

# **Trump Classified Documents - Model Prosecution Memo**

## **Second Edition**

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## **Executive Summary**

This model prosecution memorandum assesses potential charges federal prosecutors may bring against former President Donald Trump. It focuses on those emanating from his handling of classified documents and other government records since leaving office on January 20, 2021. It includes crimes related to the removal and retention of national security information and obstruction of the investigation into his handling of these documents. The authors have decades of experience as federal prosecutors and defense lawyers, as well as other legal expertise. Based upon this experience and the analysis that follows, we conclude that Trump should—and likely will—be charged.

Before indicting a case, prosecutors prepare a prosecution memo (or “pros memo”) that lays out admissible evidence, possible charges, and legal issues. This document provides a basis for prosecutors and their supervisors to assess whether the case meets the standard set forth in the Federal Principles of Prosecution, which permit prosecution only when there is sufficient evidence to obtain and sustain a conviction. Before a decision is made about bringing charges against Trump (and co-conspirators, if any), prosecutors will prepare such a memo.

There is sufficient evidence to obtain and sustain a conviction here, if the information gleaned from government filings and statements and voluminous public reporting is accurate. Indeed, the DOJ is likely now, or shortly will be, internally circulating a pros memo of its own saying so. That DOJ memo will, however, be highly confidential, in part because it will contain information derived through the grand jury and attorney work product. Since it will not be publicly available, we offer this analysis. Ours is likely more detailed than what DOJ will prepare internally for explanatory purposes. But, given the gravity of the issues here, our memo provides a sense of how prosecutors will assemble and evaluate the considerations that they must assess before making a prosecution decision.

Our memo analyzes six federal crimes in depth:

### **Mishandling of Government Documents**

1. Retention of National Defense Information (18 U.S.C. § 793(e))
2. Concealing Government Records (18 U.S.C. § 2071)
3. Conversion of Government Property (18 U.S.C. § 641)

### **Obstruction, Contempt, False Information**

1. Obstruction of Justice (18 U.S.C. § 1519)
2. Criminal Contempt (18 U.S.C. § 402)
3. False Statements to Federal Investigators (18 U.S.C. § 1001)

In the course of discussing these statutes, we also touch upon others that may have been violated but where the factual predicate for applicability is less clear. For instance, additional charges

could be appropriate—under 18 U.S.C. §§ 798 and 793(e) (dissemination)—if the public reporting regarding Trump’s having intentionally disseminated classified material to aides and others is accurate. Additional charges could also potentially be brought under 18 U.S.C. § 1924 if there is sufficient evidence that Trump unlawfully removed classified documents from the White House (see our discussion of DOJ precedents for past prosecutions under § 1924 in Part IV and in the Appendix). Based on the publicly available information to date, a powerful case exists for charging Trump under several federal criminal statutes, which we discuss in detail.

## **Methodology**

In considering prosecution of a former president, we begin with the standard articulated by Attorney General Merrick Garland: “upholding the rule of law means applying the law evenly, without fear or favor.”<sup>1</sup> In other words, this case must be evaluated for prosecution like any other case with similar evidence would be, without regard to the fact that the case is focused on the conduct of a former president of the United States. This memo accordingly includes a balanced assessment of this particular case, and a thorough review of past DOJ precedents for charging similar cases. Those past cases show that to decline to bring charges against Trump would be treating him far more favorably than other defendants, including those who were charged for less egregious conduct than his. “All Americans are entitled to the evenhanded application of the law,”<sup>2</sup> Garland has stated, and we are guided by the values underlying those words as well.

This model prosecution memo is, however, limited in an important sense. Throughout the memo, we draw as much as possible on the unusual amount of factual information provided by the Government in its court filings. We do not, however, have visibility into the full volume of information the Justice Department has assembled. That means we could be missing important facts, including exculpatory evidence, that may inform the DOJ’s decision-making process. We may be unaware of admissibility issues with some of the evidence. And equally true, the evidence could be better or more extensive than what is available in the public record.

What’s more, by necessity, we at times rely on news reports from investigative journalists whereas the actual prosecution memo would instead rely on direct evidence the federal investigators have collected. For that reason, we do not reach an unqualified charging decision. Instead, we conclude that there is sufficient evidence to obtain a conviction here, if the Government filings and statements and voluminous public reporting we detail below are accurate. We also note that, based on the reported facts, charges would be strongly warranted based on Department precedent in similar cases.<sup>3</sup>

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<sup>1</sup> Department of Justice, *Attorney General Merrick Garland Delivers Remarks* (Aug. 11, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-garland-delivers-remarks>.

<sup>2</sup> *Id.*

<sup>3</sup> Two of the authors of this model prosecution memo, Norman Eisen and Fred Wertheimer, were among the counsel for amici supporting DOJ’s position in litigation before the U.S. District Court for the Southern District of Florida,

## **Substance**

The model prosecution memo proceeds in five parts.

### **Part I. Summary of Publicly Known Facts**

In Part I, we provide a detailed summary of the relevant facts under investigation, in which we group the facts by key issues.

First, the discussion starts with Trump's resistance to the Government's attempts to recover the documents. We recount the more than one-and-a-half-year effort on the part of the National Archives and Records Administration (NARA) and the Justice Department to recover the documents. Those efforts culminated in the FBI's recovery of approximately 13,000 documents, including information on some of the nation's most sensitive national defense programs, pursuant to a court-authorized search warrant for Mar-a-Lago (MAL). In this discussion, we also look at Trump aides who can provide testimony about his privately stated intent to retain the documents despite the Government's efforts to recover them. This discussion includes Trump in late October or early November 2021 telling his advisers he would return the boxes of material in exchange for NARA releasing documents related to the FBI's investigation into his 2016 campaign's ties to Russia.

Second, the memorandum details several efforts Trump made to conceal the documents he retained at MAL. That conduct includes his efforts, personally or through agents, to obstruct the investigation and impede the Government's ability to recover the documents. This included pressing his legal counsel Alex Cannon, in February 2022, to make false statements to NARA that all presidential records had been returned, which Cannon refused to do on the ground that he did not believe that statement to be true. As another example, Trump's aide, Walt Nauta, told federal agents that, subsequent to the subpoena, Trump directed him to move boxes containing classified documents from the MAL storage room to the residence where Trump removed some of the documents before having the boxes returned to the storage room.

Third, we discuss evidence that Trump had knowledge that he had the government documents, and that he was directly involved in handling them. The discussion includes evidence that he personally helped pack government documents before leaving the White House in January 2021. It also includes evidence that, in December 2021, Trump helped decide which documents to return to NARA and packed the boxes himself with great secrecy. Several aides can testify that Trump told them, "it's not theirs; it's mine," in reference to the documents he was retaining at the time. This discussion also includes several examples that Trump's own counsel have

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and the U.S. Court of Appeals for the Eleventh Circuit, related to the criminal investigation mentioned in this report. For more information, see <https://democracy21.org/category/news-press/press-releases>.

provided to federal courts of Trump’s directing the response to NARA and the Justice Department.

Finally, we discuss how Trump’s own lawyers provided numerous warnings and notifications making him aware that he could not lawfully retain the documents and risked criminal penalties for doing so. Those warnings began when his White House Counsel issued a memorandum on “Presidential Records Act Obligations” identifying the criminal penalties for concealment of presidential records and continued when his White House Chiefs of Staff urged him to follow the law on preserving documents. Those warnings continued after he left office with specific regard to the documents retained at MAL. Trump was warned, for example, in Fall 2021 by his counsel Alex Cannon and in late 2021 by his former White House lawyer Eric Herschmann. Those exchanges were followed by warnings from NARA’s General Counsel Gary Stern and the Chief of the Counterintelligence and Export Control Section of the Department of Justice’s National Security Division Jay Bratt.

## **Part II. The Law - Relevant Federal Offenses**

Part II explains the federal criminal statutes potentially applicable to Trump’s conduct, noting the criminal statutes alleged in the MAL search warrant, but also identifying additional federal offenses that could potentially be charged. We discuss six relevant federal criminal statutes and outline the elements for each and the significant case law.

In Section A, we discuss three criminal statutes concerning the mishandling of government documents: (1) Retention of National Defense Information (18 U.S.C. § 793(e)); (2) Concealing Government Records (18 U.S.C. § 2071); and (3) Conversion of Government Property (18 U.S.C. § 641).

In Section B, we discuss three criminal statutes concerning interference with a federal investigation and related offenses. These statutes include: (1) Obstruction of Justice (18 U.S.C. § 1519); (2) Criminal Contempt (18 U.S.C. § 402); and (3) False Statements to Federal Investigators (18 U.S.C. § 1001).

## **Part III. Application of the Facts to the Law**

In this Part, we consider the six federal offenses and apply the facts set forth in Part I to the elements of each offense. The Government would need to prove that Trump acted knowingly and intentionally to secure a conviction for several of these offenses, and for other crimes, would have to prove that he acted willfully. Accordingly, in Part III.A, we analyze Trump’s awareness and intent, for which there is considerable evidence. That evidence includes Trump personally handling the documents; Trump’s statements made to aides and advisors about his intent to retain the documents; his instructions to staff to move the documents at MAL; his failure to deliver documents until after the grand jury subpoena and even then only a small portion of the

remaining documents; and his self-incriminating admissions subsequent to the August 8, 2022 search.

In addition, false exculpatory statements are frequently used to show “consciousness of guilt”—the Government uses the proof that a defendant lied to ask the jury why the defendant would lie if she had nothing to hide and had done nothing wrong. We discuss how the Government can show whether Trump had knowledge of or authorized false representations by his attorneys to NARA and the Justice Department.

In Part III.B, we assess the evidence that Trump met the elements of the three statutes that concern mishandling of government documents. Under 18 U.S.C. § 793(e), we discuss the facts that show Trump clearly did not have authorized possession of or control over the documents. The other elements of § 793(e)—that the documents contained national defense information and that Trump failed to deliver the documents to government officials eligible to receive them—are readily provable.

Under 18 U.S.C. § 2071(a), we focus on concealment (rather than removal or destruction) of government records. We discuss the challenges if the Government needs to show these documents were unique, that is, if the statute does not apply to concealment of copies/duplicates of government documents. The statute also refers to government documents or records “filed or deposited ... in any public office.” To establish that element, we rely on various sources including D.C. district court cases—involving John Poindexter and Oliver North—which held that §2071 applies to presidential records, including National Security Council documents.

Under 18 U.S.C. § 641, we discuss the relative advantages of this statute as applied to the facts in the case. The evidence shows Trump’s clear intention to convert government documents for his own use. The evidence also shows that for over 18 months Trump substantially interfered with both the Government’s ability to maintain presidential records at NARA and the U.S. intelligence community’s ability to conduct damage assessments of the risk to national security. Importantly, the Government need not prove that it was, in fact, permanently deprived of its property, and as such, copies of government documents are captured by § 641. We also discuss how the Government would be able to establish that the value of the documents exceeded \$1,000 for purposes of establishing a felony.

In Part III.C, we assess the evidence that Trump met each element of the statutes that concern obstruction of the investigation and related offenses. An important distinction is that 18 U.S.C. § 1519 requires the Government to prove that Trump intended to interfere with the Justice Department investigation or administration of NARA’s ability to recover the documents, but this will not be difficult to prove. We highlight one challenge to establishing Trump failed to comply with the grand jury subpoena. It is that the subpoena was issued to the Office of Donald J. Trump rather than Trump personally. Notably, even if the documents were declassified, that would also not affect any of the charges for obstruction, disobeying a grand jury subpoena, and false

statements. The grand jury subpoena, for example, demanded “any and all documents or writings ... bearing classification markings.” Trump’s counsel admitted that, in response to the subpoena, “President Trump determined that a search for documents bearing classification markings should be conducted – even if the marked documents had been declassified.”

#### **Part IV. Department of Justice Precedents**

In Part IV, we consider whether charging Trump under these statutes would be in line with established DOJ precedent. This section focuses on the retention of government documents under 18 U.S.C. §§ 793(e) and 1924. We compare Trump’s conduct to the complete universe of individuals charged under the same statutes for simple retention (absent any charges or allegations of dissemination).

Based on this extensive analysis, we determine there is strong precedent for the DOJ to charge Trump. There are many felony cases that the DOJ pursued based on conduct that was significantly less egregious than the present set of facts in the Trump case. Aggravating factors in Trump’s case include the length of time of his retention of government documents, the volume of government documents, the highly sensitive nature of the documents, the number of warnings he received, his obstructive conduct, and his involving other individuals in his scheme. In short, we conclude that if Trump were not charged, it would be a major deviation from how defendants are typically treated.

That said, we also detail how there is ample DOJ precedent for affording significant leniency in cases in which a defendant is willing to plead guilty.

Finally, in Part IV, we examine the DOJ’s decisions to decline to prosecute in two cases involving senior officials for actions taken while they were in office: former Secretary of State Hillary Clinton for using private email servers and former Attorney General Alberto Gonzales for taking classified notes to his residence and storing highly classified documents in a Department safe not approved for such information. We rely on reports from the Department’s Office of Inspector General for these analyses. We explain why neither of the two cases compare to the facts in Trump’s case, and why those declination decisions were consistent with the Department’s precedents.

#### **Part V. Defenses**

In Part V, we consider several defenses that Trump may attempt to assert if he were charged under the six statutes. Our analysis includes defenses that Trump, his associates, and his legal counsel have asserted or insinuated that they might assert, as well as others that are potentially relevant. Trump, his counsel, and associates have asserted potential defenses in an often haphazard and inconsistent manner; nevertheless, we present and discuss each potential defense in its strongest form. The potential defenses fall into five general categories: (1) a defense based

on Trump's having declassified some or all of the documents bearing classification markings recovered from MAL; (2) defenses based on the Presidential Records Act (PRA); (3) defenses based on purported FBI misconduct; (4) a defense based on advice of counsel; and (5) a defense based on lack of knowledge of subordinates' actions. We show why none of these potential defenses would provide a complete or effective defense to any of the crimes discussed in Part II, at least based upon currently available information.

The defense based on declassification is unavailing for several reasons, including that none of the criminal statutes at issue turns on the classification status of the documents, overwhelming evidence indicates Trump did not declassify the documents (and in fact he and his counsel repeatedly took actions inconsistent with declassification), there is a fundamental illogic to Trump's claimed standing declassification order, and Trump did not have unilateral authority as president to declassify certain information. Furthermore, there is no reason to believe that Trump, while he was president, made an individualized assessment of each document to determine that each no longer contained national defense information. The situation is thus entirely different from Department precedent involving documents that were never classified and never determined to be national defense information. As the Eleventh Circuit succinctly explained, "the declassification argument is a red herring because declassifying an official document would not change its content or render it personal."

The defenses based on the PRA, including executive privilege, are for the most part based on mischaracterizations about the PRA and cases interpreting it, and would not excuse Trump's retention of documents or noncompliance with the grand jury subpoena. These defenses are inconsistent with the known facts. Moreover, any claim of executive privilege would be highly unlikely to succeed given the Government's demonstrated, specific need for the documents and Trump's status as a former President especially when it comes to claims of privilege over classified materials and other state secrets.

