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[ORAL ARGUMENT NOT SCHEDULED]

No. 23-5154

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE ATTORNEY GENERAL MERRICK GARLAND, IN HIS OFFICIAL CAPACITY; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION DIRECTOR CHRISTOPHER A. WRAY, IN HIS OFFICIAL CAPACITY; FEDERAL BUREAU OF INVESTIGATION,

PETITIONERS.

PETITION FOR A WRIT OF MANDAMUS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MARK R. FREEMAN
GERARD SINZDAK
MARTIN TOTARO
Attorneys, Appellate Staff
Civil Division, Room 7525
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5048

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INTRODUCTION AND SUMMARY

In light of the significant separation of powers and institutional concerns raised by permitting unnecessary discovery from a former President relating to his official duties, the government respectfully requests that this Court issue a writ of mandamus directing the district court to quash the deposition of former President Donald Trump, which plaintiffs intend to schedule in the coming weeks. *See* 28 U.S.C. §1651; Fed. R. App. P. 21.

This petition arises out of the Federal Bureau of Investigation's decision to dismiss Peter Strzok, a former senior FBI official, after an investigation by the Justice Department's Inspector General revealed that Strzok and another FBI employee, Lisa Page, had used their FBI-issued phones to send and receive thousands of inappropriate text messages, many of which criticized the former President and one suggesting they would stop then-candidate Trump from becoming President. Strzok and Page exchanged the text messages while assigned first to the FBI's investigation into former Secretary of State Clinton's use of a private email server and, later, to the FBI's investigation into Russia's efforts to interfere with the 2016 Presidential election. Strzok held a leadership role in both investigations. The eventual discovery and disclosure of Strzok's and Page's

inappropriate messages subjected the FBI to intense criticism and—by Strzok's own admission—caused lasting harm to the Bureau's reputation.

Although Strzok concedes the seriousness of his misconduct, he alleges that he was terminated not because of those actions, but rather at the urging of then-President Trump in retaliation for what Strzok maintains was constitutionally protected speech. Strzok has already deposed a litany of current and former high-ranking federal officials, including FBI Director Christopher Wray; former Deputy Attorney General Rod Rosenstein; former FBI Deputy Director David Bowdich; Justice Department Inspector General Michael Horowitz, and others. This extensive discovery revealed no substantial evidence in support of Strzok's theory that the FBI dismissed him because of pressure from President Trump. [redacted]

Nonetheless, the district court denied the government's motion to quash the deposition of former President Trump. The court did so over the government's repeated objection that such a deposition would be improper, and despite acknowledging that the assembled factual record left it uncertain what practical purpose such a deposition would serve. *See* Feb. 23, 2023 Tr.

13 (A19) (conceding that the "utility of and the necessity for [the former President's] deposition is less clear").

That deposition should be quashed. As this Court and others have recognized, depositions in civil litigation of current and former senior government officials about their official duties are permitted only in "extraordinary circumstances." *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). The same stringent standard, at a minimum, should govern the deposition of a former President regarding his official actions taken while in office.

No such "extraordinary circumstances" exist here. It is undisputed that former FBI Deputy Director David Bowdich, not the former President, made the decision to terminate Strzok from the FBI. It is thus Bowdich's reasons and motivations for dismissing Strzok that are relevant to Strzok's claim, not the former President's. Strzok has already had ample opportunity to pursue discovery into Bowdich's reasons for his decision, including through depositions of Bowdich himself, Director Wray, and other senior FBI and Justice Department officials. [redacted]

[redacted]

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[redacted] as the district court itself recognized, Bowdich has provided a robust and well-reasoned explanation for his decision to dismiss Strzok, leaving little basis on which a factfinder could justifiably conclude that Strzok was dismissed for reasons other than his own conceded misconduct. *See* Feb. 23, 2023 Tr. 9 (A15).

The district court nonetheless allowed the former President's deposition to proceed, reasoning that it might be "of some relevance" to Strzok's claims if the former President "expressed his viewpoint [about Strzok] or issued directives during meetings in the Oval Office." Feb. 23, 2023 Tr. 13 (A19). That "some relevance" standard falls far short of establishing the type of exceptional circumstances that would allow a plaintiff to depose a former President about his official actions. And in any event, the former President's views about Strzok were widely known and "broadly communicated." *Id.* The former President stated openly and publicly on numerous occasions that he believed the FBI should dismiss Strzok. Strzok hardly needs to confirm whether the President expressed the same views in meetings in the Oval Office that he expressed publicly.

Nor would any such testimony cast doubt on Bowdich's account of his reasons for dismissing Strzok. The former President's views are relevant to

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this case only to the extent they were conveyed to the deciding officials at the FBI, all of whom have already been deposed. [redacted]

This Court and others consistently grant mandamus relief to bar the compelled deposition of current and former high-ranking executive officials. *See, e.g.*, *In re Clinton*, 973 F.3d 106, 112-13 (D.C. Cir. 2020); *In re U.S. Dep't of Educ.*, 25 F.4th 692, 701 (9th Cir. 2022) (collecting cases). The Court should do the same here.

STATEMENT

1. This petition arises out of the FBI's termination of Special Agent Peter Strzok, former Deputy Assistant Director of the FBI's Counterintelligence Division. In August 2015, Strzok was assigned to lead the investigation into Secretary of State Clinton's use of a private email server to conduct official business. Compl. ¶15. During that investigation,

Strzok worked with Lisa Page, an attorney serving as Special Counsel to the FBI's Deputy Director. In July 2016, Strzok and Page were assigned to work on the FBI's investigation into the Russian government's efforts to interfere in the 2016 Presidential election, with Strzok being "one of the key members of that investigative team." *Id.* ¶31; *see also* Dkt. No. 30-5, at 2 (No. 19-2367) (noting that Strzok was "assigned to lead" the Russia investigation). Later, both Strzok and Page served on Special Counsel Robert Mueller's team investigating Russian interference in the election.

In early 2017, the Justice Department's Office of the Inspector General began an examination of the FBI's and the Department's handling of the email-server investigation. During that examination, the Inspector General identified over 40,000 text messages that Strzok and Page had exchanged on FBI-issued phones while working on the email-server and Russian-interference investigations. *See* Compl ¶32; Office of the Inspector Gen., U.S. Dep't of Justice, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* 395-96 (June 2018) (OIG Report). Many of the texts between Strzok and Page, which were commingled with texts about Strzok's work on the investigations, were highly critical of former President Trump and described

him unfavorably. For example, Strzok in 2016 described then-candidate Trump as a "disaster," "abysmal," "an idiot," and "unable to provide a coherent answer." OIG Report 399-400. In response to a text from Page expressing dismay about then-candidate Trump becoming President, Strzok stated that Trump would not become President because "[w]e'll stop" him from taking office. *Id.* at 404. The OIG Report emphasized that these and other text messages "demonstrated extremely poor judgment and a gross lack of professionalism." *Id.* at xii. The Report further concluded that Strzok's and Page's conduct "brought discredit to themselves, sowed doubt about the FBI's handling of the [email-server] investigation, and impacted the reputation of the FBI." *Id.* at xi. The Report emphasized that "the damage caused by their actions extends far beyond the scope of the [email-server] investigation and goes to the heart of the FBI's reputation for neutral factfinding and political independence." *Id.* The Special Counsel removed Strzok from his investigation in July 2017, after learning about the texts. *Id.* at 397.

In early December 2017, the press reported on the texts and "several Senate and House committee chairs" requested them. Dkt. No. 38-1, ¶8 (Rosenstein Decl.). Until that time, the basis for Strzok's removal from the

Special Counsel's team had not been publicly reported. Deputy Attorney General Rod Rosenstein discussed with career and political Department officials whether Congress had a legitimate oversight interest in the texts, whether any countervailing law-enforcement interest could justify withholding them, and whether Strzok and Page had any privacy interests in the messages despite sending the messages on their FBI-issued phones. *Id.* ¶¶9-14. Rosenstein decided to release redacted versions of the texts pursuant to congressional requests. *Id.* After confirming with the Department's privacy expert that doing so would not violate the Privacy Act, Rosenstein agreed with the Department's Office of Public Affairs' recommendation to also "provid[e] the text messages to the media because otherwise, some congressional members and staff were expected [to] release them intermittently before, during, and after [a hearing with Rosenstein scheduled the following day], exacerbating the adverse publicity for Mr. Strzok, Ms. Page, and the Department." *Id.* ¶15. Rosenstein later explained that, "[i]f [he] had believed that the disclosure was prohibited by the Privacy Act, [he] would have ordered Department employees not to make the disclosure." *Id.* ¶19.

2. The FBI's Office of Professional Responsibility initiated an investigation into Strzok's misconduct. In June 2018, Office staff recommended that the FBI dismiss Strzok based on its finding that he violated FBI regulations when he: (1) engaged in unprofessional conduct by making inappropriate political comments in text messages on his FBI-issued cell phone; (2) used a personal email account to conduct official FBI business; and (3) failed to diligently pursue a credible lead when new information was brought forth regarding the private server investigation. Dkt. No. 30-5, at 1; *see id.* at 4-11 (excerpting text messages Strzok exchanged on his FBI-issued phone). Page had already resigned when Office staff made its recommendation.

Strzok provided a written response to the recommendation that he be terminated and participated in a subsequent disciplinary hearing. Dkt. No. 30-5, at 18. Strzok conceded that his text exchanges "without question" represented "horrible judgment." *Id.* He also acknowledged that the disclosure of the messages caused significant damage to the FBI's reputation. *Id.* As a penalty for that misconduct, he proposed to receive, in lieu of dismissal, a suspension and a demotion to a non-supervisory position.

Dkt. No. 30-6. He submitted a "Last Chance" Adjudication Agreement to that effect. *Id.*

The career Assistant Director for the FBI's Office of Professional Responsibility, Candice Will, reviewed the allegations and Strzok's response, substituted a charge concerning dereliction of supervisory responsibility for the charge concerning failure to diligently pursue an investigative lead, and concluded that the three charges against Strzok were "substantiated." Dkt. No. 30-5, at 1, 23. Will found that Strzok's "excessive, repeated, and politically-charged text messages, while [he] w[as] assigned as the lead case agent on the FBI's two biggest and most politically-sensitive investigations in decades, demonstrated a gross lack of professionalism and exceptionally poor judgment." *Id.* at 19. Will further found that Strzok's misconduct "caused immeasurable harm to the Bureau's reputation with [the Department of Justice], other government officials, and the American public." *Id.* at 22. Will determined that the "nature and scope of the misconduct certainly warrant[ed] dismissal." *Id.* at 23. But she chose the lesser penalty of a 60-day suspension without pay and demotion in light of Strzok's long career and his "profound[] remorse[]." *Id.*

Pursuant to his authority as Deputy Director of the FBI—the highest-ranking career official within the FBI—David Bowdich "reconsidered the [Assistant Director's] punishment and conclude[d] that dismissal [wa]s appropriate under the facts of this case." Dkt. No. 30-7, at 1. Bowdich reinstated the original staff recommendation of dismissal "given the severe, long-term damage [Strzok's] conduct has done to the reputation of the FBI," noting that "[i]t is difficult to fathom the repeated, sustained errors of judgment [Strzok] made while serving as the lead agent on two of the most high-profile investigations in the country." *Id.* at 1-2. Bowdich explained that he "could not recall another incident like [Strzok's] that brought such discredit on the organization." *Id.* at 2. In Bowdich's "23 years in the FBI," he "ha[d] not seen a more impactful series of missteps that has called into question the entire organization and more thoroughly damaged the FBI's reputation." *Id.* ("In our role as FBI employees we sometimes make unpopular decisions, but the public should be able to examine our work without having to question our motives.").

