**No. 20-5056**

# In the United States Court of Appeals for the District of Columbia Circuit

IN RE HILLARY RODHAM CLINTON AND CHERYL MILLS,
PETITIONERS

*ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 14-1242)*

## REPLY OF PETITIONERS

BETH WILKINSON
BRIAN STEKLOFF
CALI COPE-KASTEN
ANGELA CAI
WILKINSON WALSH LLP
*2001 M Street, N.W., 10th Floor*
*Washington, DC 20036*
*(202) 847-4000*

*Counsel for Petitioner Cheryl Mills*

DAVID E. KENDALL
KATHERINE M. TURNER
STEPHEN L. WOHLGEMUTH
SURAJ KUMAR
WILLIAMS & CONNOLLY LLP
*725 Twelfth Street, N.W.*
*Washington, DC 20005*
*(202) 434-5000*

*Counsel for Petitioner Hillary Rodham Clinton*

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## INTRODUCTION

Judicial Watch does not dispute that discovery in FOIA cases is rare. Nor does it dispute that, in those rare cases, discovery must have some FOIA-related purpose—that it be a means to some end. Yet Judicial Watch never articulates what that end is here. The best it can do is to say (near the very end of its brief) that it needs to depose the former Secretary of State and her Chief of Staff so that it can seek an order from the district court "compel[ing] State to take further action with respect to [Judicial Watch's] request." Opp. 30.

What that "further action" is, Judicial Watch never says. It clearly has nothing to do with State obtaining and producing more documents about Ambassador Rice's talking points, which is the most to which FOIA entitles Judicial Watch. There are no more sources of documents to explore. Judicial Watch does not contend that Secretary Clinton, Ms. Mills, or anyone else has more responsive documents to produce. Nor does it have any answer for this Court's decision in *Pompeo*, which held that the government "has already taken every reasonable action to retrieve any remaining emails." *Judicial Watch, Inc. v. Pompeo*, 744 F. App'x 3, 4 (D.C. Cir. 2018). Judicial Watch can-

not identify what it wants the district court to do despite having *already* conducted unprecedented discovery in this FOIA case.

Judicial Watch's inability to tie its extraordinary request to depose two high-ranking former officials to any relief contemplated by FOIA shows its true purpose. As the Department of State, represented by the Department of Justice, noted before the district court: Judicial Watch is not interested in "any additional searches" for documents, or in "develop[ing] factual information to be used in supporting any claim or defense in this litigation." Dkt. 133 at 10. Instead, it wants "discovery for discovery's sake." *Id.* The law requires more before a FOIA requester can depose a former Cabinet member and her Chief of Staff.

For the reasons set forth in the Petition and this Reply, mandamus is appropriate and this Court should direct the district court to deny Judicial Watch's request to depose Secretary Clinton and to re-depose Ms. Mills.

## I. Mandamus Is Appropriate in This Extraordinary Case.

Judicial Watch asserts (at 12) that mandamus is inappropriate because "[t]he ordinary way to obtain quick appellate review of a discovery order is to disobey it" and risk contempt. That is wrong for at least three reasons.

*First*, this is no "ordinary" case. This case presents the extraordinary

circumstance of a district court ordering depositions of a former Secretary of State and her Chief of Staff under the further extraordinary circumstance of FOIA discovery, which should only be granted in "rare" cases. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006) (quotations omitted); *see also* Pet. 17–33; Dkt. 133 at 10 (Department of Justice noting that Judicial Watch has received "extraordinary" discovery into "the adequacy of the Government's search, of the sort that is virtually never provided to a FOIA plaintiff"). These circumstances are all the more extraordinary given the unusually extensive discovery already conducted and given that these depositions are not plausibly tied to obtaining any additional documents responsive to Judicial Watch's FOIA request.