The defenses based on alleged FBI misconduct are thoroughly rebutted by the available evidence, and it is notable that Trump has refrained from asserting them in any legal filings where he or his counsel could be subject to sanction for making false representations.

The two categories of defenses that neither Trump nor his attorneys have to date asserted—advice of counsel and lack of knowledge of his subordinates' actions—are similarly unavailing. It is highly unlikely that Trump could satisfy the requirements of the advice of counsel defense, and, on the contrary, the available evidence suggests that Trump's legal advisors attempted to have him return the documents and warned him about his unlawful retention of those documents. With respect to Trump's knowledge of his subordinates' actions, the case against him is overwhelming, including evidence that Trump was personally involved in and oversaw, among other things, packing boxes to be sent from the White House to Mar-a-Lago, sorting and selecting documents to turn over to NARA in January 2022, moving boxes to his residence after

receiving the grand jury subpoena, approving the security for the storage room, and making statements to aides about retaining the documents including leveraging them to get NARA release other documents. What's more, the government documents were found in the desk drawers and closet of Trump's office at MAL and commingled with his personal belongings. And in a series of self-incriminating admissions following the August search, Trump admitted he held documents that the Government wanted, knew where they were stored at MAL, and how they were packaged.

### **Acknowledgements**

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## **Part I: Summary of Publicly Known Facts**

### **Section A. Introduction**

### **Section B. Trump resisted Government attempts to recover the documents**

### **Section C. Trump's direct knowledge and involvement in handling the government documents**

### **Section D. Warnings and notifications to Trump**

#### **Section A. Introduction**

Until at least August 8, 2022, former President Donald J. Trump knowingly retained some of the nation's most highly classified materials and other sensitive presidential records, despite lacking the authorization to do so.<sup>4</sup> As we detail below in this statement of relevant publicly available evidence, he affirmatively denied he had these documents and concealed them from the Government. He kept the documents in different locations at a public resort, "Mar-a-Lago [which] does not include a secure location authorized for the storage of classified information."<sup>5</sup>

Throughout 2021 and into August 2022, the Government gave Trump every opportunity to comply with the law, but he, time and again, chose to retain the government documents and conceal his possession of them from law enforcement and other government authorities. Finally, on August 8, 2022, pursuant to a court-authorized search warrant, the FBI recovered 103 documents with classification markings and approximately 13,000 additional government documents totaling approximately 22,000 pages from Mar-a-Lago [MAL], including from a storage room and from desk drawers and a closet in Trump's office.<sup>6</sup> The highly classified documents reportedly included information, for example, on a foreign country's nuclear weapons

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<sup>4</sup> In the memorandum, "Mar-a-Lago (MAL) documents" refers to documents recovered by the government in three tranches: on January 17-18, 2022 by NARA, on June 3, 2022 pursuant to a grand jury subpoena, and on August 8, 2022 pursuant to a court-authorized search warrant.

<sup>5</sup> Jay Bratt, Chief of Counterintelligence and Export Control Section, National Security Division, Department of Justice, Letter to Trump Counsel Evan Corcoran, Jun. 8, 2022 (quoted in FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022)) (less redacted version released Sept. 13, 2022), at p. 22, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>6</sup> Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 9, <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf>; Department of Justice, Affidavit Regarding Revised Detailed Inventory (Sept. 26, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/Revised-Detailed-Inventory-Sept-26-2022.pdf>; Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 12, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

readiness,<sup>7</sup> Iran’s missile program, and highly sensitive intelligence work aimed at China.<sup>8</sup> The FBI also recovered 46 empty folders with classified banners.<sup>9</sup>

In this facts section, we detail the events that culminated in the recovery of those classified documents and other presidential records, as well as subsequent developments—including that the Justice Department believes Trump may still possess classified materials today.

We address the facts in the following order. We begin in January 2021 with Trump’s departure from the White House, his subsequent and repeated resistance to the National Archives and Records Administration’s (NARA) and later the Department of Justice National Security Division’s and FBI’s attempts to recover the documents. We next turn to facts relating to the former president’s personal knowledge of what was contained in the materials removed from the White House, starting with his tenure as president and moving forward to the present day. Finally, we look at the various warnings and notifications that Trump received, also spanning his White House days to the present and including from his own legal advisers. As will be seen from this summary, rather than taking a strictly chronological approach to the facts, we group them around the key issues. But in the course of presenting them, we cover all of the material developments relevant to assessing the law.

## **Section B. Trump resisted Government attempts to recover the documents**

In January 2021, “as Trump grudgingly began to pack up his belongings, he included documents that should have been sent to the National Archives and Records Administration, along with news articles and gifts he received while president, several former officials said.”<sup>10</sup> “He and others put briefing books, gifts, news clippings and other possessions into boxes, some in the residence and others in different locations throughout the White House.”<sup>11</sup> In the days following, “classified documents... were removed from the secure facilities at the White House and moved to Mar-a-Lago on or around January 20, 2021.”<sup>12</sup>

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<sup>7</sup> Devlin Barrett & Carol D. Leonnig, *Material on foreign nation’s nuclear capabilities seized at Trump’s Mar-a-Lago*, Washington Post (Sept. 6, 2022), <https://www.washingtonpost.com/national-security/2022/09/06/trump-nuclear-documents/>.

<sup>8</sup> Devlin Barrett, *Mar-a-Lago classified papers held U.S. secrets about Iran and China*, Washington Post (Oct. 21, 2022), <https://www.washingtonpost.com/national-security/2022/10/21/trump-documents-mar-a-lago-iran-china/>.

<sup>9</sup> Department of Justice, Affidavit Regarding Revised Detailed Inventory (Sept. 26, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/Revised-Detailed-Inventory-Sept-26-2022.pdf>.

<sup>10</sup> Shane Harris, Josh Dawsey, Ellen Nakashima & Jacqueline Alemany, *In Trump White House, classified records routinely mishandled, aides say*, Washington Post (Oct. 4, 2022), <https://www.washingtonpost.com/national-security/2022/10/04/trump-classified-documents-meadows/>.

<sup>11</sup> *Id.*

<sup>12</sup> FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 22, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>; see also *id.* at p. 11, (“According to a CBS Miami article titled ‘Moving Trucks Spotted At Mar-a-Lago,’ published Monday, January 18, 2021, at least two moving trucks were observed at the PREMISES on January 18, 2021.”).

“Throughout 2021, the United States National Archives and Records Administration (‘NARA’) had ongoing communications with representatives of former President Trump in which it sought the transfer of what it perceived were missing records from his Administration.”<sup>13</sup> In September 2021, Trump’s representative to NARA, Patrick Philbin, told NARA’s General Counsel Gary Stern that Mark Meadows had informed him that the boxes contained nothing sensitive, only “news clippings.”<sup>14</sup> Meadows obtained that information from Trump. “As Mr. Stern increased the pressure on Mr. Trump to return the boxes, Mr. Trump told Mr. Meadows that there were about a dozen boxes that had been taken from the White House but that they only contained newspaper clippings and personal effects.”<sup>15</sup> “Archives officials made clear that even newspaper clippings and printouts of articles seen by Mr. Trump in office were considered presidential records.”<sup>16</sup> In addition, “top Archives officials continued to believe there was more material than they were being told about”<sup>17</sup> and “throughout the fall of 2021, Stern continued to urge multiple Trump advisers to help the Archives get the records back.”<sup>18</sup>

In late October or early November, “Trump told advisers[] he would return to the National Archives the boxes of material he had taken to Mar-a-Lago” in exchange for NARA releasing documents related to the FBI’s investigation into his 2016 campaign’s ties to Russia.<sup>19</sup> “Trump’s aides—recognizing that such a swap would be a non-starter since the government had a clear right to the material Mr. Trump had taken from the White House and the Russia-related documents held by the Archives remained marked as classified—never acted on the idea.”<sup>20</sup>

NARA “continued to make requests until approximately late December 2021 when NARA was informed twelve boxes were found and ready for retrieval at the PREMISES.”<sup>21</sup> “Trump only

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<sup>13</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 4, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>; see also National Archives letter to Chairwoman Maloney (Feb. 18, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-ferriero-response-to-maloney-february-18-2022.pdf>.

<sup>14</sup> Jacqueline Alemany, Josh Dawsey & Rosalind S. Helderman, *Trump team claimed boxes at Mar-a-Lago were only news clippings*, Washington Post (Sept. 16, 2022), <https://www.washingtonpost.com/national-security/2022/09/16/trump-records-archives-clippings/>.

<sup>15</sup> Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

<sup>16</sup> *Id.*

<sup>17</sup> Jacqueline Alemany, Josh Dawsey & Rosalind S. Helderman, *Trump team claimed boxes at Mar-a-Lago were only news clippings*, Washington Post (Sept. 16, 2022), <https://www.washingtonpost.com/national-security/2022/09/16/trump-records-archives-clippings/>.

<sup>18</sup> Josh Dawsey & Jacqueline Alemany, *Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says*, Washington Post (Aug. 24, 2022), <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/>.

<sup>19</sup> Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

<sup>20</sup> *Id.*

<sup>21</sup> FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 14, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

decided to give some of the documents back after Stern told Trump officials that the Archives would soon have to notify Congress”<sup>22</sup> or “refer the matter to ... the Justice Department.”<sup>23</sup>

On January 17-18, 2022, NARA recovered 15 boxes from MAL containing 184 documents with classified markings “up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials.”<sup>24</sup> Trump, however, continued to hold onto 141 documents marked as classified and approximately 11,000 government records and attempted to conceal them from the Government.

Several Trump advisers can testify that Trump strongly objected to returning the documents. “Mr. Philbin tried to help the National Archives retrieve the material, two of the people familiar with the discussions said. But the former president repeatedly resisted entreaties from his advisers. ‘It’s not theirs; it’s mine,’ several advisers say Mr. Trump told them.”<sup>25</sup> When Trump provided the 15 boxes to NARA in January, “he eventually agreed to hand over some of the documents, ‘giving them what he believed they were entitled to,’ in the words of one adviser.”<sup>26</sup>

In February 2022, Trump asked his legal counsel Alex Cannon, who had been acting as an intermediary with NARA, to make a false statement to NARA “that Trump had returned all materials requested by the agency.” Cannon refused on the ground that he was not sure the statement was true. “Cannon’s refusal to declare everything had been returned soured his relationship with Trump, people familiar with the matter said. Cannon, who had worked for the Trump Organization since 2015, was soon cut out of the documents-related discussions.”<sup>27</sup>

The Government knew of more classified documents being held by Trump at MAL. On May 11, 2022, a DC grand jury issued a subpoena for “any and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification

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<sup>22</sup> Josh Dawsey & Jacqueline Alemany, *Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says*, Washington Post (Aug. 24, 2022), <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/>.

<sup>23</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>24</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 5 & 7, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>; Trump counsel Evan Corcoran, Letter to Justice Department (May 25, 2022), at p. 1 <https://www.justsecurity.org/wp-content/uploads/2022/09/evan-corcoran-letter-to-jay-bratt-may-25-2022.pdf>

<sup>25</sup> Maggie Haberman, *F.B.I. Interviewed Top White House Lawyers About Missing Trump Documents*, New York Times (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/trump-cipollone-philbin-interviews-fbi.html>.

<sup>26</sup> Devlin Barrett, Josh Dawsey, Rosalind S. Helderman, Jacqueline Alemany & Spencer S. Hsu, *Mar-a-Lago search appears focused on whether Trump, aides withheld items*, Washington Post (Aug. 9, 2022), <https://www.washingtonpost.com/national-security/2022/08/09/trump-fbi-search-mar-a-lago/>.

<sup>27</sup> Josh Dawsey & Jacqueline Alemany, *Trump’s lawyer refused his request in February to say all documents returned*, Washington Post (Oct. 3, 2022), <https://www.washingtonpost.com/national-security/2022/10/03/trump-alex-cannon-documents/>.

markings.”<sup>28</sup> On June 3, 2022, Trump responded by providing the Justice Department with only 37 documents marked as classified,<sup>29</sup> including “16 documents marked as SECRET, and 17 documents marked as TOP SECRET. Further, the FBI agents observed markings reflecting the following caveats/compartments, among others: HCS, SI, and FISA.”<sup>30</sup>

Trump’s counsel told the Department and FBI officials that “based upon the information that has been provided to me” (Christina Bobb),<sup>31</sup> and based on what he was “advised” (Evan Corcoran<sup>32</sup>), all documents responsive to the subpoena had now been returned. The Government determined those statements to be false.

Subsequently, “Bobb told agents Corcoran informed her that the storage room had been thoroughly searched—and indicated it was the only area of the club that needed to be searched. Corcoran’s search for classified documents in response to the subpoena did not include the president’s private residence.”<sup>33</sup> Corcoran subsequently testified before the grand jury “that

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<sup>28</sup> Department of Justice, Trump Subpoena (May 11, 2022), at p. 2, <https://www.justsecurity.org/wp-content/uploads/2022/09/department-of-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

<sup>29</sup> Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 7 n.3 <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf> (explaining accurate number is 37, not 38 documents).

<sup>30</sup> FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 21, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>31</sup> Certification signed by Christina Bobb and prepared by Christina Bobb and Evan Corcoran (Jun. 3, 2022), reprinted in Justice Department Attachments (Aug. 30, 2022), at p. 16, <https://www.justsecurity.org/wp-content/uploads/2022/09/department-of-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

<sup>32</sup> FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at pp. 20-21, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>33</sup> Devlin Barrett, Josh Dawsey & Shane Harris, *Key Mar-a-Lago witness said to be former White House employee*, Washington Post (Oct. 14, 2022), <https://www.washingtonpost.com/national-security/2022/10/13/walt-nauta-maralago-trump-documents/>.

The following details provide additional background of these false statements.