3. Following his termination, Strzok filed suit in federal court against the Attorney General and the Director of the FBI, in their official capacities, as well as the Justice Department and the FBI. Compl. ¶¶9-12. Strzok

alleges that defendants retaliated against him in violation of the First Amendment when they dismissed him, *id.* ¶¶72-74, and that the manner in which he was terminated deprived him of due process, *id.* ¶¶76-77. He further alleges violations of the Privacy Act based on alleged disclosures of his text messages to the news media. *Id.* ¶¶79-82. Page also brought suit, claiming that the disclosure of the text messages to the press violated the Privacy Act. The cases have been consolidated for purposes of discovery.

The parties have engaged in extensive discovery. Defendants have produced thousands of pages of documents, and Strzok has deposed numerous witnesses, including current FBI Director Christopher Wray; former Deputy Attorney General Rod Rosenstein; former FBI Deputy Director David Bowdich; former Assistant Director of the FBI's Office of Professional Responsibility Candice Will; former Associate Deputy Attorney General Scott Schools; and Justice Department Inspector General Michael Horowitz. And Strzok interviewed and obtained a declaration from the former President's Chief of Staff during the relevant time period, General John Kelly.

Strzok also subpoenaed former President Trump to sit for a deposition. Although Strzok did not name the former President as a defendant, his

complaint alleges that "Trump directly and indirectly pressured FBI Director Wray and then-Attorney General Sessions to fire Special Agent Strzok." Compl. ¶45. In support of that allegation, the complaint cites a number of public statements made by the former President advocating for Strzok's termination. The complaint notes, for example, that then-President Trump publicly questioned why Strzok was "still" at the FBI following Page's resignation. *Id.* ¶47. Trump also allegedly accused Strzok of "treason" and told reporters at the White House that he was "amazed that Peter Strzok is still at the FBI" and that "Strzok should have been fired a long time ago." *Id.* ¶¶46, 47. When Strzok was dismissed, Trump tweeted "finally." *Id.* ¶46. The complaint alleges that, "[b]ut for the intervention of the President and his political allies and their insistence on punishing Special Agent Strzok for the content of his protected speech" in his texts, the FBI would not have terminated him. *Id.* ¶48. Strzok additionally alleges that the former President has taken credit for his dismissing in public statements made following his termination.

The government moved to quash the subpoena of the former President in the Southern District of New York because that venue was the place of compliance for the subpoena. Fed. R. Civ. P. 45(d)(1). The court transferred

the motion, by consent, to the U.S. District Court for the District of Columbia. *See* Order, *In re Subpoena Served on Donald Trump*, No. 22-27 (D.D.C. Feb. 1, 2022). That matter has not been consolidated with the Strzok and Page suits, but the district court has treated it as a related case.

Discovery continued as the district court considered the government's motion to quash. As particularly relevant here, plaintiffs deposed former Deputy Director Bowdich in the intervening months. During that deposition, Bowdich [redacted]

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[redacted]

4. In February 2023, the district court denied from the bench the government's motion to quash the deposition of former President Trump (as well as the government's motion to quash the deposition of sitting FBI Director Christopher Wray, a decision that the government did not subsequently challenge). *See* Feb. 23, 2023 Tr. (A7-46); Feb. 23, 2023 Minute Order (A3). The court acknowledged the well-established principle that a "top executive department official should not, absent extraordinary circumstances, be called to testify regarding [his] reasons for taking official actions." Feb. 23, 2023 Tr. 6 (A12). The court also recognized that Bowdich's testimony explaining his reasons for dismissing Strzok does not "leave[] much wiggle room at all for a factfinder to conclude that he did what he did because Christopher Wray told him to or because Christopher Wray

conveyed a message from the then President, or because he thought the President had directed him to." *Id.* The court further found that "[t]he utility of and the necessity for" Trump's deposition was not altogether "clear" given that the former President's "views on the subject were broadly communicated." *Id.* at 13 (A19); *see also id.* at 9-10 (A15-16) (noting that former President Trump was "quite vocal and public about what he wanted" and that "it wasn't necessary for Mr. Wray to tell anybody what the President was thinking").

The district court nevertheless found that extraordinary circumstances warranted allowing Strzok to depose the former President. The court reasoned that former President Trump's "own contemporaneous and recent statements concerning his role make the inquiry legitimate and likely to lead to relevant evidence that can't be obtained elsewhere, even if it isn't ultimately fruitful." Feb. 23, 2023 Tr. 13 (A19). "It is of some relevance," the court continued, "if he expressed his viewpoint or issued directives during meetings in the Oval Office." *Id.* The court also observed that Trump "has personally initiated civil lawsuits during his post presidency period," which in the court's view "suggest[ed] that his schedule as a former president and

current candidate can withstand the modest demands on his time that a deposition would impose." *Id.* at 14 (A20).

The court permitted a two-hour deposition of the former President, limited to the following topics:

- A January 22, 2018 meeting between Trump, Wray, and then-Attorney General Jeff Sessions, "but only with respect to discussions at that meeting of the text messages between the two plaintiffs or the two plaintiffs in general, disciplining them, investigating them, et cetera." Feb. 23, 2023 Tr. 14-15 (A20-21);
- A January 23, 2018 meeting between Trump and Sessions, "but, again, only with respect to any discussions of the plaintiffs," *id.* at 15 (A21);
- A June 15, 2018 meeting purportedly between Trump, Wray, Rosenstein, and others, but "limited to any discussion of the fate of the plaintiffs, their employment status or likely discipline," *id.*;
- Trump's "own public statements and communications about the plaintiffs" from December 2, 2017, to the present, *id.*; *see id.* at 15-16 (A21-22); and
- Whether Trump "retained the text messages, where he got them, [and] what he did with them," *id.* at 16 (A22).

Following the district court decision and at the request of the court, the government informed the court that the "Executive Office of the President will not assert the Presidential Communications Privilege, and Defendants will not assert the Deliberative Process Privilege, with respect to the authorized topics" in any Trump or Wray deposition. Dkt. No. 108, at 2.

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5. The government filed a motion in district court to stay its order permitting the deposition of the former President or, alternatively, to order that the former President not be deposed until after the deposition of Director Wray (and any ensuing motion practice as to the remaining necessity of the former President's deposition). Dkt. No. 110. The district court ordered "that the deposition of Christopher Wray proceed first." May 12, 2023 Minute Order (A4).

During his deposition, Director Wray testified that [redacted]

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After the Wray deposition, [redacted], the government moved for reconsideration of the court's denial of the government's motion to quash the subpoena for the deposition of former President Trump. The court denied the government's motion without waiting for a response from plaintiffs. In doing so, the court acknowledged that, "to the extent the individuals deposed to date recalled the events in question, their testimony did not advance plaintiffs' theory that the former President was involved in the decision making at issue in this case." July 6, 2023 Minute Order (A6). But the court allowed the deposition to proceed based on its previously stated view that "the former President himself has publicly boasted of his involvement." *Id.*[1]

[1] The proceedings in this case pertaining to the Trump and Wray deposition subpoenas have been conducted under seal. At the parties'

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ARGUMENT

This Court Should Exercise Its Mandamus Authority To Block the Deposition of the Former President

Only the most extraordinary of circumstances would justify allowing a plaintiff to depose a former high-level official about actions he took in the course of his official duties. This case falls far short of that standard. Peter Strzok, while leading two of the most important and politically sensitive investigations in the recent history of the FBI, unquestionably engaged in misconduct that, all agree, caused incalculable harm to the Bureau. The FBI reasonably concluded that such misconduct by a member of its leadership team warranted dismissal. [redacted]

See July 6, 2023 Minute Order (A6) (recognizing that, "to the extent the individuals deposed to date recalled the events in question, their testimony

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request, the district court unsealed relevant portions of the transcript of the February 23, 2023 hearing at which the court denied the government's motion to quash to the former President's deposition. The government has requested that plaintiffs agree to remove the confidentiality designations of additional materials cited in this petition, where feasible, and the parties continue to engage on these issues.

did not advance plaintiffs' theory that the former President was involved in the decision making at issue in this case").

Federal courts of appeals consistently exercise their mandamus authority to block district court orders requiring the deposition of current and former high-ranking Executive Branch officials. *See, e.g.*, *In re Department of Commerce*, 139 S. Ct. 360 (2018) (No. 18A375) (staying deposition of Commerce Secretary); *In re Department of Commerce*, 139 S. Ct. 566 (2018) (No. 18-557) (treating petition for writ of mandamus as petition for writ of certiorari, and granting petition); Order, *In re Murthy*, No. 22-30697 (5th Cir. Jan. 5, 2023) (per curiam) (staying deposition of former White House Press Secretary) (Psaki Order); *In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022) (granting mandamus to quash deposition of former Secretary of Education); *In re Clinton*, 973 F.3d 106 (D.C. Cir. 2020) (granting mandamus to quash deposition of former Secretary of State). This Court should do the same here.

A. Mandamus Is Appropriate To Block Depositions of Former and Current High-Ranking Officials Absent Exceptional Circumstances

It is well-settled that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their

reasons for taking official actions." *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). Allowing depositions of those officials in civil litigation—to say nothing of a current or former President—is "not normally countenanced," *Peoples v. U.S. Dep't of Agric.*, 427 F.2d 561, 567 (D.C. Cir. 1970), and is "quite unusual," *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998); *see, e.g.*, *In re Cheney*, 544 F.3d 311 (D.C. Cir. 2008) (per curiam) (Vice President's Chief of Staff). That is because "the compelled appearance of a high-ranking officer of the executive branch in a judicial proceeding implicates the separation of powers." *In re United States*, 624 F.3d 1368, 1372 (11th Cir. 2010); *U.S. Department of Education*, 25 F.4th at 702 (emphasizing that a judicial order allowing the deposition of a current or former high-ranking Executive Branch official threatens to "disrupt the normal governmental balance of powers").

Courts, including this Court, consistently grant mandamus relief to enforce this rule. *See, e.g.*, *Cheney*, 544 F.3d 311; *Clinton*, 973 F.3d at 121; Order, *In re United States*, No. 14-5146 (D.C. Cir. July 24, 2014) (per curiam) (Secretary of Agriculture) (Vilsack Order); *U.S. Department of Education*, 25 F.4th at 701 ("Although district courts have occasionally ordered such depositions, circuit courts have issued writs of mandamus to stop them when

asked to, generally finding that the circumstances before them were not extraordinary.") (collecting cases); *cf. In re Department of Commerce*, 139 S. Ct. 360 (2018) (No. 18A375) (staying deposition of Commerce Secretary).

The separation-of-powers concerns inherent in all depositions of high-level Executive Branch officials are near their zenith where, as here, plaintiffs seek to depose a former President about his official conduct while in office. "The President occupies a unique position in the constitutional scheme"; one that "distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 750 (1982). In light of the "special nature of the President's constitutional office and functions" and "the singular importance of [his] duties," separation-of-powers principles require particular "deference and restraint" in the conduct of litigation involving the President. *Id.* at 751-56; *see also Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 382, 385, 388 (2004) (emphasizing that discovery directed at the Office of Vice President raised "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office," the "energetic performance" of the Commander-in-Chief 's "constitutional responsibilities," and "[t]he high respect that is owed to the office of the

Chief Executive" (alteration in original) (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997))).

That this case involves the deposition of a former President, rather than a sitting President, does not diminish the separation-of-powers concerns. Strzok seeks to depose former President Trump about his official conduct in office. That claim implicates the interests and autonomy of the Office of the President and of the Executive Branch more broadly. Indeed, the foundational case about a President's immunity from civil damages for conduct in office, *Nixon v. Fitzgerald*, likewise involved a former President. As courts have explained in granting mandamus to preclude the deposition of former high-ranking cabinet officials, "[t]he threat of having to spend their personal time and resources preparing for and sitting for depositions could hamper and distract officials from their duties while in office." *U.S. Department of Education*, 25 F.4th at 705. That rationale applies with even greater force to the President "[i]n view of the visibility of his office and the effect of his actions on countless people." *Nixon*, 457 U.S. at 752. A President should not have to perform his official duties while in office in the expectation of regularly being subpoenaed to testify in civil litigation after his term in office ends.

