IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	
v.	Case No.
JEFFREY B. CLARK, ET AL.,	23SC188947
Defendants	

MOTION TO COMPEL

Comes Now Jeffrey Bossert Clark, Defendant in above-entitled matter, and submits this motion to compel production of certain documents from the State.

BACKGROUND

On December 12, 2023, the undersigned counsel for Mr. Clark wrote to the Fulton County District Attorney requesting the following information:

> Please provide copies of all communications with any agency or office of the U.S. Government relating to any request or subpoena for testimony or documents from your office to any agency, office or current or former employee of the federal government under or pursuant to the *Touhy* regulations for that agency or office in connection with the investigation or prosecution of *State v. Trump, et al.*, or any pre-indictment investigation eventually giving rise to the indictment in that case.

A copy of this letter is attached hereto as Exhibit 1.

Counsel wrote a follow up letter on January 9, 2024, seeking an answer to this query, and adding an additional request as follows:

> Copies of all communications with the White House Counsel's office, including but not limited to those referenced on the invoice from the Law Offices of Nathan J. Wade dated May 32, 2022, showing an entry

> for May 23, 2022 "Travel to Athens: Conf with White House Counsel," and the invoice from the same office dated January 19, 2023 showing an entry for November 18, 2022 "Interview with DC/White House."
>
> In your response, please identify all persons present or participating in the referenced conference and interview, and all documents or information provided or received by your office in such meetings.

A copy of this letter is attached as Exhibit 2.

On January 10, Executive District Attorney Daysha Young responded to these requests on behalf of the District Attorney via email. In the same email she responded to counsel for President Trump with respect to his Motion to Compel filed January 8, 2024. In this email, Executive District Attorney Young took the position that the State had fully complied with all of its statutory discovery and disclosure obligations and declined to provide the information we had requested.

The Court previously scheduled a hearing on President Trump's Motion to Compel for January 12, 2024. Mr. Clark adopted President Trump's Motion to Compel, but the scope of the issues in President Trump's motion does not include the above-referenced items. In light of the State's refusal of the requests, the issues are ripe for decision, as this Motion calls for.

ARGUMENT AND CITATION OF AUTHORITY

Granting (purely for the sake of argument) the State's position that the state law criminal discovery statutes do not require them to produce the information, it is

elementary that those statutes do not exhaust the scope of the State's disclosure obligations.

The State is required by *Brady* to disclose information that is exculpatory. "Exculpatory" means:

> [E]vidence tending to establish a criminal defendant's innocence. Fed. R. Crim. P. 16. • The prosecution has a duty to disclose exculpatory evidence in its possession or control ***when the evidence may be material to the outcome of the case***. See Brady Material"

BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). *Cf. Houston v. State*, 187 Ga. App. 335, 338 (1988) (citing BLACK'S LAW DICTIONARY (4th ed.) definition of "exculpatory"). *Black's* defines "Brady Material" as "information or evidence ***that is favorable to a criminal defendant's case*** and that the prosecution has a duty to disclose. The prosecution's withholding of such information violates the defendant's due-process rights. *Brady v. Maryland*, 373 U.S. 83 (1963)." *Id*. (emphasis added).

Brady and *Giglio* must also be disclosed in time for use in pretrial motions such as will be forthcoming in this case. *See e.g., United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) ("The suppression of material evidence helpful to the accused, whether at a trial or on a motion to suppress, violates due process"). In *United States v. Williams*, the Fourth Circuit approvingly cited a Third Circuit case involving a "pre-trial evidentiary hearing resulting from a motion to suppress" and holding that the Jencks Act "in no way impairs the government's constitutional obligations under *Brady v. Maryland*." 10 F.3d 1070, 1079 (4th Cir. 1993) (citing *United States v. Murphy*, 569 F.2d 771 (3d Cir. 1978)).

The State is thus required to disclose the requested information because it "may be material to the outcome of the case" and because it is "favorable" to Mr. Clark.