*Second*, Judicial Watch is wrong about the appealability of a contempt order, at least as to Secretary Clinton, who is "a party to the suit by virtue of [her] permissive intervention."[1] *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987). Citing this Court's decision *In re Papandreou*,

[1] Ms. Mills also may be unable to appeal a contempt order, given the "substantial congruence of interests" between her and Secretary Clinton; under such circumstances "the non-party may not immediately appeal" so as to avoid "piecemeal" and "duplicative appeals." *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 926 F.3d 534, 538–39 (9th Cir. 2019).

Judicial Watch argues that petitioners can ignore the district court's order and then appeal any resulting contempt order, Opp. 12, but fails to disclose *Papandreou*'s subsequent treatment. This Court later recognized that the parties in *Papandreou* "did not bring to our attention a longstanding distinction between civil and criminal contempt orders issued against a party to a litigation." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1064 (D.C. Cir. 1998). That distinction is critical: unlike a criminal contempt order, "a civil contempt order against a party" is not an appealable final order. *Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999). Given the uncertainty as to whether a contempt order will be civil or criminal, this Court has held that risking contempt is not an adequate alternative to mandamus. *In re Sealed Case*, 151 F.3d at 1065.

*Third*, Secretary Clinton and Ms. Mills are no less entitled to the mandamus remedy than sitting officials. Two important rationales for the principle articulated in *Morgan* apply equally to former officials: (1) the need to avoid "discourag[ing] otherwise upstanding individuals from public service," *FDIC v. Galan-Alvarez*, No. 15-mc-00752, 2015 U.S. Dist. LEXIS 130545, at *12 (D.D.C. Sept. 4, 2015) (quotation omitted); and (2) the rule against probing officials' mental processes, which "hardly becomes inapplicable upon an official's departure from [] office," *In re United States*, 542 F.

App'x 944, 949 (Fed. Cir. 2013). Even if petitioners could appeal a contempt order, Judicial Watch's proposed rule would force former officials to violate a court order and risk contempt to vindicate the "well-established" principle that high-ranking officials should only be deposed in extraordinary circumstances. *In re United States*, No. 14-5146, 2014 U.S. App. LEXIS 14134, at *1 (D.C. Cir. July 24, 2014).

Judicial Watch cites no authority holding that the interests protected by *Morgan* are somehow less important than claims of privilege by a private company or foreign sovereign immunity, both of which have justified mandamus. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) ("forcing a party to go into contempt is not an 'adequate' means of relief in these circumstances"); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998) (mandamus is appropriate where a contempt order "would be problematic" and "offend[] diplomatic niceties"). Under these extraordinary circumstances, mandamus is necessary.

## II. This Case Is Moot as to Former Secretary Clinton and Ms. Mills.

In *Pompeo*, this Court held that the government "has already taken every reasonable action to retrieve any remaining emails" and that "no imaginable enforcement action" could recover additional emails. *Pompeo*, 744 F.

App'x at 4–5. Those holdings render this case moot, as FOIA cases end when an agency has produced documents located after a reasonable search. *Pompeo* makes clear that there are no more documents to be located. Pet. 19–22. Judicial Watch does not dispute that mootness is a valid threshold ground for dismissal that would obviate expansive discovery and support mandamus. Pet. 16. Instead, it attacks *Pompeo*. Its attacks fail.

*First*, Judicial Watch argues that *Pompeo* "did not address the reasonableness of State's search for records" in response to the at-issue FOIA request. Opp. 31. That is beside the point. While the *Pompeo* Court obviously did not address the specific search in this case, it did hold that the government had already obtained *all* of Secretary Clinton's recoverable emails. State has already produced to Judicial Watch any emails responsive to its FOIA request. State Br. 2; Dkt. 133 at 4–6.

