

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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PETER P. STRZOK,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No. 1:19-CV-2367-ABJ
v.	)	
	)	
WILLIAM P. BARR, in his official capacity	)	
as Attorney General of the United States, <i>et</i>	)	
<i>al.</i> ,	)	
	)	
Defendants.	)	
	)	
	)	

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**DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR  
SUMMARY JUDGMENT AS TO COUNT ONE AND COUNT TWO, AND MOTION  
FOR SUMMARY JUDGMENT AS TO COUNT THREE**

For the reasons stated in the accompanying memorandum, Defendants respectfully request that the Court dismiss Count One and Count Two of Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or, in the alternative, enter summary judgment in Defendants' favor as to Count One and Count Two pursuant to Federal Rule of Civil Procedure 56. Defendants also respectfully request that the Court enter summary judgment in Defendants' favor as to Count Three.

Dated: November 18, 2019

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN  
THE ALTERNATIVE, FOR SUMMARY JUDGMENT AS TO COUNT ONE AND  
COUNT TWO, AND MOTION FOR SUMMARY JUDGMENT AS TO COUNT THREE**

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## INTRODUCTION

Plaintiff Peter Strzok served his country honorably for over twenty years, first as a uniformed member of the United States Army and then as a Special Agent of the Federal Bureau of Investigation. In the latter role, in particular, Plaintiff performed with distinction and gained the respect of his superiors. He rose through the ranks over his career to ever-higher positions of authority and trust within the Bureau, ultimately becoming a member of its Senior Executive Service and then Deputy Assistant Director of its Counterintelligence Division. As Plaintiff describes in his Complaint, he was at the center of some of the most consequential and politically charged FBI investigations of recent memory—the investigation into former Secretary of State Hillary Clinton’s use of a private email server and the investigation into Russian interference in the 2016 Presidential election.

Yet, as the FBI was placing enormous trust in Plaintiff and giving him substantial authority over some of the most important investigations in recent memory, he committed a series of serious and sustained lapses in judgment. In particular, a Department of Justice (“Department”) Office of the Inspector General (“OIG”) investigation found that Plaintiff had exchanged over 40,000 text messages with an FBI attorney (“Government Attorney” or “GA”) on their government-issued phones, among them texts written in 2016 in which Plaintiff called the President—at that time, still a candidate for President—a “disaster” and suggested that “[w]e’ll stop” him from taking office. And in a text he wrote in 2017—after the President had taken office and during Plaintiff’s tenure as a lead investigator for Special Counsel Robert Mueller’s team—Plaintiff described his own “sense of unfinished business.” As he wrote to the Government Attorney in that text: “I unleashed it with [the Clinton email investigation]. Now I need to fix it and finish it. . . . Who

gives a f\*ck, one more A[ssistant] D[irector] . . . [versus] [a]n investigation leading to impeachment?”

The statements made in those and similar text exchanges involved matters of public concern. But when made by an FBI Special Agent—especially a member of the Bureau’s senior leadership—in the context of active investigations over which that Special Agent had official responsibility, these messages posed grave risks to the Bureau’s institutional interests and basic integrity. The lapses in judgment embodied in those messages and others like them risked undermining public confidence in two of the Bureau’s highest-profile investigations. And even more broadly, those lapses in judgment risked damaging the public trust in the FBI as a non-partisan, even-handed, and effective law enforcement institution—trust that is essential to the FBI’s ability to vigorously enforce the nation’s laws without fear or favor.

On that basis, FBI Deputy Director David Bowdich—a Bureau veteran and longtime career civil servant—made the decision to dismiss Plaintiff from the FBI. In doing so, Deputy Director Bowdich weighed Plaintiff’s years of service against the actual and potential harms wrought by his conduct: “While there is no doubt your 21 years of service to this organization should not be discounted, I am persuaded that serious aggravation is warranted for your [] offense given the severe, long-term damage your conduct has done to the reputation of the FBI. It is difficult to fathom the repeated, sustained errors of judgment you made while serving as the lead agent on two of the most high-profile investigations in the country.” As Deputy Director Bowdich noted, the OIG investigation found no evidence that Plaintiff’s apparent bias had actually affected his actions or decisions in either FBI investigation. But that did not counsel against Plaintiff’s dismissal: “As I considered the facts associated with the adjudication of your case, I could not recall another incident like yours that brought such discredit on the organization. In my 23 years in the FBI, I

have not seen a more impactful series of missteps that has called into question the entire organization and more thoroughly damaged the FBI's reputation. In our role as FBI employees we sometimes make unpopular decisions, but the public should be able to examine our work without having to question our motives."

Following his dismissal from the FBI, Plaintiff brought this action advancing First Amendment, due process, and Privacy Act claims. He cannot succeed on any of them. First, on Plaintiff's alleged facts, his First Amendment wrongful separation claim fails under Rule 12(b)(6). Plaintiff's senior leadership position within the FBI, and his key role in the Clinton email and Russian interference investigations, imposed upon him a higher burden of caution with respect to his speech—particularly speech involving matters related to those investigations. Plaintiff plainly failed to meet that burden of caution as to his text exchanges with the Government Attorney, and the substance of those messages posed substantial potential harm to the FBI. It is because of those text messages, and the paramount importance of preserving the FBI's ability to function as a trusted, nonpartisan institution, that Plaintiff was removed from his position, and not because of any alleged disagreement with Plaintiff's viewpoints on political issues or Tweets from the President. Under these circumstances, Plaintiff's First Amendment claim cannot survive, even at this early stage of the litigation.

Plaintiff also cannot prevail on his due process argument, and the Court should dismiss that claim as well. Despite Plaintiff's military service, he did not have a property interest in his position at the time of his dismissal, because he was a member of the FBI's Senior Executive Service ("SES"). That fact alone forecloses Plaintiff's claim. Yet, even assuming Plaintiff enjoyed some property interest in his position, Plaintiff's due process argument would still fail, because he was given ample notice and opportunity to be heard. The Due Process Clause was satisfied.

Finally, Plaintiff cannot succeed on his claim that the Department violated the Privacy Act. To the degree Plaintiff bases his claim in part on alleged disclosures by “officials within the White House,” such alleged disclosures do not implicate the Privacy Act, which applies only to “agencies” (not the White House). And as to any Privacy Act claim based on the Department’s disclosures of his text messages with the Government Attorney to the news media, Plaintiff also cannot prevail because—even assuming the text messages were contained in an OIG system of records, as Plaintiff alleges—the disclosures were made pursuant to a published routine use compatible with the purpose for which the records were collected. In any event, even if Plaintiff could somehow establish that the Department’s disclosures were inconsistent with the published routine use, he cannot show that the Department did so willfully or intentionally, given the Department’s careful analysis and good-faith conclusion that the Department’s disclosures were permissible under the published routine use in question.

Accordingly, the Court should dismiss Count One and Count Two of Plaintiff’s Complaint or, in the alternative, enter summary judgment in Defendants’ favor as to those claims. In addition, the Court should grant summary judgment for Defendants as to Count Three of Plaintiff’s Complaint.

## **FACTUAL BACKGROUND**

After serving in the United States Army, Plaintiff entered the rolls of the FBI in 1998. *See* Compl. ¶¶ 14-15. When Plaintiff exchanged the relevant texts with the Government Attorney, beginning around August 2015 through May 2018, Plaintiff was a member of the FBI’s SES. *See* OIG Report at 396. During that period, Plaintiff was promoted to Deputy Assistant Director of

the FBI’s Counterintelligence Division in September 2016. *Id.*<sup>1</sup> As Plaintiff details in his Complaint, his career at the FBI put him at the center of some of the most important and politically charged investigations in the Bureau’s history. *See Compl. ¶¶ 1, 13-16.* Particularly relevant here, Plaintiff was assigned in August 2015 to lead the criminal investigation of former Secretary of State and presidential candidate Hillary Clinton’s use of a private email server, which the FBI referred to as “Midyear Exam” or “Midyear.” Compl. ¶ 15, 32. Then, in July 2016, Plaintiff was assigned to the FBI’s investigation into the Russian government’s efforts to interfere in the 2016 presidential election. *See Letter of Unit Chief, Adjudication Unit II, Office of Professional Responsibility 2, June 15, 2018 (“Proposal Letter”)* (Exhibit 1). In Plaintiff’s own words, he was “one of the key members” of that investigative team. Compl. ¶ 31. After former FBI Director Robert Mueller III was appointed Special Counsel over the Russian investigation, Plaintiff was a member of the Special Counsel’s staff from May 2017 until July 28, 2017. *See Proposal Letter at 2.*

In early 2017, in response to requests from Congress, various organization, and members of the public, the OIG opened an investigation into various actions by the FBI and the Department in connection with the Midyear investigation. Compl. ¶ 32; *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, June 2018 (“OIG Report”), <https://www.justice.gov/file/1071991/download>. As part of that investigation, the OIG requested and received from the FBI text message communications of FBI personnel involved in the Midyear investigation using FBI-issued mobile devices, including those

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<sup>1</sup> Plaintiff was later reassigned to Deputy Assistant Director of the FBI’s Human Resources Division.

sent and received by Plaintiff, for the period when the Midyear investigation began through July 1, 2017. OIG Report at 395-96.

In its review of the collected text messages, the OIG identified over 40,000 text messages exchanged on FBI-issued cell phones between Plaintiff and the Government Attorney, who was serving as Special Counsel to former Deputy Director Andrew McCabe. OIG Report at 396. Those messages included political opinions about candidates and issues involved in the 2016 Presidential election, “including statements of hostility toward then candidate Trump and statements of support for candidate Clinton.” *Id.* In addition, according to the OIG, “[s]everal of their text messages also appeared to mix political opinions with discussions about the Midyear and Russia investigations,” which raised questions as to whether Plaintiff’s and the Government Attorney’s political opinions may have affected investigative decisions. *Id.* Below is a small sample of the text messages exchanged between Plaintiff and the Government Attorney, as described in the OIG Report:

**July 21, 2016:**

Plaintiff: Trump is a disaster. I have no idea how destabilizing his Presidency would be.

**July 31, 2016:**

Plaintiff: And damn this [the Russia investigation] feels momentous. Because this matters. The other one [the Clinton E-Mail investigation] did too, but that was to ensure we didn’t F something up. This matters because this MATTERS.

**August 8, 2016:**

GA: [Trump’s] not ever going to become president, Right?  
Plaintiff: No. No he’s not. We’ll stop it.

**August 15, 2016:**

Plaintiff: I want to believe the path you threw out for consideration in [DD’s] office—that there’s no way [Trump] gets elected—but I’m afraid we can’t take that risk. It’s like an insurance policy in the unlikely event you die before you’re 40. . .

**August 26, 2016:**

Plaintiff: Just went to a southern Virginia Walmart. I could SMELL the Trump support. . . .

**October 19, 2016:**

Plaintiff: I am riled up. Trump is a fucking idiot, is unable to provide a coherent answer.

**November 7, 2016: (referencing an article titled “A victory by Mr. Trump remains Possible”)**

Plaintiff: OMG THIS IS F\*CKING TERRIFYING.

**March 14, 2017:**

GA: Finally two pages away from finishing [All The President’s Men]. Did you know the president resigns in the end?? ☺

Plaintiff: What?!?! God, that we should be so lucky.

**May 18, 2017 (after the GA had just joined the Special Counsel’s investigation):**

Plaintiff: For me, and this case, I personally have a sense of unfinished business. I unleashed it with [the Clinton email investigation]. Now I need to fix it and finish it. . . . Who gives a f\*ck, one more A[ssistant] D[irector] . . . [versus] [a]n investigation leading to impeachment?” . . . [Y]ou and I both know the odds are nothing. If I thought it was likely I’d be there no question. I hesitate in part because of my gut sense and concern there’s no big there there.

OIG Report at 400, 403-05.

Upon review of Plaintiff’s text messages, the OIG was “particularly concerned” that they “potentially indicated or created the appearance that investigative decisions they made were impacted by bias or improper considerations.” *See* OIG Report at ix. The OIG pointed to, in particular, Plaintiff’s August 8, 2016 text message stating that “‘we’ll stop’ candidate Trump from being elected,” which gave rise to the implication that Plaintiff was “willing to take official action to impact a presidential candidate’s electoral prospects.” *Id.* The OIG Report is replete with other examples of how Plaintiff evidenced political bias—or, at best, created the perception of bias. *See, e.g., id.* at 399-410.

Plaintiff does not dispute the existence of the text messages that led to his dismissal. Indeed, Plaintiff quotes several—though far from all—in his Complaint. *See* Compl. ¶ 29. Moreover, Plaintiff acknowledged to the OIG that

his text messages could be read to suggest that [Plaintiff] held himself responsible for Trump’s victory and Clinton’s defeat because of the Midyear investigation and that he viewed the Russia investigation as providing him an opportunity to ‘fix’ this result by working on an investigation that could result in the impeachment of President Trump.

OIG Report at 405. Plaintiff also does not appear to dispute the OIG’s conclusion that his text messages with the Government Attorney “cast a cloud over the FBI’s handling of the Midyear investigation and the investigation’s credibility.” *Id.* at iii.

When the OIG learned of the existence of the text messages between Plaintiff and the Government Attorney in the summer of 2017, both Plaintiff and the Government Attorney were members of Special Counsel Mueller’s staff. The OIG informed Special Counsel Mueller of the text messages, and Plaintiff was removed from the Special Counsel’s investigation on July 28, 2017. *Id.* at 397.

On December 2, 2017, the New York Times and the Washington Post each reported on the existence of Plaintiff’s text messages with the Government Attorney and his removal from the Special Counsel’s investigation. *See* Compl. ¶ 60; *Top FBI Official Assigned to Mueller’s Russia Probe Said To Have Been Removed After Sending Anti-Trump Texts*, Washington Post (Dec. 2, 2017), [https://www.washingtonpost.com/world/national-security/two-senior-fbi-officials-on-clinton-trump-probes-exchanged-politically-charged-texts-disparaging-trump/2017/12/02/9846421c-d707-11e7-a986-d0a9770d9a3e\\_story.html](https://www.washingtonpost.com/world/national-security/two-senior-fbi-officials-on-clinton-trump-probes-exchanged-politically-charged-texts-disparaging-trump/2017/12/02/9846421c-d707-11e7-a986-d0a9770d9a3e_story.html); *Mueller Removed Top Agent in Russia Inquiry Over Possible Anti-Trump Texts*, NY Times (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/politics/mueller-removed-top-fbi-agent-over-possible-anti-trump-texts.html>.

Shortly thereafter, the chairmen of congressional committees in both the U.S. House of Representatives and the U.S. Senate (“Congressional Committees”) made verbal and written inquiries to the Department regarding the existence and substance of the text messages. Declaration of Stephen Boyd ¶ 7 (“Boyd Decl.”) (Exhibit 2). These inquiries included written requests for the Department to produce the text messages to Congress for oversight purposes. *Id.* In order to respond to Congress, the Department requested the text messages from the OIG, which provided an initial subset of the total universe of discovered text messages between Plaintiff and the Government Attorney that the OIG considered particularly troubling. *Id.* ¶ 8. After receiving that subset of the text messages, the Department redacted them to remove non-political, personally sensitive and law enforcement information. *Id.* ¶ 9.

The Department made its initial hard copy production of the redacted text messages to the Congressional Committees on the evening of December 12, 2017, and subsequent productions to the Congressional Committees followed. *Id.* ¶ 11. The Department also determined that it would be appropriate to make the same subset of redacted text messages available to members of press. *Id.* ¶ 12. The Department did so after consulting with the appropriate senior member of Department career staff—Peter Winn, Director of the Office of Privacy and Civil Liberties and Acting Chief Privacy and Civil Liberties Officer—who reviewed the text messages to determine whether disclosing them in redacted form to the media would be permissible under the Privacy Act. *See* Declaration of Peter Winn ¶¶ 3-4 (“Winn Decl.”) (Exhibit 3).

As described in his accompanying declaration, Mr. Winn considered that the routine use in an OIG Systems of Records Notice, or SORN, permits compatible disclosures “[t]o the news media and the public, including disclosures pursuant to 28 C.F.R. § 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an

unwarranted invasion of personal privacy.” *Id.* ¶ 10 (quoting Office of the Inspector General Privacy Act of 1974, 82 Fed. Reg. 36,725, 36,726 (July 5, 2007)). Based on his review of the text messages provided to him, and assuming the text messages were contained in an OIG system of records, Mr. Winn concluded that the public interest outweighed the privacy interest of Plaintiff and the Government Attorney and the relevant routine use would permit disclosure. Accordingly, Mr. Winn concluded that the Department’s disclosure of the text messages would not violate the Privacy Act, and Mr. Winn so advised senior leadership within the Department. *Id.* ¶¶ 11-18.<sup>2</sup> Senior leadership then made the decision to release the records. *See* Boyd Decl. ¶ 13.

Fast forward several months, and the FBI’s Office of Professional Responsibility (“OPR”) was weighing what action should be taken with respect to Plaintiff’s conduct. On June 15, 2018, OPR staff proposed dismissing Plaintiff from the FBI based on its finding that he: (1) engaged in unprofessional conduct by making inappropriate political comments in text messages on his FBI-issued cell phone, in violation of FBI Offense Code 5.21; (2) utilized a personal email account to conduct official FBI business, in violation of FBI Offense Code 5.18; and (3) failed to diligently pursue a credible lead when new information was brought forth regarding the Clinton private server investigation, in violation of FBI Offense Code 1.7. *See generally* Proposal Letter.

With the assistance of his attorneys, Plaintiff provided a written response to OPR’s recommendation and participated in an oral hearing at which he defended his conduct. *See* Letter of Candice M. Will, Assistant Director, OPR, Aug. 8, 2018 at 18 (“Will Letter”) (Exhibit 4). In

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<sup>2</sup> As the Inspector General explained in his December 15, 2017 letter to the leadership of congressional oversight committees, the OIG did not object to the release of the FBI text messages to Congress, if the Department determined that legal restrictions did not prohibit it from doing so. The Inspector General also stated in his letter that the Department did not consult OIG regarding the disclosure to the media. *See* <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Nadler%20Raskin%20Response%20Letter.pdf>.

July 2018, Plaintiff and his attorney also signed a “Last Chance” Adjudication Agreement, in which Plaintiff requested, in lieu of dismissal, that OPR reduce the proposed penalty of dismissal “to a 60-day suspension, in which Offense Codes 5.21 and 5.18 are substantiated, Offense Code 5.2 (Dereliction of Supervisory Responsibility) be substituted for Offense Code 1.7, and he be demoted to a non-supervisory position.” “Last Chance” Adjudication Agreement for Peter P. Strzok II (July 2018) (Exhibit 5). In exchange for a reduced punishment, Plaintiff proposed that he would, among other things, complete a suspension of 60 days and be subject to removal from the rolls of the FBI if he were to engage in any other serious misconduct. *Id.*

In a letter dated August 8, 2018, the career Assistant Director (“AD”) for OPR, Candice M. Will, analyzed the OPR’s staff’s recommendation, together with Plaintiff’s written and oral responses and Plaintiff’s “Last Chance” Adjudication Agreement. *See generally* Will Letter. As described in her letter, AD Will reviewed the available information and analyzed Plaintiff’s conduct according to the twelve factors articulated in the Merit Systems Protection Board’s decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). *Id.*<sup>3</sup> AD Will determined, based on her weighing of those factors, to suspend Plaintiff from duty without pay for 60 days and to demote him to a non-supervisory position. *Id.* at 23.

Before the FBI took any official employment action with respect to Plaintiff’s misconduct, and before the FBI informed Plaintiff of AD Will’s decision, the FBI’s Deputy Director (“DD”), David Bowdich, reviewed relevant evidence and the *Douglas* factors. *See generally* Letter of

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<sup>3</sup> In *Douglas*, the Merit Systems Protection Board recognized twelve factors “generally recognized as relevant” in determining the appropriateness of a penalty. Those factors include, among others: (1) the employee’s job level and type of employment; (2) the employee’s past disciplinary record; (3) the employee’s past work record; and (4) the consistency of the penalty with those imposed upon other employees for the same or similar offenses. *Douglas*, 5 M.S.P.R. at 305-06.

David Bowdich, FBI Deputy Director, Aug. 9, 2018 (“Bowdich Letter”) (Exhibit 6). On August 9, 2018, DD Bowdich exercised his delegated authority, consistent with FBI policy, to modify disciplinary actions as necessary to advance the best interests of the FBI. *See* Bowdich Letter at 1; *see also* FBI Policy Directive 0915D, *Disciplinary Appeals Process* § 4.3 (Exhibit 7). Pursuant to that authority, DD Bowdich reconsidered AD Will’s decision and concluded that dismissal was appropriate based on all of the facts. *See* Bowdich Letter at 1. DD Bowdich concurred with AD Will that the three offenses were substantiated; however, as he explained in his letter, DD Bowdich disagreed with AD Will’s evaluation of the relevant *Douglas* factors in deciding the appropriate penalty. *Id.*

In his letter, DD Bowdich explained that he had reviewed relevant evidence pertaining to Plaintiff’s case, including text messages between Plaintiff and the Government Attorney, Plaintiff’s role as one of the most senior counterintelligence agents in the FBI, and Plaintiff’s many years of service. *Id.* DD Bowdich concluded that—notwithstanding Plaintiff’s 21 years of service—“serious aggravation is warranted for your [FBI Offense Code] 5.21 offense given the severe, long-term damage your conduct has done to the reputation of the FBI.” *Id.* DD Bowdich explained that, as “a Deputy Assistant Director in the Counterintelligence Division, you were expected to be a leader who was beyond reproach and to set an example for not only your direct subordinates, but others throughout the organization who watched and observed your behavior and actions.” *Id.* DD Bowdich also noted that it was “difficult to fathom the repeated, sustained errors of judgment you made while serving as the lead agent on two of the most high-profile investigations in the country,” and that Plaintiff’s “sustained pattern of bad judgment in the use of an FBI device called into question the decisions made during both the Clinton E-Mail investigation and the initial stages of the Russian collusion investigation.” *Id.* In short, Plaintiff’s “repeated

selfishness has called into question the credibility of the entire FBI.” *Id.* DD Bowdich indicated that his decision to dismiss Plaintiff was final and not subject to further administrative review. *Id.*

The FBI updated Plaintiff’s personnel file with an official Standard Form (“SF”) 52, Request for Personnel Action, which terminated Plaintiff from his FBI position effective August 10, 2018. *See* Pl.’s SF 52 (Exhibit 8). The following day, on August 11, 2018, the FBI issued a SF 50, Notice of Personnel Action to Plaintiff, officially alerting him of his termination. *See* SF 50 (Exhibit 9).

On September 5, 2018, Plaintiff filed an appeal of the FBI’s dismissal decision with the Merit Systems Protection Board (“MSPB”), which was dismissed for lack of jurisdiction by an Administrative Judge (AJ) on November 15, 2018. *See* MSPB Initial Decision (Exhibit 10). The AJ concluded that, as a member of the FBI SES, Plaintiff did not occupy a position that gave him appeal rights to the MSPB under the Civil Service Reform Act of 1978 (“CSRA”), Pub. L. No. 95-454, 92 Stat. 1111, as amended, codified throughout Title 5 of the United States Code. *Id.* at 9.

Plaintiff filed this action on August 6, 2019. Compl., ECF No. 1. Plaintiff’s Complaint names the Attorney General and the Director of the FBI, in their official capacities, as well as the Department of Justice and the FBI. *Id.* ¶¶ 9-12. Plaintiff alleges that, by removing him from the rolls of the FBI, Defendants engaged in viewpoint discrimination in violation of the First Amendment, *id.* ¶¶ 72-74, and deprived him of protections he claims are required by the Due Process Clause, *id.* ¶¶ 76-77. Plaintiff also alleges violations of the Privacy Act based on alleged disclosures of his text messages with the Government Attorney to the news media. *Id.* ¶¶ 79-82.

#### **STANDARD OF REVIEW**

To withstand a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that

is plausible on its face.”” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under *Iqbal* and *Twombly*, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Plausibility” represents something less than “probability,” but it does require “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* (citation omitted). If the well-pleaded facts of a complaint do not suggest more than the mere possibility of a violation, the complaint has failed to show that the plaintiff is entitled to relief and cannot survive application of Rule 12(b)(6). *Id.*

Likewise, a complaint cannot substitute conclusions of law and other conclusory assertions for well-pleaded allegations of fact and hope to withstand a motion to dismiss. In particular, conclusions of law are not to be accepted as true. *Id.* By the same token, “bare assertions . . . amount to nothing more than a formulaic recitation of the elements of a . . . claim[,] and therefore are not entitled to be assumed true.” *Id.* at 698 (citation omitted).

In deciding a motion to dismiss under Rule 12(b)(6), courts may consider not only the well-pleaded allegations of the complaint, but also materials “incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.” *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 867 n.\* (D.C. Cir. 2008) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed.)); *see also Marshall v. Honeywell Tech. Sols. Inc.*, 536 F. Supp. 2d 59, 65-66 (D.D.C. 2008) (document

referred to in complaint and central to plaintiff's claim may be considered under Fed. R. Civ. P. 12(b)(6)) (citing *Vanover v. Hantman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999)).

Rule 56(a) of the Federal Rules of Civil Procedure provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Although a court should draw all inferences from the supporting records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment." *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 112 (D.D.C. 2003) (citation omitted). Rather, the dispute must regard a question of fact that is material, meaning that it is "capable of affecting the substantive outcome of the litigation." *Id.* That is determined by "look[ing] to the substantive law on which each claim rests." *Mori v. Dep't of the Navy*, 731 F. Supp. 2d 43, 45 (D.D.C. 2010) (citation omitted), *dismissing appeal*, 2010 WL 5371504 (D.C. Cir. 2010). The dispute must also be genuine, meaning that it is "supported by sufficiently admissible evidence such that a reasonable trier-of-fact could find for the nonmoving party." *Pro-Football*, 284 F. Supp. 2d at 112.

## **ARGUMENT**

### **I. PLAINTIFF'S INTEREST IN SPEAKING WAS OUTWEIGHED BY THE FBI'S INTEREST IN ENSURING CONTINUED INTEGRITY OF ITS MISSION.**

Plaintiff alleges that he was removed from his position because of the political viewpoints he expressed in the text messages he exchanged with the Government Attorney—specifically his statements critical of first Candidate, and then President, Trump. Compl. ¶¶ 32-34. Plaintiff's First Amendment claim fails as a matter of law, as discussed below.

Although government employees "do not surrender all their First Amendment rights by reason of their employment," *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), it is well-settled that a "governmental employer may subject its employees to such special restrictions on free

expression as are reasonably necessary to promote effective government,” *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980), and that those restrictions may include those that would be unconstitutional if applied to the general public, *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004).

Plaintiff’s Complaint appears to attempt to sketch the contours of a First Amendment claim governed by *Pickering v. Board of Education Township High School District 205, Will County*, 391 U.S. 563 (1968), which articulated the balancing test required to evaluate government employees’ free speech rights against those of their government employer. The *Pickering* balancing test has four elements. First, the public employee must have been speaking on a matter of public concern. See *Connick v. Myers*, 461 U.S. 138, 146-47 (1983). Second, the Court must balance the interests of the employee, “as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568. Third, the employee must provide that his speech was a substantial or motivating factor in his discharge. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Finally, the government employer must have an opportunity to prove it would have reached the same decision even absent the protected conduct. *Id.* “The first two of the four questions set forth above are questions of law for the court to resolve.” *Navab-Safavi v. Glassman*, 637 F.3d 311, 316 (D.C. Cir. 2011).

Defendants acknowledge that Plaintiff’s speech regarding the 2016 election is, broadly speaking, related to a matter of public concern. However, as discussed below, Defendants still prevail under *Pickering*—even at this early stage—because the FBI’s interest in “promoting the efficiency of the public services it performs through its employees” clearly outweighed Plaintiff’s interest as a citizen in exchanging texts of a political and highly damaging nature with the Government Attorney. 391 U.S. at 568. The *Pickering* balance tips strongly in Defendants’ favor

because Plaintiff's speech relates directly to his governmental duties—*i.e.*, his key roles on the Clinton e-mail and Russian interference investigations, making the potential damage to the government particularly great. Plaintiff's First Amendment claim also cannot succeed because of his policy-level role within the FBI, which imposed upon him a greater burden of caution with respect to his speech—a burden Plaintiff clearly failed to meet. *See Hall v. Ford*, 856 F.2d 255, 258-59 (D.C. Cir. 1988); *see also McEvoy v Spencer*, 124 F.3d 92, 103 (2d Cir. 1997); *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993); *Kinsey v. Salado Indep. Sch. Dist*, 950 F.2d 988, 994 (5th Cir. 1992). The time, place, and manner in which Plaintiff engaged in that speech also significantly decreases its weight in the *Pickering* framework.

