

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JUDICIAL WATCH, INC., CV No. 1:14-cv-01242-RCL

Plaintiff, Washington, D.C.
v. Thursday, August 22, 2019
2:00 p.m.

U.S. DEPARTMENT OF STATE,

Defendant.

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TRANSCRIPT OF STATUS CONFERENCE
HELD BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, we're on the record with civil case 14-1242, Judicial Watch, Incorporated, v. Department of State.

Counsel, if you could please approach the lectern; identify yourselves for the record.

MS. COTCA: Good afternoon, Your Honor. Ramona Cotca for Judicial Watch. Also at counsel's table is Paul Orfanedes representing Judicial Watch and Christopher Farrell. He's a corporate designee.

THE COURT: All right.

MR. PEZZI: Good afternoon, Your Honor. Stephen Pezzi from the Department of Justice on behalf of Defendant Department of State. With me at counsel's table today are Robert Prince, also with the Department of Justice; Elizabeth Shapiro, Deputy Director of the Department of Justice; as well as Elizabeth Grosso and Michael Lieberman who are both attorney advisers with the State Department.

THE COURT: Okay.

MR. KENDALL: Good afternoon, Your Honor. May it please the Court. I'm David Kendall here for Intervenor Hillary Rodham Clinton.

THE COURT: Pleasure to have you, Mr. Kendall, as always.

MR. KENDALL: Thank you, sir.

1 MR. STEKLOFF: Good afternoon, Your Honor. Brian
2 Stekloff from Wilkinson Walsh on behalf of Third Party
3 Cheryl Mills.

4 THE COURT: Okay. Nice to have you.

5 Okay. Let me start with Judicial Watch. If
6 you'll tell me where we are in your point of view.

7 MS. COTCA: Yes, Your Honor. Thank you.

8 The posture at this point in the case, we've
9 completed the discovery that the Court has ordered back in
10 December of 2018 and then pursuant to the Court's January
11 15, 2019, order. During that discovery, there are
12 additional new facts that plaintiff has learned that give
13 rise to additional discovery plaintiff deems is necessary in
14 this case. In our status report that we filed with the
15 Court, we identify some of the additional information that's
16 been learned. And if I skip over anything, I'd just let the
17 Court know, please feel free to ask me to clarify.

18 But some of the most pertinent facts that I just
19 want to bring the Court's attention to today are, one, in
20 December of 2012, the White House Counsel's Office was
21 communicating with the State Department about a FOIA request
22 from CREW with respect to Secretary Clinton's emails.
23 Following that, in June of 2013, IPS office which handles
24 FOIA for the State Department begins an inquiry into
25 Secretary Clinton's emails. That was brought to the

1 attention at -- of -- by John Hackett, who was deposed in
2 this case, and that's where we have a lot of the factual
3 information that we learned. He's no longer a State
4 Department employee, but back in 2013 he was the Deputy
5 Director of IPS. At the time -- fast-forward a year -- he
6 became the Director of IPS. So he had several roles during
7 this time frame.

8 But in 2013, he saw the photograph that, I think,
9 a lot of people know of Secretary Clinton holding the
10 BlackBerry in the military plane and raised questions to him
11 about the BlackBerry use -- it was while she was Secretary
12 of State on a military plane -- and what that meant with
13 respect to her email use at the State Department. As a
14 result, certain things happened. One was, well, he alerted
15 his boss, who was Sheryl Walter at the time, but that led to
16 an inquiry by the records officer within IPS. Her name is
17 Tasha Thian, who we did not know of before, and she led an
18 inquiry in 2013 about Secretary Clinton's email use.

19 Just this week, we learned that actually,
20 Ms. Thian had published a book called State Department
21 Records & the Elections in which she details in about two
22 chapters about Secretary -- what she knew at the time. She
23 was there when Secretary Clinton began her tenure at the
24 State Department, and also, when she left the State
25 Department, and she left -- finally left the State

1 Department in June of 2014. And I just want to alert the
2 Court -- and we're happy to supplement the record, if the
3 Court wishes, with the chapters that are relevant.

4 Obviously, this is a witness that had first fact --
5 firsthand knowledge about the facts at issue. But just one
6 quote on Page 89 of her book, it says, I had asked her
7 office several times if she used personal email, and I was
8 told she did not use her email for work. Later on, it says,
9 I'm aware of at least six occasions where staff should have
10 informed Mrs. Clinton of her records requirements. These
11 include four records management training sessions; one
12 meeting with her aide prior to her tenure; and the final one
13 was when she was leaving the Department with the Departing
14 Officials Procedures. And from the discovery through
15 document production in this case as well as Mr. Hackett's
16 testimony, Ms. Thian was directly involved with Secretary
17 Clinton's office when they were departing with respect to
18 their records management and -- or retention prior to
19 departing the State Department.

20 In addition to Ms. Thian's inquiry, during that
21 summer, as Mr. Hackett described it, they were trying to
22 figure out what -- Secretary Clinton's email use and what
23 this meant for FOIA. In or around August of 2014, according
24 to Mr. Hackett's testimony, IPS issued a directive not to
25 send any more "no records located" responses to FOIA

1 requests related to Secretary Clinton's emails, and as
2 Mr. Hackett described, it is, Well, it would be
3 inappropriate if we don't know what this email meant. In
4 relation to that directive, Mr. Hackett identified Patrick
5 Scholl within IPS, and he's also listed as an individual who
6 we would like to question specifically with respect to this
7 directive.

8 In December --

9 THE COURT: Now, I take it -- in your
10 presentation, you said Scholl, in fact, did send out that
11 directive to his staff or not?

12 MS. COTCA: No, that --

13 THE COURT: Because at one point, I saw that
14 Mr. Hackett, I think, said he didn't know whether that was
15 ever produced. He didn't have a copy.

16 MS. COTCA: Correct.

17 THE COURT: So is there a copy or do we know that
18 email was actually sent to the staff ordering them to do the
19 "no records located" response?

20 MS. COTCA: We do not.

21 THE COURT: We don't have it?

22 MS. COTCA: We do not have the record, but that is
23 one of the --

24 THE COURT: Okay.

25 MS. COTCA: -- document requests that is listed in

1 plaintiff's --

2 THE COURT: Okay.

3 MS. COTCA: -- additional discovery.

4 THE COURT: To see if there was such an email
5 sent --

6 MS. COTCA: Correct.

7 THE COURT: -- to say, "Don't do a no-records
8 response"?

9 MS. COTCA: Correct. Correct.

10 THE COURT: That's what Mr. Hackett testified to.
11 I read that this morning --

12 MS. COTCA: Yes, he testified that --

13 THE COURT: -- that he directed that that be done.

14 MS. COTCA: Correct.

15 THE COURT: Right.

16 MS. COTCA: Correct. Now, he didn't recall --

17 THE COURT: He and Ms. Walter, both.

18 MS. COTCA: Yes, he and Ms. Walter. Now, from my
19 recollection of Mr. Hackett's testimony, Mr. Hackett didn't
20 recall if he had given the directive to Patrick Scholl in
21 writing or not --

