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' REPLY IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER

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INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion for a Protective Order demonstrates that the discovery they seek from the President of the United States in this case is extraordinary, unprecedented, and unsupported by law. Plaintiffs candidly acknowledge that they seek interrogatory responses directly from the President to "test" the President's statements on military policy concerning service by transgender individuals. For a variety of reasons, all rooted in fundamental separation-of-powers principles, the Court should preclude the requested discovery of the President.

In a number of different settings, the Supreme Court has instructed that courts should refrain from exercising authority directly over the President in civil suits, subjecting the President to discovery in those suits, and forcing a premature showdown on privilege over presidential communications. Plaintiffs' discovery demands violate all of these precepts. First, before requiring the President to respond to burdensome, expansive interrogatories, Plaintiffs must show that the President is a proper party to this suit. *See Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); Defs.' Br., ECF No. 89 at 12–17. Plaintiffs have not and cannot do so. Second, even if the President were a proper defendant, Plaintiffs should be required to exhaust alternative sources of discovery to support their claims before seeking discovery from the President or forcing an assertion of privilege regarding presidential communications. *See Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 390 (2004); Defs.' Br. at 18–22. Plaintiffs have failed to meet this burden as well. Third, to the extent this Court is even required reach the question, separation-of-powers principles protect the President's communications and deliberative process from discovery. *See In re Sealed Case*, 121 F.3d 729, 743–45 (D.C. Cir. 1997). The presidential communications privilege applies to the factual information about confidential presidential communications and deliberations that Plaintiffs seek, and Plaintiffs have not met their initial

burden of heightened need necessary to shift the burden to the White House to formally invoke the privilege by affidavit, much less their ultimate burden to overcome the privilege. *See* Defs.' Br. at 26–39.

In the face of these precepts, Plaintiffs *intentionally* seek to probe the President's deliberative process about military policy. In what they trivially cast as mere "log-type information," Pls.' Opp., ECF No. 91 at 1, Plaintiffs demand to know precisely whom the President conferred with, when he spoke with them, and what topics they discussed before he made statements and decisions on policy. Plaintiffs' suggestion that such discovery would be permissible because it purportedly does not seek the "substance" of communications is wholly unfounded. The entire *purpose* of their demand is to test and expose the President's deliberative process, and protection of the information sought through interrogatories falls comfortably within the law protecting presidential communications and deliberations.

None of Plaintiffs' arguments support such an unprecedented intrusion into the President's deliberations. Contrary to Plaintiffs' suggestion, adherence to the separation-of-powers principles at stake here would not "effectively immunize" the President from civil discovery. Pls.' Opp. at 15. Rather, established law sets out a series of considerations that must be overcome before civil discovery of the President's decisionmaking process should even be considered. Indeed, the Supreme Court has made clear that assertion of Executive Privilege should be the last resort because "[o]nce executive privilege is asserted, coequal branches of the Government are set on a collision course." *Cheney*, 542 U.S. at 389.

Finally, forcing the President to provide interrogatory responses to the Court *in camera* at this stage would compound the separation-of-powers concerns, not resolve them. For these reasons, set forth further below, the Court should preclude the discovery demanded of the President and not direct any *in camera* submissions.

ARGUMENT

I. Constitutional Separation-of-Powers Principles Preclude Discovery Directed to the President Here.

A. The Court Should First Resolve the President's Motion to Dismiss.

The President is not a proper defendant in this case and, for this threshold reason, should not be required to respond to Plaintiffs' interrogatories. Because Plaintiffs may not receive any relief directly against the President in this case, Defendants have moved for partial judgment on the pleadings to dismiss the President as a defendant.[1] *See* Defs.' Mot. for Partial J. on the Pleadings, ECF No. 90. The Court should rule on that motion before addressing any issue regarding discovery of the President. If the Court dismisses the President from the case, then, as a non-party, the President would have no obligation to provide responses to the interrogatories at issue. *See* Fed. R. Civ. P. 33 (allowing interrogatories to be served only on parties to the case); *Kendrick v. Bowen*, No. CIV. 83-3175, 1989 WL 39012, at *1 (D.D.C. Apr. 13, 1989). Thus, the issue of whether the President must respond to Plaintiffs' interrogatories would be moot.[2]

This approach would also allow the Court to avoid reaching the significant constitutional question of whether separation-of-powers principles preclude Plaintiffs' discovery here directed

[1] Rather than provide any argument that the President is a proper defendant in this case, Plaintiffs "incorporate by reference the arguments in the brief that they will file separately in opposition" to Defendants' partial motion for judgment on the pleadings. Pls.' Opp. at 26 n.7. Plaintiffs' reliance on arguments made in a separate brief should not be considered by the Court. *See Sheikh v. District of Columbia*, 305 F.R.D. 16, 18 (D.D.C. 2014) (stating that "filings that employ incorporation by reference are disfavored") (Kollar-Kotelly, J.); *see also Sloan v. Urban Title Servs., Inc.*, 689 F. Supp. 2d 94, 99 n.3 (D.D.C. 2010) (Kollar-Kotelly, J.). This is especially true here, where Plaintiffs rely on arguments made in a brief that had not been filed at the time they filed their opposition brief. But if the Court permits Plaintiffs to rely on arguments made in a subsequent filing, the Court should also consider the arguments made by Defendants in their forthcoming reply in support of their partial motion for judgment on the pleadings.

