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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|---|---|--------------------|
| In re Grand Jury subpoenas: |) | Grand Jury Matter |
|  |) | No. 22-25 |
| |) | |
| |) | |
| United States of America |) | September 22, 2022 |
| interested party: |) | 1:02 p.m. |
| Donald J. Trump |) | Washington, D.C. |
| |) | |

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**TRANSCRIPT OF HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE**

APPEARANCES:

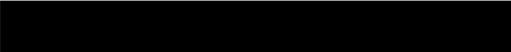
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Proceedings reported by machine shorthand.
Transcript produced by computer-aided transcription.

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P R O C E E D I N G S

THE COURT: Matter before the Court, Grand Jury matter 22-25, in reference to GJ Subpoena Nos. [REDACTED] and GJ [REDACTED].

Interested parties are United States of America and Donald J. Trump.

Counsel, please come forward and state your names for the record.

MR. WINDOM: Good afternoon, Your Honor. Thomas Windom, John Pellettieri, and Amanda Vaughn for the United States.

THE COURT: All right. Good afternoon, Mr. Windom.

MR. PARLATORE: Good afternoon, Your Honor. Timothy Parlatore, along with John Rowley and Evan --

THE COURT: Timothy --

MR. PARLATORE: Parlatore.

THE COURT: Parlatore?

MR. PARLATORE: Yes.

THE COURT: All right. That's a new name. And also?

MR. PARLATORE: John Rowley and Evan Corcoran.

THE COURT: Mr. Corcoran, who I have seen before. Are you going to be arguing today, Mr. Parlatore?

MR. PARLATORE: Yes, Your Honor. I will.

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1 THE COURT: Okay. Good. All right.

2 So -- and everybody else sitting in the audience
3 is okay for a sealed hearing?

4 I know Ms. Dohrmann.

5 But everybody else is fine?

6 MR. WINDOM: On the government's side, Your Honor,
7 it's Mary Dohrmann, John Crabb, and J.P. Cooney for the
8 United States.

9 THE COURT: I'm sorry. Through my plexiglas,
10 Mr. Crabb -- I'm sorry. The plexiglas gets a little cloudy
11 when I am looking that far back.

12 All right. Well, this is the government's motion
13 to compel, so I will hear first from the government.

14 Could you just remind me what your name is?

15 MR. PELLETTIERI: Thank you, Your Honor.
16 John Pellettieri for the United States.

17 THE COURT: Pellettieri, okay.

18 MR. PELLETTIERI: The grand jury is entitled
19 to the testimony of --

20 THE COURT: Okay. I have read all of the papers.
21 Let me just ask you questions --

22 MR. PELLETTIERI: Absolutely.

23 THE COURT: You don't have to put on a show for
24 everybody here.

25 MR. PELLETTIERI: Glad to.

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1 THE COURT: So I just want to begin with the types
2 of communications that fall under this shield of executive
3 privilege which -- in the D.C. Circuit case law, and I think
4 more broadly -- is considered to include deliberative
5 process privilege, the presidential communications
6 privilege.

7 And I fully appreciate that the government has
8 just said assume these are privileged, you know, to move
9 forward; don't bother your little head about what is and
10 isn't, just assume it's all privileged.

11 But I think it will be very helpful to understand
12 where the parties agree about what executive privilege
13 actually covers and what's at issue here.

14 So although executive privilege generally covers
15 both deliberative process privilege, which we usually see in
16 the FOIA context in this court on an almost daily basis, the
17 privilege -- the executive privilege species, basically to
18 quote a D.C. Circuit case which calls it subspecies, species
19 of executive privilege -- is the presidential communications
20 privilege -- that's the only privilege that's at issue here.

21 So even though we talk broadly about "executive
22 privilege," we're really just talking about the presidential
23 communications privilege; is that right?

24 MR. PELLETTIERI: That's correct, Your Honor.

25 THE COURT: All right. And if you all --

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1 Mr. Parlatore, just listen to this because I want to get on
2 the record what we're agreeing on here before we talk about
3 what is in dispute. I just want to make sure we're not
4 talking past each other -- particularly me -- I am not
5 talking past anybody.

6 The parties' briefing doesn't go into detail at
7 all about what is covered by the presidential communications
8 privilege -- again, because I am just going to assume that
9 the testimony that the government is seeking to compel from
10  is privileged. But I want to make
11 sure we're all defining "presidential communications
12 privilege" the same way.

13 So just to cut through this, by my reading of the
14 law, the privilege is intended to preserve the president's
15 ability to obtain candid and informed opinions from his
16 advisors and to make decisions confidentially so that the
17 presidential communications privilege protects only
18 communications that satisfy the following two prongs:
19 Communications directly involving and documents actually
20 viewed by the President, as well as documents solicited and
21 received by the President or his immediate White House
22 advisors, and those advisors have to have broad and
23 significant responsibility for investigating and formulating
24 the advice to be given to the president. So that's prong
25 one.

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1 Prong two is the communications have to reflect
2 presidential decisionmaking and deliberations; and I
3 understand that to mean: Communications in performance of a
4 president's responsibilities of his office or made in the
5 process of shaping policies and making decisions.

6 Are there any additional prerequisites, or that
7 pretty much what the government views the presidential
8 communications privilege to encompass?

9 MR. PELLETTIERI: Yes, Your Honor. I think that
10 accurately reflects the governing precedent.

11 THE COURT: Okay. So, now, as I read the case law
12 on this, the courts have further looked at the types of
13 information subject to the presidential communications
14 privilege and identified certain types of information as the
15 core types of information covered by the presidential
16 communications privilege; and as "core" it means they're
17 entitled to the very most deference in shielding them from
18 disclosure. And those core types of information are those
19 that protect military, diplomatic, or sensitive national
20 security interests.

21 Do you agree, though, that the privilege covers
22 more than just those core types of confidential information?

23 MR. PELLETTIERI: Yes. And I think that's the
24 teaching of Nixon where the Court said there could be a
25 generalized claim of executive privilege or presidential

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1 communications privilege; and then, when there is that type
2 of generalized assertion, the two-part standard that the
3 Court set forth there and that the D.C. Circuit elucidated
4 more *In re Sealed Case*, the *Espy* case would apply.

5 THE COURT: Okay. So now I'm going to get to the
6 list of [REDACTED] topics that are in the cover letter to the grand
7 jury subpoenas to [REDACTED] and to [REDACTED].

8 As I look through those [REDACTED] topics, none of them
9 appear to relate to military, diplomatic, or sensitive
10 national security interest, so they're not -- none of the
11 information that the government is seeking to question these
12 witnesses about deal with these core types of communications
13 entitled to the most deference for the cloaking of the
14 privilege, is that -- do you agree?

15 MR. PELLETTIERI: That's correct, Your Honor.

16 THE COURT: Okay. So these are topics, in these
17 subpoenas that -- these [REDACTED] topics relate to more general
18 federal -- or do you think that they relate to more general
19 confidential federal government policy matters, or do they
20 do that even?

21 MR. PELLETTIERI: I think the way we have phrased
22 it is that it's likely that many -- if not all -- of the
23 communications at issue would not be presidential
24 communications.

25 THE COURT: I have read the cover letter, I have

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1 seen that. So I want to know -- I look at these [REDACTED] topics
2 and they don't -- they don't -- they're certainly not core.

3 MR. PELLETTIERI: Yes.

4 THE COURT: But the government itself has said
5 that they may potentially implicate executive privilege. So
6 what of these [REDACTED] topics -- and why do you think they
7 implicate the presidential communications privilege?