*Second*, Judicial Watch argues that *Pompeo* is distinguishable because it does not address "what relief is available" to a FOIA requester when an agency allegedly acts in bad faith to thwart FOIA. Opp. 31, 33. While *Pompeo* did not address that issue, other cases do. Even if an agency withholds documents in bad faith, or routes them outside the government to "evade" FOIA,

the only possible remedy is for the agency to locate and produce any responsive documents. Pet. 22. As the Department of Justice's brief recognizes, State has "already" done that. State Br. 2.[2]

*Third*, Judicial Watch argues that *Pompeo* is "wrong" because State has produced a small number of additional emails in a separate case before Judge Boasberg. Opp. 32. But none of those emails is responsive to the FOIA request here.[3] Dkt. 156 at 23. Moreover, Judicial Watch ignores the legal standard under FOIA. "[I]t is long settled that the failure of an agency to turn up

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[2] The Department of Justice made the same argument before the district court (with different lawyers and more oomph):

> Even if this Court found that Secretary Clinton used private email with the specific intent of evading FOIA obligations, Plaintiff has already received the only relief such a finding would (arguably) make available: State's recovery, search, and processing of any records held by the former Secretary, including records that were not in the possession, custody, or control of State at the time the FOIA request was filed or the original searches were conducted. Thus, resolution of the factual and legal dispute underlying this topic would have no effect on the rights of the parties, and it is therefore an inappropriate avenue for additional discovery.

Dkt. 133 at 5.

[3] One of the emails references Benghazi but does not concern the talking points that are the subject of Judicial Watch's FOIA request here.

one specific document in its search does not alone render a search inadequate." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *see also Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399, 408 (D.C. Cir. 2017); Pet. 17–18. This Court has repeatedly held that the existence of other potentially responsive documents does not undermine a search's adequacy.[4] That is all the more true where the "new" documents are not even responsive.

Moreover, as State explained to the district court, the production in the Judge Boasberg case does not "cast[] any doubt on the bigger picture of the FBI's investigation," Dkt. 156 at 25, which, as this Court recognized, included "every reasonable action to retrieve any remaining emails."[5] 744 F. App'x at 4. Judicial Watch has obtained emails that State received from FBI, in response to a separate request for all emails sent or received by Secretary Clinton. Dkt. 61 at 2, 15-cv-687. And it cannot credibly contend that Secretary

[4] *See, e.g., Iturralde*, 315 F.3d at 315; *Reporters Comm.*, 877 F.3d at 408.

[5] While Judicial Watch suggests that third parties may still possess emails exchanged with Secretary Clinton, this Court has already rejected that argument as "both fanciful and unpersuasive." *Pompeo*, 744 F. App'x at 4. In any event, no authority suggests that FOIA requires an agency to acquire documents from third parties who corresponded with agency officials.

Clinton has any more emails responsive to its FOIA request. *See* Pet. 20 & n.2.

To the extent Judicial Watch has any objections about the documents produced in the Judge Boasberg case, it can raise those objections before Judge Boasberg. If it believes the FBI has additional records not provided to State—and there is no indication that it does—it should file a FOIA request with the FBI. The bottom line, however, is that this case is moot.

## III. Judicial Watch Has Not Demonstrated the Extraordinary Circumstances Necessary To Depose Petitioners.

Petitioners have a clear and indisputable right to mandamus on the additional ground that the district court erred by ordering the deposition of high-ranking government officials in a FOIA case about matters that are the subject of a large, existing record. Pet. 23–33.[6] In response, Judicial Watch argues that the district court's ruling was proper because the normal rules about high-ranking officials do not apply to petitioners and because petitioners supposedly possess discoverable information. Opp. 15–24.

[6] This Court "assess[es] whether to grant the [] requested relief using the specific standard for mandamus relief alone." *In re Al Hawsawi*, — F.3d —, No. 19-1100 (Apr. 10, 2020), slip op. 6–7.

