

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JASON LEOPOLD, et al. .
. .
Plaintiff, .
vs. . Docket No. CA 19-957-RBW
. .
U.S. DEPARTMENT OF JUSTICE .
. .
Defendant. .
.x
ELECTRONIC PRIVACY .
INFORMATION CENTER .
Plaintiff, .
vs. . Docket No. CA 19-810-RBW
. .
U.S. DEPARTMENT OF JUSTICE . Washington, D.C.
Defendant. . Monday, August 5, 2019
.x 10:03 a.m.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE SENIOR JUDGE REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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8 Official Court Reporter
9 Room 6521, U.S. District Court
10 333 Constitution Avenue, N.W.
11 Washington, D.C. 20001

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14 Proceedings recorded by machine shorthand, transcript
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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this morning this is In re: Jason Leopold, et al. versus U.S. Department of Justice, and this is Civil Action Number 19-957. But also consolidated with Electronic Privacy Information Center versus Department of Justice, Civil Action 19-810.

We'd ask the parties to step forward and identify yourselves for the record, please.

MR. BUTLER: Your Honor, Alan Butler on behalf of Electronic Privacy Information Center. Good morning.

THE COURT: Good morning.

MR. TOPIC: Good morning, Your Honor, Matt Topic on behalf of Buzz Feed and Jason Leopold.

THE COURT: Good morning.

MR. PETERSON: Good morning, Your Honor, Courtney Enlow on behalf of the Department of Justice, and with me at counsel table is Elizabeth Shapiro.

THE COURT: Good morning.

I think the best and the most expeditious way to try and deal with these issues is to have the plaintiffs indicate in reference to each exemption claimed by the government and we'll go through each individually, why you think what the government has provided does not comport with the requirements of FOIA, and what you propose in reference to those purported deficiencies I should order that the

1 department do.

2 So I'll hear individually from the plaintiffs.
3 We'll start with the Exemption Three and Federal Rule of
4 Civil Procedure 6(e), and then we'll move onto Exemption
5 Three as it relates to the National Security.

6 MR. TOPIC: Good morning, Your Honor, again, Matt
7 Topic.

8 THE COURT: Good morning.

9 MR. TOPIC: Between the plaintiffs we've split up
10 the issues so you won't -- unless you want to hear from both
11 of us, we'll streamline it.

12 THE COURT: No. Unless the other misses something
13 and you think it's important enough to bring that to my
14 attention. And in reference to the amicus, I don't know if
15 they are here or not.

16 MR. TOPIC: I believe they are here.

17 THE COURT: If they are here and they feel that
18 something hasn't been done that I need to know about, I'll
19 let them weigh in. Okay.

20 MR. TOPIC: Very good. So, Your Honor, as to the
21 Grand Jury material under Rule 6(e), the first point I would
22 make is that the value of this information is not so much to
23 learn what happened before the Grand Jury, but to fully
24 understand what information was available to the Special
25 Counsel when he made his various decisions of who to charge

1 and who not to charge. And there has been no showing here
2 that there would be any harm to any investigation or the
3 like from the release of this information. In fact, for the
4 information that's been withheld under Rule 6(e) generally
5 speaking no other exemption has been claimed. There hasn't
6 been a second exemption, for example, for interference with
7 an investigation or invasion of privacy.

8 And so in instances in which the primary value of
9 the information is other than to learn what happened before
10 the Grand Jury and there's no serious risk that any harm
11 would come from disclosure, then the information should be
12 released.

13 The second argument I would make, Your Honor, is
14 that the government has not shown that this is all
15 information that still remains secret. They acknowledge in
16 their brief the information that's already publicly known
17 about the Grand Jury is not subject to Rule 6(e), and
18 there's no indication that they've done any analysis to go
19 through the redactions and make a determination as to what
20 information is already public and what information still
21 remains secret. And so even under the standard that they
22 acknowledge, they have not made the necessary showing for
23 Rule 6(e).

24 Their primary argument seems to be that there has
25 not been any official acknowledgment by the government that

1 any of these people testified before the Grand Jury or
2 testified to this or that, but that really confuses the
3 issue. The case they cite acknowledges that official
4 acknowledgment is basically if a record is exempt it would
5 still, it would still be produced if there's been official
6 acknowledgment of the information. But in and of itself it
7 doesn't create an exemption if the information is not
8 publicly available, so they still have to prove that Rule
9 6(e) applies.

10 And so whether it's through official
11 acknowledgment, whether it's through a brief that the
12 government has filed in the Manafort case or otherwise.
13 Whether it's through the first person accounts in the media
14 of people who've testified before the Grand Jury to the
15 extent that information is already public or wouldn't reveal
16 anything that's secret, then it does not fall within Rule
17 6(e).

18 And so we would ask since they have not undertaken
19 that analysis, that we've provided information to the Court
20 about information that's publicly available. And we think
21 this is an example of an area where an in-camera inspection
22 would be appropriate so Your Honor can compare what's public
23 to what has been withheld and make sure the government is
24 not overwithholding information that's not covered by Rule
25 6(e).

1 MS. ENLOW: Your Honor, plaintiffs started out by
2 saying that they were concerned about the harm, whether
3 there's a harm to release or the value of the information,
4 that is completely irrelevant to this Court's analysis.
5 Rule 6(e) protects the secrecy of the Grand Jury
6 deliberation and Grand Jury matters and leaves no discretion
7 to the Court to do any kind of balancing of public interest
8 or harm to release or anything like that. Only question
9 before the Court is whether the material properly falls
10 within a statute, a qualifying statute under Exemption
11 Three. Rule 6(e) is a qualifying statute. There's no doubt
12 about that, and the material falls within that statute.

13 Ms. Brinkmann attested that what was upheld was
14 the quintessential Grand Jury material, the identities of
15 witnesses who appeared before the Grand Jury, the identities
16 of individuals who were subpoenaed by the Grand Jury, and
17 the substance of the Grand Jury testimony. This material
18 because it falls within Rule 6(e) that's the end of the
19 Court's analysis.

20 Now, plaintiffs also argue that this information
21 no longer remains secret. But Ms. Brinkmann attested that
22 revealing any additional information from the Grand Jury
23 proceedings would reveal a secret aspect of the Grand Jury
24 proceedings and that everything that's been withheld was
25 explicitly before the Grand Jury. And in addition,

1 plaintiffs bear the burden of showing that the withhold
2 material is exactly the same as what may be in the public
3 domain. There's no evidence that they met that burden here.

4 And with regard to in-camera review, this Court
5 recognized in the *Judicial Watch versus Nora* case about the
6 Hilary Clinton indictment, it's appropriate to rely on the
7 declaration of Ms. Brinkmann here. There's no need for the
8 Court to conduct an in-camera review to determine whether or
9 not information still may remain secret.

10 THE COURT: Well, in reference to information
11 that's already publicly known, you're, I assume, taking the
12 position that what has not been produced in fact is
13 information that's not in the public domain?

14 MS. ENLOW: That is correct, Your Honor, and
15 that's what Ms. Brinkmann has attested to.

16 THE COURT: What about the position that she takes
17 that there's no balancing to be done here, and that if they
18 represent that what they're withholding was, in fact,
19 information that was submitted to the Grand Jury, that that
20 ends the inquiry?

21 MR. TOPIC: So as to the second point, there is no
22 evidence in Ms. Brinkmann's affidavit that she has conducted
23 an analysis to make that comparison, and that is unlike the
24 *Judicial Watch* case that they have cited. There's basically
25 just a conclusory paragraph. There's no indication that she

1 has actually undertaken that analysis. And so if she did
2 and she attest at that point it might be a different
3 situation, but they've now had two briefs and two
4 opportunities to provide affidavits that would show that and
5 they haven't.

6 As to the balancing test, the case we would
7 primarily rely on, and it's cited on page 29 of our opening
8 brief, is In Re: Grand Jury impaneled, October 2nd, quote,
9 since the subcommittee is looking into the public integrity
10 section's performance and not the Grand Jury itself these
11 record analyses would seem to fall into that category of
12 unprotected documents that have a significance of their own
13 here is part of the Public Integrity Section's investigation
14 of Robert Vesco. I'll confess I don't know who Robert Vesco
15 is at this point, but we certainly are not the Public
16 Integrity Section of any unit of government, but that isn't
17 relevant under Rule 6(e). The point is that when
18 information primarily has value other than to learn what
19 transpired before the Grand Jury then there is discretion
20 for the Court to release the information.

21 Last point I would make --

22 THE COURT: And that other, that other purpose
23 would be what here?

24 MR. TOPIC: The purpose would be the public's full
25 understanding of how the Special Counsel came to the

1 conclusions that it did on who it would charge and who it
2 would not charge. As you read through the redacted report
3 there are large sections where we don't know, we have no
4 idea what that evidence is that the Special Counsel was
5 looking at, discounted, credited. There's just big gaps.
6 We don't have a full understanding.

7 And so it's true that a large part, I mean,
8 depending on how you look at it, there are significant parts
9 that have been released. There are significant parts that
10 have not been released. And individual sentences,
11 individual passages, even if they, you know, originate with
12 the Grand Jury might tell us a lot about how did the Special
13 Counsel come to the conclusion that there was no basis to
14 charge, for example, Donald Trump, Junior, with any crimes
15 associated with the Trump Tower meeting and conspiring with
16 the Russian government or accepting anything of value.

17 There's just large sections that we don't -- we
18 really don't understand or know how that conclusion was
19 reached, so that's the value. The Grand Jury is really, it
20 doesn't matter if it came from the Grand Jury or came
21 otherwise. Frankly, they probably could have written a
22 report without even identifying that it came from the Grand
23 Jury or didn't come from the Grand Jury. The point is just
24 the information. And the secrecy under Rule 6(e) does not
25 apply to everything just because there's a Grand Jury. It's

1 things that would reveal secret aspects of the Grand Jury's
2 activities.

3 THE COURT: So are you assuming that an
4 investigation, for example, regarding Donald Trump, Junior,
5 was, in fact, undertaken by the Special Counsel?

6 MR. TOPIC: Well, there's a section of the report
7 that talks about the Trump Tower meeting and talks about --
8 it talks about busy Donald Trump, Junior, and Mr. Kushner
9 and Mr. Manafort as being in attendance. When we get to the
10 privacy arguments, I think this will come up again.

11 But they have redacted the subheadings of people's
12 names, but when you read it in context, it seems pretty
13 clear that it's talking about one of those people. There's
14 some basic information upfront and then it walks through the
15 analysis of -- or it walks through what some of that
16 evidence is.

17 THE COURT: I mean, obviously I don't know what,
18 if anything, was referred by the Special Counsel to other
19 prosecutors' offices, but I mean, what if that is, in fact,
20 what occurred, that there was a referral made to, for
21 example, the Southern District of New York for them to
22 assess whether they believed that some type of prosecution
23 should proceed. Wouldn't they have a right to not disclose
24 that information at this time?

25 MR. TOPIC: Well, you would expect to see an

1 assertion of Section 7(a) for interference with a pending
2 investigation, and we don't really have that for most of
3 these Grand Jury exemption claims. This is just Grand Jury
4 because it's Grand Jury is essentially what they're arguing.

5 And in some of the passages it really kind of --
6 it's difficult for me, and I think for many people, to
7 understand how the particular passage would actually be
8 revealing something even before the Grand Jury.

9 So Docket Number 54-5 at page 13, we also sought a
10 voluntary interview with the president. After more than a
11 year of discussion, the president declined to be
12 interviewed. Then a redaction under B3. During the course
13 of our discussions the president did agree to answer written
14 questions, and it talks about that.

15 Well, the president obviously was never called
16 before the Grand Jury. Yeah, it really -- there's been no
17 explanation, for example, how that passage would reveal
18 anything secret about what transpired before the Grand Jury.

19 If that's an assessment by the Special Counsel's
20 office as to whether they would issue a Grand Jury subpoena
21 or whether they would attempt to bring the president before
22 the Grand Jury, that doesn't reveal anything that transpired
23 before the Grand Jury. That reveals the thought processes
24 or the analysis by the Special Counsel's office. And it's
25 axiomatic at this point that the Grand Jury is independent

1 from the prosecutor. So the fact that the prosecution was
2 considering bringing something before the Grand Jury unless
3 that was directed by the Grand Jury and there's no
4 indication of that, then that passage certainly should not
5 be considered Rule 6(e) material.

6 THE COURT: What about this point regarding the
7 proposal that the president either provide written responses
8 or appear before the Grand Jury? I mean, what he was saying
9 in response to what counsel just indicated in that regard
10 that what's been indicated doesn't indicate that that
11 information was in fact something presented to the
12 government. It may have been something internal within the
13 Special Prosecutor's office. And if that is the case, why
14 would that be covered by 6(e)?

15 MS. ENLOW: Your Honor, plaintiffs are basically
16 speculating as to what is under that redaction. Ms.
17 Brinkmann in her sworn declaration said that that
18 information that was withheld was only that information
19 which explicitly discloses matters occurring before a
20 federal Grand Jury. That's it. The speculation about what
21 might be under that particular redaction does not -- is not
22 sufficient to doubt the good faith of Ms. Brinkmann's
23 declaration.

24 In any event, it's important to take a step back
25 here. Plaintiff's counsel cited some case about the value

1 of its information, but the D.C. Circuit just recently held
2 this year in *McKeever* that the Court has no inherent
3 authority to release 6(e) information for public interest
4 purposes.

5 That is the case here. Again, the Court's
6 analysis is simply whether or not the information falls
7 within 6(e), and Ms. Brinkmann's declaration shows that it
8 does.

9 THE COURT: I guess they're saying I shouldn't
10 rely upon that representation that that redacted information
11 was, in fact, information submitted to the Grand Jury or
12 considered by the Grand Jury.

13 MS. ENLOW: They are, but this is just speculation
14 as to what's under the redaction. And it's certainly not
15 good enough to question the good faith of Ms. Brinkmann's
16 declaration where she says that only the matters that were
17 explicitly before the Grand Jury was withheld; witness'
18 names, identity of individuals who were subpoenaed by Grand
19 Jury, witness testimony. These things are quintessential
20 Rule 6(e) material. The D.C. Circuit has recognized this
21 over and over again. And fun for Constitutional government
22 and assessment and Senate for the common law of Puerto Rico
23 and Hodge.

24 All of these cases repeatedly say that once it's
25 shown that in a declaration that this is the kind of

1 information that was withheld it must be protected from
2 disclosure under Rule 6(e) in Exemption Three.

3 THE COURT: I mean she says you're just
4 speculating about this information not having been submitted
5 to the Grand Jury, and that I have to rely upon what's in
6 the declaration that says that this was, in fact, something
7 that was either before or considered by the Grand Jury. And
8 therefore, that ends the inquiry. You say I should conduct
9 an in-camera inspection. What would be the basis for me
10 concluding on the existing record that I should not adhere
11 or respect the presumption that's given to the good faith of
12 the agency in reference to its representations in this
13 regard?

14 MR. TOPIC: The reason, Your Honor, is that you
15 don't have to and you are not supposed to rely on legal
16 conclusions put in the form of an affidavit. And that's
17 exactly what Ms. Brinkmann's affidavit is. Just says only
18 information that was explicitly connected to the operation
19 of the federal Grand Jury and -- which could not be
20 disclosed without clearly revealing the inner workings of
21 Grand Jury proceedings was protected pursuant to Exemption
22 Three.

23 So there is an -- I mean in some places there's an
24 explanation that these are witness names or testimony that
25 was provided by a witness. At least there we understand,

1 okay, what is the class of information they're talking
2 about? Logically is that information that would be before a
3 Grand Jury? The example I gave you reading that in context
4 calls into question the voracity of the affidavit as applied
5 at least to that particular passage. Reading it in context,
6 there's no explanation as to how --

7 THE COURT: So in reference to this particular
8 issue, are you saying that I should require that they
9 supplement their affidavit with something more than what
10 they've indicated before I would even reach the point of
11 saying that I needed to conduct an in-camera review?

12 MR. TOPIC: Your Honor, the cases -- there's a
13 public interest obviously here and a desire to expedite the
14 case. So they've had two opportunities. We've raised these
15 issues all along the way. It's not uncommon for the
16 government to provide a supplemental affidavit in its second
17 brief. They had the opportunity to do that. They didn't do
18 that. I think at this point we would add and I'm sure
19 you're hear reasons throughout the argument today why
20 in-camera inspection would be more appropriate. We think
21 given the fact that they've had opportunities that would
22 make sense.

23 If I can touch a couple of other -- unless there's
24 something else on that point.

25 THE COURT: That's fine. You may.

1 MR. TOPIC: *McKeever* really is not the issue here.
2 *McKeever* says if material is subject to Rule 6(e) then the
3 Court doesn't have discretion. And we'll see how that plays
4 out en banc and what will happen next with *McKeever* because
5 it really is contrary to some prior decisions. But that's
6 not our argument. Our argument is that if it's not a matter
7 occurring before the Grand Jury as that term of art has been
8 interpreted, including in the case that I cited to you, then
9 it's not Rule 6(e) material in the first place.

10 It is not our burden to prove anything here. It's
11 their burden of proving that this material is subject to
12 Rule 6(e). So obviously I haven't seen the material. I can
13 only see what Ms. Brinkmann said and what I see is very
14 generic, high level legal conclusion type of language. It
15 doesn't specifically talk about some of these passages that
16 don't plausibly seem to possibly have anything to do with
17 the Grand Jury.

18 It could be that Ms. Brinkmann is taking a very
19 aggressive legal interpretation of what is a matter
20 occurring before the Grand Jury. And her affidavit is not
21 entitled to any deference at all when it comes to those
22 kinds of issues.

23 THE COURT: You know, government counsel, I'm
24 obviously very sensitive to the need to maintain the privacy
25 of information provided to the Grand Jury, but counsel says

1 that Ms. Brinkmann really is just providing legal
2 conclusions, and I shouldn't just rely upon those
3 conclusions in concluding what's been -- we're talking about
4 now that these redactions were, in fact, do, in fact, relate
5 to information that was provided to the Grand Jury.

6 I mean, can I just rely upon her generalized
7 statement that the information that they're seeking is
8 covered by 6(e) without more?

9 MS. ENLOW: Your Honor, it's not just a
10 generalized statement of, oh, yes, this material is Grand
11 Jury material. That's how they're painting this. When you
12 actually look at Ms. Brinkmann's declaration she explicitly
13 states that the material that was withhold, Grand Jury
14 witnesses, individuals who were subpoenaed by the Grand
15 Jury, and Grand Jury testimony. That's what she says. She
16 doesn't say that there's any other squishy category of
17 information that was withheld. She said those three
18 categories.

19 Those are quintessential Rule 6(e) material --

20 THE COURT: You're saying all of the claimed
21 Exemption Three exemptions as it relates to 6(e) fall within
22 those three categories?

23 MS. ENLOW: That is what the declaration says.
24 And because it does fall within those categories, and courts
25 have recognized time and again that this is quintessential

1 6(e) material, it must be protected from disclosure. And
2 the fact that the McKeever case, that actually -- the time
3 for en banc has run. That case is final. That case is
4 binding. The Court has no inherent discretion to release
5 this material just for public interests purposes.

6 THE COURT: Okay. I think I understand your
7 respective positions regarding this particular exemption.
8 We can move on to Exemption Three and the National Security
9 Act.

10 MR. TOPIC: That's me again, Your Honor, and I
11 think really this exemption sort of merges with the 7(e)(1)
12 category, so sources and methods and intelligence kind of
13 information. Our argument is largely the same here.

14 THE COURT: You said 7(e)?

15 MR. TOPIC: Sorry, yes. So they claim under 7(e)
16 they have subdivided in between 7(e)(1) and 7(e)(2).

17 THE COURT: Right.

18 MR. TOPIC: Seven (e)(1) is law enforcement
19 gathering techniques, and then Exemption Three is
20 intelligence gathering techniques. And I think they've
21 largely sorted them together, and so we can certainly
22 address them the same way.

23 THE COURT: Does the government agree?

24 MS. ENLOW: Yes, your Honor.

25 THE COURT: Okay.

1 MR. TOPIC: So we've explained in our briefs the
2 case law makes clear that notwithstanding any deference, the
3 Court must be satisfied that only exempt material was
4 redacted. Here, what they're largely describing is, quote,
5 investigative and information gathering techniques, end
6 quote, which I think is quite a bit too vague to really
7 allow the Court and not allow us to test the veracity of
8 those claims.

9 I would primarily point you to the *Crew* decision
10 involving the DeLay, Tom DeLay materials. We are not told
11 what procedures are at stake, nor are we told how
12 disclosures of the 302s or investigative materials could
13 reveal such procedures directly or indirectly. And then
14 they provide some examples in that case of the kind of
15 information that has provided that would be satisfactory.

16 I think details about procedures used during the
17 forensic examination of the computer of an FBI forensic
18 examiner. And really I think all we have here is just sort
19 of very generalized descriptions. And so under *Ray* and
20 under other cases I think this is also appropriate for
21 in-camera inspection.

22 THE COURT: Government counsel, why is he wrong?

23 MS. ENLOW: He's wrong for two reasons, Your
24 Honor. The first is that this material is covered by
25 Exemption Three as well under the National Security Act and

1 Courts have recognized this is near blanket FOIA exemption.
2 And the kind of detail that he's describing here as being
3 required under 7(e) is simply not required under Exemption
4 Three for the National Security Act.

5 Courts have recognized and upheld redactions under
6 the National Security Act when the declaration simply say
7 that the withholdings were taken to protect intelligent
8 source and methods or when they were protected special
9 practices or procedures or where they are meant to protect
10 investigative techniques or information regarding how an
11 inspector general conducts its investigations.

12 As the Court can tell, these are very generalized
13 descriptions and we have them in our brief for the case
14 citation.

15 Under the Crew case that plaintiff's counsel
16 referenced, *Crew* does not deal with Exemption 3. It only
17 deals with Exemption 7(e). So this material is covered by
18 Exemption three and 7(e.) And under Exemption Three it just
19 has to relate to intelligence sources and methods.

20 And Ms. Brinkmann's declaration read in
21 conjunction with the FOIA marked version of the report shows
22 that it does. Ms. Brinkmann said that these are what's
23 being protected as techniques and procedures authorized for
24 and used in national security investigations. These are
25 unclassified sources and methods relating to investigative

1 and information gathering techniques used in investigations
2 and to interference activities emanating from Russia and
3 2016 presidential election.

4 Not only that, Ms. Brinkmann describes that the
5 information withheld would describe the specific
6 circumstances of the use of these investigative and
7 information gathering techniques, such as when the
8 techniques were used, the types of information, information
9 that was gathered, the limitations of the use, what
10 techniques might be used to gather, and specific details
11 about how the techniques are implemented.

12 Now, this is all that is required certainly under
13 Exemption Three and also under Exemption 7(e). Again, *Crew*
14 was just about 7(e). And *Crew* said there was insufficient
15 detail because we were not told what procedures are at
16 stake. But here, we are. They are information -- excuse
17 me, investigative and information gathering techniques. And
18 when you read it in conjunct -- the declaration in
19 conjunction with the report, you can see that whenever
20 there's a heading, the information and gathering techniques
21 are described under that heading clearly relate to the
22 investigation of what the Court is talking about.

23 For example, there's a heading that says active
24 measures, social media campaign. And then there's some
25 exemptions for 7(e) and for Exemption Three of the National

1 Security Act under that. Clearly what's going on there is
2 what's being redacted as investigation gathering techniques
3 that were used to investigate the active measure social
4 media campaign. So you have to look at the context within
5 this narrative together with the declaration to reach this
6 conclusion.

7 And Ms. Brinkmann further attested that no further
8 detail about these techniques could be revealed without
9 giving individuals the means to evade detection. And the
10 Court must -- special deference are owed to agency
11 affidavits such as the one in this case from DOJ on national
12 security matters.

13 THE COURT: So you seem to be saying that when
14 both 7(e) and Exemption Three are in play that the Court's
15 review is more limited?

16 MS. ENLOW: Under Exemption Three the case law
17 seems to be more -- provides more deference -- well, not
18 more deference, more -- there are fewer requirements as to
19 what needs to be in a declaration to support Exemption
20 Three. It just has to show that it relates to sources and
21 methods.

22 THE COURT: Brief response to that?

23 MR. TOPIC: Only response would be that courts
24 have held notwithstanding the deference, Your Honor has the
25 discretion to elect to conduct an in-camera inspection. And

1 given the nature of this case we think it would be
2 appropriate to conduct an in-camera inspection.

3 THE COURT: I mean, that's an issue we're going to
4 have to address, but you've raised it now in reference to
5 both discussions we've had. I mean, besides your belief
6 that conceivably there's other information that could be and
7 should be released as required by FOIA, is there any other
8 reason why you believe that in-camera inspection is
9 appropriate? Because obviously the Circuit has held that
10 in-camera review is a matter of last resort, and that
11 obviously I have to, you know, assume the good faith of the
12 government in reference to its claimed exemptions unless
13 there's some good reason not to do so.

14 So besides what you believe may exist and
15 therefore you believe that that would be a sufficient
16 predicate for me to conduct an in-camera review, is there
17 any other reason why you think in-camera review would be
18 appropriate?

19 MR. TOPIC: Under these particular exemptions
20 there's really nothing more I would point Your Honor to. I
21 think, as we talked about earlier for a Grand Jury and I
22 think as you'll hear from some of the other sections, there
23 are some areas where it really seems like they have
24 overasserted exemptions or the exemptions don't quite make
25 sense. And we've listed in our opening brief, we pasted in

1 a lot of passages whereas if you look at the claim and you
2 read the passage in context, it really does calls into
3 question the validity of the claims by the government, and
4 whether they're just interpreting the exemptions too broadly
5 and then asking for deference under the standards for
6 affidavits for things that are really more legal
7 conclusions.

8 THE COURT: Okay. Thank you.

9 The next, we've already talked about 7(e). I
10 don't know to what extent we need to have further
11 discussions on it, but the law enforcement information
12 exemption claimed by the government pursuant to 7(a), 7(b)
13 and 7(e), I'll hear from counsel in reference to those
14 claimed exemptions.

15 MR. BUTLER: Your Honor, I don't know if you
16 wanted to talk about Exemption 5 before we talked about
17 7(a). I'm happy to do either.

18 THE COURT: We can.

19 MR. BUTLER: Okay. I'll just make a couple of
20 quick notes following up on what my colleague said about
21 in-camera review. A few additional reasons I think it's
22 particularly appropriate in this case, the scope of the
23 different exemptions. One is that we're dealing a single
24 discreet document here, and so it's different than other
25 case where in-camera review might be especially burdensome

1 if there are hundreds or thousands of pages, and also the
2 unique circumstances of this case.

3 The extreme public interest in this information
4 and significance of the report as well as the complications
5 caused by the Attorney General's statements about the report
6 before it was released. The statement responsive by the
7 Special Counsel, statements by the Special Counsel, I think
8 that the integrity of this process has been called into
9 question sufficiently that it would be in the public's
10 interest to have a neutral, independent review by this
11 court.

12 Shifting over to Exemption 5, there's two
13 subcategories of Exemption 5 claims in this report as to the
14 government described them.

15 THE COURT: I don't want to cut you off, but
16 before we move to that, let me just query the government on
17 this issue of in-camera review. Counsel now says that in
18 addition to what was previously indicated that I also should
19 factor in -- well, obviously, there's significant public
20 interest, but that may be the case in reference to a lot of
21 matters that come before the Court. But the position
22 regarding statements and actions that were taken by the
23 Attorney General that counsel is suggesting should cause me
24 to conclude that there's sufficient reason to conduct
25 in-camera review. I'll hear from the government in

1 reference to that.

2 I mean, I do have some concerns because it seems
3 to me that it's difficult to reconcile the content of the
4 Mueller report. And the statements made by the Attorney
5 General in reference to the content of the Mueller report,
6 it seems to me that it's difficult to reconcile the
7 representation that the Special Counsel found that there was
8 no collusion, when, in fact, the Special Counsel did not
9 address the issue of collusion, and also the representation
10 that there was no determination or at least the Special
11 Counsel exonerated the president in reference to
12 obstruction, when, in fact, the report specifically says
13 that that was not the case.

14 And also I guess the timing of the letter that was
15 written by the Attorney General after the report was
16 produced to him, which occurred very quickly, and these two
17 positions were taken which appear to be inconsistent with
18 what the report itself says. And then the events that took
19 place on the day that the report itself was released, and
20 that before or at least giving the public and the media the
21 opportunity to review the report, again, there were
22 statements made by the Attorney General that would tend,
23 that would seem to be inconsistent with what the report
24 itself says and how if that's the case how that should
25 factor in on my assessment as to whether in-camera review

1 would be appropriate.

2 MS. ENLOW: Your Honor, the Attorney General made
3 a discretionary release of the report. If you look at the
4 Special Counsel's regulations 600.8(c) says that it's
5 supposed to be a confidential report from the Special
6 Counsel to the Attorney General. And the Attorney General
7 was not required to release the report to the public. He
8 could have simply provided notice to Congress under the
9 regulation.

10 Instead the Attorney General took the step of
11 releasing the report to the public. And the report as the
12 Court can tell is lightly redacted. It's got, media
13 statements estimate as much as 92 percent of the report is
14 unredacted. From that the Court can glean context together
15 with Ms. Brinkmann's affidavit to fully assess the propriety
16 of the redactions here. And with regard to Ms. Brinkmann's
17 declaration, it's sufficiently detailed. Courts usually for
18 in-camera review when the declaration itself was not
19 sufficiently detailed.

20 But here it is especially when read in context to
21 the FOIA marked report, and especially given that the Office
22 of Information Policy went through and provided additional
23 codes on the side to, for ease of reference to the Court and
24 to better understand the basis for each and every redaction.
25 And no one is questioning the good faith of Ms. Brinkmann or

1 the Office of Information Policy here and going through and
2 diligently marking and preparing the report for release
3 under the FOIA.

4 THE COURT: I guess they're not specifically
5 questioning her good faith, but I think they are questioning
6 the good faith of the Attorney General in reference to the
7 representations that he made in reference to what the report
8 purportedly says. And they seemed to be saying that what he
9 said was not an accurate indication of what the report
10 indicates at least in two respects, and to what extent that
11 in and of itself should cause me to have sufficient concern
12 about the good faith of the department and therefore justify
13 me conducting an in-camera review.

14 MS. ENLOW: Again, because the Office of
15 Information Policy specifically went through and you heard
16 the detailed declaration, again reviewed the report
17 separately to ensure that everything that was redacted was
18 pursuant to one of the FOIA exemptions and then provided
19 extensive detail as to why it all fell within the FOIA
20 exemption, in-camera review is simply not necessary here.

21 THE COURT: Thank you. Counsel, why what she says
22 does -- I mean, if she doesn't really address the concerns I
23 expressed about the content of the report as compared to the
24 representations made by the Attorney General, but she says
25 if I just considered the declaration and the representations

1 made by Ms. Brinkmann in the declaration, that that in and
2 of itself is sufficient reason regardless of anything else
3 to conclude an in-camera review is not necessary or
4 appropriate.

5 MR. BUTLER: Well, Your Honor, the sequence of
6 events here is significant. The fact that the DOJ
7 acknowledged in our first hearing the Office of Information
8 Policy didn't actually conduct their review until after the
9 Attorney General had directed a team at DOJ to conduct a
10 review and release the report without FOIA markings. So
11 what OIC was doing was reviewing the report that had already
12 been released and basically applying FOIA markings to it,
13 but there was no, you know, significant additional release
14 of information. And so --

15 THE COURT: So you're saying the record does
16 support the proposition that the redactions that were made
17 by the Attorney General mirror what Ms. Brinkmann says are
18 appropriate exemptions under FOIA?

19 MR. BUTLER: That there was no change after the
20 Attorney General made his decision with his team as to what
21 to redact and what to release.