8 MR. PELLETTIERI: Your Honor, we think they likely
9 don't. But what we don't want -- what we're trying to do --
10 the approach we propose here would be to short-circuit
11 collateral litigation on issues like this to assume the most
12 demanding standard possible, which is under the assumption
13 that the former President has made a valid assertion of
14 executive privilege over presidential communications and
15 that that assertion stands on the same footing as that of a
16 sitting President. And under that assumption --

17 THE COURT: And I appreciate that.

18 But if the communications at issue here, in these
19 [REDACTED] topics, involve topics on matters other than the core
20 confidential types of communications that are entitled to
21 the most deference in being shielded by the privilege,
22 shouldn't that be some factor or consideration in evaluating
23 the need for the grand jury's -- evaluating the grand jury's
24 need for the information in the face of the assertion of the
25 privilege?

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1 MR. PELLETTIERI: Well, I think, Your Honor --
2 maybe there are three categories. There is what you call
3 the "core" type of communications, national security. There
4 is the more generalized communications that still qualifies
5 presidential communications, which Nixon talked about; and
6 then there are communications that fall outside the
7 presidential responsibility that are not entitled to any
8 kind of executive privilege.

9 This case does not -- I think it's undisputed that
10 this case does not at all implicate national security or any
11 of those types of communications --

12 THE COURT: Any of the core, most critical types
13 of information entitled to the most deference for --

14 MR. PELLETTIERI: Correct.

15 THE COURT: -- under the presidential
16 communications privilege?

17 MR. PELLETTIERI: I think that the only dispute
18 between the parties would be -- or the interested parties
19 would be that whether the communications here are within
20 that more generalized category or totally outside --

21 THE COURT: But I want to understand what the
22 lines are -- a little bit more what the party's thinking is
23 about those lines -- because, clearly, things having to do
24 with decisionmaking by the President about, you know,
25 federal policy issues would fall on the side of the

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1 privilege line.

2 MR. PELLETTIERI: Correct.

3 THE COURT: The Circuit has been pretty clear that
4 political issues -- political decisions by a President fall
5 on the other side of the line; they are not covered by the
6 presidential communications privilege.

7 Do you read *In re Sealed Case* the same way?

8 MR. PELLETTIERI: That's our understanding as
9 well, Your Honor.

10 THE COURT: Okay. Clearly what the President
11 orders for lunch -- what kind of sandwich he orders -- not
12 covered by the presidential communications privilege, right?

13 MR. PELLETTIERI: Correct, Your Honor.

14 THE COURT: So I am looking at the [REDACTED] topics and
15 wondering -- none of them are core, I think, in the
16 government's view. And certainly [REDACTED]

17 [REDACTED]
18 [REDACTED] would that fall on the line of politics or would that
19 be somewhat maybe -- maybe that would be something national
20 security related? What's your view on that?

21 MR. PELLETTIERI: Well, not national security
22 related, Your Honor. In the abstract, depending on what the
23 communications could be, it could fall under one line or the
24 order.

25 But I think what we would like to stress is that

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1 the interest here is in the grand jury being able to
2 expeditiously conduct its investigation here, to get the
3 information it's entitled to, to follow the leads where they
4 lead, and to -- and to do what its responsibility is, to
5 decide whether a crime has or has not occurred.

6 And so our overarching interest is getting the
7 information that the grand jury is entitled to as quickly as
8 possible. And in our view, the best way of doing that is to
9 assume -- just for purposes of this motion -- that all of
10 these communications are governed by the executive
11 privilege, the presidential communications privilege. For
12 the reasons we've set forth in our *ex parte* submission, we
13 believe that we have met the two-part showing in the *Espy*
14 case and that we'll get the information to the grand jury so
15 that it can conduct its investigation, rather than going
16 down other areas of inquiry that could just lead to, in our
17 view, unnecessary litigation and delay the grand jury
18 conducting its constitutionally prescribed responsibilities.

19 THE COURT: Well, the government -- I know you are
20 just saying just assume it's all subject to the presidential
21 communications privilege. But, at the same time, the
22 government is somewhat critical that the former President's
23 assertion of privilege lacks sufficient specificity, and
24 so -- in saying that it's, at best, vague and boundless;
25 fails to meet its burden of articulating some compelling

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1 explanation for nondisclosure to overcome the countervailing
2 considerations -- at the same time the government is just
3 asking me to presume that they're all privileged.

4 MR. PELLETTIERI: Well, Your Honor --

5 THE COURT: So what am I supposed to make of those
6 arguments?

7 Am I supposed to -- I am going to follow the
8 government's, you know, suggestion, I just presume -- I
9 think it's -- I am required to. You know, in the *Nixon* case
10 you have to presume the former President's entitled to a
11 presumption that there is -- the communications are -- in
12 which he was involved are presumptively privileged.

13 But in looking at the government's arguments about
14 lack of specificity and the assertion of the privilege --
15 which I agree with you wasn't particularly specific, but I
16 am not sure that the President has to be any more specific
17 because he's entitled to a presumption of privilege.

18 Is the government's point that at some point the
19 burden shifts to the President to be more specific? And, if
20 so, at what point?

21 MR. PELLETTIERI: Our point is that the privilege
22 is not possessed by the witness, and making a vague kind of
23 categorical assertion of privilege and then delegating what
24 may or may not fall on either side to the witness is
25 inconsistent with that principle of law. We -- you know,

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1 but we felt it was important to set forth what we view as
2 sort of --

3 THE COURT: I know you had that fancy little
4 chart -- some of them said this, some of them said that --
5 so you may not be applying the privilege the same way
6 because it's so vague in its assertion; I get all of that.

7 But I am trying to figure out what am I supposed
8 to make of that when I am presuming everything is privileged
9 anyway?

10 MR. PELLETTIERI: You don't have to make anything
11 of it if that is troubling you, Your Honor.

12 We would ask you -- and invite you -- to rule on
13 the assumption that the former President has adequately
14 asserted executive privilege here; and that's consistent
15 with what the Supreme Court said in *Thompson* -- the *Thompson*
16 case where it denied cert. And in its denial it said the
17 D.C. Circuit didn't have to get into this other stuff
18 because the former President's claim failed under even the
19 most demanding standard, and that's the path we're asking
20 you to follow here. We think it's the cleanest. We think
21 it's based on established precedent; it's clear precedent.
22 It is binding authoritative precedent --

23 THE COURT: Without getting into the debate that
24 the Circuit sort of went into; and that's what the Supreme
25 Court said was in dicta, which is -- the current President

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1 calls the privilege -- whether it applies or not -- it's not
2 a former President privilege, it's a current President
3 privilege. I think that's what they said was dicta and, I
4 think, possibly with good reason, but...

5 So let me -- let's just look at what the test is.
6 The test that the government has said that I need to
7 overcome the privilege here, given the fact that it's
8 testimony in connection with a grand jury subpoena -- this
9 particular context -- is to look to see whether the
10 government has specifically demonstrated: One, why it is
11 likely that evidence contained in presidential
12 communications is important to the ongoing grand jury
13 investigation; and, two, why this evidence is not available
14 from another source.

15 Do you think that a review of any public interests
16 at stake in this matter would also be something I needed to
17 look at?

18 MR. PELLETTIERI: Your Honor, I am not aware of
19 that as being a component of the standard; its importance,
20 which is judged against the grand jury's -- topic of the
21 grand jury's investigation; and it's unavailable without
22 diligence elsewhere. And --

23 THE COURT: Well, it's sort of -- the section of
24 *In re Sealed Case*, page 746, where the court says: While
25 both the deliberative process privilege and the presidential

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1 privilege are qualified privileges, the *Nixon* cases suggest
2 that the presidential communications privilege is more
3 difficult to surmount -- okay -- so far so good.