### A. *Morgan* Applies to Former Officials and Bars the Depositions.

Contrary to Judicial Watch's argument, *Morgan*'s rule against deposing high-ranking officials applies to former officials. *E.g., Raymond v. City of New York*, No. 15-cv-6885, 2020 WL 1067482, at *4 (S.D.N.Y. Mar. 5, 2020) (former police commissioners); *Croddy v. FBI*, No. 00-cv-0651, 2005 WL 8168910, at *1 (D.D.C. Mar. 30, 2005) (former FBI director); Pet. 24–25 (additional authorities). At least one circuit has so held, barring the deposition of the former deputy mayor of New York City. *Lederman v. New York City Dep't of Parks & Recreation*, 731 F.3d 199, 203–04 (2d Cir. 2013). The Department of Justice agrees. As recently as 2018, it argued that "the '*Morgan* Doctrine' and its progeny" applied to "a former high-ranking government official." *Rodriguez Alvarado v. United States*, No. 16-cv-05028, Dkt. 70-3 (D.N.J. Aug. 1, 2018).

Judicial Watch contends (at 16–17) that *Morgan* does not apply because Secretary Clinton was not enforcing a regulation or "discharging" a "uniquely delegated" duty. But Judicial Watch fails to cite a case holding that *Morgan* is limited to those contexts. In any event, Judicial Watch seeks to question Secretary Clinton about her email practices—and, specifically, emails related to the Benghazi attacks—while performing official duties as Secretary of State. Pet. App. C at 10. This Court has already held that Secretary Clinton's

email "communications"—concerning matters of foreign policy and national security—"fall within the heartland of her duties as Secretary of State."[7] *Smith v. Clinton*, 886 F.3d 122, 127 (D.C. Cir. 2018). Judicial Watch offers no plausible distinction between Secretary Clinton's email practices in performing official duties and the Agriculture Secretary's "personnel decision," *In re United States*, 2014 U.S. App. LEXIS 14134, at *2, or the Commerce Secretary's addition of a citizenship question to the census, *In re Dep't of Commerce*, 139 S. Ct. 16 (2018). In fact, *Morgan*'s presumption against depositions should carry even more weight here than in typical administrative agency cases, where a showing of bad faith can justify vacatur of the agency decision. Under FOIA, by contrast, the remedy for bad faith is remand for additional review

[7] The Department of Justice now claims that deposing Secretary Clinton regarding her email practices would not "prob[e] internal government decisionmaking regarding official policy." State Br. 3. That assertion cannot be squared with State's Westfall certification in *Smith v. Clinton*, in which it represented that Secretary Clinton's email communications were within "the scope of her office as Secretary of State." *Smith*, 886 F.3d at 127; *see also* Dkt. 14 at 3–4, 07-cv-712 (D.D.C. Mar. 6, 2008) (urging court to "look to the nature of the communication and not to the email account used" in rejecting the "factually unsupported premise that no email sent from an RNC email account could have contained 'official advice'"). Any email communications related to Ambassador Rice's talking points surely relate to "internal government decisionmaking regarding official policy."

and production of documents—which would be futile here. Pet. 19–22.

Nor does Judicial Watch explain why the information it seeks is unavailable through less burdensome means. Pet. 26–28. It asserts that Secretary Clinton and Ms. Mills "uniquely possess information needed by the District Court to resolve issues raised in this litigation." Opp. 18. Even if that were true, *cf.* Pet. 22, Judicial Watch fails to show that such information is not already present in the large, existing record, which includes interrogatory responses from Secretary Clinton, other testimony, and the FBI's summaries of its interviews of Secretary Clinton and Ms. Mills. Pet. 26–28. And while Judicial Watch and the district court believe that record only "scratches the surface" of "Clinton's motives and state of mind in using a personal email server to conduct official business, her understanding of State's record management obligations, and her thought process when leaving State with at least 30,000 public records," the reality is she already addressed *all* of these subjects in verified answers to Judicial Watch's interrogatories in the Judge Sullivan case. Pet. 27; Dkt. 143-1.[8] The district court erred by ordering depositions given

[8] Between this case and the case before Judge Sullivan, Judicial Watch has taken 19 depositions. Dkt. 133 at 1. Notably, after the extensive discovery in the Judge Sullivan case, Judicial Watch settled and the case was dismissed. Dkt. 187, 13-cv-1363.

that record.