[2] If the Court finds that the interrogatories directed to other defendants that request information about presidential communications are also presently at issue, dismissing the President from the case would at least significantly narrow the issues before the Court.

at the President. *See Cheney*, 542 U.S. at 389–90 (stating that "'occasion[s] for constitutional confrontation between the two branches' should be avoided whenever possible" (quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974))); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *Stillman v. CIA*, 319 F.3d 546, 547 (D.C. Cir. 2003).

B. *Cheney* Plainly Applies to Foreclose Discovery of the President at this Stage in the Litigation.

Even if Plaintiffs' claims against the President were to proceed, Defendants have set forth why the requested discovery still would intrude on fundamental separation-of-powers concerns. Because the "President occupies a unique position in the constitutional scheme," *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982), lower courts are required to address separation-of-powers objections before the President is required to either assert privilege or respond to civil discovery, *Cheney*, 542 U.S. at 391 (finding that the Court of Appeals "labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections"). *See* Defs.' Br. at 18–22.

Plaintiffs mischaracterize Defendants' arguments regarding *Cheney*. Defendants do not argue, as Plaintiffs contend, that "*Cheney* immunizes the President from discovery." Pls.' Opp. at 28. Rather, Defendants seek precisely what *Cheney* calls for: that this Court strictly control and circumscribe discovery by restricting both the scope and the timing of discovery about confidential presidential communications or deliberations before an assertion of privilege is required. 542 U.S. at 385 (citing *Clinton v. Jones*, 520 U.S. 681, 707 (1997); *Fitzgerald*, 457 U.S. at 753); *id.* at 390 (directing the "district courts to explore other avenues" to dispose of discovery demands that would not require the assertion of privilege (citation omitted)). Simply put, even assuming that civil

discovery directly of the President could be appropriate, the President should not have to respond to Plaintiffs' burdensome, far-reaching interrogatories at this stage in the litigation. Instead, the Court should, at a minimum, require Plaintiffs to exhaust discovery from other sources before seeking discovery from the President.

Plaintiffs fail to counter these basic principles. First, Plaintiffs argue that "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." Pls.' Opp. at 27. But Plaintiffs do not cite to any civil case where the court required a *sitting* President to answer interrogatories (or other forms of discovery) about his own communications or deliberations. Instead, Plaintiffs cite three cases—all pre-dating *Cheney*—that involve the invocation of the privilege by a *former* president. *See Dellums v. Powell*, 561 F.2d 242, 274 (D.C. Cir. 1977) ("It is of cardinal significance, in the controversy now before this court, that the claim of privilege is being urged solely by a former president, and there has been no assertion of privilege by an incumbent president[.]"); *Sun Oil Co. v. United States*, 206 Ct. Cl. 742, 744 (1975) (stating that the issue was "whether or not a former President of the United States, a private citizen, can maintain privilege as to certain White [H]ouse papers"); *Halperin v. Kissinger*, 401 F. Supp. 272, 274 (D.D.C. 1975) (noting that the "privilege has not been invoked by the incumbent Executive," and that "Mr. Nixon makes the claim on his own behalf as a private citizen"). As this Court itself has recognized, "[t]he Supreme Court held that a former president could assert the privilege over his own records, but that such an assertion carried less weight than an assertion by an incumbent over his own presidential records." *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (citing *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 449 (1977)) (Kollar-Kotelly, J.).[3]

[3] Plaintiffs also rely on *Dairyland Power Cooperative v. United States*, 79 Fed. Cl. 659, 668 (2007) to support their contention that "courts have long recognized that separation of powers does not

Plaintiffs also seek to limit *Cheney* to circumstances "when the Executive challenges a discovery plan as overbroad." Pls.' Opp. at 28. But that reading of *Cheney* is far too narrow.[4] *Cheney* sets forth separation-of-powers principles that are implicated when discovery would require the President to assert privilege and *a fortiori* when discovery is sought directly from the President. *See* 542 U.S. at 390 (discussing challenges to subpoenas). Indeed, this Court has recognized that "the 'special considerations' due where the incumbent president has asserted constitutional privilege over his own records" applies even "outside the context of a subpoena." *Am. Historical Ass'n*, 402 F. Supp. 2d at 182 (Kollar-Kotelly, J.).

Additionally, Plaintiffs' suggestion that the requests in *Cheney* were more sweeping than the requests here is entirely without support. Indeed, the requests in *Cheney* were significantly more targeted than Plaintiffs' interrogatory requests, which seek probing details directly from the

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deprive courts of the power to order the Executive to answer appropriately tailored discovery requests." *See* Pl. Opp. at 27. But even assuming that case was correctly decided, it did not involve discovery directed at the President's own personal communications or deliberations, let alone interrogatories directed specifically to the current President. *See* 79 Fed. Cl. at 667. Plaintiffs' reference to a court-martial where President Monroe responded to written interrogatories is likewise unavailing. *See* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote*, 1975 U. Ill. L. Forum 5–6. A court-martial proceeding is more analogous to a criminal than civil matter, *see id.*, and that case pre-dates the most recent Supreme Court authority on separation-of-powers concerns with discovery of the President, particularly in a civil case, *see Cheney*, 542 U.S. at 383–85; *see also infra* Subsection IV(C)(1).