4 And then it goes on to say: In regard to both,
5 both courts must balance the public interests at stake in
6 determining whether the privilege should yield in a
7 particular case, and must specifically consider the need of
8 the party seeking privileged evidence.

9 So do you think that public interest in the grand
10 jury context is already subsumed by the test that *In re*
11 *Sealed Case* ultimately laid out?

12 MR. PELLETTIERI: Yes. We think it's baked into
13 that. I think that the court elsewhere says that there
14 doesn't have to be a balancing anew every time a court
15 applies the importance and unavailability standard; that
16 two-prong standard bakes in the weighing of the public
17 interest.

18 THE COURT: Okay. I wanted to clarify that.

19 And as to -- then with respect to the
20 attorney-client privilege that the former President has
21 asserted with respect to [REDACTED],
22 it's the government's view that *In re Lindsey* -- which
23 rejected attorney-client privilege assertion or any common
24 interest exception for the privilege for White House counsel
25 called to testify before a grand jury -- is just dispositive

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1 here?

2 MR. PELLETTIERI: Absolutely. The argument is a
3 nonstarter under directly binding precedent in *In re*
4 *Lindsey*.

5 THE COURT: Okay. And then the former President
6 has suggested some procedures that I should follow here; and
7 the government urges that I reject the additional procedures
8 that have been suggested.

9 And one of those procedures that the former
10 President has suggested is that I consolidate this motion
11 with anticipated but not yet filed litigation involving
12 other witnesses. And the President -- former President
13 makes the argument that that will facilitate judicial
14 economy by hearing and resolving all of the various
15 arguments presented by witnesses at the same time.

16 What's wrong with that analysis?

17 MR. PELLETTIERI: Well, number one, it would not
18 facilitate judicial economy. I think we would be in kind of
19 an infinite loop here where you get another witness. And
20 the question is: Do you add that to the briefing schedule,
21 another witness, because the grand jury's investigation is
22 ongoing. And in our view, ruling on this motion -- the
23 first that raises the executive privilege in the grand
24 jury -- will clear a lot of the brush away for anything that
25 can come later because a lot of what the former President is

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1 saying here is just a purely legal matter. And so if the
2 Court were to rule on these legal matters, it would knock
3 them out in any kind of future proceeding involving another
4 witness.

5 It's also inconsistent with the grand jury's
6 important interest in expeditiously conducting its
7 investigation and getting the evidence that it's entitled to
8 get, so judicial economy is not served. And it's
9 inconsistent and a real substantial tension with the
10 important role and function and proceedings of the grand
11 jury.

12 THE COURT: And is there any concern that the
13 grand jury's need for each witness's testimony, and other
14 issues involving that witness's particular role within --
15 vis-à-vis the former President, would also raise unique
16 issues as to each witness so that that would militate
17 against consolidation because of the unique issues that each
18 witness may raise?

19 MR. PELLETTIERI: The application of the
20 established two-part standard could differ with some
21 witnesses, yes, Your Honor.

22 THE COURT: Okay.

23 All right. Is there anything else that you want
24 to talk to me about or add, since I interrupted your
25 original presentation?

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1 MR. PELLETTIERI: No, Your Honor. We are here --
2 I am happy to answer any questions that you have, unless you
3 don't have any additional questions. We're happy to rest on
4 our papers.

5 Hopefully, perhaps, I will have the opportunity to
6 reply to any comments.

7 THE COURT: Of course. This is a little bit more
8 relaxed. I am going to let people comment on each other.

9 Okay. Mr. Parlatore.

10 And I take it that all three attorneys here are
11 representing the former President; is that correct?

12 MR. PARLATORE: Yes, Your Honor.

13 THE COURT: Okay. I just wanted to make sure that
14 there were no representatives of the two witnesses at issue.

15 So if I can get to my questions... If you have
16 other things you want to add afterwards, we'll get to those
17 if you don't mind; but just to save all of our time because
18 I know you are all pretty busy too --

19 MR. PARLATORE: I was going to skip my speech and
20 go straight to your questions. I appreciate it.

21 THE COURT: Thank you. Thank you.

22 There is a time for speechifying; this isn't
23 really one of them.

24 Just to make sure -- I want to be absolutely clear
25 on the record what things we're -- both sides are agreeing

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1 on.

2 The former President's opposition is -- which also
3 discusses executive privilege broadly, it even mentions
4 deliberative process privilege -- but the President agrees
5 that what is at issue here is the presidential
6 communications privilege; is that right?

7 MR. PARLATORE: That's correct, Your Honor.

8 THE COURT: All right. And the -- and do you
9 agree with the definition, which I will repeat, of the
10 presidential communications privilege and what it covers?

11 Do you want me to repeat or you heard it?

12 MR. PARLATORE: I heard it, Your Honor; and I
13 think you stated it correctly.

14 THE COURT: Okay. And of the [REDACTED] topics in the
15 cover letters to [REDACTED] and [REDACTED] --

16 MR. PARLATORE: Yes.

17 THE COURT: -- where the government essentially
18 concedes in its opening paragraph that some of them may
19 potentially implicate it uses executive privilege, but I
20 think they mean presidential communications privilege.

21 Do you believe that each of these [REDACTED] topics --
22 would you agree -- don't implicate the core military,
23 diplomatic, or sensitive national security secrets that the
24 Supreme Court has said are entitled to the most deference?

25 MR. PARLATORE: Not exactly, Your Honor.

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1 THE COURT: Okay. Could you explain that?

2 MR. PARLATORE: Sure.

3 THE COURT: And which ones of these [REDACTED] topics do
4 you think might implicate some of these core privileged
5 communications?

6 MR. PARLATORE: Sure.

7 All of these [REDACTED] topics are subsets of a larger
8 topic, and that topic is [REDACTED].

9 So all of these come into different facets of the
10 President's responsibility to ensure that the laws are
11 faithfully executed and -- specifically in this case -- to

12 [REDACTED]
13 [REDACTED].

14 And so every single one of these goes to that.

15 And so I would quarrel with the idea that [REDACTED]
16 [REDACTED] is not a national security issue. We believe that
17 it is a national security issue.

18 And while, certainly, there is great disagreement
19 over [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED], that is a national security issue.

23 THE COURT: Well, like one of the topics is

24 [REDACTED]
25 [REDACTED]

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[REDACTED]

[REDACTED]

Would you say that that's one of the core issues --

MR. PARLATORE: [REDACTED], no.

THE COURT: -- core types of communications?

MR. PARLATORE: [REDACTED] --

THE COURT: [REDACTED], which would fall outside the presidential communications privilege to me. And why would I be wrong?

MR. PARLATORE: I understand.

There are certain aspects --

THE COURT: Unless you agree with me.

MR. PARLATORE: Well, I agree with you mostly, Judge.

And part of the problem is we don't know -- I am kind of shooting in the dark here somewhat because I don't know what questions were asked at the grand jury --

THE COURT: You and I are in the same position then.

MR. PARLATORE: Okay.

But to the extent that we're talking about [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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1 [REDACTED]. So to the
2 extent that they want to ask: [REDACTED]
3 [REDACTED] That
4 would probably be on the political side.

5 But to the extent that he's saying: [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED], then that
10 would definitely go on the other side where that would be
11 privileged.

12 THE COURT: Okay.

13 MR. PARLATORE: So it would be a very
14 fact-specific question, Your Honor.

15 THE COURT: All right. Well, this has clarified
16 where there is agreement and where there isn't, so that is
17 helpful to me.