Even where a President is not involved, a party must overcome a high bar to demonstrate the "extraordinary circumstances" necessary to depose a current or former high-level official regarding actions taken pursuant to official duties. *Simplex Time Recorder*, 766 F.2d at 586. No extraordinary circumstances exist where "information . . . could be obtained elsewhere." *Cheney*, 544 F.3d at 314; *see Simplex Time Recorder*, 766 F.2d at 587 (party did not show that information was unavailable "from published reports and available agency documents"); *U.S. Department of Education*, 25 F.4th at 704 ("[T]o take the deposition of a cabinet secretary, the information sought cannot be obtainable in any other way."). In other words, the deposition may not proceed unless it is "essential to the case." *U.S. Department of Education*, 25 F.4th at 703.

B. The District Court Clearly Abused Its Discretion in Concluding That Extraordinary Circumstances Justified the Former President's Deposition

The district court committed a clear abuse of discretion in authorizing Strzok to depose the former President. The permissible topics for the deposition—White House meetings where plaintiffs may have been discussed; former President's Trump's public statements about plaintiffs as well as any related communications about his statements with the

Department of Justice or the FBI; etc.—concern the former President's actions in the course of his official duties as President. The court accordingly did not dispute that the presumption against compelled testimony of a high-ranking official applied here. But it committed a "clear abuse of discretion" that "justif[ies] mandamus," *Clinton*, 973 F.3d at 111, when it determined that this case presents "extraordinary circumstances" warranting the deposition of the former President, Feb. 23, 2023 Tr. 12 (A18).

The former President's testimony is not "essential" to Strzok's retaliation claim, *U.S. Department of Education*, 25 F.4th at 703, nor could it yield information vital to Strzok's claim that is unavailable from any other source. Strzok challenges the reasons for his termination from the FBI. It is undisputed that former FBI Deputy Director David Bowdich, not former President Trump, made the decision to dismiss Strzok. *E.g.*, Compl. ¶3 ("The discharge decision was made by Deputy Director David Bowdich . . . ."). It is thus Bowdich's motives for dismissing Strzok that are relevant to Strzok's retaliation claim. Strzok has had ample opportunity to explore those motives directly, including through depositions of Bowdich himself, FBI Director Wray, former Deputy Attorney General Rod Rosenstein, Justice Department Inspector General Michael Horowitz, and others.

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Despite this extensive discovery Strzok has identified no evidence that would undermine Bowdich's stated, plainly sufficient, non-retaliatory reasons for Strzok's termination. *Cf, CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008) ("[W]e have long presumed that executive agency officials will discharge their duties in good faith."). Indeed, the district court recognized that Bowdich's stated reasons for dismissing Strzok (*i.e.*, that Strzok engaged in serious, acknowledged, and damaging misconduct), as conveyed in his letter terminating Strzok and [redacted], did not "leave[ ] much wiggle room at all for a factfinder to conclude that [Bowdich] did what he did because Christopher Wray told him to or because Christopher Wray conveyed a message from the then President, or because he thought the President had directed him to." Feb. 23, 2023 Tr. 9 (A15).

That conclusion has since become even more plain. [redacted]

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[redacted] Moreover, former White House Chief of Staff John Kelly has since similarly stated that he never recalled former President Trump asking "FBI Director Christopher Wray, FBI Deputy Director David Bowdich, or anyone else at the FBI" to dismiss or investigate Strzok or Page. Dkt. No. 115-1, Ex. C ¶¶1, 4, 5. Kelly also noted that he "did not take any action to put into effect, or cause to be put into effect, former President Trump's expressed views with respect" to Mr. Strzok or Ms. Page, and that he is not "aware of anyone else doing so." *Id.* ¶11. [redacted]

The district court had all of this information before it when it nonetheless decided to allow the deposition to proceed. In its ruling denying the government's motion to quash, the district court stated that "the President's own contemporaneous and recent statements concerning his role

make the inquiry legitimate and likely to lead to relevant evidence that can't be obtained elsewhere," and "[i]t is of some relevance if he expressed his viewpoint or issued directives during meetings in the Oval Office." Feb. 23, 2023 Tr. 13 (A19); *see also* July 6, 2023 Minute Order (A6) (acknowledging that, "to the extent the individuals deposed to date recalled the events in question, their testimony did not advance plaintiffs' theory that the former President was involved in" Strzok's termination, but nonetheless permitting the deposition on the ground that "the former President himself has publicly boasted of his involvement").

This gets matters backwards. The former President's repeated public statements criticizing Strzok and expressing his strong desire that Strzok be dismissed undermine any basis for the deposition. The former President's statements made his views on the matter pellucidly clear, "broadly communicated," and widely known. Feb. 23, 2023 Tr. 13 (A19). [redacted] As the district court recognized, therefore, it "wasn't necessary for" FBI Director Wray or any other senior officials who met with the President in the Oval Office to tell Bowdich "what the President was

thinking." Feb. 23, 2023 Tr. 9-10 (A15-16). Everyone knew what the President thought. The question at the core of this case is whether there is any basis to second-guess [redacted] based on the nature and extent of Strzok's misconduct in his improper texts with Page and the damage that he caused to the FBI.

Strzok has in his possession all the information he needs to make his legal argument on that score. He is free to argue, if he wishes, that the testimony of [redacted] should not be believed and that President Trump's desire to see Strzok dismissed was the true reason for his termination. In the government's view, [redacted] refutes that claim. In no event, however, is a deposition of the former President necessary for Strzok to make that argument. At most, such a deposition would show that the former President privately expressed views consistent with his public statements—[redacted]

The former President's public statements purportedly "boast[ing] of his involvement" in Strzok's termination, *see* July 6, 2023 Minute Order (A6), are likewise beside the point. As discussed above, [redacted] *See supra* pp. 14-15, 18. How the former President himself might now characterize his role in Strzok's termination is thus irrelevant to Strzok's retaliation claim. The fact that Strzok may [redacted] about the reasons for his decision is not an "exceptional circumstance" warranting the deposition of a former President.

The district court further erred in attempting to justify its ruling based on the limitations it placed on the duration and scope of the deposition of the former President. That reasoning gives insufficient weight to the separation-of-powers principles at stake in allowing the deposition to proceed in the first place. Courts have rejected similar arguments in the context of depositions of senior agency officials. *See In re United States*, 985 F.2d 510, 511-13 (11th Cir. 1993) (per curiam) (explaining that the court issued a writ of mandamus to quash an order directing the Commissioner of the Food and Drug Administration "to be available for thirty minutes" by telephone because,

even given that significant limitation, compelling the testimony of the Commissioner of the Food and Drug Administration "'would have [had] serious repercussions for the relationship between two coequal branches of government.'" (quoting *In re United States*, 985 F.2d at 510)). The separation-of-powers injury here is inflicted by the deposition itself and the court-sanctioned inquiry into the former President's conduct while in office. That threshold harm cannot be cured by placing guardrails around the duration and scope of the deposition.[2]

C. The Petition Satisfies the Remaining Mandamus Factors

The remaining two mandamus factors—whether the issuance of the writ is appropriate under the circumstances and whether the petitioner has no other adequate means to obtain relief—are also satisfied. This Court has

[2] Plaintiffs also claim that "President Trump's testimony is likely to be highly relevant to the Privacy Act claims" brought by Strzok and Page because "President Trump has long been fixated on—and in some instances personally involved in—matters relating to Ms. Page and Mr. Strzok." Dkt. No. 111, at 7. But former Attorney General Rod Rosenstein, not former President Trump, decided to release texts sent between Strzok and Page on their FBI-issued phones. Rosenstein has already explained that he did so based on his own analysis after consulting with Department of Justice officials to ensure that the release would not violate the Privacy Act. Rosenstein Decl. ¶¶8-15. Plaintiffs' attempt to force former President Trump to sit for a deposition is no more justified for their Privacy Act claims than for Strzok's retaliation claim.

made clear that mandamus is appropriate when a court orders the deposition of a current or former high-level official concerning actions taken while in office. *E.g.*, Vilsack Order, *supra* (third-party subpoena); *Clinton*, 973 F.3d at 117-18. Other courts have likewise "routinely found that, in cases involving high-level government officials, there are no other means of relief beyond mandamus because to disobey the subpoena, face contempt charges, and then appeal would not be appropriate for a high-ranking government official." *U.S. Department of Education*, 25 F.4th at 705; *see id.* ("[S]erious repercussions for the relationship between two coequal branches of government can remain even if the official is no longer in office when the official faces the subpoena because of their role in the executive branch."); Psaki Order, *supra*. And the "totality of the circumstances" factor also "merits granting the writ," *Clinton*, 973 F.3d at 117-18, given the weighty separation-of-powers interests at stake, *see U.S. Department of Education*, 25 F.4th at 705-06; *Cheney*, 542 U.S. at 382.

Mandamus is particularly warranted here given the weakness of Strzok's retaliation claim. To state a claim of retaliation in violation of the First Amendment, a public employee must show, among other things, that the "governmental interest in 'promoting the efficiency of the public services

it performs through its employees'" does not outweigh the "employee's interest, 'as a citizen, in commenting upon matters of public concern' and the interest of potential audiences in hearing what the employee has to say." *O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1998) (citation omitted) (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). It is far from clear that Strzok, a senior FBI agent charged with leading highly sensitive investigations, had a constitutionally protected interest in sharing his political views with a co-worker on his FBI-issued cellphone, especially given that the investigations concerned the major-party candidates for the presidency. But even assuming he possessed such an interest, it was far outweighed by the FBI's interest in protecting its integrity, impartiality, and reputation by making clear to its employees and the public that the damaging misconduct committed by Strzok demanded his termination.

Indeed, it is undisputed that Strzok's actions, undertaken while he was leading two prominent, politically sensitive investigations, caused immense harm to the FBI. *See* Dkt. No. 30-5, at 23; *see also* Dkt. No. 30-7, at 1-2 (concluding that Strzok's "repeated, sustained errors of judgment " were the most damaging acts to the FBI's reputation by an employee that Bowdich had seen in his 23 years at the agency). As Strzok acknowledged, the text

exchanges "without question" represented "horrible judgment" and the disclosure of the messages caused significant damage to the FBI's reputation. Dkt. No. 30-5, at 18. The plainly flawed nature of Strzok's claim renders the district court's decision to permit him to depose the former President in service of that claim all the more unjustified.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

MARK R. FREEMAN
GERARD SINZDAK
/s/ Martin Totaro
MARTIN TOTARO
Attorneys, Appellate Staff
Civil Division, Room 7525
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5048
martin.v.totaro@usdoj.gov

July 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs in district court, and respondents here, are Peter Strzok and Lisa Page.

Defendants in district court, and petitioners here, are Attorney General Merrick Garland, in his official capacity; the United States Department of Justice; FBI Director Christopher A. Wray, in his official capacity; and the Federal Bureau of Investigation.

There were no amici in district court.

Former President Donald Trump is not a party or amicus but is the subject of the third-party deposition subpoena at issue here.

B. Rulings Under Review

Petitioner seeks review of the February 23, 2023 Minute Order and the February 23, 2023 oral ruling of the U.S. District Court for the District of Columbia in *Strzok v. Garland*, No. 19-2367 (D.D.C.) (Jackson, J.), and a July 6, 2023 Minute Order denying reconsideration of the February 23 rulings. Those rulings are reproduced at A3, A6, and A7.

C. Related Cases

The case on review has not previously been before this Court or any other court, except the district court where it originated. Counsel for the government is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Martin Totaro
Martin Totaro

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume and typeface/typestyle limitations of Federal Rule of Appellate Procedure 21(d) because it contains 7162 words (excluding exempted matter) according to the count of Microsoft Word, and has been prepared in proportional CenturyExpd BT 14-point font.

CERTIFICATE OF SERVICE

I certify that, on July 11, 2023, I electronically filed a public version of this petition through this Court's CM/ECF system. I also certify that eight copies of the sealed petition and eight copies of the public petition will be hand-delivered today to the D.C. Circuit.