22 THE COURT: Okay.

23 MR. BUTLER: Shall I move on?

24 THE COURT: Yes.

25 MR. BUTLER: So under Exemption 5 there's two

1 categories described by the Department of Justice that are
2 redacted. One is the sort of application of law to specific
3 facts, and the other concerns individuals who were not
4 charged. But across the board Exemption 5 does not apply to
5 the material in this report. Because this report is a final
6 report, a closing report of the Special Counsel's office
7 issued under the DOJ, counsel mentioned the operative
8 regulation 600.8c. And so this is a report of the Special
9 Counsel's office, a official report about decisions that
10 have already been made.

11 So this report is not pre-decisional. It's
12 post-decisional. It's the quintessential post-decisional
13 report. And the courts have said over and over again in
14 Exemption 5 cases that pre-decisional requirement means that
15 the document has to be in temporal sequence, must predate
16 the decision, and also separately it has to be deliberative
17 in nature, and a document that summarizes a decision that's
18 already been reached by the operative agency official or
19 office, here the Special Counsel and his office, is not a
20 pre-decisional document nor is it deliberative.

21 THE COURT: This is sort of a unique situation,
22 isn't it? Because the Special Counsel as at least it
23 relates to the president did not have the ultimate authority
24 pursuant to DOJ policy to determine whether the president
25 should be charged with a crime or not. Ultimately that was

1 going to have to be a decision by the Attorney General if he
2 decided to disregard the policy that's been in place for
3 some period of time about not indicting or charging a
4 sitting president.

5 So was what Mr. Mueller submitted really a final
6 determination?

7 MR. BUTLER: As to the specific point of charging
8 the president, I think that the Special Counsel's view of it
9 is that DOJ operative regulation does not allow indictment
10 while the president is in office, but that there are other
11 constitutional mechanisms that can be brought to bear to
12 consider these questions.

13 One obviously is Congress's role under the
14 impeachment clause. And so in order for that to be
15 available, and in order for that process to actually work it
16 would necessarily have to be an ability of both Congress and
17 I think the public to access the information. And there is
18 information about the president's actions in the report
19 that's unredacted.

20 So I don't think that specific reason maps on to
21 why they're withholding information in this report. And
22 volume two is not -- there are extensive redactions in
23 volume two that concern the president's activities.

24 Instead, we have in volume one, at the end of
25 volume one, a series of charging decisions. Where there are

1 redactions under, many under what is designated B-one,
2 application of law and facts. And these are decision that
3 the Special Counsel is invested with the authority to
4 decide --

5 THE COURT: Charging decisions regarding
6 individuals other than the president?

7 MR. BUTLER: Correct, exactly. Charging decisions
8 and those are final decisions by the Special Counsel's
9 office. The Special Counsel's office no longer is in
10 operation, and so by definition they can't make decisions in
11 the future. If some other office makes a different decision
12 in the future it's not relevant to this, the post-decisional
13 or non-deliberative nature of the report as to these
14 charging decisions.

15 THE COURT: Okay.

16 MS. ENLOW: Your Honor, a couple of points about
17 Exemption 5, but first I want to respond to the in-camera
18 review just briefly. I don't want the Court to have the
19 wrong impression. The redactions that's shown in the
20 Attorney General's letters before the report came out, they
21 were done in conjunction with the Special Counsel and his
22 staff, and other individuals who were involved in ongoing
23 matters. This is not just the Attorney General's
24 redactions. This is redactions that were done in
25 consultation and together with these other --

1 THE COURT: Mr. Mueller, as I understand, did take
2 exception with some representations made by the Attorney
3 General about what was in his report, right?

4 MS. ENLOW: Well, Mr. Mueller actually said that
5 he didn't question the good faith of the Attorney General in
6 releasing what he released. He said that at the press
7 conference in May.

8 THE COURT: Well, but I thought, at least from the
9 media reports, the Special Counsel wanted his summaries to
10 be released also, which the Attorney General did not do.
11 And I thought he took the position that the representations
12 made by the Attorney General about conclusions that the
13 Special Counsel's office had reached were not consistent
14 with the Special Counsel's position.

15 MS. ENLOW: They certainly were released, of
16 course, with the report. And then also, as I said, the
17 Special Counsel specifically stated at the press conference
18 on May 29th, that he did not question the good faith of the
19 Attorney General in releasing the report.

20 THE COURT: Not releasing the report, but he seems
21 to disagree with the conclusion that the Attorney General
22 represents are contained in the report both in reference to
23 the issue of collusion which Mr. Mueller did not assess
24 because he only assessed whether the legal principle of
25 conspiracy had provided a basis for charges. And clearly

1 says in reference to the alleged obstruction activity that
2 he did not exonerate the president in reference to those
3 allegations.

4 And Mr. Barr seems to say something very different
5 than that.

6 MS. ENLOW: In any event, Your Honor, now that the
7 report has been released, any sort of difference between the
8 report and statements can be plainly viewed from the report
9 itself and certainly doesn't support in-camera review of the
10 redacted material.

11 THE COURT: Except I guess their position is that
12 well, a determination was basically made and set in stone by
13 the Attorney General as to what should be redacted from the
14 report. And that all Ms. Brinkmann did was mimmick what the
15 Attorney General had already decided should be -- should not
16 been disclosed and, therefore, became what purportedly are
17 appropriate FOIA exemptions.

18 MS. ENLOW: That takes me back to my first point,
19 Your Honor. When the report was being redacted for public
20 release it was done in conjunction with the Special Counsel
21 in conjunction with the staff, in conjunction with others in
22 the government that were dealing with ongoing matters at the
23 time. It was not a singular person that was making the
24 redactions to the report. This was done in conjunction with
25 others in taking into account the interests that needed to

1 be protected before this information could be disclosed.

2 THE COURT: Well, I mean, should I, should I, I
3 don't know how you do it now since the Special Counsel's
4 office doesn't exist anymore, but should I require that
5 something be submitted indicating that the Special Counsel
6 did, in fact, agree with the Attorney General in reference
7 to the redactions?

8 MS. ENLOW: No, Your Honor. Because he was
9 already consulted, and Special Counsel's office was part of
10 the redaction process. But in any event after that, Ms.
11 Brinkmann and the Office of Information Policy, also did a
12 thorough review, and that's what we're looking at here. Her
13 declaration, her sworn declaration and the detailed
14 declaration and the redactions that the Office of
15 Information Policy took.

16 THE COURT: I understand that. But, you know, I
17 also worked for the department at one point too, and I do
18 appreciate, you know, in the executive branch of government
19 that sometimes when the head says they want a result, that
20 sometimes the body does what the head wants. So I mean, I
21 guess the suggestion, i.e., should I just accept what
22 Ms. Brinkmann says when, in fact, there already had been a
23 determination made by the Attorney General as to what should
24 not been disclosed and she just agreed with that. And
25 therefore, we have a consistent claim of exemptions with

1 what the Attorney General thought was appropriate to redact.

2 MS. ENLOW: Well, that is not what Ms. Brinkmann
3 attested to in her sworn declaration, Your Honor. She said
4 that the Office of Information Policy went through line by
5 line and looked at information under the redactions and
6 determined that it could be and should be withheld under the
7 exemptions under FOIA.

8 THE COURT: Okay. Thank you.

9 MS. ENLOW: Thank you. And moving on to Exemption
10 5, Exemption 5 not only, the deliberative process privilege
11 not protects pre-decisional documents. This Court
12 recognized in *Judicial Watch versus DOJ*, the case about the
13 Black Panther party dismissal, that post-decisional
14 documents can still be protected under the deliberative
15 process privilege to the extent they recount or reflect
16 pre-decisional deliberations.

17 And that's what's going on here. Akin to *Judicial*
18 *Watch*, in that case one of the documents at issue was a
19 briefing paper made after the decision to dismiss the case
20 had been made, was a briefing paper to superiors within the
21 department about why the case was dismissed. And in doing
22 so it described the legal analysis and the application of
23 facts and law and the strengths and weaknesses of evidence.
24 And that is akin to what we have here. The report, it
25 described in the Special Counsel to the Attorney General the

1 basis for the charging and declination decisions. It
2 recounts pre-decisional deliberations about the analysis of
3 facts to law, the strengths and weaknesses of evidence, and
4 why individual decisions were made. It is the exact same
5 situation and should be ruled upon the exact same way.

6 THE COURT: Are you able to distinguish that case?
7 That was the circuit, right?

8 MS. ENLOW: No, that was decisional 2011.

9 THE COURT: Okay, 2001, that was a long time ago.

10 MS. ENLOW: 2011.

11 MR. BUTLER: Your Honor, I just wanted to quickly
12 just in response to the in-camera point, just point to the
13 fact that Exhibit 4 to our Summary Judgment Motion is the
14 letter from the Special Counsel to the Attorney General that
15 you mentioned, so it has, I think it's worth reading, just
16 reviewing again. And noting that Special Counsel did feel
17 the public confusion about the critical aspects of the
18 results of their investigation. And that there was a need
19 for public release of the material, and that the Special
20 Counsel had essentially provided a document with limited
21 designations of things that may be redacted based on the
22 review.

23 As to the *Judicial Watch* case, I think that that
24 case is easily distinguishable because what was at issue in
25 that case were internal emails and communications

1 summarizing prior discussions between inferior officers.
2 The Special Counsel is not an inferior officer in this
3 context. He is given under the regulations the authority
4 ultimately to make prosecution and declination decisions.

5 The Attorney General, the Crew amicus brief lays
6 this out in detail, but the Attorney General has the
7 authority to step in if the Special Counsel is far outside
8 the boundaries of what is reasonable under DOJ policy. The
9 Attorney General explicitly said that he would not do so.
10 The Special Counsel had on his own independent authority to
11 make these prosecution and declination decisions.

12 So he's not an internal communication to an
13 inferior officer. This is a closing report, a final report,
14 and it's really a sui generis document, so it's really not
15 like the type of traditional deliberative pre-decisional
16 documents that are at issues in all of the other cases.

17 THE COURT: So we're talking about his decisions
18 to or not to prosecute as it relates to individuals other
19 than the president? That's what you're referencing?

20 MR. BUTLER: Yes, correct. The prosecution and
21 declination decisions described a specific, in particular in
22 volume one, at the end of volume one of the report for all
23 of the issues that are sort of the factual issues that are
24 discussed in volume one of the report. The Special counsel
25 again had ultimate authority and did make ultimately

1 decisions that were summarized in the report. So it's
2 really not like the type of internal staff discussions or
3 candid communications. This is not a candid communication,
4 it is an official report that the Special Counsel very well
5 knew that we know based on Exhibit 4 to our Summary Judgment
6 Motion, the Special Counsel not only knew that this was
7 going to be given to Congress and disclosed to the public,
8 but intended it to be so.

9 And so the core of Exemption 5, which is
10 protecting the deliberative process and the interests of
11 government officials in having candid communications isn't
12 implicated at all here because the Special Counsel's office
13 wrote this report to be released to Congress and to the
14 public, so it really doesn't implicate the interest of
15 Exemption 5.

16 THE COURT: Well, counsel, your opponent says it
17 was submitted to the Attorney General for his assessment as
18 to what he would do with it.

19 MR. BUTLER: It is submitted to the Attorney
20 General under the regulation, but it's still marked as a
21 closing final report and the Special Counsel himself
22 indicated in his March 27th letter that it met the standards
23 for public release and should be released to Congress --

24 THE COURT: He couldn't make that determination
25 though? Ultimately, it was the Attorney General who had to

1 make that assessment, right? The Attorney General did not
2 have to make it public if he chose not to.

3 MR. BUTLER: He didn't have to make it public
4 under the Special Counsel regulations, but, of course, we
5 could have still filed the FOIA request. And ultimately the
6 question about whether it is subject to Exemption 5 under
7 the deliberative process privilege goes to whether it was
8 pre-decisional, which it was not, and also whether it would
9 harm the deliberative process, which it would not because
10 the special counsel did not intend this as a, ultimately a
11 candid secret communications. This is a formal final report
12 describing decisions that were made.

13 THE COURT: And you're not, I assume, talking
14 about matters that were referred to other prosecutors'
15 offices for their investigation? You're talking about final
16 decisions that the Special Counsel made about either the
17 decision to prosecute or not to prosecute?

18 MR. BUTLER: Correct. As we understand the
19 Exemption 5 claims in the declaration and as laid out in the
20 report, these are the formal, there are two categories or
21 one application of specific law and specific facts with
22 respect to charging decisions and decisions not to bring
23 charges.

24 THE COURT: Okay. Counsel, why aren't those final
25 decisions and therefore not pre-decisional?

1 MS. ENLOW: Yes, your Honor.

2 THE COURT: As I understand, I guess the Special
3 Counsel did have the authority other than the president to
4 make decisions about whether individuals should or should
5 not be prosecuted and he made those decisions. And why
6 aren't those final decisions therefore not covered by
7 Exemption 5?

8 MS. ENLOW: Your Honor, this case again goes back,
9 and it is akin to the *Judicial Watch* case in which the Court
10 said that post-decisional documents can still be protected
11 under the privilege so long as they recount or reflect
12 pre-decisional deliberation. That's what we have here. And
13 the *Judicial Watch* case specifically, and counsel said there
14 was just emails, internal emails that were protected from
15 release. But that's not what happened.

16 In that case it was the documents that were
17 created in order to brief officials within the DOJ about the
18 decision-making process that led up to the dismissal of the
19 case at issue.

20 They were prepared in order to rehash the
21 litigation process as they peeled back the core decision
22 making processes which unfolded in the course of the new
23 Black Panther party case. One of those documents was a
24 detailed chronology of the author's thoughts on the
25 litigation decisions, actions, strategies, recommendations

1 as they developed, as well as rumination and retrospective
2 analyses of the variety of decision-making processes in
3 several DOJ offices.

4 So that case dealt with several different records
5 not just internal emails, but also these briefing papers
6 that laid out the decision-making process that led to the
7 decision to dismiss that case.

8 THE COURT: I think counsel is right, the Judicial
9 Watch circumstances are different than what we have here. I
10 guess what I'm struggling with is if, for example, a local
11 U.S. Attorney's Office made a decision not to prosecute and
12 it was a high profile, you know, type case, and the public
13 wanted to know, well, you know, why in reference to this
14 individual who may have some type of status that conceivably
15 the public would have concerns about, why this individual as
16 compared to other individuals wouldn't be prosecuted.

17 Wouldn't the public under FOIA once that decision
18 not to prosecute by that local U.S. Attorney's office, once
19 that decision has been made, wouldn't the public have a
20 right to know why the government made that decision? I mean
21 that's what open government is about. And I think that
22 obviously there are some concerns that a lot of the American
23 public has about the criminal justice system in America, and
24 questions about the decisions, prosecutorial decisions are
25 made by the government.

1 I mean, during the Epstein case, for example, that
2 there's some real concerns about the judgment that was used
3 in that case in deciding how the government would proceed.
4 And you seem to be suggesting that if the government, an arm
5 of the government makes a decision not to prosecute, that
6 that is information that the public can't know about.

7 And it seems to me that undermines even further
8 the question that some people have about the fairness of our
9 criminal justice system if a decision by a prosecutor's
10 office made not to prosecute and the public can't know why
11 that decision was made.

12 MS. ENLOW: Your Honor, I'm not aware of any case
13 where a Court has found that deliberations leading up to
14 charging or declination decisions should be released to the
15 public. Indeed, the D.C. Circuit has said that the
16 deliberative process privilege is tailor made for a
17 situation like this, that it protects the actual process
18 leading up to the decision. And that the process leading to
19 a decision to initiate or to forego prosecution is squarely
20 within the scope of this privilege. That's a direct quote
21 from the D.C. Circuit's Senate of -- Puerto Rico case.

22 And so here too the process leading up to the
23 declination charging decision is likewise protected under
24 the deliberative process privilege. And this idea about the
25 public interest right to know, that doesn't come in to

1 Exemption 5. The public interest comes in in the balancing
2 of Exemption 6 and 7(c), of course. But Exemption 5 is just
3 whether it's pre-decisional, deliberative and whether
4 there's foreseeable harm of release.

5 And here the declaration shows that it does. It's
6 pre-decisional because there -- recounts the deliberations
7 leading up to these, the charging and declination decisions.
8 And the harm of release is that it releases the thoughts of
9 a prosecutor when trying to determine whether or not they
10 are going to bring a case against someone. That is internal
11 thought processes of an attorney that could cause in the
12 future if information like that is released could cause
13 attorneys in the future to think, well, maybe I shouldn't
14 write this down. Maybe I shouldn't be quite so candid which
15 would harm the decision-making process overall.

16 THE COURT: Why isn't she right in that regard? I
17 mean, wouldn't it have a chilling impact on prosecutors if
18 what they reported to their supervisors about why they
19 thought a case should not be prosecuted, wouldn't it they
20 have a chilling impact on whether they would be forthright
21 in reference to those communications?

22 MR. BUTLER: Well, Your Honor, I think that
23 there's a fundamental difference between that hypothetical
24 that my opponent proposes and this case in that, one, the
25 Special Counsel is not reporting to his supervisor in this

1 regard. He has the ultimate authority to make these
2 decisions.

3 And two, there's no risk of chill here because
4 again the Special Counsel's office wrote this report as an
5 official document documenting their reasons for the
6 decisions they've already made. So it's very different from
7 a situation where an inferior officer is, for example,
8 explaining a proposal to their supervisor, or ultimately
9 their recommended course of action, or is playing out
10 through the give and take of the deliberative process
11 different potential arguments or avenues. These are not --
12 the reports not summarized for potential arguments that the
13 Special Counsel's office might make, it explains their
14 decision.

15 And so there's just a -- there's a really unique
16 character to this report that is similar I think to what
17 Your Honor mentioned, yeah, you could imagine a very high
18 profile case where the United States attorney believes it's
19 important to document the reasons that a decision was made
20 in the past. And that wouldn't itself be rehashing of the
21 deliberative process. Otherwise, the pre-decisional,
22 post-decisional rule would completely disappear. Because
23 any document, that post-decisional document that summarizes
24 the decision is necessarily going to discuss the reasons for
25 that decision. And yes, some of those reasons may have been

1 discussed before the decision was made, but that's not the
2 same thing as summarizing, for example, discussions between
3 different attorneys individually when opposing counsel
4 quoted from the *Judicial Watch* case. All of those documents
5 contained personal views, right, internal notes, and other
6 strategic considerations that really aren't what's at issue
7 in this report. This report is fundamentally different in
8 character from that hypothetical.

9 THE COURT: Okay. I understand.

10 MR. SHAW: Your Honor, did you still want to hear
11 from the --

12 THE COURT: If there's something different that
13 you'd like to raise.

14 Yes, can you identify yourself for the record,
15 please?

16 MR. SHAW: Yes, I'm Conor Shaw on behalf of
17 Citizens for Responsibility and Ethnics in Washington.

18 Just a couple of quick points, Your Honor. I'm
19 not going to try to repeat anything in our brief or what's
20 already been said. But I think it is very important to
21 understand the relationship between the Attorney General and
22 the Special Counsel.

23 Special Counsel Mueller was given broad authority
24 to investigate and prosecute cases within his jurisdiction.
25 And there was a process by which the Special Counsel was --

1 had to explain investigative steps to the acting Attorney
2 General and the Mueller report describes occasions on which
3 Deputy attorney General was either briefed in writing or in
4 person about potential steps that the Special Counsel might
5 take, and we'd argue that those kind of memoranda are
6 different in nature from the final report.

7 The pre-decisional memoranda that weigh charging
8 decisions might very well be protected by Exemption 5. When
9 the decision is made and the report explaining those
10 decisions is issued later that's a clearly post-decisional
11 document. And I think it's important to sort of look at
12 those two documents beside each other. One happens before
13 the decision, articulates the reasons why a potential step
14 might be taken. The other explains after those steps have
15 been taken why they were taken. And so I think that's a
16 very clear distinction the Court can make.

17 The Court also asked about how to consider the
18 non-indictability of a president when weighing Exemption 5,
19 and I think we have two points to make there.

20 One is that the government's claiming Exemption
21 five for a lot of material that has nothing to do with the
22 president. And I think the answer is very easy there. So
23 in that case the non-indictability of a president doesn't
24 really enter into the conversation.

25 With respect to the president though the Special

1 Counsel did have authority to conduct his investigation with
2 respect to the president, and was given the authority to
3 articulate the results of that investigation with respect to
4 the president. And I think we should view the Special
5 Counsel's articulation of that as a final decision.

6 THE COURT: Well, I may be in line with you on
7 your first position, but regarding the president I'm not so
8 sure. Because if Mr. Mueller pursuant to DOJ regulations
9 did not have the authority to make a final decision about
10 prosecution, then it seems to me it's questionable as to
11 whether we're talking about something that's post-decisional
12 as compared to pre-decisional.

13 MR. SHAW: With respect to the president it
14 wasn't -- there was no limitation in Mueller's authority
15 that prevented him from indicting the president. It was a
16 DOJ policy that a sitting president can be indicted. And
17 argue -- well --

18 THE COURT: He couldn't have indicted him, the
19 president, you know, in contradiction to the existing policy
20 though?

21 MR. SHAW: Sure. And arguably the same would be
22 true for Attorney General Barr unless Attorney General Barr
23 explicitly overruled that policy.

24 THE COURT: But he would have that authority.

25 MR. SHAW: He would have that authority, but we

1 would argue that he did not exercise it. And that gets to
2 another point which is that the Special Counsel regulations
3 also provide for a mechanism by which the Attorney General
4 can overrule the Special Counsel. And we know from Attorney
5 General Barr that there were no instances in which he did
6 so.

7 So Attorney General Barr is kind of trying to have
8 it both ways. He claims that he did not overrule the
9 Special Counsel in any respect, so he's claiming there's no
10 daylight there. But at the same time he's also claiming
11 that he has the authority to say, to absolve the president
12 when the Special Counsel explicitly did not do so. And
13 those things are a little bit intention, and I can't speak
14 for the Attorney General and why they're trying to have it
15 both ways.

16 THE COURT: Thank you.

17 MR. SHAW: Thank you.

18 THE COURT: Let me give the court reporter a ten
19 minute break.

20 [Thereupon, recess taken at 11:05 a.m.,
21 resuming at 11:15 a.m.]

22 THE COURT: Okay. I guess we're at the Exemption
23 7 at this point. Is there anything else besides that that
24 we need to address before we go to 7? Okay.

25 MR. BUTLER: Your Honor, I'm going to be

1 addressing Exemption 7(a), and then the lingering 7(e)(2)
2 category that was mentioned before we haven't discussed yet.
3 As to Exemption 7(a), ultimately the government -- the court
4 cannot --

5 THE COURT: What about 7(b), we haven't addressed
6 that?

7 MR. BUTLER: Seven(b) will be addressed by my
8 colleague. On the record before the court that there's
9 really no way to grant summary judgment on 7(a), because
10 there's simply not only isn't it enough detail, but clearly
11 the government hasn't satisfied the requirements of the
12 threefold test described by the D.C. Circuit in the 2014
13 *Crew* decision.

14 The government is attempting to conduct a
15 categorical 7(a) withholding or analysis, but it hasn't
16 defined its categories functionally. One or two assigned to
17 the withholding says specific categories or three, explained
18 how the release of each category of information would
19 interfere with specific enforcement actions. That's the
20 threefold task under *Crew*, and the government hasn't done
21 any of those things.

22 This document I'll also note at the outset is a
23 *sui generis* document. It's not what is traditionally at
24 issue in a 7(a) case. Normally courts are reviewing 7(a)
25 claims with respect to witness statements or FBI interview

1 records or other notes or maybe indexes of evidence. Right?
2 But this document is a final report that describes the
3 findings of the Special Counsel's office. So it's
4 fundamentally not the type of document that's traditionally
5 withheld under 7(a), and therefore, if there were any valid
6 7(a) assertions they would have to be explained with
7 specificity.

8 In addition to that this report concerns at least
9 eight charged cases and other investigations that may or may
10 not be pending at this time. I'll come back to the fact
11 that 7(a) is temporal in nature. The nature of 7(a) claim
12 changes as an enforcement matter progresses. And so when a
13 prosecution is charged as many of the cases are here, and
14 then subsequently moves through the process of trial and
15 sentencing, et cetera, the 7(a) claim necessarily gets
16 narrow over time and ultimately disappears when the
17 enforcement matter is concluded.

18 So there would need to be detail about any 7(a)
19 claim that links specific redactions to specific cases.
20 Otherwise, there's no way to actually analyze under the 7(a)
21 test the redactions in the different parts of the report. I
22 would also point out that many of the redactions in this
23 report are under 7(a) slash 7(e)(2), and or fall within the
24 first 50 pages of the report. So they concern the factual
25 findings of the Special Counsel's office with respect to the

1 social media disruption campaign and the Russian hacking and
2 dumping operations.

3 In addition, there is another issue that the
4 government hasn't really come to grips with, but just the
5 fact that there are very few cases that concern the
6 assertion of Exemption 7(a) in regards to a criminal case
7 that has been charged and is being or has been prosecuted.
8 As I mentioned when a prosecution is completed at the end of
9 that process the 7(a) claim goes away.

10 But even after, while a prosecution is ongoing
11 after a case has been charged and there's been a public
12 charging document and a public airing of information about
13 that case that the equities and the interests at stake I
14 think fundamentally change especially I think there's a
15 distinguishing factor between criminal cases in which the
16 defendants have significant discovery access through due
17 process versus the type of civil investigations that are at
18 issue in a lot of these cases like NLRB labor cases, or EPA
19 environmental investigations, or FCC communications
20 investigations. So I think there's a lot of distinguishing
21 factors between criminal and civil charged cases as well.

22 But ultimately, the record in this case and
23 particularly the first 50 pages concern factual findings
24 related to cases that have already been charged and are
25 being prosecuted.

1 THE COURT: Thank you. Does the government
2 disagree with the prospective that the affidavit does not
3 satisfy the *Crew* requirements?

4 MS. ENLOW: Yes, the government disagrees with
5 that, Your Honor. *Crew* dealt with the categorical taking of
6 Exemption 7(a). The case law came from cases where the
7 government would take 7(a) for an entire investigative file.
8 So it's got all sorts of material in there; investigative,
9 administrative, et cetera. And the courts in those cases
10 simply said that that kind of -- just taking 7(a) over the
11 entire file really didn't breakdown what the harms were for
12 release. And the point of that kind of case law is to allow
13 the court to trace a rational link between the harm and the
14 nature of the document, but here that rational link is
15 plain.

16 When you take a step back and you look at what was
17 redacted under 7(a), this is all in Volume I or the vast
18 majority in Volume I in any event. For ongoing
19 prosecutions, eight prosecutions that Ms. Brinkmann
20 identified in her declaration and other ongoing
21 investigations. And as is apparent from the unredacted
22 portions of the report the report's a narrative describing
23 evidence collected, witness statements, et cetera and an
24 analysis of that evidence.

25 And release of this information whether it

1 pertains to the prosecutions that are pending or the ongoing
2 investigations plainly lead to harm. If you release witness
3 statements that can lead to witness hampering. If you
4 release evidence of, documentary evidence that can lead to
5 evidence tampering or fabrication tampering. If you release
6 an analysis of why certain information is important then
7 clearly you're showing the strengths and weaknesses of the
8 government's case before the government has had a chance to
9 present its case in court.

10 As regards to investigations you release this kind
11 of information you let the targets of the investigations
12 know where the strengths and weaknesses of the
13 investigations are; whose been talked to, who hasn't. All
14 these things together can undermine the purpose of the
15 investigation.

16 Exemption 7(a) could frankly not be stronger here.
17 The plaintiffs argue that we haven't cited to a case that's
18 post-indictment pretrial. But there are numerous cases that
19 recognize 7(a) all the way up through appeal and even
20 habeas. For example, there's a *Judicial Watch versus DOJ*
21 case from 2017. It's a DCC case that relates to the 302s
22 for Rod Blagojevich after the trial. And in that case, the
23 court recognized that even when an appeal of a criminal
24 conviction is pending that still qualifies for withholding
25 the information under 7(a).

1 And indeed, the legislative history also supports
2 this position. When 7(a) was enacted Senator Hart said that,
3 "7(a) should be taken whenever the government's case in
4 court could be harmed." Here that is exactly what the
5 government took for 7(a).

6 THE COURT: I understand the concern about
7 providing a level of specificity about the information
8 because conceivably that could create a problem as far as
9 pending prosecutions are concern. But has a sufficient
10 amount of information been provided that gives me the
11 ability to conduct a de nova assessment as to whether the
12 exemptions are properly claimed?

13 MS. ENLOW: Yes it has, Your Honor. Again, the
14 declaration has to be read in conjunction with the report.
15 The report was so lightly and surgically redacted that you
16 can tell from headings and from paragraphs that weren't
17 redacted what the gist of the information under the
18 redactions is, or what it pertains to, what matter it
19 pertains to. Nothing more is required here, Your Honor.

20 THE COURT: And you're of the view that no more
21 specificity can be provided and at the same time protect the
22 information?

23 MS. ENLOW: That's correct, Your Honor. That's
24 correct. And in a recent case judge, *CNN versus FBI*, Judge
25 Boasberg recognized that. The government simply cannot

1 provide additional information without revealing, without
2 causing the very harm to these ongoing matters the
3 government is trying to prevent.

4 THE COURT: Thank you. Any brief response? I
5 mean --

6 MR. BUTLER: Yes, Your Honor.

7 THE COURT: -- give me an example of what you're
8 saying you think the government could do and should do in
9 reference to 6(a) on the one hand and on the other hand,
10 would not jeopardize the legitimate desire not to cause
11 potential harm to pending cases?

12 MR. BUTLER: Well, Your Honor, it's helpful to
13 look at the Brinkmann declaration itself. If you go to page
14 22 of the Brinkman declaration.

15 THE COURT: What page?

16 MR. BUTLER: Page 22 of the Brinkmann declaration.
17 This is the section that concerns Exemption 7(a) in
18 particular. It is the section that concerns pending
19 prosecutions, and we're given two paragraphs.

20 THE COURT: Okay.

21 MR. BUTLER: And those two paragraphs essentially
22 restate the statutory standard. They don't actually
23 describe what information, what types of information would
24 be revealed in the redacted portions of the Mueller report.
25 So opposing counsel, for example, mentioned witness

1 statements, documentary evidence, right. There's no mapping
2 of that information onto these different prosecutions. So,
3 for example, if the government said as to the case against
4 the Internet Research Agency on page you know X there is a
5 witness statement quoted. That would be different with --
6 that would not actually reveal the underlying information,
7 but it would provide a basis for de novo review of the
8 decision to withhold and would provide necessary information
9 for this court to conduct review in camera.

10 THE COURT: So the two paragraphs you're
11 referencing on page 22 are paragraph 44 and 45?

12 MR. BUTLER: Forty-five and 46.

13 THE COURT: Let me look at them real quick.

14 MR. BUTLER: And then paragraph 44 just for
15 clarification actually lists the charged cases.

16 THE COURT: Right.

17 MR. BUTLER: But doesn't actually map the charged
18 cases onto redactions. So even the act of mapping charged
19 cases onto specific redactions would provide some record for
20 review. Currently there's basically no such record for
21 review. And when the government mentions pending
22 investigations, for example, yes, an Appendix D of the
23 report there's a list of referred cases, but we don't know
24 whether all those cases are still pending, whether any of
25 them have been closed.

1 We also don't know whether any information about
2 those pending investigations are non-charged cases is
3 included in the other volumes of the report. There's just
4 not sufficient information to actually conduct the review
5 necessary or to establish that a meaningful harm would
6 attach. And I'll note that --

7 THE COURT: Well your opponent says I can make
8 that de nova assessment by not just reviewing the
9 declaration, but viewing it in context of what's in the
10 report that's been released.