The request for the State's *Touhy* correspondence with agencies of the Federal government "may be material to the outcome of the case" and ''favorable" to Mr. Clark because it may show that the Department of Justice has refused to grant *Touhy* clearance for Jeffrey Rosen and Richard Donoghue to testify at trial in this case. The State needs their testimony to prove its case against Mr. Clark, and cannot prove it without them. If the State is unable to call them as witnesses, and therefore unable to prove its case against Mr. Clark, that is clearly material to the outcome of the case against him and favorable to his defense and should be produced.

It was reported by the *New York Times* that the Department of Justice refused the State's request for *Touhy* clearance for Mr. Rosen and Mr. Donoghue for the Special Purpose Grand Jury. *See* Exhibit 3, p. 2, Glenn Thrush, Danny Hakim, and Adam Goldman, *Trump's Next Legal Threat Could Be in Georgia. That May Be Tricky for Federal Prosecutors*, THE NEW YORK TIMES (Apr. 7, 2023). According to the article, "[a]ides to Ms. Willis filed what are known as Touhy requests, named after a 1951 Supreme Court case. Under the rule, local prosecutors are required to get authorization from the Justice Department to question its current or former employees. But the requests were ultimately rejected." The article gave no reason for the rejection. There are no material witness

applications or certificates for Mr. Rosen or Mr. Donoghue in the public record of the Special Purpose Grand Jury proceedings.

This reported refusal of the State's *Touhy* requests is consistent with the notation on the State's Witness List for the Special Purpose Grand Jury for Mr. Rosen and Mr. Donoghue that reads "Video Presentment/Review." As noted in Mr. Clark's adoption of President Trump's Motion to Compel, the undersigned asked the DA's office what this notation meant on November 29, and December 11, 14, and 20, 2023, before finally getting answer on December 27, 2023 that it meant that the Special Purpose Grand Jury had been shown an unspecified video recording of their congressional testimony. In other words, it appears that the Special Purpose Grand Jury was shown video of these witnesses' congressional testimony because the State could not obtain their live testimony, since the Department of Justice had earlier refused the State's *Touhy* requests for their testimony.

DOJ's apparent refusal to grant *Touhy* clearance for Mr. Rosen and Mr. Donoghue at the Special Purpose Grand Jury stage suggests that the State will likewise be unable to call them as witnesses at trial. Knowing that the State would be unable to prove its case against Mr. Clark through these witnesses would obviously be helpful to his defense and material to the outcome of the case against him.[1] Conversely, if *Touhy* clearance has been

[1] If the State knew these witnesses would be unavailable at trial, it would raise troubling questions about the decision to indict Mr. Clark.

granted for trial, and these witnesses will in fact appear at trial, that is also material to the outcome of the case and should be disclosed to Mr. Clark.

In either event, the matter should not be left to mere inferences or conjecture. The *Touhy* correspondence should be produced. For all of these reasons, we are entitled to obtain a copy of the correspondence to review it, so that we can determine precisely what it says.

There is an additional way in which the *Touhy* correspondence might be material to the outcome of the case or helpful to Mr. Clark's defense. From review of the *Touhy* regulations and from Mr. Clark's considerable experience in the Department of Justice, it is possible, if not likely, that *Touhy* clearance for the Special Purpose Grand Jury was refused on grounds of federal supremacy and related immunity doctrines similar to and congruent with those articulated in President Trump's motion to dismiss on supremacy and immunity grounds.[2] Mr. Clark will be filing his own motion asserting federal supremacy and related immunity doctrines according to the deadlines in his Case Specific Scheduling Order. Mr. Clark's arguments on these issues would be strengthened if DOJ has asserted the same supremacy and immunity doctrines as grounds for refusing *Touhy*

[2] After all, we are unaware of any other case—ever—in which a former Assistant Attorney General of the United States was indicted by a state or local prosecutor in any circumstance, much less circumstances analogous to those charged in this case. The exceptional challenge this case poses to federal supremacy is clear. If Mr. Clark were still in the Justice Department, and a former senior Democrat DOJ official were indicted in a state court under comparable circumstances, he would advocate a ***vigorous*** assertion of the supremacy interests of DOJ and the federal government against any such prosecution.

clearance for Rosen and Donoghue. If DOJ did, this would tend to explain the State's reluctance to produce the requested information.