Significantly, the government is not required to point to actual, manifest harm to justify its decision to remove Plaintiff from his position; to the contrary, the Court may draw “reasonable inferences” of harm in balancing the interests under *Pickering*. As the D.C. Circuit explained in *Hall v. Ford*, “[a]lthough unadorned speculation as to the impact of speech, whether public or private, on the government’s enterprise will not suffice,” courts may draw “reasonable inferences of harm from the employee’s speech, his position, and his working relationship with his superior.” 856 F.2d at 261. Here, as discussed below, based on the very significant potential for harm to the FBI’s mission, Plaintiff cannot plausibly show that his interest in exchanging texts on his FBI-issued phone outweighed the FBI’s interests in promoting the efficiency of its public service by protecting its reputation as a trusted, non-partisan investigative institution.

**A. The Bureau’s Compelling Interest in Objectivity and in Avoiding Appearance of Political Bias Cannot Be Overstated.**

Courts have recognized that a government employer’s interest in impartiality—and even the appearance of impartiality—justifies limits on employee First Amendment activity. *See, e.g.*, *U. S. Civil Serv. Comm’n v. Nat'l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565-66 (1973)

(noting “this great end of Government—the impartial execution of the laws”). As the Supreme Court has explained, “a democracy is effective only if the people have faith in those who govern.” *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961). Accordingly, the government has a legitimate interest in regulating activity that “might generate [an] . . . appearance of improper influence.” *U.S. v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 473 (1995) (“NTEU”); *see also U.S. Civil Service*, 413 U.S. at 565 (“[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent”). The FBI’s Core Values include fairness, uncompromising personal and institutional integrity, and leadership by example both professionally and personally. *See* FBI’s Domestic Investigations and Operations Guide, Section 3.1. As a law enforcement agency, the FBI must be above the political fray and beyond reproach in order to fulfill its duties. The government’s interest in objectivity, therefore, is particularly strong as to the FBI, and weighs heavily against Plaintiff’s First Amendment claim.

**B. The *Pickering* Balance Weighs in Defendants’ Favor Because of Plaintiff’s Role and the Work-Related Content of His Speech.**

Plaintiff’s personal interest in the speech in the relevant text messages was significantly diminished—and, conversely, the FBI’s interest in regulating Plaintiff’s speech was particularly great—for at least two separate reasons: (1) the text messages were related to investigations in which Plaintiff himself played a key role, and (2) Plaintiff occupied a high-level position within the Bureau.

1. Plaintiff’s Speech Was Directly Related to His Role in the Clinton E-Mail and Russian Interference Investigations.

When evaluating the government’s interest under *Pickering*, courts should consider whether the relevant speech “impairs discipline by superiors or harmony among co-workers, has

a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). In short, this element "focuses on the effective functioning of the public employer's enterprise." *Id.* Courts have recognized that such impairment is particularly acute when there is a need for the appearance of impartiality, and the speech touches directly on a governmental employee's work. *See, e.g.*, *Navab-Safavi*, 637 F.3d at 316-17; *Locurto v. Giuliani*, 447 F.3d 159, 174 (2d Cir. 2006) (distinguishing between off-duty speech on the basis of whether it was work related).

The D.C. Circuit's decision in *Navab-Safavi v. Glassman* is instructive on this point. Ms. Navab-Safavi was a contract employee of the Broadcasting Board of Governors, the federal government agency that oversaw the Voice of America network and, indirectly, the Persian News Network at the time. 637 F.3d at 313. Her primary responsibility was to translate material into Farsi and to provide voice-overs of content approved by an editor. *Id.* The Board terminated Ms. Navab-Safavi after learning that she had appeared in a music video criticizing the United States' participation in the Iraq war, citing the Board's weighty interest in its journalistic integrity and the risk that Ms. Navab-Safavia's appearance in that video could undermine the Board's mission. *See id.* at 313, 316-17. The court rejected the Board's argument that its interest in impartiality outweighed Ms. Navab-Safavi's First Amendment interest, finding that Ms. Navab-Safavi's speech did not address matters within her work responsibilities, and that her role "fell on the side nearer the role of [a] janitor" rather than that of "an on-the-air editorialist for [Voice of America] or a top executive." *Id.* at 317.

Contrast the facts in *Navab-Safavi* with those in this case. Plaintiff was the senior Special Agent in charge of the Clinton e-mail investigation and a key member of the team investigating

Russian interference in the 2016 Presidential election. Compl. ¶ 15. Plaintiff's speech, moreover, was squarely related to his job duties and called into question whether his personal political views influenced his work, undermining public confidence in the FBI's role as an impartial law enforcement agency. *See generally* Bowdich Letter. Accordingly, Plaintiff had a significantly reduced First Amendment interest, and the government's corresponding interest in protecting its operations and reputation as a nonpartisan, unbiased institution were particularly great.

As the OIG detailed at length in its Report, and as DD Bowdich described in his August 9, 2017 letter, Plaintiff's text messages also risked serious harm to the FBI's mission by undermining its perception of professionalism and impartiality. *See* OIG Report at 420-21 ("[W]hen one senior FBI official, Strzok, who was helping to lead the Russia investigation at the time, conveys in a text message to another senior FBI official, [the Government Attorney], that 'we'll stop' candidate Trump from being elected . . . it is not only indicative of a biased state of mind but, even more seriously, implies a willingness to take official action to impact the presidential candidate's electoral prospects."); Will Letter at 20 ("You admitted that your texts 'without question' constituted 'horrible judgment' and have done significant damage to the reputation of the FBI."); Bowdich Letter at 1-2 ("[Y]our sustained pattern of bad judgment in the use of an FBI device called into question the decisions made during both the Clinton E-Mail investigation and the initial stages of the Russian collusion investigation."). Given that Plaintiff's speech related directly to investigations for which he had significant responsibility, and in light of the effect the text messages had on the FBI's efficient operation, Plaintiff's dismissal was permissible under *Pickering*.

2. Plaintiff Occupied a High-Level Position.

The *Pickering* analysis further tips in Defendants' favor because Plaintiff held a high-level position within the FBI. “[T]he higher the level the employee occupies, the less stringent the government’s burden of proving interference with its interest.” *Hall*, 856 F.2d at 261 (citing *Rankin*, 483 U.S. at 390-91). A higher-level employee bears a greater “burden of caution” as to his or her speech, depending upon “the extent of authority and public accountability the employee’s role entails.” *Id.* That stands in sharp contrast to the relative burdens in the case of lower-level employees who serve “no confidential, policymaking, or public contact role.” *Id.* The basis for this distinction is self-evident: “High-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their superiors’ policies, and perceived by the public as sharing their superiors’ aims.” *Id.* at 263.

As the senior FBI Special Agent in charge of the investigation into former Secretary Clinton’s use of a private email server, and then, beginning in September 2016, as the Deputy Assistant Director for the Counterintelligence Division, Plaintiff fell squarely within this “narrow band” of relationships subject to a “greater burden of caution.” *Hall*, 856 F.2d at 261-63. Three main questions guide the Court in determining whether an employee falls within this category. First, the Court must ask “whether the employee’s position relates to an area as to which there is room for principled disagreement on goals or their implementation. . . . In other words, is it a *policy* area?” *Id.* at 264. If so, the Court must next ask “whether the office gives the employee broad responsibilities with respect to policy formulation, implementation, or enunciation. Put differently, was the individual a *policy level* employee?” *Id.* Finally, if both those criteria are met, the Court must ask “whether the government interest in accomplishing its organizational objectives

through compatible policy level deputies is implicated by the employee’s speech.” *Id.* In light of these factors, Plaintiff was clearly subject to greater burden of caution regarding his speech.

*i. Plaintiff’s Position Fell within a Policy Area.*

The allegations in Plaintiff’s complaint establish that his former position at the FBI related to areas in which there is “substantial room for principled disagreement on goals or their implementation.” *Id.* at 264. As Plaintiff explains, in many cases, he led “some of the most high profile and sensitive investigations in recent history.” Compl. ¶ 15. For example, he “oversaw the investigation of Edward Snowden and literally dozens of spies, including investigations into the most significant U.S. losses of classified information in the past two decades.” *Id.* Particularly relevant here, Plaintiff “was assigned to lead the criminal investigation of former Secretary Hillary Clinton’s use of a private email server,” and Plaintiff was one of the “key members” in the FBI’s investigations into Russian interference in the 2016 Presidential election.” *Id.*

These allegations alone are sparse—and do not begin to illustrate Plaintiff’s full responsibilities—but they more than suffice to meet this criterion of the test articulated in *Hall*. Overseeing and leading investigations involves leadership and guidance as to both day-to-day activities and the long-term directions those investigations would take. Insofar as there are numerous policy decisions as to each aspect of Plaintiff’s former role, his own allegations plainly suggest a position that involves “room for principled disagreement on goals or their implementation.” *Hall*, 856 F.2d at 264 (finding that an “Athletic Directorship clearly is a position that relates to policy concerns,” because there could be “principled disagreement on the formulation and implementation of goals,” such as “which sports to emphasize”).

Plaintiff’s allegations regarding his responsibilities, of course, can be supplemented by information incorporated by reference in the complaint and matters of public record. And those materials establish definitively the policy nature of Plaintiff’s position. As the OIG Report

explains, and as is confirmed in Deputy Director Bowdich’s decision letter, Plaintiff served—not only as the lead investigator for some of the FBI’s most high-profile matters—but also Deputy Assistant Director for the Counterintelligence Division of the FBI. *See* OIG Report at 43 n.51; Bowdich Letter at 2. In his role as a Deputy Assistant Director, Plaintiff was “responsible for managing and overseeing foreign counterintelligence [ ] investigative matters nationwide,” and for, among other things, the “promulgation of [counterintelligence] policy.” SES Job Posting Information Form, Job Posting Number 20160948 (Exhibit 11); *see also* Deputy Assistant Director Position Description (Exhibit 12) (explaining that Plaintiff’s position “exercises authority in establishing and revising important policies). Plaintiff’s leadership position as the head of the Counterterrorism Division leaves no doubt that he was in a position to shape Bureau policy and/or its implementation.

*ii. Plaintiff’s Position Was at a Policy Level.*

Plaintiff’s allegations likewise establish that his authority and responsibilities were sufficiently extensive that he occupied a policy level position. The “relevant indicia” of policy-making authority include: “vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.” *Hall*, 856 F.2d at 262. Most are present here based only on the allegations in Plaintiff’s complaint. There is no question that, over the course of 21 years at the FBI, Plaintiff developed significant technical competence. By his own description, Plaintiff led some of the FBI’s most important and politically charged investigations. He was also a member of the SES, Compl ¶ 33, which itself indicates a senior level of responsibility and authority, as well as relatively high pay and programmatic influence. *See* 5 U.S.C. § 3131 (describing the purpose of the Senior Executive Service); *see also* SF 52 (indicating Plaintiff’s salary exceeded \$225,000 at

the time of his dismissal). That Plaintiff was in a policy level position is further confirmed by the OIG Report and the materials incorporated by reference into the Complaint, which confirm that Plaintiff occupied the supervisory position of Deputy Assistant Director of the FBI's Counterintelligence Division. *See* OIG Report at 43 n.51; Bowdich Letter at 2. As described above, Plaintiff enjoyed broad responsibility in that position. Among many other functions, Plaintiff served as the principal management official and advisor to executive FBI management with regard to all matters under his jurisdiction at the Deputy Assistant Director of Counterintelligence for the FBI. *See* Deputy Assistant Director Position Description. Plaintiff's former position thus qualifies as "policy-level."

*iii. The FBI's Interests Were Implicated by Plaintiff's Speech.*

Finally, there is no plausible argument that Plaintiff's speech did not implicate the FBI's interest in preserving its perception of impartiality and operational efficacy. As explained in *Hall*, to satisfy this criterion, the speech at issue "must relate to policy areas for which [the employee] is responsible." 856 F.2d at 264. Here, that test is easily satisfied on the complaint allegations alone.

Plaintiff and the Government Attorney's controversial and politically charged text messages directly addressed the investigation into former Secretary Clinton's use of a private server—an investigation that Plaintiff himself led. *See, e.g.*, Compl. ¶ 15; OIG Report at 396-400 (discussing Plaintiff's and the Government Attorney's role in the Midyear investigation and quoting a sampling of text messages). Plaintiff and the Government Attorney also exchanged similarly politically charged text messages—including at least one that arguably suggested the President should be impeached—when both Plaintiff and the Government Attorney were working on Special Counsel Mueller's investigation into Russian interference into the 2016 election. OIG Report at 396-400. These text messages go to the heart of Plaintiff's responsibilities as a leader

or “key player” in those two investigations, Compl. ¶ 15, and implicate the FBI’s interest in maintaining effective operations and public confidence, *see, e.g.*, Bowdich Letter.

**C. The Content, Manner, Time, and Place of Plaintiff’s Speech Further Reduces the Weight of Its Importance under *Pickering*.**

In addition to Plaintiff’s policy-level position, and the great public trust that the FBI placed in him, the “content, manner, time and place” of Plaintiff’s speech are relevant factors when “weighing the governmental interest in regulating the speech.” *O’Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir 1998). It is beyond dispute that Plaintiff’s texts with the Government Attorney, which led to his dismissal, were conducted on his FBI-issued phone, *see, e.g.*, Proposal Letter at 3, which weighs heavily in favor of Defendants in the *Pickering* analysis. The FBI has, of course, invested significant resources into its communications systems and therefore has broad authority to regulate how they are used. Courts, moreover, regularly uphold Government restrictions on speech conducted via its own channels of communication. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 48 (1983); *Bryant v. Gates*, 532 F.3d 888, 896 (D.C. Cir. 2008). The FBI may, of course, discipline an employee without violating the Constitution when that employee uses the FBI’s equipment at the expense of one of the agency’s core principles. *See, e.g., Waldau v. Coughlin*, Civ. A. No. 95-1151 (LFO), 1997 WL 161958, at \*6 (D.D.C. Apr. 1, 1997) (“Plaintiff’s liberty interest in speaking on matters of public concern is diminished by the fact that plaintiff used government property to do so.”), *aff’d*, No. 97-5162, 1997 WL 634539 (D.C. Cir. Sept. 25, 1997) (per curiam).

Some of Plaintiff’s more than 40,000 text messages with the Government Attorney seemingly took place while Plaintiff was on duty. *See* OIG Report at 397.<sup>4</sup> The Government’s

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<sup>4</sup> Although some of the over 40,000 text messages between Plaintiff and the Government Attorney appeared to originate during work hours when Plaintiff was on duty, OPR did not factor

interest in regulating its employees, during official time, on government property, and using government equipment, is paramount, and easily tips the balance in the FBI’s favor. *See Waldau*, 1997 WL 634539 at \*6 (finding government had “strong interest in terminating” employee who, on government time, used a government computer to express his views on privatization of the Postal Service); *see also Davis v. Billington*, 51 F. Supp. 3d 97, 122 (D.D.C. 2014) (concluding Congressional Research Employee’s interest in speaking was diminished based on his concession that he “used at least some CRS time and resources” when engaging in political speech).

The fact that the relevant speech very likely occurred, at least in part, during work hours strongly favors the Government’s interest in regulating it. Although “[e]mployees in some cases may receive First Amendment protection for expressions made at work,” *Garcetti*, 547 U.S. at 420, “the fact that [an employee], unlike Pickering, exercised her rights to speech at the office supports [the employer’s] fears that the functioning of his office was endangered,” *Connick*, 461 U.S. at 153. Thus, courts routinely distinguish between speech that is prepared during work hours and speech that is entirely made outside of the office. *See, e.g., NTEU*, 513 U.S. at 466 (emphasizing that “[t]he speeches and articles . . . were made outside the workplace,” among other things); *Navab-Safavi*, 637 F.3d at 313-14 (“VOA resources were not involved in making the video and Navab-Safavi worked on the video only during non-work hours.”). The FBI properly pays its employees to spend their work days furthering FBI’s statutory mission—not undermining it at government expense.

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into its analysis the likelihood that Plaintiff and the Government Attorney exchanged texts during work hours, “due to the uncertain nature of [Plaintiff’s] work schedule on the specific days related to this inquiry.” Proposal Letter at 1 n.1. That at least some of the text messages at issue were likely sent during work hours is still relevant for the Court’s evaluation of Plaintiff’s constitutional claim, however.

Another aspect of the manner of Plaintiff’s speech that weighs against his claim is its vulgar, vituperative, and *ad hominem* character. The First Amendment does not require an employer to tolerate such speech, even if it touches on a matter of public concern. *See, e.g.*, *Mitchell v. Hillsborough Cty.*, 468 F.3d 1276, 1288 (11th Cir. 2006); *Germann v. City of Kansas City*, 776 F.2d 761, 764-65 (8th Cir. 1985) (discussing harsh and distrustful tone of employee’s letter as important factor in *Pickering* balancing); *Craven v Univ. of Colo. Hosp. Auth.*, 260 F.3d 1218, 1228-29 (10th Cir. 2001) (relying on the abrasive, offensive manner of employee’s speech). A review of Plaintiff’s text messages quoted above—and more fully set forth in the OIG Report—quickly illustrate the base tone of Plaintiff’s discourse. *See, e.g.*, OIG Report at 399 (quoting Plaintiff’s text stating “OMG [Trump’s] an idiot”); *id.* at 400 (quoting Plaintiff’s texts referring to then-Candidate Trump as a “fucking idiot” and stating that he could “SMELL” support for then-Candidate Trump at a “southern Virginia Walmart”). Plaintiff’s First Amendment interests should be weighed accordingly.

\* \* \*

At bottom, Plaintiff cannot plausibly allege that he was removed because of the viewpoints expressed in his speech, or because of any Tweets authored by the President. Rather, he was removed because of the potential harm that his repeated lapses of judgment did to the FBI. It was entirely reasonable—and certainly constitutional—for DD Bowdich to conclude that the FBI’s reputation for impartiality, objectivity, and non-partisanship was directly harmed by Plaintiff’s actions, and DD Bowdich removed Plaintiff accordingly.

## **II. PLAINTIFF’S DUE PROCESS CLAIM IS MERITLESS.**

Plaintiff received notice of the bases of his proposed dismissal and the opportunity, which he availed himself of, to provide a written response and to have an oral hearing on the bases for

his dismissal. All the while, Plaintiff was assisted by highly capable counsel. But the outcome of this process obviously was not what Plaintiff sought. Plaintiff thus contends that he was denied due process by being deprived of a property interest in his employment. *See Compl.* ¶ 77. Not so. As discussed below, Plaintiff did not have a property interest in his job, and therefore he cannot maintain a due process claim. But even putting that dispositive point aside, Plaintiff received more than enough due process to satisfy the Constitution. *See generally Twist v. Meese*, 854 F.2d 1421, 1428 (D.C. Cir. 1988) (“[G]iven the fact that Twist received advance notice, an on-the-record hearing, and an opportunity to submit a written answer to the charges against him, even if Twist had a property right to his continued employment, which we have held he does not, he has received all the process to which he would be due.”).

#### **A. Plaintiff Had No Property Interest in His Former Job.**

“The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest . . . Only after finding the deprivation of a protected interest do [courts] look to see if the [government’s] procedures comport with due process.” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). Plaintiff alleges that he was deprived of a property interest; however, under clearly established law, this allegation is without.

An employee has a property interest in a government position only if, under the law, “he did not serve in his job at his employer’s ‘will,’ but he could be removed only ‘for cause.’” *Thompson v. Dist. of Columbia*, 530 F.3d 914, 918 (D.C. Cir. 2008) (citation omitted). Here, Plaintiff did not enjoy for-cause removal protections: Although Chapter 75 of the CSRA provides such protections for many federal employees, 5 U.S.C. §§ 7511, 7513, it generally excludes FBI employees, 5 U.S.C. § 7511(b)(8). Indeed, numerous courts—including one in this district—have held that FBI personnel lack a protected property interest in their jobs. *See, e.g., Lamb*, 82 F. Supp.

3d at 424-25; *Mack v. United States*, 814 F.2d 120, 123 (2d Cir.1987); *Painter v. FBI*, 694 F.2d 255, 257 (11th Cir. 1982).

Veterans, like Plaintiff, may in some circumstances be “preference-eligible,” meaning they are entitled to for-cause protections. *See 5 U.S.C. § 2108(3)*. However, because Plaintiff was a member of the FBI’s SES, he was excluded from that statutory status. *Id.* (“preference eligible” . . . does not include applicants for, or members of, the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service.”) Thus, as a non-preference eligible FBI employee, Plaintiff was excluded from the CSRA’s for-cause protections and, by extension, any viable argument that he has a property interest in his former job. Absent a protected property interest in his job, Plaintiff cannot seek reinstatement as a remedy for any alleged due process violations. *See Doe v. Dep’t of Justice*, 753 F.2d 1092, 1102 (D.C.Cir.1985); *Dave v. D.C. Metro. Police Dep’t*, 926 F. Supp. 2d 247, 249 n.1 (D.D.C. 2013).

Defendants anticipate that Plaintiff may argue—as he did before the MSPB—that he became preference eligible on August 8, 2018, which is the date of AD Will’s letter stating her decision to “demot[e] [Plaintiff] to a non-supervisory position.” Will Letter at 23; *see also* MSBP Initial Decision at 4. Therefore, Plaintiff may claim, he was entitled to for-cause protections on the next day when DD Bowdich made the decision to dismiss him. This argument is unconvincing. As the AJ explained in rejecting Plaintiff’s argument, the MSPB has “long held that an adverse action is effective on the day on which the appellant is notified that the action will become effective.” MSBP Initial Decision at 6 (citing *Scull v. Department of Homeland Security*, 113 M.S.P.R. 287, ¶ 12 (2010)). Neither AD Will’s letter nor DD Bowdich’s letter included an effective date, and Plaintiff does not allege that he was served with AD Will’s August 8, 2018 letter before DD Bowdich made his final determination the next day. The official SF-52 Request

for Personnel Action, moreover, indicates that Plaintiff was being terminated directly from his position within the SES, with a proposed effective date of August 10, 2018. *See* SF-52. There is therefore no plausible argument that Plaintiff had been removed from the SES prior to the FBI's final decision, reflected in DD Bowdich's letter and the SF-52.

#### **B. Plaintiff Cannot Plausibly Claim that He Was Denied Due Process.**

Even assuming Plaintiff enjoyed a property interest in his position—which he clearly did not, for the reasons discussed above—Plaintiff could not show that he was deprived of any constitutionally guaranteed amount of process prior to his dismissal. Plaintiff alleges that he was deprived of due process because DD Bowdich made the decision to remove him—despite the fact that AD Will typically made final decisions for OPR—and because Plaintiff was not allowed to appeal DD Bowdich's decision to a Disciplinary Review Board. *See, e.g.*, Compl. ¶¶ 50-51. Not so: Plaintiff, aided by multiple lawyers, had ample opportunity to respond to his proposed dismissal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (“The essential requirements of due process . . . are notice and an opportunity to respond.”). Indeed, Plaintiff submitted a written response to OPR's June 15, 2018 findings—which clearly stated the basis for his proposed dismissal—and Plaintiff took advantage of the opportunity to participate—again aided by counsel—in an oral hearing to defend his actions. Due process requires nothing more in these circumstances. Plaintiff's real objection stems from the FBI's ultimate decision—not from any legitimate lack of process. Plaintiff received all of the process that the situation could possibly require.

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Here, OPR informed Plaintiff that it proposed to dismiss him through a letter dated June 15, 2018. That letter explained in detail OPR's reasoning and explained specific steps Plaintiff could take to respond to OPR's

analysis and proposed action. *See* Proposal Letter at 21-22. As noted above, Plaintiff took advantage of those procedural avenues and submitted both a written response and an oral presentation to attempt to justify his behavior and provide his version of the relevant events. *See* Will Letter at 18-19.

Despite clear notice of the proposed action against him and ample opportunity for him to make his case, Plaintiff takes issue with the fact that it was DD Bowdich who made the final decision with respect to his dismissal, rather than AD Will. *See* Compl. ¶ 50. The Due Process Clause, however, does not mandate that any particular government employee make a particular personnel decision, or that the impacted employee have an opportunity to respond to any particular government decisionmaker. And DD Bowdich's involvement was not procedurally deficient. Standard FBI's policy expressly permits designees of the FBI Director—here, DD Bowdich—to “modify any disciplinary finding, penalty, or both as determined necessary in the best interests of the FBI. *See* FBI Corporate Policy Directive 0915D, *Disciplinary Appeals Process*. Moreover, as reflected in his August 9, 2018 letter, DD Bowdich reviewed AD Will’s analysis and relevant facts before making his decision. *See* Bowdich Letter at 1-2.

In short, Plaintiff received ample due process. He knew of the conclusions on which his dismissal was based and he had ample opportunity to present arguments. Plaintiff, aided by his attorney, put on testimony and submitted a lengthy written response to the notice. He was clearly heard. The fact that Deputy Director Bowdich made a different decision than what Plaintiff and his attorneys asked for did not deprive Plaintiff of due process.

### **III. PLAINTIFF CANNOT SUCCEED ON HIS PRIVACY ACT CLAIM.**

#### **A. Plaintiff Does Not Allege a Privacy Act Violation with Respect to Any Disclosure by Officials in the White House.**

Plaintiff alleges that sometime “[b]etween late July and December 2017, officials in the White House . . . began to contact members of the news media about the [texts between Plaintiff and the Government Attorney] as a means to try to undermine the Special Counsel’s investigation.” Compl. ¶ 59. To the degree Plaintiff intends to argue that this alleged disclosure violates the Privacy Act, 5 U.S.C. § 552a, *see* Compl. ¶¶ 79-82, Plaintiff has failed to state a claim.

The Privacy Act, by its plain terms, places restrictions only on the disclosure of certain “agency” records, as that term is used in the Freedom of Information Act (“FOIA”). 5 U.S.C. § 552a(b) (setting out “[c]onditions of disclosure” for records contained in a system of records); *id.* § 552a(a)(1) (adopting definition of “agency” from the FOIA). As explained below, Plaintiff has not alleged facts sufficient to plead that “officials in the White House” qualify as an “agency” under that definition.

The President himself, of course, cannot qualify as an “agency” absent “an express statement by Congress” to that effect in light of “the separation of powers.” *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) (President himself not an “agency” under the APA). And both the Supreme Court and this Circuit have consistently recognized that while the statutory definition of “agency” may be broad, it does not encompass entities within the Executive Office of the President that do not exercise substantial independent authority. In *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), for example, the court considered the definition of “agency” under the APA which then, as now, is defined as any “authority of the Government of the United States, whether or not it is within or subject to review by another agency.” *Id.* at 1073 (quoting 5 U.S.C. § 551(1)). This Circuit concluded that the APA “apparently confers agency status on any

administrative unit with substantial independent authority in the exercise of specific functions.”

*Id.* Following this reasoning, the court held that the FOIA, which at the time incorporated the APA’s definition of “agency,” applied to the Office of Science and Technology Policy (“OSTP”), which is an entity within the Executive Office of the President. *Id.* at 1073-74. It reasoned that OSTP’s function was not merely to “advise and assist the President,” but that it also had an “independent function of evaluating federal programs,” and therefore was an agency with substantial independent authority that was subject to the APA. *Id.* at 1075.