11 MR. BUTLER: Right. And the problem with that is
12 that not only is the mapping not always clear from the
13 structure of the report. I agree sometimes you're in a
14 section of the report that concerns the Russian social media
15 campaign. And maybe the government is saying this court can
16 assume that that material is about the relevant prosecution
17 of the Internet Research Agency.

18 But there are, according to the government's
19 declaration, information in this report about all the
20 charged cases including cases that are in the sentencing
21 phase or cases where they have a jury trial set in November
22 in the Stone case. And the decision about whether harm
23 would attach to disclosure is made based on the record as it
24 exists when the court makes its decision. That's what the
25 court said in *Crew*, not based on when the request was filed.

1 And so there needs to be a record of how the,
2 which prosecutions apply to which exemptions and also
3 ultimately the stage of the prosecution. Because although
4 Exemption 7(a) can in theory attach to a prosecution that's
5 at the appeals stage, what the cases that, the very few
6 cases that have been in that posture have shown is that over
7 time that exempt material gets narrowed and narrowed and
8 wind down to zero because there's, the harm goes away,
9 right. When it may be the case in some, we've seen in civil
10 proceedings a concern in *NLRB* context, for example, with
11 witness intimidation because of the unique relationship
12 between an employer and employee who are typically witnesses
13 there.

14 Prior to the swearing in of a witness at that
15 stage of the litigation there may be that specific concern,
16 but it's very specific to the case and where it is in the
17 litigation process and the nature of the record at issue.
18 And here we have again a report that summarizes factual
19 findings. They're not, the report itself is not a witness
20 statement. The report itself is not a recitation of
21 documentary evidence. There may be references in the
22 footnotes to documents, we don't know in all cases, but the
23 report itself on its face is factual statements by the
24 Special Counsel about what happened.

25 THE COURT: Government counsel, why as plaintiff's

1 counsel suggest why requiring that you have to identify what
2 type of evidence we're talking about without specifying
3 names or specific dates or whatever, but at least some
4 categories as to what type of evidence we're talking about,
5 why would providing that information in some way compromise
6 these pending litigations or methods or whatever?

7 MS. ENLOW: Your Honor, that level of granularity
8 simply isn't required under the case law here. I mean
9 there's a D.C. Circuit case *Juarez* where they talk about the
10 DEA Form 6s that are basically a narrative about evidence
11 being collected so far. And in no way did that case require
12 this kind of detailed granularity of going through literally
13 every single sentence or parts of sentences and saying this
14 is a witness statement, so witness intimidation could happen
15 there. And this is a document, so document could happen
16 there, evidence fabrication could happen if that's released.

17 This simply is not the case law. Exemption 7(a)
18 is meant to be extremely broad. It's supposed to protect
19 information whenever release of that information could
20 reasonably be expected to harm the government's case in
21 court. And here --

22 THE COURT: Well you may not have to associate a
23 particular passage to a particular type of evidence, but why
24 not have to generally indicate well, what type of evidence
25 you're talking about without specifically keying it to any

1 particular passage in the report?

2 MS. ENLOW: Ms. Brinkmann has essentially done
3 that, Your Honor. She said that release of this information
4 could cause witness intimidation, witness tampering.

5 THE COURT: But she didn't say what type of
6 evidence it was.

7 MS. ENLOW: I would have to go back and look at
8 the declaration. I can't recall that at the moment. But in
9 any event clearly if something's going to lead to witness
10 intimidation then there's going to be something about the
11 witness in there in their statement.

12 THE COURT: I'm looking at the two photographs on
13 page 22 and 23 of her declaration, and she does not identify
14 what type of evidence we're talking about. Again, whether
15 we're talking about dates, whether we're talking about
16 names, whether we're talking about whatever. She's a lot
17 more general than that.

18 MS. ENLOW: But again, Your Honor, it has to be
19 read in conjunction with the report itself. You can see
20 from the report it lists citations to different pieces of
21 evidence in there. That read in conjunction with her
22 declaration describing the kinds of harms that could result
23 show the kinds of information that was withheld under 7(a).
24 And that is all that is required --

25 THE COURT: Without me seeing those redactions how

1 would I be able to conduct that type of in-camera review?

2 MS. ENLOW: The citations for some redactions are
3 not redacted, so the court can get a sense from what been
4 produced of what is under the redacted material from that,
5 from looking at the 92 percent of the report that was not
6 redacted.

7 THE COURT: Okay. Nothing else on that matter we
8 can move on.

9 MR. BUTLER: Just one quick additional point, Your
10 Honor. I think it's helpful to note that we're not talking
11 about when it comes to the 7(a) material, we're generally
12 not talking about one line on a page being redacted, or a
13 witness name, or a citation to documentary evidence. We're
14 talking about entire pages being redacted. Page after page
15 in the first fifty.

16 So it's a substantial amount of material. And
17 again, there's no linkage between specific cases. And that
18 causes a real problem when it comes to the time-bound
19 element that I mentioned. Because when and if, if and when
20 these prosecutions are completed there will be no way to
21 know which exemption material need to be, you know, reviewed
22 subsequently or need additional information.

23 The other thing I'll note I mentioned at the
24 beginning that 7(e)(2) is relevant to 7(a) material. And
25 the reason that's true is because the 7(e)(2) claims are,

1 overlap with the 7(a) claims in every instance. And what
2 7(e)(2) ultimately is is the government's assertion of a
3 7(a) -- the use of 7(a) language to make a claim that
4 techniques or procedures would be disclosed. But that's not
5 actually a legally valid use of Exemption 7(e).

6 And the reason why it's problematic is because
7 Exemption 7(e) unlike Exemption 7(a) is not time limited.
8 And so essentially what the government is asserting here is
9 that these materials that relate to the charged cases should
10 never be released, but not because they would reveal
11 techniques or procedures.

12 If you look at page 43 of the Brinkmann's
13 declaration, paragraphs page 87 and 88, those are the only
14 two paragraphs that concern Exemption 7(e)(2). And even the
15 heading and the general description of the claim I think
16 reveals that this is not about techniques or procedures,
17 right. It says details about techniques or procedures, but
18 that would reveal investigative focus and scope, and the
19 circumstances, methods and fruits of investigatory
20 operations those are not techniques or procedures.

21 When we're talking about the focus and scope of an
22 investigation that's potentially material that the
23 government may claim as exempt under 7(a), but it's not a
24 technique or procedure which is required in order to assert
25 a claim of Exemption 7(e)(2). It has to itself reveal

1 techniques or procedures and create a risk of circumvention
2 of the law. So really this is just an overlapping category
3 that should not overlap. But the language itself --

4 THE COURT: But the heading does include methods
5 which I assume would be procedures conceivably?

6 MR. BUTLER: Techniques.

7 THE COURT: Techniques, could be.

8 MR. BUTLER: I think that's what being said in
9 paragraphs 87 and 88 is not that the techniques or
10 procedures would be revealed, but that the fruits, the focus
11 of an investigation is not a procedure. The fruits of an
12 investigation are not a technique or procedure. And so the
13 fact that those are all included together does not engender
14 confidence in the conclusion that all of this material on
15 these many, many pages is all properly exempt under 7(e)(2).
16 I think it's not consistent with the case law.

17 There's a few cases that recently where the
18 government have mentioned offhand this investigative scope
19 and focus in the course of a huge list of reasons to exempt
20 something under 7(e). It was never analyzed in detail. No
21 court has ever found specifically that investigative focus
22 and scope is a technique or procedure that its disclosure
23 would qualify for 7(e).

24 THE COURT: I might tend to agree with you, but I
25 think there is language looking at, for example, paragraph

1 87, where there is some reference to techniques and
2 procedures.

3 MR. BUTLER: There are a few references. I think
4 they're basically conclusory references. And the court
5 would need -- this is a perfect situation where the court
6 could simply conduct in-camera review to determine whether
7 the redacted material does actually talk about some
8 technique, or whether the material simply talks about
9 factual findings of the Special Counsel's office.

10 THE COURT: Okay. Government counsel, if I am of
11 the view that I need more in order to conduct my independent
12 assessment, and if you are of the view that you can't
13 provide more than what you provided because it would somehow
14 potentially put at risk the techniques and procedures then
15 what do I do? I mean do I require that at least that
16 portion of the report unredacted be provided since counsel
17 did identify one pages -- well, two pages where a
18 significant portion of those two pages were redacted?

19 And if I were to conclude that I can't make an
20 independent determination without more from you or the
21 ability to view it myself what would be your preference?

22 MS. ENLOW: Your Honor, I'd have to consult my
23 colleague for a moment about that. In any event, when I was
24 describing earlier about how the court can look at the
25 unredacted portions to determine what is under the

1 redactions I don't just mean on the pages where there are
2 redactions. I mean the court can review the entire
3 unredacted report, and there's plenty of pages where there
4 are no redactions at all to see the types of information
5 that's being withheld here. When there are redactions --

6 THE COURT: I don't mean to cut you off. Wouldn't
7 that be pretty hard? Because when I look at page 43 and 44,
8 paragraphs 87 and 88, I mean it doesn't really direct me to
9 where in the report it's referencing, so it would be it
10 seems to me a little difficult for me to assess what's being
11 referenced in those two paragraphs as it relates to the
12 report itself.

13 MS. ENLOW: Well for those two paragraphs that's
14 the 7(e) material. And that's, the court can use the
15 declaration to determine whether or not that material has
16 been improperly withheld under 7(e). I was referring to
17 7(a) where discussing the harms and breaking down the harms.
18 And the court can use the unredacted portions to determine
19 what kind of information has been withheld or what kind of
20 information has been cited throughout the report. And
21 therefore it tells us what kind of information has been
22 withheld under the redactions.

23 THE COURT: That might be true in reference to
24 7(a), but in reference to 7(e), I think it would be very
25 difficult for me to make that assessment based upon what's

1 been provided not knowing to any degree what type of
2 evidence or information is being referenced. And I'm saying
3 generally what type of, not specifically, you know, specific
4 dates or anything. But are we talking about dates? Are we
5 talking about names? Are we talking about something
6 different? I don't know.

7 MS. ENLOW: Your Honor, for 7(e) the 7(e)(2)
8 material that's been marked in the report, OIP withheld
9 details about the use of the various investigative or
10 information gathering techniques used by the prosecutors and
11 the FBI and the Special Counsel, and Special Counsel's
12 office, and in other investigations. And that information
13 included information about the gathering and or the analysis
14 of the information. How and from which sources the FBI or
15 prosecutors collected particular types of information, and
16 the methodologies used to analysis and use the collected
17 information.

18 And even then it also disclosed the exact
19 circumstances in which these techniques were used, and the
20 specific dates, the time, and the targets of information
21 gathering techniques, as well as the actual fruits of the
22 investigative operations relied on by the Special Counsel's
23 office, so the court can use Ms. Brinkmann's declaration
24 there to determine that that information is properly
25 withheld under 7(e).

1 THE COURT: Okay. Any other matters?

2 MR. TOPIC: Your Honor, if you like I can proceed
3 to 7(b) which is fair trial. I don't think there's any
4 dispute that the government has redacted essentially
5 everything in the report having anything to do with Roger
6 Stone. In fact, in Ms. Brinkmann's affidavit she refers to
7 any information released regarding Mr. Stone would run into
8 these risks.

9 Judge Jackson, who's presiding over that case, did
10 not enter a blanket order that says everything related to
11 Roger Stone must be withheld by the government. Instead,
12 all that is prohibited from being released is things where
13 there is a substantial likelihood of material prejudice.
14 And then they also cite to Judge Friedrich's order which was
15 an interpretation of the local criminal rule. And she only
16 found very narrow examples of instances in which the
17 material was sufficiently prejudicial.

18 So maybe there's some individual passages where
19 they can show that Mr. Stone would be deprived of a fair
20 trial notwithstanding Supreme Court precedent setting an
21 extremely high bar for a defendant to make out that case,
22 but to apply it on a blanket level across everything related
23 to Mr. Stone. By the way, while simultaneously claiming it
24 would give Mr. Stone an advantage in the prosecution.
25 Because they've asserted 7(a) and 7(b) over all that

1 material simultaneously.

2 It makes clear that they have just wholesale
3 redacted everything related to Mr. Stone, and that is not
4 what the FOIA statute provides and that is not what the
5 judge presiding over that case has actually entered.

6 The only exception to that is they did release
7 what the president said in response to questions that were
8 posed to him by the Special Counsel about Roger Stone. And
9 of course, the Attorney General has said publicly and many
10 times in very prominently that the president was
11 cooperative, talks about his frustrations, et cetera. So
12 that piece of information about Mr. Stone they elected to
13 release, but the related information, anything else they've
14 just wholesale withheld everything about Mr. Stone.

15 So this is an example of complete over redaction.
16 I think the remedy is for Your Honor to look at the specific
17 provisions or them to come forward with some kind of a far
18 more specific analysis of what exactly we're talking about,
19 and also explain how it simultaneously would hurt the
20 government's case and would hurt Mr. Stone's right to a fair
21 trial over the exact same pieces of information.

22 THE COURT: When you say exactly what they're
23 talking about what do you mean? I mean are you saying
24 generally indicating what type of topics are in play? Or
25 what? Because I mean I do have some concerns because I know

1 Judge Jackson has concerns about ensuring that both sides
2 receive a fair trial. And while she didn't issue a blanket
3 gag order she did issue at least a partial order to try and
4 restrict information that was being disseminated that she
5 thought conceivably would make it more difficult for her to
6 pick a jury.

7 MR. TOPIC: Right.

8 THE COURT: I mean obviously she's in the best
9 position to make a decision as to what information would
10 conceivably impact the ability of the parties to receive a
11 fair trial, but that doesn't obviate I guess the need for me
12 to make an independent decision under FOIA as to whether I
13 order something more than what's been provided in order to
14 comply with FOIA.

15 MR. TOPIC: We have no disagreement with applying
16 the standard from Judge Jackson's order to the material
17 that's been redacted, which is they must make a showing of a
18 substantial likelihood of material prejudice to his case.
19 It's just implausible that everything referencing Roger
20 Stone would deprive him of the right to a fair trial or
21 would create a substantial likelihood.

22 I don't know again what they have redacted, but
23 they have suggested today well you can interpret a lot of
24 this in context. While there's a public indictment of
25 Mr. Stone there's a lot of information in that public

1 indictment about Mr. Stone, and they've redacted everything
2 about Mr. Stone that's in the report. It, that should
3 logically follow from there that some of the information is
4 not materially different from what is in the indictment.

5 Judge Jackson in open court and quoted by the
6 government later said that the evidence detailed in the
7 indictment alone is quite compelling. So obviously that
8 kind of statement was not even enough to create a
9 substantial likelihood of material prejudice. So it's a
10 pretty high standard that they need to meet. How they go
11 about that I haven't seen the unredacted copy obviously, so
12 I can't really say they can do it this way or they can do it
13 that way. But they need to go through their redactions, or
14 I should say they needed to have gone through their
15 redactions and linked up at least at some level of
16 generality.

17 This is the type of information about, it's not
18 just about Mr. Stone. It's something very specific. They
19 can -- the specific details can be left out if those details
20 are adequately prejudicial. But there needs to be some
21 showing of substantial likelihood of material prejudice to
22 his case and they have not made that showing or even
23 attempted to make that showing.

24 THE COURT: Thank you. Government.

25 MS. ENLOW: Your Honor, the information pertaining

1 to Mr. Stone was redacted pursuant to 7(a) for ongoing
2 matters, 7(b) because he has an imminent trial scheduled for
3 November, 7(c), which we'll get to later, and then the
4 sealing order that's in place from Judge Berman Jackson.

5 Now the judge in that case recognized the high
6 profile nature of the case and the media attention the case
7 was getting, and therefore, thought it was necessary to
8 enter this order prohibiting the parties from making
9 statements that posed a substantial likelihood of a material
10 prejudice to Mr. Stone's case. And she said that this was
11 necessary because otherwise Mr. Stone may be deprived of the
12 right to a fair trial, and the court knew the ability to
13 seat a jury without volunteering that the jury wasn't
14 tainted by pretrial publicity.

15 THE COURT: Counsel says he's willing to comply
16 with the limitation that she imposed on what could be
17 released. He's saying well, to the extent that she hasn't
18 foreclosed dissemination that I shouldn't either.

19 MS. ENLOW: She has foreclosed dissemination, Your
20 Honor.

21 THE COURT: Not all. She hasn't issued a blanket
22 as far as I recall gag order in her case.

23 MS. ENLOW: There's no blanket gag order, but here
24 again taking a step back and think about what we're looking
25 at here, we're looking at a report that describes in detail

1 Mr. Stone's conduct. Now release of this narrative walking
2 through the evidence against him and his conduct could
3 clearly prejudice and interfere with the fairness of his
4 trial. And that is why that material is withheld under the
5 sealing order and under 7(b), and it could prejudice the
6 government's case in court, so it's also withheld under
7 7(a).

8 Now this is clear not only from the sealing order
9 itself but also the local rule. The order was issued under
10 Local Criminal Rule 57.7(b). And in a similar case, the
11 case against *Concord Management*, Judge Friedrich recently
12 found that even without some kind of sealing order in place
13 like Judge Berman Jackson had that the government by
14 releasing information about *Concord* in the report had
15 violated Rule 57.7(b), and then the judge issued an order
16 prohibiting further releases.

17 So here this is not some kind of idle speculation
18 that release of this information could violate local rules,
19 or could violate the orders in place in the court. The
20 government is working very hard to ensure that these
21 individuals receive fair trials here. This information
22 simply cannot be released without potentially violating
23 those rights.

24 THE COURT: Well, I mean, one concern is on page
25 128, Volume II of the Mueller report. And there's a

1 redaction of Roger Stone associate which was in a CNN
2 article apparently. And I guess what was the basis for
3 redacting that information since it was already in the
4 public domain?

5 MS. ENLOW: Your Honor, simply because information
6 can be pieced together doesn't mean it shouldn't still be
7 redacted especially to protect someone's fair trial rights
8 as we're doing here, or as DOJ has done here especially
9 given the order in place and especially given his imminent
10 trial in November.

11 THE COURT: Anything else on that we need to
12 address?

13 MR. TOPIC: Your Honor, I believe the final item
14 we have left is a privacy exemptions, and I'm prepared to
15 walk through those.

16 THE COURT: Right.

17 MR. TOPIC: So there's multiple independent
18 reasons why we should prevail on the privacy exemption
19 claims here. First and foremost is the government continues
20 to rely on a legal standard that is not the law. The law
21 comes from the *Fabish* decision. It does not require us to
22 prove by compelling evidence that illegal conduct occurred
23 by the Attorney General or the Special Counsel. That would
24 be an anathema to the entire purpose for FOIA which is to allow
25 the public to have information and judge for themselves

1 whether misconduct occurred.

2 So the standard in *Fabish* is simply that we must
3 go beyond a bare suspicion and we must come forward with
4 evidence or material that a reasonable person would be
5 justified in believing that some kind of government
6 impropriety not illegal conduct, impropriety which could
7 include negligence, might have occurred. Not did it, that
8 it might have occurred.

9 We cite a litany of statements by the president of
10 the United States. We cite statements by senators, by legal
11 experts kind of going in the other direction, that have
12 called into question all kinds of aspects about the origins
13 of the investigation, about how the investigation was
14 conducted, about who was charged, about who wasn't charged
15 and why they weren't charged.

16 So they don't even attempt to meet the standard
17 under *Fabish*. They first cited SafeCard which predates
18 *Fabish* and has a different legal standard. And then in
19 response in their second brief they make note of *Fabish*.
20 They don't endeavor to comply with it. And a rely on
21 another pre*Fabish* case to try to set the standard that
22 doesn't make any sense in light of *Fabish*, which says that
23 the purposes to allow the public to potentially uncover
24 whether there was some kind of wrongdoing.

25 So I don't need to come up here and prove to you

1 that Mr. Mueller did something illegal in the course of the
2 investigation, that any of the things the president has said
3 are true. I don't need to prove to you in the opposite
4 direction that people weren't charged because Mr. Mueller
5 took it easy on them, because perhaps they were the
6 president's son, didn't want to incur of the wrath of the
7 president, or whatever various things that have been said
8 about this.

9 This is obviously an extremely important issue.
10 It's something that frankly has ripped the country apart.
11 And to have anything less than full disclosure in the name
12 of privacy interest there really is a very high standard
13 that they need to meet to overcome the public interest in
14 disclosure. That is just one of the theories, Your Honor.

15 Before I move on one other thing. I think we --
16 even if you discount what the president has said, what
17 senators have said, what legal experts have said, the report
18 itself raises questions about the declination decision as to
19 what appears to be Donald Trump, Jr. So you look at the
20 section that talks about the Trump Tower meeting. It talks
21 about Donald Trump, Jr. It talks about some other people
22 who were involved in it. And then there is the beginnings
23 of an explanation as to why none of those people were
24 charged.

25 And the primary reason was because the Special

1 Counsel concluded that they hadn't developed evidence that
2 would show the necessary mens rea for that crime. So they
3 weren't adequately inside the head of any of those people.
4 Yet there was no decision to bring Donald Trump, Jr. in
5 front of the Grand Jury where they could have put him in on
6 the spot to answer questions.

7 That alone at least raises the question in the
8 entire analysis then it's a redacted name which is probably
9 Donald Trump, Jr. and complete redaction over the specific
10 analysis that the Special Counsel undertook in order to
11 conclude that there weren't going to be charges against
12 Donald Trump, Jr.

13 That information has a strong public interest in
14 multiple ways. It would allow the public to better
15 understand the charging decision and either feel comfortable
16 with it or point out why it was wrong. It would also allow
17 the public to assess whether it's true as the president has
18 claimed that this has been an illegal witch hunt politically
19 motivated from the very beginning. While they didn't charge
20 his son with a crime so it might be relevant to the public
21 understanding the veracity of those claims to have a better
22 understanding of what evidence was before the Special
23 Counsel and how did they come to that conclusion.

24 All of that is more than enough to meet the
25 standard under *Fabish*, that we're required to show. Even if

1 we don't rely on *Fabish*, Your Honor, under the *Crew* case
2 there's an entirely independent doctrine of public interest
3 that applies here. I'll read from the case, "Disclosure of
4 the FD 302s and investigative material could shed light on
5 how the FBI and the DOJ handled the investigation and
6 prosecution of crimes that undermine the very foundation of
7 our government.

8 As the DOJ itself explained the requested records
9 relate to a wide-ranging public corruption investigation as
10 part of ongoing efforts to root out systemic corruption
11 within the highest levels of government. Government
12 disclosure of the records would likely reveal much about the
13 diligence of the FBI's investigation and the DOJ's exercise
14 of its prosecutorial discretion.

15 Whether the government had the evidence, but
16 nevertheless pulled its punches. Indeed, we have repeatedly
17 recognized a public interest in the manner in which the DOJ
18 carries out substantive law enforcement policy whether or
19 not that interests outweighs any privacy interest at stake
20 in a given case."

21 So under the public interest theory that comes
22 from their case it reads directly on the facts of this case.
23 This is absolutely an investigation that goes to the very
24 foundation of our government. It involves potentially
25 systemic problems. And the DOJ fails to say anything at all

1 in its brief about this legal theory or about this strand of
2 public interest in disclosure.

3 I would note too then as a third point that if you
4 look at Your Honor's decision in *Judicial Watch* involving
5 the Hillary Clinton draft indictments or if you look at the
6 facts of *Fabish* you can easily distinguish those from the
7 facts here. In *Judicial Watch* it was many years after the
8 independent counsel conducted an investigation and it was in
9 the runup to the election, and I think the requestor pretty
10 much conceded that the information would shed light on
11 Ms. Clinton's truthfulness or whatever, which is not the
12 type of analysis that the public interest doctrine under the
13 privacy exemptions looks to.

14 It looks to do we need to know more about the
15 entity that did the investigation. And there it was many,
16 many years later, and so Your Honor properly found that in
17 that instance there was not a public interest that would
18 overcome any privacy interest. That is clearly not the case
19 here. This is a fresh investigation.

20 There have been questions raised up and down all
21 over this town, and all over this country and the world, as
22 to was this investigation properly conducted or not. And
23 the people deserve to know as much as they possibly can
24 about that unless there is a truly compelling interest on
25 the other side of the scales and the government hasn't shown

1 it.

2 The third is that they have selectively decided
3 when they care about people's privacy interest and when they
4 don't. They have redacted everything it appears about
5 Donald Trump, Jr. Maybe it's Kushner. I'm pretty sure it's
6 Donald Trump, Jr. Certainly Your Honor can figure that out
7 in an in-camera inspection. That has been redacted in favor
8 of that person's privacy, but Jeff Sessions, George
9 Papadopoulos, Carter Page, the president of the United
10 States, they've released information about the
11 investigation, about their declination decisions. And so
12 they seem to be picking and choosing when it is they're
13 going to assert the privacy exemption and when they aren't.

14 And the reason that's particularly important, and
15 I think this is true as to Exemption 5 as we heard about
16 earlier, is that under the foreseeable harm standard they
17 have to show that the harm is foreseeable and specific. So
18 you have similarly situated people where in some instances
19 they release the information without any problem and then
20 now they're trying to use the same argument against
21 information about other people really calls into question
22 the validity of that argument and they have made no effort
23 to attempt to explain that.

24 So that's the public interest in disclosure. I
25 don't think there really is a very serious dispute that

1 there is a significant public interest in disclosure here.
2 So that leaves us with the privacy interest. We take Donald
3 Trump, Jr. as an example or Kushner or Manafort or whoever
4 those people are who are under those redactions. We're
5 talking about public people not shy about being in the
6 public eye, have commented on the investigation, have been
7 critical of the investigation.

8 It's not to say they don't have any privacy
9 interest at all, but their privacy interest is at least
10 somewhat diminished. And there is absolutely not a complete
11 exemption for everything related to personal privacy. They
12 have to show, they have to show that it would overcome the
13 public interest in disclosure. We have to identify a public
14 interest and we very clearly have, but it's their burden to
15 prove the exemptions and they have completely discounted the
16 public interest in disclosure in favor of privacy.

17 THE COURT: When you say there should be or there
18 is a diminished privacy interest of someone who is a public
19 figure as compared to a nonpublic figure in the FOIA
20 context.

21 MR. TOPIC: I believe it's in the *Crew* case they
22 were talking about Mr. DeLay and noted that he was a
23 prominent public official.

24 I don't read that to be a distinction between
25 government officials and other people who are kind of

1 prominent in more generally in society or in the government.
2 I mean Mr. Trump, Junior is heavily involved in Mr. Trump's
3 campaign in the past, and appears like he will be in the
4 future. He speaks very frequently about these kinds of
5 issues in front of various audiences. So we aren't talking
6 about a person who otherwise is living an entirely private
7 life. We're talking about someone who is willingly and
8 ongoingly [sic] living a life that is somewhat in the public
9 domain.

10 That doesn't mean there is no privacy interest.
11 That's not what we're saying. What we're saying is it's at
12 least diminished. And it's weighed against a tremendous
13 public interest in disclosure on the other side of the
14 scales.

15 The last thing, Your Honor, that I would talk
16 about is some of the other categories that they've
17 identified. They talk about reporters and Facebook groups
18 who have received messages from Russian actors. They
19 haven't shown any privacy interest at all. They try to
20 equate those people to crime victims or victims of the
21 Jonesboro massacre and the like, and they aren't.

22 As far as they have disclosed these are people who
23 got emails from someone not knowing that they were a Russian
24 actor. They used the phrase interactive or they're engaged
25 with. As best I can tell that's people who re-tweeted

1 things. That's just a de minimis amount of privacy. And so
2 even if we had to show a public interest -- we don't have to
3 show a public interest and there's a de minimis amount of a
4 privacy interest.

5 But again they've been selective in what they've
6 disclosed. So they disclosed that an entity called the
7 Smoking Gun had been contacted about I believe it was the
8 DNC email hacks. They released that information. They
9 haven't explained why they're withholding this other
10 information. That alone is another public interest in
11 disclosure.

12 Facebook groups, nonhuman entities do not have a
13 privacy interest under 7(c) or under Exemption 6. I don't
14 think they dispute that. And if they want to show or are
15 relying on the theory that if you knew the Facebook group
16 you could identify the individual people. Under the *Rose*
17 case from the United States Supreme Court that is a prime
18 candidate, in fact, maybe even a requirement for in-camera
19 inspection. They haven't connected the dots of okay if you
20 know the Facebook group how would you know the individual
21 people whose privacy interest are at issue?

22 Roger Stone we sort of talked about already.
23 Roger Stone doesn't seem to have any concerns at all been
24 publicity surrounding his case as I think we all know from
25 things that have occurred recently. And then there's things

1 they just describe as mere mentions. In many instances or
2 at least some of the instances those are people whose names
3 are redacted from the glossary of the report about people
4 who are relevant to the investigation. So these aren't just
5 one off unknown people. These are people who do factor in
6 to the, did factor in to investigation in some meaningful
7 way.

8 And so for all these reasons we think the public
9 interest in disclosure here far outweighs any privacy
10 interest.

11 THE COURT: Are you as they say trying to hold
12 them to a standard is was not applicable here?

13 MS. ENLOW: No, Your Honor. They're referring to
14 the *SafeCard* case. That's still good law as this court
15 recognized in *Cooper v. DOJ* a few years ago. What that case
16 says that the identity of individuals in connection with a
17 criminal investigation should be withheld absent compelling
18 evidence to the contrary. That's still good law again as
19 this court has recognized.

20 Which brings me to the category one and four which
21 I'll discuss together. Category one of the privacy
22 information where these individuals that were unwittingly
23 contacted by agents emanating from Russian and were
24 interacted with on social media, and were also individuals
25 who were contacted about the hacking operation. Those

1 individuals have an extreme privacy interest of being not
2 associated with this investigation.

3 Even merely being associated with this
4 investigation could cause stigma, could cause reputational
5 harm to these individuals. Whereas, on the other side of
6 the ledger there's literally no public interest in releasing
7 a name of an email address, for example. How is releasing
8 that specific information going to let the public know what
9 the government was up to?

10 THE COURT: Well, I don't know. If someone
11 unwittingly receives information from Russia how would that
12 alone create some type of problem for them? I mean --

13 MS. ENLOW: They have a high interest -- I mean
14 their names or their contact information are identifying
15 information that's in this report. And clearly --

16 THE COURT: I guess it might depend on -- I don't
17 mean to cut you off, who that person may be. If Russia was
18 targeting certain individuals in order to try and bring
19 about a certain result the fact that certain individuals
20 were targeted it seems to me could be a public interest.
21 And if they unwittingly received the information and
22 therefore were not in some how in collusion with the Russian
23 government then how would that shed bad light on them I
24 guess?

25 Categorically it seems to me to say just because

1 somebody was unwittingly contacted by Russia that that
2 necessarily would somehow put them in jeopardy or somehow
3 adversely impact their good name I guess I'm missing how
4 that would be the case.

5 MS. ENLOW: Courts have repeatedly held that even
6 being associated with criminal activity puts a stigma on
7 that person. And especially here when you're talking about
8 third parties, individuals that are completely private
9 individuals that no one has ever heard of. Of course, that
10 would be a burden on them if their name or contact
11 information is released. Of course, that's going to impinge
12 upon their privacy.

13 And simply releasing individual email addresses or
14 groups that may be members of where you can tell they are a
15 member of a group releasing that information does not tell
16 you anything about how the Special Counsel conducted the
17 investigation here, which is what the public interest has to
18 look at. Given that the privacy interest is so high and the
19 public interest is none then something outweighs nothing
20 every time, Your Honor.

21 THE COURT: I mean theoretically what if the
22 Russian government was, for example, targeting local
23 political figures in key states with the hope of maybe
24 having an impact on what their position would be about the
25 election. If that were a pattern that were being used, and

1 these individuals did not know where that information was
2 coming from then wouldn't the public interest outweigh the
3 privacy?