I further certify that, on July 11, 2023, four copies of the attached petition (two copies of the public petition and two copies of the sealed petition) were served on the following counsel by e-mail and by first-class mail:

Aitan D. Goelman
Christopher R. MacColl
Zuckerman Spaeder LLP
1800 M Street NW, Suite 1000
Washington, DC 20036
AGoelman@zuckerman.com
CMacColl@zuckerman.com
Counsel for Peter Strzok

Richard A. Salzman
Heller, Huron, Certkof & Salzman PLLC
1730 M Street NW, Suite 412
Washington, DC 20036
salzman@hellerhuron.com

Amy Jeffress
Robert Katerberg
Kaitlin Konkel
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001
Amy.jeffress@aporter.com
Robert.katerberg@arnoldporter.com
Kaitlin.konkel@arnoldporter.com
Counsel for Lisa Page

Finally, I certify that, on July 11, 2023, four copies of the attached petition (two copies of the public petition and two copies of the sealed petition) were sent to the Honorable Amy Berman Jackson, U.S. District Court Judge for the District of Columbia, by hand delivery.

/s/ Martin Totaro
Martin Totaro

[ORAL ARGUMENT NOT SCHEDULED]

No. 23-5154

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE ATTORNEY GENERAL MERRICK GARLAND, IN HIS OFFICIAL CAPACITY; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION DIRECTOR CHRISTOPHER A. WRAY, IN HIS OFFICIAL CAPACITY; FEDERAL BUREAU OF INVESTIGATION,

PETITIONERS.

PUBLIC ADDENDUM TO PETITION FOR A WRIT OF MANDAMUS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA—SEALED MATERIAL IN SEPARATE SUPPLEMENT

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK R. FREEMAN
GERARD SINZDAK
MARTIN TOTARO
Attorneys, Appellate Staff
Civil Division, Room 7525
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-5048

ADDENDUM AND SUPPLEMENT TO ADDENDUM
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JURY,TYPE-L

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:19-cv-02367-ABJ

STRZOK v. GARLAND et al
Assigned to: Judge Amy Berman Jackson
Case: 1:19-cv-03675-TSC
Case in other court: USCA, 19-05262
Cause: 28:1331 Fed. Question

Date Filed: 08/06/2019
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Plaintiff

PETER STRZOK

represented by **Aitan D. Goelman**
ZUCKERMAN SPAEDER, LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036
(202) 778-1996
Fax: (202) 822-8106
Email: agoelman@zuckerman.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Christopher MacColl
ZUCKERMAN SPAEDER LLP
1800 M St. NW
Suite 1000
Washington, DC 20036
(202) 778-1849
Fax: (202) 822-8106
Email: cmaccoll@zuckerman.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard A. Salzman
HELLER, HURON, CHERTKOF & SALZMAN, PLLC
1730 M Street, NW
Suite 412
Washington, DC 20036
(202) 293-8090
Fax: (202) 293-7110
Email: salzman@hellerhuron.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Julia Theresa Quinn
DOJ-CRT

12/07/2022	103	MOTION for Order *Reentering Pretrial Schedule* by LISA PAGE. (Attachments: # 1 Text of Proposed Order)(Jeffress, Dorothy) (Entered: 12/07/2022)
12/08/2022		MINUTE ORDER granting in part and denying in part 103 Plaintiffs' Motion to Reenter Pretrial Schedule. The defendants must produce all documents covered by the Court's August 10, 2022 Minute Order by the agreed date of January 13, 2023. While the Court is well aware that there are issues holding up the completion of discovery, it is not aware that there has been any impediment to the defendants' production of the records they were ordered to produce in August, and so this date will not be extended. Also, the Court is reluctant to leave the schedule entirely open-ended for an indefinite period of time, and therefore, the parties must submit a joint report transmitting an agreed plan (or their individual proposals if they cannot agree) for completing any outstanding discovery unaffected by the pending apex doctrine and executive privilege dispute by December 16, 2022, and a report with a proposed schedule or schedules for the completion of all discovery must be filed seven days after the Court's ruling on the motion to quash. Signed by Judge Amy Berman Jackson on 12/8/2022. (lcabj1) (Entered: 12/08/2022)
12/16/2022	104	Joint STATUS REPORT by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY. (Abbuhl, Joshua) (Entered: 12/16/2022)
12/21/2022		MINUTE ORDER. In light of the 104 joint status report and proposed discovery schedule filed by the parties, it is ORDERED that: (1) defendants must produce all documents covered by the Court's August 10, 2022 minute order, by January 13, 2023, as previously ordered by the Court; (2) plaintiffs must provide defendants with a complete list of proposed topics for a 30(b)(6) deposition of the FBI by January 20, 2023; (3) the parties must complete any remaining document productions by January 31, 2023 (this deadline applies only to the parties to these actions, and not to potential productions sought by third-party subpoenas); (4) the parties must agree on a complete list of 30(b)(6) deposition topics by February 3, 2023, or otherwise notify the Court that the parties have reached an impasse, in which case each party must provide the Court with its proposed list of 30(b)(6) deposition topics; (5) the parties must complete all discovery unaffected by the pending apex doctrine and executive privilege dispute in Strzok v. Garland and Page v. DOJ by March 15, 2023; (6) the parties must submit a joint status report on whether the cases should remain consolidated for purposes of summary judgment or trial by March 22, 2023. Per the Court's December 8, 2022 minute order, the parties will submit a joint report with a proposed schedule or schedules for the completion of all discovery seven days after the Court's ruling on the motions to quash. SO ORDERED. Signed by Judge Amy Berman Jackson on 12/21/2022. (lcabj1) (Entered: 12/21/2022)
02/03/2023	105	NOTICE *of Additional Inquiry Areas for Depositions at Issue in Motions to Quash* by PETER STRZOK (Goelman, Aitan) (Entered: 02/03/2023)
02/03/2023	106	Joint STATUS REPORT *per Court's December 21, 2022 minute order and request for conference* by PETER STRZOK. (Attachments: # 1 Exhibit Amended 30(b)(6) Deposition Notice)(MacColl, Christopher) (Entered: 02/03/2023)
02/09/2023		MINUTE ORDER. In light of the request in the parties' February 3, 2023 Joint Status Report, it is ORDERED that a conference is set for February 23, 2023 at 10:00 AM in Courtroom 3 in person before Judge Amy Berman Jackson. SO ORDERED. Signed by Judge Amy Berman Jackson on 2/9/23. (DMK) (Entered: 02/09/2023)
02/21/2023		MINUTE ORDER. Since the issues to be discussed at the hearing set for February 23, 2023 involve consideration of numerous sealed pleadings and exhibits, the hearing will be conducted under seal. During and after the hearing, with the input of the parties, the

		Court will assess what portions of the transcript, if any, can be unsealed. Signed by Judge Amy Berman Jackson on 2/21/2023. (jth) (Entered: 02/21/2023)
02/23/2023		MINUTE ORDER. For the reasons stated on the record at the hearing on February 23, 2023, the 75 Defendants' Motion to Quash Subpoena and for a Protective Order barring plaintiff Strzok's proposed deposition of FBI Director Christopher Wray on the basis of the apex doctrine, and the Defendants' Motion to Quash Subpoena and for a Protective Order, filed in the related case, 22-mc-27, also based on the apex doctrine, related to the subpoena issued by plaintiff Strzok to former President Donald J. Trump, were DENIED in part. The Court authorized the plaintiffs to conduct depositions of each witness that do not exceed two hours and are limited to the narrow set of topics specified on the record at the hearing. Today's ruling addressed the apex doctrine issues only and did not resolve any questions related to either the Presidential communications prong or the deliberative process prong of the executive privilege. For the reasons stated on the record, the government must inform the Court whether the current President will invoke the executive privilege with respect to the specified topics by March 24, 2023. Also, for reasons stated on the record at the hearing, the Court resolved several discovery disputes, and a status report on the state of discovery is due on March 13, 2023. The hearing was conducted under seal, but in accordance with the Court's 2/21/2023 Minute Order, and with the consent of the parties, the transcript of the proceedings will be unsealed with the limited exception of those portions of the apex doctrine discussion that made reference to sealed deposition testimony, and the portions of the hearing related to discovery disputes. SO ORDERED. Signed by Judge Amy Berman Jackson on 2/23/2023.(lcabj1) (Entered: 02/23/2023)
03/13/2023	107	Joint STATUS REPORT *ON THE STATE OF DISCOVERY* by LISA PAGE. (Attachments: # 1 Text of Proposed Order)(Jeffress, Dorothy) (Entered: 03/13/2023)
03/24/2023	108	NOTICE *REGARDING EXECUTIVE PRIVILEGE* by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY (Humphreys, Bradley) (Entered: 03/24/2023)
04/20/2023		MINUTE ORDER. With respect to the parties' discovery dispute that was brought to the Court's attention in accordance with the procedure sent out in the Scheduling Order, and after, considering the information provided by both parties, the Court has determined that no conference is necessary. It is ordered that the plaintiffs may reopen the deposition of former Associate Deputy Attorney General Scott Schools and question him for up to 70 minutes concerning the topics and documents that were previously designated as privileged. If the plaintiffs choose to devote some portion of that time to newly produced records, they may do so, but the Court is not ruling that the ongoing production of additional responsive records by either party is enough by itself to support a request by the opposing party to reopen a deposition absent extraordinary circumstances presented by a particular document or set of documents. SO ORDERED. Signed by Judge Amy Berman Jackson on 4/20/2023. (lcabj1) (Entered: 04/20/2023)
05/11/2023	109	UNSEALED PURSUANT TO MINUTE ORDER FILED 05/12/23.....SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Unredacted Motion for Reconsideration and/or Stay, # 2 Text of Proposed Order) (Lynch, Christopher) Modified on 5/12/2023 (zjth). (Entered: 05/11/2023)
05/11/2023	110	MOTION for Reconsideration re Order on Motion to Quash,,,,,,,, Order on Motion for Protective Order,,,,,,,, Set/Reset Deadlines,,,,,,, , MOTION to Stay by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES

		DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY. (Attachments: # 1 Declaration of Christopher Lynch and Exhibits A-D, # 2 Text of Proposed Order)(Lynch, Christopher) (Entered: 05/11/2023)
05/12/2023		MINUTE ORDER denying as moot 110 Motion for Reconsideration and Motion to Stay. On August 10, 2022, the Court ruled, pursuant to the apex doctrine, that any request to depose FBI Director Christopher Wray or former President Donald J. Trump must await the completion of the depositions of former FBI Deputy Director Bowdich and former Deputy Attorney General Rod Rosenstein. Thereafter, on February 23, 2023, after full briefing by the parties as to what had transpired in those proceedings, the Court issued a lengthy oral ruling on the question of whether the depositions of Director Wray and former President Trump could proceed. It ordered in its discretion and in accordance with the applicable law that they could both go forward under very strict restrictions as to time and subject matter. The Court is somewhat surprised to learn that since then, the parties have done nothing more than wrangle over the order of the two depositions. The government seems chagrined that the Court did not order that the deposition of the FBI Director be completed first, but it may recall that it was the Court's view that it was Director Wray, the only current high-ranking public official in the group of proposed deponents, whose ongoing essential duties fell most squarely under the protection of the doctrine in question. The defendants' instant motion repeats arguments that were made and fully considered before, and it does not set forth grounds warranting reconsideration. The Court's ruling was appropriate in light of all of the facts, including the former President's own public statements concerning his role in the firing of the plaintiff. However, in order to get the parties -- who apparently still cannot agree on anything -- over this impasse, it is hereby ORDERED that the deposition of Christopher Wray proceed first, rendering the instant motion moot. SO ORDERED. Signed by Judge Amy Berman Jackson on 5/12/23. (DMK) (Entered: 05/12/2023)
05/12/2023		MINUTE ORDER DENYING 109 Sealed Motion for Leave to File Document Under Seal. Given the parties' stated positions in the 109 Motion, the Clerk is directed to unseal the motion for leave to file under seal 109 itself and the attachments to the Motion [109-1], [109-2]. SO ORDERED. Signed by Judge Amy Berman Jackson on 5/12/2023. (lcabj1) Modified on 5/12/2023 (jth). (Entered: 05/12/2023)
05/15/2023	111	Joint MOTION to Clarify *the Minute Order Regarding Depositions of Donald J. Trump and Christopher A. Wray on behalf of both Plaintiffs* by PETER STRZOK. (Attachments: # 1 Declaration of Christopher R. MacColl and Exhibits, # 2 Text of Proposed Order) (MacColl, Christopher) (Entered: 05/15/2023)
05/15/2023		MINUTE ORDER. The instant motion is not a proper motion for "clarification," since the Court's May 12, 2023, minute order did not address the dates of the depositions at all. It is a new motion asking for additional relief, which will be GRANTED in part and DENIED in part. The very lengthy account of the ins and outs of the scheduling negotiations between the parties does little to assuage the Court's concerns that the parties are being unnecessarily contentious. The Court shares plaintiffs' frustration that the government waited to challenge the ruling ordering that both depositions take place until now, but it is also unpersuaded that there is any case-related justification for plaintiffs' continuing efforts to pursue the former President's deposition before the others. Since the Court lacks complete information about the lawyers' schedules and the witnesses' schedules, it is not in a position to order that any particular deposition take place on any particular date, and given Director Wray's critical responsibilities, it will not order that his deposition take place during a two week period when he has said he is not available. Therefore, it is ORDERED that the deposition of Director Wray must be completed by June 2, 2023, and any motion by the defendants seeking reconsideration of the order that former President Trump must be deposed for two hours must be filed by June 9, 2023. The motion must be based on the deposition of Director Wray and it may not re-argue what took place in the