22 THE COURT: Right.

23 MS. COTCA: -- via email.

24 THE COURT: Right.

25 MS. COTCA: That may have been verbal.

1 THE COURT: Right.

2 MS. COTCA: But his testimony is that there was a
3 directive sent --

4 THE COURT: Right.

5 MS. COTCA: -- from Patrick Scholl to IPS --

6 THE COURT: But you don't have one?

7 MS. COTCA: We do not have that --

8 THE COURT: All right.

9 MS. COTCA: -- no. And --

10 THE COURT: And you don't know whether, in fact,
11 that there were responses that did not follow that order?

12 MS. COTCA: No, we do not know that, as well.

13 THE COURT: And did Judicial Watch receive a
14 response that said, "No records"?

15 MS. COTCA: In other cases? Not in -- well --

16 THE COURT: In this case.

17 MS. COTCA: In this case? No.

18 THE COURT: Because you just never got a response?

19 MS. COTCA: We never received a response until we
20 filed the lawsuit. Correct.

21 THE COURT: Right. Right.

22 MS. COTCA: Correct.

23 Then in -- as this is going on, in December of
24 2013, again, in response to a different FOIA request that
25 was submitted by Gawker Media -- and this one -- apparently

1 2013, there was actually a public release of Secretary
2 Clinton's email address, hdr22@clintonemail.com, and that
3 request specifically asked for emails between Secretary
4 Clinton at that email address and Sidney Blumenthal.
5 Mr. Hackett recalled that this issue arose once again during
6 this time frame in December/January of 2013 because, in
7 response to that request, certain emails were located that
8 identified her email address. He wasn't clear on what
9 exactly those email records are, and that is something --
10 that is another document request that we asked for, but --
11 and we provided the description from his -- the excerpt from
12 his testimony as to how Mr. Hackett described it.

13 And it is noteworthy that, I believe, at that
14 point, Gawker had still not received, until after it was
15 publicized -- I don't believe they received a response, but
16 I'm not -- actually, I'm not quite certain on that, but --
17 so after January of 2014, Judicial Watch's FOIA request is
18 submitted in July -- or in May of 2014. We filed the
19 lawsuit in July of 2014. At that time, what we've learned
20 is, once more, there were a lot of discussions actually
21 between IPS and the Office of Legal Adviser about Secretary
22 Clinton's emails as well as to this other 2012 CREW request
23 concerning Secretary Clinton's emails, and those discussions
24 occurred with Mr. Hackett, per -- according to Mr. Hackett's
25 testimony; also, Mr. Finney, who we did depose in this case,

1 but also the State Department attorney Jamie Bair, who we've
2 also identified in -- as part of our discovery.

3 Now, he is an attorney at the State Department in
4 -- the State Department opposes his testimony because he is
5 an attorney, but -- and points to the fact that we knew that
6 he was the attorney at -- assigned to this case to argue
7 that we should have included him in the initial discovery;
8 however, the fact that we did not include Mr. Bair in our
9 initial discovery supports our position that we are not
10 seeking attorney-client communications. What we're seeking
11 is his knowledge about State Department -- about Secretary
12 Clinton's emails. So in other words, we're not seeking to
13 ask him, What was your discussions with, you know, State
14 Department officials about, you know, how to litigate this
15 case? But rather, What was your knowledge at the time that
16 he was responding and the State Department was responding to
17 our case with respect to Secretary Clinton's emails in 2014?
18 The evidence so far that we've collected through discovery
19 strongly -- I mean, well, I think, supports the fact that
20 State Department officials and attorneys -- IPS officials
21 and attorneys knew at that point that the -- that Secretary
22 Clinton had used email for State Department work. And, in
23 fact, I believe Mr. Hackett's testimony -- which is included
24 in the excerpts we've provided -- stated that as a result of
25 the Gawker request back in December and January, they knew

1 that she had used it to some degree for her State Department
2 business.

3 So Mr. Bair, in the summer of 2014, according to
4 Mr. Hackett's testimony, he alerted Mr. Hackett about --
5 well, initially, he was involved in the document production
6 from State to the Benghazi Select Committee. As part of
7 that document production in August -- August 11th, I
8 believe, or sometime in August -- the State Department
9 included emails from Secretary Clinton's email account about
10 -- related to Benghazi, and Mr. Bair alerted Mr. Hackett
11 that the State Department may receive press inquiries about
12 Secretary Clinton's email use. And, in fact, Mr. Hackett
13 testified that he was asked to brief Public Affairs sometime
14 in August or September of 2014 about Secretary Clinton's
15 email use and his -- he didn't want to do it, but the State
16 Department did actually produce a copy during their 30(b)(6)
17 deposition, an email that confirmed the request for the
18 Public Affairs briefing which is also included as part of
19 the supporting documents with the status report.

20 All of the -- so Mr. Bair's knowledge about
21 Secretary Clinton's email use while they were responding and
22 searching for plaintiff's records in this case is paramount.
23 Secretary Clinton was the head of the agency. We asked for
24 records from the Secretary's office relating to Benghazi and
25 we asked for email records. It can't be disputed that her

1 email records were not relevant to the State Department's
2 search. So we, therefore, request Mr. Bair's testimony, as
3 well.

4 In addition, also, through the deposition of
5 Mr. Hackett, we've also identified Eric Stein. He is the
6 current -- so he actually holds the position that
7 Mr. Hackett held back in 2014 and, as the State Department
8 points out, we do know that Mr. -- we did note that
9 Mr. Stein held that role in 2016. They point to the
10 supplemental production that the State Department made in
11 this case; however, only at Mr. Hackett's deposition is the
12 first time we knew of Mr. Stein's FBI 302 notes that also
13 point to a discussion between Mr. Stein and an attorney --
14 unidentified attorney from the Office of Legal Adviser
15 asking about Secretary Clinton's emails in an unidentified
16 PST file from a previous FOIA case. That's the first time
17 that we learned that those notes are based on the interview
18 that Mr. Stein provided to the FBI and the reason that we've
19 included Mr. Stein at this point in our supplemental
20 request.

21 These are -- I would say, these are the four
22 individuals -- the way I would parse the additional
23 depositions that Judicial Watch has asked for, these are the
24 four individuals that are new per se, let's say, based on
25 information that we learned in the depositions. The other

1 individuals are three individuals who we knew of, but we
2 didn't know their identities, who the Court permitted us to
3 ask from the State Department by -- through an
4 interrogatory, and because their names are subject to
5 protective order, I'll just refer to them as officials in
6 Mr. Pagliano's 302 notes.

7 THE COURT: Right.

8 MS. COTCA: And they've since been identified, and
9 our understanding is that they're still at the State
10 Department, and their testimony is relevant to -- I mean, if
11 -- in Mr. Pagliano's notes, he describes that either one or
12 all three of them had raised concerns about federal records
13 issues with respect to Secretary Clinton's email use.
14 Obviously, that goes to the State Department's good faith or
15 bad faith in this case. So therefore, we're asking for
16 their limited depositions.

17 And then initially, when we submitted our proposed
18 discovery proposal in December, we did say that we would
19 come back to Secretary Clinton and Cheryl Mills. It is
20 based on the evidence that we've -- the additional facts
21 that we found. We want -- we believe it's necessary to also
22 take their depositions in this case. Ms. Mills, when we --
23 we did depose Ms. Mills in the previous case before Judge
24 Sullivan in this court; however, at that point, we didn't
25 have all of the record that we have at this point. We

1 didn't know about Mr. Pagliano's FBI notes identifying --
2 stating that he spoke with Mr. Mills [sic] and relayed the
3 concerns that were addressed to him about federal records
4 retention issues and Secretary Clinton's email. Obviously,
5 that is paramount to plaintiff's case and the reason for --
6 part of the reason for requesting her deposition.