4 MS. ENLOW: The public interest is knowing what
5 our government is up to, how the investigation was run.

6 THE COURT: Right.

7 MS. ENLOW: Not what the Russia's government may
8 or may not have been doing. That's not the public interest
9 that has to be assessed here. The public interest is what
10 the United States government is up to. And here even if
11 assuming there was a public interest in that the privacy
12 interest was so high for these individuals that it just is
13 not outweighed by the public interest.

14 THE COURT: Okay.

15 MS. ENLOW: And then for category four these
16 individuals who are merely mentioned in the report, the
17 balancing is the same. The privacy interest is very high
18 and the public interest is very low even for the individuals
19 that were referred to other parts of the government for
20 further investigation. The public interest is low on
21 figuring out like what the Special Counsel's office was up
22 to because those individuals came up in the course of the
23 Special Counsel's investigation and were referred elsewhere.

24 Again, the privacy interest is very high for all
25 the individuals in that category and does not outweigh the

1 public interest.

2 And for Roger Stone, again his information is
3 protected by 7(a), 7(b), the order and 7(c). With regard to
4 7(c), the only argument plaintiff seem to be making is that
5 Mr. Stone goes out and seeks attention. Well, even if that
6 is the case that does not mean that the -- just because an
7 individual might voluntarily go and seek attention for any
8 matter that does not mean the government can then release
9 information about that individual. And it does not also
10 mean that the individual would want the information within
11 the report released.

12 Now with regard to category two these are the
13 individuals that were not charged by the Special Counsel's
14 office. And even assuming a public interest here the
15 privacy interest is at it's peak when someone has been
16 investigated but never charged with a crime. The D.C.
17 Circuit has recognized over and over again that there is an
18 obvious and great privacy interest for these individuals.
19 And that was in the *Crew* case, that was in the *ACLU* case.

20 And then in the D.C. Circuit in the case involving
21 the Hillary Rodham Clinton draft indictment, the D.C.
22 Circuit recognized there would be a severe intrusive to her
23 privacy to release that information. And that is because
24 release of this information would result in someone being
25 tried in the court of public opinion rather than the court

1 of law. And this interest is recognized in the Federal
2 Registrar that was used to promulgate the Special Counsel
3 regulations.

4 The reason why there is a confidential report to
5 the Attorney General so we're talking about here is because
6 the independent counsel back in the '90s produced a report
7 that was later recognized that intruded on various
8 individuals' privacy interest. And so the concern was so
9 great that Attorney General Janet Reno went to the Hill and
10 testified in front of Congress to get that statute repealed
11 because she recognized that there was a privacy concern in
12 that final report.

13 And what she said was, "Is that the report
14 requirement cuts against many of the basic traditions and
15 practices of American law enforcement. Under our system we
16 presume innocence and we value privacy. We believe this
17 information obtained during a criminal investigation should
18 in most all cases be made public only if there's an
19 indictment and prosecution not in a lengthy and detail
20 report filed after a decision has been made not to
21 prosecute. We have come to believe that the price of the
22 report is often too high."

23 And again, echoing that in the Federal Registrar
24 notice the DOJ recognized that the report should be handled
25 as a confidential document because there are such

1 significant privacy concerns by releasing this information.
2 Again this has been recognized over and over again by the
3 D.C. Circuit and should be recognized here as well.

4 THE COURT: Okay.

5 MR. TOPIC: Your Honor, here's what the D.C.
6 Circuit recently had to say in the *Barco* case. "The public
7 has an interest in knowing that a government investigation
8 itself is comprehensive, that the report of an investigation
9 released publicly is accurate, that any disciplinary
10 measures imposed are adequate. And that those who are
11 accountable are dealt with in an appropriate manner."

12 That is how FOIA helps to hold the governors
13 accountable to the govern. That exactly applies to this
14 case. We have, we have not simply said we're just
15 interested in digging around to find some information that
16 the report happened to have. There have been questions
17 raised on both sides about the origins of the investigation,
18 about how it was conducted. I think if nothing else the
19 American people have a right to know whether the president
20 has been accurate when he has said this is a political
21 witness hunt, an illegal, and the people have committed
22 treason, and the people should be in jail, et cetera, et
23 cetera.

24 And the kind of information that's being redacted
25 here goes to the very heart of the work of the Special

1 Counsel's office and the decisions that he made, and who he
2 was going to charge, who he wasn't, whether he felt that he,
3 of that kind of pressure, whether that maybe had something
4 to do with the decisions he ultimately made, but the *Barco*
5 situation that I quoted it reads exactly on this situation.
6 If Congress wanted an absolute rule for privacy in this
7 instance then they write an exemption that says that, but
8 there's a balancing against the public interest in
9 disclosure.

10 THE COURT: So what information are -- because I
11 would tend to agree with you that obviously there have been
12 a lot of statements made by individuals including the
13 president suggesting that this was a witch hunt and it was
14 predicated on a false narrative. So what information do you
15 believe would or could be made available from this report
16 that would undermine the suggestion that this was in fact a
17 witch hunt?

18 MR. TOPIC: Well, if there's a detailed,
19 thoughtful analysis of why Donald Trump, Jr. wasn't charged.
20 One would think that if this was a political witch hunt that
21 would not have been the conclusion. Conversely, other have
22 said, legal experts have said and obviously, you know,
23 people have different opinions on what the law requires or
24 doesn't. But questions have been raised about why at least
25 wasn't Donald Trump, Jr. brought to the Grand Jury.

1 You declined to charge him based on a mens rea
2 element, but you didn't do everything you could to get to
3 the bottom of what was in his head or so the argument goes.
4 It doesn't mean that it's right. It doesn't mean that it's
5 wrong. But understanding exactly how the Special Counsel's
6 office came to the conclusion that they were not going to
7 charge Donald Trump, Jr. with any crimes would answer that
8 question as best as anything is going to answer that
9 question.

10 THE COURT: But wouldn't the fact that Special
11 Counsel opted not to charge Donald Trump, Jr. wouldn't that
12 in and of itself undermine the situation that this was a
13 witch hunt just to charge people for things that they didn't
14 do?

15 MR. TOPIC: It might, but it may go the other way.
16 It isn't just statements of the president. It's statements
17 of people going the other way who believe he should have
18 been charged or could have been charged or at least have
19 questions. The standard under *Fabish* again is not -- they
20 seem to now concede that all SafeCard holds is that you have
21 to show compelling circumstances to overcome a privacy
22 interest in this kind of situation. Not that you have to
23 provide compelling evidence of illegal conduct by the
24 government which is something very, very different.

25 I think, if ever there were compelling

1 circumstances for full disclosure of information I think
2 this is exactly it. And the Supreme Court has said that the
3 courts are necessary protectors of the public's right to
4 know and the public right to know here is that it's apex in
5 any case I've seen at any times.

6 THE COURT: Thank you.

7 MR. TOPIC: Thank you.

8 THE COURT: What's the government's position
9 whether someone who is a public figure has diminished
10 privacy interest under FOIA? Do you have any position on
11 that? I don't know of any cases that have said that, but --

12 MS. ENLOW: Yes, Your Honor. In the *Judicial*
13 *Watch versus Nora* case, I believe the D.C. Circuit
14 recognized that given Hillary Rodham Clinton's position and
15 the amount of attention her case got she actually faced an
16 increased privacy interest and an increased intrusion upon
17 her privacy should that draft indictment be released.

18 THE COURT: Okay. Is that it?

19 MR. BUTLER: One quick point, Your Honor, this is
20 just a minor correction for something we identified in our
21 brief. On page 19, we refer to the *Crew* case. We refer to
22 the D.C. Circuit 2014 *Crew* case. The case we meant to refer
23 to is actually cited in the government's reply brief is also
24 a *Crew* case, *Crew versus Department of Justice*, 658 F2d.
25 2019, so that's the case that concerned the records of

1 Special Prosecutor Fitzgerald. That's the point we were
2 making.

3 And then related to that to underscore a point I
4 made earlier about in-camera review, in that case the court
5 ordered, not only ordered in-camera review but supplemental
6 declarations which as we noted before is I think the right
7 remedy in this case where there is substantial questions
8 about the independence of the review of the exemption claims
9 from the Attorney General.

10 THE COURT: Okay. Thank you. If there's nothing
11 else I understand the importance of trying to have this
12 resolved as quickly as possible, because I assume regardless
13 of how I rule the case is going to go on appeal, so I think
14 it's important that we get a resolution of this as quickly
15 as possible.

16 I have an overwhelming calendar both here and in
17 Pittsburgh, so I'll do the best I can to get this done as
18 quickly as possible. What I may end up doing is to the
19 extent that I think it's clear that a particular position
20 should be taken I may in part require that some additional
21 thing be done so that I can be in a position to resolve the
22 case as quickly as possible, but I'll turn my attention to
23 this.

24 I've got some other things I've got to get done,
25 but we'll get this done as quickly as we can so we can have

1 this matter resolved one way or the other.

2 Thank you.

3 [Thereupon, the proceedings adjourned at
4 12:18 p.m.]

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CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 96 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 12th day of August, 2019.

/s/_Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

<p>MR. BUTLER: [30] 3/8 25/14 25/18 30/4 30/18 30/22 30/24 32/6 33/6 38/10 39/19 40/18 41/2 41/17 45/21 50/24 51/6 57/5 57/11 57/15 57/20 58/11 58/13 58/16 59/10 63/8 65/5 65/7 66/2 94/18</p> <p>MR. PETERSON: [1] 3/14</p> <p>MR. SHAW: [6] 47/9 47/15 49/12 49/20 49/24 50/16</p> <p>MR. TOPIC: [28] 3/11 4/5 4/8 4/15 4/19 8/20 9/23 11/5 11/24 15/13 16/11 16/25 19/9 19/14 19/17 19/25 23/22 24/18 69/1 71/6 71/14 75/12 75/16 82/20 91/4 92/17 93/14 94/6</p> <p>MS. ENLOW: [46] 6/25 8/13 13/14 14/12 18/8 18/22 19/23 20/22 23/15 28/1 29/13 33/15 34/3 34/14 35/5 35/17 36/7 37/1 37/8 38/7 38/9 41/25 42/7 44/11 54/3 56/12 56/22 61/6 62/1 62/6 62/17 63/1 66/21 67/12 68/6 72/24 73/18 73/22 75/4 85/12 86/12 87/4 88/3 88/6 88/14 94/11</p> <p>THE COURT: [110]</p> <p>THE DEPUTY CLERK: [1] 3/1</p>	<p>2nd [1] 9/8</p> <p>3</p> <p>302s [3] 20/12 55/21 79/4</p> <p>311 [1] 1/22</p> <p>333 [1] 2/7</p> <p>4</p> <p>43 [2] 64/12 67/7</p> <p>44 [3] 58/11 58/14 67/7</p> <p>45 [1] 58/11</p> <p>46 [1] 58/12</p> <p>5</p> <p>50 [2] 52/24 53/23</p> <p>54-5 [1] 12/9</p> <p>57.7 [2] 74/10 74/15</p> <p>6</p> <p>600.8 [1] 28/4</p> <p>600.8c [1] 31/8</p> <p>60607 [1] 1/23</p> <p>6521 [1] 2/6</p> <p>658 [1] 94/24</p> <p>6s [1] 61/10</p>	<p>activities [3] 11/2 22/2 32/23</p> <p>activity [2] 35/1 87/6</p> <p>actor [1] 83/24</p> <p>actors [1] 83/18</p> <p>actual [2] 44/17 68/21</p> <p>actually [18] 9/1 12/7 18/12 19/2 30/8 32/15 34/4 52/20 57/22 58/6 58/15 58/17 59/4 64/5 66/7 70/5 94/15 94/23</p> <p>add [1] 16/18</p> <p>addition [4] 7/25 26/18 52/8 53/3</p> <p>additional [8] 7/22 25/21 28/22 30/13 57/1 63/9 63/22 95/20</p> <p>address [7] 19/22 24/4 27/9 29/22 50/24 75/12 86/7</p> <p>addressed [2] 51/5 51/7</p> <p>addresses [1] 87/13</p> <p>addressing [1] 51/1</p> <p>adduced [1] 97/5</p> <p>adequate [1] 91/10</p> <p>adequately [2] 72/20 78/3</p> <p>adhere [1] 15/10</p> <p>adjourned [1] 96/3</p> <p>administrative [1] 54/9</p> <p>advantage [1] 69/24</p> <p>adversely [1] 87/3</p>
<p>'90s [1] 90/6</p>	<p>8</p> <p>810 [1] 3/6</p> <p>87 [4] 64/13 65/9 66/1 67/8</p> <p>88 [3] 64/13 65/9 67/8</p>	<p>affidavit [10] 8/22 15/16 15/17 16/4 16/9 16/16 17/20 28/15 54/2 69/6</p> <p>affidavits [3] 9/4 23/11 25/6</p> <p>after [13] 12/10 27/15 30/8 30/19 36/10 37/19 48/14 53/10 53/11 55/22 63/14 80/7 90/20</p>
<p>.x [2] 1/7 1/11</p> <p>/</p> <p>/s [1] 97/13</p>	<p>9</p> <p>92 [2] 28/13 63/5</p> <p>957 [1] 3/4</p> <p>96 [1] 97/7</p>	<p>again [31] 4/6 11/10 14/5 14/21 18/25 19/10 22/13 27/21 29/14 29/16 31/13 38/16 39/25 42/8 46/4 56/13 60/18 62/14 62/18 63/17 71/22 73/24 84/5 85/18 88/24 89/2 89/17 90/23 91/2 91/2 93/19</p>
<p>1</p> <p>10:03 [1] 1/11</p> <p>1100 [1] 2/3</p> <p>11:05 [1] 50/20</p> <p>11:15 [1] 50/21</p> <p>128 [1] 74/25</p> <p>12:18 [1] 96/4</p> <p>12th [1] 97/11</p> <p>13 [1] 12/9</p> <p>1718 [1] 1/19</p> <p>19 [1] 94/21</p> <p>19-810 [1] 3/6</p> <p>19-810-RBW [1] 1/9</p> <p>19-957 [1] 3/4</p> <p>19-957-RBW [1] 1/4</p>	<p>A</p> <p>a.m [3] 1/11 50/20 50/21</p> <p>Aberdeen [1] 1/22</p> <p>ability [5] 32/16 56/11 66/21 71/10 73/12</p> <p>able [2] 38/6 63/1</p> <p>about [156]</p> <p>above [1] 97/6</p> <p>absent [1] 85/17</p> <p>absolute [1] 92/6</p> <p>absolutely [2] 79/23 82/10</p> <p>absolve [1] 50/11</p> <p>accept [1] 36/21</p> <p>accepting [1] 10/16</p> <p>access [2] 32/17 53/16</p> <p>according [1] 59/18</p> <p>account [1] 35/25</p> <p>accountable [2] 91/11 91/13</p> <p>accounts [1] 6/13</p> <p>accurate [3] 29/9 91/9 91/20</p> <p>acknowledge [2] 5/15 5/22</p> <p>acknowledged [1] 30/7</p> <p>acknowledges [1] 6/3</p> <p>acknowledgment [4] 5/25 6/4 6/6 6/11</p> <p>ACLU [1] 89/19</p> <p>across [2] 31/4 69/22</p> <p>act [6] 19/9 20/25 21/4 21/6 23/1 58/18</p> <p>acting [1] 48/1</p> <p>action [3] 3/4 3/6 46/9</p> <p>actions [4] 26/22 32/18 42/25 51/19</p> <p>active [2] 22/23 23/3</p>	<p>against [9] 45/10 58/3 74/2 74/11 78/11 81/20 83/12 90/14 92/8</p> <p>agency [5] 15/12 23/10 31/18 58/4 59/17</p> <p>agents [1] 85/23</p> <p>aggressive [1] 17/19</p> <p>ago [2] 38/9 85/15</p> <p>agree [6] 12/13 19/23 36/6 59/13 65/24 92/11</p> <p>agreed [1] 36/24</p> <p>aided [1] 2/12</p> <p>airing [1] 53/12</p> <p>akin [3] 37/17 37/24 42/9</p> <p>al [2] 1/3 3/3</p> <p>Alan [2] 1/17 3/9</p>
<p>2</p> <p>200 [1] 1/19</p> <p>20001 [1] 2/7</p> <p>20005 [1] 2/3</p> <p>20009 [1] 1/20</p> <p>2001 [1] 38/9</p> <p>2011 [2] 38/8 38/10</p> <p>2014 [2] 51/12 94/22</p> <p>2016 [1] 22/3</p> <p>2017 [1] 55/21</p> <p>2019 [3] 1/10 94/25 97/11</p> <p>22 [4] 57/14 57/16 58/11 62/13</p> <p>23 [1] 62/13</p> <p>27th [1] 40/22</p> <p>29 [1] 9/7</p> <p>29th [1] 34/18</p>	<p>ACLU [1] 89/19</p> <p>act [6] 19/9 20/25 21/4 21/6 23/1 58/18</p> <p>acting [1] 48/1</p> <p>action [3] 3/4 3/6 46/9</p> <p>actions [4] 26/22 32/18 42/25 51/19</p> <p>active [2] 22/23 23/3</p>	<p>allegations [1] 35/3</p> <p>alleged [1] 35/1</p> <p>allow [8] 20/7 20/7 32/9 54/12 75/24 76/23 78/14 78/16</p> <p>alone [4] 72/7 78/7 84/10 86/12</p> <p>along [1] 16/15</p> <p>already [16] 5/16 5/20 6/15 8/11 25/9 30/11 31/10 31/18 35/15 36/9 36/22</p>

A
already... [5] 46/6 47/20 53/24 75/3 84/22
also [33] 3/4 7/20 12/9 20/20 22/13 26/1 26/18 27/9 27/14 31/16 34/10 34/16 36/11 36/17 41/8 43/5 48/17 50/3 50/10 51/22 52/22 56/1 59/1 60/2 68/18 69/14 70/19 74/6 74/9 78/16 85/24 89/9 94/23
although [1] 60/3
always [1] 59/12
am [1] 66/10
America [1] 43/23
American [3] 43/22 90/15 91/19
amicus [3] 1/21 4/14 39/5
amount [5] 56/10 63/16 84/1 84/3 94/15
analyses [2] 9/11 43/2
analysis [21] 5/18 6/19 7/4 7/19 8/23 9/1 11/15 12/24 14/6 37/22 38/2 51/15 54/24 55/6 68/13 68/16 70/18 78/8 78/10 80/12 92/19
analyze [1] 52/20
analyzed [1] 65/20
anathema [1] 75/24
another [4] 50/2 53/3 76/21 84/10
answer [5] 12/13 48/22 78/6 93/7 93/8
any [53] 5/2 5/2 5/10 5/18 5/25 6/1 7/7 7/22 9/16 10/14 13/24 17/21 18/16 20/2 24/7 24/17 35/6 35/7 36/10 44/12 46/23 50/9 51/21 52/5 52/18 54/18 57/4 58/24 59/1 61/25 62/9 66/23 68/1 69/1 69/3 69/7 76/22 77/2 78/3 79/19 80/18 81/19 82/8 83/19 84/23 85/9 89/7 91/9 93/7 94/5 94/5 94/10 94/11
anymore [1] 36/4
anything [19] 6/16 7/8 10/16 11/18 12/18 12/22 17/10 17/16 30/2 47/19 50/23 68/4 69/5 70/13 75/11 77/11 79/25 87/16 93/8
apart [1] 77/10
apex [1] 94/4
apparent [1] 54/21
apparently [1] 75/2
appeal [3] 55/19 55/23 95/13
appeals [1] 60/5
appear [2] 13/8 27/17
APPEARANCES [1] 1/16
appeared [1] 7/15
appears [3] 77/19 81/4 83/3
Appendix [1] 58/22
applicable [1] 85/12
application [4] 31/2 33/2 37/22 41/21
applied [1] 16/4
applies [3] 6/9 79/3 91/13
apply [4] 10/25 31/4 60/2 69/22
applying [2] 30/12 71/15
appreciate [1] 36/18
appropriate [14] 6/22 8/6 16/20 20/20 24/2 24/9 24/18 25/22 28/1 30/4 30/18 35/17 37/1 91/11
are [115]
area [1] 6/21
areas [1] 24/23
aren't [7] 41/24 42/6 47/6 81/13 83/5 83/21 85/4
arguably [1] 49/21

argue [5] 7/20 48/5 49/17 50/1 55/17
arguing [1] 12/4
argument [10] 5/13 5/24 16/19 17/6 17/6 19/13 81/20 81/22 89/4 93/3
arguments [3] 11/10 46/11 46/12
arm [1] 44/4
around [1] 91/15
art [1] 17/7
article [1] 75/2
articulate [1] 49/3
articulates [1] 48/13
articulation [1] 49/5
as [123]
ask [2] 3/7 6/18
asked [1] 48/17
asking [1] 25/5
aspect [1] 7/23
aspects [3] 11/1 38/17 76/12
assert [2] 64/24 81/13
asserted [1] 69/25
asserting [1] 64/8
assertion [3] 12/1 53/6 64/2
assertions [1] 52/6
assess [5] 11/22 28/15 34/23 67/10 78/17
assessed [2] 34/24 88/9
assessment [9] 12/19 14/22 27/25 40/17 41/1 56/11 59/8 66/12 67/25
assigned [1] 51/16
associate [2] 61/22 75/1
associated [4] 10/15 86/2 86/3 87/6
assume [6] 8/11 24/11 41/13 59/16 65/5 95/12
assuming [3] 11/3 88/11 89/14
attach [3] 59/6 59/23 60/4
attempt [3] 12/21 76/16 81/23
attempted [1] 72/23
attempting [1] 51/14
attendance [1] 11/9
attention [5] 4/14 73/6 89/7 94/15 95/22
attest [1] 9/2
attested [5] 7/13 7/21 8/15 23/7 37/3
attorney [58] 1/17 1/17 1/18 1/21 2/1 26/5 26/23 27/4 27/15 27/22 28/2 28/6 28/6 28/10 29/6 29/24 30/9 30/17 30/20 32/1 33/20 33/23 34/2 34/5 34/10 34/12 34/19 34/21 35/13 35/15 36/6 36/23 37/1 37/25 38/14 39/5 39/6 39/9 40/17 40/19 40/25 41/1 45/11 46/18 47/21 48/1 48/3 49/22 49/22 50/3 50/4 50/7 50/14 70/9 75/23 90/5 90/9 95/9
Attorney's [2] 43/11 43/18
Attorney-at-Law [4] 1/17 1/17 1/18 1/21
attorneys [2] 45/13 47/3
audiences [1] 83/5
August [2] 1/10 97/11
author's [1] 42/24
authority [17] 14/3 31/23 33/3 39/3 39/7 39/10 39/25 42/3 46/1 47/23 49/1 49/2 49/9 49/14 49/24 49/25 50/11
authorized [1] 21/23
available [5] 4/24 6/8 6/20 32/15 92/15
Avenue [2] 1/19 2/7
avenues [1] 46/11

aware [1] 44/12
away [2] 53/9 60/8
axiomatic [1] 12/25
B
B-one [1] 33/1
B3 [1] 12/12
back [9] 13/24 35/18 42/8 42/21 52/10 54/16 62/7 73/24 90/6
bad [1] 86/23
balancing [6] 7/7 8/17 9/6 45/1 88/17 92/8
banc [2] 17/4 19/3
bar [1] 69/21
Barco [2] 91/6 92/4
bare [1] 76/3
Barr [5] 35/4 49/22 49/22 50/5 50/7
based [6] 38/21 40/5 59/23 59/25 67/25 93/1
basic [2] 11/14 90/14
basically [8] 6/4 8/24 13/15 30/12 35/12 58/20 61/10 66/4
basis [7] 10/13 15/9 28/24 34/25 38/1 58/7 75/2
be [150]
bear [2] 8/1 32/11
became [1] 35/16
because [49] 7/18 10/25 12/4 17/4 18/24 22/15 24/9 27/2 29/14 31/5 31/22 34/24 36/8 38/24 40/12 41/9 45/6 46/3 46/22 49/8 51/9 56/8 60/3 60/8 60/11 63/19 63/25 64/6 64/10 66/13 67/7 69/25 70/25 70/25 73/2 73/11 75/5 77/4 77/5 77/25 86/25 88/22 89/6 89/23 90/5 90/11 90/25 92/10 95/12
been [70] 4/18 5/1 5/4 5/5 5/6 5/25 6/5 6/23 7/24 8/12 10/9 10/10 12/16 13/10 13/12 15/4 17/7 18/3 26/8 30/12 31/10 31/18 32/2 35/7 35/16 36/22 36/24 37/20 43/19 46/25 47/20 48/15 53/7 53/7 53/11 53/11 53/24 55/13 56/10 58/25 59/10 60/6 63/3 67/16 67/19 67/20 67/21 68/1 68/8 71/13 71/17 77/7 78/18 80/20 81/7 82/6 84/5 84/7 84/23 88/8 89/15 90/20 91/2 91/16 91/20 92/11 92/21 92/24 93/18 93/18
before [39] 1/14 4/23 5/9 6/1 6/14 7/9 7/15 7/25 9/19 12/8 12/16 12/18 12/21 12/23 13/2 13/8 13/19 14/17 15/7 16/2 16/10 17/7 17/20 25/16 26/6 26/16 26/21 27/20 33/20 36/1 47/1 48/12 50/24 51/2 51/8 55/8 77/15 78/22 95/6
beginning [2] 63/24 78/19
beginnings [1] 77/22
behalf [4] 3/9 3/13 3/16 47/16
being [23] 11/9 21/2 21/23 23/2 35/19 53/7 53/25 61/11 63/12 63/14 65/8 67/5 67/10 68/2 69/12 71/4 82/5 86/1 86/3 87/6 87/25 89/24 91/24
belief [1] 24/5
believe [12] 4/16 24/8 24/14 24/15 75/13 82/21 84/7 90/16 90/21 92/15 93/17 94/13
believed [1] 11/22
believes [1] 46/18
believing [1] 76/5

B

Berman [2] 73/4 74/13
beside [1] 48/12
besides [3] 24/5 24/14 50/23
best [5] 3/19 71/8 83/25 93/8 95/17
better [3] 28/24 78/14 78/21
between [13] 4/9 19/16 35/7 39/1
 45/23 47/2 47/21 53/15 53/21 54/13
 60/12 63/17 82/24
beyond [1] 76/3
big [1] 10/5
binding [1] 19/4
bit [2] 20/6 50/13
Black [2] 37/13 42/23
Blagojevich [1] 55/22
blanket [6] 21/1 69/10 69/22 71/2
 73/21 73/23
board [1] 31/4
Boasberg [1] 56/25
body [1] 36/20
both [10] 4/10 23/14 24/5 32/16 34/22
 50/8 50/15 71/1 91/17 95/16
bottom [1] 93/3
bound [1] 63/18
boundaries [1] 39/8
branch [2] 2/2 36/18
break [1] 50/19
breakdown [1] 54/11
breaking [1] 67/17
brief [15] 5/16 6/11 9/8 16/17 21/13
 23/22 24/25 39/5 42/17 47/19 57/4
 76/19 80/1 94/21 94/23
briefed [1] 48/3
briefing [3] 37/19 37/20 43/5
briefly [1] 33/18
briefs [2] 9/3 20/1
bring [6] 4/13 12/21 41/22 45/10 78/4
 86/18
bringing [1] 13/2
brings [1] 85/20
Brinkman [1] 57/14
Brinkmann [22] 7/13 7/21 8/7 8/15
 13/17 17/13 17/18 18/1 21/22 22/4
 23/7 28/25 30/1 30/17 35/14 36/11
 36/22 37/2 54/19 57/13 57/16 62/2
Brinkmann's [12] 8/22 13/22 14/7
 14/15 15/17 18/12 21/20 28/15 28/16
 64/12 68/23 69/6
broad [2] 47/23 61/18
broadly [1] 25/4
brought [2] 32/11 92/25
burden [6] 8/1 8/3 17/10 17/11 82/14
 87/10
burdensome [1] 25/25
busy [1] 11/8
Butler [2] 1/17 3/9
Buzz [1] 3/13

C

CA [2] 1/4 1/9
calendar [1] 95/16
called [4] 12/15 26/8 76/12 84/6
calls [3] 16/4 25/2 81/21
came [8] 9/25 10/20 10/20 10/22 33/20
 54/6 88/22 93/6
camera [32] 6/21 8/4 8/8 15/9 16/11
 16/20 20/21 23/25 24/2 24/8 24/10

24/16 24/17 25/21 25/25 26/17 26/25
 27/25 28/18 29/13 29/20 30/3 33/17
 35/9 38/12 58/9 63/1 66/6 81/7 84/18
 95/4 95/5
campaign [5] 22/24 23/4 53/1 59/15
 83/3
can [53] 6/22 16/23 17/12 18/6 19/8
 19/21 21/12 22/19 25/18 28/12 28/14
 32/11 35/8 37/14 42/10 47/14 48/16
 49/16 50/4 55/3 55/4 55/14 56/16
 56/21 59/7 59/15 60/4 62/19 63/3 63/8
 66/24 67/2 67/14 67/18 68/23 69/2
 69/19 71/23 72/12 72/12 72/19 72/19
 75/6 80/6 80/23 81/6 83/25 87/14 89/8
 95/17 95/21 95/25 95/25
can't [8] 33/10 44/6 44/10 50/13 62/8
 66/12 66/19 72/12
candid [5] 40/3 40/3 40/11 41/11
 45/14
candidate [1] 84/18
cannot [3] 51/4 56/25 74/22
care [1] 81/3
carries [1] 79/18
Carter [1] 81/9
case [124]
cases [36] 14/24 16/12 20/20 31/14
 39/16 47/24 52/9 52/13 52/19 53/5
 53/15 53/18 53/18 53/21 53/24 54/6
 54/9 55/18 57/11 58/15 58/18 58/19
 58/23 58/24 59/2 59/20 59/20 59/21
 60/5 60/6 60/22 63/17 64/9 65/17
 90/18 94/11
categorical [2] 51/15 54/5
Categorically [1] 86/25
categories [9] 18/18 18/22 18/24 31/1
 41/20 51/16 51/17 61/4 83/16
category [11] 9/11 18/16 19/12 51/2
 51/18 65/2 85/20 85/21 88/15 88/25
 89/12
Cathryn [4] 2/5 97/2 97/13 97/14
cause [8] 26/23 29/11 45/11 45/12
 57/10 62/4 86/4 86/4
caused [1] 26/5
causes [1] 63/18
causing [1] 57/2
CENTER [4] 1/8 1/18 3/5 3/10
certain [4] 55/6 86/18 86/19 86/19
certainly [8] 9/15 13/4 14/14 19/21
 22/12 34/15 35/9 81/6
CERTIFICATE [1] 97/1
certify [2] 97/4 97/7
cetera [6] 52/15 54/9 54/23 70/11
 91/22 91/23
chance [1] 55/8
change [2] 30/19 53/14
changes [1] 52/12
character [2] 46/16 47/8
charge [11] 4/25 5/1 10/1 10/2 10/14
 78/19 92/2 93/1 93/7 93/11 93/13
charged [24] 31/4 31/25 52/9 52/13
 53/7 53/11 53/21 53/24 58/15 58/17
 58/18 59/2 59/20 64/9 76/14 76/14
 76/15 77/4 77/24 89/13 89/16 92/19
 93/18 93/18
charges [3] 34/25 41/23 78/11
charging [13] 32/3 32/7 32/25 33/5
 33/7 33/14 38/1 41/22 44/23 45/7 48/7

