No. 20-

In the United States Court of Appeals for the District of Columbia Circuit

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IN RE HILLARY RODHAM CLINTON AND
CHERYL MILLS,
PETITIONERS

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 14-1242)

PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioners Hillary Rodham Clinton and Cheryl Mills make the following certification:

(A) Parties and Amici.

Petitioners: Hillary Rodham Clinton; Cheryl Mills.

Respondents: Judicial Watch, Inc.; United States Department of State.

Amici: None.

(B) Ruling Under Review. The ruling at issue in this petition is the March 2, 2020 Memorandum Order granting Plaintiff Judicial Watch's request to take the depositions of Secretary Clinton and Cheryl Mills issued by Judge Royce C. Lamberth of the United States District Court for the District of Columbia in Civ. No. 14-1242. That ruling is not yet reported.

(C) Related Cases. This case has not previously been before this Court. There are no pending related cases.

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INTRODUCTION

In this Freedom of Information Act case, Plaintiff Judicial Watch seeks to obtain documents from the U.S. State Department related to the talking points provided to Ambassador Susan Rice following the 2012 attack on the U.S. consulate in Benghazi, Libya. In opposing the State Department's motion for summary judgment, Judicial Watch, Inc. claimed that it required discovery to determine whether there exist any additional sources of emails belonging to former Secretary of State Hillary Rodham Clinton. Those emails, of course, were the subject of an exhaustive FBI investigation. Following that investigation, this Court held in a separate case brought by Judicial Watch under the Administrative Procedure Act that attempts to locate additional emails would be fruitless. *Judicial Watch v. Pompeo*, 744 F. App'x 3 (D.C. Cir. Dec. 4, 2018).

Nonetheless, in this FOIA case, the district court (Lamberth, J.) has granted Judicial Watch unprecedented discovery in support of the futile endeavor of identifying additional Clinton emails responsive to its FOIA request. As relevant here, on March 2, 2020, the district court granted Judicial Watch's request to depose Secretary Clinton and to depose for the second time her former Chief of Staff, Cheryl Mills, concerning, among other topics, whether

Secretary Clinton's use of a personal email server was intended to "evade" FOIA. The depositions of Secretary Clinton and Ms. Mills have not yet been scheduled, but under the district court's order they must occur within seventy-five days of the March 2, 2020 order (*i.e.*, by May 18, 2020), unless the court grants additional time. Secretary Clinton and Ms. Mills respectfully petition this Court for a writ of mandamus to prevent the ordered depositions.

FOIA cases rarely involve discovery. But Judicial Watch has already taken unusually wide-ranging discovery in this case and a similar case before Judge Emmet Sullivan, encompassing nineteen depositions of current or former officials from the State Department and other agencies, dozens of interrogatories, and broad document requests. Significantly, in the related case, Secretary Clinton already provided Judicial Watch verified interrogatory responses on the very subject that would be addressed at the deposition—her use of a personal email server. And, in a May 2016 deposition in that case, Ms. Mills already testified for hours in response to Judicial Watch's questions on the exact same topics on which it seeks to re-depose her here.

The district court nonetheless granted the request for further discovery because, in its view, the admittedly "extensive" record "does not sufficiently explain Secretary Clinton's state of mind" regarding her use of a personal

email server. The court also authorized questioning of Secretary Clinton and Ms. Mills on the existence of documents related to the 2012 Benghazi attack because "such inquiries would go to the adequacy of the search."

The district court's order inappropriately discounts this Court's prior finding that there are no remaining recoverable emails, the extraordinary discovery that Judicial Watch has already obtained, and the vast public record on Secretary Clinton's emails. Given this context, Judicial Watch could not possibly show the extraordinary circumstances required to depose (or re-depose) former high-ranking officials regarding their reasons for taking official actions, and the court abused its discretion in finding otherwise Moreover, the court lacked jurisdiction to order any discovery on this topic in the first place: because Judicial Watch's FOIA requests were submitted only after Secretary Clinton left office, the State Department did not "withhold" the emails within the meaning of FOIA. This Court, like its sister circuits, has granted mandamus relief to block impermissible depositions of high-ranking officials. We respectfully submit that it should so here.

STATEMENT OF THE RELIEF SOUGHT

Petitioners seek a writ of mandamus directing the district court to deny Judicial Watch's request to depose Secretary Clinton and to re-depose Ms. Mills.

ISSUES PRESENTED

Whether a FOIA plaintiff may depose a former Secretary of State and former State Department Chief of Staff and Counselor when this Court has held in a case involving the same parties that "there are no remaining emails for State to recover" that could be responsive to plaintiff's FOIA request and the request was submitted after the Secretary left office.

STATEMENT

A. This FOIA Case

This lawsuit arises out of a FOIA request submitted by Judicial Watch in May 2014, over a year after Secretary Clinton's departure from the State Department. The request sought two categories of documents: (1) "any updates and/or talking points given to Ambassador [Susan] Rice" concerning "the September 11, 2012 attack on the U.S. consulate in Benghazi Libya," and (2) any communications or records relating to those "talking points or updates." Compl. ¶ 5. In response to that request, State searched electronic records systems in its Office of the Executive Secretariat Staff and the

state.gov email accounts of Cheryl Mills (Secretary Clinton's former Chief of Staff), Jacob Sullivan (Deputy Chief of Staff for Policy), and Huma Abedin (Deputy Chief of Staff for Operations). Dkt. 19-1 at 3. In November 2014, State produced responsive documents to Judicial Watch. *Id.*

In December 2014, in response to a State Department letter that concerned State's general record-keeping responsibilities and requested from each former Secretary of State copies of any Department-related emails in each Secretary's possession, Secretary Clinton voluntarily provided to State "approximately 55,000 pages of hard copy emails and attachments to emails" from the clintonemail.com account she had used as Secretary of State. *Id.*

As it relates to this case, State then searched those emails and found no documents responsive to Judicial Watch's request. *Id.* at 4. State moved for summary judgment in July 2015. In opposing State's motion, Judicial Watch asserted there was insufficient information to evaluate the adequacy of the search and sought "limited discovery" to "determine where potentially responsive records are reasonably expected to reside." Dkt. 22 at 6. On March 29, 2016, the district court granted Judicial Watch's motion because "[a]n understanding of the facts and circumstances surrounding" Secretary Clinton's use of private email was "required before the Court can determine whether the

search conducted here reasonably produced all responsive documents." App. A at 1. Although the emails that Secretary Clinton voluntarily produced in December 2014 (in response to State's general records request to all Secretaries) had not been in State's possession when State conducted its initial search for documents responsive to Judicial Watch's FOIA request, the court found that Judicial Watch was entitled to discovery to determine whether State acted in bad faith by not mentioning those emails in its initial response to that request. *Id.* at 2. The court did not immediately rule on the scope of such discovery because Judicial Watch had been granted similar discovery in another FOIA case. *Id.*[1]

On December 6, 2018, the district court ordered the parties to meet and confer on a discovery plan, concluding that this was the rare FOIA case that warranted discovery, in part because "it still remains unknown whether [Secretary] Clinton used a private email to duck FOIA requests." Dkt. 54 at 5. The court then authorized discovery into "(1) whether [Secretary] Clinton intentionally attempted to evade FOIA by using a private email while Secretary of State; (2) whether State's efforts to settle this case in late 2014 and early

[1] That case is discussed in more detail below. *See* pp. 7–9, *infra*.

2015 amounted to bad faith; and (3) whether State adequately searched for records responsive to Judicial Watch's FOIA request." App. B at 1. The court left open the possibility that after obtaining such discovery, Judicial Watch could "depose additional witnesses (including Hillary Clinton or her former Chief of Staff Cheryl Mills)." *Id.* at 2.

Judicial Watch took full advantage of the discovery. Between January and June 2019, Judicial Watch took eleven depositions (including a State Department 30(b)(6) deposition); served dozens of interrogatories on six individuals and entities (including State, an FBI Assistant Director for Counterintelligence, a former Deputy National Security Advisor, and a former U.S. Ambassador to the United Nations); and "received a large volume of documents in response to its broad document requests." Dkt. 133 at 1. Those document requests—which related to Secretary Clinton's use of private email and State's response to Judicial Watch's FOIA requests—"resulted in the identification of more than 2,400 documents" on those topics. *Id.* at 4.

B. Judicial Watch's Similar Litigation Against the State Department.

The extraordinary discovery in this case was in addition to discovery Judicial Watch obtained in a similar FOIA lawsuit concerning Secretary Clinton's emails. In that case, the district court (Sullivan, J.) authorized discovery

into "the creation and operation of clintonemail.com for State Department business" and "the State Department's approach and practice for processing FOIA requests that potentially implicated former Secretary Clinton's . . . emails." *Judicial Watch v. U.S. Dep't of State*, No. 13-cv-1363, 2016 WL 10770466, at *1 (D.D.C. Aug. 19, 2016). Judicial Watch took eight depositions of current and former State Department personnel, including Ms. Mills. *Id.* at *2; Dkt. 133 at 1. Judicial Watch deposed Ms. Mills for nearly seven hours on May 26, 2015 and exhaustively questioned her about Secretary Clinton's use of private email and her search in response to State's general records request, resulting in the December 2014 production of approximately 55,000 pages of emails. *See* Dkt. 142, Ex. A.

The court rejected, however, Judicial Watch's request to depose Secretary Clinton. 2016 WL 10770466, at *6. As "the party seeking to depose a current or former high-ranking government official," the court explained, Judicial Watch was required to "demonstrate exceptional circumstances justifying the deposition." *Id.* at *3. The court concluded that Judicial Watch had failed to do so and ruled that any discovery must be obtained through "other, less burdensome or intrusive means such as interrogatories." *Id.* at *6. Accordingly, Judicial Watch served twenty-five interrogatories on Secretary

Clinton, a number of which related to her use of private email while in office. She answered twenty-four of them. Dkt. 143, Ex. A. Judge Sullivan invited Judicial Watch to move "for permission to serve additional interrogatories." 2016 WL 10770466, at *6. But Judicial Watch never sought such permission or otherwise challenged the adequacy of Secretary Clinton's responses.