7 And then there are some additional interrogatories
8 and requests for production of documents. I don't know if
9 the judge -- if -- would you like me to go through all of
10 them --

11 THE COURT: No, that's all right.

12 MS. COTCA: -- or do you have -- okay. But that's
13 where we are. And I would just -- I would say that there is
14 a lot of information that we have discovered as a result of
15 the discovery with respect to State Department's actions in
16 this case in 2014, but this additional information is
17 necessary to complete and fill in the gaps that we need.

18 THE COURT: All right. Thank you.

19 Mr. Pezzi?

20 MR. PEZZI: Good afternoon, Your Honor. Stephen
21 Pezzi from the Department of Justice.

22 Your Honor, I did not hear any argument from my
23 friend on the other side today nor did I see it in her
24 status report yesterday addressing the critical threshold
25 question as to whether any additional discovery is

1 appropriate in this case at this time, given the extensive
2 discovery that Your Honor has already permitted and that the
3 parties have now completed, not to mention the discovery
4 that Judicial Watch took in related litigation in front of
5 Judge Sullivan. We think those threshold arguments are
6 important and it is, of course, Judicial Watch's burden to
7 explain to Your Honor why there has been good cause to
8 reopen discovery now that discovery has closed in this case.

9 THE COURT: Well, I didn't close discovery. So
10 your premise is wrong.

11 MR. PEZZI: Fair enough, Your Honor. Whether you
12 want to call it closed or not, it is still --

13 THE COURT: I didn't close it. I said I would
14 have a status after they took this initial discovery, and
15 that's what I'm doing today. I didn't close discovery.

16 MR. PEZZI: That's right, Your Honor, but it is
17 still Judicial Watch's --

18 THE COURT: So they don't need any good cause --

19 MR. PEZZI: Whether --

20 THE COURT: -- today. The good cause continues
21 from whether or not State was acting in good faith, and I'll
22 tell you everything they've discovered in this period raises
23 serious questions about what the hell the State Department's
24 doing here.

25 MR. PEZZI: Your Honor --

1 THE COURT: This no -- I didn't know until I read
2 that last night and this morning about this not -- the
3 professionals saying you can't respond saying "no records"
4 because of what the Secretary was doing. It's really
5 shocking to think that you would come in here and argue to
6 me that you could still make that settlement offer -- which
7 is what you're, in effect, doing in your papers -- when you
8 have never told them about the emails for that period. So I
9 really don't even understand what you're trying to argue to
10 me today.

11 MR. PEZZI: Well, Your Honor, there's a lot to
12 unpack there, and there are some factual premises that, just
13 for the record, the Government does not necessarily agree
14 with in Your Honor's --

15 THE COURT: Okay. Tell me what you think the
16 facts are.

17 MR. PEZZI: So with respect to the directive
18 issued through Patrick Scholl, the --

19 THE COURT: Did it go out?

20 MR. PEZZI: So we have been working to determine
21 whether such a directive was ever sent and -- although, you
22 know, it requires proving a negative, and so I'm not going
23 to represent to you today that --

24 THE COURT: Well, it's not a negative. You have
25 testimony from Hackett that he ordered it.

1 MR. PEZZI: Right. Well, his testimony is a bit
2 more equivocal than that. He thinks that he recalls such a
3 directive. He wasn't --

4 THE COURT: That's not what I read. I mean, I've
5 had dozens of affidavits from that guy over the course of my
6 career here. He was State Department's primary guy. I got
7 affidavits from him all the time. I know who he is.

8 MR. PEZZI: That's right, and he was deposed in
9 this case. We have looked for that directive. We have not
10 found it. Obviously, were there to be additional discovery
11 in this case and were Judicial Watch to serve that request,
12 we would do additional searches to confirm it, but as of
13 today --

14 THE COURT: So maybe, it was never done? Well, it
15 should have been done, shouldn't it?

16 MR. PEZZI: Well, I don't think that's right, Your
17 Honor. I think --

18 THE COURT: Why? She could do this and State
19 could rely on her doing it and pretending like these records
20 never were in State's custody?

21 MR. PEZZI: I --

22 THE COURT: I'll tell you another thing I didn't
23 like in your brief. I'll tell you right now upfront. You
24 put in your brief -- the most preposterous thing, I thought,
25 in your brief was the very idea that -- let me read you the

1 line. Competitive Enterprise Institute was a case of first
2 impression and that some District Judge bought that and the
3 Court of Appeals reversed it. Now, that wasn't a case of
4 first impression at all. The first impression with me was a
5 case I had involving Ron Brown and the travel records of
6 whether or not, in the Commerce Department -- and it was a
7 Judicial Watch case -- whether or not the Commerce
8 Department was selling seats on trade missions, and I had a
9 Deputy Under Secretary of Commerce who took a box of records
10 home and then they gave a no-records response and, in the
11 course of that, I found out he had taken the records home
12 and they said they had no records. I sent the marshals over
13 and they got the box at his house, and I ordered them -- the
14 marshals -- to seize the records, and then I ordered
15 Commerce to process the records. That was the first case.

16 So Competitive Enterprise is not the first case of
17 somebody taking the records out of the agency and pretending
18 like they didn't have them and giving a no-records response
19 like what State did here. It's really a preposterous notion
20 that Competitive Enterprise, in 2006, is the first one of
21 these. It's offensive to me that you would call that the
22 first case of first impression in Competitive Enterprise.
23 The Ron Brown situation -- and what happened there when they
24 finally got the records was, it turned out the Democratic
25 National Commission -- Committee had to get a certain level

1 of contributions before you could go on a trade mission with
2 the Secretary. That practice stopped as a result of the
3 FOIA case. So FOIA can be a very important process to
4 government agencies and to those who are looking at what
5 government agencies are doing. That was the first case that
6 I know about, and it was one of mine.

7 MR. PEZZI: Your Honor, I think it's important to
8 be precise about the nature of the Government's argument and
9 the reason the Competitive Enterprise Institute citations in
10 our -- are in our brief. We are not arguing now, and we
11 never argued in this case, that -- the State Department
12 never tried to rely on that argument in taking any
13 particular action --

14 THE COURT: Well, you're pretending like between
15 that period when State knew about these documents and got
16 them back in December of 2014 until sometime later that
17 State could be arguing that they weren't in State's
18 possession and State could be denying the FOIA requests to
19 this plaintiff. That's what you're pretending about today
20 in your papers --

21 MR. PEZZI: Well --

22 THE COURT: -- you filed last night.

23 MR. PEZZI: Respectfully, Your Honor, the
24 Government did argue in as late as 2016 to the D.C. Circuit
25 that that would have been permissible. Now, that

1 obviously --

2 THE COURT: I can't even believe you would make
3 that argument.

4 MR. PEZZI: Well --

5 THE COURT: That is a preposterous argument.

6 MR. PEZZI: I mean, even the D.C. Circuit's
7 opinion in CEI makes clear that the precedents that had been
8 presented to it did not squarely resolve the case. Now, I'm
9 not trying to convince Your Honor that that's right or
10 wrong. In fact, we all now know that it is wrong, but that
11 does not -- that's a far cry from bad faith, Your Honor,
12 that it might take a little bit longer than --

13 THE COURT: Well, that's why I want to find out
14 about the whole bad faith facts.

15 MR. PEZZI: Right. And none of the facts elicited
16 in discovery, in the Government's view --

17 THE COURT: Well, that's why discovery's not
18 through.

19 MR. PEZZI: Well --

20 THE COURT: Go ahead and make your argument.

21 MR. PEZZI: Look, I -- we have our general
22 arguments, but with respect to the specifics that my friend
23 on the other side presented, first of all, I think it's
24 important, some of them on their face are not new facts at
25 all. Many of them, in fact, are not new facts at all. I

1 mean, the most obvious example is one that Your Honor did
2 not hear of in my friend on the other side's presentation.
3 They point to, for example, 2009 emails with General David
4 Petraeus that they say were newly-uncovered documents that
5 somehow bear on this question of the Secretary's motivations
6 in setting up her email server. Obviously, we also have a
7 threshold legal argument. We don't think that that is an
8 appropriate subject of inquiry anymore, but even accepting
9 the premise that it is -- I mean, there's a -- and we didn't
10 have time to address this in the papers, of course, because
11 we filed at the same time, but -- I mean, this is a -- and
12 if I may pass a document up to Your Honor and I have --

13 THE COURT: Sure.

14 MR. PEZZI: -- a copy for --

15 (Brief pause.)