		Bowdich deposition. Plaintiffs' response will be due on June 16, 2023. No other discovery deadlines will change. If plaintiffs are unwilling to proceed with Director Wray's deposition in accordance with this timeline due to the unavailability of lead counsel for Mr. Strzok, the parties may agree to a later mutually available date, no later than July 15, 2023, with any motion by the defendants due one week later, and plaintiffs' response due two weeks from the date of the deposition. The parties are reminded that with the limited exception of the motion for reconsideration provided for in this order, the provision in the scheduling order for how discovery disputes should be handled remains in effect. SO ORDERED. Signed by Judge Amy Berman Jackson on 5/15/2023. (lcabj1) (Entered: 05/15/2023)
05/19/2023	112	Unopposed MOTION to Unseal Document *Portions of Feb 23, 2023 Hearing Transcript* by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY. (Attachments: # 1 Text of Proposed Order)(Lynch, Christopher) (Entered: 05/19/2023)
05/22/2023		MINUTE ORDER. The parties have contacted the Court concerning the scheduling of the deposition of FBI Director Christopher Wray. Due to his unavailability in the interim, the deposition will take place on June 27, 2023. The Court has noted repeatedly that his deposition is the one that falls most squarely within the apex doctrine, and there has been no indication that the defense has sought this extension in bad faith. The Court understands plaintiffs' desire to complete the discovery process at long last, but it is not the witness's fault that it has taken so long to get to this point; there were a number of serious legal issues to be decided before the order approving the two remaining depositions could be issued, and the fact that the plaintiffs have insisted that former President Trump's deposition go first is one of the main reasons why Director Wray's deposition has not yet been completed. Any motion by the defendants seeking reconsideration of the order that former President Trump may be deposed for two hours, which may include information from the Wray deposition, but may not repeat arguments advanced previously, must be filed by July 5, 2023, and any response will be due on July 12, 2023. SO ORDERED. Signed by Judge Amy Berman Jackson on 5/22/2023. (lcabj1) (Entered: 05/22/2023)
06/22/2023		MINUTE ORDER. The parties have informed the Court of a discovery dispute concerning the scope of the upcoming deposition of FBI Director Christopher Wray, and it has reviewed the statements of each side's position. As both parties are aware, the Court limited the scope of the deposition to a set of narrow topics including meetings Director Wray attended with the President at which plaintiffs' employment status was discussed. It is true that in its ruling, the Court identified the specific meetings in question by date, but that is because those were the only relevant meetings attended by Wray that had ever been brought to the Court's attention. Defendants are ordered to complete their response to Plaintiffs' Joint Interrogatory 24 by noon on Monday, June 26, 2023, and Director Wray may be questioned concerning any additional White House meetings he attended in which the plaintiffs' employment status was discussed. The length of the deposition will remain the same. SO ORDERED. Signed by Judge Amy Berman Jackson on 6/22/23. (Entered: 06/22/2023)
06/23/2023		MINUTE ORDER granting 112 unopposed Motion to Unseal. The motion to partially unseal pages 1-40 of the February 23, 2023 hearing transcript, with the exception of the excerpt at 24:22-25:12, is GRANTED. SO ORDERED. Signed by Judge Amy Berman Jackson on 6/23/2023. (lcabj1) (Entered: 06/23/2023)
06/28/2023	113	TRANSCRIPT OF PROCEEDINGS before Judge Amy Berman Jackson held on February 23, 2023; Page Numbers: 1-75. Date of Issuance: June 28, 2023. Court Reporter: Janice Dickman, Telephone number 202-354-3267, Transcripts may be ordered by submitting the Transcript Order Form

		For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 7/19/2023. Redacted Transcript Deadline set for 7/29/2023. Release of Transcript Restriction set for 9/26/2023.(Dickman, Janice) (Entered: 06/28/2023)
07/05/2023	114	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Memorandum in Support Defendants' Motion for Reconsideration of Order Denying in Part Defendants' Motion to Quash Subpoena for Deposition of Former President Trump, # 2 Exhibit Rough Transcript of June 27, 2023 Deposition of FBI Director Christopher Wray, # 3 Exhibit Transcript of May 19, 2023 Reopened Deposition of Former Associate Deputy Attorney General Scott Schools, # 4 Text of Proposed Order)(Humphreys, Bradley) (Entered: 07/05/2023)
07/05/2023	115	REDACTED DOCUMENT- Motion for Reconsideration *of Order Denying in Part Defendants' Motion to Quash Subpoena for Deposition of Former President Trump* by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY. (Attachments: # 1 Declaration Humphreys Declaration and Attached Exhibits in Support of Defendants' Motion, # 2 Text of Proposed Order)(Humphreys, Bradley) (Entered: 07/05/2023)
07/06/2023		MINUTE ORDER granting 114 Sealed Motion for Leave to File Document Under Seal. The Clerk of the Court is directed to file [114-1] the Motion for Reconsideration, [114-2] Exhibit A, and [114-3] Exhibit E under seal. SO ORDERED. Signed by Judge Amy Berman Jackson on 7/6/2023. (lcabj1) (Entered: 07/06/2023)
07/06/2023	116	SEALED MOTION for Reconsideration re Minute Order filed 2/23/2023 filed by FEDERAL BUREAU OF INVESTIGATION, MERRICK B. GARLAND, UNITED STATES DEPARTMENT OF JUSTICE, CHRISTOPHER A. WRAY. (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Exhibit A, # 2 Exhibit E)(znmw) (Entered: 07/06/2023)
07/06/2023		MINUTE ORDER. After review of the sealed materials submitted in connection with the 116 Motion for Reconsideration, the motion is DENIED. While to the extent the individuals deposed to date recalled the events in question, their testimony did not advance plaintiffs' theory that the former President was involved in the decision making at issue in this case, the fact remains that the former President himself has publicly boasted of his involvement. Given the limited nature of the deposition that has been ordered, and the fact that the former President's schedule appears to be able to accommodate other civil litigation that he has initiated, the outcome of the balancing required by the apex doctrine remains the same for all of the reasons previously stated.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Peter Strzok, Plaintiff, vs. Merrick B. Garland, et al., Defendants.	)	Civil Action No. 19-cv-2367 STATUS CONFERENCE **SEALED** Washington, DC February 23, 2023 Time: 10:00 a.m.
Lisa Page, Plaintiff, vs. U.S. Department of Justice, et al., Defendants.	)	Civil Action No. 19-cv-3675 STATUS CONFERENCE **SEALED** Washington, DC February 23, 2023 Time: 10:00 a.m.

TRANSCRIPT OF STATUS CONFERENCE
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

For Plaintiff Strzok: Christopher MacColl
Aitan D. Goelman
ZUCKERMAN SPAEDER LLP
1800 M St. NW, Suite 1000
Washington, DC 20036
(202) 778-1849
Email: Cmaccoll@zuckerman.com
Email: Agoelman@zuckerman.com

Richard A. Salzman
HELLER, HURON, CHERTKOF & SALZMAN, PLLC
1730 M Street, NW, Suite 412
Washington, DC 20036
(202) 293-8090
Email: Salzman@hellerhuron.com

For Plaintiff
Page: Kaitlin Brooke Konkel
Robert J. Katerberg
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5757
Email: Kaitlin.konkel@arnoldporter.com
Email: Robert.katerberg@arnoldporter.com

For Defendants: Joshua Charles Abbuhl
Michael Gaffney
Bradley Humphreys
U.S. DEPARTMENT OF JUSTICE
1100 L Street, NW
Washington, DC 20005
(202) 616-8366
Email: Joshua.abbuhl@usdoj.gov
Email: Michael.J.Gaffney@usdoj.gov
Email: Bradley.humphreys@usdoj.gov

Court Reporter: Janice E. Dickman, RMR, CRR, CRC
Official Court Reporter
United States Courthouse, Room 6523
333 Constitution Avenue, NW
Washington, DC 20001
202-354-3267

THE COURTROOM DEPUTY: Good morning, Your Honor, pursuant to order, this is a sealed hearing, the courtroom has been closed. This morning we have civil action number 19-2367, Peter Strzok versus Merrick v. Garland, et al. and civil action number 19-3675, Lisa Page versus the United States Department of Justice, et al.

Will one attorney representing plaintiff Strzok please approach the lectern and identify yourself and your colleagues for the record, followed by plaintiff Page, followed by the government.

MR. MacCOLL: Good morning, Your Honor. Christopher MacColl, with Zuckerman, Spaeder, for Mr. Strzok. Also with me in the courtroom today is Richard Salzman, with Heller, Huron; Aitan Goelman, also with Zuckerman, Spaeder, and; Mr. Strzok himself. Thank you, Your Honor.

THE COURT: All right. Good morning.

MR. SALZMAN: Good morning.

MS. KONKEL: Good morning, Your Honor. I'm Kaitlin Konkel for plaintiff Lisa Page. I'm here with Ms. Page and my colleagues Robert Katerberg and Amy Jeffress, from Arnold & Porter.

THE COURT: All right. Good morning.

MR. ABBUHL: Good morning, Your Honor. My name is Joshua Abbuhl, with the Department of Justice. With me, also from the Department of Justice, is Michael Gaffney, Bradley

Humphreys, Marcia Berman, Christopher Hall. And from the FBI, Pooja Patel and Marisa Ridi.

THE COURT: Good morning, everybody. The hearing was originally prompted by the fact that there's some discovery disputes that we need to iron out and you contacted chambers, as I asked you to do. And I'm going to get to those, but I've also been wanting to get to a lot of other matters, and thought since I was going to be talking to you, I might as well talk to you about everything.

So we do have the miscellaneous matter that was filed on January 24th of 2022, the motion to quash the former President Trump's deposition subpoena. Then there was a motion at docket 75 to quash the deposition subpoena of Christopher Wray. A lot of supplementary information was provided by both sides in support of all of that.

I held a hearing last August where I granted the motion to quash the deposition notices and subpoenas insofar as how the depositions would be sequenced, but left open the question of whether they would happen at all. And I ordered that the depositions of FBI Deputy Director David Bowdich and Deputy Attorney General -- former Deputy Attorney General Rod Rosenstein take place first.

Then the parties were supposed to file supplemental pleadings telling me how any information gathered in those exercises would bear on the resolution of the Apex Doctrine

issue. And I also said, looking forward to the executive privilege issues that we were going to have to resolve, why don't we start identifying what the questions are that we want to ask in these depositions. And then I asked whether the government was going to assert its executive privilege in response to those questions. And I also ordered the parties to set forth legal arguments about the applicability of the executive privilege.