[4] Plaintiffs' argument that Defendants waived the opportunity to raise separation-of-powers concerns by agreeing to a discovery plan is meritless. *See* Pls.' Opp. at 28–29. In the email cited by Plaintiffs, Defendants agreed only to provide responses to interrogatories by a certain date. *See* ECF No. 91-11. Nothing in the email suggests that Defendants agreed to waive any objections to interrogatories, let alone objections rooted in constitutional separation-of-powers principles. *See id.* And nothing forecloses Defendants from raising objections in response to discovery itself—which is plainly allowed under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 33(b)(4). Given that the Court should "'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice,'" *Cheney*, 542 U.S. at 382 (quoting *Nixon*, 418 U.S. at 715), the Court cannot infer that Defendants waived the separation-of-powers objections. *See Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543–44 (9th Cir. 1984) ("The component of the separation of powers rule that protects the integrity of the constitutional structure . . . cannot be waived by the parties[.]")

President and his immediate advisers about his deliberations on military policy. The requests in *Cheney* sought, *inter alia*, all documents related to personnel involved with a Presidential task force, to sub-groups of the task force, and to communications concerning the activities of the task force. 542 U.S. at 387. The breadth of the interrogatories here is vastly more expansive and intrusive: they seek information directly *from the President about presidential decisionmaking*. The interrogatories purport to require the President to personally identify communications he had with his advisors on a variety of topics related to decisions about military policy, as well as to identify what documents the President relied on and considered in making these decisions, what meetings he attended and with whom, the topics discussed, and all documents relating to those meetings, among other requests. *See* Pls.' First Set of Interrogs., ECF No. 89-1. The notion that this would be less intrusive of the President's interests than in *Cheney* defies common sense.

Plaintiffs also contend that *Cheney* would not bar discovery about presidential communications and deliberations from the other Defendants. *See* Pls.' Opp. at 29–30 (arguing that "courts have held that the separation-of-powers considerations that might limit discovery of the President do not apply to lower-ranking executive officials."). As Defendants have explained, this discovery dispute puts at issue not only *from whom* the Plaintiffs seek discovery (the President) but also *the subject of that discovery*—the President's communications and deliberations. Although the concerns in *Cheney* are most acute where the President must personally respond to discovery, *Cheney* itself makes clear that separation-of-powers concerns are not so limited, but rather "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice." 542 U.S. at 382; *see also id.* at 385 ("[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated" in civil discovery.). Here, Plaintiffs seek *the exact same information* about presidential communications and deliberations from other

defendants, including from the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Service Secretaries, and the Director of the Defense Health Agency. *See* Pls.' First Set of Interrogs. at Interrogs. No. 14–25. The principles set forth in *Cheney* would be a nullity if they could easily be evaded by seeking presidential communications and deliberations from the very senior officials with whom the President communicates. Even in that setting, discovery is still directed at information about presidential communications and deliberations, and the President would still face the need to assert privilege to protect his deliberative process. Like discovery directed to the President himself, such discovery would still run afoul of *Cheney*'s admonition that an assertion of Executive privilege leads to a "collision course" between coequal branches of Government and thus "should be avoided whenever possible." 542 U.S. at 389–90. Here, avoidance of separation-of-powers concerns is not achieved by allowing discovery of presidential communications from a source other than the President himself but, rather, by focusing on discovery from other defendants about the military policy being challenged—as to which Defendants have produced substantial discovery. *See* Defs.' Br. at 22.[5]

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

Plaintiffs contend that *Cheney* says nothing about whether *in camera* review would be foreclosed here. *See* Pls.' Opp. at 30. That is inaccurate—as explained below, *in camera* review by the district court was at issue in *Cheney*. Moreover, Plaintiffs do not explain *why* the separation-of-powers principles in *Cheney* would apply any differently to *in camera* review. In recognition

[5] None of the authority Plaintiffs cite supports seeking the same privileged information concerning presidential communications and deliberations from other Government officials. *See In re Sealed Case*, 121 F.3d at 752 (holding that "communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President"); *In re Kessler*, 100 F.3d 1015, 1018 (D.C. Cir. 1996) (denying the petition for a writ of mandamus to preclude the deposition of the Commissioner of the FDA).

of those principles, the Court in *Cheney* held that Plaintiffs must exhaust alternative sources of discovery before forcing the President to assert privilege. The possibility of *in camera* review does little to address or mitigate this concern. The Court is still placed "in the awkward position of evaluating the Executive's claims of confidentiality and autonomy." *Cheney*, 542 U.S. at 389. Indeed, the Court of Appeals in *Cheney* had explicitly permitted the district court to entertain claims of privilege and review allegedly privileged documents *in camera*, and the Supreme Court rejected that approach. *See id.* at 402.

Nor do Plaintiffs explain how responding to interrogatories *in camera* would be any less intrusive and burdensome for the President than responding directly to the Plaintiffs. *See generally* Pls.' Opp. The burden on the President lies in investigating and formulating his responses to the interrogatories. These tasks—which would require the President and his staff to question numerous current and former employees, try to recall scores of previous meetings, and review countless records—require substantial effort regardless of the immediate recipient of the President's responses. Thus, as in *Cheney*, *in camera* review in this case would do nothing to diminish the significant separation-of-powers concerns raised by forcing the Executive to assert privilege. *See Cheney*, 542 U.S. at 389.