And while it is a federal not state guideline, the U.S. Attorney's Manual Section 9-5.001(C)(2) states that "[a] prosecutor must disclose information that…might have a significant bearing on the admissibility of prosecution evidence." This guideline is persuasive authority for disclosure of the requested information because it exemplifies the general prosecutorial duty to seek justice rather than merely conviction, so that it can prevail in this litigation.

To the extent the State claims the requested *Touhy* correspondence is work product, any such privilege would yield to the State's disclosure obligations. "Certainly, much of a prosecutor's work product will not fit the definition of exculpatory evidence subject to disclosure under *Brady*, but where the work product doctrine and the constitutional right to exculpatory evidence to be in conflict, the former obviously would have to yield to the latter." *Waldrip v. Head*, 279 Ga. 826, 827 (2005). Upon this basis, the Court in *Waldrip* noted that while there was no obligation to disclose the defendant's own statements, "it would be another case altogether if the State failed to disclose evidence confirming the defendant's allegations." *Id*. at 828. The Court went on to hold that the habeas petitioner was nevertheless not entitled to relief because the evidence he claimed had been wrongfully withheld was inadmissible hearsay and therefore did not support his claims. *Id*. at 828. Here, the requested disclosure should be made (1) to establish the

official position of the United States under the Biden Administration as to Messrs. Rosen and Donoghue's authorization to testify here and (2) to confirm whether DOJ's *Touhy* responses, in fact, will provide further support for Mr. Clark's federal supremacy and immunity defenses.

Finally, the requested *Touhy* correspondence should be produced under *Brady* because it may bear on the Prosecution's credibility. If the State indicted Mr. Clark knowing that it would not be able to prove its case against him, then the indictment is wrongful, as a prosecutor should only indict upon a good faith belief that they can prove the case beyond a reasonable doubt. ABA Standard 3-4.3, though not adopted in Georgia, emphasizes that a prosecutor must believe they can prove the charges with admissible evidence:

> Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges
>
> (a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, ***that admissible evidence will be sufficient to support conviction beyond a reasonable doubt***, and that the decision to charge is in the interests of justice.
>
> (b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and ***that admissible evidence will be sufficient to support conviction beyond a reasonable doubt***.
>
> (c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, ***or sufficiency of the evidence*** in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to

> supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case.

(Emphasis added). Georgia Rule of Professional Conduct 3.8, Comment 1, is not as specific as this ABA Standard but is doctrinally consistent in requiring sufficient evidence, which necessarily means admissible evidence: "This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and ***that guilt is decided upon the basis of sufficient evidence***." (Emphasis added).

The requested information regarding contacts between the State and the White House Counsel's Office may be material to the outcome of the case or helpful to the defense, if it supports an argument that the prosecution of this case is tainted with partisan political objectives coordinated with, suggested or directed by the White House. The political benefit of this prosecution to President Biden and his political party are obvious and a current fact of political life. The record shows clear and obvious collaboration between the State and the January 6 Committee and the Biden White House. The political animus of that Committee and the Biden White House toward President Trump and Mr. Clark is open, obvious, and undeniable. The District Attorney's partisan motives as a member of the opposite political party from President Trump and Mr. Clark, as applied to another Republican official, previously resulted in the disqualification of her entire office from any further investigation of Lt. Gov. Burt Jones during the Special Purpose Grand Jury. All defendants should know the nature of the State's communications with the White House Counsel's Office to assess whether they can

mount a defense based on selective or political prosecution in violation of their rights to due process and the equal protection of the laws. There is a plausible basis for suspicion on that score, and therefore sufficient justification to require production of the requested information that might support a defense motion.

There is no privilege between the D.A.'s office and the White House Counsel's Office. An analogy can be drawn to cases piercing the deliberative process privilege. *See*, *e.g.*, *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) ("where there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve "the public's interest in honest, effective government.") (cleaned up).