The Supreme Court has confirmed the principle that not all entities within the Executive Office of the President are “agencies.” In *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the Supreme Court considered the scope of FOIA, whose definition of “agency” had been amended in 1974 to its current version, where “[a]gency’ as defined in [5 U.S.C. §] 551(1) . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including the Executive Office of the President*), or any independent regulatory agency.” 5 U.S.C. § 552(f)(1) (emphasis added). That definition is incorporated by reference into the Privacy Act. *See id.* § 552(a). The Court concluded that, despite this language, “[t]he legislative history is unambiguous . . . in explaining that the ‘Executive Office’ does not include the Office of the President.” *Kissinger*, 445 U.S. at 156. Rather, Congress did not intend “agency” to encompass “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” *Id.* (quoting H.R. Rep. No. 93-1380, at 15 (1974) (Conf. Rep.)). That Conference Report further specified that “[w]ith respect to the meaning of the term ‘Executive Office of the President’ the conferees intend[ed] the result reached in *Soucie v. David*, 448 F.2d 1067 ([D.C. Cir.] 1971).” *See Rushforth v. Council of Econ Advisers*, 762 F.2d

1038, 1040 (D.C. Cir. 1985) (quoting H.R. Rep. 93-1380, at 14-15); *see also Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (explaining Congress had codified the D.C. Circuit’s analysis of EOP entities in *Soucie* in the 1974 FOIA Amendments).

The controlling question in determining whether an entity within the Executive Office of the President is an “agency” for purposes of the APA or the Privacy Act, therefore, is whether “the entity in question ‘wield[s] substantial authority independently of the President.’” *Citizens for Responsibility & Ethics in Wash. (“CREW”) v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) (quoting *Sweetland v. Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995)). Here, with respect to the alleged disclosure “[b]etween July and December 2017,” Plaintiff alleges only that “officials in the White House” released the texts at issue to news media. Plaintiff, therefore, has not plead facts that could plausibly establish that those officials wield substantial authority independently of the President such that they could qualify as an “agency.” Accordingly, Plaintiff fails to state a claim with respect to the alleged pre-December 2017 disclosure, and therefore that aspect of Plaintiff’s Privacy Act claim must be dismissed.

**B. Defendants Are Entitled to Summary Judgment As to the Department’s Disclosures of Plaintiff’s Texts to Members of the Press.**

Plaintiff also cannot prevail as to the parts of Plaintiff’s Privacy Act claim that implicate the Department’s disclosure of Plaintiff’s text messages to members of the news media. *See* Compl. ¶¶ 61-64, 80. The Privacy Act allows disclosure of records “for a routine use as defined in subsection (a)(7) . . . and described under subsection (e)(4)(D) . . . .” 5 U.S.C. § 552a(b)(3). A routine use is defined as a disclosure of a record “for a purpose which is compatible with the purpose for which it is collected.” *Id.* § 552a(a)(7); *see also Budik v. United States*, 949 F.Supp.2d 14, 28 (D.D.C. 2013), *aff’d* 2013 WL 6222903 (D.C. Cir. Nov. 19, 2013). Because the Department was authorized to disclose Plaintiff’s text messages to members of the news media pursuant to a

routine use, and because that routine use was compatible with the purpose for which the records were collected, the Court should enter summary judgment for Defendants with respect to the remainder of Plaintiff's Privacy Act claim.

The government may successfully invoke the routine use exception by demonstrating "compatibility" and "publication." *See Budik*, 949 F.Supp.2d at 28; *Reed v. Dep't of the Navy*, 910 F. Supp. 2d 32, 41 (D.D.C. 2012); *Radack v. U.S. Dep't. of Justice*, 402 F. Supp. 2d 99, 105 (D.D.C. 2005); *Dep't of the Air Force v. Fed. Labor Relations Auth.*, 104 F.3d 1396, 1401-02 (D.C. Cir. 1997)). To determine compatibility, a court must conduct a "dual inquiry into the purpose for the collection of the record in the specific case and the purpose of the disclosure." *Britt v. Naval Investigative Serv.*, 886 F.2d 544, 548-49 (3d Cir. 1989).

The compatibility test is satisfied where a "concrete relationship or similarity" exists "between the disclosing agency's purpose in gathering the information and in its disclosure." *Id.* at 549-50. This requirement is independent of, and unaffected by, an agency's published routine uses and was intended to act as a check on the "unnecessary exchange of information to another person or to agencies who may not be as sensitive to the collecting agency's reasons for using and interpreting the material." *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, reprinted in 120 Cong. Rec. 40405, 40406 (1974)). Some "meaningful degree of convergence" between collection and disclosure is all that is required to overcome this modest barrier. *Britt*, 886 F.2d at 549. As discussed below, the OIG's routine use easily satisfies the compatibility requirement. In addition, agencies are required to publish in the Federal Register notice of the types of disclosures that they may make pursuant to the "routine use" exception. 5 U.S.C. §§ 552a(b)(3), 552a(e)(4)(D). Plaintiff cannot succeed on his Privacy Act claim related to the Department's disclosure to the news media because, even assuming Plaintiff's text messages

were contained in an OIG system of record, as Plaintiff allege, *see* Compl. ¶ 57, any alleged disclosures were permitted under an OIG routine use exception published in the Federal Register, discussed below.<sup>5</sup>

1. The Department’s Disclosure of the Text Messages from OIG Investigation Records Was Compatible with the Purposes for Which Those Records Were Collected.

As described in the OIG Report, the text messages at issue were collected as part of the OIG’s investigation into various actions by the FBI and the Department in connection with the Midyear investigation that Plaintiff led. The purpose of that investigation—consistent with the OIG’s statutory mandate to “prevent and detect fraud and abuse,” 5 U.S.C. § App. 3, § 2—was to respond to public and congressional concerns regarding the FBI’s handling of that investigation, *see* OIG Report at i. Assuming Plaintiff’s texts were contained in an OIG system of records, the Department’s disclosure of the text messages to the public pursuant to the OIG’s routine use was consistent with that purpose by increasing public transparency into the Department’s official actions.

Relevant to the compatibility analysis is that the OIG’s collection of information relevant to its investigation—including the text messages at issue in this case—later culminated in a publicly available report, which itself described some of those text messages. *See* OIG Report at 395-410. Plaintiff could hardly argue that disclosure to the public of the text messages collected through the OIG’s investigation is incompatible with the purpose of the collection of those messages, when the ultimate product of the OIG’s investigation is a report that also disclosed many

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<sup>5</sup> If Plaintiff’s text messages were not, in fact, contained in an OIG system of records, then they would not be covered by the Privacy Act, and Plaintiff’s claim would be subject to dismissal. *See* 5 U.S.C. § 552a(b). The Court need not resolve that factual question for the purposes of Defendants’ motion, however, because Defendants are entitled to summary judgment even assuming the text messages fall within the Privacy Act’s protection.

of the same messages publicly. On these facts, the compatibility requirement is easily satisfied. *See Britt*, 886 F.2d at 549 (requiring only some “meaningful degree of convergence” between collection and disclosure).

2. The Department Disclosed the Text Messages Pursuant to a Routine Use Exception Published in the Federal Register.

The OIG published a SORN which describes the purpose, scope, uses, management, and maintenance of its investigative records. *See* 72 Fed. Reg. 36,725. The Department then determined that disclosing the text messages to the media would be consistent with a routine use contained in that SORN that permits disclosures “[t]o the news media and the public, including disclosures pursuant to 28 C.F.R. § 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.” *Id.* at 36,726. Because the routine use the Department relied on is contained in the SORN, which was published in the Federal Register, the publication requirement is satisfied. *See Radack*, 402 F. Supp. 2d at 105-06 (finding the publication requirement satisfied where the government published notice in the Federal Register of “the categories of individuals covered by the system, the categories of records in the system, the system’s purpose, and the routine uses of records maintained in the system”).

There is also no doubt that, if the disclosed text messages were contained in an OIG system of records, the Department’s disclosures would properly fall within the routine use upon which the Department relied. That routine use—which permits disclosures to the news media “unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy,” 72 Fed. Reg. at 36,726—closely tracks the language from Exemptions 6 and 7(C) of the FOIA, *see* 5 U.S.C. § 552(b)(6), (b)(7)(C). In evaluating a withholding under Exemption 6 and/or 7(C), courts rely on the declarations of agency

officials to determine whether the agency has properly weighed the private interests at stake versus the public interest in disclosure in analyzing whether the release would constitute an unwarranted invasion of privacy. *See Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (explaining that a court may award summary judgment in a FOIA action the basis of information provided by the agency through declarations that describe “the documents and the justifications for nondisclosure with reasonably specific detail,” that “demonstrate that the information withheld logically falls within the claimed exemption[s],” and that are “not controverted by either contrary evidence in the record nor by evidence of agency bad faith”); *Dutton v. U.S. Dep’t of Justice*, 302 F. Supp. 3d 109, 124 (D.D.C. 2018) (granting the government’s summary judgment motion with respect to withholdings under Exemptions 6 and 7(C) on the basis of an agency declaration). Defendants respectfully submit that the Court should do the same here.

In support of their request for summary judgment on this part of Plaintiff’s Privacy Act claim, Defendants submit the declaration of Peter Winn, Director of Office of Privacy and Civil Liberties and Acting Chief Privacy and Civil Liberties Officer, the senior Department official responsible for providing authoritative legal advice and guidance to the Department’s leadership regarding whether disclosures fall within a routine use contained in a component’s SORN. Winn Decl. ¶ 3; *see also*, e.g., Director, Office of Privacy and Civil Liberties, <https://www.justice.gov/legal-careers/job/director-office-privacy-and-civil-liberties> (explaining that the Office of Privacy and Civil Liberties “provides legal advice and guidance to, among other things, “[e]nsure[] the Department’s privacy compliance, including compliance with the Privacy Act of 1974”); 42 U.S.C. § 2000ee-1 (requiring the Attorney General to designate privacy and civil liberties officers). As Mr. Winn explains in his declaration, the Department’s practice has been to treat the “unwarranted invasion of personal privacy” limitation in its routine uses as requiring the same

analysis required under the FOIA’s Exemptions 6 and 7(C). *Id.* ¶ 11. That is, the Department does not disclose records to the public or to news media under this routine use if such a disclosure “could reasonably be expected to constitute an unwarranted invasion of privacy.” See 5 U.S.C. § 552(b)(6), (b)(7)(C). *Id.* This analysis, in turn, requires balancing the public interest in the information against the privacy interest of the individual to which the record pertains, effectively the same balancing test that is required under the privacy provisions of the FOIA. *Id.*

“Whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny. . . . rather than on the particular purpose for which the document is being requested.’ *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989); Winn Decl. ¶ 12. Information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose. *Id.* (citing *Reporters Committee*, 489 U.S. at 773).

Applying that test, the Department concluded that disclosure was appropriate. As Mr. Winn explains, he considered that both Plaintiff and the Government attorney were both high-ranking officials within the FBI, and that the text messages exhibit very strong opinions about a then-ongoing FBI investigation—an investigation in which both Plaintiff and the Government Attorney were personally involved. Winn Decl. ¶ 13. The communications between Plaintiff and the Government Attorney took place, not on personal devices, but on Department-issued mobile devices, which contained clear banner warnings that inform users of the lack of any reasonable expectation of privacy. *Id.* ¶ 14. While the Department permits limited personal use of its equipment, this policy does not exempt mobile devices from Department monitoring and oversight, and Department employees receive regular training and notices that any activity and

content on Department is subject to being monitored. *Id.* ¶15. Plaintiff and the Government Attorney knew, or should have been aware, that these texts would have been subject to review by others in the Department and possibly even the subject of a FOIA request or disclosed in connection with criminal prosecutions. *Id.*

In addition, because the public had already become aware of the names of both individuals, there appeared to be no way to mitigate the invasion of privacy that would accompany the release of the texts by redacting the individuals' names. *Id.* ¶ 16. However, before providing the texts to Congress and the media, the Department redacted non-work-related personal information contained in the texts, which significantly reduced Plaintiff's privacy interest in the disclosed material. *Id.*; *see also* Boyd Decl. ¶ 9. It is also significant that the text messages would be disclosed to Congress—as is permitted by the Privacy Act, *see* 5 U.S.C. § 552a(b)(9)—and that Deputy Attorney General Rosenstein was scheduled to testify publicly before Congress the next day where he was expected to be asked questions about these text messages. Winn Decl. ¶ 16. Congress, of course, could have released the text messages itself without creating any Privacy Act implications, because Congress is not an “agency.” *Id.*; 5 U.S.C. § 552a(a)(1).

As to the public interest side of the balancing, the texts displayed what a reasonable person could consider to constitute bias. Winn Decl. ¶ 17. This in turn risked undermining public confidence in the objectivity and impartiality of the work of the FBI and the Department, given that the apparent bias concerned individuals who figured prominently in a criminal investigation for which the FBI senior officials were responsible. *Id.* The appearance of possible bias in this matter also involved the potential exercise of government power against a citizen. *Id.* Such an appearance of bias in connection with criminal investigations, was sufficient to shift the presumption away from protecting personal privacy to one favoring public transparency.

Under all the facts and circumstances presented to him at the time, it was the considered judgment of the Department that the public interest outweighed the privacy interest of the two individuals, and that the Department’s disclosure of the text messages would not violate the Privacy Act. *Id.*

\* \* \*

Because the Department’s disclosure of the texts at issue between Plaintiff and the Government Attorney would fall within a compatible, published routine use exception—assuming the records were contained in an OIG system of records, as Plaintiff alleges—the Court must dismiss Plaintiff’s Privacy Act claim.

**C. Plaintiff Cannot Establish That the Department’s Disclosure to the News Media Was a Willful or Intentional Violation of the Privacy Act.**

Even if the Court were to find that the disclosures made by the Department were not permitted under the Privacy Act, Plaintiff would not be entitled to damages because he cannot prove that the disclosure was “intentional or willful.” 5 U.S.C. § 552a(g)(4). Where a complaint is based on violations not described in § 552a(g)(1)(A)-(C) and instead on the “catch-all,” § 552a(g)(1)(D)—as Plaintiff’s claim is here—the D.C. Circuit has held that only monetary damages, not declaratory or injunctive relief, are available to plaintiffs, *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1122 (D.C. Cir. 2007) (citing *Doe v. Stephens*, 851 F.2d 1457, 1463 (D.C. Cir. 1988)), and such monetary damages are available only where “the agency acted in a manner which was intentional or willful,” 5 U.S.C. § 552a(g)(4). Therefore, “proof of intent or willfulness is a *necessary* element of [the plaintiff’s] claims, and failure to provide supporting evidence [will] lead to summary judgment in favor of the [defendants].” *Sussman*, 494 F.3d at 1122 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)) (emphasis added). An agency acts in an intentional

or willful manner only “by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others’ rights under the Act.” *Sussman*, 494 F.3d at 1122.

In distinguishing between an intentional violation and an inadvertent error, this Circuit has assembled a variety of tests—whether a “violation [is] so patently egregious and unlawful that anyone undertaking the conduct should have known it to be unlawful”; whether the violation was “commit[ed] without grounds for believing it lawful”; and whether the violator acted in “flagrant disregard[ of] other’s rights under the act.” *Id.* (quoting *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (per curiam)); *Waters v. Thornburgh*, 888 F.2d 870, 875 (D.C. Cir. 1989); *Maydak v. United States*, 630 F.3d 166, 182 (D.C. Cir. 2010). Together, these tests provide a barrier to a claim that is “greater than gross negligence.” *Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987) (quoting *Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, reprinted in 120 Cong. Rec. 40405-06 (1974)).

Additionally, courts have found affirmative evidence of a defendant’s belief in the legality of a disclosure—and subsequently no willful or intentional violation—where the defendant does “due diligence before releasing the documents.” *Reed*, 910 F. Supp. 2d at 44. For example, in *Reed*, one alleged wrongdoer (Cooper) conducted legal research and consulted with colleagues experienced in Privacy Act issues before deciding to disclose the information. *Id.* Based on that due diligence, the Court found no Privacy Act violation. *Id.* Similarly, regarding a second alleged wrongdoer (Carter), the Court noted that the Navy official “was trained in the Privacy Act, was well aware of his duties under the Act, and asked Cooper to be present during the conference call with the [Charleston Police Department] to be sure that he did not inadvertently violate the Privacy Act.” *Id.* at 44 n.1.

Here, Mr. Winn's sworn declaration demonstrates that the Department did not intentionally or willfully seek to violate the Privacy Act. The Department contacted Mr. Winn—Director of the Office of Privacy and Civil Liberties and Acting Chief Privacy and Civil Liberties Officer—who has extensive expertise with regard to the Privacy Act and is the person in the Department responsible for providing authoritative legal advice and guidance on questions about that statute. *See Winn Decl.* ¶ 3. As described in his declaration, Mr. Winn reviewed the text messages at issue and engaged in a thoughtful analysis of whether the Privacy Act would permit disclosure.

Given the Department's thoughtful treatment of its disclosure—and specifically with respect to any potential Privacy Act implications—Plaintiff cannot prove willfulness or intent because no reasonable finder of fact could conclude that the Department disclosed the text messages without grounds for believing its actions were lawful, let alone that the Department “flagrantly disregard[ed]” any rights guaranteed under the Privacy Act. *Sussman*, 494 F.3d at 1122. Therefore, Plaintiff is not entitled to damages because he cannot prove that any disclosure was “intentional or willful.” 5 U.S.C. § 552a(g)(4).

## **CONCLUSION**

For the above stated reasons, the Court should dismiss Count One and Count Two of Plaintiff's Complaint or, in the alternative, enter judgment in favor of Defendants as to those claim. Further, the Court should enter summary judgment in Defendants' favor as to Count Three.

Dated: November 18, 2019

Respectfully submitted,

JOSEPH H. HUNT  
Assistant Attorney General

MARCIA BERMAN  
Assistant Branch Director

CHRISTOPHER R. HALL  
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*Counsel for Defendants*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

PETER P. STRZOK,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No. 1:19-CV-2367-ABJ
v.	)	
	)	
WILLIAM P. BARR, in his official capacity	)	
as Attorney General of the United States, <i>et</i>	)	
<i>al.</i> ,	)	
	)	
Defendants.	)	
	)	
	)	

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**DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Civil Rule 7(h), Defendants hereby submit this Statement of Material Facts Not in Dispute in conjunction with their motion, in the alternative, for summary judgment as to Count One and Count Two and their motion summary judgment as to Count Three.

1. After serving in the United States Army, Plaintiff entered the rolls of the FBI in 1998. *See* Compl. ¶¶ 14-15.
2. When Plaintiff exchanged the text messages at issue in this litigation, beginning around August 2015 through May 2018, Plaintiff was a member of the FBI's SES. *See* OIG Report at 396.
3. During the same period, Plaintiff was promoted to Deputy Assistant Director of the FBI's Counterintelligence Division in September 2016. *Id.*
4. Plaintiff's career at the FBI put him at the center of some of the most important and politically charged investigations in the Bureau's history. *See* Compl. ¶¶ 1, 13-16.

5. Plaintiff was assigned in August 2015 to lead the criminal investigation of former Secretary of State and presidential candidate Hillary Clinton's use of a private email server, which the FBI referred to as "Midyear Exam" or "Midyear." Compl ¶¶ 15, 32.

6. Then, in July 2016, Plaintiff was assigned to the FBI's investigation into the Russian government's efforts to interfere in the 2016 presidential election. *See Letter Unit Chief, Adjudication Unit II, Office of Professional Responsibility* 2, June 15, 2018 ("Proposal Letter") (Exhibit 1).

7. Plaintiff was "one of the key members" of that investigative team. Compl. ¶ 31.

8. After former FBI Director Robert Mueller III was appointed Special Counsel over the Russian investigation, Plaintiff was a member of the Special Counsel's staff from May 2017 until July 28, 2017. *See* Proposal Letter at 2.

9. In early 2017, in response to requests from Congress, various organization, and members of the public, the OIG opened an investigation into various actions by the FBI and the Department in connection with the Midyear investigation that Plaintiff led. Compl ¶ 32; *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, June 2018 ("OIG Report"), <https://www.justice.gov/file/1071991/download>.

10. As part of that investigation, the OIG requested and received text messages from FBI-issued mobile devices for personnel involved in the Midyear investigation, including those sent and received by Plaintiff, for the period when the Midyear investigation began through July 1, 2017. OIG Report at 395-96.

11. In its review of the collected text messages, the OIG identified over 40,000 text messages exchanged on FBI-issued cell phones between Plaintiff and the Government Attorney,

who was serving as Special Counsel to former Deputy Director Andrew McCabe. OIP Report at 396.

12. Those messages included political opinions about candidates and issues involved in the 2016 Presidential election, “including statements of hostility toward then candidate Trump and statements of support for candidate Clinton.” *Id.*

13. In addition, according to the OIG, “[s]everal of their text messages also appeared to mix political opinions with discussions about the Midyear and Russia investigations,” which raised questions as to whether Plaintiff’s and the Government Attorney’s political opinions may have affected investigative decisions. *Id.*

14. The text messages exchanged between Plaintiff and the Government Attorney, as well as others described in the OIG Report, include the following:

**July 21, 2016:**

Plaintiff: Trump is a disaster. I have no idea how destabilizing his Presidency would be.

**July 31, 2016:**

Plaintiff: And damn this [the Russia investigation] feel momentous. Because this matters. The other one [the Clinton E-Mail investigation] did too, but that was to ensure we didn’t F something up. This matters because this MATTERS.

**August 8, 2016:**

GA: [Trump’s] not ever going to become president, Right??  
Plaintiff: No. No he’s not. We’ll stop it.

**August 15, 2016:**

Plaintiff: I want to believe the path you threw out for consideration in [DD’s] office—that there’s no way [Trump] gets elected—but I’m afraid we can’t take that risk. It’s like an insurance policy in the unlikely event you die before you’re 40. . .

**August 26, 2016:**

Plaintiff: Just went to a southern Virginia Walmart. I could SMELL the Trump support. . .”

**October 19, 2016:**

Plaintiff: I'm riled up. Trump is a fucking idiot, is unable to provide a coherent answer.

**November 7, 2016: (referencing an article titled “A victory by Mr. Trump remains Possible”)**

Plaintiff: OMG THIS IS F\*CKING TERRIFYING.

**March 14, 2017:**

GA: Finally two pages away from finishing [All The President's Men]. Did you know the president resigns in the end?? ☺

Plaintiff: What?!?! God, that we should be so lucky.

**May 18, 2017 (after the GA had just joined the Special Counsel’s investigation):**

Plaintiff: For me, and this case, I personally have a sense of unfinished business. I unleashed it with [the Clinton email investigation]. Now I need to fix it and finish it. . . . Who gives a f\*ck, one more A[ssistant] D[irector]..[versus] [a]n investigation leading to impeachment?" . . . [Y]ou and I both know the odds are nothing. If I thought it was likely I'd be there no question. I hesitate in part because of my gut sense and concern there's no big there there.

OIG Report at 400, 403-05.

15. Upon review of Plaintiff's text messages, the OIG was "particularly concerned" that they "potentially indicated or created the appearance that investigative decisions they made were impacted by bias or improper considerations." *See* OIG Report at ix.

16. The OIG pointed to, in particular, Plaintiff's August 8, 2016 text message stating that "'we'll stop' candidate Trump from being elected," which gave rise to the implication that Plaintiff was willing to take official action to impact a presidential candidate's electoral prospects. *Id.* The OIG Report is replete with other examples how Plaintiff evidenced political bias—or, at best, created the perception of bias. *See, e.g., id.* at 399-410.

17. Plaintiff acknowledged to the OIG that

his text messages could be read to suggest that [Plaintiff] held himself responsible for Trump's victory and Clinton's defeat because of the Midyear investigation and that he viewed the Russia investigation as providing him an opportunity to 'fix' this result by working on an investigation that could result in the impeachment of President Trump.

OIG Report at 405.

18. The OIG concluded that Plaintiff's text messages with the Government Attorney "cast a cloud over the FBI's handling of the Midyear investigation and the investigation's credibility." *Id.* at iii.

19. When the OIG learned of the existence of the text messages between Plaintiff and the Government Attorney in the summer of 2017, both Plaintiff and the Government Attorney were members of Special Counsel Mueller's staff.

20. The OIG informed Special Counsel Mueller of the text messages, and Plaintiff was removed from the Special Counsel's investigation on July 28, 2017. OIG Report at 397.

21. On December 2, 2017, the New York Times and the Washington Post each reported on the existence of Plaintiff's text messages with the Government Attorney and his removal from the Special Counsel's investigation. *See Compl. ¶ 60; Top FBI Official Assigned to Mueller's Probe Said To Have Been Removed After Sending Anti-Trump Texts*, Washington Post (Dec. 2, 2017), [https://www.washingtonpost.com/world/national-security/two-senior-fbi-officials-on-clinton-trump-probes-exchanged-politically-charged-texts-disparaging-trump/2017/12/02/9846421c-d707-11e7-a986-d0a9770d9a3e\\_story.html](https://www.washingtonpost.com/world/national-security/two-senior-fbi-officials-on-clinton-trump-probes-exchanged-politically-charged-texts-disparaging-trump/2017/12/02/9846421c-d707-11e7-a986-d0a9770d9a3e_story.html); *Mueller Removed Top Agent in Russia Inquiry Over Possible Anti-Trump Texts*, NY Times (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/us/politics/mueller-removed-top-fbi-agent-over-possible-anti-trump-texts.html>.

22. Shortly thereafter, the chairmen of congressional committees in both the U.S. House of Representatives and the U.S. Senate ("Congressional Committees") made verbal and written inquiries to the Department regarding the existence and substance of the text messages. These inquiries included written requests for the Department to produce the text messages to Congress for oversight purposes. *See Declaration of Stephen Boyd ¶ 7 ("Boyd Decl.") (Exhibit 2)*

23. In order to respond to Congress, the Department requested the text messages from the OIG and, once received, redacted them to remove non-political, personally sensitive and law enforcement information. *Id.* ¶¶ 8-9.

24. The Department made its initial hard copy production of redacted text messages to the Congressional Committees on the evening of December 12, 2017, and subsequent productions followed. *Id.* ¶ 11.

25. The Department also determined that it would be appropriate to make the same subset of text messages available to members of press. *Id.* ¶ 12.

26. The Department did so after consulting with the appropriate senior member of Department career staff—Peter Winn, Director of the Office of Privacy and Civil Liberties and Acting Chief Privacy and Civil Liberties Officer—who reviewed the text messages to determine whether disclosing them in redacted form to the media would be permissible under the Privacy Act. *See Declaration of Peter Winn ¶¶ 3-4 (“Winn Decl.”) (Exhibit 3).*

27. As described in his accompanying declaration, Mr. Winn considered that the routine use in an OIG Systems of Records Notice, or SORN, permits compatible disclosures “[t]o the news media and the public, including disclosures pursuant to 28 C.F.R. § 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.” *Id.* ¶ 10 (quoting 82 Fed. Reg. at 36,726).

28. Based on his review of the text messages provided to him, and assuming the text messages were contained in an OIG system of records, Mr. Winn concluded that the public interest outweighed the privacy interest of Plaintiff and the Government Attorney and the relevant routine use would permit disclosure. *See id.* ¶¶ 11-18

29. Mr. Winn concluded that the Department's disclosure of the text messages would not violate the Privacy Act, and Mr. Winn so advised senior leadership within the Department. *Id.* ¶¶ 11-18.

30. The Department's senior leadership then made the decision to release the records. *See* Boyd Decl. ¶ 13.

31. On June 15, 2018, OPR staff proposed dismissing Plaintiff from the FBI based on its finding that he: (1) engaged in unprofessional conduct by making inappropriate political comments in text messages on his FBI-issued cell phone, in violation of FBI Offense Code 5.21; (2) utilized a personal email account to conduct official FBI business, in violation of FBI Offense Code 5.18; and (3) failed to diligently pursue a credible lead when new information was brought forth regarding the Clinton private server investigation, in violation of FBI Offense Code 1.7. *See generally* Proposal Letter.

32. With the assistance of his attorneys, Plaintiff provided a written response to OPR's recommendation and participated in an oral hearing at which he defended his conduct. *See* Letter of Candice M. Will, Assistant Director, OPR, Aug. 8, 2018 at 18 ("Will Letter") (Exhibit 4).

33. In July 2018, Plaintiff and his attorney also signed a "Last Chance" Adjudication Agreement, in which Plaintiff requested, in lieu of dismissal, that OPR reduce the proposed penalty of dismissal "to a 60-day suspension, in which Offense Codes 5.21 and 5.18 are substantiated, Offense Code 5.2 (Dereliction of Supervisory Responsibility) be substituted for Offense Code 1.7, and he be demoted to a non-supervisory position." "Last Chance" Adjudication Agreement for Peter P. Strzok II (July 2018) (Exhibit 5).