Plaintiffs also assert that the Supreme Court and the D.C. Circuit have previously endorsed *in camera* inspection in litigation involving requests for documents to Presidents and former Presidents. *See* Pls.' Opp. at 15. Again, Plaintiffs miss the point. *Cheney* first requires that Plaintiffs exhaust alternative sources of non-privileged discovery to support their claims, and *Dairyland* requires that Plaintiffs make a heightened showing of need—all before the President must assert privilege. To be sure, it may be appropriate for courts to conduct *in camera* review to

resolve an actual claim of privilege when it must be raised. But *Cheney* admonishes courts to avoid that circumstance where possible, and this case is simply not at that stage.[6]

In addition, as Defendants have explained, *in camera* review of interrogatory responses would serve no purpose where it should be apparent, on the face of the interrogatories, what information is being sought. For example, Interrogatory No. 4 requests that the President "[i]dentify the 'Generals and military experts' referenced in the Twitter Statement, and, for each such person, [i]dentify all [c]ommunications between that person and President Trump." Pls.' First Set of Interrogs. at Interrog. No 4. Whether the identities of generals and military experts who advise the President on issues of military policy would be protected by the presidential communications privilege is a purely legal question that does not turn on the identities of the generals and military experts in question. Submitting actual responsive information *in camera* would not be necessary to find that such information is privileged. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 36, 48–49 (D.D.C. 2007) (rejecting plaintiff's position that the defendants must name the White House advisors participating in communications to invoke the presidential communications privilege and explaining that the Court could evaluate whether the privilege applied based on "the nature of the adviser's responsibilities; not his or her name"); *In re United States*, 678 F. App'x 981, 991–92 (Fed. Cir. 2017). Plaintiffs therefore fail to explain why *in camera* review would be necessary or appropriate, and there is no basis for requiring it in this case. *See Quinon v. F.B.I.*, 86 F.3d 1222,

[6] Contrary to Plaintiffs' apparent suggestion, *see* Pl. Opp. at 18 n.5, no claim of privilege has been perfected here. Plaintiffs have not moved to compel any information, and Defendants' motion for a protective order seeks relief generally from discovery consistent with the principles of *Cheney*, and also explains why the information sought would be subject to the presidential communications privilege if and when that issue were ripe. *See infra* Section III.

1228 (D.C. Cir. 1996) ("[*I*]*n camera* review should not be resorted to as a matter of course, simply on the theory that 'it can't hurt.'").

Finally, declining to submit information responsive to the interrogatories for *in camera* review here does not render the presidential communications privilege an "absolute" privilege. *See* Pls.' Opp. at 14. As Defendants have explained, the presidential communications privilege would be subject to judicial review if that became necessary: once Plaintiffs have exhausted alternative sources of non-privileged discovery to support their claims and made the requisite heightened, particularized showing of need (assuming the President then asserts privilege), it would be ripe for the Court to decide whether the Plaintiffs have made a "focused demonstration of need" sufficient to overcome the privilege. *See In re Sealed Case*, 121 F.3d at 746. The privilege thus includes a mechanism through which Plaintiffs can show entitlement to disclosure. At this stage, however, *in camera* review would address none of the separation-of-powers concerns arising from Plaintiffs' demand that the President respond to interrogatories, nor would it be necessary to decide whether the information sought would be subject to the presidential communications privilege.

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

The foregoing separation-of-powers considerations should foreclose the requested interrogatories and *in camera* review of the responses about presidential communications. Even if interrogatories were appropriate at this stage, the Court must first require Plaintiffs to meet their initial burden of establishing a heightened, particularized need for the specific information sought before requiring the President to formally invoke the privilege by affidavit. *See Dairyland*, 79 Fed. Cl. at 660. Plaintiffs' argument that they already have satisfied their ultimate burden to overcome the privilege demonstrates a fundamental misunderstanding of the broad scope of the

presidential communications privilege, as well as the timing of when it must be formally invoked and at what stage it can be overcome.

A. 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. Plaintiffs repeatedly acknowledge that they seek information about the President's decisionmaking process. *See, e.g.*, Pls.' Opp. at 1 ("Plaintiffs sought narrowly focused information about the *process* preceding the President's decision[.]"); *id.* at 13 ("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[.]"). Because information regarding the President's confidential decisionmaking process clearly "reflect[s] presidential decisionmaking and deliberations," it is plainly protected by the presidential communications privilege. *See In re Sealed Case*, 121 F.3d at 744.

Plaintiffs' contention that they seek only information about the *process* preceding a presidential decision and not *substantive* responses about the President's decisions or confidential communications, *see, e.g.*, Pls.' Opp. at 1, 9–15, is meritless. Disclosing the kind of comprehensive information that Plaintiffs seek about the participants, timeline, and scope of the President's decisionmaking would reveal the inner workings of the President's decisionmaking process and constitute a substantial intrusion on the Presidency. While the substance of presidential communications obviously are covered by the privilege, the information sought here

is also the type of confidential information that the privilege is intended to protect.[7] *See In re Sealed Case*, 121 F.3d at 744; *Sirica*, 487 F.2d at 717 (explaining that confidentiality is needed to protect "the effectiveness of the executive decision-making process.").