In her voluntary interview with the Justice Department, Bobb “told them that another Trump lawyer, Boris Epshteyn, contacted her the night before she signed the attestation and connected her with Mr. Corcoran. Ms. Bobb, who was living in Florida, was told that she needed to go to Mar-a-Lago the next day to deal with an unspecified legal matter for Mr. Trump;” she “emphasized that she was working as part of a team rather than as a solo actor when she signed the statement.” “Bobb, a 39-year-old lawyer juggling amorphous roles in her new job, was being asked to take a step that neither Mr. Trump nor other members of the legal team were willing to take — so she looked before leaping. ‘Wait a minute — I don’t know you,’ Ms. Bobb replied to Mr. Corcoran’s request, according to a person to whom she later recounted the episode. She later complained that she did not have a full grasp of what was going on around her when she signed the document, according to two people who have heard her account.” Glenn Thrush, Maggie Haberman & Michael S. Schmidt, *She Went Out on a Limb for Trump. Now She’s Under Justice Dept. Scrutiny*, New York Times (Oct. 11, 2022), <https://www.nytimes.com/2022/10/11/us/politics/christina-bobb-trump-lawyer-investigation.html>.

several Trump employees told him that the Mar-a-Lago storage room was the only place where the documents were kept.”<sup>34</sup> What’s more, “although Mr. Corcoran testified that Mr. Trump did not personally convey that false information, his testimony hardly absolved the former president... Mr. Corcoran also recounted to the grand jury how Mr. Trump did not tell his lawyers of any other locations where the documents were stored, which may have effectively misled the legal team.”<sup>35</sup>

Prosecutors have also “gathered evidence indicating that Trump at times kept classified documents in his office in a place where they were visible and sometimes showed them to others,”<sup>36</sup> including aides and visitors.<sup>37</sup>

In a voluntary interview with the Justice Department, Bobb “told investigators that before she signed the attestation, she heard Mr. Trump tell Mr. Corcoran that they should cooperate with the Justice Department and give prosecutors what they wanted—an assurance that would come to ring hollow as the investigation proceeded.”<sup>38</sup>

“Trump ignored multiple opportunities to quietly resolve the FBI concerns by handing over all classified material in his possession – including via [the] grand jury subpoena that Trump’s team

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“Bobb, who was Trump’s custodian of record at the time, did not draft the statement, according to the three sources;” “Trump’s lead lawyer in the case at the time, Evan Corcoran, drafted it and told her to sign it, Bobb told investigators;” “Before Bobb signed the document, she insisted it be rewritten with a disclaimer that said she was certifying Trump had no more records ‘based upon the information that has been provided to me,’ the sources said of what she told investigators. Bobb identified the person who gave her that ‘information’ as Corcoran, the sources said. ‘She had to insist on that disclaimer twice before she signed it,’ said one source who spoke with Bobb about what she told investigators.” Marc Caputo, *Trump lawyer Christina Bobb speaks to federal investigators in Mar-a-Lago case*, NBC News (Oct. 10, 2022), <https://www.nbcnews.com/politics/donald-trump/trump-lawyer-christina-bobb-speaks-federal-investigators-mar-lago-case-rcna51459>.

<sup>34</sup> Maggie Haberman, Adam Goldman, Alan Feuer, Ben Protess & Michael S. Schmidt, Justice Dept. Intensifying Efforts to Determine if Trump Hid Documents, New York Times (May 4, 2023),

<https://www.nytimes.com/2023/05/04/us/politics/trump-documents-subpoenas-justice-department.html>.

<sup>35</sup> Id..

<sup>36</sup> Devlin Barrett, Josh Dawsey, Spencer S. Hsu and Perry Stein, *Trump workers moved Mar-a-Lago boxes a day before FBI came for documents*, CNN (May 25, 2023), <https://www.washingtonpost.com/national-security/2023/05/25/trump-classified-documents-mar-a-lago/>.

Prosecutors have also been looking into whether “Trump showed off to aides and visitors a map he took with him when he left office that contains sensitive intelligence information.” Maggie Haberman, Adam Goldman and Alan Feuer, *Witnesses Asked About Trump’s Handling of Map With Classified Information*, New York Times (April 12, 2023), <https://www.nytimes.com/2023/04/12/us/politics/trump-map-classified-documents-justice-department.html>.

<sup>37</sup> Spencer S. Hsu, Josh Dawsey & Devlin Barrett, *Mar-a-Lago prosecutors eye July episode with Trump surveillance cameras*, Washington Post (May 30, 2023), <https://www.washingtonpost.com/national-security/2023/05/30/trump-mar-a-lago-surveillance-camera/>.

<sup>38</sup> Glenn Thrush, Maggie Haberman & Michael S. Schmidt, *She Went Out on a Limb for Trump. Now She’s Under Justice Dept. Scrutiny*, New York Times (Oct. 11, 2022), <https://www.nytimes.com/2022/10/11/us/politics/christina-bobb-trump-lawyer-investigation.html>.

accepted May 11. Again and again, he reacted with a familiar mix of obstinance and outrage, causing some in his orbit to fear he was essentially daring the FBI to come after him.”<sup>39</sup>

On the evening of June 2, “a lawyer for Trump [now known to be Corcoran] contacted the Justice Department and said officials there were welcome to visit Mar-a-Lago and pick up classified documents related to the [May] subpoena.” However, Carlos Deoliveira, head of maintenance at Mar-a-Lago allegedly helped Nauta on June 2 move boxes of papers to a storage room, “using a dolly or hand truck.” The next day, Deoliveira “helped Nauta pack an SUV ‘when former president Trump left for Bedminster for the summer.’”<sup>40</sup> Notably, in mid-July subsequent to the June 24 subpoena for video surveillance footage, Deoliveira reportedly “had a conversation with an IT worker [Yusil Taveras] at the site about how the security cameras worked, and how long images remained stored in the system.”<sup>41</sup> In fact, prosecutors appear to also be investigating “whether Mr. Trump and some of his aides sought to interfere with the government’s attempt to obtain security camera footage from Mar-a-Lago that could shed light on how those documents were stored and who had access to them.”<sup>42</sup>

During the Government’s June 3 visit to Mar-a-Lago, as Trump later admitted (via counsel) in court filings, the Justice Department’s Chief of the Counterintelligence and Export Control Section Jay “Bratt asked to inspect a storage room. Counsel for President Trump advised the group that President Trump had authorized him to take the group to that room.”<sup>43</sup> As the Government previously explained, “[c]ritically, however, the former President’s counsel explicitly prohibited government personnel from opening or looking inside any of the boxes that

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<sup>39</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>40</sup> Devlin Barrett, Josh Dawsey, Spencer S. Hsu & Perry Stein, Trump workers moved Mar-a-Lago boxes a day before FBI came for documents, CNN (May 25, 2023), <https://www.washingtonpost.com/national-security/2023/05/25/trump-classified-documents-mar-a-lago/>. See also, Alan Feuer & Maggie Haberman, Mar-a-Lago Worker Provided Prosecutors New Details in Trump Documents Case, New York Times (May 25, 2023), <https://www.nytimes.com/2023/05/25/us/politics/mar-a-lago-trump-classified-documents.html>; Alan Feuer, Maggie Haberman & Ben Protess, Prosecutors Scrutinize Handling of Security Footage by Trump Aides in Documents Case, New York Times (May 31, 2023), <https://www.nytimes.com/2023/05/31/us/politics/security-footage-trump-documents.html>.

<sup>41</sup> Spencer S. Hsu, Josh Dawsey & Devlin Barrett, *Mar-a-Lago prosecutors eye July episode with Trump surveillance cameras*, Washington Post (May 30, 2023), <https://www.washingtonpost.com/national-security/2023/05/30/trump-mar-a-lago-surveillance-camera/>; Alan Feuer, Maggie Haberman & Ben Protess, Prosecutors Scrutinize Handling of Security Footage by Trump Aides in Documents Case, New York Times (May 31, 2023), <https://www.nytimes.com/2023/05/31/us/politics/security-footage-trump-documents.html>.

<sup>42</sup> Alan Feuer, Maggie Haberman & Ben Protess, Prosecutors Scrutinize Handling of Security Footage by Trump Aides in Documents Case, New York Times (May 31, 2023).

<sup>43</sup> Motion for Judicial Oversight and Additional Relief, Case No. 9:22-cv-81294, SD Florida, (Aug. 22, 2022), at pp. 5-6 <https://s3.documentcloud.org/documents/22161730/trump-request-for-judicial-review-of-search.pdf>.

remained in the storage room, giving no opportunity for the government to confirm that no documents with classification markings remained.”<sup>44</sup>

“[T]he FBI uncovered multiple sources of evidence indicating that the response to the May 11 grand jury subpoena was incomplete and that classified documents remained at the Premises, notwithstanding the sworn certification made to the government on June 3. In particular, the government developed evidence that a search limited to the Storage Room would not have uncovered all the classified documents at the Premises. The government also developed evidence that government records were likely concealed and removed from the Storage Room and that efforts were likely taken to obstruct the government’s investigation. See also MJ Docket D.E. 80 at 8 (“As the Government aptly noted at the hearing, these concerns are not hypothetical in this case. One of the statutes for which I found probable cause was 18 U.S.C. § 1519, which prohibits obstructing an investigation.”). This included evidence indicating that boxes formerly in the Storage Room were not returned prior to counsel’s review.”<sup>45</sup>

Then-Chief Judge Howell noted in a March 2023 opinion “that a further search of Trump properties late last year, conducted by experts on Mr. Trump’s behalf after pressure from prosecutors, turned up additional documents with classified markings in his bedroom at Mar-a-Lago, the person briefed on the document said.” According to a person familiar with the opinion, Howell wrote: “Notably, no excuse is provided as to how the former president could miss the classified-marked documents found in his own bedroom at Mar-a-Lago.”<sup>46</sup>

### **Section C. Trump’s direct knowledge and involvement in handling the government documents**

“The FBI proceeded with interviews ...with others in Trump’s orbit, including valets and former White House staffers .... Agents were told that Trump was a pack rat who had been personally overseeing his collection of White House records since even before leaving Washington and had been reluctant to return anything.”<sup>47</sup>

In January 2021, Trump personally helped pack the boxes with presidential records that were sent to MAL. As we have noted above, “as Trump grudgingly began to pack up his belongings, he included documents that should have been sent to the National Archives and Records

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<sup>44</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 9, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>45</sup> *Id.* at p. 10-11.

<sup>46</sup> Alan Feuer and Maggie Haberman, Mar-a-Lago Worker Provided Prosecutors New Details in Trump Documents Case, New York Times (May 25, 2023), <https://www.nytimes.com/2023/05/25/us/politics/mar-a-lago-trump-classified-documents.html>.

<sup>47</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

Administration.”<sup>48</sup> “He and others put briefing books, gifts, news clippings and other possessions into boxes.”<sup>49</sup> In the following days, “classified documents ... were removed from the secure facilities at the White House and moved to Mar-a-Lago on or around January 20, 2021.”<sup>50</sup> On May 10, 2023, in a CNN Town Hall, Trump himself stated, “I was there and I took what I took and it gets declassified.” He also stated in the Town Hall, “I didn’t make a secret of it. You know, the boxes were stationed outside of the White House,” and he claimed that his holding onto the documents was a negotiating tactic he used against NARA (e.g., “I went by the Presidential Records Act, and we were negotiating with NARA”).<sup>51</sup> Notably, this statement was inconsistent with what Trump’s lawyers told Congress claiming the removal of documents was due to staff error and inadvertence.<sup>52</sup>

Federal prosecutors have also obtained an audio recording of Trump—in July 2021, at his golf club in Bedminster, New Jersey—discussing a classified military document about a potential attack on Iran.<sup>53</sup> The meeting in which the discussion took place included at least four other people without security clearances, two people working on the autobiography of Mark Meadows as well as aides employed by Trump, including communications specialist Margo Martin. Trump “began referencing [the] document that he had with him.”<sup>54</sup> Meadows’ book refers to the conversation in Bedminster stating: “The president recalls a four-page report typed up by Mark Milley himself. It contained the general’s own plan to attack Iran, deploying massive numbers of troops.”<sup>55</sup> In December 2021, after Trump decided to return some boxes to NARA, his attorney Alex Cannon “told associates that the boxes needed to be shipped back as they were, so the professional archivists could be the ones to sift through the material.”<sup>56</sup> Nevertheless, Trump

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<sup>48</sup> Shane Harris, Josh Dawsey, Ellen Nakashima & Jacqueline Alemany, *In Trump White House, classified records routinely mishandled, aides say*, Washington Post (Oct. 4, 2022), <https://www.washingtonpost.com/national-security/2022/10/04/trump-classified-documents-meadows/>.

<sup>49</sup> *Id.*

<sup>50</sup> FBI Affidavit (less redacted) accompanying search warrant application, (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 22, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>; see also *id.* at p. 11, (“According to a CBS Miami article titled ‘Moving Trucks Spotted At Mar-a-Lago,’ published Monday, January 18, 2021, at least two moving trucks were observed at the PREMISES on January 18, 2021.”).

<sup>51</sup> CNN Town Hall Transcript, <https://edition.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html>.

<sup>52</sup> Trump Lawyers’ letter to House Intelligence Committee Chair Mike Turner (R-Ohio) (April 26, 2023), <https://www.justsecurity.org/wp-content/uploads/2023/05/letter-from-the-parlatore-law-group.pdf>, (“White House staff simply swept all documents from the President’s desk and other areas into boxes, where they have resided ever since.”).

<sup>53</sup> Katelyn Polantz, Paula Reid & Kaitlan Collins, EXCLUSIVE: Trump captured on tape talking about classified document he kept after leaving the White House, CNN (May 31, 2023), <https://edition.cnn.com/2023/05/31/politics/trump-tape-classified-document-iran-milley/index.html>.

<sup>54</sup> Maggie Haberman, Jonathan Swan & Alan Feuer, *Trump Was Taped Discussing Sensitive Document He Had Kept After Leaving Office*, New York Times (May 31, 2023).

<sup>55</sup> Mark Frank Meadows, *The Chief’s Chief* (All Seasons Press 2021). Reporting suggests that Milley did not actually write the report himself. Katelyn Polantz, Paula Reid and Kaitlan Collins, *Trump captured on tape talking about classified document he kept after leaving the White House*, CNN (May 31, 2023).

<sup>56</sup> Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

elected “to go through them.”<sup>57</sup> “Trump himself eventually packed the boxes that were returned in January [2022], people familiar with the matter said.”<sup>58</sup> “Trump had overseen the packing process himself with great secrecy, declining to show some items even to top aides.”<sup>59</sup> “Philbin and another adviser... have told others that they had not been involved with the process and were surprised by the discovery of classified records.”<sup>60</sup>

Federal “agents have gathered evidence indicating that Trump told people to move boxes to his residence after his advisers received the subpoena. That description of events was corroborated by the security-camera footage showing people moving the boxes.”<sup>61</sup> “A Trump employee [Walt Nauta] has told federal agents about moving boxes of documents at Mar-a-Lago at the specific direction of the former president.”<sup>62</sup> “The boxes that Nauta is said to have moved at Trump’s direction at Mar-a-Lago also contained classified documents mixed with newspaper articles, according to people familiar with the case.”<sup>63</sup> “[A]fter they were taken to the residence, Trump looked through at least some of them and removed some of the documents. At least some of the boxes were later returned to the storage room, this person said, while some of the documents remained in the residence.”<sup>64</sup> Nauta “was captured on security camera footage moving boxes out of a storage room at Mar-a-Lago, Mr. Trump’s residence in Florida, both before and after the Justice Department issued a subpoena in May.”<sup>65</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Josh Dawsey & Jacqueline Alemany, *Trump’s lawyer refused his request in February to say all documents returned*, Washington Post (Oct. 3, 2022), <https://www.washingtonpost.com/national-security/2022/10/03/trump-alex-cannon-documents/>.

<sup>59</sup> Rosalind S. Helderman, *Trump and the Mar-a-Lago documents: A timeline*, Washington Post (Sept. 8, 2022), <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>; Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>60</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>61</sup> Devlin Barrett, Josh Dawsey & Shane Harris, *Key Mar-a-Lago witness said to be former White House Employee*, Washington Post (Oct. 14, 2022), <https://www.washingtonpost.com/national-security/2022/10/13/walt-nauta-maralago-trump-documents/>.