While litigating these FOIA cases, Judicial Watch also sued the State Department under the Administrative Procedure Act, seeking an order requiring the Secretary of State to initiate an enforcement action through the Attorney General under the Federal Records Act "to recover Secretary Clinton's emails." *Judicial Watch, Inc. v. Kerry*, 156 F. Supp. 3d 69, 74 (D.D.C. 2016). The district court initially dismissed the case as moot, but this Court reversed. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 953 (D.C. Cir. 2016). The Court recognized Secretary Clinton's voluntary production of "roughly 55,000 pages of emails" and additional efforts by the State Department and the FBI to determine whether other Department-related emails transmitted via Secretary Clinton's personal email addresses existed. *Id.* at 954, 955. But it ruled that the case was not moot until the government could "show[] that the requested enforcement action could not shake loose a few more emails," or that an action would be "pointless" because "no imaginable enforcement action

by the Attorney General could lead to recovery of the missing emails." *Id.*

On remand, the government presented "new evidence of [] additional efforts to track down the Clinton emails," including the FBI's investigation into Secretary Clinton's handling of classified information. *Judicial Watch, Inc. v. Tillerson*, 293 F. Supp. 3d 33, 35 (D.D.C. 2017). The district court described the FBI's efforts in detail. It explained, for example, that the FBI sought "consensual access to any email repositories" and "obtain[ed] personal electronic devices used by the Secretary that might have contained relevant emails." The FBI also "interviewed individuals who had the most frequent work-related communications with Secretary Clinton," *id.* at 41, including Ms. Mills, as well as Secretary Clinton herself (with summaries of those interviews now publicly available). The FBI further "used grand-jury subpoenas to assess whether service providers might still maintain Clinton's emails," including subpoenas to "RIM, the maker of Blackberry electronic devices" and several service providers, who confirmed they had no additional information. *Id.* at 42.

In light of the FBI's thorough work, the government declared there was "no reason to believe that recoverable Clinton email records remain extant."

Id. at 36. The district court agreed and again dismissed the case as moot, finding that, after the FBI's efforts, "there are no remaining emails for State to recover," and "[i]t strains credulity that the Attorney General would implement a more exhaustive search in response to a federal-records request." *Id.* at 42.

This Court affirmed. *Judicial Watch, Inc. v. Pompeo*, 744 F. App'x 3 (D.C. Cir. Dec. 4, 2018). According to this Court, even under the high standards set in *Kerry*, "the Secretary of State was never required to engage in a 'pointless' action," and now "the FBI's thorough investigation has since mooted the controversy because it has made the requested referral 'pointless.'" *Id.* at 4. The Court rejected as "both fanciful and unpersuasive" Judicial Watch's argument that the government "had not done enough to retrieve emails directly from persons outside the State Department with whom Clinton frequently corresponded." After approvingly quoting the district court's detailed findings, the Court held that the case was moot, observing that "no imaginable enforcement action could lead to recovery of the missing emails." *Id.* at 5 (internal quotations and alterations omitted).

C. Judicial Watch's Request To Depose Secretary Clinton and Cheryl Mills.

In August 2019, Judicial Watch sought in this case leave to depose Secretary Clinton and re-depose Ms. Mills about "(i) whether [Secretary Clinton's] use of a private email server was intended to stymie FOIA; (ii) whether the State Department's efforts to settle this case in late 2014 and 2015 amounted to bad faith; and (iii) whether the State Department has adequately searched for records responsive to Plaintiff's request." Dkt. 131 at 14. Judicial Watch also sought their testimony on new subjects entirely unrelated to the Department's conduct in responding to the FOIA request—namely, "the preparation of talking points for former U.N. Ambassador Susan Rice's September 16, 2012 media appearances, the advance dissemination or discussion of those talking points, the aftermath of Rice's appearances, and the Department's evolving understanding of the Benghazi attacks." *Id.* at 15. Secretary Clinton intervened to oppose the deposition. *See* Dkt. 143. Ms. Mills filed a separate opposition, explaining that she has no further relevant testimony to offer. *See* Dkt. 142.

D. The District Court's Order

On March 2, 2020, the district court granted "Judicial Watch's request to depose Secretary Clinton on matters concerning her reasons for using a

private server and her understanding of State's records management obligations," as well as her "knowledge of the existence of any emails, documents, or text messages related to the Benghazi attack." App. C at 10. The court premised its order on a series of what it called "unanswered" questions about Secretary Clinton's email use, including:

- "[H]ow did she arrive at her belief that her private server emails would be preserved by normal State Department processes for email retention? Who told her that—if anyone—and when?"
- "When did she first learn that State's records management employees were unaware of the existence of her private server?"
- "[W]hy did she think that using a private server to conduct State Department business was permissible under the law in the first place? Again, who told her that—if anyone—and when?"
- "How could Secretary Clinton possibly believe that everyone at State knew about her private server if her subordinates took pains to ensure that her email address would not be widely disseminated? Was she aware of this attempt—or any attempts—to keep other State Department employees in the dark?"

Id. at 7–8. In the court's view, these topics had "not been explored in nearly

enough detail to convince the Court that Secretary Clinton does not have any new testimony to offer." *Id.* at 8; *see also id.* at 10 ("[I]t is time to hear directly from Secretary Clinton"). "As extensive as the existing record is," the court stated, "it does not sufficiently explain Secretary Clinton's state of mind" in using private email. *Id.* at 8. The court acknowledged that "high-ra[n]king government officials" should not be deposed absent "extraordinary circumstances," but it held that this case presented such circumstances because Secretary Clinton had "unique first-hand knowledge" of "her reasons for setting up and using a private server and her understanding of State's records management obligations." *Id.* at 9 n.4. A deposition was necessary in the court's view because Secretary Clinton's prior interrogatory responses "were either incomplete, unhelpful, or cursory at best," and "additional interrogatories will only muddle any understanding of Secretary Clinton's state of mind and fail to capture the full picture." *Id.* at 9.

As to a second deposition of Ms. Mills, the district court stated that it "sympathized with [Judicial Watch's] argument" that because it "has a better understanding of what happened, it should have an opportunity to craft new questions derived from newly discovered facts" in a new deposition. *Id.* at 5. In support of this conclusion, the district court made an inaccurate statement:

"When Ms. Mills was deposed, Judicial Watch was not aware of the 30,000 deleted Clinton emails or that a Congressional subpoena had already been served on Secretary Clinton for her Benghazi records." *Id.*; *but see* pp. 31–32, *infra.* It added, "State's mishandling of this case opened up discovery in the first place, and Judicial Watch should not be prohibited from asking Ms. Mills about what it learned from discovery just because she was deposed over three years ago in Judicial Watch's case before Judge Sullivan." *Id.* at 5–6.

The district court also allowed Judicial Watch to question both Secretary Clinton and Ms. Mills about "the existence of any emails, documents, or text messages related to the Benghazi attack." *Id.* at 10. According to the court, "[s]uch inquiries would go to the adequacy of the search." *Id.*

REASONS FOR GRANTING THE PETITION

Mandamus is warranted because Judicial Watch's impending depositions of Secretary Clinton and Ms. Mills are inappropriate, unnecessary, and a clear abuse of discretion. The mandamus remedy is designated for "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (quotations omitted). Three conditions must be satisfied: (1) the party seeking mandamus must have "no other adequate means" of relief, (2) the petitioner

must have a "clear and indisputable" right to issuance of the writ, and (3) the writ must be "appropriate under the circumstances." *Id.* This Court has recognized that mandamus is the proper remedy to prevent depositions of high-ranking government officials. *See In re United States*, No. 14-5146, 2014 U.S App. LEXIS 14134 (D.C. Cir. July 24, 2014); *In re Cheney*, 544 F.3d 311, 313 (D.C. Cir. 2008). In these circumstances, the potential deponent has "no other adequate means of obtaining relief." *In re United States*, 2014 U.S App. LEXIS 14134 at *2. When "extraordinary circumstances are not present in th[e] record, the district court abuse[s] its discretion by allowing the deposition." *Id.* Notably, mandamus is appropriate "where valid threshold grounds for dismissal, denied by the district court, would obviate the need for intrusive discovery." 544 F.3d at 313.

Secretary Clinton and Ms. Mills have a clear and indisputable right to relief for at least three reasons. First, this FOIA case is moot with respect to Secretary Clinton's emails in light of this Court's decision in *Pompeo*. Second, the district court's order violates the well-established principle that high-ranking government officials should not be subjected to depositions absent extraordinary circumstances. Third, the district court lacked jurisdiction to order ad-

ditional discovery because the FOIA requests were submitted only after Secretary Clinton left office and therefore the State Department did not "withhold" Secretary Clinton's emails under FOIA.

I. This Case Is Moot as to Former Secretary Clinton and Ms. Mills.

A. FOIA Cases Involve the Production of Responsive Documents Following an Adequate Search, and Discovery Is Rare.

This is a FOIA case. FOIA permits a citizen to obtain agency records—not to investigate agency conduct for the sake of investigation. Because FOIA is about the production of documents, "[p]roviding documents to the individual fully relieves whatever informational injury may have been suffered by that particular complainant." *Kennecott Utah Cooper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1203 (D.C. Cir. 1996); *see also Sanders v. U.S. Dep't of Justice*, No. 10–5273, 2011 WL 1769099, at *1 (D.C. Cir. Apr. 21, 2011) ("FOIA requesters are not entitled to relief beyond the disclosure of the records they seek"). A district court's authority under FOIA is tied to the production of documents: the court has "jurisdiction to enjoin the agency from withholding agency records" and to "order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (App. D).

A FOIA requester is entitled to an "adequate search" for responsive documents. Most cases can be resolved based on "reasonably detailed" agency

declarations showing "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Baker Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006) (quotations omitted). The adequacy of a search is measured "by the appropriateness of the methods used to carry out the search," not "by the fruits of the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). "[T]he agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004).

Discovery in FOIA cases is "rare." *Baker Hostetler LLP*, 473 F.3d at 318 (quotations omitted). Although courts may permit discovery where plaintiffs can make a sufficient showing of bad faith by the agency in responding to the request, the ultimate remedy in such cases is "a remand to the agency to complete an adequate search." *Asarco, Inc. v. EPA*, No. 08–cv–1332, 2009 WL 1138830, at *1 (D.D.C. Apr. 28, 2009).

B. This Court's Decisions in *Kerry* and *Pompeo* Have Mooted Judicial Watch's Request to Depose Secretary Clinton and Ms. Mills.

This Court's decisions in *Kerry* and *Pompeo*—which the district court never acknowledged—conclusively resolved the adequacy of the search in this case.