16 This is an October 20th, 2016, press release
17 issued by Judicial Watch. The headline is, "Clinton Emails
18 with Petraeus Reveal Her 'BlackBerry Blues'; Clinton Tells
19 Then-CENTCOM Commander to Use Her 'Personal Email Address.'"
20 Now, this is not a new fact that was learned in this case,
21 and I'm not just saying this to, you know, score points at
22 an argument. I think it's really fundamental to the
23 disagreement that we have with Judicial Watch. These issues
24 have been exhaustively investigated, and these facts have
25 been developed in Inspector General reports.

1 Another example -- I mean, we talked about the
2 three IT officials whose names are subject to the Privacy
3 Act. If you look at Page 40 of the May 2016 Office of
4 Inspector General report -- which is one of several
5 Inspector General reports investigating these issues -- it
6 discusses the same -- not by name, of course, but it
7 discusses the same sort of conversations that counsel is now
8 telling Your Honor are some sort of newly-discovered facts
9 that need to be addressed. It's not just that they didn't
10 know the names before. They knew of the basic story here.

11 Now, with respect to Mr. Hackett's testimony and
12 Mr. Bair's knowledge -- I mean, the Government concedes, and
13 has conceded for quite some time, that there were some
14 individuals, no doubt, within the State Department that had
15 some awareness that Secretary Clinton was using her private
16 email at least in some instances to conduct government
17 business. That's -- and what led ultimately to a request
18 being made to Secretary Clinton that she return any federal
19 records in her possession.

20 So the Government is not saying now, and has never
21 said to this Court before, that nobody in the State
22 Department had any idea that Secretary Clinton was using
23 this email address at the time, but there was a big gap
24 between the facts we all know now -- which is that, you
25 know, not only was she using email, but she was using it

1 routinely and systematically and she had a private server --
2 and what -- certainly, what most individuals involved with
3 processing FOIA requests knew. I mean, even Mr. Hackett's
4 testimony -- I mean, counsel referred to this photograph of
5 Secretary Clinton using a BlackBerry. Mr. Hackett, in his
6 deposition, ultimately said, quote, We did not know what
7 that photograph meant or what even having an email -- a
8 private email address of hers meant back in 2013. That's at
9 Page 92 of Mr. Hackett's deposition transcript.

10 And so ultimately, this was a very -- this was an
11 unusual situation, to be sure, and the Government is not
12 trying to persuade Your Honor otherwise, but the State
13 Department requested the records. They were returned. When
14 they were returned, they needed some time to figure out what
15 they were; whether, in fact, there are agency records
16 subject to FOIA in this box; and there needed to be a
17 decision made as to whether, you know -- whatever legal
18 arguments might be available to the Government, are we going
19 to rely on those arguments or are we instead, as a matter of
20 prudence, going to search for, process all these documents
21 and release them through FOIA? Obviously, as Your Honor
22 knows, the Government decided of its own accord to take the
23 latter path, and that's why all of these documents have now
24 been on the Internet for quite some time after an exhaustive
25 effort by the State Department over a matter of years that

1 occupied a lot of time in this courthouse that, of course,
2 Your Honor is familiar with.

3 And so -- I mean, allegations of bad faith are
4 something that the Government takes extremely seriously, and
5 I think it's important that Your Honor's aware of that. And
6 we understand, you know, that there -- that Your Honor has
7 concerns with how these records were managed within the
8 State Department over the years, but certainly -- and on the
9 Government's view, there's no need for any additional
10 discovery on any of these subjects.

11 And with respect -- I mean, with respect to some
12 of the specifics, in addition, I think it's worth pointing
13 out the Gawker email that, again, my friend on the other
14 side refers to. I mean, that's something -- it's a -- on
15 its face, it's a 2015 article published on Gawker.com about
16 a FOIA request submitted by Gawker about Hillary Clinton's
17 private email address. So I have a hard time seeing why
18 that is some sort of new fact that justifies additional
19 discovery just because one of the 11 deponents in this case,
20 you know, had a vague recollection of some discussions about
21 that. They've already had the opportunity to get, you know,
22 access to these individuals, a much greater opportunity than
23 a typical plaintiff would in a FOIA case, and I think most
24 or all of the testimony that they're now seeking is very
25 likely to be extremely cumulative or, worse than that, it's

1 going to result in no additional information at all on most
2 of the subjects that they claim to be interested in.

3 I also think it's important to note that the
4 subjects they claim to be interested in -- again, we saw
5 nothing in the status report and I heard nothing today about
6 how any of this discovery is at all tethered to the case or
7 controversy before Your Honor. Their complaint is a -- has
8 one count --

9 THE COURT: Well, there is -- there's -- one
10 problem with that is, I think, if it's bad faith, they're
11 entitled to attorneys' fees, whether or not they ever got a
12 document in this case. So I think it would really be
13 relevant to attorneys' fees. So I don't think the case is
14 moot in terms of your argument that it's moot.

15 MR. PEZZI: And we're not arguing that -- I mean,
16 we haven't filed a motion to dismiss --

17 THE COURT: Right.

18 MR. PEZZI: -- for lack of subject matter
19 jurisdiction --

20 THE COURT: Right.

21 MR. PEZZI: -- for example. We're not arguing
22 that the case is moot and we don't even dispute, actually,
23 that Your Honor, of course, has jurisdiction to explore
24 whether, you know, a party in his courtroom acted in bad
25 faith.

1 THE COURT: Right.

2 MR. PEZZI: We don't dispute that.

3 THE COURT: Right.

4 MR. PEZZI: We think there's no factual basis for
5 a finding of bad faith and, frankly, Judicial Watch hasn't
6 even really tried to articulate one.

7 And I mean, with respect to attorneys' fees,
8 again, Judicial Watch has never raised attorneys' fees, but
9 we are -- I mean, if and when the time comes in this case,
10 of course, per usual, we can meet and confer with Judicial
11 Watch and see what attorneys' fees, if any, they think are
12 appropriate and, in a way, that's how we think this case
13 should proceed at this point, similar to how the discovery
14 in the Judge Sullivan case, 13-1363 -- when that discovery
15 completed, ultimately, the parties met and conferred and
16 Judicial Watch requested some additional searches; the
17 Government agreed to conduct additional searches that it
18 didn't believe were legally required, but in the interest of
19 resolving that case, it conducted those additional searches;
20 Judicial Watch was satisfied; and it dismissed the case.
21 Now, here, they've taken a different path --

22 THE COURT: And were fees agreed upon, then?

23 MR. PEZZI: What's that?

24 THE COURT: Were fees agreed upon, then, or --

25 MR. PEZZI: Yes, the parties reached a settlement

1 agreement that included a payment of attorneys' fees.