<sup>62</sup> Devlin Barrett & Josh Dawsey, *Trump worker told FBI about moving Mar-a-Lago boxes on ex-president’s orders*, Washington Post (Oct. 12, 2022), <https://www.washingtonpost.com/national-security/2022/10/12/maralago-witness-trump-boxes-moved/>.

<sup>63</sup> Devlin Barrett, Josh Dawsey & Shane Harris, *Key Mar-a-Lago witness said to be former White House Employee*, Washington Post (Oct. 14, 2022), <https://www.washingtonpost.com/national-security/2022/10/13/walt-nauta-maralago-trump-documents/>.

<sup>64</sup> *Id.*

<sup>65</sup> Maggie Haberman & Alan Feuer, *Trump Aide Was Seen on Security Footage Moving Boxes at Mar-a-Lago*, New York Times (Oct. 12, 2022), <https://www.nytimes.com/2022/10/12/us/politics/trump-mar-a-lago-walt-nauta.html>. Prosecutors questioned Trump Organization employees in spring 2023 on the handling of surveillance footage, including about gaps in the footage and if it may have been tampered with. The Times reported that “some of the footage from the storage camera appears to be missing or unavailable.” See e.g., Maggie Haberman, Adam Goldman, Alan Feuer, Ben Protess & Michael S. Schmidt, *Justice Dept. Intensifying Efforts to Determine if Trump Hid Documents*, New York Times (May 4, 2023), <https://www.nytimes.com/2023/05/04/us/politics/trump->

Within the 15 boxes of documents recovered in January 2022, “[s]everal of the documents also contained what appears to be FPOTUS’s handwritten notes,”<sup>66</sup> showing at a minimum Trump’s personal familiarity with the content of these records. Similarly, among the 37 documents recovered on June 3, 2022, “[m]ultiple documents also contained what appears to be FPOTUS’s handwritten notes,”<sup>67</sup> allowing the same inference to be drawn about Trump’s familiarity with their content.

In describing the documents recovered in the August 8, 2022 search, Trump’s own counsel admitted in a court hearing: “What we are talking about here, in the main, are Presidential records in the hands of the 45th President.”<sup>68</sup> He repeated essentially that same statement twice more before the court.<sup>69</sup>

Many of the documents recovered from MAL in the August 8 search were found commingled with Trump’s personal belongings, as shown in the Inventory list from the search.<sup>70</sup> For example, “the government seized the contents of a desk drawer that contained classified documents and governmental records commingled with other documents. The other documents included two official passports, one of which was expired, and one personal passport, which was expired. The location of the passports is relevant evidence in an investigation of unauthorized retention and mishandling of national defense information.”<sup>71</sup> Some of the personal belongings obtained along with the documents marked as classified in the FBI search postdated January 20, 2021,<sup>72</sup> further indicating Trump’s knowledge and handling of the boxes at MAL after his time in office. The documents with classification markings returned in January were also “intermixed

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[documents-subpoenas-justice-department.html](https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf); Katelyn Polantz & Paula Reid, *Exclusive: Special counsel probing Trump Organization’s handling of Mar-a-Lago surveillance footage*, CNN (May 4, 2023), <https://edition.cnn.com/2023/05/03/politics/maralago-footage-trump-special-counsel-calamari/index.html>.

<sup>66</sup> FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 17, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>67</sup> *Id.* at pp. 21-22; Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 7 n.3 <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf> (explaining accurate number is 37, not 38 documents).

<sup>68</sup> Judge Aileen M. Cannon, Transcript of Motion to Appoint Special Master Hearing (Sept. 1, 2022), p. 8-9, <https://www.justsecurity.org/wp-content/uploads/2022/09/transcript-hearing-judge-cannon-september-1-2022.pdf>.

<sup>69</sup> *Id.* at p. 9 (“This is, as I say, Presidential records in the hands of [sic] 45th President of the United States.”); *id.* (“And in there are, again, Presidential records in the hands of 45th President of the United States.”)

<sup>70</sup> Department of Justice, Affidavit Regarding Revised Detailed Inventory (Sept. 26, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/Revised-Detailed-Inventory-Sept-26-2022.pdf>.

<sup>71</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 12, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>72</sup> Department of Justice, Privilege Review Team Inventory (filed Aug. 30, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/10/departement-of-justice-privilege-review-team-inventory-august-30-2022.pdf>; Philip Bump, *What the FBI took from Trump, according to an accidentally unsealed list*, Washington Post (Oct. 5, 2022), <https://www.washingtonpost.com/politics/2022/10/05/trump-fbi-search-documents/>.

with other records” including “post-presidential records.”<sup>73</sup> And when the government personnel looked into the storage room on June 3, they observed remaining boxes and “[o]ther items were also present in the STORAGE ROOM, including a coat rack with suit jackets, as well as interior décor items such as wall art and frames.”<sup>74</sup>

Trump’s awareness of the documents is also demonstrated by his own actions and statements. In summer 2021, for example, “Trump show[ed] off the letters from Mr. Kim, waving them at people in his office, where some boxes of material from the White House are being stored.”<sup>75</sup>

Trump’s self-incriminating admissions include the following:

1. Trump admitted he held documents that the Government wanted:

“They could have had it anytime they wanted—and that includes LONG ago. ALL THEY HAD TO DO WAS ASK. The bigger problem is, what are they going to do with the 33 million pages of documents, many of which are classified, that President Obama took to Chicago?”<sup>76</sup>

“NOW THEY RAID MY HOME, ban my lawyers and, without any witnesses allowed, break the lock that they asked us to install on the storage area that we showed them early on, which held papers that they could have had months ago for the asking, and without the ridiculous political grandstanding of a ‘break in.’”<sup>77</sup>

2. Trump stated on August 26, 2022 he gave the Government “much” instead of saying he gave them “everything”:

“Affidavit heavily redacted!!! Nothing mentioned on ‘Nuclear,’ a total public relations subterfuge by the FBI & DOJ, or our close working relationship regarding document turnover - WE GAVE THEM MUCH. Judge Bruce Reinhart should NEVER have allowed the Break-In of my home.”<sup>78</sup>

Note: In February 2022, “Trump asked his team to release a statement he had dictated. The

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<sup>73</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>74</sup> FBI Affidavit (less redacted) accompanying search warrant application, August 5, 2022 (less redacted version released Sept. 13, 2022), at p. 21, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>75</sup> Luke Broadwater, Katie Benner & Maggie Haberman, *Inside the 20-Month Fight to Get Trump to Return Presidential Material*, New York Times (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/politics/trump-documents-search-timeline.html>.

<sup>76</sup> Just Security, *Trump’s Knowledge of MAL Classified Documents – Truth Social Posts*, <https://www.justsecurity.org/wp-content/uploads/2022/11/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social-Google-Docs.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

statement said Trump had returned ‘everything’ the Archives had requested.”<sup>79</sup> “The statement was circulated to several Trump aides for approval, including his spokesman Taylor Budowich, who was among several advisers who cautioned the former President to consult his attorneys before releasing it. Ultimately, a version of the statement was released that did not reference giving all documents over.”<sup>80</sup> The final statement is available online.<sup>81</sup>

3. Trump admitted he knew how the documents were organized in containers:

“There seems to be confusion as to the ‘picture’ where documents were sloppily thrown on the floor and then released photographically for the world to see, as if that’s what the FBI found when they broke into my home. Wrong! They took them out of cartons and spread them around the carpet, making it look like a big ‘find’ for them. They dropped them, not me - very deceiving.”<sup>82</sup>

4. Trump admitted he intentionally kept the boxes of documents at MAL:

“I had a small number of boxes in storage at Mar-a-Lago guarded by Secret Service and my people and everybody, I mean it’s safe. When you look at these other people, what they did, and the FBI raided my home and violated my Fourth Amendment rights and many other rights .... There is no crime, you know, there is no crime. It’s not a crime, and they should give me immediately back everything that they’ve taken from me because it’s mine, it’s mine. They took it from me, in the raid, they broke into my house.”<sup>83</sup>

#### **Section D. Warnings and notifications to Trump**

There is substantial evidence that Trump knew his actions were in violation of the law. NARA, the Justice Department, and Trump’s own lawyers placed him on notice including warning him of the legal and criminal implications in retaining the government records. These warnings began during Trump’s presidency, and were later specifically addressed to Trump’s retention of government documents at MAL after leaving office.

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<sup>79</sup> Josh Dawsey & Jacqueline Alemany, *Trump’s lawyer refused his request in February to say all documents returned*, Washington Post (Oct. 3, 2022), <https://www.washingtonpost.com/national-security/2022/10/03/trump-alex-cannon-documents/>.

<sup>80</sup> Gabby Orr, *Lawyer refused Trump instruction to tell Archives all records had been returned*, CNN (Oct. 3, 2022), <https://www.cnn.com/2022/10/03/politics/trump-lawyer-alex-cannon-archives-records/index.html>.

<sup>81</sup> Gabby Orr, Pamela Brown & Paula Reid, *Archives threatened to go to Congress and Justice Department to get Trump to turn over records*, CNN (Feb. 13, 2022), <https://www.cnn.com/2022/02/11/politics/trump-mar-a-lago-documents-archives/index.html>; Statement by Donald J. Trump, 45th President of the United States of America (Feb. 12, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/11/Statement-by-Donald-J-Trump-Feb-10-2022.pdf>.

<sup>82</sup> Just Security, *Trump’s Knowledge of MAL Classified Documents – Truth Social Posts*, <https://www.justsecurity.org/wp-content/uploads/2022/11/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social-Google-Docs.pdf>.

<sup>83</sup> Donald J. Trump, Remarks at Mesa, Arizona Political Rally (Oct. 9, 2022), available at <https://twitter.com/Acyn/status/1579267214838231040>.

## 1. Trump White House Counsel and Chiefs of Staff warnings

During the first month of his presidency, Trump appointed White House Counsel Don McGahn to serve as his representative to NARA.<sup>84</sup> The following week, McGahn issued a “MEMORANDUM FOR ALL PERSONNEL” with the subject, “Presidential Records Act Obligations.” The Memorandum stated:

When you leave EOP employment, you may not take any presidential records with you. You also may not take copies of any presidential records without prior authorization from the Counsel's office. The willful destruction or concealment of federal records is a federal crime punishable by fines and imprisonment.<sup>85</sup>

After instances in which Trump had torn up government documents during his presidency, he was “urged by at least two chiefs of staff and the White House counsel to follow the law on preserving documents.”<sup>86</sup> A former White House records analyst, Solomon “Lartey said someone in the White House chief of staff’s office White House chief of staff’s office told the president that the documents were considered presidential records and needed to be preserved by law.”<sup>87</sup>

In the final days of Trump’s presidency, White House Counsel Pat Cipollone did not provide prior authorization to remove documents from the White House. On the contrary, as NARA General Counsel Stern later wrote, “roughly two dozen boxes of original presidential records were kept in the Residence of the White House over the course of President Trump’s last year in office and have not been transferred to NARA, despite a determination by Pat Cipollone in the final days of the administration that they need to be.”<sup>88</sup>

The Government—including NARA throughout 2021 and until August 8, 2022 and the Justice Department’s National Security Division from at least April 29, 2022 and until August 8, 2022—

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<sup>84</sup> White House, Trump letter designating representatives to Archives (Feb. 16, 2017), <https://www.justsecurity.org/wp-content/uploads/2022/10/President-Trump-letter-designating-representatives-to-Archives-don-mcgahn-february-2017.pdf>.

<sup>85</sup> Memorandum through Donald F. McGahn III, from Stefan Passantino, Scott Gast and James D. Schultz, *Presidential Records Act Obligations Memorandum*, White House (Feb. 22, 2017), at p. 3, <https://www.justsecurity.org/wp-content/uploads/2022/10/White-House-Counsel-Don-McGahn-Memo-to-WH-Staff-Re-Presidential-Records-Act-02-22-2017.pdf>.

<sup>86</sup> Ashley Parker, Josh Dawsey, Tom Hamburger & Jacqueline Alemany, ‘He never stopped ripping things up’: Inside Trump’s relentless document destruction habits, Washington Post (Feb. 5, 2022), <https://www.washingtonpost.com/politics/2022/02/05/trump-ripping-documents/>.

<sup>87</sup> Deb Reichmann, *Will Trump’s mishandling of records leave a hole in history?*, Associated Press (Jan. 16, 2021), <https://www.pbs.org/newshour/politics/will-trumps-mishandling-of-records-leave-a-hole-in-history>.

<sup>88</sup> Josh Dawsey & Jacqueline Alemany, *Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says*, Washington Post (Aug. 24, 2022), <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/>.

warned Trump’s representatives of the legal and criminal implications of retaining the government records.

## **2. Government warnings and notifications in 2021**

In reference to the approximately 24 boxes in the residency of the White House, NARA General Counsel Stern stated, “I had also raised this concern with Scott [Gast] in the final weeks” of the administration.<sup>89</sup> On May 6, 2021, Stern then emailed three of Trump’s designated representatives to NARA—Patrick F. Philbin, Michael M. Purpura, and Gast—reminding them that Cipollone, also a Trump representative to NARA, had determined the approximately 24 boxes of records needed to be returned to NARA.<sup>90</sup> General Counsel Stern added, “We therefore need your immediate assistance to ensure that NARA receives all Presidential records as required by the Presidential Records Act,” and “it is absolutely necessary that we obtain and account for all original Presidential records.” In late 2021, “[o]fficials at the Archives warn[ed] Mr. Trump’s representatives that there could be a referral to the Justice Department or an alert to Congress if the former president continue[d] to refuse to comply with the Presidential Records Act.”<sup>91</sup>

## **3. Government warnings and notifications in 2022**

On February 9, 2022, after finding classified documents in the boxes recovered from MAL the previous month, the Special Agent in Charge of NARA’s Office of the Inspector General made a referral to the Justice Department for Trump’s handling of the records.<sup>92</sup> The referral was widely reported in the national news media on that date.<sup>93</sup> On February 18, 2022, NARA publicly confirmed in a letter to Congress, “Because NARA identified classified information in the boxes, NARA staff has been in communication with the Department of Justice.”<sup>94</sup> On April 12, 2022, NARA notified Trump’s representatives that the FBI asked for access to 15 MAL boxes and NARA planned to soon provide access to the documents to the Bureau “in light of the urgency of

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<sup>89</sup> Gary M. Stern, National Archives General Counsel, Email to Patrick Philbin, Mike Purpura and Scott Gast, titled, “Need for Assistance re Presidential Records” (May 6, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/10/Email-from-National-Archives-General-Counsel-Gary-M.-Stern-to-Patrick-Philbin-Mike-Purpura-and-Scott-Gast-Need-for-Assistance-re-Presidential-Records-May-6-2021.pdf>.

<sup>90</sup> *Id.*

<sup>91</sup> Luke Broadwater, Katie Benner & Maggie Haberman, *Inside the 20-Month Fight to Get Trump to Return Presidential Material*, New York Times (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/politics/trump-documents-search-timeline.html>.