We recognize that there may be legitimate non-political reasons for such consultations, such as discussions of various federal privileges relevant to this case. If the communications were related to privileges arising from federal supremacy, it may also be helpful to Mr. Clark's defense by lending support to the federal supremacy, immunity, and separation of powers arguments that he intends to make. But this is another topic that should neither be left to conjecture, nor to hastily drawn presumptions or inferences in favor of or against any party, especially in the supercharged political climate within and surrounding this case. If there are legitimate State interests in confidentiality that would be implicated by disclosure of the requested communications with the White

House, the Court can conduct an *in camera* review of the requested documents and balance the interests of the parties in making its decision and tailoring any disclosure that it might order.

CONCLUSION

The District Attorney has routinely assured defense counsel of her "Open File Policy." In addition to the reasons stated above, Mr. Clark's Motion to Compel should be granted to vindicate that policy. Prosecutors wielding the immense power of the State should be held to their own pronouncements as a basic element of fairness.

Respectfully submitted, this 12 day of January, 2024.

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of January, 2024, I electronically lodged the within and foregoing ***Motion to Compel*** with the Clerk of Court using the PeachCourt eFile/GA system which will provide automatic notification to counsel of record for the State of Georgia:

Fani Willis, Esq.
Nathan J. Wade, Esq.
Fulton County District Attorney's Office
136 Pryor Street SW
3rd Floor
Atlanta GA 30303

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December 12, 2023

VIA USPS AND ELECTRONIC MAIL:
The Honorable Fani D. Wills
& Prosecution Team
136 Pryor Street, 3rd Floor
Atlanta GA 30303

RE: State v. Trump, et. al.; Discovery Request

Dear Ms. Willis:

Please provide copies of all communications with any agency or office of the U.S. Government relating to any request or subpoena for testimony or documents from your office to any agency, office or current or former employee of the federal government under or pursuant to the *Touhy* regulations for that agency or office in connection with the investigation or prosecution of State v. Trump, et al., or any pre-indictment investigation eventually giving rise to the indictment in that case.

Should you have any questions regarding this request, please do not hesitate to call on me.

Sincerely,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

cc: Catherine Bernard
Jeffrey B. Clark
Counsel of Record

Exhibit 1

CALDWELL, CARLSON,
ELLIOTT & DELOACH, LLP

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January 9, 2024

Via Email: fani.willisda@fultoncountyga.gov

The Honorable Fani Willis, Esq.
District Attorney for Fulton County
Fulton County District Attorney's Office
136 Pryor Street, S.W., Third Floor
Atlanta GA 30303

RE: State v. Clark, 23SC188947

Dear Madame District Attorney:

I am writing to follow up on my request of December 12, 2023 to your office to the attention of Grant Rood for the following:

> Please provide copies of all communications with any agency or office of the U.S. Government relating to any request or subpoena for testimony or documents from your office to any agency, office or current or former employee of the federal government under or pursuant to the *Touhy* regulations for that agency or office in connection with the investigation or prosecution of *State v. Trump, et al.*, or any pre-indictment investigation eventually giving rise to the indictment in that case.

A copy of this letter is enclosed for your reference.

Thus far, I have not received any response from your office. Please respond at your earliest convenience.

In addition, I am also requesting the following:

Copies of all communications with the White House Counsel's office, including but not limited to those referenced on the invoice from the Law Offices of Nathan J. Wade dated May 32, 2022, showing an entry for May 23, 2022 "Travel to Athens: Conf with White House Counsel," and the invoice from the same office dated January 19, 2023 showing an entry for November 18, 2022 "Interview with DC/White House."

In your response, please identify all persons present or participating in the referenced conference and interview, and all documents or information provided or received by your office in such meetings.

Thank you in advance for your attention and assistance in this matter.

Sincerely,

Caldwell, Carlson, Elliott & DeLoach, LLP

Harry W. MacDougald

Enclosure
cc Prosecution Team (by email only)
Catherine Bernard (by email only)
Jeffrey B. Clark (by email only)

Exhibit 2

The New York Times https://www.nytimes.com/2023/04/07/us/politics/trump-georgia-justice-department.html

Trump's Next Legal Threat Could Be in Georgia. That May Be Tricky for Federal Prosecutors.