Plaintiffs' argument that it is routine for the Government to provide identifying information about presidential communications is misguided. *See* Pls.' Opp. at 11–12. First, three of the cases Plaintiffs cite are Freedom of Information Act ("FOIA") cases involving *Vaughn* indices. *See id.* (citing *Loving v. Dep't of Defense*, 550 F.3d 32, 36 (D.C. Cir. 2008); *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1110–1111 (D.C. Cir. 2004); *Amnesty Int'l USA v. Central Intelligence Agency*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010)). *Vaughn* indices are produced by federal agencies, not by the President, who is not subject to FOIA. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). Additionally, the mere fact that a *Vaughn* index or privilege log is provided does not necessarily mean that specific information revealing Presidential deliberations is disclosed. Rather, information sufficient to assess the claim of privilege can be provided at a high level of generality. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 736 (noting the Government's argument that "the withheld documents come under the presidential communications privilege because they were generated in response to the President's request for advice on . . . one of the President's core functions under Article II of the Constitution."); *Dairyland*, 79 Fed. Cl at 668 (privilege log described "memorandum from [Department of Energy] officials to the Office of Management and Budget and the White House regarding nuclear waste litigation"); *Amnesty Int'l USA*, 728 F. Supp. 2d at 522 (finding that the withheld documents

[7] Additionally, Plaintiffs' description of the interrogatories as seeking merely the "general subject matter" and "identifying characteristics" of presidential communications is misleading. Pls.' Opp. at 9, 11. Some of the interrogatories request information about the President's communications with his immediate advisors concerning specific topics, such as "any evaluation(s) conducted by [DoD] on the impact of accessions of transgender applicants on readiness or lethality." *See* Pls.' First Set of Interrogs. at Interrog. No. 20.

"reflect or memorialize communications between senior presidential advisors and other United States government officials and are therefore properly withheld"). Moreover, Plaintiffs cite no case law holding that the President is required to formally assert the presidential communications privilege each and every time the privilege could be applied.

Similarly, Plaintiffs' contention that "courts have recognized that the privilege protects only the substance of documents or communications" is wrong. *See* Pls.' Opp at 10 (citing *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 127, 132 (D.D.C. 2000)). *CREW*, a district court FOIA case about White House visitor logs, did not hold that *only* substantive communications were covered by the presidential communications privilege—it held that the particular logs at issue there were not covered and carefully reserved any broader holding. *See CREW*, 592 F. Supp. 2d at 132. In the parallel litigation of *Citizens for Responsibility & Ethics in Washington v. Department of Homeland Security*, 592 F. Supp. 2d at 111, 118–19 (D.D.C. 2009), the Court explained that the White House visitor logs were not privileged because the information contained in the logs "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." *Id.* In contrast, Plaintiffs here specifically demand information that identifies communications (including dates and the identity of the participants) with the President and his immediate advisors and their staff regarding military service by transgender individuals for the express purpose of assessing the process preceding a presidential decision. *See* Defs. Br. at 32–34.[8] Plaintiffs also disregard D.C. Circuit authority indicating that the privilege protects

[8] Notably, the D.C. Circuit later observed, in holding that the White House visitor logs were not subject to FOIA, that construing FOIA to extend to these visitor logs "could substantially affect the President's ability to meet confidentially with foreign leaders, agency officials, or members of the public" and "render FOIA a potentially serious congressional intrusion into the conduct of the

"documents *or other materials* that reflect presidential decisionmaking and deliberations," *In re Sealed Case*, 121 F.3d at 744 (emphasis added), as well as factual information and "sources of information," *see id.* at 745, 750; *Loving*, 550 F.3d at 38. Defendants do not contend that the presidential communications privilege covers "all information related to the President," Pls.' Opp. at 9, or that the privilege is "absolute" in the sense of being outside the scope of judicial review or immune from disclosure based on a strong showing of need in certain circumstances. 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.[9]

Plaintiffs also argue that Defendants have "placed the involvement of the military in the President's decision squarely at issue" because the President publicly referenced his consultations with advisors and Defendants have argued that deference is owed to decisions about military personnel. *See* Pls.' Opp. at 1, 3–4. That argument has no merit. Under Plaintiffs' theory, every time the President indicates that he consulted advisors about a decision, the door would be open to discovery into the President's decisionmaking process and confidential deliberations. Indeed, Plaintiffs concede that "the President would be expected to consult with senior military leaders about changes to *any* major military policy[.]" Pls.' Opp. at 12. Plaintiffs' legally unsupported

President's daily operations." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 226–227 (D.C. Cir. 2013); *see also* Defs.' Br. at 32–33.

[9] Plaintiffs' reliance on cases describing other privileges, such as the attorney-client, clergy-penitent, and psychotherapist-patient privileges, is likewise misplaced. Pls.' Opp. at 10–11. The presidential communications privilege is unique, as it is "rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case*, 121 F.3d at 745; *see also Cheney*, 542 U.S. at 382 ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Executive Office of the President] occupies.") (quoting *Clinton*, 520 U.S. at 698–99). Analogies to other privileges are therefore simply inapposite.

theory thus would permit extraordinary discovery into the President's deliberations every time he publicly references consultations with advisors.

Plaintiffs' related contention that protecting the kind of information at issue here is not justified by the purpose of the privilege is also meritless. On the contrary, the D.C. Circuit has recognized that confidentiality in the President's "performance of his official duties" is necessary to protect "the effectiveness of the executive decision-making process." *Sirica*, 487 F.2d at 717. Permitting broad-ranging, intrusive interrogatories into the President's decisionmaking process has the potential to chill the President's willingness to make strategic decisions about which advisors he chooses to consult and when, whom he trusts to participate in important meetings, which advisors he chooses *not* to consult, and what topics to discuss. Revealing such confidential information 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.