All that briefing has taken place. The government filed -- the plaintiffs filed their notice of supplemental questions, of questions that they wanted to ask and the areas inquires and the -- then the government responded to the areas of inquiry at the depositions and said I think this is privilege, this is privilege, this isn't.

We got the briefs on executive privilege, and then I issued another order, in light of a status report back in December, that said plaintiffs have to provide the defendants with lists of 30(b)(6) topics and you can let me know if there's any disputes with respect to some of the topics. And, unsurprisingly, that happened.

And, so, that's the discovery dispute that prompted the status conference. Now there's also a discovery dispute with respect to documents that are being requested of Ms. Page.

So what's on the table, as far as I can tell, are the Apex Doctrine rulings left open as to former President Trump

and Christopher Wray -- prior to which I required the completion of other depositions -- the executive privilege questions, and the discovery disputes. And this is all intertwined. It's something like a law school issue-spotting exercise, which one are you going to take up first? And I'm going to take them up in that order because that turned out to be the easiest way for me to think about all of it.

With respect to the Apex Doctrine, I put the law on the record in the August 22nd, 2022 hearing. The rule explained by the Supreme Court in *United States versus Morgan*, 313 U.S. 409, from 1941, which is regularly enforced in this circuit, is the top executive department official should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.

Consistent with that, it's well-established in this circuit that a party attempting to depose a high-ranking government official must demonstrate the extraordinary circumstances requiring such a deposition. The test is that those officials are generally are not suject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere.

That's also been expressed as: Unless the official has unique firsthand knowledge related to the litigated claims or that the necessary information can't be obtained through

other, less burdensome or intrusive means.

The Apex Doctrine is supposed to protect the integrity and the independence of the government's decision-making processes, and it permits high-ranking government officials to perform their official tasks without disruption or diversion. Separation of powers concerns are part of the context and the underpinning for the ruling.

But in *Clinton versus Jones*, 520 U.S. 681, at 705, the Supreme Court recognized that separation of powers does not bar every exercise of jurisdiction over the President of the United States, and in that case they were talking about deposing a sitting president.

One of the officials involved is a former official, the former President. But that alone is not dispositive. There are three rationales for the protection of the Apex Doctrine. First, in *Morgan*, the Supreme Court instructed that the integrity of the administrative process must be equally respected with that of judicial decision making, cautioning against probing the mental processes of highly ranking agency officials.

And this will one bears on the issue, but it doesn't fall squarely within the heartland of what the purpose of the rule is, this case doesn't. Because we're talking about an employment decision, as opposed to agency policy. And it was an employment decision that was already being played out in the

public eye, with public statements, as the -- that the President chose to disseminate along the way. And the government keeps telling me, it wasn't the President's decision to make anyway.

Second, the doctrine ensures that high-ranking government officials are permitted to perform their official tasks without disruption or diversion. This one doesn't apply to the former President as strongly as it would bear directly on Christopher Wray. And, third, the Court said, A contrary rule might discourage otherwise upstanding individuals from public service.

I note the courts in this district have consistently held that the Apex Doctrine is no less applicable to former officials than to current officials. Even though, they say, the rationale based on interference with official duties is absent, the other two rationales apply to former officials and current officials with equal force.

But the doctrine doesn't bar all testimony by either group of people. The doctrine only forecloses the deposition of officials who lack relevant knowledge that can't be obtained from other witnesses, or through less burdensome or obtrusive means.

I deferred to the Trump and Wray decisions until Bowdich and Rosenstein could be deposed and I've reviewed all of your subsequent submissions.

When the Bowdich deposition was described, frankly it was like I was reading about two different depositions. So I have now read every single word of it myself. And I've read the entire Rosenstein deposition myself. And I have to tell you, the Wray deposition -- I mean, the Bowdich deposition, when we're talking about whether Christopher Wray should be deposed, I don't read it the way plaintiffs attempt to characterize it.

At page 33 the witness testified that he personally, strongly, disagreed with the Will decision. It's true, as plaintiffs point out, the frequent meetings between the director and the deputy gave, as they put it, ample opportunity to learn of any pressure being applied by the President. But Bowdich testified, at pages 201 to 202, that he absolutely did not recall being told by Christopher Wray the President had pressured him to fire Mr. Strzok, which is -- who was the subject of the motion to quash -- and that he tried to keep Mr. Wray out of the process.

I don't believe that leaves much wiggle room at all for a factfinder to conclude that he did what he did because Christopher Wray told him to or because Christopher Wray conveyed a message from the then President, or because he thought the President had directed him to.

Indeed, the former President was quite vocal and public about what he wanted, in any event, and it wasn't

necessary for Mr. Wray to tell anybody what the President was thinking. But, more importantly, Mr. Bowdich expressed strong opinions of his own. He emphasize the very high-profile nature of the case under investigation and the high level of the employees involved.

He emphasized the impact of the text messages on an investigation that would be subject to enormous public scrutiny and the impact of the messages on the reputation and credibility of the agency as a whole, which, according to the deposition, in the deponent's mind ultimately outweighed the credit due to the plaintiff's reputation and history of exemplary service at the very highest levels of the agency.

Indeed, some of that prominence was why he felt that strong action was necessary. Whether that's credible or not is not for me to say. How it would bear on the constitutional claims, if found to be credible and true, is not before me or up to me either.

I also read the Rosenstein deposition and it isn't particularly illuminating on the issues in this case regarding the Strzok termination or any other issues. There are pages and pages of questions about other issues before we even get to the termination, such as the appointment of the Special Counsel, the President's reaction to Comey and the Clinton email issues. There are many questions from Ms. Page's counsel regarding the Privacy Act issues that aren't the focus of the

motions to quash, before we get to the questions about the termination of Mr. Strzok.

Mr. Rosenstein said he didn't attend the January 26, 2018 meeting with the President, Attorney General Sessions, and Christopher Wray, he didn't know who did, he didn't know the contents of the meeting. He didn't recall being at the January 23rd meeting, he didn't recall if he had discussions about it with Mr. Sessions or Mr. Wray. He was not a good alternative source of information. So the deposition didn't do much to support the notion that testimony sought was available elsewhere, because it wasn't available from him.

He attended the June 15, 2018 meeting about the IG report. He said repeatedly that he didn't remember comments by the President regarding the plaintiff or regarding firing him. But he did say that the President had said it all publicly, in any event. He said it was possible that statements were made. And he offered that if the President did say anything, that he, Mr. Rosenstein, viewed it as an opinion and not an order. He said the President probably discussed Mr. Strzok, but he couldn't recall or distinguish between what the president had said publicly versus what he said in the Oval Office. And he denied any knowledge of or involvement in Mr. Bowdich's decision.

So that's the background I have before ruling on the Apex Doctrine issues. And I do find that the case presents

extraordinary circumstances. Given the facts that the firing decision was made at the highest level of the Department immediately under Director Wray, that it varied from the procedure that had been established and allegedly varied from agency regulations, that it varied from the decision of the officially designated decision maker, and that it varied from an agreement offered to and accepted by the plaintiff, and the fact that the proposed questions, or at least the proposed questions as I plan this morning to narrow them, will not probe the operations or decisions made by the FBI, other than with respect to this one employment decision.

I will permit a two-hour deposition of the exceedingly busy Christopher Wray. And the motion to quash his deposition completely based on the Apex Doctrine alone will be denied. I note, and it's very important to emphasize, that that is not a ruling on the privilege issues. That is just a ruling on whether a deposition can happen at all.

I also note that even if Mr. Bowdich was clear that the decision was his and not the director's the procedures that were followed raise questions about how he became the designated decision maker under the unique circumstances involved.

I will say, now that I've given you two hours, that I've read a few deposition transcripts now and I would recommend that counsel utilize that opportunity to ask open-

ended questions and glean information rather than to ask argumentative questions advancing their own theory. You don't have a lot of time to waste.

What about the deposition of former President Trump? The utility of and the necessity for that deposition is less clear. His views on the subject were broadly communicated. The defendants insist that there is a lack of any evidence suggesting the former President influenced the actual decision maker. They say that at docket 101, at page 3.

But the President's own contemporaneous and recent statements concerning his role make the inquiry legitimate and likely to lead to relevant evidence that can't be obtained elsewhere, even if it isn't ultimately fruitful. It is of some relevance if he expressed his viewpoint or issued directives during meetings in the Oval Office.

Although, even if he were to take credit for the firing, as he did then, and apparently again recently, there would still be a question for the factfinder as to whether to credit his assertions on that point, given Bowdich's testimony and whatever Wray has to say, and whatever else may bear on his credibility. But he has fewer concerns in terms of any risk that the time devoted to the deposition would take him away from his official duties. The Apex Doctrine still applies and I'm not ruling solely on the basis that he is a former official.

But the considerations underlying the doctrine are much weaker in this case. I can take note of the public fact that he has personally initiated civil lawsuits during his post presidency period and that suggests that his schedule as a former president and current candidate can withstand the modest demands on his time that a deposition would impose.

Also, narrowing the topics, as I plan to do, can ameliorate the potential impact on people being willing to work in the government in the future, notwithstanding the fact that this deposition will proceed.

So now I've read through the proposed areas of questioning at docket 91-5 and the defendant's response at docket 101 and the briefs on executive privilege. And while I will permit the depositions, I will require that they be narrowly tailored and limited to the following of the topic areas identified.

And as I go through each of these topics, basically I'm pulling them from docket 91-5, plaintiff Strzok's notice of filing of Rosenstein deposition transcript and listing of inquiry areas for depositions at issue in the motion to quash. And you'll find that, to the extent possible, I'm following the order of the topics listed in that and in the government's response.

Questions regarding the January 22nd, 2018 meeting are permitted for both the Trump and Wray depositions, but only

with respect to discussions at that meeting of the text messages between the two plaintiffs or the two plaintiffs in general, disciplining them, investigating them, et cetera.

With respect to the January 23rd, 2018 meeting, those questions are also permitted but, again, only with respect to any discussions of the plaintiffs.

The June 15th, 2018 meeting was about the Inspector General's report on the midyear investigation. But, again, the deposition cannot be that broad. It has to be limited to any discussion of the fate of the plaintiffs, their employment status or likely discipline. Plaintiffs may not ask the former President or Christopher Wray about what they said, quote, any policy or other decisions being deliberated at that meeting, close quote. They can ask Mr. Wray what, if anything, he then communicated to Bowdich with respect to the two plaintiffs.

And, again, these are not privilege rulings, these are Apex Doctrine rulings. This is the scope of the deposition I'm letting you take.

The plaintiffs can ask the former President about his own public statements and communications about the plaintiffs between December 2nd, 2017 and June 15, 2018, as well as between June 15, 2018 and August 10, 2018, as well as any related communications about his statements with the Department of Justice or the FBI.

The proposed questions concerning understandings that

others in the White House may have had about his communications are excluded. If the testimony is that he was not informed that OPR decided not to fire the plaintiff, then there can be no questions about what his reaction would have been if he had been informed because that would simply call for speculation.

Communications following August 10, 2018, that category of questions with respect to the Trump deposition is okay. The source of the disclosure of the text to the press, the claim really is about the later disclosure, what happened when the press was called and given the text. So I'm not sure that that is appropriate. It seems to go beyond the scope of what we need to get to.

He can be asked if he retained the text messages, where he got them, what he did with them, although I think it has limited relevance to the complaint and there's no need to get into what other people are doing with the text messages.

With respect to Mr. Wray, the fourth category of questions, Mr. Bowdich's participation in the midyear report, I'm not going to permit questions about that. I don't believe that the description of Bowdich's testimony offered in support of this category in footnote 5 of the document is accurate. When asked about the statement made by Mr. Wray when transmitting the IG report, there was no evidence of any bias affecting the investigation. Mr. Bowdich's answer was, "I hope that's true."