18 So one of the things that the government has
19 argued is that, in the former President's briefing, they
20 have said that he's seeking to impose a tougher test to
21 overcome the privilege, like a showing of necessity -- which
22 is a word used in the opposition -- or critical need, rather
23 than what the *In re Sealed Case* test is, which is a likelihood
24 of important evidence and lack of availability elsewhere.

25 So is that correct?

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1 And, if so, precisely what are you seeking to change
2 in the *In re Sealed Case*? -- which is, specifically, that the
3 subpoenaed material likely contains important evidence, and
4 this evidence is not available with due diligence elsewhere.

5 MR. PARLATORE: I think what we're trying to do
6 there, Your Honor, is we're trying to really drill down into
7 the definition of "important evidence," and what Your Honor
8 should be considering when figuring out whether this
9 evidence is, in fact, important.

10 In the *In re Sealed Case* they said that the
11 evidence sought must be directly relevant to issues that are
12 expected to be central in the trial. And so if you then
13 look back at, for example, the *Nixon v Sirica* case, where it
14 talks about a uniquely powerful showing by the special
15 prosecutor in that case which overcame the privilege.

16 So the reason why we're raising those issues is
17 really to drill into: What is the definition? What is the
18 actual standard of "important evidence"?

19 In this case -- and, again, I haven't seen what
20 they've presented to the grand jury or what's in any
21 *ex parte* submissions. But from the outside looking in, what
22 we see is -- we are not seeing that they are in fact -- that
23 this grand jury is, in fact, investigating a crime. It's
24 investigating [REDACTED]
25 [REDACTED], but not an actual crime.

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1 THE COURT: Well, this was an area I wanted to ask
2 you about in your brief because you sort of elaborate a
3 little bit on this in your brief because you argue that the
4 government must demonstrate -- and I quote: The viability
5 of the underlying investigation, which -- as you have just
6 said -- well, what you say in your papers is -- requires a
7 showing beyond a reasonable doubt that a criminal offense
8 has occurred before overcoming any presidential
9 communications privilege issue. And I think that's the
10 point you are getting to right now.

11 MR. PARLATORE: Yes, it is.

12 THE COURT: So you -- so this is --

13 MR. PARLATORE: I am not suggesting that's the
14 standard right now, Judge.

15 THE COURT: Okay. So I wanted to understand what
16 are you talking about because the grand jury is entitled to
17 conduct an investigation based on a suspicion, not on a
18 showing -- a suspicion that criminal conduct has been
19 undertaken, not on a showing of beyond a reasonable doubt
20 that a criminal offense has occurred, not the trial
21 standard.

22 MR. PARLATORE: Correct.

23 THE COURT: So I really wanted -- I really puzzled
24 over that statement in the opposition, at page 6, note 3.

25 MR. PARLATORE: Sure.

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1 THE COURT: What are you asking me to do?

2 MR. PARLATORE: Sure. Perhaps that was inartfully
3 stated, Your Honor. I am not asking you to make a finding
4 of reasonable doubt at this point.

5 But the reality is -- and going back to the
6 standard here that these are issues -- they must be directly
7 relevant issues expected to be central at trial. So any
8 indictment that could potentially come would be something
9 that would later have to be proved beyond a reasonable
10 doubt.

11 THE COURT: Of course.

12 MR. PARLATORE: In the grand jury --

13 THE COURT: But that is not the standard for the
14 grand jury.

15 MR. PARLATORE: No, it's not. And I am not
16 arguing that that is the standard here. And I apologize if
17 that was unclear from our papers.

18 What we're arguing here is that the conduct that
19 is being investigated is not a crime. And the government,
20 DOJ, have -- their responsibility before the grand jury is
21 to instruct them and to guide them on the law and make sure
22 that they are not, for political reasons, going down the
23 path of investigating conduct that is not criminal.

24 THE COURT: Well, let's say that the government
25 has obtained search warrants from a number of different

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1 magistrate judges and judges around the country upon showing
2 probable cause to believe a crime has been committed related
3 to some of these topics, if not all of these topics. So
4 they have gotten search warrants based on probable cause to
5 believe a crime has been committed -- even more than a
6 showing of a suspicion, which is all the grand jury requires
7 to begin an investigation.

8 So wouldn't that satisfy whatever special test you
9 are trying to get me to focus on as -- is there a crime here
10 that's being investigated, based on the fact that they have
11 already obtained -- you know, say they have obtained a lot
12 of search warrants based on -- predicated on probable cause,
13 I am sure you are aware of. Haven't they more than met that
14 threshold already to present that evidence obtained from
15 search warrants to the grand jury that that has satisfied
16 more than the mere suspicion required for a grand jury
17 investigation?

18 MR. PARLATORE: Without reading the affidavits in
19 support of those search warrants, I would have to say no,
20 Judge. Because here, although they may have presented
21 affidavits to magistrates that they were able to obtain
22 warrants, the fact -- the unfortunate fact is that --
23 especially when it comes to political issues such as this,
24 DOJ has in the past -- and I am not accusing them of any
25 intentional wrongdoing -- but they have in the past

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1 submitted affidavits to obtain search warrants that were not
2 supported by probable cause. You know, consider, for
3 example, the FISA warrants into Carter Page which were later
4 admitted by DOJ to not be supported by probable cause.

5 So the fact that -- in a separate proceeding in
6 front of a magistrate, that they made a presentation to
7 them -- this application is before you, Your Honor. And I
8 would say that for you to make a determination as to whether
9 this evidence is important, Your Honor should make that
10 determination as to whether what they are investigating is
11 in fact a crime. And I can go a little bit more into the
12 specifics of why I believe that what they're investigating
13 is not a crime here, if you would like --

14 THE COURT: Well, I have seen, in your opposition,
15 your same footnote. I mean, you have said that the
16 prosecution bears the burden of proving beyond a reasonable
17 doubt, *inter alia*, [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED].

22 You go on to say, but the government cannot prove
23 that [REDACTED]
24 [REDACTED]
25 [REDACTED]

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[REDACTED]

Finally, the government cannot establish [REDACTED]

[REDACTED]

So I think that's what you were about to go on to say, right? -- because you have made that argument in your opposition. [REDACTED]

[REDACTED]

So I look at that and I think, well, there is the defense. Should the grand jury ever return an indictment against the former President, you have got your summation already done -- summation to the jury --

MR. PARLATORE: Or motion to dismiss.

THE COURT: -- or motion to dismiss.

The issue, as I see it, is the job of the grand jury is to do precisely what you are asking me to do -- which is to look at the evidence collected and decide: Was

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1 there criminal conduct here or was there not? -- and to
2 decide -- and it happens that the grand jury decides there
3 is insufficient evidence to indict and returns no true
4 bills. I supervise the grand jury; I can tell you it
5 happens.

6 MR. PARLATORE: Absolutely.

7 THE COURT: So to me, that is the job of the grand
8 jury. It is not in my job description, I think, to make
9 that decision for the grand jury; and that is, in some
10 ways -- as I read your papers, is that what you are asking
11 me to do?

12 MR. PARLATORE: Not exactly, Your Honor. You are
13 absolutely right, that is within the province of the grand
14 jury.

15 What I am asking you to do is: In evaluating this
16 particular prong of whether it is important evidence, has
17 the government presented things to the grand jury on these
18 threshold issues, or are they jumping straight ahead to the
19 conclusion and saying, well, let's start by trying to invade
20 the privilege.