Again, none of these considerations mean that the presidential communications privilege is "absolute" in the sense that it cannot be overcome in certain circumstances by an adequate showing of need or in the sense that "no court may therefore even evaluate whether the privilege applies." Pls.' Opp. at 13–14. However, the Court cannot even begin to evaluate whether the privilege has been overcome until (i) after Plaintiffs have exhausted other avenues of non-privileged discovery to support their claims and (ii) have met their initial burden of demonstrating heightened need, *see Cheney*, 542 U.S. at 386, and only then (iii) after it is necessary for the President to formally invoke the privilege through affidavit. Nor are Defendants arguing that the privilege is outside the scope of judicial review. Rather, as explained in Section II, *supra*, the

Court can resolve the legal question of whether the type of information at issue here is privileged as a matter of law without the need for *in camera* review.[10]

B. Plaintiffs Have Not Met Their Initial Burden to Demonstrate Heightened Need for the Information They Seek, Thus the Burden Has Not Shifted to the President to Formally Invoke the Presidential Communications Privilege.

Plaintiffs' Opposition demonstrates a fundamental misunderstanding about the sequence of events that must occur before the President is required to formally invoke the presidential communications privilege by affidavit—a necessary prerequisite before the Court can begin to evaluate whether Plaintiffs can overcome the privilege with a "focused demonstration of need." *In re Sealed Case*, 121 F.3d at 746. Instead of presenting a meaningful response to this argument, *see* Defs.' Br. at 34–37, Plaintiffs contend in a footnote that "Defendants have *already* asserted the presidential communications privilege . . . . It is unclear what else Defendants believe they must do to perfect their claim of privilege," *see* Pls.' Opp. at 18 n.5. Plaintiffs are wrong—indeed, they misunderstand how and when the privilege must be formally invoked—and their argument runs afoul of *Cheney*, 542 U.S. at 389–90, and *In re Sealed Case*, 121 F.3d at 746.

Because of the "unique position in the constitutional scheme" that the Executive Office of the President occupies, parties seeking discovery from the President must satisfy an initial burden of demonstrating a heightened, particularized need for the information they seek. *Cheney*, 542 U.S. at 382 (quoting *Clinton*, 520 U.S. 698–99). Until Plaintiffs have met this initial burden of satisfying the "exacting standards" of "relevancy," "admissibility," and "specificity," pursuant to

[10] Contrary to Plaintiffs' contention, the instant dispute is limited to the interrogatories directed to the President. Nevertheless, where Plaintiffs seek confidential information regarding presidential communications from other Defendants, the presidential communications privilege applies, just as the privilege applies where Plaintiffs seek such confidential information directly from the President himself. *See Blumenthal v. Drudge*, 186 F.R.D. 236, 242 (D.D.C. 1999) (holding that an advisor to the President has "an obligation to preserve the presidential communications privilege long enough for the President to invoke it if he so desires").

the Supreme Court's analysis of this issue in *Cheney*, 542 U.S. at 386 (internal quotation marks omitted), the burden does not shift to the White House to formally invoke the privilege by affidavit. *See Dairyland*, 79 Fed. Cl. at 662 ("[T]he 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.").

Plaintiffs also fail to recognize that in order to formalize a privilege claim, a declaration formally asserting privilege is lodged. *See, e.g.*, *In re Sealed Case*, 121 F.3d at 745 n.16 (affidavit properly invoked privilege where White House Counsel averred that he was specifically authorized by the President to invoke the privilege); *Dairyland Power Co-op v. United States*, 2008 WL 8776547, No. 04-106C, at *2 (Fed. Cl. Mar. 17, 2008) (after concluding that plaintiffs had met their initial showing of need, Court ordered Government to submit affidavit formally invoking presidential communications privilege). Indeed, this burden is an "important factor" to be considered by the courts due to the special deference and "high respect that is owed to the office of the Chief Executive." *Cheney*, 542 U.S. at 385 (internal quotation marks omitted). Further, , 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. 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 privilege.

Accordingly, if the Court concludes that discovery of the President is not precluded on mootness or separation-of-powers grounds, *see* Section I *supra*, the Court should first require Plaintiffs to meet their initial burden of demonstrating a heightened need. Only then should

Defendants be required to formally invoke the privilege. Until these steps have been completed, the Court should not begin to evaluate whether Plaintiffs have overcome the privilege.

C. In Any Event, Plaintiffs Have Not Met Their Ultimate Burden Of Showing a "Focused Demonstration of Need" to Overcome the Privilege.

Because Plaintiffs have not met their initial burden of heightened need to shift the burden to the White House to formally invoke the presidential communications privilege, it is premature for the Court to consider whether Plaintiffs have met their ultimate burden to overcome the privilege. In any event, Plaintiffs have not satisfied their ultimate burden to overcome the privilege. Plaintiffs' burden would be especially high in a civil case like this, and they have not demonstrated that the discovery they seek from the President contains important evidence directly relevant to the central issues of the case.

1. There is a High Burden to Overcome the Privilege in a Civil Case.

First, as set forth in Defendants' opening motion, the Supreme Court in *Cheney* distinguished between criminal and civil proceedings in assessing how discovery against the President may proceed in a civil case like this. *Cheney*, 542 U.S at 383. Simply put, "the right to production of relevant evidence in civil proceedings does not have the same constitutional dimensions" as it does in criminal proceedings. *Id.* at 384 (quotation omitted). Plaintiffs respond to this authority by arguing that "this case is closer to *Nixon* than *Cheney*" in several respects, including because alleged constitutional violations are at issue here (but not in *Cheney*) and as in *Nixon* the "essential functions" of an Article III court in adjudicating this case are implicated. *See* Pls.' Opp. at 24–25. This argument is meritless. If that were all there were to distinguishing between criminal and civil cases for purposes of discovery on the President, *Cheney* would have little force. Numerous civil cases involve constitutional claims, and the essential function of an

Article III court is at issue in all them. *Cheney*, relying on *Nixon*, explains the considerations at issue in a criminal setting that do not apply here.