34. In exchange for a reduced punishment, Plaintiff proposed that he would, among other things, complete a suspension of 60 days and be subject to removal from the rolls of the FBI if he were to engage in any other serious misconduct. *Id.*

35. In a letter dated August 8, 2018, the career Assistant Director (“AD”) for OPR, Candice M. Will, analyzed the OPR’s staff’s recommendation, together with Plaintiff’s written and oral responses and Plaintiff’s “Last Chance” Adjudication Agreement. *See generally* Will Letter.

36. As described in her letter, AD Will reviewed the available information and analyzed Plaintiff’s conduct according to the twelve factors articulated in the Merit Systems Protection Board’s decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). *Id.*

37. AD Will determined, based on her weighing of those factors, to suspend Plaintiff from duty without pay for 60 days and to demote him to a non-supervisory position. *Id.* at 23.

38. Before the FBI took any official employment action with respect to Plaintiff’s misconduct, and before the FBI informed Plaintiff of AD Will’s decision, the FBI’s Deputy Director (“DD”), David Bowdich, reviewed relevant evidence and the *Douglas* factors. *See generally* Letter of David Bowdich, FBI Deputy Director, Aug. 9, 2018 (“Bowdich Letter”) (Exhibit 6).

39. On August 9, 2018, DD Bowditch exercised his delegated authority, consistent with FBI policy, to modify disciplinary actions as necessary to advance the best interests of the FBI. *See* Bowdich Letter at 1; *see also* FBI Policy Directive 0915D, *Disciplinary Appeals Process* § 4.3 (Exhibit 7).

40. Pursuant to that authority, DD Bowdich reconsidered AD Will’s decision and concluded that dismissal was appropriate based on all of the facts. *See* Bowdich Letter at 1.

41. DD Bowdich concurred with AD Will that the three offenses were substantiated; however, as he explained in his letter, DD Bowdich disagreed with AD Will's evaluation of the relevant *Douglas* factors in deciding the appropriate penalty. *Id.*

42. In his letter, DD Bowdich explained that he had reviewed relevant evidence pertaining to Plaintiff's case, including text messages between Plaintiff and the Government Attorney, Plaintiff's role as one of the most senior counterintelligence agents in the FBI, and Plaintiff's many years of service. *Id.*

43. DD Bowdich concluded that—notwithstanding Plaintiff's 21 years of service—“serious aggravation is warranted for your [FBI Offense Code] 5.21 offense given the severe, long-term damage your conduct has done to the reputation of the FBI.” *Id.*

44. DD Bowdich explained that, as “a Deputy Assistant Director in the Counterintelligence Division, you were expected to be a leader who was beyond reproach and to set an example for not only your direct subordinates, but others throughout the organization who watched and observed your behavior and actions.” *Id.*

45. DD Bowdich also noted that it was “difficult to fathom the repeated, sustained errors of judgment you made while serving as the lead agent on two of the most high-profile investigations in the country,” and that Plaintiff’s “sustained pattern of bad judgment in the use of an FBI device called into question the decisions made during both the Clinton E-Mail investigation and the initial stages of the Russian collusion investigation.” *Id.*

46. In short, Plaintiff's “repeated selfishness has called into question the credibility of the entire FBI.” *Id.* DD Bowdich indicated that his decision to dismiss Plaintiff was final and not subject to further administrative review. *Id.*

47. The FBI updated Plaintiff's personnel file with an official Standard Form ("SF") 52, Request for Personnel Action, which terminated Plaintiff from his FBI position effective August 10, 2018. *See* Pl.'s SF 52 (Exhibit 8).

48. The following day, on August 11, 2018, the FBI issued a SF 50, Notice of Personnel Action to Plaintiff, officially alerting him of his termination. *See* SF 50 (Exhibit 9).

49. On September 5, 2018, Plaintiff filed an appeal of the FBI's dismissal decision with the Merit Systems Protection Board ("MSPB"), which was dismissed for lack of jurisdiction by an Administrative Judge ("AJ") on November 15, 2018. *See* MSPB Initial Decision (Exhibit 10).

50. The AJ concluded that, as a member of the FBI SES, Plaintiff did not occupy a position that gave him appeal rights to the MSPB under the Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111, as amended, codified throughout Title 5 of the United States Code. *Id.* at 9.

Dated: November 18, 2019

Respectfully submitted,

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Assistant Attorney General

MARCIA BERMAN  
Assistant Branch Director

CHRISTOPHER R. HALL  
Assistant Branch Director

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*Counsel for Defendants*

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 2**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

PETER P. STRZOK, )  
Plaintiff, )  
v. ) Case No. 1:19-cv-2367-ABJ  
ATTORNEY GENERAL WILLIAM F. BARR, )  
in his official capacity, et al., )  
Defendants. )  
\_\_\_\_\_  
)

**DECLARATION OF STEPHEN E. BOYD**

I, Stephen E. Boyd, hereby declare:

1. I serve as the Assistant Attorney General for Legislative Affairs at the United States Department of Justice (Department). I have held this position since August 9, 2017.
2. I head the Department's Office of Legislative Affairs (OLA), which is generally responsible for managing the Department's relationship with Congress. OLA represents the Department's interests on Capitol Hill, develops and implements strategies to advance the Department's legislative initiatives, and articulates the Department's position on legislation proposed by Congress. Additionally, OLA facilitates the appearance of Department witnesses at congressional hearings, manages the interagency clearance process led by the Office of Management and Budget, coordinates the Department's response to congressional committee oversight requests, and participates in the Senate confirmation process for the Department's executive nominees.

3. The statements herein are based on my personal knowledge and other information I acquired while performing my official duties.

4. As Assistant Attorney General, my direct supervisors at the Department are the Deputy Attorney General and the Attorney General, who at the time of the events described in this declaration were Rod J. Rosenstein and Jefferson B. Sessions, respectively. In fulfilling its core responsibilities, OLA often consults with and, on certain matters, receives guidance from attorneys in the Office of the Deputy Attorney General. Attorney General Sessions recused himself from the matters described in this declaration.

5. On or around December 2, 2017, based on reporting in the New York Times, I became aware of the existence of text messages exchanged between Peter Strzok and a Federal Bureau of Investigation (FBI) attorney on their FBI-issued mobile devices.

6. My understanding is that the Department's Office of the Inspector General (OIG) previously discovered the messages as part of its then ongoing review of various actions taken by the Department and the FBI in connection with the FBI's 2016 investigation into former Secretary of State Hillary Clinton's use of a private email server, and that the OIG briefed officials within the Office of the Deputy Attorney General regarding the messages.

7. Soon after the December 2, 2017 news report, the chairmen of congressional committees in both the U.S. House of Representatives and the U.S. Senate (Congressional Committees) made verbal and written oversight inquiries to the Department regarding the existence and substance of the text messages. These inquiries included written requests for the Department to produce the text messages to Congress for oversight purposes.

8. My understanding is that, at or around the time of the publication of the New York Times article, the Office of the Deputy Attorney General requested from the OIG, and the OIG provided, an initial subset of the total universe of discovered text messages between Mr. Strzok and the FBI attorney that the OIG considered particularly troubling.

9. Before producing the initial set of text messages to the Congressional Committees, the Department endeavored to redact certain information, which may have included purely personal information and law enforcement sensitive information.

10. The Office of the Deputy Attorney General provided OLA with the redacted text messages for the purposes of coordinating the production of the text messages to the Congressional Committees.

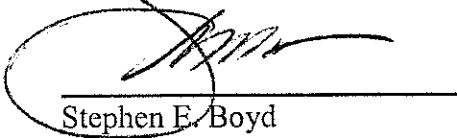
11. The Department made its initial hard copy production of redacted text messages to the Congressional Committees on the evening of December 12, 2017. Subsequent productions followed.

12. Though I was not directly involved in matters involving the media, my recollection is that the Office of the Deputy Attorney General and the Department's Office of Public Affairs determined that it was appropriate to make the same subset of redacted text messages available to certain members of the media.

13. My understanding is that, on December 12, 2017, the Department made the same set of redacted text messages available to certain members of the news media.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct, to the best of my knowledge and belief....

Dated: 15 NOV 19



Stephen E. Boyd

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 3**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

PETER P. STRZOK, )  
Plaintiff, )  
v. ) Case No. 1:19-cv-2367-ABJ  
ATTORNEY GENERAL WILLIAM F. BARR, )  
in his official capacity, et al., )  
Defendants. )  
\_\_\_\_\_  
)

**DECLARATION OF PETER WINN**

I, Peter Winn, hereby declare:

1. I am the Director of the Office of Privacy and Civil Liberties (“OPCL”) at the United States Department of Justice (“Department” or “DOJ”), and a member of the Senior Executive Service. Since January 20, 2017, have been the Acting Chief Privacy and Civil Liberties Officer (“CPCLO”) of the Department, where I report to the Deputy Attorney General. I have worked at DOJ since 1994, both as an Assistant United States Attorney and as an Attorney-Advisor at the Office of Legal Counsel. I also served on a detail as the Acting General Counsel of the Privacy and Civil Liberties Oversight Board, during its review of the NSA programs that were the subject of the Edward Snowden disclosures.

2. I have taught privacy law at the University of Washington, Southern Methodist University, and the University of Melbourne, have published a number of articles on privacy law and hold certifications as an information privacy professional in United States government privacy law and domestic privacy law from the International

Association of Privacy Professionals. I have worked on issues involving privacy law and policy at the Department of Justice, with other federal agencies, and with the Rules Committee of the Judicial Conference of the United States. I obtained my J.D. from Harvard Law School in 1986, clerked for Judge James B. McMillan, in the Western District of North Carolina, and worked at private law firms in New York City and Dallas, Texas.

3. Among my responsibilities as the head of OPCL, is to provide authoritative legal advice and guidance to the Department's leadership and DOJ components on questions about the Privacy Act of 1974. I also advise DOJ leadership and the heads of DOJ components on questions regarding the lawfulness of proposed disclosures under the Privacy Act. The statements herein are based on my personal knowledge and other information I acquired while performing my official duties.

4. On December 12, 2017, then-Acting Deputy Attorney General ("ADAG"), Scott Schools, contacted me, seeking advice on whether disclosure to the news media of certain text messages exchanged between Peter Strzok and an FBI attorney on a Department-issued mobile device would be permissible under the Privacy Act and other Department policies. ADAG Schools provided the relevant messages to me with the proposed redactions so that I could review them. My advice was limited to the question whether the proposed disclosure of the texts as redacted would violate the non-disclosure provisions of the Privacy Act, not whether the disclosure was advisable as a matter of policy.

5. ADAG Schools informed me that one or more congressional committees had requested the text messages from the Department and that the Department intended to provide them to at least some of the requesting members of Congress on December 13,

2017. He also informed me that the Department’s Office of the Inspector General (“OIG”) did not object to the disclosure to Congress.

6. Given the politically charged nature of the text messages, it was my understanding that one or more members of the requesting committee(s) would very likely disclose them to the public shortly after receiving them from the Department. Accordingly, according to ADAG Schools, the Department wanted to be as open and transparent with the public as possible, consistent with the law and established Department policy.

7. Under the Privacy Act of 1974, 5 U.S.C. § 552a, agencies of the United States Government are authorized to disclose records contained within a system of records, among other reasons, for a routine use published in the Federal Register with an opportunity for interested persons to comment. *See id.* § 552a(b)(3); *see also id.* § 552a(e)(11).

8. Ordinarily, Department emails and text messages maintained in the Department’s general archives have not constituted “records” in a “system records” that would be subject to the Privacy Act. The Office of Management and Budget Guidelines explain that a system of records exists if: (1) there is an “indexing or retrieval capability using identifying particulars [that is] built into the system”; and (2) the agency “does, in fact, retrieve records about individuals by reference to some personal identifier.” OMB Guidelines, 40 Fed. Reg. 28,948, 28,952 (July 9, 1975). The Guidelines state that the “is retrieved by” criterion “implies that the grouping of records under the control of an agency is accessed by the agency by use of a personal identifier; not merely that a capability or potential for retrieval exists.” *Id.* This narrow interpretation of “system of records” has been adopted by courts that have had occasion to address the question. *See Kreiger v. U.S.*

*Dep’t of Justice*, 529 F. Supp. 2d 29, 42 (D.D.C 2008) (stating that email archives were not a system of records, in part, because the plaintiff “offers no facts suggesting that [the Department] would have been indexed by name, or that an electronic folder existed that grouped emails related to [the plaintiff] by name or other identifier”); *Minshew v. Donley*, 911 F. Supp. 2d 1043, 1071 (D. Nev. 2012) (finding emails about individual as the method of disclosure and not the source or record of the disclosure); *Counce v. Nicholson*, No. 3:06cv00171, 2007 WL 1191013, at \*15 (M.D. Tenn. Apr. 18, 2007) (concluding that “email contain[ing] information regarding a potential presentation on bullying that [plaintiff’s] supervisors directed her to submit for their review” was not a “record”).

9. That said, if the records of these text messages had been copied from the FBI’s general archives into a “system of records,” for instance into an OIG investigative file, it is conceivable that they would come under the protection of the Privacy Act, and could not be disclosed without the consent of the individual involved, absent a routine use allowing for such a disclosure. I determined that, assuming the text messages at issue came from a system of records maintained by the OIG, the relevant routine uses would have been published in the Federal Register as System of Records Notice JUSTICE/OIG-001, “Office of the Inspector General Investigative Record.” 82 Fed. Reg. 36,725 (July 5, 2007).

10. One of the routine uses within JUSTICE/OIG-001 permits compatible disclosures “[t]o the news media and the public, including disclosures pursuant to 28 C.F.R. § 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.” 82 Fed. Reg. at 36,726.

11. The Department practice has been to treat the “unwarranted invasion of personal privacy” limitation in its routine uses, as requiring the same analysis required under the FOIA’s 552(b)(7)(C) and 552(b)(6) exemptions. That is, the Department would not disclose records to the public or to news media under this routine use if such a disclosure “could reasonably be expected to constitute an unwarranted invasion of privacy.” *See* 5 U.S.C. § 552(b)(6), (b)(7)(C). This in turn requires balancing the public interest in the information against the privacy interest of the individual to which the record pertains, effectively the same balancing test that is required under the privacy provisions of the FOIA. *Id.*

12. My analysis was based in part on the leading Supreme Court case in this area, in which the Court stated that, “[w]hether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’ . . . rather than on the particular purpose for which the document is being requested.” *U.S. Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772 (1989). Information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose. *Id.* at 773. The public interest is at its zenith when based on the information a reasonable person could conclude that the agency was acting inconsistent with the presumption of legitimacy it would ordinarily enjoy.

13. Applying that test, and based upon my review of the materials, I considered it relevant that the text messages were exchanged between two high-ranking FBI officials, and that the text messages exhibited very strong political opinions about an individual who

was the subject of an ongoing FBI investigation, an investigation in which both of the authors of the text messages appeared to be personally involved.

14. Further, the communications between the DOJ employees took place not on personal devices, but on Department-issued mobile devices, which contained clear banner warnings that inform users of the lack of any reasonable expectation of privacy. While the Department permits limited personal use of its equipment, this policy does not exempt mobile devices from Department monitoring and oversight, and Department employees receive regular training and notices that any activity and content on Department devices is subject to monitoring.

15. I felt that the two individuals knew or should have been aware that these texts would have been subject to review by others in the Department and possibly even the subject of a FOIA request or disclosed in connection with discovery in a possible criminal prosecution.

16. In addition, because the public had already become aware of the names of both individuals, there appeared to be no way to mitigate the invasion of privacy that would accompany the release of the texts by redacting the individuals' names. However, the fact that the Department proposed to redact non-work-related personal information from the text messages before releasing them to the media reduced the individual's privacy interests in the texts. It is also significant that the text messages would be disclosed to Congress—as is permitted by the Privacy Act, *see* 5 U.S.C. § 552a(b)(9)—and that Deputy Attorney General Rosenstein was scheduled to testify publically before Congress the next day where he was expected to be asked questions about these text messages. Congress, of course, could have released the text messages itself without creating any Privacy Act implications.

17. As to the public interest side of the balancing, the texts displayed what a reasonable person could consider to constitute bias. This in turn risked undermining public confidence in the objectivity and impartiality of the work of the FBI and the Department, given that the apparent bias concerned individuals who figured prominently in a criminal investigation for which the FBI senior officials were responsible. It bears mention that the appearance of possible bias in this matter also involved the potential exercise of government power against a citizen. I believed, and continue to believe, that such an appearance of bias in connection with criminal investigations, was sufficient to shift the presumption away from protecting personal privacy to one favoring public transparency.

18. Under all the facts and circumstances presented to me at the time, it was my considered judgment that the public interest outweighed the privacy interest of the two individuals, and that the Department's disclosure of the text messages would not violate the Privacy Act. I advised ADAG Schools accordingly.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct, to the best of my knowledge and belief.

Dated: November 18, 2019

  
Peter Winn

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

## **Exhibit 4**



**U.S. Department of Justice**

Federal Bureau of Investigation

Washington, D.C. 20535-0001

*August 08, 2018*  
PERSONAL

Mr. Peter P. Strzok II  
Federal Bureau of Investigation  
Washington, D.C.

Dear Mr. Strzok:

On June 15, 2018, the Office of Professional Responsibility (OPR) proposed dismissing you from the rolls of the FBI based on its finding that you: (1) made inappropriate political comments in text messages on your FBI-issued cell phone, in violation of FBI Offense Code 5.21 (Unprofessional Conduct – Off Duty); (2) utilized a personal email account to conduct official FBI business, in violation of FBI Offense Code 5.18 (Security Violation – Other); and (3) failed to diligently pursue a significant investigative lead, in violation of FBI Offense Code 1.7 (Investigative Deficiency – Misconduct Related to Judicial Proceedings). As the deciding official in this matter, I have given full and impartial consideration to all the documentation and evidence upon which the proposed disciplinary action was based, your written response dated July 17, 2018, the oral presentation by you and your counsel on July 24, 2018, and the “Last Chance Agreement” you executed on July 26, 2018. Pursuant to the request in your “Last Chance Agreement,” Offense Code 5.2 (Dereliction of Supervisory Responsibility) is substituted for Offense Code 1.7 (Investigative Deficiency – Misconduct Related to Judicial Proceedings), and Offense Code 1.7 will not be further discussed. Based on a preponderance of the evidence, I conclude the allegations are substantiated. However, based on the circumstances of this case, including the supplemental information you presented, and considering the 12 *Douglas* Factors, including, but not limited to, consistency with precedent, the Penalty Guidelines, prior disciplinary history, and aggravating/mitigating factors, I am: (a) suspending you from duty, without pay, for 60 calendar days, not dismissing you, as originally proposed; and (b) demoting you to a non-supervisory position.<sup>1 2 3</sup>

<sup>1</sup> This administrative inquiry was opened after January 1, 2017, and thus will be analyzed under the FBI’s 2017 Offense Codes and Penalty Guidelines.

<sup>2</sup> In your Last Chance Agreement (LCA), you agreed the LCA and this letter reflect the Bureau’s final disposition of this disciplinary inquiry, from which no appeal will be taken. However, nothing in this disposition affects the ability of the Human Resource Division, Security Division, or other Bureau component to address your conduct as a performance matter, security issue, or otherwise, as appropriate.

<sup>3</sup> Pursuant to Policy Directive 0772D, whenever a demotion is based on an OPR finding of misconduct, the demotion must start at step 01. I leave it to the discretion of Division management to identify an appropriate non-supervisory position for you.

360-40-293724-218

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## DISCUSSION

### **Background**

On July 10, 2015, the FBI opened an investigation into the storage and transmission of classified information on former Secretary of State Hillary Clinton's unclassified private servers (Clinton Email investigation). The FBI interviewed numerous witnesses and obtained and analyzed servers and devices used by Clinton, as well as the contents of private email accounts. In August 2015, you were assigned to lead the Clinton Email investigation and, according to your signed, sworn statement (SSS), you "built a team" to conduct the investigation. You made the day-to-day investigative decisions and kept the then-FBI Director (D) and the then-FBI Deputy Director (DD) informed of ongoing developments.

The Clinton Email investigation culminated on July 5, 2016, with a press conference by D announcing that the FBI had completed its investigation and would recommend to the Justice Department that prosecution of Clinton be declined despite her having been "extremely careless" in handling classified information.<sup>4</sup> In late September 2016, the Clinton Email investigation was reopened following the discovery of Clinton emails on the laptop of former Congressman Anthony Weiner, the ex-husband of Clinton aide Huma Abedin, during an unrelated criminal investigation. However, from September 28 through October 28, no action was taken by the Clinton Email investigative team to obtain a search warrant to review the emails on Weiner's laptop. On October 28, 2016, eleven days before the 2016 presidential election, D sent a letter to Congress disclosing the existence of these additional emails as "appear[ing] to be pertinent" to the Clinton Email investigation. On October 30, thirty-two days after the Clinton Email team learned of the existence of the emails, the FBI obtained a search warrant to review the emails. On November 6, just two days before the presidential election, D sent a second letter to Congress advising that there was, in fact, no new information in the emails and that the FBI's decision remained unchanged – to wit, that criminal charges against Clinton were unwarranted.

In July 2016, you were assigned to lead the FBI's investigation into the Russian government's efforts to interfere in the 2016 presidential election (Russia investigation). On May 17, 2017, former FBI Director Robert Mueller III was appointed Special Counsel over the Russia investigation. From May 2017 to July 28, 2017, you worked on the Special Counsel's staff. You worked closely with former FBI General Attorney (GA).<sup>5</sup> GA served as counsel to DD, was his liaison to the Clinton Email investigation starting in February 2016<sup>6</sup> and to the Russia investigation beginning in July 2016, and worked on the Special Counsel's staff from May 22 to July 15, 2017.

In early 2017, the Department of Justice (DOJ), Office of the Inspector General (OIG), began a review of various actions taken by DOJ and the FBI in connection with the Clinton Email investigation. During the course of its investigation, the OIG interviewed more than 100

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<sup>4</sup> At the time, Clinton was the presumptive Democratic nominee in the 2016 presidential election. D was subject to widespread condemnation for holding the press conference, including his use of imprecise and misleading language.

<sup>5</sup> (P-1)

<sup>6</sup> Text records indicate GA was involved in an unknown capacity in the Clinton Email investigation as early as August 2015.

**Mr. Peter P. Strzok II**

witnesses and reviewed more than 1.2 million documents, including electronic communications (ECs), interview reports (FD-302s), agent notes, communications between and among agents, prosecutors, supervisors, and other officials involved in the Clinton Email investigation, as well as a variety of other written materials. The OIG obtained and reviewed in excess of 100,000 text and instant messages to or from FBI personnel who worked on the investigation.<sup>7</sup>

During the course of its review, the OIG located more than 40,000 unique text messages between you and GA from June 30, 2015 to May 17, 2017.<sup>8 9</sup> Those text messages covered a wide range of topics, including routine work-related communications, as well as personal messages which included discussions about your families, medical issues, and daily events, and reflected that you and GA were communicating on your FBI-issued phones as part of an extramarital affair.<sup>10</sup> Of serious concern was the overtly political tone of many of your text messages related to the 2016 presidential election, including statements expressing hostility for then-candidate Donald Trump and support for then-candidate Hillary Clinton. Even more concerning, certain text messages mixed your political opinions with discussions about the work you were conducting on the Clinton Email and Russia investigations, which raised serious questions about your impartiality and whether your political opinions affected your investigative decisions.

On July 28, 2017, when the Special Counsel learned of your improper text messaging, you were removed from the Special Counsel's investigation and returned to the FBI. Your communications with GA received extensive media coverage and caused many political figures, media commentators, and members of the public to harshly criticize the handling of the Clinton Email and Russia investigations by the FBI, DOJ, and the Special Counsel.

Finally, during the course of its investigation, the OIG uncovered evidence that you used a personal email account to conduct official FBI business.

### **Unprofessional Conduct**

The investigation uncovered text messages between you and GA that raised concerns about potential bias in the Clinton Email and Russia investigations, including texts that commented on Trump and/or Clinton, and other texts that expressed political opinions while discussing your work on the Clinton Email and Russia investigations.<sup>11</sup> GA stated the

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<sup>7</sup> The OIG reviewed text messages from FBI-issued mobile devices and instant messages exchanged on Government System #1 and Government System #2. Government System #1 is the FBI's computer system for information classified at the Secret level, while Government System #2 handles Top Secret and compartmented information.

<sup>8</sup> After initial difficulties securing text messages for the period from December 15, 2016 to May 17, 2017, the OIG was able to recover a large number of these messages, although it "cannot definitively say that [the OIG's] forensic recovery captured every text message exchanged between [GA] and [you] during the gap period."

<sup>9</sup> OPR reviewed approximately 74,000 text messages between you and GA on your FBI-issued cell phones between February 1, 2015 and July 5, 2017.

<sup>10</sup> During the relevant period of time both you and GA were married to other people.

<sup>11</sup> OPR notes that during your text exchanges, you and GA expressed a high volume of critical opinions about a broad array of topics and individuals including your families, work colleagues, the United States government, colleges, cities, entertainers, political commentators, and politicians affiliated with both the Republican and Democratic parties.

Mr. Peter P. Strzok II

"predominant reason" the two of you communicated so extensively on your FBI-issued cell phones was "to keep [your] affair a secret from [your] spouses."

**Relevant Text Messages:**

August 16, 2015 (You are the lead agent for the Clinton Email investigation)

You: [Bernie Sanders is] an idiot like Trump. Figure they cancel each other out.

December 20, 2015 (GA forwarded you an article about Trump)

GA: What an utter idiot.

You: No doubt.

February 12, 2016 (GA is now assigned to Clinton Email investigation by DD)

GA: I'm no prude, but I'm really appalled by this. So you don't have to go looking (in case you hadn't heard), Trump called him the p-word. The man has no dignity or class. He simply cannot be president. ...

You: Oh, [Trump's] abysmal. I keep hoping the charade will end and people will just dump him. The problem, then, is Rubio will likely lose to Cruz. The Republican party is in utter shambles. When was the last competitive ticket they offered?

February 24, 2016 (Discussing the FBI's upcoming interview of Hillary Clinton)

GA: One more thing: [Clinton] may be our next president. The last thing you need [is] going in there loaded for bear. You think she's going to remember or care that it was more DOJ than FBI?<sup>12</sup>

You: Agreed...

March 1, 2016 (You recalled a conversation with your teenage son)

You: [My son] asked me who I'd vote for [and he] guessed Kasich.

GA: Seriously?! Would you not [vote for a] D[emocrat]?

You: I don't know. I suppose Hillary. I would [vote for a] D[emocrat].

GA: [Your son] doesn't think you're a[] R[epublican], does he?

You: [State #1 is] going to [Clinton] anyway. He thinks I wouldn't vote for her right now. He knows I'm a conservative Dem[ocrat]. But now I wonder.

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<sup>12</sup> You and GA said this conversation related to the number of people that would attend Clinton's interview. You said you "did not take this to mean [...] we should treat [Clinton] differently because she's the next president" and claimed you "made no decision based on anything [Clinton] might be or [might] become..."

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March 3, 2016

GA: God trump is a loathsome human.  
You: Yet he may win. Good for Hillary.  
GA: It is.  
You: Would he be a worse president than cruz?  
GA: Trump? Yes, I think so.  
You: I'm not sure. Omg [Trump's] an idiot.  
GA: He's awful.  
You: America will get what the voting public deserves.  
GA: That's what I'm afraid of.  
You: God Hillary should win 100,000,000-0.  
GA: Also did you hear [Trump] make a comment about the size of his d\*ck earlier? This man cannot be president.

March 12, 2016 (GA forwarded an article about a “far right” candidate in State #2)

GA: [W]hat the f is wrong with people?  
You: That [State #2] article is depressing as hell. But answers how we could end up with President trump.

March 16, 2016

GA: I can not believe Donald Trump is likely to be an actual, serious candidate for president.

April 1, 2016

GA: So look, you say we text on that phone when we talk about hillary because it can't be traced . . .  
You: Right.

May 3, 2016

GA: And holy shit Cruz just dropped out of the race. It's going to be a Clinton, Trump race. Unbelievable.  
You: What?!?!??  
GA: You heard that right my friend.  
You: I saw trump won, figured it would be a bit. Now the pressure really starts to finish [the Clinton email investigation] ....  
GA: It sure does.