In the end, much of Judicial Watch's argument depends on the deposition of Tasha Thian, a former State Department records officer. It cites her testimony at least ten times. But Ms. Thian admitted during her deposition that she left the Department in June 2014 (Dkt. 147-1 at 13), a month after the at-issue FOIA request, and that she has no firsthand information about the search conducted pursuant to that request.[9] Moreover, Ms. Thian admitted that *she never met nor spoke to Secretary Clinton about her emails or anything else*. She was unaware of Secretary Clinton's use of her personal email and never saw any of her emails (*id.* at 38.) While she briefed certain State employees about recordkeeping, she could not recall which staffers attended those briefings (*id.* at 42–46, 70–72).

Ms. Thian's speculative opinions are not based on firsthand knowledge but instead on documents produced in response to Ms. Thian's own FOIA request "to know what the Secretary was briefed on before she came to the department" (*id.* at 61–62), as well as "you know, the OIG investigations and the

[9] When asked about Ms. Mills' testimony that she had never received FOIA training while at the State Department, Ms. Thian replied: "I wasn't in charge of the FOIA program. I'm not aware." Dkt. 147-1 at 83.

FBI investigations" (*id.* at 129). Her speculation about Secretary Clinton's email practices thus comes not from her personal knowledge but primarily from the news media, her FOIA request response, and deposition transcripts in this case (*id.* at 185).

### B. Another Deposition of Ms. Mills Is Unwarranted.

In attempting to justify re-deposing Ms. Mills, Judicial Watch mischaracterizes or ignores the discovery it already took from Ms. Mills in the Judge Sullivan case. Contrary to its assertions here (at 21), Judicial Watch had the opportunity to and did ask Ms. Mills about documents related to the Benghazi attack in the prior, five-hour deposition.[10] Dkt. 142-1 at 202:4–212:5.

Judicial Watch takes the unjustifiable position, blessed by the district court, that there are no limits to re-deposing a witness anytime a modicum of new information surfaces or when a party wishes it had asked different questions. For example, Judicial Watch points to statements Bryan Pagliano made

[10] Judicial Watch states that "a search warrant affidavit for Mills's personal Gmail account was drafted but never filed," but fails to mention that Ms. Mills provided emails from her personal account to State that constituted federal records. Dkt. 19-2, at 8; *see also* Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements, Dep't of State OIG, May 2016, at 24, https://www.oversight.gov/sites/default/files/oig-reports/esp-16-03.pdf.

to the FBI. But Ms. Mills already testified about whether she spoke to Mr. Pagliano about Secretary Clinton's email server. Dkt. 142-1 at 95:5–15. Moreover, Ms. Mills later provided interrogatory responses with even more detail about her conversations with Mr. Pagliano. Dkt. 132 at 3–4, No. 13-cv-01363. Judicial Watch has obtained the exact discovery it seeks. It is just dissatisfied with the results.

Nor are the alleged "new facts" cited by Judicial Watch an adequate basis for a second deposition. Judicial Watch acknowledges that the district court erred in stating that "[w]hen Ms. Mills was deposed, Judicial Watch was not aware of the 30,000 deleted Clinton emails or a Congressional subpoena had already been served on Secretary Clinton for her Benghazi records." Pet. App. C. at 5. That was the only basis the district court cited for permitting the deposition, and it was clearly erroneous.

Left with nothing else, Judicial Watch invokes assertions upon which the district court did not rely. Judicial Watch apparently plans to ask Ms. Mills about the technical treatment of the Clinton email server after federal records from it were culled. But this has nothing to do with the permitted discovery topics. Similarly, Judicial Watch's plan to depose Ms. Mills about John Hackett's alleged concerns about the identification of Secretary Clinton's federal

records after she left office is outside the permitted discovery topics. Finally, Judicial Watch already deposed Ms. Mills about the process for identifying federal records provided by Secretary Clinton to State. Dkt. 142-1 at 246:11–248:16.[11] Judicial Watch's opposition only demonstrates that it is on a fishing expedition for facts unrelated to the FOIA search here. Mandamus is necessary.