<sup>92</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>93</sup> Matt Zapotosky, Jacqueline Alemany, Ashley Parker & Josh Dawsey, *National Archives asks Justice Dept. to investigate Trump’s handling of White House records*, Washington Post (Feb. 9, 2022), <https://www.washingtonpost.com/politics/2022/02/09/trump-archives-justice-department/>.

<sup>94</sup> David Ferriero, Letter to Rep. Carolyn B. Maloney (Feb. 18, 2022), at p. 2, <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-ferriero-response-to-maloney-february-18-2022.pdf>.

this request.”<sup>95</sup> On April 29, 2022, the Justice Department’s National Security Division alerted Trump’s counsel Evan Corcoran that the Department had an “ongoing criminal investigation” into the handling of the materials marked as classified recovered in January 2022.<sup>96</sup>

In a letter on May 10, 2022, Acting Archivist Debra Steidel Wall informed Trump’s counsel Corcoran of the FBI’s and broader intelligence community’s needs to access the January documents “in order to investigate whether those records were handled in an unlawful manner but also, as the National Security Division explained, to ‘conduct an assessment of the potential damage resulting from the apparent manner in which these materials were stored and transported and take any necessary remedial steps.’”<sup>97</sup> The following day, May 11, a D.C. grand jury issued a subpoena for “any and all documents or writings in the custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings.”<sup>98</sup> After weeks of negotiations, on June 3, 2022, the Justice Department’s Chief of the Counterintelligence and Export Control Section Jay Bratt and FBI officials recovered 37 documents marked as classified from Trump’s counsel in a meeting at MAL.<sup>99</sup> On June 8, 2022, Bratt wrote Trump counsel a letter stating:

As I previously indicated to you, Mar-a-Lago does not include a secure location authorized for the storage of classified information. As such, it appears that since the time classified documents (the ones recently provided and any and all others) were removed from the secure facilities at the White House and moved to Mar-a-Lago on or around January 20, 2021, they have not been handled in an appropriate manner or stored in an appropriate location. Accordingly, we ask that the room at Mar-a-Lago where the documents had been stored be secured and that all of the boxes that were moved from the

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<sup>95</sup> National Archives, Letter to Trump Counsel Evan Corcoran (May 10, 2022) (quoting April 12, 2022 correspondence), <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-wall-letter-to-evan-corcoran-re-trump-boxes-may-10-2022.pdf>. See also Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>. (“On April 12, an Archives official emailed Philbin and John Eisenberg, another former deputy White House counsel, to tell them the Justice Department, via the Biden White House, had made the request. The email offered the lawyers the opportunity to view the documents as well, but said the documents were too sensitive to be removed from the agency’s secure facility.”).

<sup>96</sup> National Archives, Letter to Trump Counsel Evan Corcoran (May 10, 2022), at p. 2 (quoting April 29, 2022 correspondence), <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-wall-letter-to-evan-corcoran-re-trump-boxes-may-10-2022.pdf>.

<sup>97</sup> National Archives, Letter to Trump Counsel Evan Corcoran (May 10, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-wall-letter-to-evan-corcoran-re-trump-boxes-may-10-2022.pdf>.

<sup>98</sup> Department of Justice, Trump Subpoena (May 11, 2022), at p. 1, <https://www.justsecurity.org/wp-content/uploads/2022/09/department-of-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

<sup>99</sup> Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 7 n. 3, <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf> (explaining accurate number is 37, not 38 documents).

White House to Mar-a-Lago (along with any other items in that room) be preserved in that room in their current condition until further notice.<sup>100</sup>

On June 24, 2022, a subpoena was served seeking “[a]ny and all surveillance records videos images, photographs, and/or CCTV from internal cameras located on ground floor (basement) on the Mar-a-Lago property... from the time period of January 10, 2022 to present.”<sup>101</sup> Following the FBI search on August 8, 2022, “investigators have sought additional surveillance footage from the club.”<sup>102</sup>

Weeks after the August 8, 2022 search, Chief of the Justice Department’s Counterintelligence and Export Control Section Jay Bratt told Trump’s counsel “that the department believed he had not returned all the documents he took when he left the White House.”<sup>103</sup> “Justice Department officials have demanded ... that he return any outstanding documents marked as classified, making clear they do not believe he has returned all materials taken when he left the White House.”<sup>104</sup>

#### **4. Trump’s attorneys’ warnings and notifications**

Trump’s own lawyers warned him of the legal and criminal implications of retaining the government records. In Fall 2021, Trump’s lawyer who was acting as his intermediary with NARA, Alex Cannon, “warned Mr. Trump... that officials at the archives were serious about getting their material back, and that the matter could result in a criminal referral.”<sup>105</sup> In late 2021,

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<sup>100</sup> Jay Bratt, Chief of Counterintelligence and Export Control Section, National Security Division, Department of Justice, Letter to Trump Counsel Evan Corcoran (Jun. 8, 2022) (quoted in FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 22), <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>101</sup> FBI Affidavit accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 23, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>.

<sup>102</sup> Maggie Haberman, Jodi Kantor, Adam Goldman & Ben Protess, *Trump Had More Than 300 Classified Documents at Mar-a-Lago*, New York Times (Aug. 23, 2022), <https://www.nytimes.com/2022/08/22/us/politics/trump-mar-a-lago-documents.html>.

<sup>103</sup> Michael S. Schmidt, Maggie Haberman & Katie Benner, *Justice Dept. Is Said to Believe Trump Has More Documents*, New York Times (Oct. 6, 2022), <https://www.nytimes.com/2022/10/06/us/politics/trump-white-house-documents-lawyers.html>.

<sup>104</sup> Kaitlan Collins, Katelyn Polantz & Tierney Sneed, *Justice Department insists Trump return all classified documents*, CNN (Oct. 7, 2022), <https://www.cnn.com/2022/10/06/politics/trump-white-house-documents-mar-a-lago-justice-department/index.html>. In addition, we note, but do not rely on here, that “[f]ederal officials also have expressed concern about whether Mr. Trump took documents on flights as he traveled from Mar-a-Lago to his other properties in New York and New Jersey.” Sadie Gurman & Alex Leary, *FBI Seeks Additional Information From Two Trump Aides About Mar-a-Lago Records*, Wall Street Journal (Oct. 14, 2022), <https://www.wsj.com/articles/fbi-seeks-additional-information-from-two-trump-aides-about-mar-a-lago-records-11665775694>.

<sup>105</sup> Maggie Haberman & Michael S. Schmidt, *Lawyer Declined Trump Request to Tell Archives All Material Was Returned*, New York Times (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/us/politics/trump-alex-cannon-archives.html>.

former Trump White House lawyer and a former prosecutor, Eric Herschmann, “warned” Trump that he “could face legal liability if he did not return government materials he had taken with him when he left office, three people familiar with the matter said.” Herschmann “sought to impress upon Mr. Trump the seriousness of the issue and the potential for investigations and legal exposure if he did not return the documents, particularly any classified material, the people said.” “Mr. Trump thanked Mr. Herschmann for the discussion but was noncommittal about his plans for returning the documents, the people familiar with the conversation said.”<sup>106</sup>

Further, in respect of the May 2022 subpoena, Trump was also advised, reportedly on more than one occasion by Corcoran in spring 2022, that he “would need to return all records marked classified to the government.” Trump’s response was to ask “if there was any way to fight it.”<sup>107</sup>

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## **Part II: The Law: Relevant Federal Offenses**

In this section, we identify potentially applicable federal offenses and the elements of each offense before turning in the next section to the application of this law to the facts we have set forth above.

Multiple criminal statutes could be applied to Trump’s retention of government records and his conduct during the investigation. We include in this discussion the three statutes included in the search warrant application: Retention of National Defense Information (18 U.S.C. § 793(e)), Removing or Concealing Government Records (18 U.S.C. § 2071), and Obstruction (18 U.S.C. § 1519). In addition, the Department of Justice could investigate and potentially charge at least three further statutes, and so we look at those as well: Conversion of Government Property (18 U.S.C. § 641), Criminal Contempt (18 U.S.C. § 402), and False Statements to Federal Investigators (18 U.S.C. § 1001).

We group these six statutes as follows in this section:

### **Section A. Mishandling of Government Documents**

1. Retention of National Defense Information (18 U.S.C. § 793(e))
2. Concealing Government Records (18 U.S.C. § 2071)
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### **Section B. Obstruction, Contempt, False Information**

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<sup>106</sup> Maggie Haberman, *Trump Was Warned Late Last Year of Potential Legal Peril Over Documents*, New York Times (Sept. 19, 2022), <https://www.nytimes.com/2022/09/19/us/politics/trump-herschmann-documents.html>.

<sup>107</sup> Paula Reid, Kaitlan Collins, Katelyn Polantz, Kristen Holmes & Sara Murray, Trump’s attorney took notes that say the former president wanted to fight subpoena for classified docs, CNN (May 22, 2023), <https://amp.cnn.com/cnn/2023/05/22/politics/trump-subpoena-classified-documents-mar-a-lago/index.html>.

1. Obstruction of Justice (18 U.S.C. § 1519)
2. Criminal Contempt (18 U.S.C. § 402)
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## **Section A. Mishandling of Government Documents**

### **1. Retention of National Defense Information (18 U.S.C. § 793(e))<sup>108</sup>**

Title 18, United States Code, § 793(e), is one of several offenses under the Espionage Act,<sup>109</sup> a statute generally associated with classic leaking cases and foreign government spies.<sup>110</sup> It is generally thought to involve leaking classified information, although technically it requires the information to be “national defense information.”<sup>111</sup> The Act prohibits conduct that encompasses information and documents that relate to the national defense of the United States (“National Defense Information,” or “NDI”).<sup>112</sup> As discussed in Part IV below, significant precedent exists for the Department of Justice successfully prosecuting willful retention cases under § 793(e).

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<sup>108</sup> Title 18, United States Code, § 793(e) provides:

“Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it.”

<sup>109</sup> Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793 *et seq.*).

<sup>110</sup> Section 793(e) contains two sets of clauses. First, the “willfully communicates, delivers, transmits clause” and “willfully retains clause.” Our analysis focuses on retention. The definition of “willful” in those clauses can turn on whether the subject matter is tangible items or intangible information. As discussed below, courts have imposed a lower threshold when it comes to tangible items such as government documents. The second set of clauses is the “document clause” and “information clause.” The former includes all types of “tangible items”: “any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note.” The latter concerns “intangible items” (or information). “Information” has been understood differently by the Circuits, some concluding that it includes both tangible and intangible information, others considering it covers only intangible information. *See, e.g., United States v. Rosen*, 445 F. Supp. 2d 602, 615-16 (E.D. Va. 2006); *cf. United States v. Kim*, 808 F. Supp. 2d 44, 51-52 (D.D.C. 2011). We focus our analysis on tangible items, namely documents. For instructive overviews of the Espionage Act and other relevant statutes and offenses, *see, e.g.: Criminal Prohibitions on the Publication of Classified Defense Information* (Congressional Research Service, Report RR41404, Dec. 6, 2010), [https://www.justsecurity.org/wp-content/uploads/2022/10/2010\\_1206\\_CRS\\_Criminal\\_Prohibitions\\_Defense\\_Information.pdf](https://www.justsecurity.org/wp-content/uploads/2022/10/2010_1206_CRS_Criminal_Prohibitions_Defense_Information.pdf); *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information* (Congressional Research Service, Report RR41404, March 7, 2017), <https://www.justsecurity.org/wp-content/uploads/2022/10/R41404.pdf>.

<sup>111</sup> Under Exec. Order No. 13526, information in any form may be classified if it: (1) is owned by, produced by or for, or is under the control of the United States Government; (2) falls within one or more of the categories set forth in the Executive Order (Top Secret, Secret, and Confidential); and (3) is classified by an original classification authority who determines that its unauthorized disclosure reasonably could be expected to result in damage to the national security.

<sup>112</sup> *See, e.g., United States v. Ford*, 288 Fed. App’x. 54, 57 (4th Cir. 2008) (The *Ford* appeal was brought by Kenneth Ford). *See* Part IV. The Fourth Circuit court said: “The legislative history of § 793(e) shows no congressional intent to criminalize transmittal, but not retention, of classified information by unauthorized

Congress specifically addressed in § 793(e) individuals with *unauthorized* possession of, access to, or control over NDI. This provision makes it a criminal offense for a person, not having such authorization, to willfully retain NDI and fail to deliver it to an officer or employee of the United States entitled to receive it. A § 793(e) offense is a felony punishable by fine of up to \$250,000, by imprisonment not more than ten years, or both.

The Government must prove the following elements beyond a reasonable doubt:<sup>113</sup>

1. The defendant had unauthorized possession of, access to, or control over;
2. a document related to NDI;
3. willfully retained the document; and
4. failed to deliver the document to an officer or employee of the United States entitled to receive it.

#### Element 1: Unauthorized possession, access, or control

A defendant has “lawful possession” of classified information or NDI if she is “entitled to have it” – i.e., she “held an appropriate security clearance and had a need to know at the time the person acquired the classified information [or NDI].”<sup>114</sup> Conversely, a person’s possession is “unauthorized” if she is “not entitled to have it.”<sup>115</sup> Essentially, “unauthorized possession” can

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possessioners. On the contrary, the Senate Report preceding the statute's enactment states: ‘Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of the items enumerated in this statute are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand.’” 288 Fed. App’x. at 57 (quoting S. Rep. No. 80-427, at 7 (1949)); *United States v. Morison*, 844 F.2d 1057, 1064, 1070 (4th Cir. 1988) (“no basis in the legislative record for finding that Congress intended to limit the applicability of sections 793(d) and (e) to ‘classic spying’ on our analysis of the statute in question and a review of its legislative history”); *United States v. McGuinness*, 35 M.J. 149, 153 (C.M.A. 1992) (“[I]t is clear that Congress intended to create a hierarchy of offenses against national security, ranging from ‘classic spying’ to merely losing classified materials through gross negligence.”).

<sup>113</sup> The elements the Government must prove for a prosecution under Section 793(e) retention have been addressed in *United States v. Hitselberger*, 991 F. Supp. 2d 101, 104-06 (D.D.C. 2013); *United States v. Drake*, 818 F. Supp. 2d at 916-18; *United States v. Ford*, PJM-05-0235 (D. Md.), Jury Instructions, p. 41 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Ford-PJM-05-0235-D.-Md.-2005-Jury-Instructions.pdf>. These instructions were given in the Kenneth Ford trial (see Part IV). See also Modern Federal Jury Instructions-Criminal § 29.04, Instruction 29-21, p. 3 <https://www.justsecurity.org/wp-content/uploads/2022/10/1-Modern-Federal-Jury-Instructions-Criminal--29.04-18-U.S.C.-%C2%A7%E2%80%89793d-%5E0-e.pdf> and Eric Wm. Ruschky, Pattern Jury Instructions for Federal Criminal Cases District of South Carolina (2022) pp. 119-120 <https://www.justsecurity.org/wp-content/uploads/2022/10/PatternJuryInstructions-2.pdf>, although both of these sets of instructions incorrectly suggest that the additional mens rea discussed below applies to the document clause.