The lawsuit in *Kerry* and *Pompeo* was also brought by Judicial Watch against the State Department in an effort to compel State to conduct an additional search for Secretary Clinton's emails. It involved the Federal Records Act, which, as interpreted by this Court, requires more than just an adequate search. Instead, the government was required to "show[] that the requested enforcement action could not shake loose a few more emails" or that further action would be "pointless" because "no imaginable enforcement action by the Attorney General could lead to recovery of the missing emails." *Kerry*, 844 F.3d at 955–56. The district court found that exacting standard met on remand. *Tillerson*, 293 F. Supp. 3d at 47. This Court agreed, holding that "the Government has already taken every reasonable action to retrieve any remaining emails," making it "absolutely clear this case is moot." *Pompeo*, 744 F. App'x at 5; *see* p. 11, *supra*.

If the relevant agencies, including the Department, took "every reasonable action" to recover Secretary Clinton's emails and "no imaginable enforcement action" could uncover additional emails, then they plainly conducted an "adequate" search for any emails responsive to the narrow requests at issue in this case. That is all Judicial Watch is entitled to under FOIA. Judicial Watch appears to acknowledge as much, asserting that its deposition topics are "vital to determining the adequacy of the search for records at issue in Plaintiff's FOIA request." Dkt. 144 at 10. In December 2014, former Secretary Clinton produced to the State Department, at the Department's request, approximately 55,000 pages of work-related or arguably work-related emails. She has no more, nor does Judicial Watch claim she does.[2] And the FBI has concluded that the emails do not exist elsewhere. After the exhaustive searches approved in *Pompeo*, the production of responsive documents, and the extraordinary discovery already taken by Judicial Watch, any "informational injury" has been "fully reliev[ed]." *Kennecott Utah Cooper Corp.*, 88

[2] Secretary Clinton executed a declaration on August 8, 2015 in *Judicial Watch, Inc. v. United States Department of State*, No. 13-cv-1363, stating that "I have directed that all my emails on clintonemail.com in my custody that were or potentially were federal records be provided to the Department of State, and on information and belief, this has been done."

F.3d at 1203; *Sanders*, 2011 WL 1769099, at *1.

The district court here was unconvinced "that ***all*** of Secretary Clinton's recoverable emails have been located," pointing to "thirty previously undisclosed Clinton emails" produced by the FBI in another case. App. C at 1–2 (emphasis added). But FOIA only required the agency to conduct an "adequate search for the requested records," *Wilbur*, 355 F.3d at 678, not to track down "all" of Secretary Clinton's emails. In any event, the FBI completed an exhaustive investigation and turned over what it found to the State Department. As State explained at the December 2019 status conference, "none" of the "fewer than 30" emails produced in the other case was produced here because those emails were not "responsive to the FOIA request at issue in this case." Dkt. 156 at 23.[3] The district court never explained how those emails—produced in response to a different FOIA request—could justify its extraordinary discovery order here. As this Court has made clear, "mere speculation

[3] The State Department, moreover, did not suggest these emails came from some previously overlooked source. Instead, "when the FBI turned over the documents at the end of its investigation, large chunks of those are duplicates that the State Department already has," and State had to go through "a process to figure out the precise history of each particular document." State was "working on" that process, which did not undermine "anything about the FBI's exhaustive investigation." Dkt. 156 at 23–24.

that as yet uncovered documents might exist[] does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur*, 355 F.3d at 678.

The district court's list of "unanswered" questions is beside the point. Even if an agency withholds records in bad faith—and there is no evidence that occurred here—the ultimate remedy is production of the withheld documents. *See Asarco,* 2009 WL 1138830, at *1. So the answer to (for example) whether Secretary Clinton was "aware of . . . attempts . . . to keep other State Department employees in the dark" about her use of private email will not change the fact that Judicial Watch has already received everything it was entitled to under FOIA: an adequate search for documents responsive to its requests. The same is true for Judicial Watch's effort to question Secretary Clinton about documents related to the Benghazi attack, which suggests that the impending deposition could expand to topics beyond FOIA. Because Judicial Watch has received an adequate search, the case is moot as it relates to Secretary Clinton's and Ms. Mills's depositions, and mandamus is warranted.[4]

[4] Judicial Watch cannot rely on the possibility of receiving attorneys' fees to defeat mootness. "[A]n interest in attorneys' fees 'is, of course, insufficient to create an Article III case or controversy where none exists on the merits of

II. Allowing the Depositions of a Former Secretary of State and Her Chief of Staff Is Inappropriate Absent Extraordinary Circumstances Not Presented Here.

A. Depositions of High-Ranking Officials Are Generally Not Permitted.

This Court has made clear that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). Subjecting such an official to deposition is "not normally countenanced," *Peoples v. U.S. Dep't of Agriculture*, 427 F.2d 561, 567 (D.C. Cir. 1970), and "quite unusual," *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998). The rule against such depositions derives from *United States v. Morgan*, 313 U.S. 409 (1941). There, the Supreme Court chastised the district court for permitting a deposition of the Secretary of Agriculture on his process in reaching an official decision, holding that the Secretary should never have been subject to this examination," and it was inappropriate "to probe the mental processes of the Secretary." *Id.* at 421–22.

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the underlying claim." *Liu v. I.N.S.*, 274 F.3d 533, 536 (D.C. Cir. 2001) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990)).

Applying this "well-established" principle, this Court has blocked depositions of high-ranking officials by writs of mandamus. *In re United States*, 2014 U.S App. LEXIS 14134, at *2 (Secretary of Agriculture); *In re Cheney*, 544 F.3d at 313 (Vice President's Chief of Staff). Other circuits have granted mandamus relief in similar situations, including the Seventh Circuit just last year. *In re Commodity Futures Trading Comm'n*, No. 19–2769, 2019 WL 5382228, at *5 (7th Cir. Oct. 22, 2019) (CFTC Chairman, Commissioners, and staff); *In re McCarthy*, 636 F. App'x 142, 143–44 (4th Cir. 2015) (EPA Administrator); *In re United States*, 542 F. App'x 944, 948 (Fed. Cir. 2013) (Federal Reserve Chairman); *In re USA*, 624 F.3d 1368, 1377 (11th Cir. 2010) (EPA Administrator).

The general rule against depositions applies to former officials such as Secretary Clinton and Ms. Mills. That is because the rule is intended in part to preserve "the integrity of the administrative process" by limiting judicial inquiries into an official's reasons for taking official actions. *Morgan*, 313 U.S. at 422; *see also In re Dep't of Commerce*, 139 S. Ct. 16, 17-18 (2018) (Gorsuch, J., concurring) (noting that Court stayed "highly unusual" deposition into Cabinet secretary's "mental processes"). That rationale "hardly becomes inapplicable upon an official's departure from [] office." *In re United States*, 542 F.

App'x at 949; *see United States v. Wal-Mart Stores*, No. 01-CV-152, 2002 WL 562301, at *3–4 (D. Md. Mar. 29, 2002) ("If the immunity *Morgan* affords is to have any meaning, the protections must continue upon the official's departure from public service"). Further, allowing depositions of former officials "might discourage otherwise upstanding individuals from public service." *FDIC v. Galan-Alvarez*, No. 15-mc-00752, 2015 U.S. Dist. LEXIS 130545, at *12 (D.D.C. Sept. 4, 2015) (internal quotation marks omitted). Accordingly, courts have rejected requests to depose former high-ranking officials. *See, e.g., id.* at *14–15 (former FDIC chairperson and senior deputy director); *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1050 (E.D. Cal. 2010) (former governor); *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 316–17 (D.N.J. 2009) (former EPA administrator).

B. This Case Presents No Reason To Depart From That Principle.

This petition calls for a straightforward application of *Morgan* and this Court's precedent. Allowing Judicial Watch to depose Secretary Clinton and her former Chief of Staff absent "extraordinary circumstances" was a clear abuse of discretion. *In re United States*, 2014 U.S. App. LEXIS 14134, at *1.

1. The District Court Abused Its Discretion in Allowing Judicial Watch To Depose Secretary Clinton.

There are no "extraordinary circumstances" that would justify Judicial Watch's deposing Secretary Clinton on her use of private email or "her understanding of her records management obligations." App. C at 8. Those issues have been thoroughly investigated, yielding an "extensive" public record. *Id*; *Simplex Time Recorder Co.*, 766 F.2d at 587 (no extraordinary circumstances where party failed to show information was unavailable "from published reports and available agency documents"). Secretary Clinton has spoken about her use of private email before Congress, the FBI, and the media. The Benghazi Select Committee, the State Department Inspector General, and the FBI all conducted inquiries and made findings on her use of private email. The findings of those inquiries are public.[5] Notably, the FBI released to the public

[5] *See* U.S. Department of State, Office of Inspector General, *Evaluation of the Department of State's FOIA Process for Requests Involving the Secretary* (Jan. 2016); U.S. Department of State, Office of Inspector General, *Office of the Secretary: Evaluation of Email Records Management and Cyber Security Requirements* (May 2016); U.S. Department of Justice, Office of Inspector General, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* (June 2018); House of Representatives Select Committee on Benghazi, *Final Report of the Select Committee on the Events Surrounding the 2012 Terrorist Attack in Benghazi*, H.R. Rep. No. 114-848 (2016).

not only its investigation report but also summaries of dozens of witness interviews, including its interview of Secretary Clinton.

In addition, Secretary Clinton has already answered questions on this topic from Judicial Watch itself in her response to its interrogatories in a similar case. Judicial Watch asked about why she used a private email account (Interrogatory 7), the process by which she made this decision (Interrogatories 4, 5, 6, and 20), and whether FOIA or other recordkeeping laws played any role in the decision (Interrogatories 7, 8, and 9). In her verified responses, Secretary Clinton explained that she "decided to use a clintonemail.com account for the purpose of convenience," and that "she does not recall considering factors other than convenience." Dkt. 143, Ex. A at 5, 8. She stated that she "understood that e-mail she sent or received in the course of conducting official State Department business was subject to FOIA" and she "d[id] not recall participating in any communication, conversation, or meeting in which it was discussed that her use of a clintonemail.com e-mail account to conduct State Department business conflicted with or violated federal recordkeeping laws." *Id.* at 6, 8. Because "her practice was to e-mail State Department staff on their state.gov accounts," she understood that "her e-mail was being captured in the State Department's recordkeeping systems." *Id.* at 8. Judicial

Watch has already received answers to any questions it could possibly have regarding whether Secretary Clinton intended to "evade" FOIA.[6]

Despite this "extensive" record, the district court held that "Judicial Watch demonstrated 'extraordinary circumstances'" warranting a deposition, rejecting the less intrusive alternative of additional interrogatories because it viewed Secretary Clinton's responses as "cursory at best" and insufficiently illuminating as to her "state of mind." App. C at 9 & n.4.[7] As the responses above show, that is wrong. But even if Judicial Watch found those responses "incomplete" or "unhelpful," *id.* at 9, Judge Sullivan invited Judicial Watch to seek leave to propound "additional interrogatories" if there were any "follow-up questions" that it was "unable to anticipate," 2016 WL 10770466, at *6. Judicial Watch did not do so—apparently in the hope of convincing a different district judge to authorize a deposition.