June 11, 2016

You: They fully deserve to go, and demonstrate the absolute bigoted nonsense of Trump.

June 17, 2016

You: Now we're talking about Clinton, and how a lot of people are holding their breath, hoping.

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July 13, 2016 (You were assigned to lead the Russia investigation; GA forwarded an article entitled "For Whites Sensing Decline, Donald Trump Unleashes Words of Resistance")

- GA: Have you read this? It's really frightening.  
You: I have not. But I think it's clear he's capturing all the white, poor voters who the mainstream Republicans abandoned in all but name in the quest for the almighty \$\$\$\$.

July 18, 2016

- You: And f\*ck the cheating mother\*fking Russians. Bastards. I hate them.  
GA: I'm sorry, me too.

July 18, 2016 (While watching the Republican National Convention)

- You: Oooh, TURN IT ON, TURN IT ON!!! THE DOUCHEBAGS ARE ABOUT TO COME OUT. You can tell by the excitable clapping.  
GA: And wow, Donald Trump is an enormous d\*uche.

July 19, 2016

- You: Hi. How was Trump, other than a douche?  
GA: Trump barely spoke, but the first thing out of his mouth was "we're going to win soooo big." The whole thing is like living in a bad dream.  
You: Jesus.  
GA: God, it's just a two-bit organization. I do so hope his disorganization comes back to bite him hard in November.  
You: It HAS to, right? Right?!? Panicked.

July 21, 2016

- You: Trump is a disaster. I have no idea how destabilizing his Presidency would be.

July 26, 2016 (While watching the Democratic National Convention)

- You: Congrats on a woman nominated for President in a major party. About damn time! . . . Chills, just because I'm a homer for American democracy that way. If they played patriotic music or did something with the flag and an honor guard, I probably would have teared up..... And [your daughter] just asked, since [Clinton's] married to man, there's no First Lady. What is there? And I happily told her, a First Husband! (who's gonna be an utter charismatic hound dog, btw...)  
GA: Yeah, it is pretty cool. [Clinton] just has to win now. I'm not going to lie, I got a flash of nervousness yesterday about trump. The sandernistas have the potential to make a very big mistake here . . .  
You: I'm not worried about them. I'm worried about the anarchist Assanges who will take fed information and disclose it to disrupt. We've gotta get the memo and brief and case filing done. . . . And I don't like Chelsea! Her husband even less...  
GA: I like Chelsea fine. Why not?  
You: Self-entitled. Feels she deserves something she hasn't earned.

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July 27, 2016

GA: Have we opened on him yet?  
You: Opened on Trump? If Hillary did, you know 5 field offices would...

July 31, 2016

You: And damn this [Russia investigation] feel momentous. Because this matters. The other one did too, but that was to ensure we didn't F something up. This matters because this MATTERS.

August 6, 2016 (GA forwarded an article relating to Trump's criticism of a Gold Star family)

GA: Jesus. You should read this. And Trump should go f himself.  
You: God that's a great article. Thanks for sharing. And F Trump.  
GA: And maybe you're meant to stay where you are because you're meant to protect the country from that menace. To that end, read this: [GA forwards an article entitled, "Trump's Enablers Will Finally Have to Take a Stand"]  
You: Thanks. It's absolutely true that we're both very fortunate. And of course I'll try and approach it that way. I just know it will be tough at times. I can protect our country at many levels, not sure if that helps...  
GA: I know it will too. ....  
You: [Referring to and quoting GA's article] I really like this: [Trump] appears to have no ability to experience reverence, which is the foundation for any capacity to admire or serve anything bigger than self, to want to learn about anything beyond self, to want to know and deeply honor the people around you.  
GA: Sigh. That's the paragraph, upon reading, that caused me to want to send it to you.

August 8, 2016

GA: [Trump's] not ever going to become president, right? Right?!  
You: No. No he's not. We'll stop it.

August 10, 2016

You: OMG I CANNOT BELIEVE WE ARE SERIOUSLY LOOKING AT THESE ALLEGATIONS AND THE PERVERSIVE CONNECTIONS. What the hell has happened to our country?!?!??

August 14, 2016 (GA forwarded an article entitled "Donald Trump is Making America Meaner")

GA: God this makes me so angry.  
You: And I am worried about what Trump is encouraging in our behavior. The things that made me proud about our tolerance for dissent – what makes us different from Sunnis and Shias losing each other up – is disappearing. I'm worried about what happens if [Clinton] is elected.

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August 15, 2016

You: I want to believe the path you threw out for consideration in [DD's] office—that there's no way [Trump] gets elected—but I'm afraid we can't take that risk. It's like an insurance policy in the unlikely event you die before you're 40....

August 26, 2016

You: Just went to a southern [State #1 Store]. I could SMELL the Trump support.... Yeah it's scary real down here.

September 12, 2016

You: [Radio] says Trump hotel opens today. It doesn't look ready....

GA: That's one place I hope I never stay in.

You: Agree. Hope it fails horribly. It won't, but still.

September 26, 2016 (GA forwarded an article entitled "Why Donald Trump Should Not Be President")

GA: Did you read this? It's scathing. And I'm scared. . . . Man I should have started drinking earlier. ....

September 28, 2016

You: Oh sweet jes\*s I need to send you what my father has been sending. The liberal media is all in the tank for Hillary. Because, you know, Trump isn't batsh\*t crazy for our country....

GA: Please don't. I really don't want to know what is out there.

You: My father is crazy, btw. EVERYTHING about him is a dem[ocrat]. Except maybe [strong] national defense (except Hillary is that but she can't be, because, you know, CLINTON!).

GA: I know. His political affiliation is truly baffling. He's a HUGE D[emocrat].

You: I know! I WANT YOU TO MEET HIM AND CONVINCE HIM! You're very persuasive. ....

September 28, 2016 (You forwarded an article entitled "Donald Trump Got Too Much Debate Advice, So He Took None of It")

You: "Found it hard to focus?" "Found it hard to focus?!?!??!" Are you f\*cking kidding me?!??!!

October 5, 2016 (GA forwarded an article critical of Trump entitled "The Editorialists have Spoken; Will Voters Listen?")

You: No they won't listen, because they're f\*cking stupid. And I'm moving to [Another Country].

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October 8, 2016

- You: Currently reading about Trump. Wondering if he stepped down if Pence could actually get elected.
- GA: That's probably more likely than Trump getting elected.
- You: I agree. I think it would actually energize the Republican vote. And no, not really re path forward. And funny quote from my cousin-in-law: "No way Trump will drop out. Hey Republicans: how does it feel to carry something to term?"

October 19, 2016 (While watching a Clinton-Trump debate on television)

- You: I am riled up. Trump is a fucking idiot, is unable to provide a coherent answer. I hate these people.
- GA: Please. I honestly don't want to know. It looks and sounds like a Saturday Night Live skit.
- You: I CAN'T PULL AWAY. WHAT THE FUCK HAPPENED TO OUR COUNTRY, [GA]?!!!!?! Bad hombres? That's some jive turkey talk, honkey!
- GA: I don't know. But we'll get it back. We're America. We rock.
- You: Donald just said "bad hombres." Oh hot damn. [Clinton] is throwing down saying Trump in bed with russia. Holy shit are you fucking kidding me?!?!? . . . She could do SO MUCH BETTER. But she's just not getting traction. Jesus.

October 19, 2016 (After GA attempted to convince you to turn off the debate)

- You: Maybe. I have to watch this. And I'm so damn mad, [GA]. And disgusted. And disappointed. Trump just said what the fbi did is disgraceful.

November 1, 2016

- GA: God, this makes me very angry. I honestly think I should bow out rather than find out things, be unable to tell [DD], and powerless to stop them.
- You: No. Need you on the inside now more than ever. Truly. And no bs, your country needs you now. We are going to have to be very wise about all of this. The only thing wrong in your statement is your powerlessness.
- GA: I'm not sure I agree with you there.
- You: .... And this is a finite thing. I want to be done before the inauguration. You're wrong. Not the type of power you (or i) would prefer, but not powerless.

November 3, 2016

- GA: The [Newspaper] probability numbers are dropping every day. I'm scared for our organization.
- You: [Writer #1] and moron [Writer #2] are F'ing everything up, too.

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November 7, 2016 (You sent an article entitled "A Victory by Mr. Trump Remains Possible")

You: OMG THIS IS F\*CKING TERRIFYING.  
GA: Yeah, that's not good.

November 9, 2016

GA: Are you even going to give out your calendars? Seems kind of depressing. Maybe it should just be the first meeting of the secret society.

November 13, 2016

GA: I bought all the president's men. Figure I needed to brush up on watergate.

November 14, 2016

GA: God, being here makes me angry. Lots of high fallutin' national security talk. Meanwhile, we have OUR task ahead of us...

November 20, 2016 (GA forwarded an article entitled "White Nationalists Celebrate Awakening After Donald Trump Victory")

GA: This is really disgusting.  
You: Im worried racial tension is going to get really bad.... And god that was a depressing article.

December 22, 2016

GA: The election stuff makes me want to cry.  
You: I know. Me too. And I don't see it getting better....  
GA: As you said last night, I'm really scared for our country....

March 14, 2017

GA: Finally two pages away from finishing ["All The President's Men"]. Did you know the president resigns in the end?! 😊  
You: What?!?! God, that we should be so lucky.

May 18, 2017 (GA had just joined the Special Counsel's investigation)

You: For me, and this case, I personally have a sense of unfinished business. I unleashed it with [the Clinton email investigation]. Now I need to fix it and finish it. .... Who gives a f\*ck, one more A[ssistant] D[irector]...[versus] [a]n investigation leading to impeachment?<sup>13</sup> ...

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<sup>13</sup> In a May 22, 2017 Government System #1 email to GA, you expressed similar sentiments regarding impeachment. GA forwarded an article entitled, "Trump asked intelligence chiefs to push back against FBI collusion probe after [D] revealed its existence." You responded saying, "Yup. Assuming you/team will do it via [Attorney]?" After GA confirmed this, you responded, "God I suddenly want on this. You know why." GA responded and offered to leave the Special Counsel investigation to enable you to join it and you replied, "I'm torn. I think - know - I'm more replaceable than you are in this. I'm the best for it, but there are others who can do OK. You are different and more unique. This is yours. Plus, leaving a S[pecial] C[ounsel] (having been an SC) resulting in an impeachment as an attorney is VERY different than leaving as an investigator . . ."

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[Y]ou and I know the odds are nothing. If I thought it was likely I'd be there no question. I hesitate in part because of my gut sense and concern there no big there there.

### **Public Reaction to Text Messages**

Your removal for cause from the Special Counsel's investigation garnered media attention in the late summer and early fall of 2017. However, in December 2017, when media outlets learned of your illicit relationship with GA and the nature of your political text messaging, the story became a media sensation. It was widely reported, cast doubt on the FBI's investigative findings and the Special Counsel's investigation, and brought harsh criticism upon the FBI from politicians at all levels in both political parties, President Trump, the media, and the public.

### **Your Account of Text Messaging**

On September 26, 2017 and April 20, 2018, you gave voluntary sworn interviews to the OIG. You said you took "the allegations [] that there might be political bias extraordinarily seriously . . . [and you felt] very comfortable that there was not." You claimed your text messages with GA were your "personal opinion talking to a friend" and stated your political opinions "never transited into the official realm" or impacted your professional duties. You said that the "acts," "decisions," and "conduct" of the investigations were "absolutely clear of any personal beliefs."

You stated that "personal conversations are not relevant" to the investigative decisions that were made, but that "people will want to spin and assign motive or see conspiracy where there is not." You stressed that while you discussed personal opinions with GA "there [was] never a [discussion that] in order to achieve [a particular] personal belief, we're going to need to [take any specific action]." You said it was "ingrained" in your culture and training "that whatever personal beliefs you have [] that there is absolutely a bright and inviolable line between what you think personally [] and the conduct of your official business."

You stated that GA was a "colleague who is also a close friend" and noted that your personal opinions and beliefs "intermixed" in some of your work conversations. You acknowledged that expressing your opinions in such a manner "was dumb to do [] on a government device," but claimed your use of the FBI-issued cell phone to express your opinions was not as bad as expressing your opinions in a more public forum which might call into question the integrity of the FBI investigation. You posited that your texts with GA were a "direct, one-on-one, private conversation" and "a non-official record between two friends." You stated your use of your FBI-issued phone to engage in these conversations was a matter of "convenience" and acknowledged that in hindsight you "would have preferred [] to do that [] not on a [] government system."

You were aware your communications with GA on your FBI-issued phone were monitored and logged and admitted you could "envision a number of scenarios" in which the disclosure of those messages would hurt the integrity of the FBI and the Clinton Email and Russia investigations. You acknowledged your conduct was not "smart from the perspective of

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perception.” However, you claimed it would be difficult to “find a person [who] does not have an opinion about things of either a political or a public interest perspective . . . most people have an opinion and they talk about it.” In spite of the strong language and apparent bias evidenced in your messages with GA, you denied that you were prejudiced against a particular person, pointing out that “at some time or another, [you were] angry at everybody.” You stated that “never, ever, ever did [you] ever make any operational or work decision based on any personal preference, desire, or belief.” You admitted you viewed the allegations involved in the Russia investigation as more serious than the Clinton Email investigation allegations, but noted that was due to the possible engagement of, and collusion between, a domestic political campaign and a foreign government.

You were aware of the significant public interest and political ramifications in both the Clinton Email and Russia investigations. You acknowledged that you considered certain investigative steps to ensure the public would feel that the investigations were thorough, the conclusions were based on fact, and to deter perceptions that “the fix was in.” You told investigators you approached the Clinton Email and Russia investigations with a keen sense of “absolutely [doing] it right” such that the public “could look at it and say this was done right and well, and there is no question about it.”

### **Security Violation**

The investigation uncovered numerous occasions on which you used your personal email account to conduct FBI business.<sup>14</sup> Examples of official communications forwarded to your personal email account included drafts of a Congressional response and the search warrant affidavit for the Anthony Weiner laptop. Concerning the latter, you stated that the FBI phones “at the time had significant limitations” which made it impossible to view certain edits. You acknowledged the Weiner search warrant was filed under seal, but claimed it was not “sensitive” because “most of [the information contained therein] had already been in the public domain” and that filing the document under seal was “an administrative sensitivity.”<sup>15</sup> In spite of sensitive grand jury information contained in the document,<sup>16</sup> you argued that using your personal email account to work on the document was “a reasonable exception to the rule given that [you] couldn’t read it on the Bureau phone.”

You said your understanding of FBI policy regarding the use of personal devices or email accounts to conduct FBI business “is that home computer and personal electronic devices use is discouraged, and that in cases where it is not practical or possible to use your [FBI-issued] device, that there are allowances made. But you should keep operationally sensitive [or classified] detail out of there.” Although you claimed you used personal email “when it wasn’t possible [to use the FBI’s systems] or there [] were problems with the FBI systems,” you also acknowledged using your personal home computer to type out FBI related documents “for

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<sup>14</sup> D and GA were also found to have used their personal email accounts to conduct FBI business. The situation is replete with irony given the FBI’s criticism of Clinton for having done so.

<sup>15</sup> Irrespective of your personal judgment as to the sensitivity of the information, it was filed under seal and entitled to protection.

<sup>16</sup> The U.S. Attorney’s Offices for the Southern District of New York and the Eastern District of Virginia were notified of your actions.

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convenience.” You stated you would send the documents from your unclassified FBI email account to your personal email account and then send it back to your FBI account so that it was “incorporated and picked up into the FBI system.”

You claimed your “usual practice” was to double delete the work emails after you sent them. You acknowledged you had been issued an FBI laptop to work from home but claimed you did not know how to properly log on to use the machine. You also acknowledged you had an Enterprise Remote Access Service (ERAS) machine but noted it was burdensome to transport and said you only “recently” discovered you could access the FBI unclassified system there as well.

You admitted your wife gained access to your personal cell phone and email accounts in 2017. You noted her access was “unusual [] and limited to a specific period of time,” and claimed she did not view any FBI case related information.<sup>17</sup><sup>18</sup> You claimed you did not have any work-related communications on your personal email account because you had double deleted all such communications. You declined the OIG’s request to review your personal email account.

Evidence was also uncovered of your and GA’s use of iMessage on your personal cell phones to conduct FBI business. You initially told investigators that you and GA “[t]ypically” used iMessage on your personal cell phones for only personal conversations. When asked if you and GA ever exchanged work-related information on your personal cell phones, you said, “I do not recall that. I can’t exclude it ever, ever happening, but I don’t recall ever sending work-related stuff on [] iMessage.”<sup>19</sup>

## **Dereliction of Supervisory Responsibility**

### **Discovery of Additional Clinton Emails**

In September 2016, the FBI’s New York Office (NYO) and U.S. Attorney’s Office for the Southern District of New York (SDNY) began a criminal investigation of Anthony Weiner related to his online relationship with a minor. Weiner’s laptop was obtained pursuant to a

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<sup>17</sup> On April 4, 2017, you and GA engaged in a text exchange that read, in part:

You: [My wife] has my phone []. Read an angry note I wrote but didn’t send you. That is her calling from my phone. She says she wants to talk to [you]. Said we were close friends nothing more.  
 GA: Your wife left me a vm. Am I supposed to respond? She thinks we’re having an affair. Should I call and correct her understanding? Leave this to you to address?  
 You: I don’t know. I said we were [] close friends and nothing more. She knows I sent you flowers, I said you were having a tough week.

<sup>18</sup> During a text exchange from April 4-8, 2017, you and GA discussed that your wife had access to your devices and had located GA’s husband’s full name, found a hotel reservation ostensibly used by you and GA during a romantic encounter, had access to photographs from your phone, threatened to send all the information to GA’s husband, and also threatened to hire a private investigator. GA told you to determine whether your wife might use recovery software to locate other evidence of your affair on your devices.

<sup>19</sup> On May 4, 2017, you and GA exchanged the following text messages on your FBI-issued cell phones:

You: Can I imsg a work q?  
 GA: Yes.  
 You: Sent.

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federal search warrant. An NYO agent discovered emails and BlackBerry messages by and between Weiner's ex-wife Huma Abedin and Hillary Clinton that appeared to be related to the Clinton Email investigation.<sup>20</sup> The case agent immediately reported his discovery up his chain of command and, on September 28, 2016, DD was notified of the discovery of possible Clinton emails. That same date, DD discussed the matter with you, and you, in turn, discussed the matter with GA via text messaging on your FBI-issued cell phones:

September 28, 2016:

You: Got called up to [DD's] earlier...hundreds of thousands of emails turned over by Weiner's atty to sdny, includes a ton of material from spouse. Sending team up tomorrow to review...this will never end...

GA: Turned over to them why?

You: Apparently one of his recent texting partners may not have been 18...don't have the details yet.

GA: Yes, reported 15 in the news.

You: So I kinda want to go up to NY tomorrow, coordinate this, take a leisurely Acela back Friday....

You told investigators you had planned to go to New York the following day, but a conference call was scheduled instead.<sup>21</sup> You said you initially did not consider this new information to be especially noteworthy because the Clinton Email team previously had people come forward and claim to have Clinton emails. The Clinton Email team would run down the leads if they thought they had potential merit. You nevertheless acknowledged this lead was more credible because it came from an FBI field office and involved information obtained from Abedin's husband.

During the September 29 conference call, NYO participants informed FBIHQ personnel that Weiner's laptop contained "hundreds of thousands" of emails potentially relevant to the Clinton Email investigation.<sup>22</sup> The connection to Clinton's email server was made clear on the call, including the fact that there were email addresses "directly tied" to Abedin and Clinton during the missing three-month timeframe. NYO participants explained that they were prohibited from further examination of the emails due to the parameters of their search warrant, which was limited to evidence of possible child exploitation by Weiner. According to NYO personnel, they were not tasked by FBIHQ to do anything relative to the Clinton emails during or following the call.

You stated that you believed "there [was] something there that potentially [Clinton Email investigators were] going to have to pursue," and "[w]e're likely looking at [a renewed investigation that will last] well into 2017." You said you believed NYO was processing the

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<sup>20</sup> During the initial Clinton Email investigation, which concluded on July 5, 2016, investigators were unable to locate three months of communications on Clinton's private server or devices, including BlackBerry messages. Therefore, this new discovery of BlackBerry messages was significant.

<sup>21</sup> You did not participate in the September 29, 2016 conference call. However, you were briefed on the issues later that day.

<sup>22</sup> Analysis later determined there were 675,000 emails on Weiner's laptop.

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data and that based on your familiarity with similar matters of data processing, "it would not have surprised [you] to have heard back [from NYO] in early-November or [] early-December."

You also emphasized that your focus in late September 2016 was on the Russia investigation, which you deemed to be more critical and time-sensitive. You said, "So [the Weiner laptop] pops up, and it's like goddammit another thing to worry about. And it's important, and we need to do it[,] but the discovery of additional emails on Weiner's laptop was not "a ticking terrorist bomb."

You acknowledged that you and your team "did not appreciate the later sense of urgency" related to the election. You told investigators that in the early process of discovering the additional emails, "there is not a shadow of [] what's going to unfold a month later." You stated, "there [was] no sense of this is going to be huge and horrible and the election is a month away, and God, are we going to say something, do we need to say something to Congress? This is just [a] good lead and [] we'll get to [it at] the end of the year [or into] next year. We'll get to it as [NYO officials] process through it."

#### **Failure of the Clinton Email Team to Take Action**

In New York, the Weiner case agent was deeply concerned that no action was being taken by Clinton Email investigators with regard to the Clinton emails. He began documenting these concerns in contemporaneous emails and also discussed his concerns with his chain of command and SDNY Assistant U.S. Attorneys (AUSAs). The case agent told the OIG that no one had contacted him regarding the laptop:

The crickets I was hearing was really making me uncomfortable because something was going to come crashing down. . . . And my understanding, which is uninformed because . . . I didn't work the Hillary Clinton matter. My understanding at the time was I am telling you people I have private Hillary Clinton emails [] and BlackBerry messages [. . .]. Why isn't anybody here? . . . Get your ass on the phone, call [the case agent], and get a copy of that drive . . . I still to this day don't understand what the hell went wrong.

The case agent arranged to meet with two SDNY AUSAs on October 19, 2016, because he felt he had nowhere else to turn. He told them about the emails discovered on the Weiner laptop and said, "I'm a little scared here. I don't know what to do because I'm not political. Like I don't care who wins this election, but this is going to make us look really, really horrible. And it could ruin this case, too." The AUSAs recalled the case agent was very stressed and "was getting, for lack of a better word, paranoid that, like somebody was not acting appropriately, somebody was trying to bury this."

That same day, October 21, 2016, following their meeting with the case agent, the AUSAs contacted DOJ to express concern about the lack of action. A DOJ prosecutor who had been assigned to the Clinton Email investigation contacted you to see if you were aware of the discovery of the emails on the Weiner laptop. Thereafter, additional calls were made by DOJ to FBIHQ, including to DD. On October 26, NYO, SDNY, and the Clinton Email team (agents and prosecutors) participated in a conference call during which FBIHQ claimed to learn important

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new information about the emails, including their large volume and the presence of Blackberry messages. However, as made clear by the interviews conducted by the OIG, FBIHQ learned nothing new on October 26 that it had not already been told on September 28-29. When asked by the OIG about the failure to timely follow-up on the Weiner laptop, DD stated he thought you "w[ere] actually doing it."

You agreed that no action was taken until SDNY alerted DOJ in late October. You stated it was only after NYO reported "the scope and content" of the Weiner laptop during the October 26 conference call that it became a significant event. You noted that, importantly, Weiner's laptop had backup emails from "the missing three months." You stated "We need[ed] to try and get this because this is, potentially would alter, would change our understanding of the investigative conclusions we arrived at in July."

On October 27, 2016, DD believed the matter was "absolutely urgent" and notified D that they needed to meet to discuss the Weiner laptop matter. When asked why it was urgent, DD said because "it's been sitting around for three weeks," "it's important," and "it's getting closer to" the election. Clinton Email investigators briefed D on October 27 and it was decided that they would seek a search warrant for the Clinton/Abedin emails contained on the Weiner laptop.<sup>23</sup>

### **Explanations for Failure to Take Action**

You provided a number of explanations for the Clinton Email team's inaction, including: (1) NYO's delay in processing the laptop; (2) a lack of specific information about what NYO had discovered on the laptop; (3) a belief that the laptop did not contain significant new information; (4) the team's focus on the Russia investigation,<sup>24</sup> and (5) legal impediments to reviewing the materials on the laptop. The investigation reveals that there is no reasonable excuse for the FBI's delay in following up on this matter.

#### **1. NYO's delay in processing the laptop**

You stated that the Clinton Email team was waiting for additional information about the contents of the laptop from NYO, which was not provided until late October. OPR finds this explanation unavailing because you knew the FBI could not examine the contents of the Clinton emails on Weiner's laptop without first obtaining consent or a new search warrant. The scope of the existing search warrant issued in the Weiner (G) case would not authorize the Clinton Email team's review of the emails. ADIC NYO informed your Assistant Director of this fact on September 29, 2016. Although NYO was still processing the laptop, it was up to the Clinton Email team to obtain proper search authority. However, the Clinton Email team took no action to inform the prosecutors about the laptop or obtain search authority. The Clinton Email team also failed to follow-up with NYO to determine how the processing was proceeding. If

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<sup>23</sup> The FBI obtained the search warrant on October 30.

<sup>24</sup> The investigation revealed that D and/or DD inexplicably assigned the same people to the FBI's two most significant investigations at the time, Clinton Email and Russia. This, in turn, meant the people were spread too thin and unable to focus the necessary time and energy needed for proper follow-up investigation on Clinton Email.

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they had done so, they would have learned that NYO completed processing of the laptop by approximately October 4, 2016.

2. A lack of specific information about what NYO had discovered on the laptop

You stated that it was only when NYO reported the “scope and content” of what was on the laptop on October 26 that it became a significant development. You noted that the laptop included Blackberry backups from the three months that the FBI had not previously reviewed. However, as of September 29, the FBI already knew the laptop contained: (a) over 340,000 emails, some of which were from domains associated with Clinton, including state.gov, clintonfoundation.org, clintonemail.com, and hillaryclinton.com; (b) numerous emails between Clinton and Abedin; (c) an unknown number of BlackBerry communications on the laptop, including one or more messages between Clinton and Abedin, indicating the possibility that the laptop contained communications from the early months of Clinton’s tenure as Secretary of State; and (d) emails dated beginning in 2007 and covering the entire period of Clinton’s tenure as Secretary of State.

3. A belief that the laptop did not contain significant new information

You described your perception of the discovery of emails on the Weiner laptop in late September as simply “a lead that likely is going to result in some investigation.” You stated that the suggestion that the matter should have been treated with more urgency was “misplaced” because “[w]e did not know what was there.” You believed the team could have reviewed the emails later on, in January or February. However, the laptop was already in FBI custody and it was a logical investigative step to obtain a search warrant to review the contents of the potentially relevant emails to discover whether they were significant. Moreover, although FBIHQ obtained no additional information about the emails from September 29 to October 27, when D was informed of the additional emails on October 27, he immediately notified Congress, suggesting he viewed the emails as potentially significant.<sup>25</sup>

4. The team’s focus on the Russia investigation

You were assigned to lead the Russia investigation, which was extremely active during the September and October time period, when the emails on the Weiner laptop were found. You stated that the Russia investigation was a higher priority. However, as noted by the OIG, the FBI has more than 14,000 agents and others could have been tasked to assist.<sup>26</sup>

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<sup>25</sup> D also indicated that had he been properly alerted to the emails in the beginning of October, and if he determined the review could be completed quickly, it may have caused him not to notify Congress, as he did on October 28, eleven days before the presidential election. D stated, “I don’t know [if] it would have put us in a different place, but I would have wanted to have the opportunity.”

<sup>26</sup> D acknowledged that using the same personnel on the FBI’s two highest-profile and most demanding cases was a mistake. D told OIG investigators, “in hindsight I needed another Strzok and maybe I needed two teams.” OPR agrees that different teams should have been assigned to the Clinton Email team and Russia investigation. The failure to more broadly staff the two investigations had a negative impact on the investigations and the FBI’s reputation.