<sup>114</sup> *United States v. Sterling*, 1:10-cr-00485-LMB, ECF No. 440 (E.D. Va. 2015), Jury Instructions, p. 31 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v.-Sterling-jury-instructions.pdf>. The case of Sterling is addressed further in Part IV on DOJ precedents.

<sup>115</sup> *United States v. Ford*, 1:17-cr-00069-RDB, ECF No. 87-1 (D. Md. 2005), Jury Instructions, p. 42 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Ford-PJM-05-0235-D.-Md.-2005-Jury-Instructions.pdf>. H.R. Rep. No. 647, 81st Cong., 1st Sess. (1949) at 4 (“The term ‘unauthorized possession’ is used deliberately in preference to ‘unlawful possession,’ so as to preclude the necessity for proof of illegal possession.”).

arise in three scenarios: (1) does not hold a security clearance; (2) holds a security clearance but, in relation to the information possessed, does not meet the “need to know” requirement; or (3) holds a security clearance, has a “need to know” the information, but mishandles the information (which would include removing it from its secure, authorized location, or retaining it at an unsecure, unauthorized location). This means that a person’s initial lawful (or authorized) possession of a specific classified information or NDI can become unauthorized if the document is: (1) removed from its secure, authorized location; (2) stored in an unauthorized location; (3) mishandled; or (4) possessed without approval.<sup>116</sup>

A defendant’s authorization status should be assessed as of the time of the willful retention. In cases where a change from authorized to unauthorized status has occurred, the trigger for this change is often not the defendant’s retention but her prior removal of documents from their secure, authorized location. That is not to say that an element of § 793(e) is “removal” – it is not – but it can be, and often is, used to establish unauthorized possession for those who have security clearance to handle classified information and NDI.

## Element 2: Document(s) related to NDI

While many prosecutions pursued under § 793(e) concern the retention of “classified information,” the gravamen of the offense is whether the document or information was related to

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The appellate courts have given little attention to the meaning of “lawful possession” (under § 793(d)) and “unauthorized possession” (under § 793(e)). The case of Kenneth Ford is discussed further in Part IV.

<sup>116</sup> See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 919, n. 10 (4th Cir. 1980) (“The trial judge provided adequate content for this phrase by advising the jury that a person would have authorized possession if he had an appropriate security clearance and if he gained access to the document because it was necessary to the performance of his official duties.”); *United States v. McGuinness*, 33 M.J. 781, 786 (N-M. C.M.R. 1991) (“[W]e find that appellant’s initial authorized possession of the classified materials became unauthorized when he exceeded the parameters of the entrustment given to him to possess, have access to, or control the classified materials.”), *aff’d*, 35 M.J. 149 (C.M.A. 1992) (concluding that the “accused was clearly on notice he was not authorized to retain classified materials and store them in his home given that he told military judge during his plea inquiry that he had worked with classified materials for the past 16 years and he knew he had no authority to retain the materials and store them in his home”); *United States v. Sterling*, 1:10-cr-00485-LMB, ECF No. 440 (E.D. Va. 2015.), Jury Instructions, p. 31 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v.-Sterling-jury-instructions.pdf> (“unauthorized possession of classified information [...] means possession of classified information by a person who does not hold a security clearance or by a person who holds a security clearance without the need to know, or by a person who holds a security clearance, has a need to know, but removed the classified information from the official premise without authorization”); *United States v. Ford*, 1:17-cr-00069-RDB, ECF No. 87-1 (D. Md. 2005), Jury Instructions, pp. 41-42 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Ford-PJM-05-0235-D.-Md.-2005-Jury-Instructions.pdf> (the court directed that that “unauthorized possession” means “possession of classified information by a person who does not hold a security clearance, by a person who holds a security clearance without the need to know, or by a person who holds a security clearance, has a need to know, but removed the classified information from the official premises without authorization.” The term “need to know” was defined as “a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized Government function.”). See also Government’s Brief in *United States v. Harold T. Martin III*, 1:17-cr-00069-MJG, ECF No. 88 (D. Md. Feb. 23, 2018), p. 5 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-of-America-v-Harold-T-Martin-III.pdf>; see Exec. Order No. 13526, Section 4.1, for general restrictions on access to classified information.

national defense, not specifically whether it was classified.<sup>117</sup> The two terms are legally distinct: a single document can be classified, or NDI, or both; not all classified information is NDI, nor is all NDI classified, although there is a close correlation between documents that are NDI and those that are classified.

The term “national defense” has been broadly construed by the U.S. Supreme Court as a “generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.”<sup>118</sup> However, not all defense-related information counts as NDI. It must be “directly and reasonably” connected with the U.S. national defense<sup>119</sup> and be “closely held,” meaning not available to members of the public at the time of the alleged

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<sup>117</sup> See, e.g., *United States v. Lee*, 589 F.2d 980, 990 (9th Cir. 1979) (“Lee wanted to challenge the propriety of the classification ... We find that such an inquiry was totally irrelevant to the issues of this case and of no help to the jury. Under the espionage statutes charged in the indictment, Lee was found guilty of gathering and transmitting documents which relate to the ‘national defense.’ There is no requirement in these statutes that the documents be properly marked ‘Top Secret’ or for that matter that they be marked secret at all.”); *United States v. Safford*, 40 C.M.R. 528 (A.B.R. 1969), rev’d on other grounds, 41 C.M.R. 33 (C.M.A. 1969) (“[A]ppellant in essence urges that this Board adopt a principle to the effect that information and documents involved in prosecutions in military courts under the Espionage Act (18 USC 793) must be of the type requiring classification under security criteria. ... [W]e find the answer crystal clear; the meaning of ‘national defense’ for Espionage Act prosecutions is of much greater breadth than the severely restricted connotation appellant would have us adopt.”); *United States v. Chung*, 659 F.3d 815 (9th Cir. 2011). Cf. *United States v. Rosen*, 445 F. Supp. 2d 602, 623 (E.D.Va 2006) (“[A]lthough evidence that the information was classified is neither strictly necessary nor always sufficient to obtain a prosecution under § 793, the classification of the information by the executive branch is highly probative of whether the information at issue is ‘information relating to the national defense’ and whether the person to whom they disclosed the information was ‘entitled to receive’ the information.”).

<sup>118</sup> *Gorin v. United States*, 312 U.S. 19, 28 (1941) (the U.S. Supreme Court defining the phrase “information relating to the national defense” as used in the Espionage Act). See also Modern Federal Jury Instructions-Criminal, Comment to Instruction 29-5 (“The well-established broad definition of ‘relating to the national defense’ has encompassed the following: radar receivers, dynamotor power units, radar transmitter-receiver units and power supply units repossessed by the Navy (*Dubin v. United States*, 363 F.2d 938 (Ct. Cl. 1966), cert. denied, 386 U.S. 956 (1967)), Joint Air-to-Surface Standoff Missile antennas (*Davinci Aircraft, Inc. v. United States*, 2017 U.S. Dist. LEXIS 63576, at \*2 (C.D. Cal. Apr. 25, 2017) (items had been purchased as part of bulk sale of surplus parts)), a document relating to a study commissioned by the CIA dealing with a worldwide communication satellite system to be used by American agents in “denied areas” of the world (*United States v. Boyce*, 594 F.2d 1246 (9th Cir.), cert. denied, 444 U.S. 855 (1979)), copies of diplomatic cables and other classified papers procured from an employee of the United States Information Agency (*United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980)), and documents containing ‘the availability of improvised explosive devices in Bahrain, [a] schedule for the monthly travel of a high-ranking commander’ in that country, ‘and information about the locations of U.S armed forces in the region and their activities’ (*United States v. Hitselberger*, 991 F. Supp. 2d 101, 103 (D.D.C. 2013).”); *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988).

<sup>119</sup> *Gorin v. United States*, 312 U.S. 19, 30 (1941) (approving of jury instruction defining “national defense” as including “all matters directly and reasonably connected with the defense of our nation against its enemies”). See also *United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir.), cert. denied, 488 U.S. 908 (1988); *United States v. Drake*, 818 F. Supp. 2d 909, 918-19 (citing *Gorin*, 312 U.S. at 30).

retention.<sup>120</sup> Further, some courts have said that to qualify under this provision, disclosure of the document or its information must pose a potential threat to U.S. national security.<sup>121</sup>

Ultimately, whether documents are NDI is a question of fact for the jury – an objective assessment in which the defendant’s own beliefs are irrelevant.<sup>122</sup>

### Element 3: Willful retention

In relation to a defendant’s mens rea under the “document clause” of § 793(e),<sup>123</sup> the Government must prove that the defendant intentionally retained documents that she knew she was prohibited by law from retaining.<sup>124</sup>

Willfulness requires the Government to prove that the defendant’s actions were intentional and voluntary, and that she acted with the specific intent to do something which she knew the law prohibited.<sup>125</sup> Retention due to mistake, negligence or inadvertence will not suffice.<sup>126</sup> The

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<sup>120</sup> *United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988) (approving of jury instruction that “the government must prove that the documents or the photographs are closely held in that they have not been made public and are not available to the general public”); *United States v. Drake*, 818 F. Supp. 2d 909 (D. Md. 2011); *United States v. Squillacote*, 221 F.3d 542, 575-76 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) (stating that the “closely held” test is not satisfied if the information is obtained “from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it”); *id.* at 579 (“[T]he mere fact that similar but unofficial information is publicly available does not automatically remove information in closely-held documents from the realm of ‘national defense’ information”).

<sup>121</sup> *United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988) (holding that for information to qualify as NDI it must be “potentially damaging to the United States or [potentially] useful to an enemy of the United States”); *United States v. Rosen*, 445 F. Supp. 2d 602, 622 (E.D.Va 2006) (“Thus, the phrase ‘information relating to the national defense,’ while potentially quite broad, is limited and clarified by the requirements that the information be a government secret, i.e., that it is closely held by the government, and that the information is the type which, if disclosed, could threaten the national security of the United States.”).

<sup>122</sup> *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985) (“*Morison IP*”) (“National defense is not a subjective test; it does not matter whether the defendant himself believed that the photographs and/or documents did indeed relate to the national defense. It is purely an objective test, and one for the jury to decide after considering all of the evidence . . . It is irrelevant whether the defendant personally believed that the items related to the national defense.”). *See also* *United States v. Drake*, 818 F. Supp. 2d at 916; *Gorin v. United States*, 312 U.S. 19, 32 n. 16 (1941) (referring to “*Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 417; *Gunning v. Cooley*, 281 U.S. 90, 94. *Cf. Dunlop v. United States*, 165 U.S. 486, 500-501”).

<sup>123</sup> The “document clause” of Section 793(e) is addressed at Part II.A.1 n. 98.

<sup>124</sup> This is sometimes referred to as simple willfulness, meaning no additional mens rea of bad intent to injure the United States is required. The leading authority for defining “willfulness” is *Bryan v. United States*, 524 U.S. 184, 190 (1998) (the *Bryan* Court accepted the following jury instructions: “A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.”). *See also* *United States v. Hitselberger*, 991 F. Supp. 2d 101, 107 (D.D.C. 2013); *United States v. Kim*, 808 F. Supp. 2d 44, 53 (D.D.C. 2011); *Drake*, 818 F. Supp. 2d at 909, 916-18.

<sup>125</sup> *Bryan v. United States*, 524 U.S. 184-193 (1998). *See also*, *United States v. Kim*, 808 F.Supp.2d 44, 53-54 (D.D.C.2011) (adopting the *Bryan* standard); *United States v. Hitselberger*, 991 F. Supp. 2d 101, 107-108 (D.D.C. 2013) (adopting the *Bryan* standard).

<sup>126</sup> *United States v. Ford*, Jury Instructions, PJM-05-0235, at \*15 (D. Md. 2005) (“‘Willfully’ means to act with knowledge that one’s conduct is unlawful and with the intent to do something the law forbids, that is to say with the

Government must prove that the defendant knew her conduct was unlawful as a general matter but is not required to show that the defendant knew the entire detail of *why* her conduct was unlawful,<sup>127</sup> or the exact content of documents retained.<sup>128</sup>

The Government is not required to prove in addition that the defendant knew or had reason to believe that the information could be used to injure the United States or advantage a foreign nation, which only applies to the “information clause.”<sup>129</sup>

Additionally, the Government need not prove that the defendant’s actions were done with ill-intent to harm the United States or others.<sup>130</sup>

Although classification markings are not necessary to establish that any particular document contains NDI, such markings have been instructive in establishing a defendant’s knowledge that the document contained NDI, especially where the defendant was trained in the classification system. And although, as already addressed, the Government need not prove that the defendant knew the documents were NDI *per se*, proving that fact can be used as circumstantial evidence to help prove her unlawful retention, i.e., knowledge that the defendant should not have retained such documentation and should have returned it. Documents clearly bearing a classification marking should reasonably alert a defendant of the need to keep them secure and stored in an

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bad purpose to disobey or to disregard the law ... [A] defendant’s conduct was not ‘willful’ if it was due to negligence, inadvertence, or mistake.”), <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Ford-PJM-05-0235-D.-Md.-2005-Jury-Instructions.pdf>.

<sup>127</sup> *United States v. Bishop*, 740 F.3d 927, 932 (4th Cir. 2014) (“knowledge that the conduct is unlawful is all that is required” (quoting *Bryan*, 524 U.S. at 196); *Morison*, 622 F. Supp. at 1010 (“showing of willfulness only requires that [a defendant] knew he was doing something that was prohibited by law”).

<sup>128</sup> Government’s Brief in *United States v. Harold T. Martin III* (D. Md. 2018) (dated February 23, 2018), p. 1 <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-of-America-v-Harold-T-Martin-III.pdf> (“The Court has asked whether the Government must prove that the Defendant knew that he possessed the specific documents listed in the Indictment, and whether he was aware that the contents of those specific documents constituted national defense information. The Government is not required to prove either.”).

<sup>129</sup> See *United States v. Hitselberger*, 991 F. Supp. 2d 101, 106-08 (D.D.C. 2013) (The defendant “incorrectly relies on [cases] [...] interpret[ing] the mens rea requirement in the ‘information’ clause [...] this additional scienter language is not applicable to the willfulness standard in the ‘documents’ clause.”); *United States v. Drake*, 818 F. Supp. 2d 909, 916-17 (D. Md. 2011) (“[O]nly the second ‘information’ clause requires proof of the ‘reason to believe’ element.”); *New York Times Co. v. United States*, 403 U.S. 713, 738-40, n. 9 (1971) (White, J., concurring) (“It seems clear from the [legislative history of Section 793(e)] ... that in prosecuting for communicating or withholding a ‘document’ as contrasted with similar action with respect to ‘information’ the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct.”).

