 389.

Unlike in *Cheney*, Defendants here are not challenging the discovery plan, which the Court entered almost four months ago. *See* Dkt. 71. Defendants did seek to postpone discovery pending issuance of the Secretary of Defense's implementation plan on February 21, 2018, *see* Dkt. 80, but after the Court declined to postpone discovery, Defendants affirmatively proposed to resolve the parties' scheduling dispute by "respond[ing] to all remaining discovery requests (interrogatories and RFAs)" by February 2, 2018, McFadden Decl. Ex. J. Plaintiffs agreed to

and relied upon that plan. *See id.* Defendants cannot invoke *Cheney* to attack the plan that they themselves proposed. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (waiver is "intentional relinquishment or abandonment of a known right," including "steer[ing] the District Court away" from an issue of which the party is aware).

Finally, in *Cheney*, the Court emphasized at numerous points that the discovery requests to the Vice President were "unnecessarily broad." 542 U.S. at 390. Here, by contrast, the discovery requests at issue are narrow and central to Plaintiffs' case. Defendants have made no showing that responding to these targeted requests will divert the President from his functions. In the absence of any such concern, generalized separation-of-powers principles cannot shield the President from all participation in civil discovery.

B. *Cheney* Does Not Bar Discovery Of The Other Defendants Or *In Camera* Review

Defendants also argue (at 21-26) that *Cheney* immunizes *every* Defendant from responding to the Subject Interrogatories and bars the Court from conducting *in camera* review to determine whether Defendants' assertions of privilege are justified. Those arguments stretch *Cheney* well past its breaking point.

Defendants have not even moved for a protective order to shield any Defendant other than the President. And *Cheney*—which concerned suits directed at "the President or the Vice President," 542 U.S. at 382; *id*. at 386—says nothing about discovery from any other Defendant. Indeed, courts have held that the separation-of-powers considerations that might limit discovery of the President do not apply to lower-ranking executive officials. *See In re Sealed Case*, 121 F.3d at 748 ("[T]he President's unique status under the Constitution distinguished him from other executive officials, particularly in separation of powers analysis." (internal quotation marks and citations omitted)); *In re Kessler*, 100 F.3d 1015, 1017 (D.C. Cir. 1996) ("President stands in

an entirely different position than other members of the executive branch" for purpose of separation of powers, and thus FDA commissioner could be deposed). Whatever the Court may decide with respect the President's responses, the other Defendants cannot hide behind *Cheney*.

Nor does *Cheney* bar *in camera* review. In fact, it does not discuss *in camera* review at all. The government contends (at 25) that *in camera* review is unnecessary because the privileged nature of the responses is "clear from the face of the interrogatories." But the Subject Interrogatories ask only that communications with the President or the Executive Office of the President be identified, and the government has routinely provided such information in other cases without making any privilege objection. *See, e.g.*, *Loving*, 550 F.3d at 36; *Judicial Watch*, 365 F.3d at 1110-11; *In re Sealed Case*, 121 F.3d at 735. The government suggests nothing extraordinary about the communications in this matter that would preclude disclosure, even *in camera* to the Court, based on the Supreme Court's teachings in *Cheney*.

V. DEFENDANTS SHOULD NOT BE ALLOWED TO INVOKE MILITARY DEFERENCE IF THEY REFUSE TO PRODUCE LOG-TYPE INFORMATION RELEVANT TO THE PROCESS OF THE PRESIDENT'S DECISION

At a minimum, the government should not be allowed to maintain that the presidential communications privilege blocks discovery into the process that led to the President's decision to ban transgender military service, while also relying on that undisclosed process to defend the ban. As courts have consistently held, "privilege cannot be used both as a sword and as a shield." *Recycling Sols., Inc. v. District of Columbia*, 175 F.R.D. 407, 408 (D.D.C. 1997); *see also In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 145 (D.C. Cir. 2015) ("[A] party may not use privilege 'as a tool for manipulation of the truth-seeking process.'").

If the government refuses to produce information relevant to its assertion that the President's decision to ban transgender military service was part of a reasoned decision-making process, the Court may draw an inference that the President's decision was not in fact the

product of such a process, but rather was motivated by an improper purpose. *See Shepherd v. ABC*, 62 F.3d 1469, 1475 (D.C. Cir. 1995) (holding that courts have inherent power to draw adverse evidentiary inferences); *International Union (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."); *SEC v. Whittemore*, 691 F. Supp. 2d 198, 206 (D.D.C. 2010) (drawing an adverse inference where civil defendants controlled the evidence, invoked their Fifth Amendment privilege, and failed to refute the SEC's allegations of securities fraud).

CONCLUSION

Defendants' motion for a protective order should be denied, and Defendants should be ordered to respond to the Subject Interrogatories. To the extent Defendants contend that specific responses implicate the substance of a presidential communication, those responses should be submitted to the Court for review *in camera*.

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Respectfully submitted,

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