**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF COLUMBIA**

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| JASON LEOPOLD, et al. | . | |
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| Plaintiff, | . | |
| vs. | . | Docket No. CA 19-957-RBW |
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| 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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Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

**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

department do.

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

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

THE COURT: Good morning.

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

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

MR. TOPIC: I believe they are here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Last point I would make --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: That's fine. You may.

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

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

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

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

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

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

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

Those are quintessential Rule 6(e) material --

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

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

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

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

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

THE COURT: You said 7(e)?

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

THE COURT: Right.

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

THE COURT: Does the government agree?

MS. ENLOW: Yes, your Honor.

THE COURT: Okay.

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

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

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

THE COURT: Government counsel, why is he wrong?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Brief response to that?

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

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

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

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

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

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

THE COURT: Okay. Thank you.

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

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

THE COURT: We can.

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

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

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

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

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

reference to that.

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

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

would be appropriate.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. BUTLER: Shall I move on?

THE COURT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

be protected before this information could be disclosed.

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

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

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

what the Attorney General thought was appropriate to redact.

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

THE COURT: Okay. Thank you.

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

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

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

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

MS. ENLOW: No, that was decisional 2011.

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

MS. ENLOW: 2011.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. ENLOW: Yes, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. I understand.

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

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

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

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

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

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

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

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

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

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

With respect to the president though the Special

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

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

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

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

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

THE COURT: But he would have that authority.

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

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

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

THE COURT: Thank you.

MR. SHAW: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And release of this information whether it

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: Yes, Your Honor.

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

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

THE COURT: What page?

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

THE COURT: Okay.

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

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

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

MR. BUTLER: Forty-five and 46.

THE COURT: Let me look at them real quick.

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

THE COURT: Right.

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

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

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

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

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

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

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

THE COURT: Government counsel, why as plaintiff's

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

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

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

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

particular passage in the report?

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

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

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

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

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

THE COURT: Without me seeing those redactions how

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

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

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

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

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

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

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

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

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

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

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

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

MR. BUTLER: Techniques.

THE COURT: Techniques, could be.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Any other matters?

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

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

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

material simultaneously.

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

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

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

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

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

MR. TOPIC: Right.

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

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

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

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

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

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

THE COURT: Thank you. Government.

MS. ENLOW: Your Honor, the information pertaining

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Right.

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

whether misconduct occurred.

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

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

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

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

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

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

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

And the primary reason was because the Special

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

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

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

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

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

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

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

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

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

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

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

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

it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Categorically it seems to me to say just because

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

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

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

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

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

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

THE COURT: Right.

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

THE COURT: Okay.

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

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

public interest.

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

I think, if ever there were compelling

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

THE COURT: Thank you.

MR. TOPIC: Thank you.

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

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

THE COURT: Okay. Is that it?

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

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

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

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

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

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

this matter resolved one way or the other.

Thank you.

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

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