<sup>130</sup> *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985) (“*Morison IP*”) (“The government must show a bad purpose to break the law by delivering or retaining the items, but a showing of an underlying purpose to damage the national defense is entirely unnecessary and irrelevant.”). See also *United States v. McGuiness*, C.M.A. 1992, 35 M.J. 149, *cert. denied*, 113 S. Ct. 1364, 507 U.S. 951, 122 L. Ed. 2d 743.

authorized location.<sup>131</sup> Finally, acts of deception to evade detection are relevant evidence of the defendant's willfulness.<sup>132</sup>

Element 4: Failure to deliver the document(s) to an officer or employee of the United States entitled to receive it

One district court has held that to establish the element of failing to deliver NDI documents, the Government does not need to establish a demand for the return of the NDI.<sup>133</sup> In essence, the fact that possession was unauthorized is sufficient to trigger an inherent and automatic requirement that such possessed NDI documents be delivered back to the Government, without the need for any formal request to do so.

Note: Additional possible application of § 793(e)

As discussed above, Trump “kept classified documents out in the open in his Florida office, where others could see them, ... and sometimes showed them to people, including aides and visitors.”<sup>134</sup> At his golf club in Bedminster, New Jersey, Trump also discussed a classified document containing plans for a potential attack on Iran with four individuals who had no security clearance. Accordingly, 18 U.S.C. § 793(e) may come to bear on this case in another regard. In addition to willful retention of NDI, § 793(e) also criminalizes willfully

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<sup>131</sup> *United States v. Hitzelberger*, 991 F. Supp. 2d 101, 106 (D.D.C. 2013) (noting that defendant's “training places him on notice that the government considers information contained in classified documents important to national security”); *Morison*, 844 F.2d at 1073-74; *Kiriakou*, 898 F. Supp. 2d at 925. *See also* Government's Brief in *United States v. Harold T. Martin III* (D. Md. 2018) (dated February 23, 2018), p. 11-13 and n. 4

<https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-of-America-v-Harold-T-Martin-III.pdf> (“Section 793(e) does not require the Government to prove that the Defendant knew that particular documents were contained within the classified documents he unlawfully retained. [...] The Defendant's theft and retention of vast quantities of classified documents does not relieve him of culpability for retaining each individual document. [...] Even though the Government is not required to prove that the defendant knew he possessed the specific charged documents, evidence regarding the location of physical documents, as well as digital forensic findings, also probative of the defendant's knowledge that he possessed the specific documents listed in the indictment. [...] The Government is not required to prove that the Defendant knew specifically which documents containing NDI he retained, and is not required to prove that he knew the documents contained NDI.”).

<sup>132</sup> *Bishop*, 740 F.3d at 936. *See also* Government's Brief in *United States v. Harold T. Martin III* (D. Md. 2018) (dated February 23, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-of-America-v-Harold-T-Martin-III.pdf>.

<sup>133</sup> *United States v. Rosen*, 445 F. Supp. 2d 602, 613 (E.D. Va. 2006) (“Congress drafted subsection (e) to require one with unlawful possession of national defense information to return it to the government even in the absence of a demand for that information.” [...] (citing *New York Times Co. v. United States*, 403 U.S. 713, 738 n. 9 (1971) (White, J., concurring) (citing S. Rep. No. 81-2369, at 8-9 (1950))).

The obligation to return NDI even in the absence of a request from the government was recognized and adhered to by both Biden and Pence (as well as earlier administrations) who all voluntarily returned documents that NARA had not identified.

<sup>134</sup> Spencer S. Hsu, Josh Dawsey & Devlin Barrett, *Mar-a-Lago prosecutors eye July episode with Trump surveillance cameras*, Washington Post (May 30, 2023), <https://www.washingtonpost.com/national-security/2023/05/30/trump-mar-a-lago-surveillance-camera/>.

communicating, delivering, or transmitting NDI to *any* person not entitled to receive it, as well as those who cause the dissemination, delivery, or transmission of NDI, or attempt to do so. As noted above, the documents prong under § 793(e), unlike the information prong, does not require a bad faith purpose. That is, the Government need not prove that a defendant had “reason to believe” the NDI *could* be used to the injury of the United States or to the advantage of any foreign nation (allies and enemies alike).<sup>135</sup> Instead, prosecutors must prove simply that the defendant acted with willfulness (meaning acting “voluntarily and intentionally and with a specific intent to do something the law forbids”<sup>136</sup>).

## 2. Concealing Government Records (18 U.S.C. § 2071(a))<sup>137</sup>

Title 18, United States Code, § 2071(a), makes it a crime for any person who “conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, ... document, ... filed or deposited with any clerk or officer of any court of the United States, or in any public office ... of the United States.” The offense is a felony punishable by fine of up to \$250,000, imprisonment not more than three years, or both.

Title 18, United States Code, § 2071(b), effectively criminalizes the same conduct as §2071(a) but applies specifically to those who have “custody of” the document or record. This provision also provides for disqualification from office as a consequence of conviction, but we consider this penalty unlikely to apply here.<sup>138</sup>

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<sup>135</sup> See e.g., *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985); *United States v. Rosen*, 445 F. Supp. 2d 602, 626-627 (E.D. Va. 2006), *aff’d*, 557 F.3d 192 (4th Cir. 2009).

<sup>136</sup> *United States v. Drake*, 818 F. Supp. 2d 909, 919 (D. Md. 2011) (quoting *United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980)); see also *United States v. Hitselberger*, 991 F. Supp. 2d 101 (D.D.C. 2013).

<sup>137</sup> Title 18, United States Code, Section 2071(a) provides:

“Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.”

Title 18, United States Code, Section 2071(b) provides:

“Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term ‘office’ does not include the office held by any person as a retired officer of the Armed Forces of the United States.”

<sup>138</sup> *The Mar-a-Lago Search Warrant: A Legal Introduction* (Congressional Research Service, Legal Sidebar LSB10810, August 29, 2022), at p. 4, (“The public office disqualification provision in Section 2071 could raise difficult constitutional questions if applied to the presidency. ... [I]f Section 2071’s statutory disqualification provision were viewed as establishing a substantive qualification for the presidency beyond what is required in the

The legislative history of § 2071, originally enacted in 1853, is “sparse,” with little in-depth discussion of the parameters of the statute’s reach.<sup>139</sup> The following principles can be drawn from the case law.

The courts have made clear that § 2071 “was not intended to punish the mere larceny or theft of the papers or documents as property, but that the essential element of the offense is the specific intent to destroy them as records of a public office; or, in other words, to obliterate or conceal them as evidence of that which constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs, be that effect or usefulness what it may.”<sup>140</sup> The statute’s “purpose is to prevent any conduct which deprives the Government of the use of its documents, be it by concealment, destruction, or removal;”<sup>141</sup> to preserve and protect those documents “as evidence relating to things which concern the public and the government;”<sup>142</sup> and to punish “the rendering of information unavailable to the Government.”<sup>143</sup> It has also been noted that the statute was not intended to criminalize conduct “which in no way interferes with the lawful use of the record or document in its proper place.”<sup>144</sup>

The Government must prove the following elements beyond a reasonable doubt:

1. The defendant concealed;
2. a government document or record;
3. filed or deposited in any public office of the United States; and
4. did so willfully.

#### Element 1: Concealment

The conduct proscribed by this statute is broad, including concealment, removal, mutilation, obliteration, and destruction. We focus our analysis on “concealment.” The statute criminalizes concealment in three scenarios: (i) the defendant conceals a government record; (ii) the defendant attempts to conceal a government record; or (iii) the defendant takes and carries away

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Constitution, it might be argued ... that the provision cannot bar a person from serving as President.”), <https://www.justsecurity.org/wp-content/uploads/2022/10/LSB10810-2.pdf>.

<sup>139</sup> *United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972). The *Rosner* court offers the most comprehensive review of section 2071, and noted that “[d]espite its antiquity, legislative history is almost wholly lacking.” *Id.*

<sup>140</sup> *United States v. Rosner*, 352 F. Supp. 915, 919-20 (S.D.N.Y. 1972) (quoting *United States v. DeGroat*, 30 F. 764, 765 (E.D. Mich. 1887)).

<sup>141</sup> *United States v. Rosner*, 352 F. Supp. 915, 919-21 (S.D.N.Y. 1972) (The court, dismissing the count under Section 2071, found that as the defendant had only taken photocopies of documents from the United States Attorney’s Office for the Southern District of New York, the Government was at no point “deprived of their use.”).

<sup>142</sup> *McInerney v. United States*, 143 F. 729, 730-31 (1st Cir. 1906) (addressing the purpose of Section 2071(a)’s predecessor statute, Section 5403 of the Revised Statutes); *United States v. De Groat*, 30 F. 764 (E.D. Mich. 1887) (“The object of the statute is to preserve the public records and papers intact from all kinds of spoliation, mutilation, or destruction.”).

<sup>143</sup> *United States v. Rosner*, 352 F. Supp. 915, 921 (S.D.N.Y. 1972).

<sup>144</sup> *Martin v. United States*, 168 F. 198, 204 (8th Cir. 1909) (the defendant was indicted under Revised Statutes Section 5408, the antecedent of Section 2071(b)).

a government record with the intent to conceal it.<sup>145</sup> We focus on the first scenario, although the third scenario could be applicable as well, but would require showing Trump’s intent to conceal at the time of the taking and carrying away of the document.<sup>146</sup>

Concealment essentially means “to prevent disclosure or recognition of; avoid revelation of; refrain from revealing recognition of; draw attention from; treat so as to be unnoticed; to place out of sight; withdraw from being observed; shield from vision or notice.”<sup>147</sup>

Most appellate courts have concluded that § 2071 does not apply to photocopies or other duplicates of public records because the original document still exists and the Government was never actually deprived of its use.<sup>148</sup> Those courts have held that the record must effectively be permanently removed or destroyed.<sup>149</sup> One Circuit Court has held – in an opinion that was

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<sup>145</sup> Department of Justice, *Criminal Resources Manual*, CRM 1663. *Protection of Government Property—Protection of Public Records And Documents* (updated Jan. 23, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/10/1663.-Protection-Of-Government-Property-Protection-Of-Public-Records-And-Documents-JM-Departm.pdf>.

<sup>146</sup> Charges under the third scenario, where the defendant takes and carries away government records with the intent to subsequently conceal, could be particularly important in consideration of proper venue for prosecution in the District of Columbia.

<sup>147</sup> *United States v. Katakis*, 800 F.3d 1017, 1028–30 (9th Cir. 2015) (defining the word “conceals” in 18 U.S.C. § 1519 (citing Webster’s Third New International Dictionary (1993))). *See also* Legal Information Institute, Cornell Law School, Concealment (“Concealment is the act of intentionally or unintentionally not revealing information that should be disclosed and would otherwise affect the terms or creation of a contract. A concealment can occur through either purposeful misrepresentation or withholding of material facts. Where the information could not have been known by the other party and it is known to be material by the concealing party, the concealment can give grounds for nullifying the contract. There are three types of concealments which are as follows: Active concealment: The non-disclosure by words or actions in a situation where there is a positive duty on the person to disclose something. Fraudulent concealment: The concealment where the person conceals something with the intent to deceive or defraud the other party. Passive concealment: The act of silence in a situation where the person had a duty to speak and disclose relevant information.”) <https://www.law.cornell.edu/wex/concealment>.

<sup>148</sup> *McInerney v. United States*, 143 F. 729 (1st Cir. 1906) (original papers and documents constitute records for purpose of statute); *United States v. Rosner*, 352 F. Supp. 915, 921 (S.D.N.Y. 1972) (“I am therefore compelled to conclude that Section 2071 does not embrace any and all instances of removal of Government records; it proscribes that removal which deprives the Government of the use of the records. That is not the type of removal involved here. There is no allegation that the documents themselves were tampered with, or that the Government was deprived of their use. At most, the Government argues for what might be termed ‘constructive destruction’; that is, although the documents were not physically destroyed, their utility in the Government’s pending prosecutions was destroyed because of their premature disclosure.”).

<sup>149</sup> *See, e.g., McInerney v. United States*, 143 F. 729 (1st Cir. 1906); *United States v. Rosner*, 352 F. Supp. 915 (S.D.N.Y. 1972). Importantly, courts have not stated that “permanent” deprivation is necessary. *Cf.* “Federal Records: Removal of Agency Documents by Senior Officials Upon Leaving Office,” United States General Accounting Office, Report to Congressional Requesters, GAO GGC-89-91 (July 1989), <https://www.justsecurity.org/wp-content/uploads/2022/10/22FEDERAL-RECORDS-Removal-of-Agency-Documents-by-Senior-Officials-Upon-Leaving-Office22-United-States-General-Accounting-Office-Report-to-Congressional-Requesters-GAO-GGC-89-91-July-1989.pdf> (at p. 4, the report states that Section 2071 “prohibits the removal of federal records, papers, and documents if the government is permanently deprived of their use”).

subsequently reversed on other grounds – that § 2071 does apply in situations where the document in question has not been essentially “obliterated ” from the public record.<sup>150</sup>

#### Element 2: Government document or record

The statutory language of a record or document, which is filed or deposited in a public office, essentially means “public records.”

Under § 2071, the words “record” and “document” are not limited in their meaning to the technical common-law records, nor to technical records or documents. Instead, they are to be understood in the common and ordinary sense, and include all and every part of any document or record filed or deposited and which becomes a part of the records of the public office.<sup>151</sup>

For the purposes of § 2071, public records do not necessarily have to be accessible to the public, hence why the statute has been used to prosecute cases involving NDI and confidential information, including in the D.C. Circuit.<sup>152</sup> Importantly, two D.C. district courts have held that presidential records materials, including National Security Council documents, fall within the meaning of public record.<sup>153</sup>

#### Element 3: Filed or deposited in a public office of the United States

Although there is no Supreme Court case on point, and sparse other case law, what law exists provides that records are generally considered filed if they are “records of a public office.”<sup>154</sup> A deposited object is something “entrusted to the care of another, either for a permanent or a temporary disposition.”<sup>155</sup>

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<sup>150</sup> In a Tenth Circuit decision that was subsequently reversed on other grounds, the defendant copied and removed a sealed affidavit from a federal clerk’s office to take home and discuss with her husband. *United States v. Lang*, 364 F.3d 1210, 1212-13 (10th Cir. 2004). The majority opinion reasoned that by copying the record, one creates a new record for the purposes of the statute and upheld her conviction on that basis. *Id.* at 1221-22. However, Murphy, J., dissenting, concluded that Section 2071 was “directed to a particularly narrow evil: obliteration from the public record of official documents of the United States.” *Id.* at 1226. *See also United States v. Hitselberger*, 991 F. Supp. 2d 108, 124 (D.D.C. 2014) (holding that in a prosecution under Section 2071(a), the Government must “prove that [the defendant] obliterated information from the public record”).

<sup>151</sup> *McInerney v. United States*, 143 F. 729, 730-31 (1st Cir. 1906) (construing predecessor statute).

<sup>152</sup> *See, e.g., Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951).