For example, the Sixth Amendment provides criminal defendants the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI; *see Nixon*, 418 U.S. at 711–13 (discussing the constitutional rights of criminal defendants). The Supreme Court has recognized that "[w]ithholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks 'conflicts with the function of the courts under Art[icle] III'" because "a 'primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions.'" *Cheney*, 542 U.S at 384 (quoting *Nixon*, 418 U.S. at 707). These criminal-case constitutional concerns are not presented in civil cases. Thus, plaintiffs' attempt to analogize this civil case to the kind of criminal proceeding at issue in *Nixon* is unavailing.[11]

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

Plaintiffs argue that "the information [they seek] is itself 'important evidence' that is necessary to test Defendants' assertions about the character of the President's decisionmaking process," and that "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

[11] Plaintiffs' reliance on *Dellums*, 561 F.2d at 248–49, is misplaced. *Dellums* pre-dates *Cheney* and involved the invocation of the privilege by a *former* president, which the Court concluded is entitled to far less weight than that assigned to a sitting President's assertion. *Id.* In addition, the court in *Dellums* noted that the document discovery sought was "'central'" evidence to the plaintiffs' case, and that plaintiffs had difficulty obtaining similar evidence from another source. *Id.* at 249 (quoting district court decision). As discussed further herein, the so-called "log-type" information sought through their interrogatories is hardly "central" to Plaintiffs' ability to challenge military policy regarding transgender persons, and they have failed to make any showing of being unable to obtain substitute evidence from other sources.

unconstitutional animus." *See* Pls.' Opp. at 19–20. Plaintiffs' broad assertions do not meet their burden to 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." *In re Sealed Case*, 121 F.3d at 754. Plaintiffs do not even attempt to separately discuss each "discrete group" of privileged material they seek, despite acknowledging that twelve separate interrogatory requests are at issue. *See* Pls.' Opp. at 2.[12] Rather, they rely again mainly on the notion that whether the President in fact consulted with any generals or military experts before announcing his policy could negate the factual grounds for any deference due. This argument cannot satisfy their heavy burden to take discovery of the President. The deference due to judgments as to military personnel policy is well established in the law and, indeed, is fundamentally a question of law, not fact. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); s*ee also Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (There is "perhaps . . . no other area" where the Supreme Court has shown the political branches "greater deference."); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (The Court's "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations destined for civilian society."). Moreover, the President's determination ultimately was to revert to a long-standing, pre-existing policy in place decades before he took office. The President ultimately directed that before a change to that long-standing policy occur, further study was needed by the Department of Defense ("DoD"). *See* Presidential Memorandum, 82 Fed. Reg.

[12] For example, Interrogatory No. 8 requests information about whether the President received advice from an attorney, the dates the advice was communicated to the President, the subject matter of the advice, the communications transmitting such advice, and the identities of all persons to whom the substance of the advice has ever been disclosed. *See* Pls.' First Set of Interrogs. at Interrog. No. 8. Plaintiffs do not address at all—much less with specificity—how the privileged information responsive to this interrogatory would contain important evidence about "the character of the President's decision-making process" or any alleged animus. Pls.' Opp. at 19.

41,319, 41,319 (Aug. 25, 2017). Any resulting policy by DoD would itself potentially be subject to further challenge, and the judgments reflected in that policy would likewise be subject to deference. In these circumstances, the notion that identifying the advisors with whom the President spoke is central to the principle of deference to military judgments is misguided.[13]

Additionally, allegations of animus are not, in and of themselves, enough to overcome the privilege. Plaintiffs cannot obtain discovery directly from the President based on pure speculation of animus, particularly where the President's decision sought to maintain a policy that existed long before he took office and ultimately called for further study before it is changed. Moreover, the D.C. Circuit has recognized that unlike the deliberative process privilege, which can be overcome "where there is reason to believe the documents sought may shed light on government misconduct," *In re Sealed Case*, 121 F.3d at 738, the presidential communications privilege is "more difficult to surmount," and the party seeking to overcome the privilege "must always

[13] The Court should reject Plaintiffs' suggestion that Defendants should be precluded from defending the challenged policy on the basis of military deference unless the President responds to discovery requests for four reasons. *See* Pls.' Opp. at 30–31. First, an adverse inference should not be drawn from a defendant's successful assertion of privilege. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000) ("[T]he Rules of Civil Procedure recognize an appropriate role for the exercise of this privilege, and a refusal to respond to discovery under such invocation cannot justify the imposition of penalties." (citing, *inter alia*, Fed. R. Civ. P. 26(b)(5) (emphasis omitted)). Second, Plaintiffs' request ignores well-established principles of military deference by courts, which the Court should not disregard. *See Rostker*, 453 U.S. at 64–65, 67; *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc). Third, although Plaintiffs argue that their request is based on the notion that privilege cannot be both a sword and a shield, Defendants are not using privileged information to support their defenses (*i.e.*, as a sword). Finally, Plaintiffs erroneously analogize this case to one where a court may draw an adverse inference against party to a civil action who refuses to testify based on an assertion of the privilege against self-incrimination under the Fifth Amendment. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Here, nothing remotely comparable is at issue. The presidential communications privilege, if invoked and upheld, would lawfully remove information from the case. The notion that any assertion of privilege over information related to presidential communications should give rise to an adverse inference is untenable.

provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials," *id.* at 746.[14]

Thus, even if the issue of overcoming the privilege were properly before the Court, Plaintiffs have not provided the Court with sufficient detail for the Court to conclude that Plaintiffs have met their heavy, ultimate burden.[15] *See U.S. Dep't of the Treasury v. Black*, No. 17-5142, 2017 WL 6553628, at *2 (D.C. Cir. Dec. 8, 2017).