2 THE COURT: So it all went away?

3 MR. PEZZI: So it all went away. And, look -- I
4 mean, maybe, we would be able to agree on fees in this case;
5 maybe, we wouldn't. If --

6 THE COURT: Right.

7 MR. PEZZI: -- we disagreed --

8 THE COURT: No, I understand.

9 MR. PEZZI: -- we could brief that in front of
10 Your Honor, but -- I mean, I think I have -- I have never
11 even had the opportunity -- I mean, I joined this litigation
12 team in December of 2018, and I have never been able to
13 discuss with counsel on the other side -- certainly not in
14 preparation for this hearing -- as to what additional
15 searches they believe are required that we haven't done.
16 And I mean, I would not be surprised -- I don't want to
17 promise anything from the lectern, of course, but we might
18 be willing to conduct additional searches even if we don't
19 believe they're legally required and make exhaustive efforts
20 beyond the exhaustive efforts we've already taken to locate
21 any responsive agency records in this case. And the fact
22 that counsel doesn't even want to discuss that matter, I
23 think, frankly, is telling, and I think what they're really
24 trying to do here is take discovery for discovery's sake,
25 and I don't think that's an appropriate use of the discovery

1 process, and I don't think it's an appropriate use of Your
2 Honor's time.

3 I mean, this FOIA request is actually quite
4 narrow. I don't -- I mean, it's been a long time since
5 we've even talked about what the FOIA request was, but there
6 was nothing special about this FOIA request. I mean, there
7 were literally hundreds of FOIA requests to the State
8 Department about Benghazi and the Secretary's emails, dozens
9 of them in litigation in this courtroom. This one asked for
10 talking points provided to Susan Rice, and so the Government
11 believes that we have conducted an adequate search.
12 Judicial Watch has had an extraordinary opportunity to kick
13 the tires on that question. I mean, they deposed several of
14 the, you know, career FOIA professionals who were part of
15 those searches half a decade ago at this point; they sent
16 interrogatories to the former Deputy National Security
17 Adviser and the senior White House official who never even
18 worked at the State Department; interrogatories to
19 Ambassador Susan Rice; they deposed, in this case, the
20 Deputy Chief of Staff to the Secretary of State, Jacob
21 Sullivan, all about, you know, the talking points and the
22 creation of the talking points. I mean, FOIA plaintiffs
23 never get that sort of opportunity, and so I think to come
24 back to Your Honor and say that they need additional
25 discovery on, you know, the adequacy of the search, for

1 example, I don't think it makes a whole lot of sense.

2 It also doesn't make sense in the context of -- I
3 mean, there's been an intervening ruling from the D.C.
4 Circuit on the question of whether or not there are
5 additional steps that the Government could take to bring
6 additional Clinton emails in outside from the four walls of
7 the State Department, and that is -- I mean, that case is
8 captioned Judicial Watch v. Pompeo. It is the same parties,
9 and that was a ruling issued against Judicial Watch and
10 they, you know -- they didn't seek en banc rehearing; they
11 did not petition for review at the Supreme Court. That
12 matter is closed, and it is binding on Judicial Watch as a
13 matter of collateral estoppel.

14 And so if there's nowhere else the Government
15 could search for Clinton emails outside of the four walls of
16 the State Department, I think discovery on, you know -- a
17 wide-ranging inquiry of that sort is inappropriate, but,
18 again, if there are specific searches that they think we
19 should have done, we're happy to discuss it, and we might
20 even be happy to do them, but that at least would be an
21 inquiry tied to the, you know -- the one claim in their
22 complaint that's before Your Honor.

23 THE COURT: Let me ask you one other question that
24 is not raised by Judicial Watch but is raised by my
25 admiration for Senator Grassley. At the hearing on my

1 successor when I stepped down as Chief Judge, Judge Cooper
2 was named by President Obama to my spot, and I accompanied
3 him to his hearing before the Senate Judiciary Committee.
4 And Senator Grassley, upon my being introduced to the
5 Committee, made some very nice comments about me and my
6 career here, and so I would repay the Senator by saying some
7 very nice things about my admiration for him.

8 He released, on Friday, a report in which he had
9 some very troubling information about a guy named Combetta
10 who had been one of the contract employees on the Clinton
11 emails, and he and the Senator who Chairs the Homeland
12 Security Committee released in the Senate this report
13 Friday, and the gist of it was that Combetta had said, I
14 guess, that he had created a dummy email account with all of
15 the Hillary Clinton emails in it in a different name, and
16 the FBI had investigated that to see whether or not the
17 Chinese had ever hacked into it. They have determined that
18 the Chinese hadn't, but that the FBI never told the State
19 Department about that account and that the emails that were
20 not given over to State could have been obtained from that
21 account, but the FBI never told State about it. So it
22 leaves out in the open whether there are these other emails
23 that State could have obtained but nobody ever bothered to
24 tell State about them. I don't know the status of that and
25 I'm sure you don't either, but that did occur to me that

1 would be a problem for me as to whether an adequate
2 examination of that circumstance occurred and, assuming that
3 Combetta deleted them, as he said he did before he took the
4 Fifth, I guess, whether or not the server that they were on
5 or the -- or whoever maintained the server, whether they can
6 be reconstructed from -- by that, I don't know, and I don't
7 know if State knows, but if State was never told about it,
8 obviously, State doesn't know, and then that gets to the
9 question of what -- where you and I started of what
10 obligations State might have if no one ever told them.

11 MR. PEZZI: Look, Your Honor, I don't pretend to
12 know all of the details of that story, but I can tell you,
13 even if accepting the factual premise that all of those
14 things happened in the exact way they were described; even
15 accepting something even worse than that happened, the D.C.
16 Circuit has already ruled against Judicial Watch on the
17 precise question of whether there are additional steps that
18 the Government can take to recover additional emails --

19 THE COURT: Well, I don't know about that. An
20 unpublished opinion from the D.C. Circuit?

21 MR. PEZZI: It is an unpublished -- well, it's in
22 the Federal Appendix, but it doesn't matter for the purposes
23 of this case because it's between the same parties. So it
24 --

25 THE COURT: So it's res judicata?

1 MR. PEZZI: It is -- yeah, collateral estoppel, I
2 think --

3 THE COURT: Collateral estoppel?

4 MR. PEZZI: -- would be the term that applies in
5 this instance. Whether you want to call it res judicata or
6 collateral estoppel, it was a hotly disputed legal question
7 in a case originally before Judge Boasberg where he made
8 detailed factual findings. He dismissed the case as moot.
9 It was actually reversed at one point by the D.C. Circuit
10 and they sent it back to Judge Boasberg and said, you know,
11 We need some additional inquiry here. There was additional
12 presentations made in the District Court again, again,
13 between the same parties; Judge Boasberg dismissed as moot
14 again; and then the D.C. Circuit affirmed that finding,
15 agreeing with Judge Boasberg that there were no additional
16 steps that could be taken to return additional --

17 THE COURT: And what was the search for?

18 MR. PEZZI: And so that's a case -- it's a Federal
19 Records Act case. And I actually think it's important to --

20 THE COURT: But it's a different search.

21 MR. PEZZI: It's a more exhaustive search than
22 would be appropriate here, because the Federal Records Act
23 -- I mean, everything I said to you before about --