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### 5. Legal impediments to reviewing the materials on the laptop

You stated that you knew NYO “couldn’t review [the Clinton emails] because [that] was outside the scope of [NYO’s] warrant.” This knowledge should have spurred your team to talk to the Clinton Email prosecutors about NYO’s discovery on the laptop. The prosecutors could have started the search warrant application process immediately, instead of a month later. As discussed above, the FBI obtained little additional information about the emails from September 28 to October 28. Therefore, there is no reason they could not have obtained a search warrant earlier.

### **Written Response and Oral Hearing**

In your written response and during your oral hearing you expressed deep remorse for your text messages and acknowledged that, although it was never your intention, the disclosure of your messages has done significant damage to the reputation FBI. You admitted that your texts “without question” represented “horrible judgment,” but denied that you ever made any investigative decisions as a result of any personal bias. Rather, you suggested your texts were “underpinned to events happening on the campaign trail” during the 2016 presidential election and simply reflected your personal thoughts and opinions. You described your actions as a “truly significant, horrible lapse in judgment.”

You pointed to Section 3.3.1 of the FBI Mobile Devices and Mobile Applications Policy Guide, 0879PG, dated July 6, 2016, to support the proposition that your behavior in using a personally owned mobile device to conduct official FBI business was allowable “when the use of an FBI owned mobile device is not possible or practicable.” You opined that your use of a personal email account “meets that standard” and was therefore “allowed by the exception written into the DOJ policy.”<sup>27</sup> You claimed the Weiner laptop affidavit you reviewed on your non-FBI personal device and in your personal email account did not contain grand jury information,<sup>28</sup> and erroneously asserted that your security clearance was suspended due to OPR’s “inaccurate conclusion.”<sup>29</sup> Ultimately, you opined that even if the draft search warrant contained sensitive information, it was “at best a technical violation of the policy.”

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<sup>27</sup> In your written response you referred to the OIG report at 424 which noted that DOJ policy allows employees to use personal email accounts for official communications “should exigent circumstances require.” However, FBI employees are subject to a different policy and are expressly prohibited from the use of personal email accounts to conduct official FBI business. See, e.g., Rules of Behavior for General Users Agreement Form (FD-889) expressly prohibiting anyone with access to the FBI Information Technology (IT) and Information Systems (IS) from using “personal e-mail services (such as Yahoo, Gmail, etc.) for government business.”

<sup>28</sup> Paragraph 16 of the draft Weiner affidavit you reviewed on your non-FBI personal device and in your personal email account states, in part, “Based on interviews and a review of the business records produced by [ ] pursuant to a grand jury subpoena, the FBI determined that shortly after [ ] took control of [ ] and [ ] in June 2013, [ ] transferred all email accounts and associated data from [ ] to [ ].”

<sup>29</sup> The Security Division’s letter to you dated June 15, 2018, states, “[o]n multiple occasions, you deliberately or negligently handled sensitive information on unauthorized equipment and/or by using a personal email service.” It makes no mention of grand jury information or any particular instance of mishandling, but rather refers to “multiple occasions” of mishandling, which is consistent with your admissions to OIG investigators.

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You disputed that you failed to properly follow the investigative lead regarding the Weiner laptop and noted that within hours of learning of its existence you assigned multiple trusted and accomplished subordinate employees to follow up on the newly discovered evidence. You noted that the Clinton Email team had many leads from many sources regarding additional Clinton emails, and while this particular lead was more credible than others due to it being Abedin material, you were unaware of the specific nature of the contents of the laptop to signal just how critical this lead was. You advised that hindsight review of this incident is unfair because you did not have all the available information at that time or the foresight to see what was yet to come.

You stated you believed: (1) the subordinate employees were appropriately following up on the lead; (2) it was not unusual for it to take weeks or months for the digital processing of a laptop; and (3) your assigned priority was the Russia investigation which posed a far greater risk to national security. After assigning this matter to subordinate employees, you noted you had a rough time frame in your mind regarding how long it would take to receive more information on the Weiner laptop and acknowledged that, prior to being contacted by DOJ in late October 2016, your "mental tickler" had not yet gone off indicating to you that more action on your part was needed.

You described the FBI's failure in this instance as "a bunch of people incorrectly assuming somebody else had the action and largely being overwhelmed with other things and not closing the loop like they should have." You noted that "everyone in [the] chain bears responsibility" (including you) for the investigative mix ups regarding the Weiner laptop. You expressed remorse for the poor outcome and said you "will carry with [you] for the rest of [your] life the question about the Bureau's actions and [D's] decisions . . . [and] how and if those impacted the election." You stated that you were completely dedicated to the mission of the FBI and noted your exceptionally strong desire to use your experience and talents to continue to serve the public and contribute to the organization.

## ANALYSIS

### A. Unprofessional Conduct – Off Duty

According to FBI Offense Code 5.21, employees are prohibited from "[e]ngaging in conduct, while off duty, which dishonors, disgraces, or discredits the FBI; seriously calls into question the judgment or character of the employee; or compromises the standing of the employee among his peers or his community."

Your excessive, repeated, and politically-charged text messages, while you were assigned as the lead case agent on the FBI's two biggest and most politically-sensitive investigations in decades, demonstrated a gross lack of professionalism and exceptionally poor judgment. Your misconduct has cast a pall over the FBI's Clinton Email and Russia investigations and the work of the Special Counsel. The immeasurable harm done to the reputation of the FBI will not be easily overcome. While "Trump is a fucking idiot," "I hate these people," "I need to fix it," "No he's not [going to become president]," and "We'll stop it," took less than a minute for you to transmit by text message, the long-term negative impact on the FBI cannot be overstated. Your

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vituperative text messages will be the subject of damning public discourse for days, months, and even years to come, and the FBI will be recipient of the expressed outrage.

You acknowledged: 1) you were aware of the significant public interest in and political ramifications of the Clinton Email and Russia investigations; 2) your text messages were monitored and preserved; and 3) disclosure of your messages would hurt the integrity of the FBI and the work on the Clinton Email and Russia investigations. You also said your conduct was a mistake “from the perspective of perception.” Your argument that it would be difficult to “find a person [who] does not have an opinion about things of either a political or a public interest perspective” is misguided and irrelevant. The hypothetical person you refer to is not: (a) tasked as the lead investigator on the FBI’s two biggest and most politically-sensitive investigations during a presidential election year; or (b) in a position to actually influence the investigation, alter investigative decisions, or potentially “stop” someone from becoming president. Your texting became a media sensation, cast doubt on the FBI’s investigative findings and the Special Counsel’s investigation, and brought harsh criticism upon the FBI from politicians at all levels of both political parties, President Trump, the media, and the public. Although you repeatedly denied that your investigative decisions in the Clinton Email and Russia investigations were the result of actual bias, the *appearance* of biased decision-making caused by your outrageous texts is as bad as if you had been biased. You admitted that your texts “without question” constituted “horrible judgment” and have done significant damage to the reputation of the FBI.

Based on a preponderance of the evidence, including your own admissions, I conclude the allegation that you violated Offense Code 5.21 is substantiated.

## B. Security Violation – Other

According to FBI Offense Code 5.18, employees are prohibited from “[e]ngaging in an activity or conduct in violation of a security regulation or policy promulgated by the FBI, DOJ, or another authoritative agency, which has not been specifically delineated in another Offense Code.” Pursuant to FBI policy, employees are prohibited from using personal e-mail services (such as Yahoo, Gmail, etc.) for government business.<sup>30</sup>

You admitted using your personal devices and email accounts to conduct FBI business. This is true even though you were provided appropriate FBI devices to conduct work outside of the office (cell phone, laptop, ERAS machine), and although personal email accounts are not secure and are not an authorized means of maintaining public records, which should have been apparent to you given your oversight of the Clinton Email investigation.

Your reliance on Section 3.3.1 of 0879PG is misplaced as it is inconsistent with the FD-889 which *expressly* prohibits the use of “personal e-mail services (such as Yahoo, Gmail, etc.) for government business.” There is no exception noted to this policy, and, although you focused

<sup>30</sup> See, e.g., Rules of Behavior for General Users Agreement Form (FD-889) expressly prohibiting anyone with access to the FBI IT and Information Systems IS from using “personal e-mail services (such as Yahoo, Gmail, etc.) for government business,” and FBI Information System Use Policy (Policy Directive 0922D), effective September 12, 2016, requiring any user of the FBI IT/IS system to “[a]cknowledge reading, understanding, and complying with this policy by signing the FD-889.”

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on but one instance in which you used your personal email account to conduct FBI business (your review of the Weiner laptop search warrant), the investigation uncovered numerous occasions in which you used your personal email account to conduct FBI business.

In addition, Section 3.3.1 of 0879PG, the authority upon which you rely, provides three examples of situations in which use of a personally owned mobile device may be permissible to conduct FBI business. All three examples involve only minimal and non-work substantive use of the non-FBI device, such as coordinating nonoperational meeting information (e.g. What time is the meeting?); use of global positioning satellite (GPS) for navigation or directions (e.g. Where is the building for the meeting?); and locating FBI personnel and communicating plans during or after a natural disaster (e.g. The FBI building just got hit by a tornado. Is everyone in a safe place?). Your purported use of reading a redlined version of an affidavit during the weekend is clearly substantive investigative work and does not meet the spirit of any of the permissible exceptions to the general rule prohibiting the use of non-FBI-owned mobile devices to conduct FBI business.

Based on a preponderance of the evidence, including your own admissions, I conclude the allegation that you violated Offense Code 5.18 is substantiated.

### C. Dereliction of Supervisory Responsibility

According to FBI Offense Code 5.2, it is prohibited for “[a] supervisor, or an employee acting in an authorized supervisory capacity, failing to exercise reasonable care in the execution of his duties or responsibilities, disregarding his duties or responsibilities, or significantly deviating from appropriate methods of supervision.”

You failed to follow up with subordinates to ensure they were properly pursuing the contents on the Weiner laptop matter. Although you stated that you directed them to take proper action in late September, thereafter you did not inquire further. It was not until late October that the issue was resurrected, and that was based on DOJ’s prodding, by which time it was too late to avoid or recover from the calamity that would follow as a result of the D’s October 28 and November 6, 2016 letters to Congress. You acknowledged that the Weiner laptop discovery was significant and needed to be thoroughly investigated, but you did not monitor the developments with the laptop or the actions of your subordinates in an appropriate manner. Your September 28, 2016 text exchange with GA is clear evidence that you knew there were “hundreds of thousands of emails” from Abedin discovered on the Weiner laptop. You acknowledged that you knew NYO did not have the legal authority to view the emails. Yet you took no action to confirm that subordinates were doing what needed to be done to determine the significance of those emails or to obtain a search warrant until a month later. The OIG harshly criticized the FBI for failing to take proper investigative steps for approximately one month and noted that the eventual actions taken by the FBI at the end of October 2016 were based on facts known to the FBI at the end of September 2016. As the lead case agent assigned to the Clinton Email team, your inaction contributed to a substantial investigative error and significantly tarnished the integrity of the Bureau.

Based on a preponderance of the evidence, including your own admissions, I conclude the allegation that you violated Offense Code 5.2 is substantiated.

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### **PENALTY DETERMINATION**

When proposing an appropriate penalty, I considered the 12 *Douglas* Factors, including, but not limited to, consistency with precedent, the FBI's Penalty Guidelines, prior disciplinary history, and aggravating/mitigating factors.

The investigation establishes you violated FBI Offense Code 5.21 (Unprofessional Conduct – Off Duty). The standard penalty is a five-day suspension. Mitigating factors warrant an oral reprimand to a three-day suspension. Aggravating factors warrant a seven-day suspension to dismissal.

The investigation establishes you violated FBI Offense Code 5.18 (Security Violation – Other). The standard penalty is a five-day suspension. Mitigating factors warrant an oral reprimand to a three-day suspension. Aggravating factors warrant a seven- to 30-day suspension.

The investigation establishes you violated FBI Offense Code 5.2 (Dereliction of Supervisory Responsibility). The standard penalty is a five-day suspension. Mitigating factors warrant an oral reprimand to a three-day suspension. Aggravating factors warrant a seven- to 14-day suspension.

I have considered all mitigating factors supported by the record, including, but not limited to, your 21 years of FBI service, outstanding performance record, and numerous awards, including those noted in your written response. I am also cognizant of the fact that you were assigned to two very stressful and high-profile investigations during the time of your misconduct. Nevertheless, severe aggravation is warranted because your inappropriate text messages were extensively covered by the media and brought extreme criticism on the FBI and DOJ. Your conduct also caused immeasurable harm to the Bureau's reputation with DOJ, other government officials, and the American public. Potential harm to the Bureau's reputation is listed as an aggravating factor for all misconduct in the Penalty Guidelines. Your inappropriate political comments on your FBI-issued cell phone resulted in skepticism about major investigative conclusions in an extremely high-profile case and required you to be removed for just cause from the Special Counsel's investigation. Your actions showed extremely poor judgment.

In addition, your use of your personal devices and personal email account to conduct FBI business paralleled the very nature of the case you were tasked to investigate. Ironically, you characterized Clinton's use of a private email server to conduct government business as "ill-advised," "really dumb," and "borderline" criminal. The level of hypocrisy seen in your conduct is staggering and further calls into question your judgment. Your impermissible use of your private email to conduct official FBI business in a matter that involved a possible misuse of a private server and email accounts to conduct government business created a strong likelihood that the public image of the FBI would be significantly tarnished, and the investigative conclusions of one of the FBI's largest cases would be called into question. The Penalty Guidelines specifically call for aggravation under Offense Code 5.18 for matters that compromise a case or have a negative impact on the FBI. Your use of personal devices and a personal email account to work on sensitive material also created a significant security risk.

Mr. Peter P. Strzok II

Finally, following the discovery of potentially significant new evidence in the Clinton Email matter, your lack of proper oversight and diligent follow through as a supervisor created an enormous embarrassment to the Bureau and has been cited by some as having altered the results of a presidential election. The Penalty Guidelines specifically call for aggravation under Offense Code 5.2 for matters that negatively impact the Bureau. In further aggravation, you are a supervisor and, as such, held to a higher standard, and you have a prior substantiated administrative inquiry.

The nature and scope of the misconduct certainly warrants dismissal. However, you executed a Last Chance Agreement acknowledging the seriousness of your misconduct. You are profoundly remorseful and determined to overcome your misdeeds. Your Division asserts you are an extremely talented and intelligent investigator, gifted agent, and hard-working employee, who your Division believes will never again engage in misconduct. Based on the record as a whole, including your written response and oral presentation, I am suspending you for 60 days, and demoting you to a non-supervisory position for your 5.21, 5.18, and 5.2 offenses.

### **CONCLUSION**

In sum, I am suspending you from duty, without pay, for 60 calendar days, and demoting you to a non-supervisory position. The FBI must hold employees accountable for violations of its standards of conduct, rules, regulations, and policies. This disciplinary penalty is intended to convey the seriousness with which the FBI views your actions. Progressive discipline is applied, where appropriate. Thus, you can expect to receive a more severe disciplinary penalty in the future for a similar disciplinary offense.<sup>31</sup>

### **REFERRAL TO OTHER DIVISIONS**

In accordance with established policy, the results of this administrative inquiry will be shared with other divisions, as appropriate. Thus, a copy of this communication is being provided to the Security Division as it may be relevant to your retention of a Top Secret security clearance. Information regarding this inquiry will also be provided to the Special Agent Mid-

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<sup>31</sup>You are admonished not to discuss this matter with anyone other than the Inspection Division's Internal Investigations Section (IIS), OPR, the Human Resources Branch's Office of Disciplinary Appeals (ODA), the Security Division, the FBI's Employee Assistance Program, the FBI's Ombudsman, or an attorney who has signed the appropriate Nondisclosure Agreement. Neither you, your attorney, nor anyone acting on your behalf should contact any witness or potential witness about this inquiry without first obtaining approval from IIS, OPR, or ODA. In addition, you are admonished that any redacted materials or other FBI documents you review in connection with this inquiry are the property of the FBI, and you are prohibited from photocopying or removing such documents from FBI space. You may take notes concerning the content of such material, but those notes may be used only to facilitate your participation in this disciplinary inquiry and for no other purpose.

Mr. Peter P. Strzok II

Level Management Selection Board and/or the Director for their consideration on any future promotion or other action requiring their recommendation.

Sincerely yours,

Candice M. Will  
Assistant Director  
Office of Professional Responsibility

Enclosures

1 - Office of the Inspector General, Department of Justice  
1 - AD, Human Resources Division (Personal Attention) Enclosure (See Note)  
263D-HQ-2937212  
1 - AD, OPR  
1 - Security Division (Attn: Unit Chief, AIU, (S) (For SecD records only--Do not forward to RMD)

1 - Human Resources Division (Attn: Unit Chief, P/PAPU, Room 10997)  
1 - Human Resources Branch (Attn: Unit Chief, ODA, Room 10283)  
1 - Tickler Copy, OPR  
Based on Human Resource Division EC to OPR, 06/14/2018, Counterintelligence Division EC to OPR, 6/15/2018, OPR ROI, dated 06/15/2018, employee's written response dated 07/17/2018, oral presentation on 07/24/2018, and Last Chance Agreement, 07/26/2018.  
CMW:blb (9)

**NOTE TO AD**

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This letter reflects OPR's final disposition of this disciplinary inquiry. Please serve the letter on Mr. Strzok. **However, Mr. Strzok's security clearance has been suspended and Mr. Strzok cannot return to work until it is reinstated.** Information regarding this inquiry will be provided to Security Division for their consideration. Please contact Unit Chief Jessica Loreto if you have any questions about the OPR matter and contact Security Division, Analysis and Investigations Unit, for information regarding the security clearance.

By EC, dated October 22, 2004, the Director instituted the following policy:

A subject who receives an initial letter proposing termination that is later amended to something less than termination will be returned to his previous position with full privileges, including restoration of any lost salary and routine grade advancements resulting from a non-duty and/or non-pay status. Annual and sick leave taken as a voluntary election cannot be restored. Restoration of any lost salary will be offset by income earned from secondary employment for the

Mr. Peter P. Strzok II

period the employee is in a non-duty and/or non-pay status, in accordance with Title 5, Code of Federal Regulations, Part 550.805(e)(1).

The HRD's Payroll/Personnel Actions Processing Unit (P/PAPU) has been assigned to coordinate the personnel actions arising out of this matter. It is incumbent upon the Division/Field Office to contact the Unit Chief at the P/PAPU via email or telephone with the information necessary to comply with the above-cited policy before the reinstatement process can begin. Information needed to process this reinstatement includes: the number of days the employee was in a non-duty and/or non-pay status; the number of days of annual leave which the employee elected to take (if applicable); the amount of any income earned from secondary employment while suspended from the FBI (if applicable); the amount of income obtained from unemployment compensation while suspended from the FBI (if applicable); and any other information needed due to the specific circumstances of this case which is required to begin processing the reinstatement of your employee.

\*\*\*\*\*

- You, or your designee, should personally present the attached letter to the employee within seven calendar days from the date the Division receives this letter.
- The Division should send OPR Unit Chief Jessica A. Loreto an email advising of the date on which the Division presented the letter to the employee.
- When you present the letter to the employee, please ensure that the employee fully understands the reason for the Bureau's action.
- You are to impose the disciplinary sanction within seven calendar days.
- A 60-day suspension requires the employee to record 44 complete work days of "Suspension" in WebTA. If the employee has not already recorded 44 days of Suspension in WebTA, please impose the disciplinary sanction in accordance with the "*Rules that Apply to the Imposition of Suspension*" listed below.

#### Rules that Apply to the Imposition of Suspensions

- All suspensions must commence on Monday morning.
- Suspensions are calculated in calendar days, not work days.
- All work days during the period of suspension must be recorded in WebTA as "Suspension."
- Suspensions may be imposed over a federal holiday. If a suspension is imposed over a federal holiday, the holiday itself must be recorded in the WebTA system as "Suspension." It cannot be recorded in WebTA as 8 hours of pay.
- A furlough day does NOT count toward the service of the suspension.
- No employee can work an alternate work schedule during any portion of a pay period in which a suspension is being served.
- Before the employee starts a suspension, the Division must e-mail the proposed dates of the suspension to the OPR Unit Chief who signed the proposal letter. OPR will ensure that the suspension conforms to the requirements listed above, in accordance with the requirements of the OIG's 2009 audit, and will advise the Division.
- Once OPR has approved the suspension start date, the Division must enter the corresponding SF-52 (Personnel Action Request) into HR Source. Enter the approved

Mr. Peter P. Strzok II

suspension start date as the effective date in HR Source. The employee will thereafter receive an SF-50 (Notification of Personnel Action) through eOPF. In HR Source, the Action Code is Suspension and the Reason Code is Suspension. The NOA Code is 450 – Suspension NTE (Date).

- Upon the employee's return to duty, the Division must enter the necessary SF-52 (Personnel Action Request) into HR Source. The employee will thereafter receive an SF-50 (Notification of Personnel Action) through eOPF. Enter the approved return date as the effective date in HR Source. In HR Source, the Action Code is Return from Suspension (REC), and the Reason Code is Recall from Suspension/Layoff (REC). The NOA Code is 292 – Return to Duty.
- If the Division is unable to enter the employee's return-to-duty SF-52 in HR Source, the Division must contact the Customer Service Support Center, HRD, (202) 324-3333, for guidance.
- The Division shall enter the following information in the "Justification" section of HR Source: "Adjudication of disciplinary action."
- If you have any questions, please contact the OPR Unit Chief assigned to your Division or the OPR Front Office (202-436-7470).

#### Administrative Issues

- Bureau property in the custody of the employee should be secured and retained until the employee returns to duty.
- In general, it is not necessary to debrief employees who are being suspended in connection with disciplinary actions.
- If specific security issues arise, the division head or designee should consult with the Division's security officer for a determination as to whether debriefing of the employee's Top Secret clearance and any applicable Sensitive Compartmented Information accesses is warranted.
- Suspended employees must be reminded of their continuing obligation not to disclose FBI sensitive and classified information, and that failure to abide by FBI rules in this regard may result in disciplinary action, up to and including dismissal.
- Furnish the employee with a copy of Standard Form 8, Notice to Federal Employee about Unemployment Compensation, before he starts the suspension.

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 5**

**"LAST CHANCE" ADJUDICATION AGREEMENT  
FOR PETER P. STRZOK II**  
July 2018

On June 15, 2018, Deputy Assistant Director Peter P. Strzok II was proposed for dismissal from the rolls of the FBI based on the findings that he: (1) made inappropriate political comments in text messages on his FBI-issued cell phone, in violation of FBI Offense Code 5.21 (Unprofessional Conduct – Off Duty); (2) utilized a personal email account to conduct official FBI business, in violation of FBI Offense Code 5.18 (Security Violation – Other); and (3) failed to diligently pursue a significant investigative lead, in violation of FBI Offense Code 1.7 (Investigative Deficiency – Misconduct Related to Judicial Proceedings). In lieu of dismissal, Mr. Strzok requests that the Assistant Director, OPR, reduce the penalty to a 60-day suspension, in which Offense Codes 5.21 and 5.18 are substantiated, Offense Code 5.2 (Derection of Supervisory Responsibility) be substituted for Offense Code 1.7, and he be demoted to a non-supervisory position. In support of this request, Mr. Strzok agrees to the following terms:

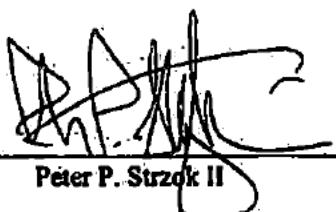
Mr. Strzok agrees to complete a suspension of 60 calendar days by remaining in Suspension Status until he has recorded a total of 44 complete work days of Suspension in WebTA. The required 44 days of lost pay includes any complete 8-hour work day already recorded in WebTA as "Suspension."

Mr. Strzok agrees that OPR will retain jurisdiction over this matter, and that failure to abide by this agreement will cause OPR to reopen this matter and summarily dismiss the employee.

Mr. Strzok further agrees that the OPR Assistant Director's decision will constitute the FBI's FINAL decision in this matter, unless the matter is reopened based on credible evidence of a violation of this agreement. Mr. Strzok agrees to waive his right to appeal to the FBI's internal disciplinary entity or to the Merit Systems Protection Board.

Mr. Strzok further agrees that if he engages in any other serious misconduct, the appropriate sanction will be removal from the rolls of the FBI.

Signature:

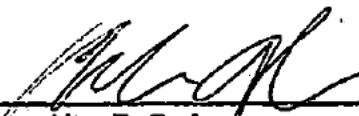


Peter P. Strzok II

Date:

07/26/2018

Signature:



Aitan D. Goelman  
Counsel for Peter P. Strzok

Date:

7/26/18

263D-HQ-2937212-37

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 6**



U.S. Department of Justice

Federal Bureau of Investigation

August 9, 2018

Mr. Peter Strzok  
3214 Prince William Drive  
Fairfax, VA 22031

Dear Mr. Strzok,

By letter dated August 8, 2018, the Assistant Director (AD), Office of Professional Responsibility, notified you of her decision to suspend you for 60 days and demote you to a non-supervisory position. The AD substantiated three offenses under the FBI Offense Table: (1) 5.21 (Unprofessional Conduct – Off Duty), for making inappropriate political comments in text messages on your FBI-issued cell phone; (2) 5.18 (Security Violation – Other), for utilizing a personal E-Mail account to conduct official FBI business; and (3) 5.2 (Dereliction of Supervisory Responsibility), for failure to properly follow up with subordinates when additional E-Mails were discovered in connection with the Clinton E-Mail investigation. I concur with the AD's conclusion that these offenses are substantiated. However, I disagree with her evaluation of the relevant *Douglas* factors in deciding an appropriate penalty in your case. FBI Corporate Policy Directive 0915D, *Disciplinary Appeals Process*, authorizes the Director or the Director's designee to modify disciplinary decisions as necessary in the best interests of the FBI. Pursuant to my delegated authority as the Deputy Director, I have reconsidered the AD's punishment and conclude that dismissal is appropriate under the facts of this case.

In making this decision, I reviewed relevant material pertaining to your case, including the text messages between you and Lisa Page, the *Douglas* factor analysis drafted by the AD of the Counterintelligence Division, your role as one of the most senior counterintelligence agents in the FBI, and your many years of dedicated service. While there is no doubt your 21 years of service to this organization should not be discounted, I am persuaded that serious aggravation is warranted for your 5.21 offense given the severe, long-term damage your conduct has done to the reputation of the FBI. It is difficult to fathom the repeated, sustained errors of judgment you made while serving as the lead agent on two of the most high-profile investigations in the country.

FBI Offense 5.21 is described as "engaging in conduct, while off duty, which dishonors, disgraces, or discredits the FBI; seriously calls into question the judgment or character of the employee; or, compromises the standing of the employee among his peers or his community." The aggravated punishment range is a 7-day suspension to dismissal. Considering *Douglas* factor 8, the notoriety of the offense or its impact upon the reputation of the agency, I find that dismissal is warranted. As an organization we are entrusted to investigate high level public officials, regardless of party affiliation. If we ourselves show personal bias or demonstrate a lack of objectivity, that trust can be lost. Our ability to be objective, no matter which party, candidate, or officeholder is in power, must be beyond question. Candidates and office holders will come and go, but the FBI must be steadfast in its resolve to find the truth, regardless of our own personal leanings or beliefs. Though the Office of the Inspector General

263D-HQ-2937212-39

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found no evidence that your bias impacted your investigative actions or decisions, your sustained pattern of bad judgment in the use of an FBI device called into question the decisions made during both the Clinton E-Mail investigation and the initial stages of the Russian collusion investigation. In short, your actions have called into question the credibility of the entire FBI.

As I considered the facts associated with the adjudication of your case, I could not recall another incident like yours that brought such discredit on the organization. In my 23 years in the FBI, I have not seen a more impactful series of missteps that has called into question the entire organization and more thoroughly damaged the FBI's reputation. In our role as FBI employees we sometimes make unpopular decisions, but the public should be able to examine our work without having to question our motives.

I made this decision considering all of the facts surrounding your precise conduct and the extremely damaging impact it has had and will have on this organization. It will take years to overcome this lasting impact. As a Deputy Assistant Director in the Counterintelligence Division, you were expected to be a leader who was beyond reproach and to set an example for not only your direct subordinates, but others throughout the organization who watched and observed your behavior and actions. You failed to do so repeatedly and put your own interests above the interests of the organization. My decision in this matter is final, and is not subject to further administrative review.