21 And so if Your Honor accepts my reasoning here,
22 then I would expect Your Honor's decision to be something
23 along the lines of: Based on what you have presented so far
24 you are not there yet, and the motion is denied without
25 prejudice to -- if you go back and you do present evidence

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1 to the grand jury on these certain threshold issues to show
2 that you are, in fact, investigating a crime and, therefore,
3 it is, in fact, important evidence, then you can come back
4 to me at that point. That's really what I am driving at
5 here, Judge --

6 THE COURT: Which is sort of jumping to some of
7 the issues in terms of your suggestions of different steps
8 that I can take, which is that I give you an opportunity to
9 further develop whatever it is -- further develop your
10 position.

11 And I really -- how did you put it? I was
12 actually was going to ask you about this, so we may as well
13 jump to it.

14 The way you put it was: An opportunity to raise
15 more particularized claims of privilege; is that what you
16 were referring to?

17 MR. PARLATORE: Yes, Your Honor. And if I may
18 address that --

19 THE COURT: I had no idea what you were talking
20 about, to be honest, so I was going to ask you to please
21 elaborate. What are you asking of me?

22 MR. PARLATORE: Sure.

23 The first two witnesses that we're discussing here
24 today [REDACTED]. The next two
25 witnesses [REDACTED],

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[REDACTED].

So not -- as opposed to what the government was just saying about leaving this as a completely open-ended thing, all we're asking for is to take these four witnesses together because certainly, when it comes to the attorney-client privilege issues, there are certain particularized fact-specific inquiries that go to [REDACTED] [REDACTED]. And, really, we're kind of starting with these two witnesses that are [REDACTED] [REDACTED] and trying to say, okay, there is no executive privilege here, and then walking --

THE COURT: Well, let's be careful and just -- because "executive privilege" is a phrase that's thrown around a lot, I mean, because it comes up so often in the FOIA context when people, really, are talking about deliberative process privilege and really sometimes only presidential communications privilege, which doesn't necessarily -- which doesn't typically reach down into the bowels of federal agencies --

MR. PARLATORE: Right.

THE COURT: -- the way that we're talking about the presidential communications privilege here. So let's just not mix things up. We're talking about the presidential communications privilege.

MR. PARLATORE: Correct.

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1 And since the next two witnesses that are going to
2 come before Your Honor are [REDACTED]
3 [REDACTED], our request is simply to take these four witnesses
4 together; not to leave it open-ended for any additional
5 witness.

6 If -- I believe that how Your Honor decides these
7 four witnesses will largely set the precedent for the
8 witnesses that come thereafter. There may be very
9 individualized fact-specific inquiries as to some of them,
10 but that's --

11 THE COURT: Let me -- and I appreciate -- look,
12 judges hear the word "consolidation" and "judicial
13 efficiency," and that's music to our ears, so you used the
14 right words to get my attention.

15 But I -- the way I deal with privilege issues,
16 it's so context specific, witness by witness; the specific
17 role of the witness; timing of the communications; scope of
18 the communications; scope of the role -- it is so
19 particularized to each witness, I am reluctant to go
20 beyond -- I mean, these two witnesses alone have very
21 different roles.

22 MR. PARLATORE: They do.

23 THE COURT: And the privilege assessment here
24 that's particularized to each of these witnesses is plenty
25 for me to chew on without then getting into more complex

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1 privilege issues [REDACTED]

2 [REDACTED]. So I am just being honest with you.

3 Although consolidation, at first blush, as I said,
4 you know, usually is something I consider pretty seriously,
5 in the privileged context, I am not sure it does anything
6 more than complicate the discussion when each individual has
7 to be looked at individually with -- in context and role; so
8 I am just telling you right off the bat.

9 But let's turn to the attorney-client privilege
10 for [REDACTED] -- that you assert applies to [REDACTED], who was
11 serving as [REDACTED]. And the
12 former President makes the assertion that he shared a common
13 interest privilege with [REDACTED]

14 [REDACTED].

15 As I read *In re Lindsey*, it rejected the
16 attorney-client privilege assertion and any common interest
17 extension of that privilege [REDACTED]. So the
18 government is clear, they think *In re Lindsey* is dispositive
19 here.

20 Why isn't *In re Lindsey* dispositive here, even on
21 the common interest argument that you have made or the
22 direct attorney-client privilege?

23 MR. PARLATORE: Sure. And this obviously will
24 become more relevant with the next two witnesses.

25 But the reason why it doesn't control here is

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1 because that presumes that this testimony would be about
2 observing criminal conduct by members of the executive
3 branch; that's what *Lindsey* dealt with.

4 *Lindsey* dealt with: There is no privilege that
5 would prevent a government attorney from providing
6 information about their observations of criminal conduct by
7 members of the executive branch.

8 But, here, what they want to do is they want to
9 get into privileged attorney-client communications about the
10 legalities of how to deal with a situation where there
11 appears to be [REDACTED]

12 [REDACTED]. So this is not a situation where they're asking
13 about: What are their observations of criminal conduct by
14 members of the executive branch. But, rather, they're
15 asking about: What are the communications, discussions, and
16 possible responses by the executive branch to [REDACTED]

17 [REDACTED]
18 [REDACTED].

19 So what they're asking you to do is to say there
20 is no attorney-client privilege just based on the
21 presumption that there must be criminal conduct by members
22 of the executive branch they're going to talk about; and
23 without that threshold showing, the attorney-client
24 privilege can't be vitiated. So that's why the
25 attorney-client privilege in *In re Lindsey* does not preclude

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1 it here.

2 The same issue is going to come --

3 THE COURT: It goes back to what is the showing
4 that there is criminal conduct here?

5 MR. PARLATORE: Correct. It does go back to that.
6 And it overlaps with the important need or important
7 evidence; it all does go back to that issue.

8 Because, ultimately, if this grand jury is
9 investigating all of the specifics of how the prior
10 administration operated on something that the current
11 administration simply disagrees with, that's not something
12 that -- it's certainly something that a grand jury should
13 come to a no true bill on; but it's not something that
14 justifies invading multiple privileges in getting to that
15 result.

16 THE COURT: I would agree with you on that broad
17 statement. And there has to be -- and I also agree with you
18 that the grand jury has to be investigating based on at
19 least a suspicion -- even more than that, a reasonable
20 suspicion of criminal conduct. And if the criminal conduct

21 is [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED].

25 MR. PARLATORE: Sure.

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1 THE COURT: And it may be that there is going to
2 be -- you know, it may be that there is going to be some
3 line-drawing; that somebody in the prosecutor's office is
4 going to have to make -- or the Attorney General's office is
5 going to make decisions at what point is this [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED].

9 And the first stop in making that assessment of
10 whether lines were crossed between [REDACTED]
11 [REDACTED] is in the grand jury.

12 Now, I appreciate that you are saying I have to --
13 I am the first stop in this context for the presidential
14 communications privilege; but, ultimately, it's the grand
15 jury that is going to be making a decision as to whether
16 those lines were crossed sufficient to warrant any kind of
17 formal charge so that you can -- so at some point you may be
18 making your summation in a public forum. Okay.

19 But that's essentially -- but I think I understand
20 that, essentially, that's -- *In re Lindsey* you would agree
21 would be dispositive, but only if I meet that threshold test
22 is there criminal activity that has been sufficiently shown.

23 And in making that evaluation of sufficient
24 showing, are you saying that I have to apply a higher test
25 than would be required of the grand jury?

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1 MR. PARLATORE: I am saying that in order to --

2 THE COURT: Because all of the -- sorry to
3 interrupt you.

4 Just to be clear, all the grand jury has to
5 operate on is a suspicion of the commission of criminal
6 activity. And you've thrown around things I have already
7 quoted, reasonable -- beyond a reasonable doubt, and so
8 on -- not even "preponderance."