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[6] Secretary Clinton also testified that she used private email for convenience under oath before the House Select Committee on Benghazi and in her interview with the FBI, subject to 18 U.S.C. § 1001.

[7] The district court denied Judicial Watch's request to serve two interrogatories on the State Department because "[t]he information Judicial Watch seeks is likely also publicly available," and the request was "unduly burdensome" and "disproportionate to the needs of the case." App. C at 4.

2. The District Court Abused Its Discretion in Permitting Judicial Watch To Re-Depose Ms. Mills.

Judicial Watch acknowledges that Ms. Mills's prior deposition covered subjects that overlap with this case: namely, "federal records retention in connection with Secretary Clinton's email." Dkt. 144 at 10. The district court's ruling would subject Ms. Mills to unduly burdensome and harassing questioning on the very topics on which she already gave sworn testimony and written answers, *see* Fed. R. Civ. P. 26(b)(2)(C), and is a clear abuse of discretion.

First, the mere fact that a party gains some new understanding, however minute, does not justify a re-deposition of a witness. If that were the rule, there would be no limits to discovery at all, and witnesses could be deposed time and again as information developed over the course of a case. Moreover, the district court, in "sympathiz[ing]" with Judicial Watch's assertion about new information gleaned since Ms. Mills's May 2016 deposition, made no effort to link the allegedly new information with the potential for relevant new testimony from Ms. Mills. Instead, it ordered that Ms. Mills be deposed on three broad topics on which she has already previously testified. For example, the first topic, "whether Secretary Clinton's use of a private email while Secretary of State was an intentional attempt to avoid FOIA," App. C at 1, is something Ms. Mills specifically addressed in her prior deposition:

> Q. Do you have any reason to believe that Secretary Clinton used Clintonemail.com to conduct government business because she or anyone else at the State Department was seeking to avoid FOIA?
>
> A. Absolutely not.

Dkt. 142, Ex. A, May 27, 2016 Mills Dep. Tr. (hereinafter "Mills. Dep. Tr.") at 263:7–11. She answered numerous questions regarding Secretary Clinton's email and FOIA.[8] The district court gave no rationale for why there should be a duplicative deposition of Ms. Mills on the same topic.

The district court also permitted questioning of Ms. Mills on "whether State's efforts to settle this case in late 2014 or early 2015 amounted to bad faith," ignoring that Ms. Mills had already left the State Department by then

[8] Mills Dep. Tr. 79:5-16 (not involved in original setup of email); 172:20–173:4 (limited knowledge of why Clinton set up private email); 183:9–184:4 (understanding that Clinton's emails would be captured in Department's system for processing FOIA requests); 186:20–193:20, 197:12–198:6, 213:1–5 (how Clinton's records would have been searched for FOIA requests); 215:15–216:2 (no concern that Clinton's emails were not being searched for FOIA); 227:14–230:20 (roles of individuals in processing FOIA requests for Clinton's email); 231:4–240:17 (steps taken to archive Clinton's records); 242:17–245:14 (whether there were conversations during her tenure about archiving records); 250:15–252:5 (whether Mills was personally involved in processing any requests for Clinton's records); 256:5–258:19 (who in Department processed FOIA requests, including those to Clinton); 258:20–259:22 (understanding of origin of server); 261:11–15 (Clinton did not do anything to avoid FOIA by using private email); 263:7–11 (Clinton did not conduct government business in a way to avoid FOIA).

and has no knowledge of State's attempt to settle this case. A new deposition would be merely treading old ground, as Judicial Watch asserted that it would ask Ms. Mills to "provide information about when State first reached out regarding Secretary Clinton's emails and who she was in contact with at the time State was attempting to settle this suit with Judicial Watch." Dkt. 144, at 11–12. Judicial Watch already asked these questions at the last deposition, and there are no reasons for additional questioning now. *See, e.g.*, Mills Dep. Tr. at 69:17–12 (questioning about correspondence with Undersecretary Patrick Kennedy regarding Secretary Clinton's emails); 73:16–78:19 (questioning about when Ms. Mills was first contacted about submitting Secretary Clinton's emails to State). The third topic, "whether State has adequately searched for records responsive to Judicial Watch's request," is also one that relates to State Department conduct that took place after Ms. Mills's tenure and, nonetheless, about which Ms. Mills was already asked at her previous deposition. *Id.* at 247:6–248:16.

The district court also abused its discretion in inappropriately adopting Judicial Watch's incorrect assertions about "new" facts when the record evidence—and plain logic—shows these facts are not new at all. The only "newly discovered fact" cited by the district court was: "When Ms. Mills was deposed,

Judicial Watch was not aware of the 30,000 deleted Clinton emails or that a Congressional subpoena had already been served on Secretary Clinton for her Benghazi records." This is patently incorrect. Judicial Watch noted in its August 21, 2015 submission to the district court—nine months before Ms. Mills was deposed—that "Mrs. Clinton 'chose not to keep her private, personal emails'" totaling "31,830" in number. Dkt. 22 at 4. Indeed, this was common public knowledge.[9] The same goes for the Congressional subpoena on Secretary Clinton: On March 4, 2015, the New York Times reported that the House Select Committee on Benghazi issued a subpoena to Secretary Clinton,[10] and the Committee itself made the text of the subpoena public in July 2015.[11]

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[9] *See, e.g.*, Zeke Miller, *Transcript: Everything Hillary Clinton Said on the Email Controversy*, TIME, Mar. 10, 2015, https://time.com/3739541/transcript-hillary-clinton-email-press-conference/; Amy Chozick & Michael S. Schmidt, *Hillary Clinton Tries to Quell Controversy Over Private Email*, N.Y. Times, Mar. 10, 2015, https://www.nytimes.com/2015/03/11/us/hillary-clinton-email.html.

[10] Michael S. Schmidt & Maggie Haberman, *Committee Investigating Benghazi Subpoenas Hillary Clinton's Emails*, N.Y. Times, Mar. 4, 2015, https://www.nytimes.com/politics/first-draft/2015/03/04/committee-investigating-benghazi-subpoenas-hillary-clintons-emails/?mtrref=www.google.com&assetType=nyt_now.

[11] House Select Committee on Benghazi, *Select Committee on Benghazi Releases Clinton Subpoena*, July 8, 2015, https://archives-benghazi-republicans-

Finally, the district court noted that it is because of "State's mishandling of this case [that] opened up discovery in the first place" that Ms. Mills should be deposed again. That reason ignores entirely that Ms. Mills—who left government service more than seven years ago—was no longer at the Department when Judicial Watch made its FOIA request, let alone there during any purported "mishandling" of the request. Thus, the court's opinion of the Department's conduct affords no legitimate basis to subject Ms. Mills, a private citizen, to duplicative and harassing deposition.

Under these circumstances, allowing the depositions of a former Secretary of State and her Chief of Staff is an abuse of discretion. For that independent reason, this Court should grant the petition.

III. The District Court Lacked Jurisdiction.

Finally, the district court lacked jurisdiction to authorize the depositions because the FOIA request was submitted only after Secretary Clinton and Ms. Mills left office. For a district court to have jurisdiction to compel agency action under FOIA, the agency must have (1) "improperly," (2) "withheld," (3) "agency records." *Kissinger v. Reporters Comm. for Freedom of the Press*,

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oversight.house.gov/news/press-releases/select-committee-on-benghazi-releases-clinton-subpoena.

445 U.S. 136, 150 (1980). The timing of the FOIA request is dispositive: "a 'withholding' must . . . be gauged by the time at which the request is made." *Id.* at 156 n.9. "[W]hen an agency does not possess or control the records a requester seeks, the agency's non-disclosure does not violate FOIA because it has not 'withheld' anything." *DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C. Cir. 2015). In such cases, "a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989).

In *Kissinger*, the former Secretary of State removed some of his papers from the State Department and gave them to the Library of Congress after leaving office. 445 U.S. at 155. The Supreme Court held that, because the Secretary and the Library were "holding the documents under a claim of right," the papers were not in State's "possession or control . . . at the time the requests were received." *Id.* at 155. "Under these circumstances," the Court held, the State Department "did not . . . withhold any agency records, an indispensable prerequisite to liability in a suit under the FOIA." *Id.* So too here. Judicial Watch's FOIA request was submitted on May 13, 2014, well after Secretary Clinton left office. At that time, she held the server "under a claim of right," and therefore the emails on the server were not in State's "possession

or control . . . at the time the requests were received." *Id.* Because no agency records were "withheld," the court lacked "an indispensable prerequisite" to order relief under FOIA.

This Court's decision in *Competitive Enterprise Institute v. Office of Science and Technology*, 827 F.3d 145 (D.C. Cir. 2016), is inapplicable. There, the Court held that an agency's refusal to search records maintained on the current director's private email account was an improper "withholding" under FOIA. But *Competitive Enterprise Institute* did not "involve[] records held by someone having no present affiliation with the agency at the time of the FOIA request (which, according to *Kissinger*, is generally the relevant time for assessing whether an agency 'withholds' records)." *Id.* at 151 (Srinivasan, J., concurring) (citation omitted). Nor did the agency assert that the director held the documents "under a claim of right." *Id.* at 148–49. Here, Secretary Clinton had left the State Department well before the FOIA request, and she held the server under a claim of right. The Supreme Court's decision in *Kissinger* controls, and it requires the conclusion that the district court lacked jurisdiction under FOIA to compel any agency action related to those emails. As a result, the Court lacked jurisdiction to order discovery related to those emails.

That is not to say Judicial Watch lacked an avenue to obtain relief. In *Kissinger*, the Supreme Court explained that the Federal Records Act, not FOIA, "provides administrative remedies . . . to retrieve wrongfully removed records." 445 U.S. at 154. Judicial Watch vigorously pursued its right under the Administrative Procedure Act to compel an enforcement action under the Federal Records Act to recover any outstanding emails. *Kerry*, 844 F.3d at 954. This Court held that such an action was "pointless" because "the Government has already taken every reasonable action to retrieve any remaining emails." *Pompeo*, 744 F. App'x at 3. Judicial Watch's request for discovery in this FOIA case is an improper attempt to circumvent that decision.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

/s/ David E. Kendall

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MARCH 13, 2020

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, David E. Kendall, counsel for petitioner and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 21(d)(1), that the attached Petition for a Writ of Mandamus, is proportionately spaced, has a typeface of 14 points or more, and contains 7,590 words.