24 THE COURT: I understand. But it was for Benghazi
25 records or not?

1 MR. PEZZI: No, it was for all Clinton emails, is
2 my understanding --

3 THE COURT: All Clinton emails?

4 MR. PEZZI: Yeah. So I don't want to get that
5 precise detail wrong, but it was certainly broader than the
6 request in this case and would be including of any of the
7 Clinton emails that would be at issue in this case, and so
8 it's a Federal Records Act case where Judicial Watch argues
9 that, you know, additional steps need to be taken. The
10 Attorney General needs to initiate some enforcement action
11 to return missing federal records, and that -- I mean, that
12 is an obligation that exists independent of FOIA, of course.
13 So I mean, the CEI argument we talked about before is about
14 FOIA, you know? Whether or not -- excuse me -- personal
15 emails are agency records subject to FOIA, there's no doubt
16 that there was a Federal Records Act obligation and, you
17 know, there was exhaustive testimony presented. There's a
18 declaration from E.W. Priestap, who was the Assistant
19 Director for Counterintelligence at the FBI who supervised
20 the Clinton email investigation -- who, by the way, has also
21 been subject to discovery in this case -- saying that
22 there's no, you know -- they -- the FBI moved heaven and
23 earth to look for these Clinton emails. It was able to
24 reconstruct some portion of the server, even some portions
25 that had apparently been lost before the FBI's exhaustive

1 efforts, and when that investigation was over, it returned
2 any -- it returned those agency records to the State
3 Department --

4 THE COURT: So he must have known about the
5 Combetta thing, presumably.

6 MR. PEZZI: I assume that the FBI knew about that
7 and more, Your Honor, and -- I mean, obviously, you know,
8 the FBI investigation is a whole 'nother story that only has
9 tangential relevance to this FOIA case, but what does have
10 relevance to this FOIA case is, to the extent Judicial Watch
11 or Your Honor is concerned about the adequacy of our search,
12 it would have to be the adequacy of the search for, you
13 know, Susan Rice talking points about Benghazi, because the
14 broader --

15 THE COURT: Right.

16 MR. PEZZI: -- question of whether there are
17 additional Clinton emails out there that can be recovered
18 somehow has already been resolved against Judicial Watch.
19 And, again, I don't think it matters whether that's a
20 precedential opinion or an unprecedential opinion, given
21 that it's between the same parties.

22 THE COURT: All right.

23 MR. PEZZI: And so -- I mean, obviously, you know,
24 the Government's position remains that we think any
25 additional discovery's inappropriate, but certainly, I

1 think, the scope of the discovery would, at a minimum, need
2 to be significantly narrowed to whatever, you know -- to the
3 extent there's been new facts elicited that requires some
4 follow-up. I mean, these document requests, for example. I
5 mean, like I said, the Government has taken some steps but
6 has not been able to locate any such directive as described
7 by Mr. Hackett. If we were able to, you know, locate it,
8 that would be something that, you know, I assume Judicial
9 Watch and Your Honor might want to know about. I don't
10 think it's necessary to resolve any question in this case,
11 like I said, but that's at least something where there was
12 some deposition testimony that led to a new request. Most
13 of their request is, frankly, not that. I mean, I talked
14 about some of it already. Tasha Thian, you know, there's a
15 -- she published a book in 2018 that my friend on the other
16 side showed Your Honor. So somebody who's writing a book in
17 2018 about these issues, I'm hard pressed to see why
18 Judicial Watch should be able to come back to Your Honor and
19 say that, you know, that's some -- somehow there's a new
20 fact that needs to be explored just because, again, some
21 witnesses who have already been deposed at length said they
22 talked to her about the things she put in her book in 2018.

23 And with respect to Eric Stein, I think they
24 essentially conceded that they knew who Eric Stein was, you
25 know, and that he had served in, you know, relevant jobs in

1 State Department before their prior round of discovery and
2 Judicial Watch has already had, like I said, the
3 extraordinary opportunity to depose many of his colleagues
4 both above and below him in the chain of command. He
5 currently holds the position that Mr. Hackett used to hold,
6 but he did not hold that position at the relevant time, and
7 so -- I mean, I think his deposition is another example of
8 overreach by Judicial Watch.

9 THE COURT: In your inquiries to try to find that
10 memo, can you state whether or not that includes talking to
11 this -- what's his name -- Patrick Scholl?

12 MR. PEZZI: I wouldn't want to -- well, let me say
13 this, Your Honor. We have taken steps such as we have been
14 able to take in the short time between we saw -- when we saw
15 Judicial Watch's first proposal and today's hearing.

16 THE COURT: Right.

17 MR. PEZZI: We are taking the sort of steps that,
18 I think, are prudent to find out, you know, for our own
19 accord, if for no one else, whether such a directive was
20 ever issued. I cannot represent to you definitively today
21 whether it was or not, but that's something that we've been
22 working on. I will also tell you --

23 THE COURT: But you've never seen it?

24 MR. PEZZI: I have never seen such a directive.
25 Patrick Scholl, I think it's important to note, he was the

1 head of the office within IPS, Information Programs and
2 Services, that handled requests that were not in
3 litigation --

4 THE COURT: Right.

5 MR. PEZZI: -- and so that is not to this request
6 at all. I mean, this request went into litigation shortly
7 after Judicial Watch first made the FOIA request. I think
8 the FOIA request is May 13th, 2014. They sue in July 2014.
9 And none of the, you know, searches that are described in
10 the original Hackett declaration in this case took place in
11 that time period. So the whole story of this FOIA request
12 is when it was in litigation, and so there's no reason to
13 think Mr. Scholl played any meaningful role in any of that,
14 and so in some ways I think we're back where we --

15 THE COURT: So what -- who would have had the role
16 here, then?

17 MR. PEZZI: So this was a -- I guess, if Your
18 Honor's question is, who had the title of the head of the
19 litigation shop --

20 THE COURT: Right.

21 MR. PEZZI: -- off the top of my head, I have --
22 some of these org chart questions --

23 THE COURT: Somebody under Hackett, though?

24 MR. PEZZI: Somebody under Hackett, yes,
25 absolutely, and then -- I mean, obviously, Judicial Watch

1 has deposed Hackett and Judicial Watch has deposed many
2 people below Hackett, and so I -- the -- my -- one of our
3 overarching concerns, Your Honor, remains that, I think,
4 unfortunately, it is clear that Judicial Watch doesn't have
5 a lot of interest in pursuing the merits of this FOIA case.
6 And I think, you know, if we do 9 more depositions, you
7 know, if they get, you know -- we're talking about
8 deposition 20 through 28, depending if you count the Judge
9 Sullivan discovery. I'm sure that in those, you know -- if
10 you get 7 hours with 9 more people, there will be some
11 remarks that they will find interesting, but there's no
12 reason to think it's going to fundamentally change our
13 understanding of this subject that has already been
14 exhaustively explored by Judicial Watch and others. I mean,
15 including literally FBI criminal investigators, some of the
16 best in the world who have looked at these issues and
17 published extensive written work product about it and so,
18 you know, I think I -- our concern is that if additional
19 discovery is authorized, we'll be back here again in 9
20 months and they'll have 5 more names that they want to
21 present to Your Honor, and I just don't think that's
22 appropriate in a FOIA case.

23 THE COURT: All right.

24 MR. PEZZI: Unless Your Honor has any more
25 questions --

1 THE COURT: Thank you very much.

2 Did you want to say anything, Mr. Kendall, or --

3 MR. KENDALL: A surprisingly few words, Your
4 Honor.

5 THE COURT: That's not surprising. You're very
6 good at that.

7 MR. KENDALL: We filed this motion to intervene
8 purely as a precautionary measure. Our interest is very
9 limited. The record here is voluminous, as I need not tell
10 the Court. I read the dueling status reports last night
11 and, frankly, I'm not sure where we are. The one thing I'm
12 confident is, at the end of this hearing, you will tell us
13 where we are. But I would simply like to ask the Court that
14 if and when the subject of further discovery from former
15 Secretary Clinton becomes an issue, that we have adequate
16 time to brief that.