53/12 78/15
charing [1] 44/14
Chicago [1] 1/23
chill [1] 46/3
chilling [2] 45/17 45/20
choosing [1] 81/12
chose [1] 41/2
chronology [1] 42/24
circuit [14] 14/1 14/20 24/9 38/7 44/15
 51/12 61/9 89/17 89/20 89/22 91/3
 91/6 94/13 94/22
Circuit's [1] 44/21
circumstances [7] 22/6 26/2 43/9
 64/19 68/19 93/21 94/1
circumvention [1] 65/1
citation [2] 21/14 63/13
citations [2] 62/20 63/2
cite [4] 6/3 69/14 76/9 76/10
cited [8] 8/24 9/7 13/25 17/8 55/17
 67/20 76/17 94/23
Citizens [1] 47/17
civil [7] 2/2 3/4 3/6 4/4 53/17 53/21
 60/9
claim [11] 19/15 25/1 36/25 52/11
 52/15 52/19 53/9 64/3 64/15 64/23
 64/25
claimed [8] 3/21 5/5 18/20 24/12
 25/12 25/14 56/12 78/18
claiming [4] 48/20 50/9 50/10 69/23
claims [12] 12/3 20/8 25/3 26/13 41/19
 50/8 51/25 63/25 64/1 75/19 78/21
 95/8
clarification [1] 58/15
class [1] 16/1
clause [1] 32/14
clear [7] 11/13 20/2 48/16 59/12 70/2
 74/8 95/19
clearly [12] 15/20 22/21 23/1 34/25
 48/10 51/10 55/7 62/9 74/3 80/18
 82/14 86/15
Clinton [3] 8/6 80/5 89/21
Clinton's [2] 80/11 94/14
closed [1] 58/25
closing [3] 31/6 39/13 40/21
CNN [2] 56/24 75/1
codes [1] 28/23
colleague [3] 25/20 51/8 66/23
collected [4] 54/23 61/11 68/15 68/16
collusion [4] 27/8 27/9 34/23 86/22
COLUMBIA [2] 1/2 97/4
come [13] 5/11 10/13 10/23 11/10
 26/21 44/25 52/10 53/4 70/17 76/3
 76/25 78/23 90/21
comes [6] 17/21 45/1 63/11 63/18
 75/21 79/21
comfortable [1] 78/15
coming [1] 88/2
commented [1] 82/6
committed [1] 91/21
common [1] 14/22
communication [2] 39/12 40/3
communications [6] 38/25 40/3 40/11
 41/11 45/21 53/19
compare [1] 6/22
compared [4] 29/23 43/16 49/12 82/19
comparison [1] 8/23
compelling [7] 72/7 75/22 80/24 85/17

C

compelling... [3] 93/21 93/23 93/25
complete [3] 70/15 78/9 82/10
completed [2] 53/8 63/20
completely [4] 7/4 46/22 82/15 87/8
complications [1] 26/4
comply [3] 71/14 73/15 76/20
comport [1] 3/23
comprehensive [1] 91/8
compromise [1] 61/5
computer [2] 2/12 20/17
computer-aided [1] 2/12
concede [1] 93/20
conceded [1] 80/10
conceivably [6] 24/6 43/14 56/8 65/5 71/5 71/10
concern [13] 29/11 32/23 52/24 53/5 53/23 56/6 56/9 60/10 60/15 64/14 74/24 90/8 90/11
concerned [2] 7/2 94/25
concerns [14] 27/2 29/22 31/3 43/15 43/22 44/2 52/8 57/17 57/18 59/14 70/25 71/1 84/23 91/1
conclude [4] 26/24 30/3 66/19 78/11
concluded [2] 52/17 78/1
concluding [2] 15/10 18/3
conclusion [9] 10/13 10/18 17/14 23/6 34/21 65/14 78/23 92/21 93/6
conclusions [6] 10/1 15/16 18/2 18/3 25/7 34/12
conclusory [2] 8/25 66/4
Concord [2] 74/11 74/14
conduct [22] 8/8 15/8 16/11 23/25 24/2 24/16 26/24 30/8 30/9 49/1 51/14 56/11 58/9 59/4 63/1 66/6 66/11 74/1 74/2 75/22 76/6 93/23
conducted [6] 8/22 76/14 80/8 80/22 87/16 91/18
conducting [1] 29/13
conducts [1] 21/11
conference [3] 1/13 34/7 34/17
confess [1] 9/14
confidence [1] 65/14
confidential [3] 28/5 90/4 90/25
confuses [1] 6/2
confusion [1] 38/17
Congress [7] 28/8 32/16 40/7 40/13 40/23 90/10 92/6
Congress's [1] 32/13
conjunct [1] 22/18
conjunction [10] 21/21 22/19 33/21 35/20 35/21 35/24 56/14 62/19 62/21
connected [2] 15/18 84/19
Connecticut [1] 1/19
connection [1] 85/16
Conor [1] 47/16
consider [2] 32/12 48/17
considerations [1] 47/6
considered [4] 13/5 14/12 15/7 29/25
considering [1] 13/2
consistent [3] 34/13 36/25 65/16
consolidated [1] 3/5
conspiracy [1] 34/25
conspiring [1] 10/15
constitute [1] 97/8
Constitution [1] 2/7

constitutional [2] 14/21 32/11
consult [1] 66/22
consultation [1] 33/25
consulted [1] 36/9
contact [2] 86/14 87/10
contacted [4] 84/7 85/23 85/25 87/1
contained [2] 34/22 47/5
content [3] 27/3 27/5 29/23
context [12] 11/12 16/3 16/5 23/4 25/2 28/14 28/20 39/3 59/9 60/10 71/24 82/20
continues [1] 75/19
contradiction [1] 49/19
contrary [2] 17/5 85/18
conversation [1] 48/24
Conversely [1] 92/21
conviction [1] 55/24
Cooper [1] 85/15
cooperative [1] 70/11
copy [1] 72/11
core [2] 40/9 42/21
correct [6] 8/14 33/7 39/20 41/18 56/23 56/24
correction [1] 94/20
corruption [2] 79/9 79/10
could [40] 10/21 15/19 17/18 20/12 23/8 24/6 28/8 36/1 37/6 41/5 45/11 45/12 46/17 55/16 56/4 56/8 57/8 61/14 61/15 61/16 61/19 62/4 62/22 65/7 66/6 73/16 74/2 74/5 74/18 74/19 76/6 78/5 79/4 84/16 86/4 86/4 86/20 92/15 93/2 93/18
couldn't [2] 40/24 49/18
counsel [80] 3/17 4/25 9/25 10/4 10/13 11/5 11/18 13/9 13/25 17/23 17/25 20/22 21/15 25/13 26/7 26/7 26/17 26/23 27/7 27/8 27/11 28/6 29/21 31/7 31/19 31/22 33/3 33/21 34/9 34/17 35/20 36/5 37/25 38/14 38/16 38/20 39/2 39/7 39/10 39/24 40/4 40/6 40/16 40/21 41/4 41/10 41/16 41/24 42/3 42/13 43/8 45/25 47/3 47/22 47/23 47/25 48/4 49/1 50/2 50/4 50/9 50/12 57/25 60/24 60/25 61/1 66/10 66/16 68/11 70/8 73/15 75/23 78/1 78/10 78/23 80/8 87/16 90/2 90/6 93/11
Counsel's [26] 12/19 12/24 28/4 31/6 31/9 32/8 33/8 33/9 34/13 34/14 36/3 36/9 40/12 46/4 46/13 49/5 52/3 52/25 66/9 68/11 68/22 88/21 88/23 89/13 92/1 93/5
country [2] 77/10 80/21
couple [4] 16/23 25/19 33/16 47/18
course [12] 12/12 34/16 41/4 42/22 45/2 46/9 65/19 70/9 77/1 87/9 87/11 88/22
court [65] 1/1 2/5 2/6 2/6 6/19 7/7 7/9 8/4 8/8 9/20 14/2 17/3 19/4 20/3 20/7 21/12 22/22 23/10 26/11 26/21 28/12 28/14 28/23 33/18 37/11 42/9 44/13 48/16 48/17 50/18 51/3 51/8 54/13 55/9 55/23 56/4 58/9 59/15 59/24 59/25 61/21 63/3 65/21 66/4 66/5 66/24 67/2 67/14 67/18 68/23 69/20 72/5 73/12 74/6 74/19 84/17 85/14 85/19 89/25 89/25 94/2 95/4 97/2 97/3

97/14
Court's [4] 7/4 7/19 14/5 23/14
Courtney [2] 2/1 3/15
courts [10] 18/24 21/1 21/5 23/23 28/17 31/13 51/24 54/9 87/5 94/3
covered [6] 6/24 13/14 18/8 20/24 21/17 42/6
create [6] 6/7 56/8 65/1 71/21 72/8 86/12
created [1] 42/17
credited [1] 10/5
Crew [18] 20/9 21/15 21/16 22/13 22/14 39/5 51/13 51/20 54/3 54/5 59/25 79/1 82/21 89/19 94/21 94/22 94/24 94/24
crime [5] 31/25 78/2 78/20 83/20 89/16
crimes [3] 10/14 79/6 93/7
criminal [11] 43/23 44/9 53/6 53/15 53/21 55/23 69/15 74/10 85/17 87/6 90/17
critical [2] 38/17 82/7
Currently [1] 58/20
cut [3] 26/15 67/6 86/17
cuts [1] 90/14

D

D.C [15] 1/10 2/7 14/1 14/20 44/15 44/21 51/12 61/9 89/16 89/20 89/21 91/3 91/5 94/13 94/22
dates [5] 61/3 62/15 68/4 68/4 68/20
Davison [1] 1/18
day [2] 27/19 97/11
daylight [1] 50/10
DC [2] 1/20 2/3
DCC [1] 55/21
de [5] 56/11 58/7 59/8 84/1 84/3
DEA [1] 61/10
deal [2] 3/20 21/16
dealing [2] 25/23 35/22
deals [1] 21/17
dealt [3] 43/4 54/5 91/11
decide [1] 33/4
decided [3] 32/2 35/15 81/2
deciding [1] 44/3
decision [46] 20/9 30/20 31/16 31/17 32/1 33/2 33/11 37/19 41/17 42/18 42/21 43/2 43/6 43/7 43/11 43/17 43/19 43/20 44/5 44/9 44/11 44/18 44/19 44/23 45/15 46/14 46/19 46/24 46/25 47/1 48/9 48/13 49/5 49/9 51/13 58/8 59/22 59/24 71/9 71/12 75/21 77/18 78/4 78/15 80/4 90/20
decision-making [4] 42/18 43/2 43/6 45/15
decisional [25] 31/11 31/12 31/12 31/14 31/20 33/12 37/11 37/13 37/16 38/2 38/8 39/15 41/8 41/25 42/10 42/12 45/3 45/6 46/21 46/22 46/23 48/7 48/10 49/11 49/12
decisions [36] 4/25 17/5 31/9 32/25 33/5 33/7 33/8 33/10 33/14 38/1 38/4 39/4 39/11 39/17 39/21 40/1 41/12 41/16 41/22 41/22 41/25 42/4 42/5 42/6 42/25 43/24 43/24 44/14 45/7 46/2 46/6 48/8 48/10 81/11 92/1 92/4
declaration [38] 8/7 13/17 13/23 14/7

D

declaration... [34] 14/16 14/25 15/6 18/12 18/23 21/6 21/20 22/18 23/5 23/19 28/17 28/18 29/16 29/25 30/1 36/13 36/13 36/14 37/3 41/19 45/5 54/20 56/14 57/13 57/14 57/16 59/9 59/19 62/8 62/13 62/22 64/13 67/15 68/23

declarations [1] 95/6

declination [9] 38/1 39/4 39/11 39/21 44/14 44/23 45/7 77/18 81/11

declined [2] 12/11 93/1

defendant [4] 1/6 1/10 2/1 69/21

defendants [1] 53/16

deference [7] 17/21 20/2 23/10 23/17 23/18 23/24 25/5

deficiencies [1] 3/25

defined [1] 51/16

definition [1] 33/10

degree [1] 68/1

DeLay [3] 20/10 20/10 82/22

deliberation [2] 7/6 42/12

deliberations [4] 37/16 38/2 44/13 45/6

deliberative [14] 31/16 31/20 33/13 37/10 37/14 39/15 40/10 41/7 41/9 44/16 44/24 45/3 46/10 46/21

department [12] 1/5 1/10 2/2 3/3 3/6 3/16 4/1 29/12 31/1 36/17 37/21 94/24

depend [1] 86/16

depending [1] 10/8

deprive [1] 71/20

deprived [2] 69/19 73/11

Deputy [1] 48/3

describe [3] 22/5 57/23 85/1

described [7] 22/21 26/14 31/1 37/22 37/25 39/21 51/12

describes [4] 22/4 48/2 52/2 73/25

describing [6] 20/4 21/2 41/12 54/22 62/22 66/24

description [1] 64/15

descriptions [2] 20/19 21/13

deserve [1] 80/23

designated [1] 33/1

designations [1] 38/21

desire [2] 16/13 57/10

detail [10] 21/2 22/15 23/8 29/19 39/6 51/10 52/18 65/20 73/25 90/19

detailed [8] 28/17 28/19 29/16 36/13 42/24 61/12 72/6 92/18

details [6] 20/16 22/10 64/17 68/9 72/19 72/19

detection [1] 23/9

determination [7] 5/19 27/10 32/6 35/12 36/23 40/24 66/20

determine [8] 8/8 31/24 45/9 66/6 66/25 67/15 67/18 68/24

determined [1] 37/6

developed [2] 43/1 78/1

did [37] 9/1 10/1 10/12 12/13 27/8 31/23 34/1 34/10 34/18 34/23 35/2 35/14 36/6 36/11 38/16 39/25 41/1 41/10 42/3 47/10 49/1 49/9 50/1 50/5 50/8 50/12 61/11 66/17 69/9 70/6 71/3 76/7 77/1 78/23 80/15 85/6 88/1

didn't [12] 10/23 16/17 30/8 34/5 41/3 54/11 62/5 71/2 77/6 78/19 93/2 93/13

difference [2] 35/7 45/23

different [22] 9/2 25/23 25/24 33/11 35/4 43/4 43/9 46/6 46/11 47/3 47/7 47/12 48/6 52/21 58/2 58/5 62/20 68/6 72/4 76/18 92/23 93/24

different with [1] 58/5

difficult [6] 12/6 27/3 27/6 67/10 67/25 71/5

digging [1] 91/15

diligence [1] 79/13

diligently [1] 29/2

diminished [4] 82/10 82/18 83/12 94/9

direct [2] 44/20 67/8

directed [2] 13/3 30/9

direction [2] 76/11 77/4

directly [2] 20/13 79/22

disagree [2] 34/21 54/2

disagreement [1] 71/15

disagrees [1] 54/4

disappear [1] 46/22

disappears [1] 52/16

disciplinary [1] 91/9

disclose [1] 11/23

disclosed [10] 15/20 35/16 36/1 36/24 40/7 64/4 68/18 83/22 84/6 84/6

discloses [1] 13/19

disclosure [19] 5/11 15/2 19/1 59/23 65/22 77/11 77/14 79/3 79/12 80/2 81/24 82/1 82/13 82/16 83/13 84/11 85/9 92/9 94/1

disclosures [1] 20/12

discount [1] 77/16

discounted [2] 10/5 82/15

discovery [1] 53/16

discreet [1] 25/24

discretion [6] 7/6 9/19 17/3 19/4 23/25 79/14

discretionary [1] 28/3

discuss [2] 46/24 85/21

discussed [3] 39/24 47/1 51/2

discussing [1] 67/17

discussion [1] 12/11

discussions [6] 12/13 24/5 25/11 39/1 40/2 47/2

dismiss [2] 37/19 43/7

dismissal [2] 37/13 42/18

dismissed [1] 37/21

dispute [3] 69/4 81/25 84/14

disregard [1] 32/2

disruption [1] 53/1

disseminated [1] 71/4

dissemination [2] 73/18 73/19

distinction [2] 48/16 82/24

distinguish [2] 38/6 80/6

distinguishable [1] 38/24

distinguishing [2] 53/15 53/20

DISTRICT [7] 1/1 1/2 1/15 2/6 11/21 97/3 97/3

Division [1] 2/2

DNC [1] 84/8

do [36] 4/1 7/7 16/17 16/17 17/16 18/4 24/13 25/17 27/2 34/10 36/3 36/17 39/9 40/18 48/21 50/12 57/8 57/8 66/15 66/15 66/15 69/5 70/23 70/25 72/12 72/12 80/14 84/12 85/5 92/4 92/14 93/2 93/14 94/10 95/17 97/4

Docket [3] 1/4 1/9 12/9

doctrine [2] 79/2 80/12

document [20] 25/24 31/15 31/17 31/20 38/20 39/14 46/5 46/19 46/23 46/23 48/11 51/22 51/23 52/2 52/4 53/12 54/14 61/15 61/15 90/25

documentary [4] 55/4 58/1 60/21 63/13

documenting [1] 46/5

documents [11] 9/12 37/11 37/14 37/18 39/16 42/10 42/16 42/23 47/4 48/12 60/22

does [28] 3/23 6/16 10/24 13/21 14/8 18/24 19/23 21/16 21/22 25/2 29/22 30/15 31/4 32/9 36/20 45/5 54/1 54/2 62/13 65/4 65/13 66/7 75/21 87/15 88/25 89/6 89/8 89/9

doesn't [23] 6/7 10/20 12/22 13/10 17/3 17/15 18/16 29/22 35/9 36/4 40/14 44/25 48/23 58/17 67/8 71/11 75/6 76/22 83/10 84/23 92/24 93/4 93/4

doing [5] 30/11 37/21 75/8 88/8 95/18

DOJ [20] 23/11 30/6 30/9 31/7 31/24 32/9 37/12 39/8 42/17 43/3 49/8 49/16 55/20 75/8 79/5 79/8 79/17 79/25 85/15 90/24

DOJ's [1] 79/13

domain [4] 8/3 8/13 75/4 83/9

don't [40] 4/14 9/14 10/3 10/6 10/17 10/18 11/17 12/2 15/15 17/16 24/24 25/10 25/15 26/15 32/20 33/18 36/3 57/22 58/23 59/1 60/22 67/1 67/6 68/6 69/3 71/22 76/16 76/20 76/25 77/3 79/1 81/4 81/25 82/8 82/24 84/2 84/13 86/10 86/16 94/11

Donald [15] 10/14 11/4 11/8 77/19 77/21 78/4 78/9 78/12 81/5 81/6 82/2 92/19 92/25 93/7 93/11

done [14] 4/18 5/18 8/17 33/21 33/24 35/20 35/24 51/20 62/2 75/8 95/17 95/21 95/24 95/25

dots [1] 84/19

doubt [2] 7/11 13/22

down [4] 45/14 60/8 67/17 80/20

draft [3] 80/5 89/21 94/17

due [1] 53/16

dumping [1] 53/2

during [4] 12/12 20/16 44/1 90/17

E

each [5] 3/21 3/22 28/24 48/12 51/18

earlier [4] 24/21 66/24 81/16 95/4

ease [1] 28/23

easily [2] 38/24 80/6

easy [2] 48/22 77/5

echoing [1] 90/23

effort [1] 81/22

efforts [1] 79/10

eight [2] 52/9 54/19

either [7] 13/7 15/7 25/17 41/16 48/3 73/18 78/15

elect [1] 23/25

elected [1] 70/12

election [3] 22/3 80/9 87/25

ELECTRONIC [4] 1/7 1/18 3/5 3/10

element [2] 63/19 93/2

Elizabeth [2] 2/1 3/17

E
else [8] 16/24 30/2 50/23 63/7 70/13 75/11 91/18 95/11
elsewhere [1] 88/23
email [3] 84/8 86/7 87/13
emails [5] 38/25 42/14 42/14 43/5 83/23
emanating [2] 22/2 85/23
employee [1] 60/12
employer [1] 60/12
en [2] 17/4 19/3
enacted [1] 56/2
end [6] 7/18 20/5 32/24 39/22 53/8 95/18
endeavor [1] 76/20
ends [2] 8/20 15/8
enforcement [7] 19/18 25/11 51/19 52/12 52/17 79/18 90/15
engaged [1] 83/24
engender [1] 65/13
Enlow [2] 2/1 3/16
enough [5] 4/13 14/15 51/10 72/8 78/24
ensure [2] 29/17 74/20
ensuring [1] 71/1
enter [3] 48/24 69/10 73/8
entered [1] 70/5
entire [6] 54/7 54/11 63/14 67/2 75/24 78/8
entirely [2] 79/2 83/6
entities [1] 84/12
entitled [1] 17/21
entity [2] 80/15 84/6
environmental [1] 53/19
EPA [1] 53/18
Epstein [1] 44/1
equate [1] 83/20
equities [1] 53/13
especially [8] 25/25 28/20 28/21 53/14 75/7 75/8 75/9 87/7
essentially [6] 12/4 38/20 57/21 62/2 64/8 69/4
establish [1] 59/5
estimate [1] 28/13
et [8] 1/3 3/3 52/15 54/9 54/23 70/11 91/22 91/22
Ethnics [1] 47/17
evade [1] 23/9
even [26] 5/21 10/11 10/22 12/8 16/10 44/7 53/10 55/19 55/23 58/18 64/14 68/18 72/8 72/22 74/12 76/16 77/16 78/25 84/2 84/18 86/3 87/5 88/10 88/18 89/5 89/14
event [6] 13/24 35/6 36/10 54/18 62/9 66/23
events [2] 27/18 30/6
ever [3] 65/21 87/9 93/25
every [4] 28/24 61/13 64/1 87/20
everything [13] 7/24 10/25 29/17 69/5 69/10 69/22 70/3 70/14 71/19 72/1 81/4 82/11 93/2
evidence [34] 8/3 8/22 10/4 11/16 37/23 38/3 52/1 54/23 54/24 55/4 55/4 55/5 58/1 60/21 61/2 61/4 61/10 61/16 61/23 61/24 62/6 62/14 62/21 63/13 68/2 72/6 74/2 75/22 76/4 78/1 78/22 79/15 85/18 93/23

exact [4] 38/4 38/5 68/18 70/21
exactly [10] 8/2 15/17 33/7 56/4 70/18 70/22 91/13 92/5 93/5 94/2
examination [1] 20/17
examiner [1] 20/18
example [23] 5/6 6/21 10/14 11/4 11/21 12/17 16/3 22/23 43/10 44/1 46/7 47/2 55/20 57/7 57/25 58/3 58/22 60/10 65/25 70/15 82/3 86/7 87/22
examples [2] 20/14 69/16
Except [1] 35/11
exception [2] 34/2 70/6
excuse [1] 22/16
executive [1] 36/18
exempt [6] 6/4 20/3 60/7 64/23 65/15 65/19
exemption [72] 3/21 4/3 4/4 5/5 5/6 6/7 7/10 12/3 15/2 15/21 18/21 19/7 19/8 19/11 19/19 20/25 21/1 21/3 21/16 21/17 21/18 21/18 22/13 22/13 22/25 23/14 23/16 23/19 25/12 25/16 26/12 26/13 29/20 30/25 31/4 31/14 33/17 37/9 37/10 40/9 40/15 41/6 41/19 42/7 45/1 45/2 45/2 48/8 48/18 48/20 50/22 51/1 51/3 53/6 54/6 55/16 57/17 60/4 61/17 63/21 64/5 64/7 64/7 64/14 64/25 75/18 81/13 81/15 82/11 84/13 92/7 95/8
exemptions [19] 18/21 22/25 24/12 24/19 24/24 24/24 25/4 25/14 25/23 29/18 30/18 35/17 36/25 37/7 56/12 60/2 75/14 80/13 82/15
exercise [2] 50/1 79/13
Exhibit [2] 38/13 40/5
exist [2] 24/14 36/4
existing [2] 15/10 49/19
exists [1] 59/24
exonerate [1] 35/2
exonerated [1] 27/11
expect [1] 11/25
expected [1] 61/20
expedite [1] 16/13
expeditious [1] 3/19
experts [3] 76/11 77/17 92/22
explain [3] 48/1 70/19 81/23
explained [5] 20/1 51/17 52/6 79/8 84/9
explaining [2] 46/8 48/9
explains [2] 46/13 48/14
explanation [4] 12/17 15/24 16/6 77/23
explicitly [8] 7/25 13/19 14/17 15/18 18/12 39/9 49/23 50/12
expressed [1] 29/23
extensive [2] 29/19 32/22
extent [6] 6/15 25/10 29/10 37/15 73/17 95/19
extreme [2] 26/3 86/1
extremely [3] 61/18 69/21 77/9
eye [1] 82/6

F
F2d [1] 94/24
Fabish [10] 75/21 76/2 76/17 76/18 76/19 76/22 78/25 79/1 80/6 93/19
fabrication [2] 55/5 61/16
face [1] 60/23

Facebook [4] 83/17 84/12 84/15 84/20
faced [1] 94/15
fact [27] 5/3 8/12 8/18 11/5 11/19 13/1 13/11 14/11 15/6 16/21 18/4 18/4 19/2 27/8 27/12 30/6 36/6 36/22 38/13 52/10 53/5 65/13 69/6 84/18 86/19 92/16 93/10
factor [5] 26/19 27/25 53/15 85/5 85/6
factors [1] 53/21
facts [8] 31/3 33/2 37/23 38/3 41/21 79/22 80/6 80/7
factual [6] 39/23 52/24 53/23 60/18 60/23 66/9
fails [1] 79/25
fair [9] 69/3 69/19 70/20 71/2 71/11 71/20 73/12 74/21 75/7
fairness [2] 44/8 74/3
faith [10] 13/22 14/15 15/11 24/11 28/25 29/5 29/6 29/12 34/5 34/18
fall [5] 6/16 9/11 18/21 18/24 52/23
falls [4] 7/9 7/12 7/18 14/6
false [1] 92/14
far [7] 39/7 56/8 61/11 70/17 73/22 83/22 85/9
favor [2] 81/7 82/16
FBI [6] 20/17 51/25 56/24 68/11 68/14 79/5
FBI's [1] 79/13
FCC [1] 53/19
FD [1] 79/4
federal [6] 2/2 4/3 13/20 15/19 90/1 90/23
Feed [1] 3/13
feel [3] 4/17 38/16 78/15
fell [1] 29/19
felt [1] 92/2
few [6] 25/21 53/5 60/5 65/17 66/3 85/15
fewer [1] 23/18
fifty [1] 63/15
figure [4] 81/6 82/19 82/19 94/9
figures [1] 87/23
figuring [1] 88/21
file [2] 54/7 54/11
filed [4] 6/12 41/5 59/25 90/20
final [16] 19/3 31/5 32/5 33/8 39/13 40/21 41/11 41/15 41/24 42/6 48/6 49/5 49/9 52/2 75/13 90/12
find [1] 91/15
findings [5] 52/3 52/25 53/23 60/19 66/9
fine [1] 16/25
first [13] 4/21 6/13 17/9 20/24 30/7 33/17 35/18 49/7 52/24 53/23 63/15 75/19 76/17
Fitzgerald [1] 95/1
five [2] 48/21 58/12
Floor [1] 1/22
focus [5] 64/18 64/21 65/10 65/19 65/21
FOIA [22] 3/24 21/1 21/21 24/7 28/21 29/3 29/18 29/19 30/10 30/12 30/18 35/17 37/7 41/5 43/17 70/4 71/12 71/14 75/24 82/19 91/12 94/10
follow [1] 72/3
following [1] 25/20
footnotes [1] 60/22

F

foreclosed [2] 73/18 73/19
forego [1] 44/19
foregoing [1] 97/7
foremost [1] 75/19
forensic [2] 20/17 20/17
foreseeable [3] 45/4 81/16 81/17
form [2] 15/16 61/10
formal [2] 41/11 41/20
forthright [1] 45/20
Forty [1] 58/12
Forty-five [1] 58/12
forward [3] 3/7 70/17 76/3
found [6] 27/7 44/13 65/21 69/16 74/12 80/16
foundation [2] 79/6 79/24
four [2] 85/20 88/15
frankly [3] 10/21 55/16 77/10
frequently [1] 83/4
fresh [1] 80/19
Friedrich [1] 74/11
Friedrich's [1] 69/14
front [3] 78/5 83/5 90/10
fruits [4] 64/19 65/10 65/11 68/21
frustrations [1] 70/11
full [4] 9/24 10/6 77/11 94/1
fully [2] 4/23 28/15
fun [1] 14/21
functionally [1] 51/16
fundamental [1] 45/23
fundamentally [3] 47/7 52/4 53/14
further [7] 23/7 23/7 25/10 44/7 74/16 88/20 97/7
future [5] 33/11 33/12 45/12 45/13 83/4

G

gag [3] 71/3 73/22 73/23
gaps [1] 10/5
gather [1] 22/10
gathered [1] 22/9
gathering [11] 19/19 19/20 20/5 22/1 22/7 22/17 22/20 23/2 68/10 68/13 68/21
gave [1] 16/3
general [51] 21/11 26/23 27/5 27/15 27/22 28/2 28/6 28/6 28/10 29/6 29/24 30/9 30/17 30/20 32/1 34/3 34/5 34/10 34/12 34/19 34/21 35/13 35/15 36/6 36/23 37/1 37/25 38/14 39/5 39/6 39/9 40/17 40/20 40/25 41/1 47/21 48/2 48/3 49/22 49/22 50/3 50/5 50/7 50/14 62/17 64/15 70/9 75/23 90/5 90/9 95/9
General's [3] 26/5 33/20 33/23
generality [1] 72/16
generalized [4] 18/6 18/10 20/19 21/12
generally [6] 5/4 61/24 63/11 68/3 70/24 83/1
generic [1] 17/14
generis [2] 39/14 51/23
George [1] 81/8
get [9] 11/9 63/3 73/3 90/10 93/2 95/14 95/17 95/24 95/25
gets [3] 50/1 52/15 60/7
getting [1] 73/7
gist [1] 56/17

give [4] 46/10 50/18 57/7 69/24
given [14] 15/11 16/21 24/1 28/21 39/3 40/7 47/23 49/2 57/19 75/9 75/9 79/20 87/18 94/14
gives [1] 56/10
giving [2] 23/9 27/20
glean [1] 28/14
glossary [1] 85/3
go [11] 3/22 5/18 50/24 57/13 62/7 72/10 72/13 76/3 89/7 93/15 95/13
goes [8] 41/7 42/8 53/9 60/8 79/23 89/5 91/25 93/3
going [23] 23/1 24/3 29/1 32/1 37/17 40/7 45/10 46/24 47/19 50/25 61/12 62/9 62/10 76/11 78/11 81/13 86/8 87/11 92/2 93/6 93/8 93/17 95/13
gone [1] 72/14
good [24] 3/10 3/11 3/12 3/14 3/15 3/18 4/6 4/8 4/20 13/22 14/15 14/15 15/11 24/11 24/13 28/25 29/5 29/6 29/12 34/5 34/18 85/14 85/18 87/3
got [6] 28/12 54/8 83/23 94/15 95/24 95/24
govern [1] 91/13
government [76] 3/22 3/23 5/14 5/25 6/12 6/23 9/16 10/16 13/12 14/21 16/16 17/23 19/23 20/22 24/12 25/3 25/12 26/14 26/16 26/25 35/22 36/18 40/11 43/20 43/21 43/25 44/3 44/4 44/5 51/3 51/11 51/14 51/20 53/4 54/1 54/4 54/7 55/8 56/5 56/25 57/3 57/8 58/3 58/21 59/15 60/25 64/8 64/23 65/18 66/10 69/4 69/11 72/6 72/24 74/13 74/20 75/19 76/5 79/7 79/11 79/11 79/15 79/24 80/25 82/25 83/1 86/9 86/23 87/22 88/5 88/7 88/10 88/19 89/8 91/7 93/24
government's [10] 48/20 55/8 56/3 59/18 61/20 64/2 70/20 74/6 94/8 94/23
governors [1] 91/12
Grand [61] 4/21 4/23 5/10 5/17 6/1 6/14 7/5 7/6 7/14 7/15 7/16 7/17 7/22 7/23 7/25 8/19 9/8 9/10 9/19 10/12 10/19 10/20 10/22 10/23 10/25 11/1 12/3 12/3 12/4 12/8 12/16 12/18 12/20 12/22 12/23 12/25 13/2 13/3 13/8 13/20 14/11 14/12 14/17 14/18 15/5 15/7 15/19 15/21 16/3 17/7 17/17 17/20 17/25 18/5 18/10 18/13 18/14 18/15 24/21 78/5 92/25
grant [1] 51/9
granularity [2] 61/7 61/12
great [2] 89/18 90/9
grips [1] 53/4
group [3] 84/15 84/20 87/15
groups [3] 83/17 84/12 87/14
guess [13] 14/9 27/14 29/4 35/11 36/21 42/2 43/10 50/22 71/11 75/2 86/16 86/24 87/3
Gun [1] 84/7