I don't think you can get from that to what the plaintiff said, quote, Bowdich seemed to disclaim the FBI's official position, suggesting a personal belief more alined with his own political affiliation may have informed his decision to terminate the plaintiff, close quote. That's maybe something you want to argue and that may be up to the jury to decide. That is a very thin read upon which to authorize an inquiry into this topic, given the Apex Doctrine, and it doesn't support it. So those questions aren't going to be asked.

There were other questions proposed for Christopher Wray only about his statements about following established procedures, and that is an acceptable topic for his deposition. Also, questions about how the authority was delegated to Mr. Bowdich are permissible. I don't believe that questions about conversations about plaintiff Strzok's security clearance are. They're not as -- they're not close to the heart of the claims and the necessity hasn't been established. If you want to know why Attorney General Sessions said what he said, then depose Sessions.

Finally, questions touched upon in the Rosenstein deposition such as conversations between the President and Mr. Wray about -- or with the Attorney General about Mr. Comey, about the firing of McCabe, about Crossfire Hurricane in general, about the midyear review in general and the security

clearances, they're all off limits. The parties have not made the necessary showing of need under the Apex Doctrine to go beyond the specific issues in this case.

As I said, this is solely a ruling on the Apex Doctrine, not executive privilege. But that brings us to a critical point, which is whether the depositions would be an empty exercise.

So what is the executive privilege? There's two aspects of the privilege at stake here. Presidential communications privilege, which would cover conversations with former President Trump directly and conversations conveying the information received directly from Mr. Trump to others. It is the primary privilege at stake in the Trump deposition.

The presidential communications privilege, though, is also at stake in the Wray deposition. But the Wray deposition, in addition, raises real concerns about the deliberative process prong of the executive privilege involving an internal agency decision.

What is the presidential communications privilege, the seminal case? As everyone in this room knows, is *United States versus Nixon*, 418 U.S. 683, from 1974. The court said that the confidentiality of a President's conversations and correspondence is necessary for, quote, protection of the public interest and candid, objective, and even blunt or harsh opinions in Presidential decision making. A President and

those who assist him must be free to explore alternatives in the process of shaping policies and making decisions, and to do so in a way many would be unwilling to express accept privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

The court also noted, though: However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privileged depends on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises.

You can't ignore the fact, though, that the *Nixon* opinion and the balancing against other values in which that court was engaged was in the context of a request, yes, for a specific set of records, but in a criminal investigation. And the Supreme Court emphasized that frequently.

Thereafter, in *Nixon versus Administrator of the General Services*, 433 U.S. 425, at 449, in 1977, after

discussing the fact that the former President, in that case Nixon, retained the privilege, although the incumbent President's view might carry more weight, the Supreme Court summed up its previous decision and said: The appellant may legitimately assert the presidential privilege, of course, only as to those materials whose contents fall within the scope of the privilege recognized in *United States versus Nixon*.

In that case the Supreme Court said, talking about its own opinion: The court held that the privilege is limited to communications in performance of a President's responsibilities of his office and made in the process of shaping policies and making decisions. That was the court's own gloss on its own opinion.

More recently, Justice Kavanaugh also emphasized the fact that the privilege is not absolute in his concurrence in the denial of the cert petition in *Trump versus Thompson*, at 211 L.Ed.2d 579, 142 S.Ct. 680, at page 681, it's in 2022. He took the position that a former President could, as a matter of law, invoke the privilege. But then he added: To be clear, to say that a former President can invoke the privilege for presidential communications that occurred during his presidency does not mean that the privilege is absolute or cannot be overcome.

The test set forth in *Nixon*, at page 713, and *Senate Select Committee on Presidential Campaign Activities versus*

Nixon, 498 F.2d 725, at 731, an en banc decision from this circuit, may apply to a former President's privilege claim as they do to a current President's privilege claim.

Moreover, he said, it could be argued that the strength of a privilege claim should diminish to some extent as the years pass after a former president's term in office.

The D.C. Circuit, in *Trump versus Thompson*, 20 F.4th 10, had also noted that the incumbent President is the one in the best position to assess the present and future needs of the executive branch, that in past cases in the circuit the current President's views were found to control, but that either President's privilege was a qualified one, in any event.

The law is also clear that the deliberative process privilege, the other prong of the executive privilege, is also a qualified one. *In re: Sealed Case*, at 121 F.3d 729, which arose out of the Special Counsel investigation into Mike Espy. In that case the court held: Courts must balance the public interests at stake in determining whether the privilege should yield in a particular case, and must specifically consider the need of the party seeking privileged evidence. This is the D.C. Circuit -- whose opinions bind me -- speaking.

It said that an analysis involves determining whether plaintiff's need for the documents outweighs the defendant's need to protect he them. To resolve this question, the court has to balance the competing interests on a flexible, case by

case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees, and whether there was a reason to believe that the documents would shed light on government misconduct, all through the lens of what would advance the public's, as well as the parties', interests.

The *Espy* case makes it clear that the presidential communication privilege is not, like the deliberative process privilege, limited to pre-decisional communications. No particular decision needs to be identified.

The deliberative process privilege does require a decision, but the precedent that governs in this circuit does not hold that the privilege is limited to deliberations concerning the formulation of policy. It's been extended to cover mundane operational matters such as the selection of contractors and even internal deliberations about public relations or how to respond to congressional inquiries.

So we have all of that to consider in this case. But judges do not issue advisory opinions or rule on hypothetical questions. Indeed, I don't have subject matter jurisdiction under Article III to do that. And this concept applies with particular force when the question is a constitutional one that raises the real possibility of conflict between the judicial

and executive branches. So you don't wade into that if you don't have to and that issue is not ripe for adjudication and I absolutely shouldn't consider it or rule on it or hint about how I'm going to rule on it unless and until the issue is joined.

And that is why I issued an order that plaintiff Strzok must outline the proposed areas of inquiry in advance and then said: The defendants must respond to that notice, identifying all questions to which they intend to assert executive privilege, specifying as to each whether they are asserting the presidential communications or deliberate process prong privilege, or both.

That order seemed to have been in English, as far as I could tell. The government responded, though: In the ordinary course, the government would object, the party would move to compel, and then the government would consult the incumbent president regarding privilege. Accordingly, the defendants understand the current briefing to serve the function of identifying where defendants would raise such objections in the first instance, giving the presumptive privileged nature of some possible answers to the proposed questions, to preserve the President's ability to perfect the privilege.

That wasn't how I understand my order. And the defendants didn't make any attempt to seek clarification. You

just handled it how you wanted to handle it.

As to the presidential communications prong of the executive privilege in this case, we are already talking about a very narrow universe of conversations; conversations between the President and the Attorney General or the FBI Director about one subject: Whether the plaintiff should be fired. And potentially, conversations the FBI Director had or may have had with his subordinates in which he relayed those conversations, if there were any, and if there were any conversations in which he relayed them.

The point of the order was to get clarification in advance as to where there would be a point to the deposition at all, which was somewhat intertwined in the Apex Decision. What I got was an extremely vague set of statements regarding the privilege that could potentially be asserted.

The defendant said, in docket 95 in response to plaintiff's notice, quote, Most of the questions proposed to ask about nonpublic conversations of former President Trump with his advisors, some or all of which may have been in the service of presidential decision making. But, really, not very clear or helpful.

[redacted]

[redacted]

In any event, the defendant's presidential communications memo, at docket 111, said: Perfection of the presidential communications privilege would require consultation with the sitting President, which should be required, if ever, only in the context of a motion to compel specific deposition testimony and after the court has ruled on the defendants' motions to quash.

They also insisted that I needed to have a deposition transcript first, so that I could rule on a question-by-question basis. I don't believe that order of operations is required, but I've now ruled on the motion to quash insofar as it's based on the Apex Doctrine. So the question is: Do we have to have the deposition first, before I can even rule on

executive privilege, as the government insists? I read all of the cases you cited and they do not establish such a clear-cut requirement. A defendants rely primarily on *Cheney versus U.S. District Court for the District of Columbia*, 542 U.S. 367, from 2004, but that does not seem to control.

This is different from the *Cheney* situation in which the district court had ordered the then currently serving vice president and other federal officials to provide discovery about a panel created under the auspices of the vice president, the National Energy Policy Development Group. The vice president brought a mandamus action to stop the case and the discovery. The District Court denied it, the Court of Appeals denied mandamus on the grounds that the vice president could have invoked executive privilege in the district court, so there was no need for the extraordinary writ of mandamus. And they said that the vice president should have had to provide detailed specific objections before the issue made its way up to them, the Circuit.

But the Supreme Court sent it back down. It emphasized that given the separation of powers concerned -- separation of powers concerns underline the privilege, the default position is that you afford the presidential confidentiality the greatest possible level of protection. It also emphasized that while the *Nixon* case did say that privilege was not absolute, *Nixon* involved a request for

information in a criminal case and it specifically distinguished that situation from a civil case where the party's need for the information is not as great.

In addition to the need for the information, though, the Supreme Court also considered the burden imposed by the discovery order. It differentiated civil from criminal because it said, well, criminal cases have been through some process first, that anybody could file a meritless claim against the government. Here, though, the claimants have already been scrutinized by a court for facial validity and have been permitted to move forward.

Most important though, what the Supreme Court was concerned about in *Cheney* was the broad scope of the discovery being requested. It was a broad swath of document requests and interrogatories, et cetera. And it said that the *Nixon* opinion did not impose a burden on the government to object on a question-by-question, document-by-document basis.

The *Cheney* court said: Given the breadth of the discovery requests in this case compared to the narrow subpoena orders in *United States versus Nixon*, our precedent provides no support for the proposition that the Executive Branch shall bear the burden of invoking executive privilege with sufficient specificity and of making particularized objections. To be sure, *Nixon* held that a President cannot, through the assertion of a broad and undifferentiated need for confidentiality

withhold information. But it did so only after the party requesting the information, the Special Prosecutor, had satisfied his burden of showing the propriety of the request.

So the *Cheney* court pointed out that the Court of Appeals had acknowledged in that case that the discovery requests were not appropriate. They were too broad. And in those circumstances, the Supreme Court said in *Cheney*, Nixon does not require the executive branch to bear the onus of critiquing the unacceptable discovery requests line by line.

Cheney also involved concerns with disrupting the effective function of the presidency and the vice presidency. And that concern is not present as to Trump, but it is as to Wray.

So at page 390 the court explained: In recognition of these concerns, there's sound precedent in the District of Columbia itself for the district courts to explore other avenues, short of forcing the executive to invoke privilege, when they are asked to enforce against the executive branch unnecessarily broad subpoenas.

That's not where we are in this case. The Supreme Court sided with approval to a decision in *United States versus Poindexter*, 727 F.Supp. 1501, in which the criminal defendant Poindexter sought to have the district court enforce subpoena orders against President Reagan to obtain allegedly exculpatory material. The executive objected: The subpoenas are

unreasonable and oppressive, rejecting the defendant's argument that the executive must first assert executive privilege to narrow the subpoenas.

The District Court agreed with the President that it was undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents. So the court decided to narrow, on its own, the scope of the subpoenas, to then allow the executive to consider whether to invoke executive privilege to a possibly smaller number of documents following that narrowing. The Supreme Court said this is but one example of the choices available to the District Court and the Court of Appeals in this case.

Now I'm back to quoting the Supreme Court in *Cheney*. Under these circumstances, the *Cheney* court said, instead of requiring petitioners to object to particular discovery requests, the District Court should have required respondents to demonstrate their particular requests would tend to establish the theory of the case.

So I'm not at all sure that *Cheney* says that we have to do what the government says it wants me to order them to do, which is let the depositions go forward, if I let the depositions go forward, and have them ask all the questions and go through question by question so that the executive branch can note its objections before I then ask the administration:

Now that your lawyers have noted potential objections, are you actually going to seek to shield this stuff or not?

If anything, Cheney seems to be saying exactly the opposite: Don't make them go question by question if you can resolve it more efficiently, District Court. You have choices, you have discretion. And the circumstances were not analogous.