17 I do notice that in the plaintiff's status report
18 that they say one of the reasons they want to depose the
19 former Secretary is about the preparation of Ambassador
20 Rice's talking points back in 2012; the advance
21 dissemination or discussion of those talking points; the
22 aftermath of Rice's appearance; and the Department's
23 evolving understanding of the Benghazi attack. Now, Your
24 Honor, I sat there for 11 hours before the congressional
25 committee listening to the Secretary testify about Benghazi.

1 I think if -- again, we need -- if we're going to address
2 the issue of the propriety of additional discovery from --
3 we just need to understand this record. So I would request,
4 respectfully, that we get 30 days from today, not -- I don't
5 know what kind of schedule the Court is going to propose,
6 but if we can have 30 days, I think we'll be prepared to
7 master the record. I won't have to tell my professional
8 liability carrier --

9 THE COURT: I'll make sure you have an adequate
10 time to --

11 MR. KENDALL: Thank you, Your Honor.

12 THE COURT: -- if we're going to get to that
13 issue.

14 MR. KENDALL: I have nothing else.

15 THE COURT: Ms. Mills need to add anything, or do
16 you want to be on the same kind of schedule?

17 MR. STEKLOFF: The same schedule, Your Honor.

18 THE COURT: All right.

19 MR. STEKLOFF: Thank you.

20 THE COURT: All right.

21 Okay. Judicial Watch gets the last word.

22 MS. COTCA: Thank you, Your Honor.

23 I'd like to address a few points that were raised
24 by opposing counsel here.

25 One is, Judicial Watch's interest in the records

1 that it requested initially in this case, it is --

2 THE COURT: Let me ask first, did you know
3 anything about the Combetta issue? Maybe you already know
4 all about that.

5 MS. COTCA: No, Your -- well, no. When the report
6 came out, there was another IG report that had come out on
7 Friday. We were looking at some other things.

8 THE COURT: Oh.

9 MS. COTCA: That's -- when that --

10 THE COURT: So you don't --

11 MS. COTCA: When that had come out --

12 THE COURT: You don't know the facts about that
13 either?

14 MS. COTCA: Not in detail, no.

15 THE COURT: I always pay attention to what Senator
16 Grassley said after he said all those nice things about me.

17 MS. COTCA: Well, that's -- he has good things to
18 say.

19 But with respect to Judicial Watch's interest in
20 this case, it is not at all correct to say -- state that
21 Judicial Watch has -- does not have an interest in receiving
22 the records it requested five years ago. Initially, the --
23 I mean, as of -- last night's filing is the first time that
24 the State Department has stated on the record that it will
25 produce the records; that the State Department still has to

1 search from the records that were returned from Cheryl
2 Mills, Huma -- and Huma Abedin and Jacob Sullivan. That
3 issue had come up before when the summary judgment briefing
4 was being done in 2015. The State Department had approached
5 us that they would search those in exchange for no
6 discovery. Judicial Watch did not take that proposal, but
7 the fact that we have discovery ongoing does not stay or
8 minimize or stop the obligation that FOIA imposes on the
9 agency to conduct the search. We're five years later, and
10 we're still waiting for the State Department to complete its
11 search, and the burden is on the State Department.

12 With respect to looking at other locations for --
13 to be able to conduct an adequate search, the State
14 Department has identified -- and it's part of Judicial
15 Watch's interrogatories -- a list of, I think, 20 or so
16 individuals who communicated as to how many times they
17 communicated with Secretary Clinton. As of today, we don't
18 know -- we don't have any information that the State
19 Department has searched those custodians' emails for
20 responsive records.

21 And there's -- DOJ attorney has tried to make a
22 parallel between this case and the case before Judge
23 Sullivan. The case before Judge Sullivan was much more
24 narrow. That sought records of -- specifically related to
25 Secretary Clinton and Huma Abedin. This case seeks records

1 from the Secretary's office and so, therefore, part of the
2 discovery here is also to figure out where else within the
3 State Department does Secretary Clinton's records reside.

4 With respect to the fact that the case by Judicial
5 Watch against, well, initially, Kerry -- Secretary of State
6 Kerry; then Secretary of State Pompeo, that's a Federal
7 Records Act case. That is different. That is an inquiry --
8 or a request that a -- I'm sorry, I just lost my notes here
9 -- that was a request -- under the Federal Records Act, if
10 the agency's aware that records have been removed, the
11 agency has to initiate an inquiry to the Attorney General to
12 do an investigation as to how to -- to recover those
13 records. That is something -- and that was with respect to
14 Secretary Clinton. That is completely different. There are
15 different elements. I mean, that's a whole different case
16 as opposed to the FOIA case that we have in this case. So
17 we don't think it's binding.

18 With respect to the email that the State
19 Department had just handed to the Court, the reason we
20 included that, that's an example of why Judicial Watch is
21 asking to question Secretary Clinton directly about her
22 emails. It's not so much about when it learned but with
23 respect to -- and we -- the plaintiff -- the reason we
24 didn't request Secretary Clinton's deposition or Cheryl
25 Mills's deposition is because we wanted to avoid -- we

1 wanted to show discretion and avoid duplication of
2 discovery. That's the reason we waited. And now, the State
3 Department perhaps wants to punish us for that, but that --
4 I just wanted to point the Court that that's just an example
5 of why we need her deposition.

6 Oh, one other point that the State Department's
7 attorney had made. With respect to State Department's bad
8 faith in this case -- or conduct in this case, the record is
9 clear -- I mean, State Department received Secretary
10 Clinton's emails, 30,000 of them, on December 5th. In
11 December, State Department was attempting to settle with
12 Plaintiff Judicial Watch in this case, and that meant to
13 dismiss this case without any revelation or any discussion
14 that there's -- there are 30,000 emails. There are 12
15 Banker Boxes, if they hadn't yet counted how many emails
16 were in there, but there were 12 Banker Boxes of Secretary
17 Clinton's emails that the State Department did not disclose
18 to Judicial Watch at the time.

19 (Brief pause.)

20 I think that's all I have --

21 THE COURT: Okay.

22 MS. COTCA: -- unless the Court has any questions.

23 THE COURT: No.

24 MR. PEZZI: Briefly, Your Honor?

25 THE COURT: All right. I have to give her the

1 last word, but you can go ahead.

2 MR. PEZZI: I'm sorry, Your Honor. I'll be very
3 brief. There's a lot I could respond to there. There's
4 just only one thing that I think is very important that the
5 Government respond to, because I think it was left
6 inaccurately stated at the prior hearing, and I want to be
7 sure it's absolutely clear about this.

8 On December 5th, 12 Bankers Boxes of Secretary
9 Clinton's records were returned to the State Department, but
10 the idea that somehow settlement negotiations in this case
11 were designed to -- I mean, I guess the inference is that
12 somehow, there was an attempt to scuttle scrutiny of the
13 Clinton email issue by settling this case. We were in the
14 process of responding to Judicial Watch's request for a
15 search declaration. It -- this is at a time in which there
16 has been no factual review of the boxes yet, let alone any
17 determination that they're agency records. And once those
18 determinations had been made in January and February -- and
19 this is all in the Hackett testimony, among others -- then
20 we notified Judicial Watch and the Court that additional
21 searches needed to be conducted. I mean, there were -- as
22 Your Honor knows, there were hundreds of FOIA requests;
23 dozens of FOIA cases in litigation on these subjects. So
24 unless we were trying to settle them all, the idea that
25 there was an attempt to settle this case in bad faith, I

1 think, is fantasy, and there has been certainly no evidence
2 in the record to support that, and I am confident there will
3 never be any evidence in the record to support that, and I
4 just think it's important to make that clear for the record.