H

habeas [1] 55/20
hacking [2] 53/1 85/25
hacks [1] 84/8
had [26] 9/3 16/14 16/17 16/21 24/5

30/9 30/11 34/13 34/25 35/15 36/22 37/20 38/20 39/10 39/25 40/25 48/1 55/8 74/13 74/14 79/15 84/2 84/7 91/6 92/3 97/5
hadn't [1] 78/1
hampering [1] 55/3
hand [2] 57/9 57/9
handled [2] 79/5 90/24
happen [4] 17/4 61/14 61/15 61/16
happened [5] 4/23 5/9 42/15 60/24 91/16
happens [1] 48/12
happy [1] 25/17
hard [2] 67/7 74/20
harm [20] 5/2 5/10 7/2 7/3 7/8 41/9 45/4 45/8 45/15 54/13 55/2 57/2 57/11 59/5 59/22 60/8 61/20 81/16 81/17 86/5
harmed [1] 56/4
harms [4] 54/11 62/22 67/17 67/17
Hart [1] 56/2
has [78] 3/23 5/1 5/5 5/14 5/24 6/12 6/23 8/12 8/15 8/22 9/1 9/18 14/2 14/20 17/7 19/3 19/4 20/15 21/19 23/20 23/24 24/9 26/8 31/15 31/16 35/7 38/15 39/6 43/19 43/23 44/13 44/15 46/1 48/21 50/11 53/7 53/7 53/11 55/8 56/9 56/13 56/14 62/2 62/18 64/25 65/21 67/15 67/19 67/20 67/21 69/4 70/5 70/9 71/1 73/2 73/19 75/8 76/18 77/2 77/10 77/16 78/13 78/17 78/18 81/7 85/19 87/9 87/17 88/9 89/15 89/17 90/20 91/2 91/7 91/20 91/20 94/2 94/9
hasn't [10] 4/18 5/5 51/11 51/15 51/20 53/4 55/13 73/17 73/21 80/25
have [147]
haven't [9] 9/5 17/12 51/2 51/5 55/17 72/11 83/19 84/9 84/19
having [4] 15/4 40/11 69/5 87/24
he [44] 4/25 13/8 20/22 28/7 29/7 29/8 32/1 34/5 34/6 34/6 34/11 34/18 34/20 34/24 35/2 36/8 39/3 39/9 40/18 40/24 41/2 41/3 42/5 46/1 49/18 49/24 49/25 50/1 50/5 50/8 50/8 50/11 73/2 82/22 83/3 83/4 91/20 92/1 92/1 92/2 92/2 92/2 92/4 93/17
he's [7] 20/23 21/2 39/12 50/9 50/10 73/15 73/17
head [4] 36/19 36/20 78/3 93/3
heading [5] 22/20 22/21 22/23 64/15 65/4
headings [1] 56/16
hear [7] 4/2 4/10 16/19 24/22 25/13 26/25 47/10
heard [3] 29/15 81/15 87/9
hearing [1] 30/7
heart [1] 91/25
heavily [1] 83/2
held [4] 14/1 23/24 24/9 87/5
helpful [2] 57/12 63/10
helps [1] 91/12
her [15] 13/17 17/20 18/6 29/5 36/12 36/13 37/3 54/20 62/13 62/21 71/5 73/22 89/22 94/15 94/17
here [69] 4/15 4/16 4/17 5/1 8/3 8/7 8/17 9/13 9/23 13/25 14/5 16/13 17/1

H
here... [56] 17/10 19/13 20/4 20/18
21/2 22/16 25/24 28/16 28/20 29/1
29/20 30/6 31/19 36/12 37/17 37/24
40/12 42/12 43/9 44/22 45/5 46/3
52/13 54/14 55/16 56/4 56/19 60/18
61/8 61/21 64/8 67/5 73/23 73/25
74/17 74/21 75/8 75/8 75/19 76/25
79/3 80/7 80/19 82/1 85/9 85/12 87/7
87/17 88/9 88/10 89/14 90/5 91/3
91/25 94/4 95/16
here's [1] 91/5
hereby [1] 97/4
hereto [1] 97/10
high [13] 17/14 43/12 46/17 69/21
72/10 73/5 77/12 86/13 87/18 88/12
88/17 88/24 90/22
highest [1] 79/11
Hilary [1] 8/6
Hill [1] 90/9
Hillary [3] 80/5 89/21 94/14
him [8] 27/16 49/15 49/18 70/8 71/20
74/2 78/5 93/1
himself [1] 40/21
his [24] 4/25 30/20 30/20 31/19 33/21
34/3 34/9 39/10 39/17 40/17 40/22
45/25 47/24 49/1 70/11 71/18 72/22
74/2 74/3 75/9 78/20 84/24 89/2 93/3
history [1] 56/1
Hodge [1] 14/23
hold [2] 85/11 91/12
holds [1] 93/20
Honor [64] 3/2 3/9 3/12 3/15 4/6 4/20
5/13 6/22 7/1 8/14 13/15 15/14 16/12
18/9 19/10 19/24 20/24 23/24 24/20
25/15 28/2 30/5 33/16 35/6 35/19 36/8
37/3 38/11 42/1 42/8 44/12 45/22
46/17 47/10 47/18 50/25 54/5 56/13
56/19 56/23 57/6 57/12 61/7 62/3
62/18 63/10 66/22 68/7 69/2 70/16
72/25 73/20 75/5 75/13 77/14 79/1
80/16 81/6 83/15 85/13 87/20 91/5
94/12 94/19
Honor's [1] 80/4
HONORABLE [1] 1/14
hope [1] 87/23
how [39] 9/25 10/8 10/12 10/18 12/7
12/17 16/6 17/3 18/11 20/11 21/10
22/11 27/24 27/24 36/3 44/3 48/17
51/18 60/1 62/25 66/24 68/14 70/19
72/10 76/13 78/23 79/5 84/20 86/7
86/11 86/22 86/23 87/3 87/16 88/5
91/12 91/18 93/5 95/13
huge [1] 65/19
hundreds [1] 26/1
hunt [6] 78/18 91/21 92/13 92/17
92/20 93/13
hurt [2] 70/19 70/20
hypothetical [2] 45/23 47/8

I
I'd [1] 66/22
I'll [14] 4/2 4/18 9/14 25/13 25/19
26/25 51/22 52/10 59/6 63/23 79/3
85/21 95/17 95/22
I'm [14] 16/18 17/23 25/17 43/10 44/12
47/16 47/18 49/7 50/25 62/12 68/2

75/14 81/5 87/3
I've [3] 94/5 95/24 95/24
i.e [1] 36/21
idea [2] 10/4 44/24
identified [3] 54/20 83/17 94/20
identify [7] 3/7 47/14 61/1 62/13 66/17
82/13 84/16
identifying [2] 10/22 86/14
identities [2] 7/14 7/15
identity [2] 14/18 85/16
idle [1] 74/17
II [1] 74/25
IL [1] 1/23
illegal [6] 75/22 76/6 77/1 78/18 91/21
93/23
imagine [1] 46/17
imminent [2] 73/2 75/9
impact [5] 45/17 45/20 71/10 87/3
87/24
impaneled [1] 9/8
impeachment [1] 32/14
impinge [1] 87/11
implausible [1] 71/19
implemented [1] 22/11
implicate [1] 40/14
implicated [1] 40/12
importance [1] 95/11
important [9] 4/13 13/24 46/19 47/20
48/11 55/6 77/9 81/14 95/14
imposed [2] 73/16 91/10
impression [1] 33/19
improperly [1] 67/16
impropriety [2] 76/6 76/6
in-camera [31] 6/21 8/4 8/8 15/9 16/11
16/20 20/21 23/25 24/2 24/8 24/10
24/16 24/17 25/21 25/25 26/17 26/25
27/25 28/18 29/13 29/20 30/3 33/17
35/9 38/12 63/1 66/6 81/7 84/18 95/4
95/5
include [2] 65/4 76/7
included [3] 59/3 65/13 68/13
including [3] 17/8 59/20 92/12
inconsistent [2] 27/17 27/23
increased [2] 94/16 94/16
incur [1] 77/6
indeed [3] 44/15 56/1 79/16
independence [1] 95/8
independent [10] 12/25 26/10 39/10
66/11 66/20 71/12 75/17 79/2 80/8
90/6
indexes [1] 52/1
indicate [3] 3/21 13/10 61/24
indicated [5] 13/9 13/10 16/10 26/18
40/22
indicates [1] 29/10
indicating [2] 36/5 70/24
indication [4] 5/18 8/25 13/4 29/9
indictability [2] 48/18 48/23
indicted [2] 49/16 49/18
indicting [2] 32/3 49/15
indictment [10] 8/6 32/9 55/18 71/24
72/1 72/4 72/7 89/21 90/19 94/17
indictments [1] 80/5
indirectly [1] 20/13
individual [12] 10/10 10/11 38/4 43/14
43/15 69/18 84/16 84/20 87/13 89/7
89/9 89/10

individually [3] 3/22 4/2 47/3
individuals [29] 7/16 14/18 18/14 23/9
31/3 33/6 33/22 39/18 42/4 43/16
74/21 85/16 85/22 85/24 86/1 86/5
86/18 86/19 87/8 87/9 88/1 88/12
88/16 88/18 88/22 88/25 89/13 89/18
92/12
individuals' [1] 90/8
inferior [4] 39/1 39/2 39/13 46/7
information [161]
inherent [2] 14/2 19/4
initiate [1] 44/19
inner [1] 15/20
innocence [1] 90/16
inquiry [2] 8/20 15/8
inside [1] 78/3
inspection [9] 6/21 15/9 16/20 20/21
23/25 24/2 24/8 81/7 84/19
inspector [1] 21/11
instance [3] 64/1 80/17 92/7
instances [6] 5/8 50/5 69/16 81/18
85/1 85/2
Instead [3] 28/10 32/24 69/11
insufficient [1] 22/14
integrity [4] 9/9 9/13 9/16 26/8
intelligence [3] 19/12 19/20 21/19
intelligent [1] 21/7
intend [1] 41/10
intended [1] 40/8
intention [2] 50/13 89/5
interacted [1] 85/24
interactive [1] 83/24
interest [71] 7/7 14/3 16/13 26/3 26/10
26/20 40/14 44/25 45/1 77/12 77/13
78/13 79/2 79/17 79/19 79/21 80/2
80/12 80/17 80/18 80/24 81/3 81/24
82/1 82/2 82/9 82/9 82/13 82/14 82/16
82/18 83/10 83/13 83/19 84/2 84/3
84/4 84/10 84/13 84/21 85/9 85/10
86/1 86/6 86/13 86/20 87/17 87/18
87/19 88/2 88/4 88/8 88/9 88/11 88/12
88/13 88/17 88/18 88/20 88/24 89/1
89/14 89/15 89/18 90/1 90/8 91/7 92/8
93/22 94/10 94/16
interested [1] 91/15
interests [5] 19/5 35/25 40/10 53/13
79/19
interfere [2] 51/19 74/3
interference [3] 5/6 12/1 22/2
internal [8] 13/12 38/25 39/12 40/2
42/14 43/5 45/10 47/5
Internet [2] 58/4 59/17
interpret [1] 71/23
interpretation [2] 17/19 69/15
interpreted [1] 17/8
interpreting [1] 25/4
interview [2] 12/10 51/25
interviewed [1] 12/12
intimidation [4] 60/11 61/14 62/4
62/10
intruded [1] 90/7
intrusion [1] 94/16
intrusive [1] 89/22
invasion [1] 5/7
invested [1] 33/3
investigate [2] 23/3 47/24
investigated [1] 89/16

I
investigation [42] 5/2 5/7 9/13 11/4 12/2 22/22 23/2 38/18 41/15 49/1 49/3 55/15 64/22 65/11 65/12 76/13 76/13 77/2 79/5 79/9 79/13 79/23 80/8 80/15 80/19 80/22 81/11 82/6 82/7 85/4 85/6 85/17 86/2 86/4 87/17 88/5 88/20 88/23 90/17 91/7 91/8 91/17
investigations [15] 21/11 21/24 22/1 52/9 53/17 53/19 53/20 54/21 55/2 55/10 55/11 55/13 58/22 59/2 68/12
investigative [15] 20/5 20/12 21/10 21/25 22/6 22/17 48/1 54/7 54/8 64/18 65/18 65/21 68/9 68/22 79/4
investigatory [1] 64/19
involved [3] 33/22 77/22 83/2
involves [1] 79/24
involving [3] 20/10 80/4 89/20
irrelevant [1] 7/4
is [325]
isn't [7] 9/16 31/22 40/11 45/16 51/10 61/8 93/16
issue [20] 6/3 12/20 16/8 17/1 24/3 26/17 27/9 34/23 37/18 38/24 42/19 47/6 51/24 53/3 53/18 60/17 71/2 71/3 77/9 84/21
issued [5] 31/7 48/10 73/21 74/9 74/15
issues [8] 3/20 4/10 16/15 17/22 39/16 39/23 39/23 83/5
it [183]
it's [76] 4/13 6/10 6/11 6/13 8/6 9/7 10/7 10/25 11/13 12/4 12/6 12/24 13/24 14/14 14/24 16/15 17/6 17/9 17/10 18/9 25/21 25/24 27/3 27/6 28/4 28/12 28/17 31/11 31/12 33/12 38/15 39/14 39/14 40/1 40/20 45/3 45/5 46/6 46/18 48/11 49/10 51/23 52/3 54/8 55/21 57/12 60/16 61/18 63/10 63/16 64/6 64/23 65/16 67/9 71/19 72/9 72/17 72/18 74/6 77/10 78/8 78/17 81/5 81/5 82/8 82/14 82/21 83/11 83/12 89/15 93/4 93/4 93/16 94/4 95/14 95/19
item [1] 75/13
its [13] 14/1 15/12 16/16 21/11 24/12 51/16 55/9 59/24 60/23 65/22 79/14 79/16 80/1
itself [23] 6/6 9/10 27/18 27/19 27/24 28/18 29/11 30/2 35/9 46/20 57/13 60/19 60/20 60/23 62/19 64/25 65/3 67/12 74/9 77/18 79/8 91/8 93/12

J
Jackson [5] 69/9 71/1 72/5 73/4 74/13
Jackson's [1] 71/16
jail [1] 91/22
Janet [1] 90/9
JASON [3] 1/3 3/3 3/13
Jay [1] 1/17
Jeff [1] 81/8
jeopardize [1] 57/10
jeopardy [1] 87/2
John [1] 1/18
Jones [4] 2/5 97/2 97/13 97/14
Jonesboro [1] 83/21
Jr [12] 77/19 77/21 78/4 78/9 78/12

81/5 81/6 82/3 92/19 92/25 93/7 93/11
Juarez [1] 61/9
judge [16] 1/14 1/15 56/24 56/24 69/9 69/14 70/5 71/1 71/16 72/5 73/4 73/5 74/11 74/13 74/15 75/25
judgment [4] 38/13 40/5 44/2 51/9
Judicial [13] 8/5 8/24 37/12 37/17 38/23 42/9 42/13 43/8 47/4 55/20 80/4 80/7 94/12
Junior [4] 10/14 11/4 11/8 83/2
jurisdiction [1] 47/24
jury [64] 4/21 4/23 5/10 5/17 6/1 6/14 7/5 7/6 7/14 7/15 7/16 7/17 7/22 7/23 7/25 8/19 9/8 9/10 9/19 10/12 10/19 10/20 10/23 10/23 10/25 12/3 12/3 12/4 12/8 12/16 12/18 12/20 12/22 12/23 12/25 13/2 13/3 13/8 13/20 14/11 14/12 14/17 14/19 15/5 15/7 15/19 15/21 16/3 17/7 17/17 17/20 17/25 18/5 18/11 18/13 18/15 18/15 24/21 59/21 71/6 73/13 73/13 78/5 92/25
Jury's [1] 11/1
just [60] 8/25 10/5 10/17 10/23 10/25 12/3 13/9 14/1 14/13 15/3 15/17 18/1 18/2 18/6 18/9 19/5 20/18 21/18 22/14 23/20 25/4 25/19 26/16 29/25 33/18 33/23 36/21 36/24 38/11 38/12 38/12 38/15 42/14 43/5 45/2 46/15 47/18 53/4 54/10 58/14 59/3 59/8 63/9 65/2 67/1 70/2 70/14 71/19 72/18 77/14 84/1 85/1 85/4 86/25 88/12 89/6 91/14 93/13 93/16 94/20
just taking [1] 54/10
justice [10] 1/5 1/10 2/2 3/4 3/6 3/16 31/1 43/23 44/9 94/24
justified [1] 76/5
justify [1] 29/12

K
key [1] 87/23
keying [1] 61/25
kind [26] 7/7 12/5 14/25 19/12 20/14 21/2 48/5 50/7 54/10 54/12 55/10 61/12 67/19 67/19 67/21 70/17 72/8 74/12 74/17 76/5 76/11 76/24 82/25 91/24 92/3 93/22
kinds [5] 17/22 62/22 62/23 76/12 83/4
knew [4] 40/5 40/6 73/12 84/15
know [49] 4/14 4/18 9/14 10/3 10/11 10/18 11/17 17/23 24/11 25/10 25/15 30/13 36/3 36/16 36/18 40/5 43/12 43/13 43/13 43/20 44/6 44/10 44/25 49/19 50/4 55/12 58/4 58/23 59/1 60/22 63/21 63/21 68/3 68/6 70/25 71/22 80/14 80/23 84/20 84/20 84/24 86/8 86/10 88/1 91/19 92/22 94/4 94/4 94/11
knowing [4] 68/1 83/23 88/4 91/7
known [2] 5/16 8/11
Kushner [3] 11/8 81/5 82/3

L
labor [1] 53/18
laid [2] 41/19 43/6
language [4] 17/14 64/3 65/3 65/25

large [3] 10/3 10/7 10/17
largely [3] 19/13 19/21 20/4
last [3] 9/21 24/10 83/15
later [5] 48/10 72/6 73/3 80/16 90/7
law [28] 1/17 1/17 1/18 1/21 14/22 19/18 20/2 23/16 25/11 31/2 33/2 37/23 38/3 41/21 54/6 54/12 61/8 61/17 65/2 65/16 75/20 75/20 79/18 85/14 85/18 90/1 90/15 92/23
lays [1] 39/5
lead [4] 55/2 55/3 55/4 62/9
leading [5] 44/13 44/18 44/18 44/22 45/7
learn [3] 4/23 5/9 9/18
least [18] 15/25 16/5 27/10 27/20 29/10 31/22 34/8 52/8 61/3 66/15 71/3 72/15 78/7 82/9 83/12 85/2 92/24 93/18
leaves [2] 7/6 82/2
led [2] 42/18 43/6
ledger [1] 86/6
left [2] 72/19 75/14
legal [13] 15/15 17/14 17/19 18/1 25/6 34/24 37/22 75/20 76/10 76/18 77/17 80/1 92/22
legally [1] 64/5
legislative [1] 56/1
legitimate [1] 57/10
lengthy [1] 90/19
LEOPOLD [3] 1/3 3/3 3/13
less [1] 77/11
let [6] 4/19 26/16 50/18 55/11 58/13 86/8
letter [3] 27/14 38/14 40/22
letters [1] 33/20
level [5] 17/14 56/7 61/7 69/22 72/15
levels [1] 79/11
life [2] 83/7 83/8
light [4] 76/22 79/4 80/10 86/23
lightly [2] 28/12 56/15
like [14] 5/3 7/8 24/23 39/15 40/2 44/17 45/12 47/13 53/18 69/2 74/13 83/3 83/21 88/21
likelihood [6] 69/13 71/18 71/21 72/9 72/21 73/9
likely [1] 79/12
likewise [1] 44/23
limitation [2] 49/14 73/16
limitations [1] 22/9
limited [3] 23/15 38/20 64/7
line [4] 37/4 37/5 49/6 63/12
lingering [1] 51/1
link [2] 54/13 54/14
linkage [1] 63/17
linked [1] 72/15
links [1] 52/19
list [2] 58/23 65/19
listed [1] 24/25
lists [2] 58/15 62/20
litany [1] 76/9
literally [2] 61/12 86/6
litigation [4] 42/21 42/25 60/15 60/17
litigations [1] 61/6
little [2] 50/13 67/10
living [2] 83/6 83/8
local [7] 43/10 43/18 69/15 74/9 74/10 74/18 87/22

L

LOEVY [2] 1/21 1/21
logically [2] 16/2 72/3
long [2] 38/9 42/11
longer [2] 7/21 33/9
look [18] 10/8 18/12 23/4 25/1 28/3 48/11 54/16 57/13 58/13 62/7 64/12 66/24 67/7 70/16 77/19 80/4 80/5 87/18
looked [1] 37/5
looking [8] 9/9 10/5 36/12 62/12 63/5 65/25 73/24 73/25
looks [2] 80/13 80/14
lot [11] 10/12 25/1 26/20 43/22 48/21 53/18 53/20 62/16 71/23 71/25 92/12
low [2] 88/18 88/20

M

machine [3] 2/11 97/4 97/9
made [43] 4/25 5/22 11/20 27/4 27/22 28/2 29/7 29/24 30/1 30/16 30/20 31/10 34/2 34/12 35/12 36/23 37/19 37/20 38/4 41/12 41/16 42/5 43/11 43/19 43/20 43/25 44/10 44/11 44/16 46/6 46/19 47/1 48/9 59/23 72/22 81/22 90/18 90/20 92/1 92/4 92/12 92/15 95/4
maintain [1] 17/24
majority [1] 54/18
make [35] 4/22 5/13 5/19 6/23 8/23 9/21 16/22 24/24 25/19 33/10 39/4 39/11 39/25 40/24 41/1 41/2 41/3 42/4 46/1 46/13 48/16 48/19 49/9 59/7 64/3 66/19 67/25 69/21 71/5 71/9 71/12 71/17 72/23 76/19 76/22
makes [5] 20/2 33/11 44/5 59/24 70/2
making [9] 35/23 42/18 42/22 43/2 43/6 45/15 73/8 89/4 95/2
Manafort [3] 6/12 11/9 82/3
Management [1] 74/11
manner [2] 79/17 91/11
many [12] 12/6 33/1 52/13 52/22 65/15 65/15 70/9 80/7 80/15 80/16 85/1 90/14
map [1] 58/17
mapping [3] 58/1 58/18 59/12
maps [1] 32/20
Marc [1] 1/17
March [1] 40/22
March 27th [1] 40/22
marked [4] 21/21 28/21 40/20 68/8
marking [1] 29/2
markings [2] 30/10 30/12
massacre [1] 83/21
material [51] 4/21 7/9 7/12 7/14 7/17 8/2 13/5 14/20 17/2 17/9 17/11 17/12 18/10 18/11 18/13 18/19 19/1 19/5 20/3 20/24 21/17 31/5 35/10 38/19 48/21 54/8 59/16 60/7 63/4 63/11 63/16 63/21 63/24 64/22 65/14 66/7 66/8 67/14 67/15 68/8 69/13 69/17 70/1 71/16 71/18 72/9 72/21 73/9 74/4 76/4 79/4
materially [1] 72/4
materials [3] 20/10 20/12 64/9
Matt [2] 3/12 4/6
matter [10] 10/20 17/6 17/19 24/10

52/12 52/17 56/18 63/7 89/8 96/1
matters [11] 7/6 13/19 14/16 23/12 26/21 33/23 35/22 41/14 57/2 69/1 73/2
Matthew [1] 1/21
may [27] 8/2 8/9 13/12 16/25 24/14 26/20 34/7 34/18 38/21 43/14 46/25 49/6 52/9 52/9 60/9 60/15 60/21 61/22 64/23 73/11 86/17 87/14 88/7 88/8 93/15 95/18 95/20
maybe [9] 45/13 45/14 52/1 59/15 69/18 81/5 84/18 87/23 92/3
McKeever [5] 14/2 17/1 17/2 17/4 19/2
me [28] 3/16 12/6 15/9 19/10 22/17 24/16 26/16 26/23 27/3 27/6 29/11 29/13 35/18 44/7 49/10 50/18 56/10 57/7 58/13 62/25 67/8 67/10 67/10 67/25 71/11 85/20 86/20 86/25
mean [40] 10/7 11/17 11/19 13/8 15/3 15/23 18/6 24/3 24/5 27/2 29/22 36/2 36/20 43/20 44/1 45/17 57/5 61/8 66/15 67/1 67/2 67/6 67/8 70/23 70/23 70/25 71/8 74/24 75/6 83/2 83/10 86/12 86/13 86/17 87/21 89/6 89/8 89/10 93/4 93/4
meaningful [2] 59/5 85/6
means [2] 23/9 31/14
meant [3] 21/9 61/18 94/22
measure [1] 23/3
measures [2] 22/24 91/10
mechanism [1] 50/3
mechanisms [1] 32/11
media [10] 6/13 22/24 23/4 27/20 28/12 34/9 53/1 59/14 73/6 85/24
meet [4] 72/10 76/16 77/13 78/24
meeting [3] 10/15 11/7 77/20
member [1] 87/15
members [1] 87/14
memoranda [2] 48/5 48/7
mens [2] 78/2 93/1
mentioned [10] 31/7 38/15 46/17 51/2 53/8 57/25 63/19 63/23 65/18 88/16
mentions [2] 58/21 85/1
mere [1] 85/1
merely [2] 86/3 88/16
merges [1] 19/11
messages [1] 83/18
met [2] 8/3 40/22
methodologies [1] 68/16
methods [8] 19/12 21/8 21/19 21/25 23/21 61/6 64/19 65/4
might [17] 9/2 10/12 13/21 22/10 25/25 46/13 48/4 48/8 48/14 65/24 67/23 76/7 76/8 78/20 86/16 89/7 93/15
mimmick [1] 35/14
minimis [2] 84/1 84/3
minor [1] 94/20
minute [1] 50/19
mirror [1] 30/17
misconduct [1] 76/1
misses [1] 4/12
missing [1] 87/3
moment [2] 62/8 66/23
Monday [1] 1/10
more [23] 12/10 16/9 16/20 18/8 23/15 23/17 23/17 23/18 23/18 24/20 25/6

56/19 56/20 62/17 66/11 66/13 66/20 70/18 71/5 71/13 78/24 80/14 83/1
morning [9] 3/2 3/10 3/11 3/12 3/14 3/15 3/18 4/6 4/8
most [3] 3/19 12/2 90/18
Motion [2] 38/13 40/6
motivated [1] 78/19
move [6] 4/4 19/8 26/16 30/23 63/8 77/15
moves [1] 52/14
moving [1] 37/9
Mr [7] 11/8 35/4 70/3 74/1 77/4 82/22 83/2
Mr. [23] 11/9 32/5 34/1 34/4 34/23 49/8 69/7 69/19 69/23 69/24 70/12 70/14 70/20 71/25 72/1 72/2 72/18 73/1 73/10 73/11 77/1 83/2 89/5
Mr. Manafort [1] 11/9
Mr. Mueller [6] 32/5 34/1 34/4 34/23 49/8 77/1
Mr. Stone [13] 69/7 69/19 69/23 69/24 70/12 70/14 71/25 72/1 72/2 72/18 73/1 73/11 89/5
Mr. Stone's [2] 70/20 73/10
Mr. Trump [1] 83/2
Ms [23] 7/13 7/21 8/7 8/15 8/22 13/16 15/17 17/13 17/18 18/1 21/22 22/4 23/7 28/15 28/16 28/25 30/17 35/14 36/10 54/19 62/2 68/23 69/6
Ms. [9] 13/22 14/7 14/15 18/12 21/20 30/1 36/22 37/2 80/11
Ms. Brinkmann [3] 30/1 36/22 37/2
Ms. Brinkmann's [5] 13/22 14/7 14/15 18/12 21/20
Ms. Clinton's [1] 80/11
much [5] 4/22 28/13 79/12 80/10 80/23
Mueller [13] 27/4 27/5 32/5 34/1 34/4 34/23 47/23 48/2 49/8 57/24 74/25 77/1 77/4
Mueller's [1] 49/14
multiple [2] 75/17 78/14
must [9] 15/1 19/1 20/3 23/10 31/15 69/11 71/17 76/2 76/3
my [11] 4/13 25/20 27/25 35/18 45/24 51/7 66/11 66/22 95/22 97/9 97/10
myself [1] 66/21

N

N.W [1] 2/7
name [7] 63/13 77/11 78/8 86/7 87/3 87/10 97/11
names [8] 11/12 14/18 15/24 61/3 62/16 68/5 85/2 86/14
narrative [5] 23/5 54/22 61/10 74/1 92/14
narrow [2] 52/16 69/16
narrowed [2] 60/7 60/7
national [8] 4/5 19/8 20/25 21/4 21/6 21/24 22/25 23/11
nature [9] 24/1 31/17 33/13 48/6 52/11 52/11 54/14 60/17 73/6
near [1] 21/1
necessarily [4] 32/16 46/24 52/15 87/2
necessary [9] 5/22 29/20 30/3 58/8 59/5 73/7 73/11 78/2 94/3

N

need [19] 4/18 8/7 17/24 25/10 38/18 50/24 52/18 63/21 63/22 66/5 66/11 71/11 72/10 72/13 75/11 76/25 77/3 77/13 80/14
needed [3] 16/11 35/25 72/14
needs [3] 23/19 60/1 72/20
negligence [1] 76/7
neutral [1] 26/10
never [4] 12/15 64/10 65/20 89/16
nevertheless [1] 79/16
new [2] 11/21 42/22
next [2] 17/4 25/9
NLRB [2] 53/18 60/10
no [53] 1/4 1/9 4/12 5/1 5/5 5/10 5/18 7/6 7/11 7/21 8/3 8/7 8/17 8/21 8/25 10/3 10/13 12/16 13/3 14/2 16/6 19/4 23/7 27/8 27/10 28/25 30/13 30/19 33/9 36/8 38/8 46/3 49/14 50/5 50/9 51/9 52/20 56/20 58/1 58/20 61/11 63/17 63/20 65/20 67/4 71/15 73/23 78/4 81/22 83/10 85/13 86/6 87/9
non [4] 33/13 48/18 48/23 59/2
non-charged [1] 59/2
non-deliberative [1] 33/13
non-indictability [2] 48/18 48/23
none [2] 77/23 87/19
nonhuman [1] 84/12
nonpublic [1] 82/19
Nora [2] 8/5 94/13
Normally [1] 51/24
not [204]
note [6] 51/22 59/6 63/10 63/23 76/19 80/3
noted [2] 82/22 95/6
notes [4] 25/20 47/5 52/1 97/9
nothing [7] 24/20 48/21 56/19 63/7 87/19 91/18 95/10
notice [2] 28/8 90/24
noting [1] 38/16
notwithstanding [3] 20/2 23/24 69/20
nova [2] 56/11 59/8
November [3] 59/21 73/3 75/10
novo [1] 58/7
now [14] 7/20 9/3 18/4 22/12 24/4 26/17 35/6 36/3 73/5 74/1 74/8 81/20 89/12 93/20
Number [2] 3/4 12/9
numerous [1] 55/18
NW [2] 1/19 2/3