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

In addition, even if the issue of overcoming the privilege were properly before the Court, Plaintiffs have not met their burden to demonstrate the unavailability of sufficient evidence. Plaintiffs argue that they can "easily" satisfy the second step in overcoming the privilege because it is "impossible" to obtain the privileged information they seek from other sources. Pls.' Opp. at 21. However, Plaintiffs misunderstand the heavy burden that is required to overcome the privilege. To do so, Plaintiffs must "first" make efforts to determine whether "sufficient evidence can be

[14] Plaintiffs contend that the "log-type information sought is independently relevant because it would enable Plaintiffs to assess whether other important evidence is being withheld." Pls.' Opp. at 20. However, Plaintiffs do not explain how responses to the Subject Interrogatories would indicate "whether other important evidence is being withheld." *See id.* Further, Plaintiffs' claim that they can overcome the privilege because they need the privileged information "to test Defendants' sweeping assertion of privilege," *id.*, is a tautology and should be summarily rejected.

[15] Plaintiffs' citation to *In re Sealed Case*'s statement that "[i]n practice, this component can be expected to have limited impact," 121 F.3d at 754, is misleading. *See* Pls.' Opp. at 19. Read in context, the portion of the case cited by Plaintiffs indicates that this first component can be expected to have little impact in a *criminal* matter, because Federal Rule of Criminal Procedure 17(c), "which governs all subpoenas for documents and materials made in criminal proceedings," "precludes use of a trial subpoena to obtain evidence that is not relevant to the charges being prosecuted or where the claim that subpoenaed materials will contain such evidence represents mere speculation." *In re Sealed Case*, 121 F.3d at 754–55. In this civil case, where Rule 17(c) does not apply, Plaintiffs must meet their heavy burden of demonstrating that each discrete group of privileged material likely contains important evidence directly relevant to central issues. *See id.* at 753–55.

obtained elsewhere," and then must "detail these efforts and explain why evidence covered by the . . . privilege is still needed." *In re Sealed Case*, 121 F.3d at 755.

Here, Plaintiffs have not explained in detail what evidence they have already sought, obtained or considered, nor why this evidence is not sufficient and why evidence covered by the privilege is still needed. *See id.*; *Black*, 2017 WL 6553628, at *2. Plaintiffs have so far deposed three officials from DoD and the Armed Forces and are scheduled to depose three more. Defendants also have produced to Plaintiffs more than 80,000 pages of documents from DoD and the Armed Forces. Before attempting to overcome the presidential communications privilege, Plaintiffs must demonstrate in detail why "sufficient evidence" to support their claims has not been found in the broad discovery that Plaintiffs have received and why, notwithstanding these other sources of information, the President's responses to interrogatories are still needed. *See In re Sealed Case*, 121 F.3d at 755. As outlined above, the issue is not whether Plaintiffs have requested precisely the same privileged information concerning presidential communications from other defendants, but whether they need such information to support their claims. Thus, even if the issue of overcoming the privilege were properly before the Court, Plaintiffs have not provided the Court with the requisite detail for the Court to conclude that Plaintiffs have met their heavy, ultimate burden and that the privilege should be overcome.

4. The President's Confidentiality Interests are Especially High in the National Security Context.

Again if the issue of overcoming the privilege were properly before the Court (which it is not), Defendants would emphasize that, contrary to Plaintiffs' argument, the President has heightened confidentiality interests in the context of his decisionmaking process as Commander-in-Chief, on a topic involving national security and military concerns. The interrogatories at issue are extraordinary, as they are directed to the sitting President himself in a civil suit brought against

the President in his official capacity. Plaintiffs argue that the President's interest in confidentiality is weak because the interrogatories at issue present only a "slight" risk of interfering with the President's ability to obtain advice from his advisors. *See* Pls.' Opp. at 22. Plaintiffs fail to comprehend that permitting broad-ranging, intrusive interrogatories to the President concerning his decisionmaking process has serious potential to chill the President's ability to make strategic decisions about which advisors he chooses to consult or *not* to consult, and what topics to discuss. Revealing this confidential information 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.

Nor does Plaintiffs' argument that public statements by the President concerning his consultations with advisors "reduce[]" his interest in confidentiality have any merit. Pls.' Opp. at 22. As noted, under this theory, every time a President describes consultations with advisors, discovery about his decisionmaking process and confidential deliberations could proceed.[16]

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; and (3) excuse the President from having to provide information in response to Plaintiffs' interrogatories solely for the Court's *in camera* review.

[16] Plaintiffs' reliance on *Center for Effective Government v. U.S. Department of State*, 7 F. Supp. 3d 16, 26 (D.D.C. 2013), is misplaced. *See* Pls.' Opp. at 22–23. That case concerned a privileged document that was "widely publicized" through fact sheets "describ[ing] in detail the goals and initiatives set forth therein, copying verbatim many portions of the [document], and closely paraphrasing . . . other sections of the [document]." *Ctr. for Effective Gov't*, 7 F. Supp. 3d at 26. That is a different situation from the case at hand.

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Certificate of Service

I hereby certify that on March 19, 2018, I electronically filed the foregoing Reply in Support of Defendants' Motion for a Protective Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 19, 2018

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