The concurrent investigations create complications for separate teams relying on similar evidence, some of the same criminal targets and a small, shared pool of witnesses.



By Glenn Thrush, Danny Hakim and Adam Goldman

April 7, 2023 6 MIN READ

WASHINGTON — The Fulton County district attorney's investigation into former President Donald J. Trump's effort to overturn the 2020 election in Georgia is nearing a decision point, posing fresh challenges for federal prosecutors considering charging him in connection with the Jan. 6, 2021, attack on the Capitol.

The long-running investigation by Fani T. Willis in Atlanta substantially overlaps with the broader inquiry into Mr. Trump's conduct by the special counsel, Jack Smith, in Washington. Both rely on similar documentary evidence, some of the same criminal targets and a small, shared pool of witnesses with knowledge of the former president's actions and intent.

Mr. Trump's critics believe the concurrent investigations provide assurance that the former president and architects of the scheme to install fake electors in battleground states, including Rudolph W. Giuliani and John C. Eastman, will be held to account.

But they also create complications for two aggressive investigative teams pursuing some of the same witnesses, increasing the possibility of discrepancies in testimony that Mr. Trump's lawyers could exploit. Ms. Willis and her team have a head start, having begun their work in February 2021, and are expected to seek indictments early next month. That raises the pressure on Mr. Smith, who has pledged to work quickly, to move even faster, according to current and former prosecutors.

Exhibit 3

The investigation by the Fulton County district attorney, Fani T. Willis, overlaps with the broader inquiry into Mr. Trump's conduct by the special counsel, Jack Smith, in Washington. Audra Melton for The New York Times

"Normally, the lead federal prosecutor just picks up the phone and tries to work it out with the local prosecutor, but it's obviously a lot more difficult in a case of this magnitude," said Channing D. Phillips, who served as acting United States attorney for the District of Columbia from March to November 2021. "The stakes of not working things out are incredibly high."

The investigative efforts are by no means the same. Mr. Smith's purview extends into other areas, most notably the investigation into whether Mr. Trump mishandled classified documents that were found at his Mar-a-Lago estate after he left office.

The federal investigation into Jan. 6 focuses on several charges, according to two law enforcement officials: wire fraud for emails sent between those pushing the false electors scheme; mail fraud for sending the names of electors to the National Archives and Records Administration; and conspiracy, which covers the coordination effort. (A fourth possible charge, obstruction of an official proceeding before Congress, has been used in many cases brought against participants in the Capitol attack.)

And some of Ms. Willis's work has been more parochial in nature, including a review of false statements that Trump allies like Mr. Giuliani made at state legislative hearings in December 2020.

Justice Department officials said the indictment of Mr. Trump by the Manhattan district attorney, Alvin L. Bragg, over a hush money payment to a porn star will have little effect on their investigations. Federal prosecutors in Manhattan passed on bringing a similar case.

But the Georgia investigation is entirely different. The Justice Department has no authority to order local prosecutors to step aside in areas where the investigations do overlap, unless their investigations conflict with federal law. In fact, internal department rules discourage indicting the subjects of prior state prosecutions.

Moreover, there is “no formal rule book” for settling jurisdictional questions or for deciding the chronological sequence of prosecutions, and disputes are usually hashed out informally, as they arise, on an ad hoc basis, said Preet Bharara, a former U.S. attorney for the Southern District of New York.

Local and federal prosecutors routinely work together to coordinate charging decisions based on which jurisdiction offers better chances of conviction or a stiffer sentence. But in many high-profile cases, prosecutors view dueling investigations as a nuisance or even a hazard.

Witnesses, even forthright ones, sometimes offer different accounts when interviewed by lawyers representing different offices. Differences between state and federal laws can lead to damaging conflicts over strategy and priorities. Then there is what is known as “witness fatigue,” when important players simply grow tired or uncooperative after running gantlets of government inquisitors.