5 THE COURT: All right. I'm going to take a short
6 recess and decide the scheduling issues.

7 THE DEPUTY CLERK: All rise. This Court will now
8 stand in a brief recess.

9 (Brief recess taken.)

10 THE COURT: All right.

11 First, let me clarify the Government's
12 misunderstanding. We're not reopening discovery here.
13 Discovery never closed. Back in January, I said, quote, The
14 Government will -- the Court will hold a post-discovery
15 hearing to ascertain the adequacy of State's searches; to
16 determine if Judicial Watch needs to depose additional
17 witnesses, including Hillary Clinton or her former Chief of
18 Staff, Cheryl Mills; and to schedule dispositive motions,
19 unquote. So June 19th was a checkpoint, not a finish line.
20 And whether Judicial Watch previously knew about some of the
21 other individuals it now wants to depose is beside the
22 point. They tailored their initial discovery request to the
23 facts and questions then before the Court.

24 Now we know more, but we have even more questions
25 than answers. So I won't hold it against Judicial Watch for

1 expanding their initial discovery request now.

2 Remember what got us started down this path in the
3 first place. In late 2014 and early 2015, at least some
4 State Department officials knew Secretary Clinton's emails
5 were missing; they knew Judicial Watch didn't know that;
6 they knew the Court didn't know that, but the Department
7 pressed forward trying to settle this case. So I authorized
8 discovery into whether these settlement efforts amounted to
9 bad faith.

10 Now, the Government says, quote, There is simply
11 no factual basis to justify any further discovery on that
12 subject, unquote, but Judicial Watch's most recent
13 submission lays out the following:

14 It appears that in the middle of 2013, State's
15 Office of Information and Program Services launched an
16 inquiry into Clinton's email practices.

17 It appears that in August 2013, that office
18 directed FOIA responders to stop issuing, quote, No record
19 located, unquote, responses to FOIA requests for Clinton's
20 emails.

21 It appears that by the summer of 2014, State knew
22 a large volume of Clinton's emails had never been searched,
23 potentially violating FOIA and record management
24 obligations. It turns out State had a standing meeting
25 every Wednesday afternoon during the summer of 2014 to

1 discuss Clinton-related FOIA inquiries. Attendees included
2 Secretary Kerry's Chief of Staff; his Deputy Chief of Staff;
3 the Deputy Secretary for Management and Resources; the
4 Assistant Secretary for Legislative Affairs; several
5 attorneys; and Patrick Kennedy, the Under Secretary for
6 Management. That's every Wednesday afternoon.

7 It appears that in August 2014, State began
8 planning for media investigations into Clinton's emails.

9 It appears that in November 2014, State told
10 Judicial Watch it performed a legally adequate search and
11 tried to settle. In fact, I think, in my original opinion
12 on authorizing discovery, I noted that State had given a
13 draft Vaughn index to Judicial Watch at that time. I don't
14 think I have ever seen that, but I think it was given to --
15 I think, in my opinion, I said that it had been given to
16 Judicial Watch. Indeed, State spent the next three
17 months from November 2014 trying to make this case
18 disappear. They kept doing it even after they came into the
19 possession of Clinton's emails.

20 Judicial Watch wants to follow up with the State
21 attorney assigned to this FOIA request to participate in
22 settlement discussions and negotiations. That seems
23 reasonable to me.

24 State wants to ask the Department official
25 responsible for overseeing FOIA requests more about why he

1 directed his office to stop using "no record located"
2 responses to FOIA requests relating to Clinton's emails if
3 that, in fact, is what happened. I'm curious, too.

4 They want to ask the current Department FOIA
5 overseer more about what went on in those weekly 2014
6 meetings. I look forward to hearing what he says.

7 They want to ask the Justice Department attorney
8 who led the settlement negotiations to divulge when he
9 learned Clinton's emails were missing. He must answer.

10 Another reason we had this initial discovery was
11 to see if Secretary Clinton intentionally attempted to evade
12 FOIA by using a private email. When Judicial Watch deposed
13 the Deputy Director who oversaw State's FOIA responses, he
14 recalled an instance when in -- his office found an email
15 from Clinton's private account and the Public Affairs team
16 said, Remember, you're not supposed to use that email. How
17 can you spin that?

18 I agree with Judicial Watch that it's worth
19 deposing the State Department records officer who personally
20 reviewed archiving procedures with Secretary Clinton and her
21 departing staff to see what they discussed.

22 I also think Judicial Watch is justified to seek
23 more information about how Secretary Clinton ultimately
24 determined which emails were public records and which were
25 private.

1 The final reason I authorized discovery was to
2 determine whether State adequately searched for records
3 responsive to Judicial Watch's FOIA request. Now the
4 Government seeks to duck behind an unpublished D.C. Circuit
5 opinion from 2018 holding the Government has already taken
6 every reasonable action under the Federal Records Act to
7 retrieve Clinton's 30,000 missing emails and no imaginable
8 enforcement action could recover any more.

9 But just last week, the Senate's -- Senate Finance
10 and Homeland Security Committees released documents
11 revealing Clinton IT aide Paul Combetta copied all but four
12 of the missing emails to a Gmail account that does not
13 appear to have ever been reconstructed and searched. The
14 Court thinks Judicial Watch ought to shake this tree.

15 And the Court agrees with Judicial Watch that it
16 should talk to three never-before-deposed State officials
17 who raised concerns about Clinton's private email use all
18 the way back to 2009.

19 There is no FOIA exemption for political
20 expedience, nor is there one for bureaucratic incompetence.

21 The Government also tries to say this Court [sic]
22 is -- no longer -- or no longer presents a live controversy.
23 This is wrong. Judicial Watch can still obtain fees if they
24 prove agency bad faith.

25 I'll close with this. When I authorized discovery

1 back in December, I described my goal: to rule out egregious
2 government misconduct and vindicate the public's faith in
3 the State and Justice Departments. That's still my goal
4 today. This isn't a case I relish, but it's the case before
5 me now, and it's a case of the government's making.

6 The Court authorizes Judicial Watch to take the
7 additional discovery described in its status report, except
8 for deposing Secretary Clinton and her Chief of Staff,
9 Cheryl Mills. I will give their attorneys 30 days to file
10 any additional opposition to their depositions and 10 days
11 thereafter for Judicial Watch to file any reply, and I'll
12 issue a separate ruling on that. Otherwise, the discovery
13 should go forward and all of it should be completed by
14 December 13th. A status will be held on December 19th at
15 10:00 a.m. to set a further schedule in this case.

16 With that, the Court will be in recess.

17 MR. PEZZI: Your Honor --

18 (Brief pause.)

19 THE DEPUTY CLERK: This Court is now adjourned.
20 You may be dismissed.

21 (Proceedings concluded at 3:25 p.m.)

22 * * * * *

23 CERTIFICATE OF OFFICIAL COURT REPORTER

24 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify
25 that the above and foregoing constitutes a true and accurate

1 transcript of my stenographic notes and is a full, true and
2 complete transcript of the proceedings to the best of my
3 ability, dated this 30th day of August 2019.

4 /s/Timothy R. Miller, RPR, CRR, NJ-CCR
5 Official Court Reporter
6 United States Courthouse
7 Room 6722
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9 Washington, DC 20001
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