O

obstruction [2] 27/12 35/1
obtained [1] 90/17
obviate [1] 71/11
obvious [1] 89/18
obviously [16] 11/17 12/15 16/13 17/12 17/24 24/9 24/11 26/19 32/13 43/22 71/8 72/7 72/11 77/9 92/11 92/22
occasions [1] 48/2
occurred [7] 11/20 27/16 75/22 76/1 76/7 76/8 84/25
occurring [3] 13/19 17/7 17/20
October [1] 9/8
of granularity [1] 61/7
off [4] 26/15 67/6 85/5 86/17

offhand [1] 65/18
office [36] 12/20 12/24 13/13 28/21 29/1 29/14 30/7 31/6 31/9 31/19 31/19 32/10 33/9 33/9 33/11 34/13 36/4 36/9 36/11 36/14 37/4 40/12 43/11 43/18 44/10 46/4 46/13 52/3 52/25 66/9 68/12 68/23 88/21 89/14 92/1 93/6
officer [3] 39/2 39/13 46/7
officers [1] 39/1
offices [3] 11/19 41/15 43/3
official [13] 2/6 5/25 6/3 6/5 6/10 31/9 31/18 40/4 46/5 82/23 97/2 97/8 97/14
officials [3] 40/11 42/17 82/25
often [1] 90/22
oh [1] 18/10
OIC [1] 30/11
OIP [1] 68/8
okay [23] 4/19 16/1 19/6 19/25 25/8 25/19 30/22 33/15 37/8 38/9 41/24 47/9 50/22 50/24 57/20 63/7 66/10 69/1 84/19 88/14 91/4 94/18 95/10
once [3] 14/24 43/17 43/18
one [35] 11/13 23/11 25/23 28/25 29/18 31/2 32/13 32/24 32/25 33/1 36/17 37/18 39/22 39/22 39/24 41/21 42/23 45/24 48/12 48/20 51/16 57/9 63/9 63/12 66/17 74/24 77/14 77/15 85/5 85/20 85/21 87/9 92/20 94/19 96/1
ongoing [9] 33/22 35/22 53/10 54/18 54/20 55/1 57/2 73/1 79/10
ongoingly [1] 83/8
only [21] 7/8 13/18 14/16 15/17 17/13 20/3 21/16 22/4 23/23 34/24 37/10 40/6 51/10 59/12 64/13 69/15 70/6 74/8 89/4 90/18 95/5
open [2] 43/21 72/5
opening [2] 9/7 24/25
operation [3] 15/18 33/10 85/25
operations [3] 53/2 64/20 68/22
operative [3] 31/7 31/18 32/9
opinion [1] 89/25
opinions [1] 92/23
opponent [3] 40/16 45/24 59/7
opportunities [3] 9/4 16/14 16/21
opportunity [2] 16/17 27/21
opposing [2] 47/3 57/25
opposite [1] 77/3
opted [1] 93/11
order [27] 3/25 32/14 32/15 42/17 42/20 64/24 66/11 69/10 69/14 71/3 71/3 71/13 71/13 71/16 73/4 73/8 73/22 73/23 74/5 74/8 74/9 74/12 74/15 75/9 78/10 86/18 89/3
ordered [2] 95/5 95/5
orders [1] 74/19
originate [1] 10/11
origins [2] 76/12 91/17
other [53] 4/12 5/5 5/9 9/18 9/22 9/22 11/18 16/23 18/16 20/20 24/6 24/7 24/17 24/22 25/24 31/3 32/10 33/6 33/11 33/22 33/25 39/16 39/18 41/14 42/3 43/16 47/5 48/12 48/14 52/1 52/9 54/20 57/9 59/3 63/23 68/12 69/1 76/11 77/15 77/21 80/25 81/21 82/25 83/13 83/16 84/9 86/5 88/19 92/21 93/15 93/17 95/24 96/1

others [2] 35/21 35/25
otherwise [6] 6/12 10/21 46/21 52/20 73/11 83/6
our [19] 9/7 12/13 17/6 17/6 17/10 19/13 20/1 21/13 24/25 30/7 38/13 40/5 44/8 47/19 79/7 79/24 88/5 90/15 94/20
out [16] 7/1 17/4 33/20 39/6 41/19 43/6 46/9 52/22 69/21 72/19 78/16 79/10 79/18 81/6 88/21 89/5
outset [1] 51/22
outside [1] 39/7
outweigh [2] 88/2 88/25
outweighed [1] 88/13
outweighs [3] 79/19 85/9 87/19
over [20] 14/21 14/21 26/12 31/13 31/13 52/16 54/10 60/6 69/9 69/25 70/5 70/15 70/21 78/9 80/21 80/21 89/17 89/17 91/2 91/2
overall [1] 45/15
overasserted [1] 24/24
overcome [4] 77/13 80/18 82/12 93/21
overlap [2] 64/1 65/3
overlapping [1] 65/2
override [2] 50/4 50/8
overruled [1] 49/23
overwhelming [1] 95/16
overwithholding [1] 6/24
owed [1] 23/10
own [2] 9/12 39/10

P

p.m [1] 96/4
page [17] 9/7 12/9 57/13 57/15 57/16 58/4 58/11 62/13 63/12 63/14 63/14 64/12 64/13 67/7 74/24 81/9 94/21
pages [11] 26/1 52/24 53/23 63/14 65/15 66/17 66/17 66/18 67/1 67/3 97/7
painting [1] 18/11
Panther [2] 37/13 42/23
Papadopoulos [1] 81/9
paper [2] 37/19 37/20
papers [1] 43/5
paragraph [4] 8/25 58/11 58/14 65/25
paragraphs [10] 56/16 57/19 57/21 58/10 64/13 64/14 65/9 67/8 67/11 67/13
part [5] 9/13 10/7 36/9 79/10 95/20
partial [1] 71/3
particular [13] 12/7 13/21 16/5 16/7 19/7 24/19 39/21 57/18 61/23 61/23 62/1 68/15 95/19
particularly [3] 25/22 53/23 81/14
parties [4] 3/7 71/10 73/8 87/8
parts [5] 10/8 10/9 52/21 61/13 88/19
party [2] 37/13 42/23
passage [7] 12/7 12/17 13/4 16/5 25/2 61/23 62/1
passages [5] 10/11 12/5 17/15 25/1 69/18
past [2] 46/20 83/3
pasted [1] 24/25
pattern [1] 87/25
peak [1] 89/15
peeled [1] 42/21
pending [11] 12/1 52/10 55/1 55/24

P
pending... [7] 56/9 57/11 57/18 58/21 58/24 59/2 61/6
people [30] 6/1 6/14 11/13 12/6 44/8 77/4 77/21 77/23 78/3 80/23 81/18 81/21 82/4 82/5 82/25 83/20 83/22 83/25 84/16 84/21 85/2 85/3 85/5 85/5 91/19 91/21 91/22 92/23 93/13 93/17
people's [2] 11/11 81/3
percent [2] 28/13 63/5
perfect [1] 66/5
performance [1] 9/10
perhaps [1] 77/5
period [1] 32/3
person [7] 6/13 35/23 48/4 76/4 83/6 86/17 87/7
person's [1] 81/8
personal [2] 47/5 82/11
pertaining [1] 72/25
pertains [3] 55/1 56/18 56/19
phase [1] 59/21
photographs [1] 62/12
phrase [1] 83/24
pick [1] 71/6
picking [1] 81/12
piece [1] 70/12
pieced [1] 75/6
pieces [2] 62/20 70/21
Pittsburgh [1] 95/17
place [7] 17/9 27/19 32/2 73/4 74/12 74/19 75/9
places [1] 15/23
plain [1] 54/15
plainly [2] 35/8 55/2
plaintiff [4] 1/4 1/8 1/17 89/4
plaintiff's [3] 13/25 21/15 60/25
plaintiffs [8] 3/20 4/2 4/9 7/1 7/20 8/1 13/15 55/17
plausibly [1] 17/16
play [2] 23/14 70/24
playing [1] 46/9
plays [1] 17/3
please [2] 3/8 47/15
plenty [1] 67/3
point [29] 4/21 8/21 9/2 9/15 9/17 9/21 10/23 12/25 13/6 16/10 16/18 16/24 20/9 24/20 32/7 35/18 36/17 38/12 38/12 50/2 50/23 52/22 54/12 63/9 78/16 80/3 94/19 95/1 95/3
points [3] 33/16 47/18 48/19
policy [14] 28/22 29/1 29/15 30/8 31/24 32/2 36/11 36/15 37/4 39/8 49/16 49/19 49/23 79/18
political [3] 87/23 91/20 92/20
politically [1] 78/18
portion [2] 66/16 66/18
portions [4] 54/22 57/24 66/25 67/18
posed [2] 70/8 73/9
position [14] 8/12 8/16 26/21 34/11 34/14 35/11 49/7 71/9 87/24 94/8 94/10 94/14 95/19 95/21
positions [2] 19/7 27/17
positon [1] 56/2
possible [4] 95/12 95/15 95/18 95/22
possibly [2] 17/16 80/23
post [10] 31/12 31/12 33/12 37/13 42/10 46/22 46/23 48/10 49/11 55/18

post-decisional [9] 31/12 31/12 33/12 37/13 42/10 46/22 46/23 48/10 49/11
post-indictment [1] 55/18
posture [1] 60/6
potential [5] 46/11 46/12 48/4 48/13 57/11
potentially [5] 64/22 66/14 74/22 76/23 79/24
practices [2] 21/9 90/15
pre [15] 31/11 31/14 31/20 37/11 37/16 38/2 39/15 41/8 41/25 42/12 45/3 45/6 46/21 48/7 49/12
pre-decisional [15] 31/11 31/14 31/20 37/11 37/16 38/2 39/15 41/8 41/25 42/12 45/3 45/6 46/21 48/7 49/12
precedent [1] 69/20
predate [1] 31/15
predates [1] 76/17
predicate [1] 24/16
predicated [1] 92/14
preFabish [1] 76/21
preference [1] 66/21
prejudice [7] 69/13 71/18 72/9 72/21 73/10 74/3 74/5
prejudicial [2] 69/17 72/20
prepared [2] 42/20 75/14
preparing [1] 29/2
present [1] 55/9
presented [1] 13/11
president [39] 12/10 12/11 12/13 12/15 12/21 13/7 27/11 31/23 31/24 32/4 32/8 32/10 33/6 35/2 39/19 42/3 48/18 48/22 48/23 48/25 49/2 49/4 49/7 49/13 49/15 49/16 49/19 50/11 70/7 70/10 76/9 77/2 77/7 77/16 78/17 81/9 91/19 92/13 93/16
president's [3] 32/18 32/23 77/6
presidential [1] 22/3
presiding [2] 69/9 70/5
press [2] 34/6 34/17
pressure [1] 92/3
presume [1] 90/16
presumption [1] 15/11
pretrial [2] 55/18 73/14
pretty [5] 11/12 67/7 72/10 80/9 81/5
prevail [1] 75/18
prevent [1] 57/3
prevented [1] 49/15
previously [1] 26/18
price [1] 90/21
primarily [3] 9/7 9/18 20/9
primary [3] 5/8 5/24 77/25
prime [1] 84/17
principle [1] 34/24
prior [3] 17/5 39/1 60/14
privacy [49] 1/7 1/18 3/5 3/10 5/7 11/10 17/24 75/14 75/18 77/12 79/19 80/13 80/18 81/3 81/8 81/13 82/2 82/8 82/9 82/11 82/16 82/18 83/10 83/19 84/1 84/4 84/13 84/21 85/9 85/21 86/1 87/12 87/18 88/3 88/11 88/17 88/24 89/15 89/18 89/23 90/8 90/11 90/16 91/1 92/6 93/21 94/10 94/16 94/17
private [2] 83/6 87/8
privilege [7] 37/10 37/15 41/7 42/11 44/16 44/20 44/24
probably [2] 10/21 78/8

problem [5] 56/8 59/11 63/18 81/19 86/12
problematic [1] 64/6
problems [1] 79/25
procedure [5] 4/4 64/24 65/11 65/12 65/22
procedures [16] 20/11 20/13 20/16 21/9 21/23 22/15 64/4 64/11 64/16 64/17 64/20 65/1 65/5 65/10 66/2 66/14
proceed [3] 11/23 44/3 69/2
proceedings [8] 2/11 7/23 7/24 15/21 60/10 96/3 97/5 97/8
process [24] 26/8 32/15 36/10 37/10 37/15 40/10 41/7 41/9 42/18 42/21 43/6 44/16 44/17 44/18 44/22 44/24 45/15 46/10 46/21 47/25 52/14 53/9 53/17 60/17
processes [4] 12/23 42/22 43/2 45/11
produced [6] 2/12 6/5 8/12 27/16 63/4 90/6
profile [3] 43/12 46/18 73/6
Programs [1] 2/2
progresses [1] 52/12
prohibited [1] 69/12
prohibiting [2] 73/8 74/16
prominent [2] 82/23 83/1
prominently [1] 70/10
promulgate [1] 90/2
properly [6] 7/9 56/12 65/15 68/24 80/16 80/22
proposal [2] 13/7 46/8
propose [1] 3/24
proposes [1] 45/24
proposition [1] 30/16
propriety [1] 28/15
prosecute [9] 39/18 41/17 41/17 43/11 43/18 44/5 44/10 47/24 90/21
prosecuted [5] 42/5 43/16 45/19 53/7 53/25
prosecution [16] 11/22 13/1 39/4 39/11 39/20 44/19 49/10 52/13 53/8 53/10 59/16 60/3 60/4 69/24 79/6 90/19
prosecutions [8] 54/19 54/19 55/1 56/9 57/19 58/2 60/2 63/20
prosecutor [3] 13/1 45/9 95/1
prosecutor's [2] 13/13 44/9
prosecutorial [2] 43/24 79/14
prosecutors [3] 45/17 68/10 68/15
prosecutors' [2] 11/19 41/14
prospective [1] 54/2
protect [5] 21/7 21/9 56/21 61/18 75/7
protected [12] 15/1 15/21 19/1 21/8 21/23 36/1 37/14 42/10 42/14 44/23 48/8 89/3
protecting [1] 40/10
protectors [1] 94/3
protects [3] 7/5 37/11 44/17
prove [6] 6/8 17/10 75/22 76/25 77/3 82/15
provide [11] 9/4 13/7 16/16 20/14 50/3 57/1 58/7 58/8 58/19 66/13 93/23
provided [17] 3/23 6/19 15/25 17/25 18/5 20/15 28/8 28/22 29/18 34/25 38/20 56/10 56/21 66/13 66/16 68/1 71/13

P
provides [2] 23/17 70/4
providing [3] 18/1 56/7 61/5
proving [1] 17/11
provisions [1] 70/17
public [91] 5/20 6/15 6/22 7/7 8/2 8/13
9/9 9/13 9/15 14/3 16/13 19/5 26/3
26/19 27/20 28/7 28/11 32/17 35/19
38/17 38/19 40/7 40/14 40/23 41/2
41/3 43/12 43/15 43/17 43/19 43/23
44/6 44/10 44/15 44/25 45/1 53/11
53/12 71/24 71/25 75/4 75/25 76/23
77/13 78/13 78/14 78/17 78/20 79/2
79/9 79/17 79/21 80/2 80/12 80/17
81/24 82/1 82/5 82/6 82/13 82/13
82/16 82/18 82/23 83/8 83/13 84/2
84/3 84/10 85/8 86/6 86/8 86/20 87/17
87/19 88/2 88/4 88/8 88/9 88/11 88/13
88/18 88/20 89/1 89/14 89/25 90/18
91/6 92/8 94/4 94/9
public's [3] 9/24 26/9 94/3
publicity [2] 73/14 84/24
publicly [6] 5/16 6/8 6/20 8/11 70/9
91/9
Puerto [2] 14/22 44/21
pulled [1] 79/16
punches [1] 79/16
purported [1] 3/25
purportedly [2] 29/8 35/16
purpose [4] 9/22 9/24 55/14 75/24
purposes [3] 14/4 19/5 76/23
pursuant [6] 15/21 25/12 29/18 31/24
49/8 73/1
put [4] 15/16 66/14 78/5 87/2
puts [1] 87/6

Q
qualifies [1] 55/24
qualify [1] 65/23
qualifying [2] 7/10 7/11
query [1] 26/16
question [14] 7/8 14/15 16/4 25/3 26/9
34/5 34/18 41/6 44/8 76/12 78/7 81/21
93/8 93/9
questionable [1] 49/10
questioning [3] 28/25 29/5 29/5
questions [11] 12/14 32/12 43/24 70/7
77/18 78/6 80/20 91/16 92/24 93/19
95/7
quick [5] 25/20 47/18 58/13 63/9
94/19
quickly [7] 27/16 38/11 95/12 95/14
95/18 95/22 95/25
quintessential [5] 7/14 14/19 18/19
18/25 31/12
quite [4] 20/6 24/24 45/14 72/7
quote [4] 9/8 20/4 20/6 44/20
quoted [4] 47/4 58/5 72/5 92/5

R
raise [1] 47/13
raised [5] 16/14 24/4 80/20 91/17
92/24
raises [2] 77/18 78/7
ranging [1] 79/9
rather [1] 89/25
rational [2] 54/13 54/14

Ray [1] 20/19
RBW [2] 1/4 1/9
re [3] 3/3 9/8 83/25
re-tweeted [1] 83/25
rea [2] 78/2 93/1
reach [2] 16/10 23/5
reached [3] 10/19 31/18 34/13
read [11] 10/2 11/12 21/20 22/18 25/2
28/20 56/14 62/19 62/21 79/3 82/24
reading [3] 16/3 16/5 38/15
reads [2] 79/22 92/5
real [3] 44/2 58/13 63/18
really [34] 6/2 10/18 10/19 12/2 12/5
12/16 17/1 17/5 18/1 19/11 20/6 20/18
24/20 24/23 25/2 25/6 29/22 32/5
39/14 39/14 40/2 40/14 46/15 47/6
48/24 51/9 53/4 54/11 65/2 67/8 72/12
77/12 81/21 81/25
reason [12] 15/14 24/8 24/13 24/17
26/24 30/2 32/20 63/25 64/6 77/25
81/14 90/4
reasonable [2] 39/8 76/4
reasonably [1] 61/20
reasons [11] 16/19 20/23 25/21 46/5
46/19 46/24 46/25 48/13 65/19 75/18
85/8
recall [2] 62/8 73/22
receive [3] 71/2 71/10 74/21
received [2] 83/18 86/21
receives [1] 86/11
recent [1] 56/24
recently [5] 14/1 65/17 74/11 84/25
91/6
recess [1] 50/20
recitation [1] 60/20
recognize [1] 55/19
recognized [21] 8/5 14/20 18/25 21/1
21/5 37/12 55/23 56/25 73/5 79/17
85/15 85/19 89/17 89/22 90/1 90/7
90/11 90/24 91/2 91/3 94/14
recommendations [1] 42/25
recommended [1] 46/9
reconcile [2] 27/3 27/6
record [13] 3/8 6/4 9/11 15/10 30/15
47/14 51/8 53/22 58/19 58/20 59/23
60/1 60/17
recorded [1] 2/11
records [5] 43/4 52/1 79/8 79/12 94/25
recount [2] 37/15 42/11
recounts [2] 38/2 45/6
redact [2] 30/21 37/1
redacted [35] 10/2 11/11 14/10 20/4
23/2 28/12 29/17 31/2 35/10 35/13
35/19 38/21 54/17 56/15 56/17 57/24
63/3 63/4 63/6 63/12 63/14 66/7 66/18
69/4 70/3 71/17 71/22 72/1 73/1 75/7
78/8 81/4 81/7 85/3 91/24
redacting [1] 75/3
redaction [9] 12/12 13/16 13/21 14/14
28/24 36/10 70/15 75/1 78/9
redactions [30] 5/19 18/4 21/5 28/16
30/16 32/22 33/1 33/19 33/24 33/24
35/24 36/7 36/14 37/5 52/19 52/21
52/22 56/18 58/18 58/19 62/25 63/2
67/1 67/2 67/4 67/5 67/22 72/13 72/15
82/4
refer [3] 94/21 94/21 94/22

reference [26] 3/21 3/24 4/14 8/10
15/12 16/7 24/4 24/12 25/13 26/20
27/1 27/5 27/11 28/23 29/6 29/7 34/22
35/1 35/2 36/6 43/13 45/21 57/9 66/1
67/23 67/24
referenced [3] 21/16 67/11 68/2
references [3] 60/21 66/3 66/4
referencing [4] 39/19 58/11 67/9
71/19
referral [1] 11/20
referred [5] 11/18 41/14 58/23 88/19
88/23
referring [2] 67/16 85/13
refers [1] 69/6
reflect [2] 37/15 42/11
regard [8] 8/4 13/9 15/13 28/16 45/16
46/1 89/3 89/12
regarding [8] 11/4 13/6 19/7 21/10
26/22 33/5 49/7 69/7
regardless [2] 30/2 95/12
regards [2] 53/6 55/10
REGGIE [1] 1/14
Registrar [2] 90/2 90/23
regulation [4] 28/9 31/8 32/9 40/20
regulations [6] 28/4 39/3 41/4 49/8
50/2 90/3
rehash [1] 42/20
rehashing [1] 46/20
relate [5] 18/4 21/19 22/21 64/9 79/9
related [7] 53/24 69/10 69/22 70/3
70/13 82/11 95/3
relates [7] 4/5 18/21 23/20 31/23
39/18 55/21 67/11
relating [1] 21/25
relationship [2] 47/21 60/11
release [35] 5/3 7/3 7/8 9/20 14/3 19/4
28/3 28/7 29/2 30/10 30/13 30/21
35/20 38/19 40/23 42/15 45/4 45/8
51/18 54/12 54/25 55/2 55/4 55/5
55/10 61/19 62/3 70/6 70/13 74/1
74/18 81/19 89/8 89/23 89/24
released [28] 5/12 10/9 10/10 24/7
26/6 27/19 30/12 34/6 34/10 34/15
35/7 40/13 40/23 44/14 45/12 59/10
61/16 64/10 69/7 69/12 73/17 74/22
81/10 84/8 87/11 89/11 91/9 94/17
releases [2] 45/8 74/16
releasing [10] 28/11 34/6 34/19 34/20
74/14 86/6 86/7 87/13 87/15 91/1
relevant [6] 9/17 33/12 59/16 63/24
78/20 85/4
relied [1] 68/22
rely [10] 8/6 9/7 14/10 15/5 15/15 18/2
18/6 75/20 76/20 79/1
relying [1] 84/15
remain [1] 8/9
remains [3] 5/15 5/21 7/21
remedy [2] 70/16 95/7
Reno [1] 90/9
repealed [1] 90/10
repeat [1] 47/19
repeatedly [3] 14/24 79/16 87/5
reply [1] 94/23
report [120]
report's [1] 54/22
reported [2] 45/18 97/4
reporter [5] 2/5 2/6 50/18 97/2 97/14

R

reporters [1] 83/17
reporting [1] 45/25
reports [2] 34/9 46/12
represent [1] 8/18
representation [3] 14/10 27/7 27/9
representations [6] 15/12 29/7 29/24 29/25 34/2 34/11
represents [1] 34/22
reputational [1] 86/4
request [2] 41/5 59/25
requested [1] 79/8
requestor [1] 80/9
require [6] 16/8 36/4 61/11 66/15 75/21 95/20
required [10] 21/3 21/3 22/12 24/7 28/7 56/19 61/8 62/24 64/24 78/25
requirement [3] 31/14 84/18 90/14
requirements [4] 3/24 23/18 51/11 54/3
requires [1] 92/23
requiring [1] 61/1
Research [2] 58/4 59/17
resolution [1] 95/14
resolve [1] 95/21
resolved [2] 95/12 96/1
resort [1] 24/10
respect [9] 15/11 41/22 48/25 49/2 49/3 49/13 50/9 51/25 52/25
respective [1] 19/7
respects [1] 29/10
respond [1] 33/17
response [7] 13/9 23/22 23/23 38/12 57/4 70/7 76/19
responses [1] 13/7
Responsibility [1] 47/17
responsive [1] 26/6
restate [1] 57/22
restrict [1] 71/4
result [4] 36/19 62/22 86/19 89/24
results [2] 38/18 49/3
resuming [1] 50/21
retrospective [1] 43/1
reveal [11] 6/15 7/23 11/1 12/17 12/22 20/13 58/6 64/10 64/18 64/25 79/12
revealed [3] 23/8 57/24 65/10
revealing [4] 7/22 12/8 15/20 57/1
reveals [2] 12/23 64/16
review [35] 8/4 8/8 16/11 23/15 24/10 24/16 24/17 25/21 25/25 26/10 26/17 26/25 27/21 27/25 28/18 29/13 29/20 30/3 30/8 30/10 33/18 35/9 36/12 38/22 58/7 58/9 58/20 58/21 59/4 63/1 66/6 67/2 95/4 95/5 95/8
reviewed [2] 29/16 63/21
reviewing [4] 30/11 38/16 51/24 59/8
Rico [2] 14/22 44/21
right [27] 11/23 19/17 34/3 38/7 41/1 43/8 43/20 44/25 45/16 47/5 52/1 58/1 58/16 59/11 60/9 64/17 70/20 71/7 71/20 73/12 75/16 88/6 91/19 93/4 94/3 94/4 95/6
rights [2] 74/23 75/7
ripped [1] 77/10
risk [4] 5/10 46/3 65/1 66/14
risks [1] 69/8
Robert [2] 9/14 9/14

Rod [1] 55/22
Rodham [2] 89/21 94/14
Roger [8] 69/5 69/11 70/8 71/19 75/1 84/22 84/23 89/2
role [1] 32/13
Room [1] 2/6
root [1] 79/10
Rose [1] 84/16
Rotenberg [1] 1/17
RPR [2] 2/5 97/14
rule [27] 4/3 4/21 5/4 5/17 5/23 6/8 6/16 6/24 7/5 7/11 7/18 9/17 10/24 13/5 14/20 15/2 17/2 17/9 17/12 18/19 46/22 69/15 74/9 74/10 74/15 92/6 95/13
ruled [1] 38/5
rules [1] 74/18
rumination [1] 43/1
run [3] 19/3 69/7 88/5
runup [1] 80/9
Russia [4] 22/2 86/11 86/17 87/1
Russia's [1] 88/7
Russian [8] 10/16 53/1 59/14 83/18 83/23 85/23 86/22 87/22

S

SafeCard [3] 76/17 85/14 93/20
said [41] 13/17 17/13 18/17 19/14 21/22 22/14 25/20 29/9 31/13 34/4 34/6 34/16 37/3 39/9 42/10 42/13 44/15 47/20 54/10 56/2 58/3 59/25 62/3 65/8 70/7 70/9 72/6 73/10 77/2 77/7 77/16 77/17 77/17 90/13 91/14 91/20 92/22 92/22 94/2 94/11 97/8
same [12] 8/2 19/13 19/22 38/4 38/5 47/2 49/21 50/10 56/21 70/21 81/20 88/17
satisfactory [1] 20/15
satisfied [2] 20/3 51/11
satisfy [1] 54/3
say [16] 14/24 15/8 18/16 21/6 35/4 50/11 62/5 70/22 72/12 72/14 79/25 82/8 82/17 85/11 86/25 91/6
saying [17] 7/2 13/8 14/9 16/8 16/11 18/20 23/13 29/8 30/15 57/8 59/15 61/13 68/2 70/23 73/17 83/11 83/11
says [30] 14/16 15/3 15/6 15/17 17/2 17/25 18/15 18/23 22/23 26/17 27/12 27/18 27/24 28/4 29/8 29/21 29/24 30/17 35/1 36/19 36/22 40/16 51/17 59/7 64/17 69/10 73/15 76/22 85/16 92/7
scales [2] 80/25 83/14
scheduled [1] 73/2
scope [6] 25/22 44/20 64/18 64/21 65/18 65/22
sealing [4] 73/4 74/5 74/8 74/12
seat [1] 73/13
second [5] 5/6 5/13 8/21 16/16 76/19
secret [2] 7/5 10/24
secret [9] 5/15 5/21 6/16 7/21 7/23 8/9 11/1 12/18 41/11
section [7] 9/16 11/6 12/1 57/17 57/18 59/14 77/20
section's [2] 9/10 9/13
sections [3] 10/3 10/17 24/22
security [8] 4/5 19/8 20/25 21/4 21/6

21/24 23/1 23/12
see [7] 11/25 17/3 17/13 17/13 22/19 62/19 67/4
seeing [1] 62/25
seek [1] 89/7
seeking [1] 18/7
seeks [1] 89/5
seem [9] 9/11 17/16 23/13 27/23 44/4 81/12 84/23 89/4 93/20
seemed [1] 29/8
seems [13] 5/24 11/12 23/17 24/23 27/2 27/6 34/20 35/4 44/7 49/10 67/10 86/20 86/25
seen [4] 17/12 60/9 72/11 94/5
selective [1] 84/5
selectively [1] 81/2
Senate [2] 14/22 44/21
Senator [1] 56/2
senators [2] 76/10 77/17
SENIOR [1] 1/14
sense [4] 16/22 24/25 63/3 76/22
sensitive [1] 17/24
sentence [1] 61/13
sentences [2] 10/10 61/13
sentencing [2] 52/15 59/20
separately [2] 29/17 31/16
sequence [2] 30/5 31/15
series [1] 32/25
serious [2] 5/10 81/25
Sessions [1] 81/8
set [3] 35/12 59/21 76/21
setting [1] 69/20
Seven [2] 19/18 51/7
several [2] 43/3 43/4
severe [1] 89/22
Shall [1] 30/23
Shapiro [2] 2/1 3/17
Shaw [1] 47/16
she [33] 8/16 8/22 8/25 9/1 9/2 14/16 15/3 18/12 18/15 18/15 18/17 29/21 29/22 29/24 36/24 37/3 45/16 62/3 62/5 62/13 69/6 69/15 71/2 71/3 71/4 73/10 73/16 73/17 73/19 73/21 90/11 90/13 94/15
she's [2] 62/16 71/8
shed [3] 79/4 80/10 86/23
Shifting [1] 26/12
shorthand [3] 2/11 97/5 97/9
should [45] 3/25 5/11 11/23 13/4 15/8 15/10 16/8 24/7 26/18 26/23 27/24 29/11 31/25 35/13 35/15 35/15 36/2 36/2 36/4 36/21 36/23 37/6 38/5 40/23 42/4 42/4 44/14 45/19 49/4 56/3 57/8 64/9 65/3 72/2 72/14 75/18 82/17 85/17 90/17 90/24 91/3 91/22 93/17 94/17 95/20
shouldn't [6] 14/9 18/2 45/13 45/14 73/18 75/6
show [13] 9/4 23/20 62/23 69/19 78/2 78/25 81/17 82/12 82/12 84/2 84/3 84/14 93/21
showing [8] 5/1 5/22 8/1 55/7 71/17 72/21 72/22 72/23
shown [6] 5/14 14/25 33/19 60/6 80/25 83/19
shows [3] 14/7 21/21 45/5
shy [1] 82/5