## IV. The District Court Lacked Jurisdiction.

Judicial Watch fails to distinguish this case from *Kissinger*. Pet. 33–35. The footnote on which Judicial Watch relies refers to "an agency official purposefully rout[ing] a document out of agency possession *in order to circumvent a FOIA request.*" 445 U.S. 136, 155 n.9 (1980) (emphasis added). That

[11] Judicial Watch also alleges that Paul Combetta "remove[d] any traces of the emails from the server … after speaking with Mills and despite a congressional subpoena." Opp. 24. The very report it cites makes clear what really happened: months *before* the subpoena, Ms. Mills asked Mr. Combetta to change the server settings to retain emails only within 60 days. As Mr. Combetta acknowledged to the FBI, he inadvertently failed to do so and, after learning of the subpoena, removed the emails without consulting Ms. Mills. *See* A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election, Dep't of Justice OIG, June 2018, at 38–39, https://www.justice.gov/file/1071991/download. Judicial Watch's suggestion that Mr. Combetta's statements open a new area of discovery is frivolous.

did not happen here because Judicial Watch's FOIA request was submitted well after Secretary Clinton left office.[12] Nor is there any evidence that Secretary Clinton "purposefully routed the entire body of emails" to "circumvent all FOIA requests"—she has already explained countless times why she used private email. Pet. 26–28. The asserted basis for jurisdiction misreads *Kissinger*, rests on pure speculation, and finds no support in the extensive discovery already taken or the voluminous public record. *See FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1094 (D.C. Cir. 2008) ("jurisdictional discovery cannot be based on mere conjecture or speculation").

Judicial Watch also misunderstands *Pompeo* and *Kerry*'s relevance to the jurisdictional question. Those cases show that Judicial Watch had another remedy to locate any missing emails under the Federal Records Act, which it pursued. Pet. 36. Judicial Watch acknowledges (at 30) that the endgame is for the district court to decide whether "it has jurisdiction to compel State to take further action with respect to Respondent's request." But it never says what that "further action" could be. This Court held in *Pompeo* that "there

[12] Judicial Watch's reliance on *Competitive Enterprise Institute* is misplaced for the same reason. Secretary Clinton was not the "agency head" at the time of the FOIA request. 827 F.3d 145, 149 (D.C. Cir. 2016).

are no remaining emails for State to recover." 744 F. App'x at 4. That only highlights the district court's erroneous reliance on a speculative chain of inferences to justify jurisdictional discovery, keeping this FOIA case alive for years—in pursuit of discovery for discovery's sake—when there are no more documents to recover.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

/s/ David E. Kendall

BETH WILKINSON
BRIAN STEKLOFF
CALI COPE-KASTEN
ANGELA CAI
WILKINSON WALSH LLP
*2001 M Street, N.W., 10th Floor*
*Washington, DC 20036*
*(202) 847-4000*

DAVID E. KENDALL
KATHERINE M. TURNER
STEPHEN L. WOHLGEMUTH
SURAJ KUMAR
WILLIAMS & CONNOLLY LLP
*725 Twelfth Street, N.W.*
*Washington, DC 20005*
*(202) 434-5000*

APRIL 10, 2020

**CERTIFICATE OF COMPLIANCE**
**WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, David E. Kendall, counsel for petitioner and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 21(d), that the attached Reply is proportionately spaced, has a typeface of 14 points or more, and contains 3,884 words.

/s/ David E. Kendall
DAVID E. KENDALL

APRIL 10, 2020

**CERTIFICATE OF SERVICE**

I, David E. Kendall, counsel for petitioner and a member of the Bar of this Court, certify, that, on April 10, 2020, a copy of the attached Reply was electronically filed with the Clerk of the Court using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ David E. Kendall
DAVID E. KENDALL

APRIL 10, 2020