/s/ David E. Kendall
DAVID E. KENDALL

MARCH 13, 2020

CERTIFICATE OF SERVICE

I, David E. Kendall, counsel for petitioner and a member of the Bar of this Court, certify, that, on March 13, 2020, a copy of the attached Petition for a Writ of Mandamus was served on the following counsel by electronic mail and by first-class mail, postage prepaid:

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I further certify that, on March 13, 2020, a copy of the attached Petition for Writ of Mandamus was sent to the Honorable Royce C. Lamberth, United States District Judge for the District of Columbia, by first-class mail, postage prepaid. I further certify that all parties required to be served have been served.

/s/ David E. Kendall
DAVID E. KENDALL

MARCH 13, 2020

APPENDICES

Appendix A: Dkt. 39, Memorandum and Order (Mar. 29, 2016)

Appendix B: Dkt. 65, Memorandum and Order (Jan. 15, 2019)

Appendix C: Dkt. 161, Memorandum Order (Mar. 2, 2020)

Appendix D: Pertinent Statutory Provision, 5 U.S.C. § 552(a)(4)(B)

Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC, **Plaintiff**	)	
v.	)	**Civil Action No. 14-1242 (RCL)**
DEPARTMENT OF STATE **Defendant**	)	

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff's motion for limited discovery regarding the adequacy of the State Department's search for responsive documents in this Freedom of Information Act case.

The Court set forth the proper legal standards for such discovery in a prior case in which the Environmental Protection Agency had excluded its Administrator from a search of "senior official" files in response to a FOIA request, did not search personal e-mail accounts where official government business was being conducted, and ultimately disclosed that the Administrator was sending and receiving e-mails in her dog's name—which was not subject to the FOIA search. *See Landmark Legal Found. v. Envtl. Prot. Agency*, 959 F. Supp. 2d 175 (D.D.C. 2013). Where there is evidence of government wrong-doing and bad faith, as here, limited discovery is appropriate, even though it is exceedingly rare in FOIA cases.

An understanding of the facts and circumstances surrounding Secretary Clinton's extraordinary and exclusive use of her "clintonemail.com" account to conduct official government business, as well as other officials' use of this account and their own personal e-mail accounts to conduct official government business is required before the Court can determine whether the search conducted here reasonably produced all responsive documents. Plaintiff is

certainly entitled to dispute the State Department's position that it has no obligation to produce these documents because it did not "possess" or "control" them at the time the FOIA request was made. The State Department's willingness to now search documents voluntarily turned over to the Department by Secretary Clinton and other officials hardly transforms such a search into an "adequate" or "reasonable" one. Plaintiff is not relying on "speculation" or "surmise" as the State Department claims. Plaintiff is relying on constantly shifting admissions by the Government and the former government officials. Whether the State Department's actions will ultimately be determined by the Court to not be "acting in good faith" remains to be seen at this time, but plaintiff is clearly entitled to discovery and a record before this Court rules on that issue.

The Court must observe that the Government argues in its opposition memorandum (page 9) that "the fact that State did not note that it had not searched Secretary Clinton's e-mails when it responded to Plaintiff's FOIA request . . . was neither a misrepresentation nor material omission, because these documents were not in its possession and control when the original search was completed." The Government argues that this does not show a lack of good faith, but that is what remains to be seen, and the factual record must be developed appropriately in order for this Court to make that determination.

The Court does understand the Government's argument that the sheer volume of pending cases involving these issues is a burden and the Court is aware that Judge Sullivan has already ruled in another case brought by this plaintiff against this defendant—regarding other requested documents—that he will authorize limited discovery. *See Judicial Watch v. Dept. of State*, Civil Action No. 13-1363-EGS (filed Sept. 10, 2013). Briefing is ongoing before Judge Sullivan. When Judge Sullivan issues a discovery order, the plaintiff shall—within ten days thereafter—

file its specific proposed order detailing what additional proposed discovery, tailored to this case, it seeks to have this Court order. Defendant shall respond ten days after plaintiff's submission.

Plaintiff's motion for limited discovery is **GRANTED**.

Defendant's motion for summary judgment is **DENIED**, without prejudice to filing a new motion after authorized discovery is concluded.

It is so **ORDERED**.

Royce C. Lamberth
United States District Judge

DATE: 3/29/16

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Case No. 14-1242**
	)	
U.S. DEPARTMENT OF STATE,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM & ORDER

When this case began, Judicial Watch sought to verify the State Department's search for records from former Secretary Hillary Clinton and her aides concerning the talking points former U.N. Ambassador Susan Rice used to respond to the attack on the U.S. Embassy in Benghazi, Libya. But the case has since expanded to question the motives behind Clinton's private email use while Secretary, and behind the government's conduct in this litigation.

Last month, this Court ordered the parties to meet and confer to plan discovery [55]. Judicial Watch submitted a proposed plan [62]; the government responded and countered with its proposal [63]; Judicial Watch replied [64]. This Memorandum & Order maps the path forward.

* * *

I. Scope & Schedule. Discovery shall be limited to three issues: (1) whether Clinton intentionally attempted to evade FOIA by using a private email while Secretary of State; (2) whether State's efforts to settle this case in late 2014 and early 2015 amounted to bad faith; and (3) whether State adequately searched for records responsive to Judicial Watch's FOIA request.

Either side must obtain permission to conduct discovery beyond the depositions, interrogatories, and document requests described herein.

The Court recognizes Judicial Watch took related discovery in *Judicial Watch, Inc. v. Department of State*, No. 13-1363 (D.D.C.) (Sullivan, J.). Yet the Court declines to expressly curtail discovery in this case as a result, especially since Judicial Watch does not propose deposing witnesses also deposed in that case. Consistent with the parties' demonstrated respect for the discovery process there, *see* Transcript of Motion Hearing Proceedings at 21:3-19, *Judicial Watch, Inc. v. Dep't of State*, No. 13-1363 (D.D.C. July 18, 2016), ECF No. 159, the Court hopes the parties avoid unnecessarily duplicative discovery here.

The parties shall complete discovery within 120 days, unless they seek additional time. The Court will hold a post-discovery hearing to ascertain the adequacy of State's searches, to determine if Judicial Watch needs to depose additional witnesses (including Hillary Clinton or her former Chief of Staff Cheryl Mills), and to schedule dispositive motions.

II. Procedure. The parties shall conduct discovery pursuant to the Federal Rules of Civil Procedure and of Evidence, subject to these limitations:

A. Time to Respond to Interrogatories & Document Requests. Absent contrary order, Federal Rules of Civil Procedure 33(b)(2) and 34(b)(2)(A) give parties thirty days to respond to interrogatories and document requests. This default limit will apply to interrogatories and document requests propounded on private citizens. For interrogatories and document requests propounded on the government, Judicial Watch wants to shorten the limits to fourteen days; the government asks for the standard thirty-day periods. Recognizing Judicial Watch's need to obtain preliminary discovery before taking depositions, but mindful of overburdening the

government, the Court gives the government twenty days to respond to interrogatories and document requests.

B. Number of Depositions. The government wants to limit Judicial Watch to Rule 30(a)(2)(A)(i)'s ten-deposition ceiling. But consistent with Rule 26(b)(2)(A), the Court allows Judicial Watch to depose all witnesses enumerated herein.

C. Privilege Claims & Objections. Neither side waives any privileges or specific objections. As the government notes, the parties may agree pursuant to Federal Rule of Evidence 502(e) to disclose information without waiving attorney–client or work-product privileges. But absent agreement, the government proposes producing its privilege log after discovery ends. That is insufficient. To facilitate meaningful document production, the government must produce a rolling privilege log, concurrent with its timely responses to document requests. And to facilitate prompt resolution of disputes, the Court will require any opposition be filed within five business days of a motion for judicial intervention, with replies due three business days after the opposition's filing.

D. Government Review of Deposition Transcripts or Recordings. The government may, in its sole discretion, embargo a deposition's contents for three business days after production of the transcript or recording—provided that it does so in good faith and that it declared its intent to do so on the record at the deposition—to review the transcript or recording for classified information, for information specifically exempted from disclosure by statute, or for information concerning a pending law enforcement investigation, and to seek an order precluding the information's public release.

III. Discovery into Hillary Clinton's Private Email Use.

A. Depositions. On whether Clinton's private email use while Secretary of State was an intentional attempt to evade FOIA, Judicial Watch may depose:[1]

1. Eric Boswell, the former Assistant Secretary for Diplomatic Security. The government argues Boswell does not have information relevant to the purpose behind Clinton's private email use, claiming he merely responded to her staff's inquiries regarding Blackberry use in her private office suite. But existing evidence contradicts this claim: Boswell's March 2009 memo to Mills (available at ECF No. 64-1) discusses security risks Clinton's Blackberry use posed more generally. And Boswell personally discussed the memo with Clinton. So he plainly has relevant information about that conversation and about his general knowledge of Clinton's email use. Judicial Watch may depose Boswell.
2. Justin Cooper, the Clinton Foundation employee who created the clintonemail.com server. In its proposal, Judicial Watch noted Cooper's prior congressional testimony "appears to contradict portions of the testimony provided by Huma Abedin in the case before Judge Sullivan." Pl.'s Prop. Disc. Plan 2, ECF No. 62. The government opposed Judicial Watch's request because Judicial

[1] If these individuals also appear in subsections IV.A or V.A of this Order, Judicial Watch may only depose each witness once.

Watch "offer[ed] no [further] explanation" or citation. Def.'s Prop. Disc. Plan & Sched. 18-19, ECF No. 63. But Judicial Watch provided one in its response: Cooper repeatedly told Congress that Abedin helped set-up the Clintons' private server, *e.g.*, *Examining Preservation of State Department Federal Records: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 40 (2016); Abedin testified under oath she did not know about the server until six years later. *See* Transcript of Huma Abedin Deposition at 19:16-20:14, *Judicial Watch, Inc. v. Dep't of State*, No. 13-1363 (D.D.C. June 28, 2016), ECF No. 129. Judicial Watch may depose Cooper.

3. Clarence Finney, the former deputy director of State's Executive Secretariat staff. The government opposes Finney's deposition on two grounds. First, the government argues Finney's testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But this case's questions hinge on what specific State employees knew and when they knew it. As the principal advisor and records management expert responsible for controlling Clinton's official correspondence and records, Finney's knowledge is particularly relevant. And especially given the concerns about government misconduct that prompted this discovery, Judicial Watch's ability to take his direct testimony and ask follow-up questions is critical.