Sincerely,

David L. Bowdich  
Deputy Director

1 - Security Division (Attn: AD Gerald Roberts)  
1 - OPR (Attn: AD Candice Will)  
1 - HRD (Attn: AD David Schlendorf)  
DLB:maw (5)

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 7**

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## FEDERAL BUREAU OF INVESTIGATION POLICY DIRECTIVE

### Disciplinary Appeals Process 0915D

#### General Information

<b>Proponent</b>	Human Resources Branch (HRD)
<b>Publication Date</b>	2016-10-23
<b>Review Date</b>	2019-10-23
<b>Last Updated</b>	N/A
<b>Supersession</b>	Policy Directive (PD) 0235D, <i>Disciplinary Appeals Process</i>

#### 1. Authorities

- Title 5 United States Code (U.S.C.) Section (§) 301
- 5 U.S.C. § 2108
- Code of Federal Regulations (CFR) § 1201.56
- 28 CFR § 0.157
- 28 CFR § 0.138

#### 2. Purpose

The purpose of this policy is to maintain the confidence of all Federal Bureau of Investigation (FBI) employees in the FBI's disciplinary process with respect to the manner in which the FBI conducts appellate reviews of the underlying findings of misconduct and the penalties assessed by the Office of Professional Responsibility (OPR) in disciplinary actions. All provisions discussed herein are to ensure the integrity and objective fairness of the appellate process.

#### 3. Scope

This policy applies to all FBI employees.

#### 4. Exemptions

4.1. This policy does not apply to the deputy director (DD), the associate deputy director (ADD), any executive assistant directors (EADs), the general counsel (GC), or any Senior Executive Service (SES) employee who reports directly to the FBI Director. The Department of Justice (DOJ) has not delegated to the FBI adverse disciplinary authority for these personnel.

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4.2. This policy does not apply to probationary employees, who do not have FBI appeal rights.

4.3. Although the decisions rendered by the EAD, Human Resources Branch (HRB) (in nonadverse action matters) and by the Disciplinary Review Board (DRB) (in adverse action matters) are considered the FBI's final internal disciplinary actions, by virtue of the authority inherent in the position, the FBI Director (or his or her designee) maintains the authority to modify any disciplinary finding, penalty, or both as deemed necessary and in the best interests of the FBI.

4.4. A preference-eligible employee who has completed one year of continuous service in the FBI has the additional right to appeal an adverse disciplinary action to the Merit Systems Protection Board (MSPB).

**5. Policy Statement**

5.1. In all appellate review matters, whether adverse or nonadverse, the "substantial evidence" standard must be used to review both OPR's underlying findings of misconduct and the penalty that OPR imposed for each substantiated offense code. Substantial evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence. With respect to the penalty imposed, substantial evidence will include an analysis as to whether the sanction comports with the penalty range set forth in the FBI Offense Codes and Penalty Guidelines; whether the sanction is consistent with FBI disciplinary case precedent, applicable statutory provisions, or both; and whether a consideration of Douglas factors, including mitigating and aggravating factors, occurred prior to the imposition of the penalty.

5.2. Using the substantial evidence standard of review, the EAD, HRB (in nonadverse actions) and the DRB (in adverse actions) will determine whether OPR's findings with respect to the underlying misconduct and the consequent penalties assessed are reasonable. Because reasonable persons can disagree, deference must be given to OPR's underlying findings of misconduct and the penalties that OPR assesses, unless it is determined that OPR's conclusions were not reasonable.

5.3. Appealable disciplinary actions, other than dismissal, must be stayed pending completion of any FBI appellate review. Dismissals may continue to be implemented immediately.

**6. Roles and Responsibilities**

6.1. Executive Assistant Director, Human Resources Branch

6.1.1. The EAD, HRB is responsible for:

6.1.1.1. Deciding all appeals from nonadverse disciplinary actions. Should the EAD, HRB be unavailable, or should the need arise for the EAD, HRB to recuse him- or herself, the matter should be handled as indicated in subsection 6.2.7.2.1.

6.1.1.2. Determining whether OPR's findings with respect to the underlying misconduct and the consequent penalties imposed are supported by substantial evidence (see subsection 8.1.9. for a definition of "substantial evidence"). The substantial evidence standard must be applied as specified in subsection 5.1.

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6.1.2. Consistent with the substantial evidence standard of review, the EAD, HRB has the authority to:

6.1.2.1. Affirm OPR's underlying findings of misconduct and the penalty imposed for each substantiated offense code.

6.1.2.2. Affirm OPR's underlying findings of misconduct and modify the penalty imposed for each substantiated offense code to comport with policy, precedent, and the consideration of Douglas factors and applicable mitigating and aggravating factors.

6.1.2.3. Vacate OPR's underlying findings of misconduct and penalties consistent with the criteria set forth above.

6.1.2.4. In both nonadverse and adverse cases, remand the matter (or a portion of the matter) under appellate review in writing to the Inspection Division (INSD), the Office of the Inspector General (OIG), or OPR, as appropriate, if additional unaddressed misconduct is identified, or if it is determined that a matter is in need of further investigation or adjudication.

6.1.3. As the decision maker for nonadverse disciplinary appeals, the EAD, HRB must ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process.

6.1.4. As chair of the DRB, the EAD, HRB will serve as the tie-breaking voting member, when necessary, and will ensure that each DRB is composed so as to ensure compliance with this policy.

6.2. Disciplinary Review Board Members

6.2.1. Each DRB will be composed of the EAD, HRB; four voting members; and one nonvoting member.

6.2.2. All DRB members, with the exception of the permanent chair, will serve for one-year terms to enhance expertise and experience among the voting DRB members and account for members' promotions, transfers, lateral movements, or separation from management ranks during the term.

6.2.3. DRB members are responsible for reviewing all appeals from adverse disciplinary actions and applying the substantial evidence standard to review both OPR's underlying findings of misconduct and the assessed penalty, as set forth in subsection 5.1.

6.2.4. Consistent with the substantial evidence standard of review, DRB members are authorized to:

6.2.4.1. Affirm OPR's underlying findings of misconduct and the penalty imposed for each substantiated offense code.

6.2.4.2. Affirm OPR's underlying findings of misconduct and modify the penalty imposed for each substantiated offense code to comport with policy, precedent, and the consideration of Douglas factors and applicable mitigating and aggravating factors.

6.2.4.3. Vacate OPR's underlying findings of misconduct and penalties, consistent with the criteria set forth above.

6.2.4.4. Remand the matter (or a portion of the matter) under appellate review in writing to INSD, OIG, or OPR, as appropriate, if additional unaddressed misconduct is identified, or if it is determined that a matter is in need of further investigation or adjudication.

6.2.5. The EAD, HRB and DRB members may not:

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6.2.5.1. Consider, when making appellate decisions, ex parte communications not contained in the record. Similarly, the Office of Disciplinary Appeals (ODA) officials are prohibited from considering ex parte communications not contained in the record when making disciplinary recommendations to the EAD, HRB and the DRB members.

6.2.5.2. Increase a penalty during the appellate process. However, in the event that additional, previously unaddressed misconduct is identified during the appellate process, this misconduct may be referred to INSD, OPR, or both for additional investigation, adjudication, or both. This referral could ultimately result in a greater cumulative penalty or an additional penalty.

6.2.6. DRB members may be required to provide factual testimony in a subsequent civil or administrative proceeding regarding the comments and impressions they provided during any DRB action or action that the DRB, as a whole, has taken in any given case. Because DRB members are acting within the scope of their duties as DRB members, they are entitled to department and/or agency legal representation in any such subsequent civil or administrative action.

6.2.7. The voting members of the DRB:

6.2.7.1. Serve as the decision-making body for all appeals from adverse disciplinary actions and must ensure that FBI policies are applied consistently to all levels of employees at all stages of the disciplinary process. A majority vote of the voting members determines the outcome of the appeal.

6.2.7.2. Represent a broad cross section of the FBI to enhance the transparency of the appellate process and to ensure the impartiality of the voting members for all appellants, regardless of rank or position. The voting members include:

6.2.7.2.1. The EAD, HRB, who serves as the permanent chair of the DRB and may serve as the tie-breaking voting member when necessary. The EAD, HRB may delegate his or her responsibilities pursuant to PD 0259D, *Succession and Delegation Policy*.

6.2.7.2.2. Two voting SES employees, who are selected by the ADD or his or her designee to serve for a period of one year.

6.2.7.2.3. Two voting midlevel managers, who are selected by the ADD or his or her designee to serve for a period of one year.

6.2.8. Two voting members will be selected from a pool of eligible supervisory special agents (SSAs). The remaining two voting members will be selected from the professional staff ranks. At least one of the four selected voting members will be chosen from a pool of eligible employees assigned to the field.

6.2.9. In addition to the five voting members detailed above, nonvoting observers will be present for each DRB. These observers are invited to express their views regarding the merits of the appeal at issue. The additional input and monitoring of the DRB process by the observers are designed to further frame the DRB as a deliberative body before which relevant issues may be analyzed and discussed in an impartial and unbiased manner.

6.2.9.1. Nonvoting observers include:

6.2.9.1.1. One midlevel manager.

6.2.9.1.2. One representative from the Office of Equal Employment Opportunity Affairs (OEEOA).

6.2.9.1.3. One or more representatives from the Office of the General Counsel (OGC). The OGC attorneys are present to provide advice to the DRB. As such, their comments are

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considered privileged communications, based on the attorney-client relationship with the DRB. The OGC attorneys, therefore, may not be required to provide testimony regarding their comments in any subsequent civil or administrative matter. Likewise, the comments of the OGC attorneys must not be released to any external entity requesting a copy of a transcript of any DRB proceeding. This privilege may only be waived by the GC.

6.2.9.2. Additionally, the Internal Investigations Section (IIS) of the INSD, as well as OPR, may have the opportunity to delegate a nonvoting representative to observe DRBs should either entity choose to do so.

6.2.9.3. Additional nonvoting observers may be present by the invitation of the EAD, HRB or his or her designee.

6.2.10. A list of employees for potential DRB selection must exclude employees assigned to those offices that have a stake in the subject employee's disciplinary matter.

6.2.10.1. For instance, employees assigned to the IIS, INSD, and OPR are not eligible to serve as DRB voting members. Further, because the EAD, HRB may delegate his or her responsibilities as the chair of the DRB to an Assistant Director (AD), all FBI employees at the AD level or higher must be excluded from consideration for DRB selection.

6.2.10.2. A DRB voting member who currently serves (or last served, in the case of a dismissal) as the employee's rating or reviewing official must not participate in the DRB considering that individual's appeal. Similarly, a direct subordinate must not be a member of the DRB reviewing his or her supervisor's conduct.

6.2.10.3. A member must recuse him- or herself from participation in a particular appeal if the member's participation may result in a personal, financial, or other conflict of interest or the appearance thereof pursuant to 28 U.S.C. § 528, 18 U.S.C. § 208, and 5 CFR Part 2635.

6.2.11. Generally, the five voting members and observers enumerated above should participate in each DRB proceeding. However, the DRB may proceed as long as a quorum is present of at least three voting members, including the chair of the DRB.

6.2.12. In order to minimize scheduling difficulties and reduce the impact of the DRB members' service on their regular duties, every effort will be made to adjudicate appeals on a single day each month. Nevertheless, circumstances may dictate scheduling more than one DRB session per month.

6.2.13. The entire DRB process will be audio recorded, and the recording will be maintained in the employee's disciplinary file following each DRB.

6.3. The ADD (or designee) is responsible for selecting the DRB members from a computer-generated list of eligible employees who possess the maturity and good judgment necessary to act as fair and impartial members of the DRB.

6.4. The ODA, HRB is responsible for:

6.4.1. Processing both adverse and nonadverse appeals of OPR's disciplinary actions.

6.4.2. Acknowledging receipt of appeal notices from employees and initiating the appellate process for each notice received within ten calendar days of the employee's receipt of an OPR final disciplinary letter.

6.4.3. Obtaining the investigative and adjudicative file material from INSD and OPR and, upon request by an employee to review the record on which OPR relied in rendering its ruling and imposing the penalty, forwarding it to the Discovery Processing Unit (DPU), OGC for redaction.

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6.4.4. Making the redacted materials available for review by the employee and his or her attorney.

6.4.5. Informing the employee and his or her attorney of the deadline for the review of the redacted materials and the deadline for any supplemental appeal submissions.

6.4.6. Reviewing the investigative and adjudicative records, as well as the issues identified by the employee in his or her appeal and supplemental appeal submission.

6.4.7. Conducting legal research, as needed, regarding applicable policy, regulations, and statutory and case law deemed relevant on appeal.

6.4.8. Evaluating precedent, Douglas factors, and any applicable mitigating or aggravating factors relevant to the issues on appeal.

6.4.9. Drafting and disseminating an appellate analysis, using the substantial evidence standard of review. This analysis will address the relevant issues for consideration by the EAD, HRB (for nonadverse disciplinary actions) and by the DRB (for adverse disciplinary actions) and state the ODA's recommendation.

6.4.10. Scheduling the DRB proceedings and the required DRB composition, allowing for the possibility that an employee may elect to disqualify a member's participation.

6.4.11. Orally presenting the ODA's analysis to the DRB members on the record and facilitating discussion as needed.

6.4.12. Stating to the employee and/or employee's attorney, in writing, the basis of the deciding officials' appellate decision in regard to OPR's findings of misconduct and the penalty imposed for each substantiated offense code.

6.4.13. Memorializing the DRB proceedings via audio recording, in addition to the written documentation described above. The recording of the entire DRB process must be maintained in the appellant's disciplinary file following the DRB proceeding.

6.4.14. Training DRB members on the FBI's disciplinary process, including the applicable standard of review and the role of each DRB participant. Training regarding the FBI's disciplinary process includes informing members that the substantial evidence standard of review must be used by DRB members to review both OPR's underlying findings of misconduct and the penalty that OPR imposed for each substantiated offense code. Additionally, the training includes the responsibilities of the various entities involved in the FBI's disciplinary process.

6.4.15. Conducting name checks to ensure that there have been no administrative issues within the preceding three years that may preclude participation by the prospective DRB members. The AD, HRD will determine preclusion pursuant to his or her authority as the AD, HRD. In the event of a DRB member's preclusion, the ADD may choose a replacement member to participate on the board.

6.4.16. Making recommendations regarding the merits of appeals for both nonadverse and adverse disciplinary actions to ensure that FBI policies apply consistently to all employees at all stages of the disciplinary process.

6.4.17. Providing the DRB case materials to DRB members prior to each respective DRB to allow DRB members to review case materials and prepare to discuss the merits of the appeal when the DRB convenes.

6.5. Employees

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6.5.1. Employees may appeal any sanction imposed by OPR, with the exception of an oral reprimand or a letter of censure. Only an employee who is subject to an adverse disciplinary action is entitled to a DRB review.

6.5.2. An employee who wishes to file an appeal of either a nonadverse or an adverse OPR disciplinary finding must:

6.5.2.1. Provide written notification to the EAD, HRB or to ODA, HRB of his or her intent to appeal within ten calendar days of receiving the final OPR disciplinary letter. A notice of appeal received more than ten days after an employee's receipt of an OPR final disciplinary letter will be considered untimely and will not be accepted.

6.5.2.2. Provide written notification to the EAD, HRB or to ODA, HRB of his or her intent to review the record on which OPR based its finding of misconduct and imposed its penalty, if desired.

6.5.2.2.1. If an employee elects to review the record, the employee must conduct the review within the timeframe set by ODA, HRB. Employees are entitled to twenty business days to review the material provided and/or submit any substantive supplemental appeal following this review.

6.5.2.3. Request an extension in writing by the deadline established for submitting the supplemental appeal, addressed to the ODA, HRB, if they believe that additional time is needed to adequately prepare the supplemental appeal.

6.5.2.4. Notify the head of their FBI Headquarters (FBIHQ) division or field office (FO) of their intent to appeal.

6.5.2.5. Ensure that any attorney whom they may retain for assistance with the appellate process has completed nondisclosure agreements prior to discussing their case.

6.5.2.6. Ensure, even after they and their attorneys have executed the appropriate nondisclosure forms, that information that is classified or law enforcement sensitive is not disclosed to attorneys in violation of FBI policies or procedures.

6.5.2.7. Notify the ODA, HRB of their intention to disqualify one DRB member from serving on their DRB.

6.5.3. Each employee's supplemental appeal, in its entirety, must be received by ODA by the deadline provided by ODA via letter.

6.5.4. Neither the employee appealing nor his or her attorney is entitled to be present during the DRB proceeding. The employee and his or her attorney are afforded an opportunity to appear and to provide arguments to the AD, OPR prior to the receipt of the final disciplinary action letter in an adverse disciplinary matter. Because the review afforded by the DRB is an appellate review only, there is no similar right extended to employees during the DRB. However, nothing may preclude the DRB from requesting an oral presentation from the employee or his or her attorney if the DRB believes that the presentation would aid the DRB in resolving the appeal.

6.5.5. Each employee whose case is before the DRB must be given the one-time opportunity to disqualify one of the eligible voting members from serving on his or her DRB. If an employee exercises this option, an alternate DRB member, chosen in the same manner, may take the place of the member who was disqualified.

## **7. References**

- [Equal Employment Opportunity Complaint Processing Program Policy Guide, 0829PG](#)

**UNCLASSIFIED**

- Memorandum from Eric Holder, Deputy Attorney General (DAG) to Louis Freeh, Director of the FBI, "Delegation of Authority to the Director for Management of the FBI Senior Executive Service" (December 29, 1999)
- Memorandum from Mark Filip, DAG to Robert Mueller III, Director of the FBI, "Updated Delegation of Authority for Senior Executive Service Positions" (May 27, 2008)
- [PD 0047D, OPR Statement of Authorities and Responsibilities](#)
- [PD 0259D, Succession and Delegation Policy](#)
- Study of the FBI's Office of Professional Responsibility (February 2004)

**8. Definitions and Acronyms****8.1. Definitions**

8.1.1. Adverse disciplinary action: the action that results from a determination by OPR that an employee has engaged in misconduct that warrants a suspension of 15 days or more, a demotion, or a dismissal.

8.1.2. Disciplinary Review Board: a panel convened to adjudicate an appeal filed by an FBI employee who has received an adverse disciplinary action.

8.1.3. Douglas factors: factors that were articulated in the MSPB case of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). While their application is not usually a legal requisite for the FBI because of its status as an excepted service, ODA routinely uses them as guidance in assessing the equity of sanctions for all employees.

8.1.4. FBI employee: includes any individual currently employed by the FBI, as well as any individual whose employment at the FBI was terminated as a result of disciplinary action. The term does not include those excluded in Section 4.

8.1.5. Midlevel manager: an employee serving at the General Schedule (GS) 14/15 level, or equivalent.

8.1.6. Nonadverse disciplinary action: the action that results from a determination by OPR that an employee has engaged in misconduct that warrants a suspension of one to fourteen days.

8.1.7. Preference-eligible employee: a military veteran who served during specifically designated dates, as provided in 5 U.S.C. § 2108.

8.1.8. Probationary employee: an employee within his or her probationary period of employment, as defined by the Performance Appraisal System Policy Guide, 0489PG, or the appropriate provision of law.

8.1.9. Substantial evidence standard: the standard used in the FBI's appellate process to review both OPR's underlying findings of misconduct and the penalty that OPR assessed for each substantiated offense code. According to 5 CFR § 1201.56(c)(1), it is "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence."

**8.2. Acronyms**

AD	assistant director
ADD	associate deputy director

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CFR	Code of Federal Regulations
DAG	deputy Attorney General
DD	deputy director
DOJ	Department of Justice
DPU	Discovery Processing Unit
DRB	Disciplinary Review Board
EAD	executive assistant director
FBI	Federal Bureau of Investigation
FBIHQ	Federal Bureau of Investigation Headquarters
FO	field office
GC	general counsel
GS	General Schedule
HRB	Human Resources Branch
HRD	Human Resources Division
IIS	Internal Investigations Section
INSD	Inspection Division
LES	Law Enforcement Sensitive
MSPB	Merit Systems Protection Board
ODA	Office of Disciplinary Appeals
OEEOA	Office of Equal Employment Opportunity Affairs
OGC	Office of the General Counsel
OIG	Office of the Inspector General
OPR	Office of Professional Responsibility
PD	policy directive
SES	Senior Executive Service
SSA	supervisory special agent

**UNCLASSIFIED**

U.S.C.

United States Code

**Approvals**

**Sponsoring Executive Approval**

**Name**

**Title**

David W. Schlendorf

Assistant Director  
Human Resources Division

**Executive Assistant Director Approval**

**Name**

**Title**

Valerie Parlave

Executive Assistant Director  
Human Resources Branch

**Final Approval**

**Name**

**Title**

David L. Bowdich

Associate Deputy Director

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 8**

Standard Form 52

Rev 7/91

U S Office of Personnel Management

Guide to Processing Personnel Actions, Chapter 4

<b>PART A - Requesting Office</b>		(Also complete Part B, Items 1,7-22,32,33,36 and 39)				
1 Actions Requested						2 Request Number
3 For Additional Information Call (Name and Telephone Number)						4 Proposed Eff Date 08-10-2018
5 Action Requested By (Typed Name, Title, Signature, and Request Date)			6 Action Authorized By (Typed Name, Title, Signature, and Date)			
<b>PART B - For Preparation of SF 50 (Use only codes in The Guide to Personnel Data Standards. Show all dates in month-day-year order.)</b>						
1 Name (Last, First, Middle) STRZOK II,PETER P			2 Social Security Number (P-1)	3 Date of Birth 03-07-1970	4 Effective Date 08-10-2018	
<b>FIRST ACTION</b>						
5-A Code 357	5-B Nature of Action Termination			6-A Code	6-B Nature of Action	
5-C Code ZLL	5-D Legal Authority 28 USC 536			6-C Code	6-D Legal Authority	
5-E Code	5-F Legal Authority			6-E Code	6-F Legal Authority	
7 FROM: Position Title and Number  SUPVY SPECIAL AGENT-DAD PD: 400140 Position: 60010856				15 TO: Position Title and Number		
8 Pay Plan ES	9 Occ CD 1811	10 Grd/Lvl 00	11 Step/Rate 00	12 Tot Salary PA	13 Pay Basis	16 Pay Plan 17 Occ CD 18 Grd/Lvl 19 Step/Rate 20 Tot Salary/Award 21 Pay Basis
12A Basic Pay \$180,009.00	12B Locality Adj \$0	12C Adj Basic Pay \$180,009.00	12D Other Pay \$45,002	20A Basic Pay	20B Locality Adj	20C Adj Basic Pay 20D Other Pay
14 Name and Location of Position's Organization  Federal Bureau of Investigation  WASHINGTON DC USA				22 Name and Location of Position's Organization		
<b>EMPLOYEE DATA</b>						
23 Veterans Preference 2 1-None 2-2 Point	3-10 Point/Disability 4-10 Point/Compensable	5-10 Point/Other 6-10 Point/Compensable/30%	24 Tenure 0 0-None 1-Permanent	25 Agency Use 2-Conditional 3-Indefinite	26 Veterans Preference for RIF YES X NO	
27 FEGLI Z5 Basic + Option B (5x) + Option A + Option C (5x)				28 Annuitant Indicator 9 Not Applicable	29 Pay Rate Determinant 0 0-Regular Rate	
30 Retirement Plan M FERS and FICA Special	31 Service Comp Date (Leave) 09-27-1992	32 Work Schedule F Full Time	33 Part-Time Hours Per Biweekly Pay Period			
<b>POSITION DATA</b>						
34 Position Occupied 3 1-Competitive Service 2-Excepted Service	35 FLSA Category E E-Exempt N-Nonexempt	36 Appropriation Code			37 Bargaining Unit Status 8888	
38 Duty Station Code 110010001		39 Duty Station (City-County-State or Overseas Location) WASHINGTON, DC Dist Columbia DC USA				
40 Agency Data 41		42	43	44		
45 Edu Lvl	46 Yr Degr Attd	47 Acad Discipl	48 Func Class	49 Citizenship 1 1-USA 8-Other	50 Veterans Status P Post VEV	51 Supervisory Status 2 Supv/Mgr
<b>PART C - Reviews and Approvals (Not to be used by requesting office.)</b>						
1 Office/Function A 2ND/SME MLEU	Initials/Signature MARTEN,CAROLINE MGMT&PROG ANAL		Date 08-13-2018	1 Office/Function D COR	Initials/Signature	
B 3RD PPAPU	LOCKWOOD,LISA GOODMAN HR SPECIALIST (GENERA		08-14-2018	E CAN		
C PRO PPAPU	LOCKWOOD,LISA GOODMAN HR SPECIALIST (GENERA		08-14-2018	F OTHER		
2. Approval: I certify that the information entered on this form is accurate and the proposed action is in compliance with statutory and regulatory requirements.				Signature		
				Approval Date		

CONTINUED ON REVERSE SIDE

OVER

Editions Prior to 7/91 Are Not Usable After 6/30/93

Name: STRZOK II,PETER P

PAR Number:

**PART D - Remarks by Requesting Office**

(Note to Supervisors: Do you know of additional or conflicting reasons for the employee's resignation/retirement?

If ""YES"", please state these facts on a separate sheet and attach to SF52).

 YES  NO**PART E - Employee Resignation/Retirement****Privacy Act Statement**

You are requested to furnish a specific reason for your resignation or retirement and a forwarding address. Your reason may be considered in any future decision regarding your re-employment in the Federal service and may also be used to determine your eligibility for unemployment compensation benefits. Your forwarding address will be used primarily to mail you copies of any documents you should have or any pay or compensation to which you are entitled.

This information is requested under authority of sections 301, 3301, and 8506 of title 5, U.S. Code. Sections 301 and 3301 authorize OPM and agencies to issue

regulations with regard to employment of individuals in the Federal service and their records, while section 8506 requires agencies to furnish the specific reason for termination of Federal service to the Secretary of Labor or a State agency in connection with administration of unemployment compensation programs.

The furnishing of this information is voluntary; however, failure to provide it may result in your not receiving: (1) your copies of those documents you should have; (2) pay or other compensation due you; (3) any unemployment compensation benefits to which you may be entitled.

1. Reasons for Resignation/Retirement (NOTE: Your reasons are used in determining possible unemployment benefits.

Please be specific and avoid generalizations.

Your resignation/retirement is effective at the end of the day - midnight - unless you specify otherwise.)

## Termination

2 Effective Date	3 Your Signature	4 Date Signed	5 Forwarding Address (Number, Street, City, State, ZIP Code)
08-10-2018	STRZOK II,PETER P		

**PART F - Remarks for SF 50**

- SF 2819 was provided. Life insurance coverage is extended for 31 days during which you are eligible to convert to an individual policy

(nongroup contract).

- Forwarding address: 3214 Prince William Drive, Fairfax, VA 22031

- Lump-sum payment to be made for any unused annual leave.