9 So if I accept what you are saying is right, I
10 have to make some kind of finding of some criminal activity
11 that would warrant the need for the information to the grand
12 jury. Should that test of whether there is criminal
13 activity essentially be the same one that the grand jury
14 operates on? Because if I apply a higher standard, am I not
15 supplanting the grand jury's role?

16 MR. PARLATORE: And I think that that is -- I
17 understand your question, Your Honor. It's not exactly
18 that.

19 It all goes into your determination of important
20 evidence. And so we're not asking you to decide the
21 entirety of what the grand jury must decide.

22 But, at a minimum, our position is that in order
23 to invade the privileges Your Honor should perform that
24 introductory test of looking at what the grand jury is
25 examining, determining whether they are -- I am trying to

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1 think of a more artful way of saying it because it's not --
2 I am not asking you to make a determination that a crime has
3 been committed. But, rather, if the government's theory is
4 correct, would that even constitute a crime?

5 I am kind of going with a 12(b)(6) kind of
6 standard here in a weird way. But if they're investigating
7 something and -- in all of the evidence that they have
8 presented they're just missing some elements entirely, and
9 they're saying: We're just going to skip these elements of
10 the crime, but we'd like to invade privilege now -- that's
11 kind of -- that's what we're asking you to take a look at
12 is -- in determining whether it is important evidence, how
13 important is it?

14 If they are totally skipping necessary elements --
15 which the grand jury will decide, but they haven't even
16 presented anything.

17 Again, I'm shooting in the dark here. But based
18 on our knowledge of the facts, we presume that there are
19 certain elements that they are not presenting anything on
20 because nothing exists. If they're not and, therefore, all
21 of the conduct that they're trying to prove would not, if
22 true, even constitute legally a crime, then is it really
23 that important evidence for Your Honor to say, okay, you may
24 invade the privilege?

25 THE COURT: But at the same time the -- well, I

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1 think among the things that you have pointed out that the
2 government would need to prove is that [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED].

7 So it may be that if these witnesses testify to
8 that, that this grand jury investigation, at least vis-à-vis
9 former President Trump, if he is a target, would be over
10 fairly quickly; although there might be other people who are
11 targets of the investigation.

12 MR. PARLATORE: And this would go to our
13 *ex parte* --

14 THE COURT: So that point, in some ways,
15 overcoming the privilege would be very important information
16 for the grand jury to hear from these witnesses.

17 So do you see what I mean?

18 Doesn't it work the opposite way if these
19 witnesses actually will say that?

20 MR. PARLATORE: But they don't know that they're
21 going to say that, that's the problem judge. And this goes
22 into our request for you to review *in camera*. And I
23 recognize that this -- we are dealing --

24 THE COURT: Well, let's go to that *in camera*,
25 because I puzzled over --

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1 MR. PARLATORE: I have a suggestion --

2 THE COURT: I puzzled over that.

3 Let me just lay out -- to make sure I haven't
4 missed something, because I sort of distilled this from your
5 opposition -- all of the different suggested steps that I
6 take; and then we can just have them laid out. I found
7 four. And I wanted to make sure that I wasn't missing any
8 steps from your brief.

9 MR. PARLATORE: Okay.

10 THE COURT: So you have suggested then, in
11 resolving the pending motion to compel, I, one, evaluate the
12 viability of the underlying investigation to see if there is
13 an actual need to invade the privilege. I think we have
14 beaten that one to death, unless you want to add more.

15 Two, conduct an *in camera* review to ensure that
16 only evidence relevant to the grand jury's inquiry is
17 disclosed. That's a puzzle to me, so we're going to come
18 back to that.

19 MR. PARLATORE: Okay.

20 THE COURT: Three, provide the former President
21 with an opportunity to raise more particularized claims of
22 privilege. That also was a puzzle to me, so I want you to
23 explain that.

24 And then, four, reserve ruling on the pending
25 motion to compel the [REDACTED]

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1 [REDACTED] so that we can consolidate with the other
2 potential grand jury witnesses, [REDACTED]
3 [REDACTED]. So I think I have already sort of told
4 you where I am coming out on the consolidations.

5 But let's go to the last -- did I miss any of the
6 steps other than those four?

7 MR. PARLATORE: No, Your Honor.

8 Although, I would say that we're not asking to
9 consolidate [REDACTED]; it's just those four first
10 witness, that's all we're asking for.

11 THE COURT: I got it. Okay. Whether it's four or
12 two, you sort of know my instinct on the consolidation; I
13 want to deal with everybody individually.

14 MR. PARLATORE: I understand.

15 THE COURT: So let's talk about the second step
16 and the third step, conducting an *in camera* review to ensure
17 that only evidence relevant to the grand jury's inquiry is
18 disclosed. What am I supposed to do about that?

19 This is not a document case where it would be easy
20 for me to do an *in camera* review -- not easy --

21 MR. PARLATORE: Correct.

22 THE COURT: -- but I could that.

23 These are grand jury witnesses. I am merely the
24 supervising judge of the grand jury.

25 I don't sit in the grand jury. I don't know

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1 everything about their grand jury investigation or what
2 questions to ask; so I certainly couldn't conduct an
3 *in camera* colloquy with these witnesses because the
4 government knows where it's going with its investigation, as
5 does the grand jury, I don't. I am merely a judge.

6 MR. PARLATORE: Right.

7 THE COURT: So what do you have in mind?

8 MR. PARLATORE: My suggestion here, Your Honor,
9 is -- they have already gone in front of the grand jury;
10 they have already been asked these questions; they have
11 already asserted the privilege.

12 And I am guessing from the government's submission
13 that they have provided you with a transcript of that
14 *ex parte*; maybe I am wrong, but that's the guess that I am
15 reading between the lines.

16 These witnesses are both represented by counsel.
17 And through counsel they could provide Your Honor an
18 *ex parte* written submission that gives you a summary of what
19 their testimony would be because -- as Your Honor properly
20 said earlier, if they're going to come in and say, [REDACTED]

21 [REDACTED]
22 [REDACTED] --
23 if that's something that was submitted to you, you are
24 probably going to turn around and say, oh, that's important
25 evidence; go ahead and put it in.

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1 If, instead, the information that they give you
2 is: [REDACTED]
3 [REDACTED]
4 [REDACTED], then -- while that
5 is certainly something that is helpful to the president and
6 would be helpful to the grand jury coming to a no true bill,
7 is that something that is worth vitiating the privilege?

8 And so our suggestion here -- because I recognize
9 you don't have time to take the transcript and then sit down
10 with the witnesses and ask all of the questions yourself --

11 THE COURT: I wouldn't know where to begin to ask
12 the questions because I merely supervise the grand jury. I
13 don't --

14 MR. PARLATORE: Right.

15 THE COURT: I am not really permitted to certainly
16 intervene in a grand jury investigation.

17 MR. PARLATORE: But as these questions have
18 already been asked, the witnesses certainly know exactly
19 what the government -- what information the government is
20 looking for from them, they can provide Your Honor with an
21 *ex parte* summary of what that testimony would be, whether
22 that's something that gets shared with us is obviously up to
23 Your Honor --

24 THE COURT: So it would both -- so this suggestion
25 would involve this Court in the fundamental

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1 information-gathering process of the grand jury in ways that
2 I think would be unprecedented. It would -- if your
3 requests were approved -- share what would otherwise be
4 protected 6(e) testimony with the former President who might
5 be a potential target --

6 MR. PARLATORE: I haven't asked for that yet.

7 THE COURT: It would -- it would possibly and
8 potentially keep from the grand jury information that could
9 be highly relevant to the grand jury's decision of whether
10 to proceed with formal charges or not, which sounds to me
11 like -- if it were helpful, something that the grand jury
12 should certainly have access to.