Second, the government opposes Finney's deposition because he testified publicly before Congress on similar issues, and because Judicial Watch unsuccessfully sought his deposition in *Judicial Watch v. Department of State*, No. 13-1363 (D.D.C.). True enough, Judge Sullivan did not allow Finney's

deposition, thinking it would unnecessarily duplicate State's 30(b)(6) deposition in that case. *See* Mem. Op. 21-23, *Judicial Watch v. Dep't of State*, No. 13-1363 (D.D.C. Aug. 19, 2016), ECF No. 124. But here, Judicial Watch seeks to go beyond cursory, second-hand testimony and directly ask Finney what he knew about Clinton's email use. This includes asking about emails suggesting he knew about her private email use in 2014, and emails he received concerning a December 2012 FOIA request from Citizens for Responsible Ethics in Washington (CREW) regarding senior officials' personal email use—topics State's 30(b)(6) deposition in Judge Sullivan's case never addressed. Judicial Watch may depose Finney.

4. Heather Samuelson, the former State Department senior advisor who helped facilitate State's receipt of Hillary Clinton's emails. The government argues Samuelson's testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case turns on what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose Samuelson.
5. Jacob Sullivan, Secretary Clinton's former senior advisor and deputy Chief of Staff. The government does not oppose Sullivan's deposition.

B. Interrogatories. Judicial Watch may discover through interrogatory the identities of the individuals referenced in the first full paragraph on the fourth page of the Federal Bureau of Investigation's December 30, 2015 report (available at ECF No. 62-1) describing its December 22, 2015 interview of Bryan Pagliano. The government does not oppose this interrogatory.

IV. Discovery into the State Department's Settlement Conduct.

A. Depositions. On whether State's settlement attempts in late 2014 and early 2015 amounted to bad faith, Judicial Watch may depose:[2]

1. The State Department. Judicial Watch may depose the State Department under Rule 30(b)(6) about
    - this FOIA request;
    - CREW's December 2012 FOIA request;
    - its initial discovery of, and reaction to, Hillary Clinton's private email use;
    - its November 12, 2014 letter to Judicial Watch regarding this litigation;
    - the December 31, 2014 Joint Status Report, ECF No. 10; and
    - the February 2, 2015 Joint Status Report, ECF No. 11.

    The government does not oppose this deposition.

2. Finney. *See supra* subsection III.A.3.
3. John Hackett, the former deputy director of State's Office of Information Programs & Services. The government argues Hackett's testimony would be more efficiently elicited through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case depends on what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose Hackett.

[2] If these individuals also appear in subsections III.A or V.A of this Order, Judicial Watch may only depose each witness once.

4. Gene Smilansky, an attorney-advisor within State's Office of the Legal Advisor. The government opposes Smilansky's deposition, calling it an "extraordinary request" because "Smilansky has provided [State with] legal advice regarding requests for emails from Secretary Clinton, FOIA litigation concerning the Benghazi attacks and the talking points at issue in this case, and because virtually all of his knowledge (if any) about the relevant facts would have come to him in his role as an attorney advising a client." Def.'s Prop. Disc. Plan & Sched. 20-21. It also claims "Smilansky is unlikely to have any relevant, non-privileged information that is unavailable from other sources," including the Department's 30(b)(6) deposition or the State Department Inspector General's public report.

   To be sure, it is rare for a party to depose his opponent's attorney. But this is rare case. Judicial Watch adequately justifies this exceptional step by establishing Smilansky's involvement in processing FOIA requests for Secretary Clinton's email from 2012 to 2014, including CREW's 2012 request. And in this case about what government officials knew and when they knew it, Smilansky's experience—documented through emails he sent and received in 2013 and 2014, *see* ECF No. 50-1—is highly relevant and critical to Judicial Watch's case. Moreover, his first-hand knowledge is what's critical, not information filtered through a 30(b)(6) deposition or through the Inspector General's report. *See also supra* subsection III.A.3. Judicial Watch may depose Smilansky.

5. Samuelson. *See supra* subsection III.A.4.

6. Sheryl Walter, former director of State's Office of Information Programs & Services. The government argues Walter's testimony would be more efficiently

covered through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case involves what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose Walter.

7. Jonathon Wasser, a management analyst for the Executive Secretariat staff. The government argues that Wasser's testimony unnecessarily duplicates State's 30(b)(6) deposition in *Judicial Watch v. Department of State*, No. 13-1363 (D.D.C.) (Sullivan, J.), and—in any event—that his testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But both arguments miss Judicial Watch's need to take his direct testimony and ask him follow-up questions, particularly regarding emails suggesting he knew about Clinton's private email use in 2014. *See also supra* subsection III.A.3. Judicial Watch may depose Wasser.

8. The Office of Information Program & Services analysts assigned to this case. The government argues these individuals' testimony would be more efficiently elicited through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case turns on what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose these analysts.

9. The unidentified Officer of Information Program & Services official whose August 17, 2015 FBI interview is memorialized in the August 18, 2015 report available at ECF No. 62-2. The government argues this person's testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But as

explained in subsection III.A.3, this case concerns what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose this unidentified official.

B. Interrogatories. Judicial Watch may also obtain via interrogatory the identity of the analysts who searched the Office of the Secretary records on September 23, 2014, and of any people who performed the search described in paragraph seventeen of John F. Hackett's July 7, 2015 declaration (available at ECF No. 19-2), as well as the dates they searched. The government does not oppose these interrogatories.

C. Document Requests. Finally, Judicial Watch may request the following documents:

1. an unredacted copy of an August 8, 2014 email exchange between Finney, Wasser, James Blair, Andrew Keller, and Smilansky (a redacted copy is available at ECF No. 50-1, p. 37);
2. an unredacted copy of a May 1, 2013 email exchange between Smilansky, Brett Gittleson, Walter, and others (a redacted copy is available at ECF No. 50-1, pp. 23-29);
3. a copy of the email exchanges available at ECF No. 62-3 with the Exemption 5 redactions removed; and
4. records concerning the Department's pre–February 2, 2015 awareness of the need to continue searching for records responsive to this FOIA request, as well as those records' locations.

The government does not oppose these document requests.

V. Discovery into the Adequacy of the State Department's Search.

A. Depositions. On whether State adequately searched for responsive records, Judicial Watch may depose:[3]

1. The State Department. Judicial Watch may depose the Department under Rule 30(b)(6) about
    - this FOIA request;
    - preparing talking points for former U.N. Ambassador Susan Rice's September 16, 2012 media appearances;
    - the advance dissemination or discussion of those talking points;
    - the aftermath of Rice's appearances; and
    - the Department's evolving understanding of the Benghazi attack.

    The government does not oppose deposing the Department on the first point. But the government does oppose deposing the Department on the latter four points, arguing they "ha[ve] nothing to do with the adequacy of State's response to the narrow FOIA request at issue in this litigation." Def.'s Prop. Disc. Plan & Sched. 2.

    Yet Rice's talking points and State's understanding of the attack play an unavoidably central role in this case: information about the points' development and content, as well as their discussion and dissemination before and after Rice's appearances could reveal extant unsearched, relevant records; State's role in the

[3] If these individuals also appear in subsections III.A or IV.A of this Order, Judicial Watch may only depose each witness once.

points' content and development could shed light on Clinton's motives for shielding her emails from FOIA requesters or on State's reluctance to search her emails. *See also* Mem. Op. 7-8, ECF No. 54 ("Did State know Clinton deemed the Benghazi attack terrorism hours after it happened, contradicting the Obama Administration's subsequent claim of a protest-gone-awry? . . . Did the Department merely fear what might be found? Or was State's bungling just the unfortunate result of bureaucratic redtape and a failure to communicate?"). The government correctly notes Judicial Watch cannot "appoint itself as a freelance Inspector General" into the Obama Administration's response to the Benghazi attack. Def.'s Prop. Disc. Plan & Sched. 11. But that's not what Judicial Watch does here. Though Judicial Watch cannot helm a fishing expedition trawling anything and everything concerning the Benghazi attack, Judicial Watch may depose State on these topics to the extent helpful to answer the questions underlying this discovery.

2. Cooper. As Clinton's email server's initial creator and manager, Cooper may have relevant insight on whether additional emails still exist and where they may be located. *See also supra* subsection III.A.2. Judicial Watch may depose Cooper.
3. Finney. *See supra* subsection III.A.3.
4. Samuelson. *See supra* subsection III.A.4.
5. Sullivan. The government does not oppose Sullivan's deposition.
6. Wasser. *See supra* subsection IV.A.7.

B. Interrogatories.

i. Judicial Watch may serve interrogatories on Rice and on Benjamin Rhodes, President Obama's former Deputy National Security Advisor who helped develop Rice's talking points. Judicial Watch actually wants to depose Rice and Rhodes. But the government opposes the depositions, casting them as "an attempt to get at the underlying issues about Benghazi, rather than issues relating to this FOIA case." Def.'s Prop. Disc. Plan & Sched. 12.

Of course, that is not entirely true. Just as the State Department's testimony on the Benghazi attack and Rice's talking points may help answer the questions underpinning this discovery, *see supra* subsection V.A.I, so too may Rice and Rhodes's testimony. But neither Rice nor Rhodes worked in the Office of the Secretary; neither has ties to Hillary Clinton's private email use or to the government's conduct in this case. And if Judicial Watch wants to discover who Rice communicated with on the day of the attack and the following weeks, it already has all her emails, thanks to its identically worded, long-resolved FOIA request to the U.S. Mission to the United Nations. *See Judicial Watch v. U.S. Dep't of State*, No. 13-951 (D.D.C. Sept. 12, 2014) (Sullivan, J.). So to the extent Judicial Watch will sail unchartered waterfront with Rice and Rhodes, it has not justified deposing them; interrogatories would seemingly suffice to verify State's search in this case. So for now, Judicial Watch may only serve interrogatories on Rice and Rhodes.

ii. Judicial Watch may serve interrogatories on E.W. Priestap, the assistant director of the FBI's counterintelligence division who supervised the investigation into Clinton's private email use. Judicial Watch's proposal goes further, seeking to depose Priestap on "the nature [and] extent of the FBI's efforts, such as who the FBI attempted to contact, who the FBI actually talked to, who the FBI requested records from, who actually provided records, and whether the FBI believes those that they requested records from actually returned all of the requested

records." Pl.'s Resp. 6, ECF No. 64. To be sure, "[t]his information could shed additional light on the adequacy of the State Department's search and other sources from which it might yet obtain records." *Id.*

But the government notes "Priestap has already provided declarations [in another case] recounting the 'FBI's extensive efforts to locate all potentially work-related' emails." *See* Def.'s Prop. Disc. Plan & Sched. 18-19 (quoting Mem. Op. at 13, *Judicial Watch v. Tillerson*, No. 15-785 (D.D.C. Nov. 9, 2017) (Boasberg, J.)). And those declarations rule out further stores of Clinton's emails. *See* Mem. Op. at 4, *Judicial Watch v. Tillerson*, No. 15-785 (D.D.C. Nov. 9, 2017), ECF No. 58. The FBI's final report echoes this testimony, U.S. Dep't of Justice, Clinton E-Mail Investigation, https://vault.fbi.gov/hillary-r.-clinton/Hillary%20R.%20Clinton%20Part%2001%20of%2028, as does the FBI Inspector General's report. U.S. Dep't of Justice, A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election (2018), https://www.oversight.gov/sites/default/files/oig-reports/2016_election_final_report_06-14-18_0.pdf.