- Reason(s) for removal: Adjudication of Disciplinary Action

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 9**

Case 1:19-cv-02367-ABJ Document 30-10 Filed 11/18/19 Page 2 of 2  
NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) <b>STRZOK II, PETER P</b>					2. Social Security Number (P-1)		3. Date of Birth <b>03/07/70</b>		4. Effective Date <b>08/10/18</b>											
<b>FIRST ACTION</b>					<b>SECOND ACTION</b>															
5-A. Code <b>357</b>	5-B. Nature of Action <b>TERMINATION</b>				6-A. Code	6-B. Nature of Action														
5-C. Code <b>ZLL</b>	5-D. Legal Authority <b>28 USC 536</b>				6-C. Code	6-D. Legal Authority														
5-E. Code	5-F. Legal Authority				6-E. Code	6-F. Legal Authority														
7. FROM: Position Title and Number <b>SUPVY SPECIAL AGENT-DAD</b> <b>60010856 400140</b>					15. TO: Position Title and Number															
8. Pay Plan <b>ES</b>	9. Occ. Code <b>1811</b>	10. Grade or Level <b>00</b>	11. Step or Rate <b>00</b>	12. Total Salary <b>180,009.00</b>	13. Pay Basis <b>PA</b>	16. Pay Plan	17. Occ. Code	18. Grade or Level	19. Step or Rate	20. Total Salary/Award	21. Pay Basis									
12A. Basic Pay <b>180,009.00</b>	12B. Locality Adj. <b>.00</b>	12C. Adj. Basic Pay <b>180,009.00</b>	12D. Other Pay <b>.00</b>	20A. Basic Pay	20B. Locality Adj. <b>.00</b>	20C. Adj. Basic Pay	20D. Other Pay <b>.00</b>													
14. Name and Location of Position's Organization <b>FEDERAL BUREAU OF INVESTIGATION</b> <b>HEADQUARTERS</b> <b>D3-HUMAN RESOURCES DIVISION</b>					22. Name and Location of Position's Organization  <b>8A</b> <b>DJ AV0103030000000000 PP 16 2018</b>															
<b>EMPLOYEE DATA</b>																				
23. Veterans Preference  <table border="1"><tr><td>2</td><td>1 - None 2 - 5-Point</td><td>3 - 10-Point/Disability 4 - 10-Point/Compensable</td><td>5 - 10-Point/Other 6 - 10-Point/Compensable/30%</td></tr></table>					2	1 - None 2 - 5-Point	3 - 10-Point/Disability 4 - 10-Point/Compensable	5 - 10-Point/Other 6 - 10-Point/Compensable/30%	24. Tenure  <table border="1"><tr><td>0</td><td>0 - None 1 - Permanent</td><td>2 - Conditional 3 - Indefinite</td></tr></table>	0	0 - None 1 - Permanent	2 - Conditional 3 - Indefinite	25. Agency Use	26. Veterans Preference for RIF  <table border="1"><tr><td>X</td><td>YES</td><td>NO</td></tr></table>				X	YES	NO
2	1 - None 2 - 5-Point	3 - 10-Point/Disability 4 - 10-Point/Compensable	5 - 10-Point/Other 6 - 10-Point/Compensable/30%																	
0	0 - None 1 - Permanent	2 - Conditional 3 - Indefinite																		
X	YES	NO																		
27. FEGLI <b>Z5 BASIC-STANDARD-5X ADDITIONAL-5X FAM</b>					28. Annuitant Indicator  <table border="1"><tr><td>9</td><td>NOT APPLICABLE</td></tr></table>	9	NOT APPLICABLE	29. Pay Rate Determinant  <table border="1"><tr><td>0</td><td>NOT APPLICABLE</td></tr></table>				0	NOT APPLICABLE							
9	NOT APPLICABLE																			
0	NOT APPLICABLE																			
30. Retirement Plan  <b>M FERS AND FICA SPECIAL</b>			31. Service Comp. Date (Leave)  <b>09/27/92</b>		32. Work Schedule  <table border="1"><tr><td>F</td><td>FULL TIME</td></tr></table>	F	FULL TIME	33. Part-Time Hours Per Biweekly Pay Period												
F	FULL TIME																			
<b>POSITION DATA</b>																				
34. Position Occupied  <table border="1"><tr><td>3</td><td>1 - Competitive Service 2 - Excepted Service</td><td>3 - SES General 4 - SES Career Reserved</td></tr></table>			3	1 - Competitive Service 2 - Excepted Service	3 - SES General 4 - SES Career Reserved	35. FLSA Category  <table border="1"><tr><td>E</td><td>E - Exempt N - Nonexempt</td></tr></table>		E	E - Exempt N - Nonexempt	36. Appropriation Code			37. Bargaining Unit Status  <b>8888</b>							
3	1 - Competitive Service 2 - Excepted Service	3 - SES General 4 - SES Career Reserved																		
E	E - Exempt N - Nonexempt																			
38. Duty Station Code <b>11-0010-001</b>			39. Duty Station (City - County - State or Overseas Location) <b>WASHINGTON DIST OF COLUMBIA DC</b>																	
40. Agency Data	41. SEX: <b>M</b>	42. CITZ: <b>1</b>	43. VET STAT: <b>P</b>	44. ED LV:13 YR:91 INST PRG: <b>450901</b>																
45. Remarks SF 2819 was provided. Life insurance coverage is extended for 31 days during which you are eligible to convert to an individual policy (nongroup contract). Forwarding address: 3214 Prince William Drive, Fairfax, VA 22031 Lump-sum payment to be made for any unused annual leave. Reason(s) for removal: Adjudication of Disciplinary Action																				
46. Employing Department or Agency <b>U.S. DEPARTMENT OF JUSTICE</b>					50. Signature/Authentication and Title of Approving Official <b>ELECTRONICALLY SIGNED BY: DAVID W. SCHLENDORF</b>															
47. Agency Code <b>DJ AV</b>	48. Personnel Office ID <b>4017</b>	49. Approval Date <b>08/11/18</b>		ASSISTANT DIRECTOR																

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

**Exhibit 10**

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
WASHINGTON REGIONAL OFFICE**

PETER P. STRZOK,  
Appellant,

DOCKET NUMBER  
DC-0752-18-0803-I-1

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: November 15, 2018

Richard A. Salzman, Esquire, Washington, D.C. for the appellant.

Eric Huang, Esquire, and Chad Y. Tang, Esquire, Washington, D.C., for the agency.

**BEFORE**  
David A. Thayer  
Administrative Judge

**INITIAL DECISION**

On September 5, 2018, Peter P. Strzok filed an appeal seeking to challenge the action taken by the Department of Justice, Federal Bureau of Investigation (FBI) which removed him from his position as a Deputy Assistant Director in the Senior Executive Service (SES), effective August 10, 2018. This decision is based on the written record.<sup>1</sup>

Based on the following analysis and findings, the appeal is DISMISSED for lack of jurisdiction.

**ANALYSIS AND FINDINGS**

The appellant bears the burden of proof on the issue of jurisdiction.

---

1 The appellant requested a hearing. However, the undisputed evidence in the record is sufficient to resolve the jurisdictional issue without a hearing. *See Beets v. Department of Homeland Security*, 98 M.S.P.R. 451, ¶ 9 (2005).

The appellant bears the burden of proof on the issue of jurisdiction. 5 C.F.R. § 1201.56(b)(2)(A) (2017). The jurisdiction of the Board is not plenary; it is limited to those matters over which the Board has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board does not have jurisdiction over all actions that are alleged to be incorrect. *See Weyman v. Department of Justice*, 58 M.S.P.R. 509, 512 (1993).

Background and undisputed facts.

The essential procedural facts in this appeal are not in dispute. The appellant encumbered the position of Deputy Assistant Director, FBI, in the SES. Appeal File (AF) Tab 12, p. 11. On June 15, 2018, the agency's Office of Professional Responsibility proposed that the appellant be removed on three charges of misconduct. AF Tab 16, pp. 12-14. On August 8, 2018, Candice M. Will, Assistant Director of the Office of Professional Responsibility, signed a decision notice she had prepared finding the allegations in the proposal notice were substantiated, but concluding that rather than removal, the penalty should be mitigated to a 60-day suspension and demotion to a non-supervisory position. AF Tab 2, pp. 3-26. Will's letter does not inform the appellant of an effective date nor is there evidence that it was served on the appellant at that time.

On August 9, 2018, the day following Will's decision to suspend and demote the appellant, David Bowdich, Deputy Director of the FBI, issued a letter to the appellant. AF Tab 2, pp. 1-2. Bowdich explained that "FBI Corporate Policy Directive 0915D, Disciplinary Appeals Process, authorizes the Director or the Director's designee to modify disciplinary decisions as necessary in the best interests of the FBI." *Id.* at 1. He advised the appellant that he, pursuant to his delegated authority, reconsidered Will's penalty decision and concluded that dismissal was appropriate under the facts of the case. This appeal followed.

In response to an Order to provide additional documentation, the agency provided copies of the SF 52, Request for Personnel Action, and the SF 50,

Notification of Personnel Action, prepared in relation to this action. AF Tab 12, pp. 11-14. The SF 52 reflects a requested effective date of August 10, 2018, with reviews and approvals occurring on August 13 and 14, 2018. *Id.* at 12. The SF 50 displays an effective date of August 10, 2018, with an approval date of August 11, 2018. In his initial appeal to the Board, the appellant indicated that he received the agency's decision notice on August 10, 2018. AF Tab 1, p. 4.

The agency moved that the appeal be dismissed for a lack of jurisdiction.

The agency filed a motion to dismiss the appeal for a lack of jurisdiction. AF Tab 8. It asserted that the appellant had been a member of the SES within the FBI. It argued that, under the provisions of 5 U.S.C. § 2108(3), the definition of "preference eligible" specifically excludes "applicants for or members of, the Senior Executive Service, . . . or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service[.]"

The appellant responded to the agency's Motion to Dismiss. AF Tab 9. He claimed that the decision by Candice Will to impose a demotion and a 60-day suspension was effective immediately on that date. He argued that the action by David I. Bowdich on August 9, 2018, was improper. The essence of his argument, on which his right to proceed before the Board hangs, is that once Will issued her decision to demote him to a non-supervisory position, he was no longer in the SES corps. The significance of an immediate demotion is that he would become an excepted service employee eligible to claim his preference eligible status and pursue his appeal before the Board.

After reviewing the parties' submissions, I concluded that additional documentation was required. I, therefore, ordered the agency to submit copies of all Standard Form (SF) 52s and 50s produced in relation to the personnel decisions made on August 8 and 9, 2018. AF Tab 11. The agency did so and provided a certification that the two documents submitted represent the entirety of all personnel documents prepared in relation to the decision letters issued on August 8 and 9, 2018.

The appellant responded to the agency's motion to dismiss with two arguments. AF Tab 16. First, that Will's demotion/suspension decision became effective immediately, thus placing the appellant in his demoted position from which Bowdich subsequently removed him (and thereby achieving eligibility to appeal to the Board as a preference eligible veteran). Second, the appellant argues that the final language within 5 U.S.C. § 2108(3) modifies only § 2108(3)(H).

Congress provided Board appeal rights to “preference eligible” veterans.

The analysis of the appellant's arguments requires a review of the statutes on which the appellant can claim a right to appeal to the Board. The statute identifying individuals entitled to appeal to the Board, includes not only definitions of “employees” with Board appeal rights, but also certain defined groups to which the Board’s authority does not extend. The statute provides:

(b) This subchapter does not apply to any employee—

....

(8) whose position is within the . . . Federal Bureau of Investigation [ . . . ] unless subsection (a)(1)(B) of this section or section 1005(a) of title 39<sup>[2]</sup> is the basis for this subchapter’s applicability[.]

5 U.S.C. § 7511(b)(6). Section 7511(a)(1)(B) creates the right of appeal to the Board for “a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions[.]” The appellant’s right to appeal his removal to the Board, therefore, turns on his status as a preference eligible. Congress provided the definition of “preference eligible” by statute at 5 U.S.C. § 2108(3).

Title 5 U.S.C. § 2108(3) identifies a preference eligible as a “veteran,” a disabled veteran, or the spouse or other family member of a disabled veteran

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<sup>2</sup> 39 U.S.C. § 1005 creates Board appeal rights for Postal Service employees who are preference eligible or who are supervisors, managers or “engaged in personnel work in other than a purely nonconfidential clerical capacity[.]”

under certain circumstances. Specifically, the statute defines a “preference eligible” as follows:

(3) “preference eligible” means, except as provided in paragraph (4) of this section or section 2108a(c)—

- (A) a veteran as defined by paragraph (1)(A) of this section;
- (B) a veteran as defined by paragraph (1)(B), (C), or (D) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the parent of an individual who lost his or her life under honorable conditions while serving in the armed forces during a period named by paragraph (1)(A) of this section, if—

- (i) the spouse of that parent is totally and permanently disabled; or

- (ii) that parent, when preference is claimed, is unmarried or, if married, legally separated from his or her spouse;

(G) the parent of a service-connected permanently and totally disabled veteran, if—

- (i) the spouse of that parent is totally and permanently disabled; or

- (ii) that parent, when preference is claimed, is unmarried or, if married, legally separated from his or her spouse; and

(H) a veteran who was discharged or released from a period of active duty by reason of a sole survivorship discharge (as that term is defined in section 1174(i) of title 10);

but does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

5 U.S.C. § 2108(3). In his initial appeal, the appellant checked the response “YES” to the question “Are you entitled to veterans’ preference.”

The appellant is not a preference eligible veteran under the statute.

I will address the appellant's arguments in reverse order. First, I find that the modifying language excluding “members of . . . the Federal Bureau of Investigation . . . Senior Executive Service” applies to all potential preference eligible individuals described within Section 2108(3) and not just to a veteran “discharged or released from a period of active duty by reason of a sole survivorship discharge . . .” A review of earlier iterations of Section 2108(3) prior to the current version amended in 2015—which added Section 2108(H) and changed wording in 2108(G) from *mother* to *parent*, etc., included the exclusionary language cited by the agency. I find that Congress has consistently and historically excluded members and applicants of the SES in the intelligence services from the definition of “preference eligible” under this statute. Accordingly, I find that members of the SES in the FBI are excluded from the population of “preference eligible” individuals under Section 2018(3).

The appellant's second argument claims that Will's decision letter immediately effected his demotion, irrespective of the agency's execution of the “ministerial act” embodied in completion of the SF 52 and SF 50. He has cited the unpublished Federal Circuit opinion of *Vandewall v. Department of Transportation*, 5 F.3d 1504 (Fed. Cir. 1993), for the proposition that “approval of the SF-52 or SF-50 is not always necessary for a personnel action to take place.”

The Board has long held that an adverse action is effective on the day on which the appellant is notified that the action will become effective. This essential event gives effect to an agency's decision only after service to the employee or good faith attempts at service. *See, e.g., Scull v. Department of Homeland Security*, 113 M.S.P.R. 287, ¶ 12 (2010) (“It is not a requirement that a probationary employee actually receive a termination notice prior to the effective date of the termination if the agency acted diligently and reasonably in attempting to afford the employee prior notification.”). In this instance, there was no effective date in either decision letter (neither Will's nor Bowdich's letters have

effective dates). There was no notice served on the appellant on August 8, 2018. The appellant did not receive notice of either decision on August 8 or 9, 2018.<sup>3</sup> He did, however, receive the removal decision from Bowdich, apparently along with a copy of Will's decision on August 10, 2018.

There is no doubt that Will possessed the authority to make the decision to demote or suspend, or even remove the appellant. Nevertheless, under the FBI's internal procedures, Will's authority, however, was subject to the FBI Director's ultimate approval as delegated to Bowdich.

I have noted that Will's notice lacked any information related to an effective date for the suspension and demotion. Further, it is undisputed that no SF 50 or SF 52 was prepared or even requested to implement Will's suspension/demotion decision. Moreover, Will's letter included the following in Footnote 2:

In your Last Chance Agreement (LCA), you agreed the LCA and this letter reflect the Bureau's final disposition of the disciplinary inquiry, from which no appeal will be taken. However, nothing in this disposition affects the ability of the Human Resources Division, Security Division or other Bureau component to address your conduct as a performance matter, security issue, or otherwise as appropriate.

AF Tab 2, p. 3 (emphasis added). This language in the footnote is specific advice that Will's "final disposition" is, nevertheless, subject to higher level scrutiny and approval. This is entirely consistent with Bowdich's action.

In its "ministerial" processing of the adverse action, the agency considered the appellant to be in his ES-graded position up to the time of his termination.

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<sup>3</sup> See, Appellant's Sur-reply in Opposition to Motion to Dismiss, Exhibit 2. AF Tab 16, p. 15. Email from the proposing official, Jessica Loreto, to the appellant's representative providing notice that the OPR's final decision had been forwarded to "AD [Will], HRD today [August 9, 2018 at 4:25 p.m.]." This would have been after Bowdich made his decision and HR was notifying AD Will of that step in the process, "final decision" being forwarded internally. The email does not reflect that the final decision is included as an attachment sent to the appellant's representative.

*See* SF 50 and SF 52, AF Tab 12, pp, 11, 12. Moreover, there was no Request for Personnel Action prepared (and which remained subsequently unused) to effect the appellant's demotion. Will's decision was subject to the agency's internal process prior to full implementation as recognized in her footnote, "[N]othing in this disposition affects the ability of the Human Resources Division, . . . or other Bureau component to address your conduct . . . as appropriate." Deputy Director Bowdich announced that he possessed delegated authority from the Director of the FBI to "modify disciplinary decisions as necessary in the best interests of the FBI." AF Tab 2, p. 1.

I recognize that no SF 50 or SF 52 was created for Will's demotion/suspension decision. I agree with the appellant that creation of the official personnel file documents is a ministerial act unnecessary for a determination of the effective date of an action. Nevertheless, the key event is notice to the appellant and service of the decision. In this instance, the appellant did not receive the decision until August 10, 2018. On that day, the agency served the appellant with Bowdich's August 9, 2018, removal notice along with a copy of Will's decision as well. The SF 52 and SF 50 were prepared immediately thereafter, with the SF 50 effective on August 10, 2018, and "approval" on August 11, 2018. Those clerical events, however, do not drive the effective date of the action. I find that the effective date of the action was the date of service on the appellant, August 10, 2018. I find, further, that the action effective on that date was the appellant's termination from his position as Deputy Assistant Director, FBI, in the Senior Executive Service. Accordingly, I find that the appellant is excluded from the definition of "preference eligible" in 5 U.S.C. § 2108(3).

The Board lacks jurisdiction over this appeal.

I find that, as a member of the FBI Senior Executive Service, the appellant did not occupy a position that would otherwise create appeal rights to the Board.<sup>4</sup> The appellant has not submitted any evidence or argument which would establish the Board's jurisdiction. Absent a showing that the appellant is a preference eligible, I find that the Board lacks jurisdiction over his appeal. Accordingly, the appeal must be dismissed.

Decision

The appeal is DISMISSED.

FOR THE BOARD:

/S/

David A. Thayer  
Administrative Judge

**NOTICE TO APPELLANT**

This initial decision will become final on **December 20, 2018**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below.

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<sup>4</sup> Cf. *Parkinson v. Department of Justice*, 874 F.3d 710 (2017) ("It is undisputed that, as a preference-eligible FBI employee, Mr. Parkinson may appeal adverse employment actions to the Board[;]" but such an appeal may not include claims of whistleblower retaliation as an affirmative defense because FBI employees are excluded from the coverage of the Whistleblower Protection Act).

The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.  
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's eAppeal website (<https://eappeal.mspb.gov>).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition

or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled “Notice of Appeal Rights,” which sets forth other review options.

**Criteria for Granting a Petition or Cross Petition for Review**

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge’s rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner’s due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the

documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5

C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

#### **NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

notice OF APPEAL rights

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

**(1) Judicial review in general.** As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days of the date this decision becomes final.** 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you

were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. \_\_\_\_ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
Equal Employment Opportunity Commission  
P.O. Box 77960  
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
Equal Employment Opportunity Commission  
131 M Street, N.E.  
Suite 5SW12G  
Washington, D.C. 20507

**(3) Judicial review pursuant to the Whistleblower Protection**

**Enhancement Act of 2012.** This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days of the date this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx)

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

# **Exhibit 11**



UNCLASSIFIED

**U.S. Department of Justice**  
Federal Bureau of Investigation  
Washington, D.C. 20535

## SES Job Posting Information Form

Date Posted 07/07/2016	Job Posting Number 20160948	Division 05	Grade ES	Position>Title DEPUTY AD (ES)
Bureau Title Code 432	Deadline 07/21/2016 11:59 PM EST	Vacancy Advertised		

### Posting Description

To announce one Agent SES vacancy for the position of DAD, Operations Branch I (OPS I), Counterintelligence Division (CD).

OPS I is responsible for managing and overseeing foreign counterintelligence (FCI) investigative matters nationwide. The OPS I DAD is responsible for providing Counterintelligence (CI) Program oversight and direction to CI investigations and operations nationwide; the promulgation of CI operations policy; the effective use of sophisticated techniques; and the documented application of law enforcement or intelligence remedies as appropriate to CI/counterespionage issues. The DAD will ensure the CI Program nationwide collects and disseminates information pertinent not only to FBI investigations and operations, but also responsive to intelligence requirements from the ODNI.

The DAD is responsible for ensuring CD operations are conducted in accordance with law, policy, and applicable guidelines.

The DAD interacts with the US Intelligence Community (USIC) on a range of sensitive matters. This position requires considerable strategic planning, significant interaction with senior officials in the USIC, and extensive collaboration with foreign services. The DAD provides executive management oversight of CD OPS I administrative matters.

Candidates should possess proven and outstanding skills, abilities, and experience in the following areas: leadership, organizational and administrative, collaboration, interpersonal ability, problem solving, and oral and written communication.

SAC experience is preferred. SES experience is required. Preference will also be given to candidates with significant CI supervisory, management and leadership experience.

Candidates must have submitted and been approved for Joint Duty credit via HR Source by the closing date of this vacancy posting.

Candidates must have passed the Leadership Skills Assessment 15 exam except those who are already Senior Executives or were ASACs prior to 06/05/2006.

A Non-SES selectee will be required to successfully complete a one-year probationary period as a condition of retaining an SES appointment in the FBI.

A Non-SES selectee is also required to complete a financial disclosure report, OGE-278, within 30 days of his/her official report.

An eligible selectee will be offered a 40% relocation incentive in conjunction with this assignment. To receive the incentive, the selected candidate must be eligible for a cost transfer and will be required to sign a two-year service agreement.

### Point of contacts

Bureau Name	Phone Number
NORRIS ALPHONSO III	202-324-2366
MANESCU MARY ANN	202-324-8301
PRIESTAP E W	202-324-4614

***Strzok v. Barr, No. 1:19-CV-2367-ABJ***

## **Exhibit 12**

<b>FD-243</b> Revised 05-11-2011 v1.1	<b>FEDERAL BUREAU OF INVESTIGATION</b> <b>POSITION DESCRIPTION COVERSHEET</b>		
<b>The submitting DIVISION/OFFICE completes only items 1-2f</b>			
<b>1.</b>			
a. Division / Field Office: <b>FBI</b> b. Branch / Section: e. Location: Limited- Headquarters		c. Unit or Squad: d. Subunit:	
<b>2.</b>			
a. Official Title of Position: <b>Supervisory Special Agent</b>		b. Organizational Title Of Position (if any): <b>Deputy Assistant Director (DAD)</b>	
c. Schedule: <input checked="" type="radio"/> Exempt <input type="radio"/> Non-exempt		d. Series: <b>1811</b>	
		e. Grade: <b>00</b>	
		f. Full Performance Level (FPL): <b>00</b>	
		g. MRN: <b>400140</b>	
<b>3.</b>			
a. Fair Labor Standard Act (FLSA): <input checked="" type="radio"/> Exempt <input type="radio"/> Non-exempt		b. Supervisor Indicator: 	
<b>4.</b>			
		a. New Position? <input checked="" type="checkbox"/>	
		b. In lieu of Number: 	
<b>5. Reserved for Classification Office Use Only</b>			
a. Job Family: 		b. Career Ladder: <b>None; this is a stand alone position. CL: 100905</b>	
<b>6. Certification</b>			
<p>I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationship; that the position is necessary to carry out Government functions for which I am responsible. This certification is made with the know that this information is to be used for statutory purposes relating to appointment and payment of public funds and that false or mis statements may constitute violations of such statutes or their implementing regulations.</p>			
a. Head Division / FO's Name & Title 		Signature: 	
		Date: (mmddyy) 	
b. Immediate Supervisor's Name & Title 		Signature: 	
		Date: (mmddyy) 	
<b>7. HRD Final Approval</b>			
Name & Title <b>Assistant Director, HRD</b>		Signature: 	
		Date: (mmddyy) 	
<b>8. Major Duties:</b>			
<p>One per Division; not to be filled simultaneously with any other DAD position serving the same Division.</p>			
<b>SENIOR EXECUTIVE SERVICE</b> Title of Position: Supervisory Special Agent Organizational Title: Deputy Assistant Director (DAD) Organizational Location: Director's Office, FBI Headquarters Pay Plan: ES (Senior Executive Service) Occupational Series: 1811			
<b>Principal Duties and Responsibilities:</b>			

Serves as the principal management official and advisor to executive management (Executive Assistant Director and Assistant Director) with regard to all matters under the jurisdiction of the Branch and its component organizational elements. Position reports to the Assistant Director of the Division. Provides technical advice and guidance to counterparts to ensure , cohesiveness of operations and services provided. Directs the Branches' work to establish, administer and evaluate policies, guidelines and standards for all aspects of work which reaches across all FBI organizational lines (domestic and international). Performs special assignments of highly confidential and delicate nature and acts as personal representative of the Assistant Director of the FBI. Establishes and maintains effective relationships with other federal, state and local law enforcement and intelligence agencies; other federal agencies; state and local governmental leaders; community leaders; and the media to further efforts under the Division's/Branches' jurisdiction. Personally assumes oversight of major work efforts and investigations within the organizations purview and is available for any type of assignment for which, in the judgment of the Assistant Director of the FBI or other executive, the services of a top executive are required. Continually work to improve the development and utilization of information technology to support work performed in the Division and to support the mission of the FBI. Regularly performs duties which cannot be described without impairing the essential security of the Bureau's operations and responsibilities.

**Executive Managerial Responsibilities:**

Directs work of the organization toward accomplishing mandated mission functions and program objectives. Provides administrative direction over establishment of the Division's/Branches' priorities, fulfillment of goals and objectives, and provision of key programs and/or services of subordinate organizational components. Authorizes the design, conduct and communication of important mission or program initiatives and projects.

Institutes accountability and control systems and methods to assure successful execution of the Branches' mission, programs and services to promote continual improvement in effectiveness and efficiency of operations and services. Establishes the Branches service philosophy, standards for delivery of services and programs and criteria for evaluating employee contributions.

Provides leadership in establishing objectives, goals and operational plans that are compatible with and fully support FBI strategic mission objectives, goals and plans. Monitors Progress toward organizational goals and makes adjustments to ensure success.

Assigns mission/functional responsibilities to subordinate managers carrying out important administrative and investigative work for Division/Branch.

Serves as executive manager of several subordinate organizational components headed by positions at the SES level, which are subdivided into components headed by positions primarily at the GS-15 level. Work covers multiple investigative classifications including, but not limited to, criminal, counterintelligence, counterterrorism; important supporting operations in the fields of engineering, science, information technology, and administrative management (budget, inventory, human resources), etc. This work is carried out by GS-1811 Special Agents/Supervisory Special Agents in addition to

professional, technical and administrative support positions occupying a variety of occupational series. Evaluates performance and accomplishments of direct subordinates and provides opportunities for development of individual and organizational capacity. Makes executive decisions regarding

matters such as allocation of resources, institution of organizational changes, resolution of serious disputes or grievances, and interpretation of broad policies and executive or legislative mandates.

Exercises authority in establishing and- revising important policies, and contributing to

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development and furtherance, of FBI mission and/or administrative program, principles and strategies. Translates and communicates broad policies and objectives in terms of immediate organizational plans, goals and strategies.

**Equal Employment Opportunity (EEO) Responsibilities:**

Employs, complies with and advances goals of FBI merit staffing affirmative action and EEO policies. Ensures that FBI human resources programs and services, as well as internal operations, are designed and carried out without regard to race, color, religion, sex, sexual orientation, or national origin. Ensures that recruitment, selection and evaluation of personnel are conducted with consistent EEO emphasis.

**Law Enforcement Retirement Coverage:**

Position requires the services of an employee with background and expertise as a GS-1811 Criminal Investigator (FBI Special Agent/Supervisory Special Agent) and is eligible for the privileges associated with federal law enforcement retirement Coverage. Must be skilled in the use of various types of weaponry and defensive tactics to lead special investigative operations and teams.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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PETER P. STRZOK,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No. 1:19-CV-2367-ABJ
v.	)	
	)	
WILLIAM P. BARR, in his official capacity	)	
as Attorney General of the United States, <i>et</i>	)	
<i>al.</i> ,	)	
	)	
Defendants.	)	
	)	
	)	

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**[PROPOSED] ORDER**

Having considered Defendants' motion to dismiss or, in the alternative, for summary judgment as to Count One and Count Two, and motion for summary judgment as to Count Three; Plaintiff's response; and the entire record, IT IS HEREBY ORDERED:

Defendants' motion is GRANTED. Counts One and Two of Plaintiff's Complaint are hereby DISMISSED, and summary judgment is entered in Defendant's favor on Count Three.

SO ORDERED.

Dated: \_\_\_\_\_

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Hon. Amy Berman Jackson  
United States District Judge