S

sic [1] 83/8
side [4] 28/23 80/25 83/13 86/5
sides [2] 71/1 91/17
significance [2] 9/12 26/4
significant [9] 10/8 10/9 26/19 30/6 30/13 53/16 66/18 82/1 91/1
similar [2] 46/16 74/10
similarly [1] 81/18
simply [17] 14/6 21/3 21/6 28/8 29/20 51/10 54/10 56/25 61/8 61/17 66/6 66/8 74/22 75/5 76/2 87/13 91/14
simultaneously [3] 69/23 70/1 70/19
since [5] 6/18 9/9 36/3 66/16 75/3
single [2] 25/23 61/13
singular [1] 35/23
sitting [2] 32/4 49/16
situated [1] 81/18
situation [10] 9/3 31/21 38/5 44/17 46/7 66/5 92/5 92/5 93/12 93/22
slash [1] 52/23
Smoking [1] 84/7
so [127]
social [5] 22/24 23/3 53/1 59/14 85/24
society [1] 83/1
some [49] 11/14 11/15 11/22 12/5 13/25 15/23 17/5 17/15 20/14 22/24 24/13 24/22 24/23 27/2 32/3 33/11 34/2 43/14 43/22 44/2 44/8 46/25 58/19 60/9 61/3 61/5 63/2 66/1 66/7 69/18 70/17 70/25 72/3 72/15 72/20 74/12 74/17 76/5 76/24 77/21 81/18 83/16 85/2 85/6 86/12 86/22 91/15 95/20 95/24
somebody [1] 87/1
somehow [3] 66/13 87/2 87/2
someone [8] 45/10 82/18 83/7 83/23 86/10 89/15 89/24 94/9
someone's [1] 75/7
something [24] 4/12 4/18 12/8 13/2 13/11 13/12 15/6 16/9 16/24 35/4 36/5 47/12 49/11 62/10 65/20 68/5 71/13 72/18 77/1 77/10 87/19 92/3 93/24 94/20
something's [1] 62/9
sometimes [3] 36/19 36/20 59/13
somewhat [2] 82/10 83/8
son [2] 77/6 78/20
Sorry [1] 19/15
sort [8] 19/11 20/18 31/2 31/21 35/7 39/23 48/11 84/22
sorted [1] 19/21
sorts [1] 54/8
sought [1] 12/9
source [1] 21/8
sources [5] 19/12 21/19 21/25 23/20 68/14
Southern [1] 11/21
speak [1] 50/13
speaking [1] 5/5
speaks [1] 83/4
special [85] 4/24 9/25 10/4 10/12 11/5 11/18 12/19 12/24 13/13 21/8 23/10 26/7 26/7 27/7 27/8 27/10 28/4 28/5 31/6 31/8 31/19 31/22 32/8 33/3 33/8 33/9 33/21 34/9 34/13 34/14 34/17 35/20 36/3 36/5 36/9 37/25 38/14

38/16 38/19 39/2 39/7 39/10 39/24 40/4 40/6 40/12 40/21 41/4 41/10 41/16 42/2 45/25 46/4 46/13 47/22 47/23 47/25 48/4 48/25 49/4 50/2 50/4 50/9 50/12 52/3 52/25 60/24 66/9 68/11 68/11 68/22 70/8 75/23 77/25 78/10 78/22 87/16 88/21 88/23 89/13 90/2 91/25 93/5 93/10 95/1
specific [26] 22/5 22/10 31/2 32/7 32/20 39/21 41/21 41/21 51/17 51/19 52/19 52/19 58/19 60/15 60/16 61/3 63/17 68/3 68/20 70/16 70/18 72/18 72/19 78/9 81/17 86/8
specifically [9] 17/15 27/12 29/4 29/15 34/17 42/13 61/25 65/21 68/3
specificity [3] 52/7 56/7 56/21
specifying [1] 61/2
speculating [2] 13/16 15/4
speculation [3] 13/20 14/13 74/17
split [1] 4/9
spot [1] 78/6
squarely [1] 44/19
squishy [1] 18/16
staff [3] 33/22 35/21 40/2
stage [3] 60/3 60/5 60/15
stake [4] 20/11 22/16 53/13 79/19
standard [14] 5/21 57/22 71/16 72/10 75/20 76/2 76/16 76/18 76/21 77/12 78/25 81/16 85/12 93/19
standards [2] 25/5 40/22
start [1] 4/3
started [1] 7/1
stated [1] 34/17
statement [8] 18/7 18/10 26/6 58/5 60/20 61/14 62/11 72/8
statements [18] 26/5 26/7 26/22 27/4 27/22 28/13 35/8 51/25 54/23 55/3 58/1 60/23 73/9 76/9 76/10 92/12 93/16 93/16
states [10] 1/1 1/15 18/13 46/18 76/10 81/10 84/17 87/23 88/10 97/3
status [2] 1/13 43/14
statute [6] 7/10 7/10 7/11 7/12 70/4 90/10
statutory [1] 57/22
step [7] 3/7 13/24 28/10 39/7 48/13 54/16 73/24
steps [3] 48/1 48/4 48/14
stigma [2] 86/4 87/6
still [16] 5/15 5/20 6/5 6/5 6/8 8/9 37/14 40/20 41/5 42/10 47/10 55/24 58/24 75/6 85/14 85/18
stone [24] 35/12 59/22 69/6 69/7 69/11 69/19 69/23 69/24 70/3 70/8 70/12 70/14 71/20 71/25 72/1 72/2 72/18 73/1 73/11 75/1 84/22 84/23 89/2 89/5
Stone's [3] 70/20 73/10 74/1
strand [1] 80/1
strategic [1] 47/6
strategies [1] 42/25
streamline [1] 4/11
Street [2] 1/22 2/3
strengths [4] 37/23 38/3 55/7 55/12
strong [1] 78/13
stronger [1] 55/16
structure [1] 59/13

struggling [1] 43/10
subcategories [1] 26/13
subcommittee [1] 9/9
subdivided [1] 19/16
subheadings [1] 11/11
subject [4] 5/17 17/2 17/11 41/6
submitted [7] 8/19 14/11 15/4 32/5 36/5 40/17 40/19
subpoena [1] 12/20
subpoenaed [3] 7/16 14/18 18/14
subscribed [1] 97/10
subsequently [2] 52/14 63/22
substance [1] 7/17
substantial [8] 63/16 69/13 71/18 71/21 72/9 72/21 73/9 95/7
substantive [1] 79/18
such [5] 20/13 22/7 23/11 58/20 90/25
sufficient [7] 13/22 24/15 26/24 29/11 30/2 56/9 59/4
sufficiently [4] 26/9 28/17 28/19 69/17
suggest [1] 61/1
suggested [1] 71/23
suggesting [3] 26/23 44/4 92/13
suggestion [2] 36/21 92/16
sui [2] 39/14 51/23
Suite [1] 1/19
summaries [1] 34/9
summarized [2] 40/1 46/12
summarizes [3] 31/17 46/23 60/18
summarizing [2] 39/1 47/2
summary [3] 38/13 40/5 51/9
superiors [1] 37/20
supervisor [2] 45/25 46/8
supervisors [1] 45/18
supplement [1] 16/9
supplemental [2] 16/16 95/5
support [3] 23/19 30/16 35/9
supports [1] 56/1
supposed [3] 15/15 28/5 61/18
Supreme [3] 69/20 84/17 94/2
sure [5] 6/23 16/18 49/8 49/21 81/5
surgically [1] 56/15
surrounding [1] 84/24
suspicion [1] 76/3
swearing [1] 60/14
sworn [3] 13/17 36/13 37/3
system [3] 43/23 44/9 90/15
systemic [2] 79/10 79/25

T

table [1] 3/17
tailor [1] 44/16
tainted [1] 73/14
take [7] 13/24 34/1 46/10 48/5 54/7 54/16 82/2
taken [9] 21/7 26/22 27/17 48/14 48/15 48/15 50/20 56/3 95/20
takes [2] 8/16 35/18
taking [6] 8/11 17/18 35/25 54/5 54/10 73/24
talk [6] 17/15 25/16 61/9 66/7 83/15 83/17
talked [5] 24/21 25/9 25/16 55/13 84/22
talking [30] 11/13 16/1 18/3 22/22 39/17 41/13 41/15 49/11 61/2 61/4 61/25 62/14 62/15 62/15 62/16 63/10

T
talking... [14] 63/12 63/14 64/21 68/4 68/5 68/5 70/18 70/23 82/5 82/22 83/5 83/7 87/7 90/5
talks [9] 11/7 11/7 11/8 12/14 66/8 70/11 77/20 77/20 77/21
tampering [3] 55/5 55/5 62/4
targeted [1] 86/20
targeting [2] 86/18 87/22
targets [2] 55/11 68/20
task [1] 51/20
team [2] 30/9 30/20
technique [4] 64/24 65/12 65/22 66/8
techniques [28] 19/19 19/20 20/5 21/10 21/23 22/1 22/7 22/8 22/10 22/11 22/17 22/20 23/2 23/8 64/4 64/11 64/16 64/17 64/20 65/1 65/6 65/7 65/9 66/1 66/14 68/10 68/19 68/21
tell [7] 10/12 21/12 28/12 56/16 83/25 87/14 87/15
tells [1] 67/21
temporal [2] 31/15 52/11
ten [1] 50/18
tend [3] 27/22 65/24 92/11
term [1] 17/7
test [4] 9/6 20/7 51/12 52/21
testified [4] 6/1 6/2 6/14 90/10
testimony [5] 7/17 14/19 15/24 18/15 97/5
than [16] 5/9 9/18 12/10 16/9 25/24 33/6 35/5 39/19 42/3 43/9 62/17 66/13 71/13 77/11 78/24 89/25
Thank [13] 25/8 29/21 37/8 37/9 50/16 50/17 54/1 57/4 72/24 94/6 94/7 95/10 96/2
that [707]
that's [70] 5/4 5/16 6/16 6/20 6/24 7/18 7/24 8/11 8/13 8/15 10/19 12/19 13/20 15/11 15/16 16/25 17/5 18/11 18/15 19/10 24/3 27/24 31/17 32/2 32/19 33/19 36/12 37/17 39/19 42/12 42/15 43/21 44/20 47/1 48/10 48/15 49/11 51/19 52/4 55/17 56/23 56/23 59/10 59/24 60/4 61/16 63/25 64/4 64/22 65/8 67/5 67/13 67/14 68/8 71/17 72/2 73/4 81/14 81/24 83/11 83/25 84/1 85/14 85/18 86/15 87/11 88/8 91/24 94/25 95/1
the FOIA [1] 82/19
their [28] 5/16 5/24 9/12 16/9 17/11 30/8 35/11 38/18 41/15 45/18 46/5 46/8 46/9 46/13 62/11 72/13 72/14 76/19 79/22 81/11 82/9 82/14 86/14 86/14 87/3 87/10 87/12 87/24
them [15] 4/19 11/21 19/21 19/22 21/13 26/14 58/13 58/25 70/17 77/5 85/12 86/12 86/23 87/2 87/10
themselves [1] 75/25
then [41] 4/4 5/11 6/16 9/19 11/14 12/12 13/4 17/2 17/8 19/19 20/13 22/24 25/5 27/18 29/18 34/16 49/10 51/1 52/14 55/6 58/14 62/10 66/14 68/18 69/14 73/3 74/15 76/18 77/22 78/8 80/3 81/19 84/25 86/23 87/19 88/2 88/15 89/8 89/20 92/7 95/3
theoretically [1] 87/21

theories [1] 77/14
theory [4] 60/4 79/21 80/1 84/15
there [94] 5/1 5/2 5/5 5/24 8/21 9/19 10/3 10/8 10/9 10/13 11/20 15/23 15/25 22/14 23/1 23/18 24/7 24/16 24/22 26/1 27/7 27/10 27/21 30/13 30/19 32/10 32/17 32/22 32/25 36/22 38/18 41/20 42/13 43/22 45/6 47/25 48/19 48/22 49/14 50/5 50/10 50/23 52/5 52/18 53/3 53/5 54/8 55/18 58/4 59/18 60/1 60/13 60/15 60/21 61/15 61/16 62/11 62/21 63/20 65/25 66/1 66/3 67/1 67/3 67/5 68/24 69/13 72/3 72/20 76/24 77/12 77/22 78/4 78/11 80/15 80/17 80/20 80/24 81/25 82/1 82/10 82/17 82/17 83/10 88/11 89/17 89/22 90/4 90/11 90/25 91/16 92/11 93/25 95/7
there's [72] 5/10 5/18 6/5 7/3 7/11 8/3 8/7 8/17 8/24 8/25 10/5 10/17 10/25 11/6 11/13 12/16 13/3 15/23 16/6 16/12 16/23 18/16 22/20 22/23 22/24 24/6 24/13 24/20 26/12 26/19 26/24 30/25 44/2 45/4 45/23 46/3 46/15 46/15 47/12 50/9 51/8 51/10 52/20 53/11 53/14 53/20 55/20 58/1 58/20 58/23 59/3 60/8 61/9 62/10 63/17 65/17 67/3 69/3 69/18 71/24 71/25 73/23 74/25 75/17 79/2 84/3 84/25 86/6 90/18 92/8 92/18 95/10
therefore [11] 15/8 24/15 29/12 35/16 36/25 41/25 42/6 52/5 67/21 73/7 86/22
Thereupon [2] 50/20 96/3
these [50] 3/20 6/1 9/10 12/3 14/19 14/24 15/24 16/14 17/15 18/4 21/12 21/22 21/24 22/6 23/8 24/19 27/16 32/12 33/2 33/13 33/25 39/11 41/20 43/5 45/7 46/1 46/11 53/18 55/14 57/2 58/2 61/6 63/20 64/9 65/15 68/19 69/8 74/20 83/4 83/22 85/4 85/5 85/8 85/22 86/5 88/1 88/12 88/15 89/12 89/18
they [121]
they're [19] 8/18 12/4 14/9 16/1 18/7 18/11 20/4 25/4 29/4 32/21 50/14 60/19 66/4 70/22 81/12 81/20 83/24 84/9 85/13
they've [14] 5/18 9/3 16/10 16/14 16/21 19/20 46/6 69/25 70/13 72/1 81/10 83/16 84/5 84/5
thing [5] 47/2 63/23 77/15 83/15 95/21
things [15] 11/1 14/19 25/6 38/21 50/13 51/21 55/14 69/12 77/2 77/7 84/1 84/25 84/25 93/13 95/24
think [66] 3/19 3/23 4/13 6/20 11/10 12/6 16/18 16/20 19/6 19/11 19/20 20/6 20/16 20/18 20/20 24/1 24/17 24/21 24/22 25/21 26/7 29/5 32/8 32/17 32/20 38/15 38/23 43/8 43/21 45/13 45/22 46/16 47/20 48/11 48/15 48/19 48/22 49/4 53/14 53/14 53/20 57/8 63/10 64/15 65/8 65/16 65/25 66/3 67/24 69/3 70/16 73/24 77/15 80/9 81/15 81/25 84/14 84/24 85/8 91/18 92/20 93/25 94/1 95/6 95/13 95/19
third [4] 1/22 80/3 81/2 87/8

this [162]
thorough [1] 36/12
those [50] 3/25 11/13 17/21 18/2 18/17 18/19 18/22 18/24 20/8 25/13 33/8 35/2 41/24 42/5 42/6 42/23 45/21 46/25 47/4 48/5 48/9 48/12 48/14 50/13 51/21 54/9 57/21 58/24 59/2 62/25 64/13 64/20 65/13 66/18 67/11 67/13 72/19 74/23 75/15 77/23 78/3 78/21 80/6 82/4 82/4 83/20 85/2 85/25 88/22 91/10
though [3] 40/25 48/25 49/20
thought [8] 12/23 34/8 34/11 37/1 45/11 45/19 71/5 73/7
thoughtful [1] 92/19
thoughts [2] 42/24 45/8
thousands [1] 26/1
three [20] 4/3 4/5 7/11 15/2 15/22 18/17 18/21 18/22 19/8 19/19 20/25 21/4 21/18 21/18 22/13 22/25 23/14 23/16 23/20 51/17
threefold [2] 51/12 51/20
through [21] 3/22 5/19 6/10 6/11 6/13 10/2 11/14 11/15 28/22 29/1 29/15 37/4 46/10 52/14 53/16 55/19 61/12 72/13 72/14 74/2 75/15
throughout [2] 16/19 67/20
time [15] 11/24 18/25 19/2 32/3 35/23 38/9 50/10 52/10 52/16 56/21 60/7 63/18 64/7 68/20 87/20
time-bound [1] 63/18
times [2] 70/10 94/5
timing [1] 27/14
today [2] 16/19 71/23
together [8] 19/21 23/5 28/14 33/25 55/14 65/13 75/6 85/21
told [3] 20/10 20/11 22/15
Tom [1] 20/10
too [6] 20/6 25/4 36/17 44/22 80/3 90/22
took [6] 27/18 28/10 34/11 36/15 56/5 77/5
Topic [3] 1/21 3/12 4/7
topics [1] 70/24
touch [1] 16/23
Tower [3] 10/15 11/7 77/20
town [1] 80/21
trace [1] 54/13
traditional [1] 39/15
traditionally [2] 51/23 52/4
traditions [1] 90/14
transcribed [1] 97/9
transcript [3] 1/13 2/11 97/8
transcription [1] 2/12
transpired [3] 9/19 12/18 12/22
treason [1] 91/22
tremendous [1] 83/12
trial [15] 2/1 52/14 55/22 59/21 69/3 69/20 70/21 71/2 71/11 71/20 73/2 73/12 74/4 75/7 75/10
trials [1] 74/21
tried [1] 89/25
true [7] 10/7 49/22 63/25 67/23 77/3 78/17 81/15
truly [1] 80/24
Trump [19] 10/14 10/15 11/4 11/7 11/8 77/19 77/20 77/21 78/4 78/9 78/12

T
Trump... [8] 81/5 81/6 82/3 83/2 92/19 92/25 93/7 93/11
Trump's [1] 83/2
truthfulness [1] 80/11
try [6] 3/20 47/19 71/3 76/21 83/19 86/18
trying [7] 45/9 50/7 50/14 57/3 81/20 85/11 95/11
turn [1] 95/22
tweeted [1] 83/25
two [25] 9/3 9/3 16/14 20/23 26/12 27/16 29/10 30/25 32/22 32/23 41/20 46/3 48/12 48/19 51/16 57/19 57/21 58/10 62/12 64/14 66/17 66/18 67/11 67/13 89/12
type [21] 11/22 17/14 39/15 40/2 43/12 43/14 52/4 53/17 61/2 61/4 61/23 61/24 62/5 62/14 63/1 68/1 68/3 70/24 72/17 80/12 86/12
types [4] 22/8 57/23 67/4 68/15
typically [1] 60/12

U
U.S [7] 1/5 1/10 2/2 2/6 3/3 43/11 43/18
ultimate [3] 31/23 39/25 46/1
ultimately [13] 31/25 39/4 39/25 40/25 41/5 41/10 46/8 51/3 52/16 53/22 60/3 64/2 92/4
unclassified [1] 21/25
uncommon [1] 16/15
uncover [1] 76/23
under [82] 4/21 5/4 5/21 7/10 9/17 10/24 12/12 13/16 13/21 14/14 15/2 19/15 20/19 20/20 20/25 21/3 21/3 21/5 21/15 21/18 22/12 22/13 22/21 23/1 23/16 24/19 25/5 28/8 29/3 30/18 30/25 31/7 32/13 33/1 33/1 37/5 37/6 37/7 37/14 39/3 39/8 40/20 41/4 41/6 42/11 43/17 44/23 51/20 52/5 52/20 52/23 54/17 55/25 56/17 61/8 62/23 63/4 64/23 65/15 65/20 66/25 67/16 67/22 68/25 71/12 74/4 74/5 74/6 74/9 76/17 78/25 79/1 79/21 80/12 81/16 82/4 84/13 84/13 84/16 90/15 93/19 94/10
underlying [1] 58/6
undermine [4] 55/14 79/6 92/16 93/12
undermines [1] 44/7
underscore [1] 95/3
understand [15] 4/24 10/18 12/7 15/25 19/6 28/24 34/1 36/16 41/18 42/2 47/9 47/21 56/6 78/15 95/11
understanding [5] 9/25 10/6 78/21 78/22 93/5
undertaken [3] 6/18 9/1 11/5
undertook [1] 78/10
unfolded [1] 42/22
unique [4] 26/2 31/21 46/15 60/11
unit [1] 9/16
UNITED [8] 1/1 1/15 46/18 76/10 81/9 84/17 88/10 97/3
unknown [1] 85/5
unless [7] 4/10 4/12 13/2 16/23 24/12 49/22 80/24
unlike [2] 8/23 64/7

unprotected [1] 9/12
unredacted [8] 28/14 32/19 54/21 66/16 66/25 67/3 67/18 72/11
until [1] 30/8
unwittily [1] 85/22
unwittingly [3] 86/11 86/21 87/1
up [18] 4/9 11/10 25/20 42/18 44/13 44/18 44/22 45/7 55/19 72/15 76/25 80/20 86/9 88/5 88/10 88/21 88/22 95/18
upfront [1] 11/14
upheld [2] 7/13 21/5
upon [8] 14/10 15/5 18/2 18/6 38/5 67/25 87/12 94/16
us [6] 4/11 10/12 20/7 67/21 75/21 82/2
use [10] 22/6 22/9 64/3 64/5 67/14 67/18 68/9 68/16 68/23 81/20
used [13] 20/16 21/24 22/1 22/8 22/10 23/3 44/2 68/10 68/16 68/19 83/24 87/25 90/2
usually [1] 28/17

V
vague [1] 20/6
valid [2] 52/5 64/5
validity [2] 25/3 81/22
value [8] 4/22 5/8 7/3 9/18 10/16 10/19 13/25 90/16
variety [1] 43/2
various [5] 4/25 68/9 77/7 83/5 90/7
vast [1] 54/17
veracity [2] 20/7 78/21
version [1] 21/21
versus [9] 3/3 3/6 8/5 37/12 53/17 55/20 56/24 94/13 94/24
very [37] 4/20 17/13 17/18 17/24 20/19 21/12 27/16 35/4 40/4 46/6 46/17 47/20 48/8 48/16 48/22 53/5 57/2 60/5 60/16 67/24 69/16 70/10 72/18 74/20 77/12 78/19 79/6 79/23 81/25 82/14 83/4 88/17 88/18 88/24 91/25 93/24 93/24
Vesco [2] 9/14 9/14
victims [2] 83/20 83/20
view [6] 32/8 49/4 56/20 66/11 66/12 66/21
viewed [1] 35/8
viewing [1] 59/9
views [1] 47/5
violate [2] 74/18 74/19
violated [1] 74/15
violating [1] 74/22
volume [10] 32/22 32/23 32/24 32/25 39/22 39/22 39/24 54/17 54/18 74/25
volumes [1] 59/3
voluntarily [1] 89/7
voluntary [1] 12/10
volunteering [1] 73/13
voracity [1] 16/4

W
walk [1] 75/15
walking [1] 74/1
walks [2] 11/14 11/15
WALTON [1] 1/14
want [9] 4/10 26/15 33/17 33/18 36/19

47/10 77/6 84/14 89/10
wanted [5] 25/16 34/9 38/11 43/13 92/6
wants [1] 36/20
was [155]
Washington [5] 1/10 1/20 2/3 2/7 47/17
wasn't [6] 49/14 73/13 76/14 92/2 92/19 92/25
Watch [13] 8/5 8/24 37/12 37/18 38/23 42/9 42/13 43/9 47/4 55/20 80/4 80/7 94/13
way [17] 3/19 16/15 19/22 38/5 51/9 52/20 55/19 61/5 61/11 63/20 69/23 72/12 72/13 85/7 93/15 93/17 96/1
ways [3] 50/8 50/15 78/14
we [92] 6/18 6/20 9/6 9/15 10/3 10/3 10/6 10/17 10/17 11/9 12/2 12/9 15/25 16/18 16/20 19/8 19/21 20/10 20/11 20/18 21/13 22/15 22/16 24/1 24/21 24/25 25/10 25/16 25/18 26/16 32/24 36/25 37/24 40/5 41/4 41/18 42/12 43/9 48/19 49/4 49/25 50/4 50/24 50/24 51/2 51/5 55/17 58/23 59/1 60/18 60/22 63/7 68/4 68/4 68/5 71/15 75/11 75/14 75/18 76/2 76/3 76/9 76/10 77/15 79/1 79/16 80/14 81/15 82/2 82/13 82/14 83/5 84/2 84/2 84/22 84/24 85/8 90/15 90/16 90/16 90/21 91/14 91/14 94/20 94/21 94/21 94/22 95/1 95/6 95/14 95/25 95/25
we'd [2] 3/7 48/5
we'll [7] 3/22 4/3 4/4 4/11 17/3 73/3 95/25
we're [29] 18/3 24/3 25/23 36/12 39/17 49/11 50/22 57/19 61/2 61/4 62/14 62/15 62/15 62/16 63/10 63/11 63/13 64/21 70/18 73/24 73/25 75/8 78/25 82/4 83/7 83/11 83/11 90/5 91/14
we've [8] 4/9 6/19 16/14 20/1 24/5 24/25 25/9 60/9
weaknesses [4] 37/23 38/3 55/7 55/12
weigh [2] 4/19 48/7
weighed [1] 83/12
weighing [1] 48/18
well [38] 8/10 11/6 11/25 12/15 20/25 23/17 26/4 26/19 30/5 34/4 34/8 35/12 36/2 37/2 40/4 40/16 43/1 43/13 45/13 45/22 48/8 49/6 49/17 53/21 57/12 59/7 61/22 61/24 66/17 67/13 68/21 71/23 73/17 74/24 86/10 89/5 91/3 92/18
went [4] 28/22 29/15 37/4 90/9
were [57] 7/2 7/16 14/16 14/18 18/4 18/14 21/7 21/8 22/8 22/15 23/3 26/22 27/17 27/21 30/16 31/3 33/21 33/22 33/24 34/13 34/15 35/22 38/4 38/25 40/1 41/12 41/14 42/14 42/16 42/20 48/15 50/5 52/5 54/11 66/18 66/19 68/19 70/7 77/5 77/22 77/23 82/22 83/23 85/22 85/23 85/24 85/25 86/20 86/22 87/25 87/25 88/19 88/23 89/13 93/6 93/25 95/1
weren't [5] 56/16 76/15 77/4 78/3 78/11
what [156]
what's [16] 6/22 13/10 14/14 15/5 18/3

W
what's... [11] 21/22 23/1 23/2 37/17 47/6 47/19 59/9 67/10 67/25 71/13 94/8
whatever [5] 61/3 61/6 62/16 77/7 80/11
when [50] 4/25 9/17 11/9 11/12 17/21 18/11 21/6 21/8 22/7 22/18 23/13 27/8 27/12 28/18 28/20 35/19 36/19 36/22 45/9 47/3 48/8 48/18 50/12 52/12 52/16 53/8 54/16 55/23 56/2 58/21 59/24 59/25 60/9 63/11 63/18 63/19 63/19 64/21 66/23 67/5 67/7 70/22 81/3 81/3 81/12 81/13 82/17 87/7 89/15 91/20
whenever [3] 22/19 56/3 61/19
where [31] 6/21 10/3 14/16 21/9 24/23 25/25 32/25 44/13 46/7 46/18 54/6 55/12 59/21 60/16 61/9 65/17 66/1 66/5 66/17 67/1 67/3 67/9 67/17 69/12 69/18 78/5 81/18 85/22 87/14 88/1 95/7
whereas [2] 25/1 86/5
whereof [1] 97/10
whether [45] 6/10 6/11 6/13 7/2 7/9 8/8 11/22 12/20 12/21 14/6 25/4 27/25 31/24 34/24 41/6 41/7 41/8 42/4 45/3 45/3 45/9 45/20 49/11 54/25 56/11 58/24 58/24 59/1 59/22 62/14 62/15 62/16 66/6 66/8 67/15 71/12 76/1 76/24 78/17 79/15 79/18 91/19 92/2 92/3 94/9
which [45] 5/8 13/19 15/19 20/6 27/16 27/17 34/10 34/23 40/9 41/8 41/9 42/9 42/22 45/14 47/25 48/2 50/2 50/3 50/5 53/15 60/2 60/2 63/21 64/24 65/5 68/14 68/19 69/3 69/14 69/16 71/17 73/3 75/1 75/24 76/6 76/17 76/22 78/8 79/17 80/11 85/20 85/20 87/17 93/24 95/6
while [6] 32/10 53/10 69/23 71/2 71/24 78/19
who [36] 4/25 5/1 7/15 7/16 9/14 10/1 10/1 14/18 18/14 31/3 33/22 40/25 43/14 55/13 60/12 76/14 76/14 77/22 82/4 82/18 82/25 83/6 83/7 83/18 83/22 83/25 85/4 85/5 85/25 86/17 88/16 91/10 92/1 92/2 93/17 94/9
who's [1] 69/9
who've [1] 6/14
whoever [1] 82/3
wholesale [2] 70/2 70/14
whose [3] 55/13 84/21 85/2
why [37] 3/22 13/13 16/19 20/22 24/8 24/17 29/19 29/21 32/21 37/21 38/4 41/24 42/5 43/13 43/15 43/20 44/10 45/16 45/18 48/13 48/15 50/14 55/6 60/25 61/1 61/5 61/23 64/6 74/4 75/18 76/15 77/23 78/16 84/9 90/4 92/19 92/24
wide [1] 79/9
wide-ranging [1] 79/9
will [5] 11/10 17/4 51/7 63/20 83/3
willing [1] 73/15
willingly [1] 83/7
wind [1] 60/8
witch [5] 78/18 92/13 92/17 92/20

93/13
withheld [22] 5/4 6/23 7/24 13/18 14/17 15/1 18/17 22/5 37/6 52/5 62/23 67/5 67/16 67/19 67/22 68/8 68/25 69/11 70/14 74/4 74/6 85/17
withhold [3] 8/1 18/13 58/8
withholding [6] 8/18 32/21 51/15 51/17 55/24 84/9
withholdings [1] 21/7
within [17] 6/16 7/10 7/12 7/18 13/12 14/7 18/21 18/24 23/4 29/19 37/20 42/17 44/20 47/24 52/23 79/11 89/10
without [15] 10/22 15/20 18/8 23/8 30/10 57/1 57/1 61/2 61/25 62/25 66/20 73/13 74/12 74/22 81/19
witness [21] 14/19 15/24 15/25 51/25 54/23 55/2 55/3 57/25 58/5 60/11 60/14 60/19 61/14 61/14 62/4 62/4 62/9 62/11 63/13 91/21 97/10
witness' [1] 14/17
witnesses [3] 7/15 18/14 60/12
won't [1] 4/10
work [2] 32/15 91/25
worked [1] 36/17
working [1] 74/20
workings [1] 15/20
world [1] 80/21
worth [1] 38/15
would [120]
wouldn't [12] 6/15 11/23 43/16 43/17 43/19 45/17 45/19 46/20 67/6 88/2 93/10 93/11
wrath [1] 77/6
write [2] 45/14 92/7
writing [1] 48/3
written [4] 10/21 12/13 13/7 27/15
wrong [5] 20/22 20/23 33/19 78/16 93/5
wrongdoing [1] 76/24
wrote [2] 40/13 46/4

Y
yeah [2] 12/16 46/17
year [2] 12/11 14/2
years [3] 80/7 80/16 85/15
yes [14] 18/10 19/15 19/24 30/24 39/20 42/1 46/25 47/14 47/16 54/4 56/13 57/6 58/22 94/12
yet [2] 51/2 78/4
York [1] 11/21
you [118]
you'd [1] 47/13
you'll [1] 24/22
you're [15] 8/11 15/3 16/19 18/20 30/15 39/19 41/13 41/15 55/7 56/20 57/7 58/10 59/13 61/25 87/7
you've [1] 24/4
your [71] 3/2 3/9 3/12 3/15 4/6 4/20 5/13 6/22 7/1 8/14 13/15 15/14 16/12 18/9 19/6 19/10 19/24 20/23 23/24 24/5 24/20 25/15 28/2 30/5 33/16 35/6 35/19 36/8 37/3 38/11 40/16 42/1 42/8 44/12 45/22 46/17 47/10 47/18 49/7 50/25 54/5 56/13 56/19 56/23 57/6 57/12 59/7 61/7 62/3 62/18 63/9 66/21 66/22 68/7 69/2 70/16 72/25 73/19 75/5 75/13 77/14 79/1 80/4 80/16 81/6

83/15 85/13 87/20 91/5 94/12 94/19
yourself [1] 47/14
yourselves [1] 3/8

Z
zero [1] 60/8