To the extent Judicial Watch will cover unexplored terrain with Priestap, it has not justified saddling this high-ranking law enforcement official with a deposition. The Court does not see why Judicial Watch cannot adequately discover the information more efficiently through interrogatories. So Judicial Watch may only serve interrogatories on Priestap.

iii. Judicial Watch may serve interrogatories on Monica Hanley, a former staff member in State's Office of the Secretary, and on Lauren Jiloty, Clinton's former special assistant. The government does not oppose these interrogatories.

Judicial Watch's proposal goes further, seeking to depose Hanley and Jiloty to elicit their recollection of Clinton's frequent email correspondents. On one hand, their testimony matters: Hanley was a key Clinton assistant, and Jiloty maintained Clinton's Blackberry contacts, so their knowledge of Clinton's email practices will help ensure State turned over every stone to search for Clinton's emails. But the Court does not see why such a limited purpose necessitates an expensive and burdensome deposition. Nor does Judicial Watch adequately justify why it cannot discover what it needs from Hanley and Jiloty with equal effect and greater economy through interrogatories. So for now, the Court only allows Judicial Watch to serve interrogatories on Hanley and Jiloty.

iv. Judicial Watch may also obtain through interrogatory the number of emails within Department records sent to or from the clintonemail.com domain name—including the "carbon copy" and "blind carbon copy" functions—between September 11, 2012 and February 2, 2013 including Alice Wells, Andrew Shapiro, Anne-Marie Slaughter, Caroline Adler, Mills, Claire Coleman, Dan Schwerin, Abedin, Sullivan, Joseph MacManus, Judith McHale, Jiloty, Lona Valmoro, Maria Sand, Melanne Verveer, Hanley, Patrick Kennedy, Philippe Reines, Richard Verma, Robert Russo, Rice, Victoria Nuland, Wendy Sherman, and William Burns. The government does not oppose this interrogatory.

Judicial Watch's proposal goes further, seeking this information for Clinton's entire turn as Secretary, starting January 20, 2009. But the Court does not see how information from before September 11, 2012 helps Judicial Watch verify State's search for documents necessarily created on or after that date. And neither Judicial Watch's proposal nor its response defends the earlier date. So Judicial Watch may only discover this information for emails sent between September 11, 2012 and February 2, 2013.

C. *Document Requests.* Judicial Watch may request the following documents:

1. all records—including internal communications—concerning this FOIA request;
2. all records relating to the Department's practices, policies, and actions accounting for Office of the Secretary records, including the emails of Hillary Clinton, Cheryl Mills, Huma Abedin, Jacob Sullivan, and other staff, during and after their employment.

The government does not oppose these document requests.

* * *

It is **SO ORDERED**.

Date: January 15, 2019

Royce C. Lamberth
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	
Plaintiff,	
v.	**Civil Case No. 14-1242**
U.S. DEPARTMENT OF STATE,	
Defendant.	

MEMORANDUM ORDER

On December 6, 2018, the Court ordered discovery into three main areas: (a) whether Secretary Clinton's use of a private email while Secretary of State was an intentional attempt to evade FOIA; (b) whether the State Department's attempts to settle this case in late 2014 and early 2015 amounted to bad faith; and (c) whether State has adequately searched for records responsive to Judicial Watch's request. Although discovery in FOIA cases is rare, the Court again reminds the government that it was State's mishandling of this case—which was either the result of bureaucratic incompetence or motivated by bad faith—that opened discovery in the first place.

Discovery up until this point has brought to light a noteworthy amount of relevant information, but Judicial Watch requests an additional round of discovery, and understandably so. With each passing round of discovery, the Court is left with more questions than answers. What's more, during the December 19, 2019, status conference, Judicial Watch disclosed that the FBI recently produced approximately thirty previously undisclosed Clinton emails. State failed to fully explain the new emails' origins when the Court directly questioned where they came from.[1]

[1] On February 12, 2020, Judicial Watch informed the Court that a recently obtained Clinton email—produced in an unrelated FOIA case involving State—strongly suggests that Secretary Clinton and her Deputy Chief of Staff, Huma Abedin, conducted State Department business via text messaging as well. Pl.'s Notice Suppl. Information 1, ECF No.

Furthermore, State has not represented to the Court that the private emails of State's former employees who corresponded with Secretary Clinton have been searched for additional Clinton emails. State has thus failed to persuade the Court that all of Secretary Clinton's recoverable emails have been located. This is unacceptable.

State asks the Court to close discovery and to move this case towards dispositive motions and an eventual resolution. But there is still more to learn. Even though many important questions remain unanswered, the Justice Department inexplicably still takes the position that the Court should close discovery and rule on dispositive motions. The Court is especially troubled by this. To argue that the Court now has enough information to determine whether State conducted an adequate search is preposterous, especially when considering State's deficient representations regarding the existence of additional Clinton emails. Instead, the Court will authorize a new round of discovery as follows.

Brett Gittleson and Yvette Jacks

Mr. Gittleson was the Director of the Office of the Secretary, the Executive Secretariat's Information Resource Management (hereinafter "S/ES-IRM") in 2013 and 2014. Pl.'s Status Report 2, ECF No. 152. That office was charged with providing technical support—including email management—to the Office of the Secretary during Secretary Clinton's years at the helm. S/ES-IRM Official Dep. 11:17–12:6; 14:1–16:16, ECF No. 152-1. In late 2012 or early 2013, Mr. Gittleson became the director of S/ES-IRM, and in April or May 2013, he discussed Secretary Clinton's email use with Gene Smilansky, an attorney in the Office of the Legal Advisor. Pl.'s Status Report 2. Mr. Smilansky had experience working on FOIA lawsuits, including one related to Secretary Clinton's emails. *Id.* at 3.

160. The government has not provided any information about whether such text messages were searched pursuant to FOIA.

Ms. Jacks was a Deputy Director of S/ES-IRM from 2010 to 2015 and assisted with the troubleshooting of Secretary Clinton's private server while in that role. *Id.* at 3–4; S/ES-IRM Official Dep. 93:5–13. During Tasha Thian's deposition, Ms. Thian identified Ms. Jacks as an employee who maintained the list of gatekeepers for Secretary Clinton's communications. Thian Dep. 125:17–126:2, ECF No. 152-3. Ms. Thian also testified to something troubling—that several S/ES-IRM employees may have intentionally withheld information about Secretary Clinton's email arrangements. *Id.* at 151:18–152:15.

Judicial Watch seeks to depose Mr. Gittleson and Ms. Jacks because they may have relevant knowledge of Secretary Clinton's email use. *See* Pl.'s Status Report 2–4. State argues that any further discovery would be cumulative or irrelevant. *See* Def.'s Status Report 5–7, ECF No. 154. The Court agrees with Judicial Watch and believes these two former employees may offer new and relevant testimony. Mr. Gittleson and Ms. Jacks may be questioned—within the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery—about their knowledge of Secretary Clinton's email use and any other non-privileged conversations pertaining to her email use. Accordingly, the Court **GRANTS** Judicial Watch's requests to depose Mr. Gittleson and Ms. Jacks.

Paul Combetta

Mr. Combetta is an IT specialist who was involved with the transfer and deletion of Secretary Clinton's emails. *See* Pl.'s Status Report 4–5. Judicial Watch seeks to depose Mr. Combetta to learn more about the archiving, existence, and deletion of any of Secretary Clinton's emails. *Id.* at 5. Additionally, Judicial Watch asks the Court to require Mr. Combetta to bring to his deposition all records in his possession relating to Secretary Clinton's emails from her time at State. *Id.* On December 30, 2019, Judicial Watch informed the Court that Mr. Combetta would

assert his Fifth Amendment privilege against self-incrimination if Judicial Watch served a subpoena on him.[2] Status Report Regarding Combetta Dep. 1, ECF No. 155. The Court sees no reason to authorize what would be an exercise in futility. Accordingly, the Court **DENIES** Judicial Watch's request to depose Mr. Combetta.

State Department Interrogatories

Judicial Watch seeks to serve two additional interrogatories on State. First, Judicial Watch asks State to "[i]dentify the number of FOIA lawsuits pending in 2014 that sought records relevant to Secretary Clinton's emails from her tenure at the State Department." Pl.'s Status Report 5. Of the total number of those lawsuits, Judicial Watch asks State to "identify the number of lawsuits the State Department attempted to settle from January 2014 through February 2015." *Id.* The Court agrees with State and holds that the first request is ambiguous and therefore inherently burdensome. The information Judicial Watch seeks is likely also publicly available. The Court **DENIES** the first request.

The second request is similarly ambiguous, unduly burdensome, and disproportionate to the needs of the case. Additionally, the request seeks information related to internal settlement discussions, which likely would be protected by the work-product doctrine. The likelihood of receiving relevant, non-privileged information does not warrant the search, so the Court **DENIES** the second request.

Subpoena for Documents

Judicial Watch seeks to subpoena Google for relevant documents and records associated with Secretary Clinton's emails during her tenure at State. *Id.* at 5–6. The subpoena seeks to discover new emails, so it certainly relates to whether State conducted an adequate search. But

[2] The Justice Department gave Mr. Combetta only limited-use immunity during the FBI's investigation into Secretary Clinton's private server. Status Report Regarding Combetta Dep. 1, ECF No. 155.