13 MR. PARLATORE: But that's --

14 THE COURT: I really -- but, mechanically, I
15 understand better what you were talking about.

16 MR. PARLATORE: That's the important --

17 THE COURT: Although I am going to have to puzzle
18 over that one. Then --

19 MR. PARLATORE: Your Honor --

20 THE COURT: I'm sorry. Go ahead.

21 MR. PARLATORE: If I may, that is the important
22 evidence standard. And that ordinarily, when we're dealing
23 with documents, Your Honor would be able to review those
24 *in camera*. Because here it's a witness and, therefore, Your
25 Honor is trying to make a decision in the dark, I am

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1 suggesting a procedure whereby Your Honor can make a more
2 informed decision of knowing what exactly the government is
3 trying to elicit to put in front of the grand jury so that
4 Your Honor can make that decision of whether it's important.

5 THE COURT: You know, I was a former prosecutor.
6 And getting proffers from lawyers about what their client
7 would or would not say is something that regularly happens
8 for prosecutors.

9 I mean, I have never heard of a presiding judge of
10 a grand jury demanding a proffer from a grand jury witness
11 before I even let the witness testify; it's a very
12 unusual -- creative, clever even -- suggestion; and I will
13 be interested to hear the government's response to that.

14 MR. PARLATORE: The reality, Judge, this entire
15 case --

16 THE COURT: Excuse me.

17 MR. PARLATORE: This entire case -- the fact that
18 we're talking about some of these issues is, in and of
19 itself, unprecedented and unusual.

20 THE COURT: Not necessarily. I mean, Presidents
21 have been investigated before, and in this Court.

22 Not me -- meaning this Court -- this court,
23 speaking for the District Court for the District of
24 Columbia. This is not -- that's not that unusual.

25 Okay. So now your next -- your next step,

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1 providing the former President with an opportunity to raise
2 more particularized claims of privilege, you certainly are
3 going to probably raise more particularized claims of
4 privilege when it comes to the other potential grand jury
5 witnesses.

6 MR. PARLATORE: Correct. I think three and four
7 might be switched.

8 THE COURT: But what -- no, three is provide
9 former -- anyway, it doesn't matter.

10 Could you explain, mechanically, what you're
11 describing, in terms of your opportunity to raise more
12 particularized claims of privilege?

13 MR. PARLATORE: With regard to the next two
14 witnesses?

15 THE COURT: It's really just the next two
16 witnesses.

17 MR. PARLATORE: Three and four may be reversed or
18 subsumed. I am really talking there about -- I am really
19 talking there about the specifics related to the second two
20 witnesses.

21 THE COURT: Okay. And I don't have a motion to
22 compel with respect to them, so that only actually proves my
23 concern about a consolidation. I want to deal with them
24 separately; and I appreciate the sensitivity of those two,
25 as opposed to the two witnesses who are at issue in this

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1 motion to compel.

2 Let me just make sure there wasn't anything else I
3 needed some clarification from you on.

4 Okay. What else do you think I need to know?

5 MR. PARLATORE: Your Honor, one final point that I
6 would leave you with is this, this case --

7 THE COURT: Could you speak up into the
8 microphone? You are tall. You can raise that so it's
9 easier for you.

10 MR. PARLATORE: So one final point.

11 This case is complicated by the fact that
12 President Trump essentially has a dual role, in that he was
13 the incumbent President at the time, but he was also a
14 candidate. You had asked the government earlier about
15 whether these things were part of his executive function or
16 political questions, and that's really where this gets
17 muddy.

18 Depending on your point of view, you could sit
19 there and say: [REDACTED]

20 [REDACTED]

21 [REDACTED]. But yet, on the flip side of it,
22 as the sitting President, who is mandated by Article II to
23 ensure that the laws of this country are faithfully
24 executed, we want the President to be able to communicate
25 with his advisors, to ask them questions, and to say: [REDACTED]

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[REDACTED]

And I think a lot of that comes into [REDACTED]

[REDACTED]

So if -- set the specifics of what everybody feels about these particular two candidates aside. [REDACTED]

[REDACTED], what do we want them to do?

I submit to you that this is exactly what we would want them to do. [REDACTED]

[REDACTED] -- and this goes back to the public interest -- do we really want in the public interest for their political rival, who then comes after them, to then invade the privilege to try to go back -- without regard to whether it's actually criminal or not, to invade these privileges?

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And there are a couple of points that must be mentioned here. I am not saying here [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

But there is binding precedent now that, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Here is another thing. [REDACTED] --
Your Honor cited the statute earlier -- just yesterday the House passed a resolution to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

So when Your Honor is looking at whether they have met the standard of important evidence, I would ask Your Honor to consider all of these factors, and not -- not just President Trump as a candidate for reelection, but also as the chief executive and what we want him to do in seeking advice, and what precedent we want to set for the subsequent

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1 administration to be able to invade that advice because
2 whatever gets decided here -- whatever precedent gets set
3 could have reverberations for future presidential turnovers.
4 And that's why this is such an important issue and why --
5 when I say we should consolidate these -- they want to talk
6 about let's move forward, the grand jury has to move
7 forward, we're a month and a half from the next election.
8 And everything this grand jury does --

9 THE COURT: Is in secret.

10 MR. PARLATORE: And yet, [REDACTED]
11 subpoenas, *The New York Times* immediately knows about it;
12 that's not something the witnesses know. When they execute
13 a search warrant, *The New York Times* is told about it.

14 45 days -- 46 or 47 days before an election we are
15 at right now. So, for that reason, Your Honor, I would
16 suggest, before invading this privilege, we try to be as
17 careful as possible, make sure we get it right.

18 We do have the [REDACTED] that is -- I am
19 sure they are going to be filing a motion on that shortly.
20 [REDACTED], so we're only talking about
21 another week or so likely before they file that motion. Why
22 not bring them together to make sure we get it right, as
23 opposed to rushing forward so we can get these two witnesses
24 into the grand -- assuming Your Honor agrees with them --
25 getting these two witnesses into the grand jury, telling *The*

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1 *New York Times* these two witnesses went into the grand jury
2 before the election.

3 THE COURT: So just to be clear, are you accusing
4 the government of leaking who is testifying in front of the
5 grand jury?

6 MR. PARLATORE: I am not accusing them directly of
7 that, Your Honor. The reality --

8 THE COURT: Are we already in that game at this
9 point? -- I mean, which happens in every single one of
10 these, it seems like, in these investigations. But, really,
11 are we there already?

12 MR. PARLATORE: The reality is that materials
13 before the grand jury, who gets subpoenaed, is something
14 that is sent to the media. I don't know --

15 THE COURT: Yes. Because the one party -- you
16 know, the one player in a grand jury proceeding that's not
17 subject to grand jury secrecy is the grand jury witness, the
18 grand jury witness's lawyer --

19 MR. PARLATORE: I doubt --

20 THE COURT: So it's -- I would not be surprised if
21 the people who are not subject to any obligation of secrecy
22 before the grand jury are the people from whom information
23 is -- to the extent there are leaks or information about
24 what is going on in the grand jury, it's coming from there.

25 MR. PARLATORE: I would hope that there is an

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1 investigation into that. I can't imagine that any witness
2 knew enough to tell *The New York Times*, hey, 40 subpoenas
3 went out today.

4 And I know from -- one of the people that was
5 subpoenaed was another of my clients. Neither he nor I told
6 *The New York Times*, yet *The New York Times* called me to say:
7 Hey, I want to talk to you about your client who we were
8 told was subpoenaed. So it's not specifically relevant to
9 this issue, but I do hope there is some investigation as to
10 why this information is being put out so close to an
11 election. And it is relevant only insofar as I am saying:
12 Let's not rush this. Let's make sure we get it right.