Fulton County prosecutors are conducting a wide-ranging investigation that includes calls made by Mr. Trump to exert pressure on state officials and efforts by the former president and his allies to replace legitimate electors in Georgia with pro-Trump alternates. Last year, Ms. Willis’s office sought to interview two key figures who had served in the Justice Department: Richard Donoghue, the acting deputy attorney general in the waning days of the Trump administration, and Jeffrey Clark, an assistant attorney general who led the department’s environmental division.

Shortly after Mr. Trump left office, it emerged that Mr. Clark had tried to circumvent the department’s leaders and aid Mr. Trump’s efforts to stay in power. He even drafted a letter that was to have been sent to lawmakers in Georgia falsely claiming that the Justice Department had “identified significant concerns” that would affect the state’s election results and urging lawmakers to convene a special session.

Mr. Donoghue was alarmed when he saw the draft, according to testimony he provided to the House committee that investigated the Jan. 6 attack.

Aides to Ms. Willis filed what are known as Touhy requests, named after a 1951 Supreme Court case. Under the rule, local prosecutors are required to get authorization from the Justice Department to question its current or former employees. But the requests were ultimately rejected.

It is not clear why the department rejected the requests. But both men were at the center of an investigation into Mr. Clark’s conduct by the Justice Department’s inspector general that was subsequently handed off to Mr. Smith’s team.

A spokesman for Mr. Smith declined to comment.

The possibility of an indictment in the Georgia investigation next month raises the pressure on the special counsel, Jack Smith, to move even faster, according to current and former prosecutors. Peter Dejong/Associated Press

Fulton County prosecutors also declined to comment. The forewoman of an Atlanta special grand jury that issued an advisory report in January, which has remained largely under seal, appeared to hint in an interview this year that it had recommended that Mr. Trump be indicted.

The Atlanta case has put additional pressure on Mr. Smith. Justice Department officials have said they wanted to make charging decisions in the spring or summer, before the 2024 election kicks into high gear — which raises the question of whether Mr. Smith will try to bring charges before Ms. Willis does.

“Looking at this as a federal prosecutor, I would just want to go first,” said Joyce Vance, a University of Alabama law professor who served as the U.S. attorney in Birmingham from 2009 to 2017. “I don’t want to have to try my case after it’s already been brought in a state court. You really want to go first to avoid problems with witnesses, and other technical or legal problems.”

If Ms. Willis moves first, Mr. Smith’s team would have to obtain department approval to waive an internal rule that precludes “multiple prosecutions and punishments for substantially the same act(s).”

Demonstrators rallying for Mr. Trump near his Mar-a-Lago estate this week. Hilary Swift for The New York Times

That is not considered a high bar, however. Mr. Smith would simply have to show that the state case did not completely cover all the issues addressed in a federal case. It is believed that exemption was recently used to obtain a hate crimes conviction against three men who murdered Ahmaud Arbery, a young Black man who was jogging through their neighborhood.

John P. Fishwick Jr., a former U.S. attorney for the Western District of Virginia, said he often requested that local prosecutors step aside when he thought their investigations conflicted with his. He suggested that Mr. Smith could at least consider asking Ms. Willis to do the same.

“D.O.J. and state prosecutors do not play well in the same sandbox, but at the end of the day, if it gets into a tug of war, D.O.J. is usually going to win,” he said. “The federal government just has more power as far as compelling witnesses, more power to assign people to a case and more oomph, in general.”

While prosecutors should clear up disputes over access to witnesses and documents, it is vital that the two efforts be seen as independent and fact-driven and not a “witch hunt,” as Mr. Trump has described all of the investigations into him, former Justice Department officials say.

“I don’t think they would coordinate on things like timing or language of the charges or anything like that — although that wouldn’t be illegal,” said Mary McCord, a former top official in the department’s national security division who is now a visiting professor at Georgetown University Law Center.

“But the goal here is avoid any appearance that they are coordinating prosecutions for political purposes,” added Ms. McCord.

Glenn Thrush and Adam Goldman reported from Washington, and Danny Hakim from New York.