State points out that Judicial Watch fails to explain how this search would be any more fruitful than the FBI's extensive investigation into Secretary Clinton's missing emails. *See* Def.'s Status Report 8–9. According to State, the request is disproportionate to the needs of the case because it is highly unlikely that Judicial Watch would receive any relevant information or emails that the FBI or DOJ Inspector General failed to uncover. *See id.*

The Court is not confident that State currently possesses every Clinton email recovered by the FBI; even years after the FBI investigation, the slow trickle of new emails has yet to be explained. For this reason, the Court believes the subpoena would be worthwhile and may even uncover additional previously undisclosed emails. Accordingly, the Court **GRANTS** this request.

Cheryl Mills

Judicial Watch seeks to depose Ms. Mills on all areas of discovery. Ms. Mills—appearing as a non-party in this case—opposes this request because Judicial Watch already deposed her in Judicial Watch's FOIA case before Judge Sullivan, *Judicial Watch, Inc. v. U.S. Dep't of State*, Case No. 13-cv-1363 (D.D.C.). *See* Mills Obj. Dep. 1–2, ECF No. 142. According to Ms. Mills, any further discovery would be duplicative because she already testified for seven hours during her previous deposition to all relevant issues in this case. *See id.*

Judicial Watch argues that it should be able to depose Ms. Mills in this case because it knows more information now than it did when it deposed her in 2016. *See* Pl.'s Combined Reply 10–12, ECF No. 144. The Court sympathizes with this argument—now that Judicial Watch has a better understanding of what happened, it should have an opportunity to craft new questions derived from newly discovered facts. When Ms. Mills was deposed, Judicial Watch was not aware of the 30,000 deleted Clinton emails or that a Congressional subpoena had already been served on Secretary Clinton for her Benghazi records. *Id.* at 12. Furthermore, State's mishandling of this

case opened up discovery in the first place, and Judicial Watch should not be prohibited from asking Ms. Mills about what it learned from discovery just because she was deposed over three years ago in Judicial Watch's case before Judge Sullivan.

To the extent that Judicial Watch tailors relevant, non-duplicative questions—and those questions fall within the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery—the Court **GRANTS** Judicial Watch's request to depose her on all areas of discovery.

Secretary Hillary Clinton

Judicial Watch believes it is now necessary to depose Secretary Clinton because significant questions pertaining to her state of mind remain that only she can answer. *See* Pl.'s Combined Reply 1–2. Secretary Clinton—appearing as an intervenor in this case—disagrees. She argues that the only relevant information she would have knowledge of is whether she used a private server to evade FOIA. *See* Clinton Opp. Dep. 5–6, ECF No. 143. State's settlement attempts and its search for records in response to Judicial Watch's FOIA request occurred well after Secretary Clinton's departure. *See id.* The Court mostly agrees with Secretary Clinton here—any further discovery should focus on whether she used a private server to evade FOIA and, as a corollary to that, what she understandood about State's records management obligations.[3]

But Secretary Clinton maintains that she has already testified extensively and in multiple settings about her reasons for using a private server, so any additional discovery would be duplicative. *See id.* at 6–12. She reminds the Court that the findings of the Benghazi Select Committee, the State Department Inspector General, and the FBI all relate to her use of a private server and that they are all publicly available. *Id.* at 7. Additionally, Secretary Clinton answered

[3] The sole exception to these limitations pertains to records of the Benghazi attack, which will be explored further in the next section of this order.

several questions related to her reasons for using a private server through interrogatories in Judicial Watch's case before Judge Sullivan. *See id.* at 7–8. Secretary Clinton specifically highlights the interrogatories that focus on how, when, and why she set up and used a private server. *See id.* Furthermore, because Secretary Clinton was a high-ranking government official, she argues that the apex doctrine requires Judicial Watch to demonstrate that "extraordinary circumstances" justify this discovery request. *Id.* at 6–7 (quoting *Judicial Watch v. U.S. Dep't of State*, No. 13-cv-1363, 2016 WL 10770466, at *6 (D.D.C. Aug. 19, 2016)). According to Secretary Clinton, Judicial Watch cannot meet that burden because her existing, publicly available testimony already answers Judicial Watch's questions. *See id.* at 7.

For its part, Judicial Watch argues that Secretary Clinton's existing testimony has only scratched the surface of the inquiry into her motives for setting up and using a private server. Pl.'s Combined Reply 2–3. Secretary Clinton has repeatedly stated that convenience was the main reason for using a private server, *see, e.g.*, Clinton Interrog. 5, ECF No. 143-1, but Judicial Watch justifiably seeks to explore that explanation further.

Judicial Watch also requests permission to question Secretary Clinton in greater detail about her understanding of State's records management obligations—including questions about her various trainings and briefings regarding these obligations. *See* Pl.'s Combined Reply 3–9. Judicial Watch correctly points out that many questions regarding her understanding of these obligations still remain unanswered. *See id.* at 6–7. For example, how did she arrive at her belief that her private server emails would be preserved by normal State Department processes for email retention? Who told her that—if anyone—and when? Did she realize State was giving "no records" responses to FOIA requests for her emails? If so, did she suspect that she had any obligation to disclose the existence of her private server to those at State handling the FOIA

requests? When did she first learn that State's records management employees were unaware of the existence of her private server? And why did she think that using a private server to conduct State Department business was permissible under the law in the first place? Again, who told her that—if anyone—and when? These areas of inquiry have not been explored in nearly enough detail to convince the Court that Secretary Clinton does not have any new testimony to offer.

The Court also needs to know whether Secretary Clinton was aware of the active steps taken to prevent others at State—especially those who worked in records management—from learning about her private server. In a December 24, 2010, email exchange, one State Department official accidently sent an email which listed Secretary Clinton's private email address to other employees who did not already have that information, prompting a second State Department official to reply, "Be careful, you just gave the secretary's personal email address to a bunch of folks . . . [.]" Pl.'s Combined Reply Ex. D, ECF No. 144-4. The first official responded, "Should I say don't forward? Did not notice[.]" *Id.* The second official replied, "Yeah-I just know that she guards it pretty closely[.]" *Id.* How could Secretary Clinton possibly believe that everyone at State knew about her private server if her subordinates took pains to ensure that her email address would not be widely disseminated? Was she aware of this attempt—or any other attempts—to keep other State Department employees in the dark? Secretary Clinton's answers to these questions directly relate to her understanding of her records management obligations.

As extensive as the existing record is, it does not sufficiently explain Secretary Clinton's state of mind when she decided it would be an acceptable practice to set up and use a private server to conduct State Department business. Even Huma Abedin, one of Secretary Clinton's closest confidants, testified that Judicial Watch "would have to ask [Secretary Clinton]" herself to ascertain whether the Secretary knew if her use of a private server satisfied her FOIA obligations.

Abedin Dep. 115:17–116:3, *Judicial Watch, Inc. v. U.S. Dep't of State*, Case No. 13-cv-1363, ECF No. 129. The Court authorizes Judicial Watch to do so. And, contrary to Secretary Clinton's assertion, the apex doctrine does not shield her from testifying.[4]

Because Judicial Watch has convinced the Court of the need for further discovery from Secretary Clinton, the only remaining issue is whether the Court should authorize additional interrogatories or a deposition of Secretary Clinton. As the parties point out, Secretary Clinton already answered interrogatories in Judicial Watch's case before Judge Sullivan. But after carefully considering the discovery materials uncovered in this case and Judge Sullivan's case, including Secretary Clinton's responses, the Court believes those responses were either incomplete, unhelpful, or cursory at best. Simply put, her responses left many more questions than answers.

The Court expects that additional interrogatories will only muddle any understanding of Secretary Clinton's state of mind and fail to capture the full picture, thus delaying the final disposition of this case even further. The Court has considered the numerous times in which Secretary Clinton said she could not recall or remember certain details in her prior interrogatory answers. In a deposition, it is more likely that plaintiff's counsel could use documents and other testimony to attempt to refresh her recollection. And so, to avoid the unsatisfying and inefficient outcome of multiple rounds of fruitless interrogatories and move this almost six-year-old case closer to its conclusion, Judicial Watch will be permitted to clarify and further explore Secretary

[4] It is true that high-raking government officials "should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)). But the only person who can speak to Secretary Clinton's reasons for setting up and using a private server and her understanding of State's records management obligations is Secretary Clinton herself. Secretary Clinton unquestionably has unique first-hand knowledge of these matters, so Judicial Watch has demonstrated "extraordinary circumstances." *See FDIC v. Galan-Alvarez*, No. 15-mc-752 (CRC), 2015 U.S. Dist. LEXIS 130545, at *12 (D.D.C. Sept. 4, 2015) (explaining that a party may depose a high-raking government official if the official has "unique first-hand knowledge related to the litigated claims") (quoting *Lederman v. N.Y.C. Dep't of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013)).

Clinton's answers in person and immediately after she gives them. The Court agrees with Judicial Watch—it is time to hear directly from Secretary Clinton.

Accordingly, the Court **GRANTS** Judicial Watch's request to depose Secretary Clinton on matters concerning her reasons for using a private server and her understanding of State's records management obligations, but **DENIES** its request to depose her on all other matters—with one exception outlined in the next section of this order.

Benghazi Attack Records

Finally, Judicial Watch seeks to question both Secretary Clinton and Ms. Mills about "the preparation of talking points for former U.N. Ambassador Susan Rice's September 16, 2012 media appearances, the advance dissemination or discussion of those talking points, the aftermath of Rice's appearances, and the Department's evolving understanding of the Benghazi attack." Pl.'s Combined Reply 12–13. Judicial Watch argues that their answers will provide more information regarding the adequacy of State's search. *Id.* at 13.

Secretary Clinton specifically opposes this request. She argues that questioning her about the government's response to the Benghazi attack has no relevance to the underlying FOIA request and falls outside the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery. Clinton Opp. Dep. 6. Additionally, she highlights the request as proof that Judicial Watch might seek to improperly expand the parameters of discovery if the Court permits Judicial Watch to depose her. *Id.* at 12–13 n.5.

The Court holds that Secretary Clinton and Ms. Mills cannot be questioned about the underlying actions taken after the Benghazi attack, but they may be questioned about their knowledge of the existence of any emails, documents, or text messages related to the Benghazi attack. Such inquiries would go to the adequacy of the search without expanding the parameters

of discovery to include the substance of the government's response to the attack. Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** this request.

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The parties shall complete this round of discovery within seventy-five (75) days, unless they seek additional time. The Court will hold a post-discovery hearing to set a further schedule herein.

It is **SO ORDERED**.

Date: March 2, 2020

Royce C. Lamberth
United States District Judge

Appendix D

PERTINENT STATUTORY PROVISION

In relevant part, 5 U.S.C. § 552(a)(4)(B) provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).