13 THE COURT: Well, I would say this is not rushed.

14 MR. PARLATORE: I am not accusing you --

15 THE COURT: I mean, the government -- I adopted a
16 schedule for briefing that the parties agreed to. You know,
17 this is -- and it was on a much longer schedule than I think
18 the government would have liked --

19 MR. PARLATORE: I am only talking about the
20 consolidation.

21 THE COURT: -- and so this is not being rushed.

22 MR. PARLATORE: I am only talking about the
23 consolidation because that is what their opposition was, to
24 the -- President Trump should not continue to delay these
25 proceedings. And I am addressing that point that was in

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1 their reply.

2 THE COURT: All right. Thank you.

3 Mr. Pellettieri, do you want to respond?

4 MR. PELLETTIERI: Thank you, Your Honor.

5 I am happy to answer any questions.

6 But I would just like to make a broader point that
7 much of the former President's submissions fundamentally
8 misunderstand the role and function of the grand jury.

9 THE COURT: But doesn't he have a point? That
10 before I just let the grand jury willy-nilly break a
11 privilege, don't I have to be persuaded that there is some
12 criminal activity -- at least have a reasonable suspicion
13 that there is some criminal activity that is the subject of
14 the grand jury's investigation and that it is not just
15 investigating political operations from a prior
16 administration? I think you would agree with that, that's
17 why you gave me a whole *ex parte* submission, right?

18 MR. PELLETTIERI: Yes. I mean, in *R. Enterprises*,
19 for example, the Supreme Court went through a lot of this.

20 THE COURT: You are talking too fast. You are
21 swallowing your words. I couldn't understand you, so I am
22 sure my court reporter is having difficulty.

23 Would you repeat that more slowly?

24 MR. PELLETTIERI: Yes, Your Honor.

25 Yes. I think a lot of this is discussed in the

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1 Supreme Court's decision in *R. Enterprises*, which discusses
2 the function of the grand jury and the role of the grand
3 jury. It can investigate merely on suspicion that the law
4 is being violated or even just because it wants assurance
5 that it is not; that's from *R. Enterprises*.

6 The function of the grand jury is to inquire into
7 all information that might possibly bear on its
8 investigation until it has identified an offense or has
9 satisfied itself that none has incident occurred. The grand
10 jury paints with a broad brush.

11 So, yes, there has to be a general subject matter
12 of suspicion of criminal activity; but it's the grand jury's
13 role and function to delve into that -- to dig, and come to
14 a conclusion whether that suspicion is founded or unfounded.
15 And they can't fulfill that function without obtaining the
16 evidence, in our view; and we have made the showing
17 *ex parte*.

18 The testimony by [REDACTED] is important to
19 the grand jury's investigation here.

20 I think the language of that -- the *Espy* case uses
21 is directly relevant. And we have shown -- and we'd be
22 happy to go into it in more detail in an *ex parte* session if
23 you want. But we have shown that the testimony of those two
24 witnesses would be directly relevant to the investigation
25 being conducted by the grand jury.

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1 It puts the cart entirely before the horse to say
2 that we have to show beyond a reasonable doubt that a crime
3 occurred before the grand jury can get information to
4 determine whether a crime did or did not occur.

5 I think that goes into -- that leaks into a number
6 of points that the former President made, about both the
7 standard for importance and also this notion of the need for
8 *in camera* review.

9 THE COURT: Well, now that I understand at
10 least -- perhaps you did from informal conferral with the
11 former President's counsel, but the -- now that I better
12 understand the *in camera* review for a testimonial --
13 testimony before the grand jury, what is your response to
14 those mechanics, basically of asking for a proffer from the
15 grand jury witnesses; me reviewing it and seeing if it's --
16 I mean, it might be explosive. Who knows?

17 If it's explosive, you know, information about

18 [REDACTED]
19 [REDACTED] -- and even under their standard would help prove

20 [REDACTED]
21 [REDACTED] -- wouldn't that be helpful to know
22 before I broke the privilege? What's so wrong with their
23 idea?

24 MR. PELLETTIERI: Well, there are a few things
25 that are wrong with it.

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1 First, the mechanics that they suggest are so
2 outside of anything that we have ever contemplated or seen
3 or thought of or even thought could possibly be proposed --

4 THE COURT: I know. I thought it was very clever
5 and creative.

6 MR. PELLETTIERI: The idea that a potential grand
7 jury witness's lawyer would come and then meet with a judge
8 outside the grand jury is so inconsistent with the practice
9 of a grand jury it's not something we even thought would
10 come up here today. So that, to us, is just a nonstarter.

11 More broadly speaking about *in camera* review,
12 number one, it provides no benefit here; and, number two, it
13 imposes substantial costs. It is of no benefit because we
14 have shown in our *ex parte* submission why this evidence is
15 important.

16 And in the context of a testimony by an
17 individual -- that showing itself demonstrates that the
18 testimony is going to be relevant to the grand jury's
19 investigation.

20 Take, for example, just a hypothetical where you
21 have a presidential advisor putting together a document, a
22 briefing document -- maybe it's the President's daily
23 brief -- that has ten subject matter that are addressed in
24 this document, and that advisor goes and gives a
25 presentation to the President on those ten topics. And

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1 then, later, a grand jury convenes that is investigating one
2 out of those ten topics for potential criminality. We would
3 be able to show that that document is important to the grand
4 jury and that -- then, at that point, under the *Espy* case
5 and *Nixon*, the Court could conduct an *in camera* review and
6 redact the nine out of the ten that are not relevant, and
7 then send the one out of the ten that is to the grand jury.

8 But if we call the actual advisor into the grand
9 jury to testify only about the one topic that's relevant,
10 there is no need for any kind of *in camera* review because
11 the witness is only going to testify about the statements
12 made about that one relevant topic; and that's what is
13 happening here.

14 *In camera* review would be duplicative and
15 unhelpful. And it would impose a cost because it would
16 impose a whole entire layer of proceedings into the grand
17 jury that would be totally unnecessary. It would hamper the
18 grand jury, it would impinge on the grand jury's ability to
19 get to evidence quickly and with dispatch.

20 I referred to *R. Enterprises* earlier. But the
21 idea in that case, throughout it, is the idea that the
22 Supreme Court has regularly rejected procedures in the grand
23 jury that would add little mini trials or collateral issues
24 that would slow down and hamper the grand jury; and that's
25 exactly what would happen here with *in camera* review. It's

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1 not necessary, and it's costly here, Your Honor.

2 THE COURT: All right. Any other matters that you
3 want to respond to?

4 MR. PELLETTIERI: Not unless you have any further
5 questions, Your Honor.

6 THE COURT: I don't.
7 Is there anything further from the former
8 President's counsel?

9 MR. PARLATORE: One moment, Your Honor.

10 THE COURT: You can't have that much more to say.

11 MR. PARLATORE: The only final point, Your Honor,
12 is -- just going back to that *In re Sealed Case*, the *Espy*
13 case, in that case -- that was a White House investigation,
14 and certain documents were withheld that the special counsel
15 thought contained false statements made to the White House;
16 so that was something where they had a very particularized
17 showing of what it was, what they were seeking; and, you
18 know, here, this is something that's far more speculative
19 and doesn't have that specific showing. And so, again, this
20 just goes into the question of important evidence just to
21 underscore the specific context in that case.

22 THE COURT: All right. Thank you.

23 Okay. You are all excused.

24 (Whereupon, the proceeding concludes, 2:26 p.m.)

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CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 29th day of September, 2022.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

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