We have already done significantly more than what was done in *Cheney* to refine, identify exactly what is at stake and what information is being sought. I can, and I have, based on the submissions before me, narrowed the areas of inquiry and then asked the government to tell me if it's asserting the privilege or not and I can rule on that before the depositions take place.

Unlike in the *Cheney* case, we know exactly who the participants in the conversations were, we know the topics of the conversations. We even know the dates of the conversations. So getting an up or down answer at this point would operate to add efficiency and minimize the burdens on both sides. It does not affect the day-to-day operations of the executive branch in any way.

Also, it occurs to me that the government's insistence that we proceed this way is a little inconsistent with its position that under the Apex Doctrine we shouldn't depose these official at all. If these officials are too busy to be deposed, why are you insisting that they be deposed

twice?

The government also cites *Alexander versus FBI*, 186 F.R.D. 128, in this District in 1998. And that isn't binding and it doesn't compel a different outcome, in any event. It was a more analogous circumstance. Officials in former administrations brought an action alleging violations with their privacy rights when FBI files about them were shared with the Clinton White House.

Howard Ickes, the Deputy Chief of Staff at the White House had already been deposed and he asserted privilege somewhat vaguely surrounding his communications with the President himself. However, later, he provided a declaration detailing the contents of the communication so the government said at that point there's no need to protect the privilege because there's nothing else left that hasn't been disclosed.

The sum total of the Court's discussion on the point was whether it should sanction the witness's failure to answer the questions, even though he'd been instructed not to answer by his counsel who was asserting a valid presumptive privilege, i.e., communications with the President. It does not mean -- it does not hold and it does not even consider whether there that is to be some sort of a mandatory two-step procedure before finding out what it is that the President actually wants to do.

In re: Sealed case, 121 F.3d 729, at 741, from the

D.C. Circuit, also cited in the government's brief, doesn't mandate that I wait before asking you to answer the question I already asked of you to answer either. The defendant takes a single sentence from the opinion, quote, The White House did not have an obligation to formally invoke its privileges in advance of the motion to compel, close quote, completely out of context.

In that case and in the paragraph with that sentence, the issue was waiver. Had the White House waived the privilege by saying in a press release that it would produce the documents and then by not identifying the specific privileged documents before filing its motion?

The court said, Nor did the White House have an obligation to formally invoke its privileges in advance of the motion to compel. In its response to the subpoena, the White House informed the OIC that it believed the withheld documents were privileged, thus satisfying the Federal Rules of Civil Procedure. The court noted that the motion to compel was the first event which could have forced disclosure of the documents, and that's all that mattered for the waiver analysis.

Since the OIC was clearly aware in advance of the motion to compel that the White House likely would be asserting privilege, it was not prejudiced by any delay in the White House's formally invoking the privileges. That's it. That was

the issue. Entirely different circumstances.

Here, we've had the issues identified. We've already had the deposition where the privilege has already been asserted, although not by anyone who has the actual authority to do so. And the Court already asked the defendants to answer the question of whether the current president will invoke.

During the Rosenstein deposition, executive privilege was in fact invoked by a Department of Justice lawyer representing the defendants. And he said he was doing so, quote, on behalf of the Office of the President. When asked which one, counsel said the current President. But when asked if President Biden had issued that instruction he again said, the Office of the President and didn't answer. And then the lawyer representing the witness also asserted the privilege because the deponent, who allegedly had been talking to the President, was not the one who owned the privilege.

It also struck me that the government says, in its executive privilege memo, docket 101, that assertion of the presidential communications privilege would be proper because, quote, Mr. Strzok seeks testimony regarding nonpublic conversations involving President Trump and his close advisors in the context of presidential decision making, close quote.

But then in the very same paragraph, defendants say plaintiff, quote, cannot come close to making the focused demonstration of need required to overcome the privilege, given

that former President Trump was not the decision maker regarding any of the events that formed the basis of Mr. Strzok's claims, close quote.

So as the defendants see it, we are talking about the President's communications with his close advisors, but not with respect to presidential decision making, which significantly diminishes the intrusion on any separation of powers concerns.

Given all the fog surrounding these issues, in order to figure out what we're dealing with here to try to get to the bottom of it efficiently, then, I've asked if the current President is going to assert the privilege. And I want to know the answer. That raises the legal question: Does it have to be the current President who asserts executive privilege? Do we need that to have to consider executive privilege at all? That is an open question, according to the Supreme Court, whether the former President has any privilege to assert or whether that privilege resides only with the current president?

In denying cert in *Trump versus Thompson* the Supreme Court took pains to say that the Circuit's comments on that matter were only dicta, and since the D.C. Circuit has been able to rule against the former President, even if one assumed he had the right to object, they didn't have to reach the question.

I certainly don't think I need to decide that issue

today either because I don't know what the current President will do, or whether, if he does not invoke the privilege, the former President will invoke the privilege during his deposition or before.

It is interesting to note, though, that the original miscellaneous action regarding subpoenaing him was filed publicly, almost a year ago. And in all that time, the former President has not taken a single step to intervene himself or to move to quash.

One question, though, is whether the issue could become moot if we deposed Director Wray first and he says he never discussed the termination of Mr. Strzok or the President's views about it with Mr. Bowdich at all. At that point then why are we asking the President about this?

Also, even if executive privilege is invoked by the former President, and even if that invocation is honored, the privilege is not absolute. It could also be relevant to any assertion of privilege that he has previously and is now currently speaking publicly about this very issue.

I note, though, that when we get to this you need more than just a showing of relevance or plaintiffs' need for the information; there also has to be a showing of public interest. And there the situation is markedly different from *United States versus Nixon* or, for example, the attempt to obtain statements made in the Oval Office regarding an

unprecedented attack on the United States Capitol and the certification of a national election. The District Court and the Circuit Court's opinions in *Trump versus Thompson* were very much rooted in their circumstances.

But I'm not going to rule on the executive privilege question in a vacuum either until I have been told whether the current President will be asserting executive privilege with respect to the very specific and very narrow set of communications I have just identified, and I don't find the deposition of the President needs to take place or that a transcript be generated before I get that information.

So how long do you think you need to find that out?

MR. ABBUHL: Would two weeks be sufficient, Your Honor?

THE COURT: That would be fine. You can file and it can be --

MR. ABBUHL: Your Honor, if I could just clarify. After getting the transcript -- I'm sorry, Your Honor. If we could have two weeks after we get an expedited copy of this transcript, to make sure we can go through all the details specifically?

THE COURT: Should I just set it three weeks from today, is that --

MR. ABBUHL: That works for fine for the government, Your Honor.

THE COURT: Is that -- will it take you longer than a week to produce a transcript?

THE COURT REPORTER: Could I have two weeks?

THE COURT: It will take you two weeks. Okay.

All right. So we'll say that the government has to file a notice informing me of that information by March 24th. Today is February 23rd. So that's about four weeks. All right.

If President Biden does invoke the privilege, then I have to rule on whether it's being appropriately invoked in this situation. If he does not, I'm only going to have to rule if and when the former President refuses to answer at the deposition, or if he intervenes or personally moves to quash once the date is actually set. And at that point, the parties may have to brief the issues of how the Supreme Court's denial of cert. in *Trump versus Thompson* bears on the issue of who gets to assert the privilege and what impact or persuasive value the Circuit's dicta in that case has on the determination, given the Supreme Court's characterization of the opinion in that manner.

But it may not be necessary for us to even reach whose privilege it is, if it turns out we can rule even assuming the former President has the right to assert it based on whether the privilege is being properly asserted, as was done in *Trump versus Thompson*.

So that ruling may narrow the scope of the depositions significantly, although there were proposed questions about non-privilege matters, such as the President's own public statements, and they would be permitted and the deposition would still move forward.

As for the Wray deposition, if it's conducted after the Trump deposition, the same terms I just outlined with respect to the presidential communications prong of the executive privilege will cover his communications with the President or his revelations of his communications with the President, if any, and we can rule on that before his deposition.

However, if he testifies that he didn't discuss the termination decision with Will or Bowdich at all, then the deliberative process privilege issue won't arise. But if it does arise, then one question we've yet to explore is who has to invoke that? Is it the President? Is it the Attorney General as head of the Department of Justice of which the FBI is a component? Is it the FBI Director as the head of the agency? No one has briefed that issue. And then we would have to determine, if it's asserted, if it's outweighed by the other factors the Court has to consider.

It still seems odd, though, that while the defendants on the one hand are talking about the Apex Doctrine and the need to bother a high-ranking public official as little as

possible, they are also the ones who are saying let's possibly do it twice. So the parties are welcome to try to work out a solution that would tee up the issue of the deliberative process prong of the executive privilege within the FBI and enable me to rule prior to the deposition, as I plan to do, with the presidential communications privilege.

In fact, I think the parties would be well advised to think about whether a short deposition of Christopher Wray first on whether he spoke to Bowdich about these matters could short circuit a lot of this, both the presidential communications and deliberative process privileges, although I suspect that plaintiff's point of view would be we still need to know how often the President expressed his wishes and with what level of vehemence to test Mr. Wray's credibility on that point, even if he says I never told anybody about it.

And since much of what the plaintiffs want to ask the former President doesn't fall within the executive privilege, I would permit his deposition to go forward no matter what Mr. Wray says on that issue. But to get to the existence of privileged communications with Mr. Bowdich, as opposed to the content, that could point towards having a short deposition first, and then ruling on the privilege and then determining whether you even have to rule on the privilege before you go further, or we can just have one and then rule on it, which is not ideal.

So I think I've done all I can do today. I've ruled on the pure Apex Doctrine questions. I've told you the principles that will apply. The law is not going to change in the executive privilege determination with respect to both prongs of the privilege. And I've asked you again what the current privilege holders plan to do. And then once we have all of that, I think you all are going to schedule these depositions and they're going to be narrowed as I narrowed them.

Which leaves us with the reason you called, which is that the 30(b)(6) deposition topics and the issues with respect to the request for production of documents that's been sent to Ms. Page. I think you've already ascertained that the transcript is going to be my ruling. There's not going to be a follow-up written opinion on this; you've waited too long for this. And there isn't -- it would be ridiculous to have you wait for me to get that in writing. I think you have all my reasoning, you have all the citations, you know what I'm thinking on everything.

One question I'm going to ask you -- I sealed this because a lot of these rulings were based on sealed submissions. Seems to me that very little of what I've just said needs to remain under seal, other than possibly my summary of the Bowdich deposition and my summary of the Rosenstein deposition, since the substance of their testimony was given to

Material Under Seal Deleted:
Materials from A47-148 Filed Under Seal in Supplemental Addendum

CERTIFICATE OF SERVICE

I certify that, on July 11, 2023, I electronically filed a public version of this addendum through this Court's CM/ECF system. I also certify that eight copies of the sealed supplemental addendum and eight copies of the public addendum will be hand-delivered today to the D.C. Circuit.

I further certify that, on July 11, 2023, two copies of the addendum (one copy of the public addendum and one copy of the sealed supplemental addendum) were served on the following counsel by e-mail and by first-class mail:

Aitan D. Goelman
Christopher R. MacColl
Zuckerman Spaeder LLP
1800 M Street NW, Suite 1000
Washington, DC 20036
AGoelman@zuckerman.com
CMacColl@zuckerman.com

Counsel for Peter Strzok

Richard A. Salzman
Heller, Huron, Certkof & Salzman PLLC
1730 M Street NW, Suite 412
Washington, DC 20036
salzman@hellerhuron.com

Amy Jeffress
Robert Katerberg
Kaitlin Konkel
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001
Amy.jeffress@aporter.com
Robert.katerberg@arnoldporter.com
Kaitlin.konkel@arnoldporter.com

Counsel for Lisa Page

Finally, I certify that, on July 11, 2023, four copies of the addendum (two copies of the public addendum and two copies of the sealed supplemental addendum) were sent to the Honorable Amy Berman Jackson, U.S. District Court Judge for the District of Columbia, by hand delivery.

/s/ Martin Totaro
Martin Totaro