<sup>153</sup> *United States v. Poindexter*, 725 F. Supp. 13, 20, n. 7 (D.D.C. 1989); *United States v. North*, 708 F. Supp. 364, 369, n. 3 (D.D.C. 1988) (“Congress had previously protected Presidential records, 44 U.S.C. §§ 2201-2207, so North’s disingenuous argument that ‘Presidential’ material is exempt is also unavailing, even if these materials are somehow ‘Presidential,’ a fact not yet apparent. Certainly there is no corollary of the executive privilege doctrine providing North constitutional protection for destruction of documents, as he asserts.”).

<sup>154</sup> *See United States v. De Groat*, at 765.

<sup>155</sup> *Davidson v. United States*, 292 F. 750, 752 (3d Cir. 1923) (addressing a predecessor to Section 2071, the court said, “‘Deposit’ means more than a delivery for mere inspection. The word is defined in 18 Corpus Juris, 559, as: ‘Something intrusted to the care of another. It may mean the permanent disposition of the thing placed or deposited, or a mere temporary disposition or placing of the thing.’ *People v. Peck*, 67 Hun, 560, 22 N.Y. Supp. 576, 579.”). *See also The Mar-a-Lago Search Warrant: A Legal Introduction* (Congressional Research Service, Legal Sidebar

With the same caveat noted regarding the sparse case law, existing case law establishes that the public office need not be open to the public, and often is not. As such, the D.C. district court judge in *Poindexter* held that the National Security Council is a public office for the purposes of the statute.<sup>156</sup>

#### Element 4: Willfully

The statutory language requires a defendant to have “willfully and unlawfully” concealed the relevant records. As noted above, to act willfully, a defendant must act voluntarily and intentionally, with the specific intent to do something which the law forbids, and with knowledge that such conduct was unlawful.<sup>157</sup> The case of Oliver North is instructive wherein the court stated:

“North also had fair notice that his conduct could fall within the scope of Section 2071. It likewise contains no exception for National Security Council documents, and the National Security Council in its 1984 Administrative Manual warns that, by law, the originals of an array of National Security documents must be included either in the NSC institutional records or Presidential records. The manual as well as the nature of

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LSB10810, August 29, 2022), at p. 4, (“There is little case law on what it means for a record or document to be ‘filed or deposited’ with a relevant office or officer, though a 1923 Third Circuit opinion interpreting a predecessor statute suggested that a document ‘deposited’ may include one ‘intrusted to [the] care’ of another.”), <https://www.justsecurity.org/wp-content/uploads/2022/10/LSB10810-2.pdf>.

<sup>156</sup> *United States v. Poindexter*, 725 F. Supp. 13, 19-20 (D.D.C. 1989) (“Defendant argues, first, that there could be no violation because the NSC is not a ‘public office’ within the meaning of the statute. ... It is defendant’s theory that a ‘public’ office is only one to which the public customarily comes, as, for example, a Post Office window or a welfare office. To be sure, the term ‘public’ office could conceivably be construed to mean just that; however, it could also be taken to mean a governmental office, as distinguished from a private one. There is not the slightest reason to suppose that, when Congress sought to protect governmental documents from destruction, concealment, or mutilation, it meant to single out those offices that are customarily visited by members of the public, while leaving unprotected those offices not accessible to the public where normally the more important and vital government records are kept. It is accordingly not surprising that the reported decisions do not bear out defendant’s theory. In *Coplon v. United States*, 191 F.2d 749 (D.C.Cir.1951), the Court of Appeals for this Circuit upheld the espionage conviction of a Department of Justice employee who had concealed and removed highly secret FBI reports located in Department of Justice offices not accessible to the public. In a similar vein, in *McInerney v. United States*, 143 F. 729 (1st Cir. 1906), the First Circuit, discussing the categories of records protected by the predecessor statute of section 2071, mentioned such documents as the ‘report of a commanding general as to the operations of an army, or of a naval commander ...’ [that when] ‘deposited or filed in the proper office, would clearly enough in the sense of the statute be so far a record of the events to which it relates as to render a person responsible who takes it from its public place and destroys it.’ 143 F. at 133. These cases only acknowledge the obvious. Even if there were no such decisions, the Court would not lightly hold, absent compelling legislative history, that Congress intended to restrict the statute to the protection of the often relatively unimportant documents found in areas where the public has access while withholding that protection from the documents of the National Security Council in whose integrity the public and the government have the highest interest.”). See also *United States v. North*, 708 F. Supp. 364, 369 n. 3 (D.D.C. 1988) (“North also argues that he could conceal, remove or destroy NSC documents because they were not publicly-created or publicly-available documents. This is a misreading of the phrase ‘public document,’ as courts have construed § 2071 and its predecessors.”).

<sup>157</sup> See, e.g., *United States v. Salazar*, 455 F.3d 1022, 1024 (9th Cir. 2006); *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); *United States v. Moylan*, 417 F.2d 1002, 1004-1005 (4th Cir. 1969).

documents themselves serve as notice to North that such papers should not be destroyed.”<sup>158</sup>

Courts also require that the defendant know that the documents were, in fact, public records, and that the defendant “intends to deprive the government of the use of its records.”<sup>159</sup> Regardless, that intention need not be motivated by a bad purpose.<sup>160</sup>

### **3. Conversion of Government Property (18 U.S.C. § 641)<sup>161</sup>**

Under Title 18, United States Code, § 641, it is a crime for a person to willfully and knowingly embezzle, steal, purloin, or convert into her own use any government record or thing of value to the Government. Section 641 also makes it a crime to receive, conceal, or retain government property with the intent to convert it to her use or gain, knowing it to have been embezzled, stolen, purloined or converted.<sup>162</sup> The offense is a felony if the value of the aggregate material exceeds \$1,000, punishable by fine of up to \$250,000, imprisonment not more than ten years, or both. Our analysis focuses on knowing conversion in the first paragraph of § 641.

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<sup>158</sup> *United States v. North*, 708 F. Supp. 364, 368-69 (D.D.C. 1988).

<sup>159</sup> See *United States v. North*, 708 F. Supp. 364, 369 n. 3 (citing *United States v. De Groat*, 30 F. 764 (E.D. Mich. 1887) (“the essential element of the offense is the specific intent to destroy them [documents or records] as records of a public office”)); *United States v. Rosner*, 352 F. Supp. 915, 920-21 (S.D.N.Y. 1972) (also citing *De Groat*).

<sup>160</sup> *United States v. Moylan*, 417 F.2d 1002, 1004-1005 (4th Cir. 1969) (discussing “willfulness” criterion for §2071(a) – “Defense counsel urged upon the court a more expansive interpretation of the word ‘willful’ as used in the statutes, namely that no violation occurred unless defendants performed the admitted acts with a bad purpose or motive ... To read the term ‘willfully’ to require a bad purpose would be to confuse the concept of intent with that of motive ... The statutory requirement of willfulness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute.”). See also *United States v. Cullen*, 454 F.2d 386 (7th Cir. 1971) (“In a case such as this, if the proof discloses that the prohibited act was voluntary, and that the defendant actually knew, or reasonably should have known, that it was a public wrong, the burden of proving the requisite intent has been met; proof of motive, good or bad, has no relevance to that issue.”); *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972).

<sup>161</sup> Title 18, United States Code, Section 641 provides:

“Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word ‘value’ means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.”

<sup>162</sup> See *Milanovich v. United States*, 365 U.S. 551, 554, 81 S. Ct. 728, 5 L. Ed. 2d 773 (1961) (distinguishing between “the provision of the statute which makes receiving an offense” and “the provision relating to robbery”).

Section 641 has been used to prosecute cases where defendants have been accused of mishandling government material, including where that information is classified or NDI.<sup>163</sup>

The Government must prove the following elements beyond a reasonable doubt:<sup>164</sup>

1. Documents were property, a record, or thing of value belonging to the Government;
2. The defendant converted the documents to her use, or concealed or retained the documents with the intent to convert;
3. The defendant did so knowingly and willfully, with the intent to deprive, without right, the United States of the use or benefit of the documents; and
4. For a felony, the documents had a value of more than \$1,000.

#### Element 1: Government property

Section 641 criminalizes the conversion of any record, voucher, money, or “thing of value” of the United States or of any department or agency – effectively, “government “property.”<sup>165</sup> The essential element of the crime, then, is a “thing of value,” where the Government must have an “interest” in the property.<sup>166</sup>

Records and “things of value” have received wide application, but successful prosecutions have “generally involved instances in which the Government had either title to, possession of, or control over the tangible objects involved.”<sup>167</sup> The Modern Federal Jury Instructions state that

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<sup>163</sup> *Criminal Prohibitions on the Publication of Classified Defense Information* (Congressional Research Service, Report RR41404, December 6, 2010), at p. 7 n. 38, [https://www.justsecurity.org/wp-content/uploads/2022/10/2010\\_1206\\_CRS\\_Criminal\\_Prohibitions\\_Defense\\_Information.pdf](https://www.justsecurity.org/wp-content/uploads/2022/10/2010_1206_CRS_Criminal_Prohibitions_Defense_Information.pdf), (citing as follows: “*United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988) (photographs and reports were tangible property of the government); *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991) (‘information is a species of property and a thing of value’ such that ‘conversion and conveyance of governmental information can violate § 641,’ citing *United States v. Jeter*, 775 F.2d 670, 680-82 (6th Cir. 1985)); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir. 1979). The statute was used to prosecute a DEA official for leaking unclassified but restricted documents pertinent to an agency investigation. See Dan Eggen, *If the Secret’s Spilled, Calling Leaker to Account Isn’t Easy*, Washington Post (Oct. 3, 2003), at A5 (reporting prosecution of Jonathan Randel under conversion statute for leaking government documents to journalist).”).

<sup>164</sup> Judicial Council of the United States Eleventh Judicial Circuit, *Pattern Jury Instructions, Criminal Cases, O21* (March 10, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/10/FormCriminalPatternJuryInstructionsRevisedMAR2022-2.pdf>; Criminal Jury Instructions for the District of Columbia (5th Edition) (also referred to as The Red Book); Modern Federal Jury Instructions, § 23A.01, Instruction 23A-2, p. 2, <https://www.justsecurity.org/wp-content/uploads/2022/10/1-Modern-Federal-Jury-Instructions-Criminal-P-23A.01-Theft-of-Government-Property-18-U.S.C.-%C2%A7-641.pdf>.

<sup>165</sup> *Morissette v. United States*, 342 U.S. 246, 248 (1952).

<sup>166</sup> *United States v. Long*, 706 F.2d 1044 (9th Cir. 1983).

<sup>167</sup> *United States v. Johnson*, 596 F.2d 842, 846 (9th Cir. 1979). See also Modern Federal Jury Instructions, § 23A.01, Instruction 23A-3, p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/10/1-Modern-Federal-Jury-Instructions-Criminal-P-23A.01-Theft-of-Government-Property-18-U.S.C.-%C2%A7-641.pdf> (“To satisfy this element, the government must prove that [the property] was a ‘thing of value of the United States.’ That means that at the time the property was allegedly stolen (or embezzled or knowingly converted) the United States government or an agency of the United States government had either title to, possession of, or control over the property (or the property was made under contract for the United States).”).

“the courts have tended to group these property interests into four categories: (1) when the government has clear ownership of the property; (2) when the government is the custodian or bailee of the property; (3) when a government employee or agent has possession of the property; and (4) when possession of the property has passed to an intermediary but the government retains supervision and control over the property.” Ultimately, though, the question is not one of law but a factual one to be left to the jury to decide,<sup>168</sup> in which the Government need not prove that it suffered an actual property loss.<sup>169</sup>

Whether the statute covers intangible information has never been answered by the Supreme Court.<sup>170</sup> As a law review article noted, “a majority of the courts of appeals that have considered this question have held that § 641 applies to information,” including confidential and classified information, but differ on the meaning of “value.”<sup>171</sup>

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<sup>168</sup> Modern Federal Jury Instructions, § 23A.01, Comment to Instruction 23A-3, p. 6, <https://www.justsecurity.org/wp-content/uploads/2022/10/1-Modern-Federal-Jury-Instructions-Criminal-P-23A.01-Theft-of-Government-Property-18-U.S.C.-%C2%A7-641.pdf> (“Despite some statements by the Ninth Circuit that the determination whether the property involved is a ‘thing of value of the United States’ is a question of law, it is strongly recommended that this issue be submitted to the jury. All of the circuit pattern instructions include a charge on this element, and there has been no discussion of this issue outside the Ninth Circuit, suggesting that it is routinely charged to the jury. The better view is that this is a factual question for the jury subject to review on appeal whether the interest alleged and found by the jury is sufficient as a matter of law.”), citing as authority *United States v. Lanier*, 920 F.2d 887, 896 (11th Cir. 1991).

<sup>169</sup> *United States v. Milton*, 8 F.3d 39, 44-45 (D.C. Cir. 1993) (holding that loss need not be proved (citing *Elmore v. United States*, 267 F.2d 595, 601 (4th Cir. 1959); *Dobbins v. United States*, 157 F.2d 257, 259 (D.C. Cir. 1946); *United States v. Bailey*, 734 F.2d 296, 301-05 (7th Cir. 1984)). At n. 5 the *Milton* court distinguishes a previous decision it made which suggested loss was required. See also *United States v. Herrera-Martinez*, 525 F.3d 60, 64 (1st Cir. 2008); *United States v. Medrano*, 836 F.2d 861, 864 (5th Cir. 1988); *United States v. Largo*, 775 F.2d 1099, 1101-02 (10th Cir. 1985); *United States v. Barnes*, 761 F.2d 1026, 1032-36 (5th Cir. 1985); *United States v. Benefield*, 721 F.2d 128, 130 (4th Cir. 1983). Cf. *United States v. Gill*, 193 F.3d 802, 805 (4th Cir. 1999) (citing *United States v. Howard*, 787 F. Supp. 769, 771 (S.D. Ohio 1992), which suggested that a loss must be suffered by the Government).

<sup>170</sup> The Supreme Court has been given numerous opportunities to consider whether Section 641’s language should be construed to reach intangible items, namely information. From the 1970s through 1990s, the court has declined to address the issue head on. See, e.g., *United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), cert. denied, 507 U.S. 1003 (1993); *United States v. Tobias*, 836 F.2d 449 (9th Cir.), cert. denied, 485 U.S. 991 (1988); *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979), cert. denied, 444 U.S. 871 (1979); *United States v. DiGilio*, 538 F.2d 972 (2d Cir. 1976), cert. denied sub nom., *Lupo v. United States*, 429 U.S. 1038 (1977); Jessica Lutkenhaus, Note, *Prosecuting Leakers the Easy Way: 18 U.S.C. § 641*, 114 Columbia Law Review 1167, 1185 n. 92 (2014) (collecting cases).

<sup>171</sup> See, e.g., Lessica Lutkenhaus, *Prosecuting Leakers the Easy Way: 18 U.S.C. § 641*, 114 Columbia Law Review 1167, 1186 (2014). Lutkenhaus writes, “The Fourth Circuit takes the broadest approach to value, seeming to suggest that all confidential government information has inherent value and thus § 641 applies to all such information. The Second and Sixth Circuits, as well as a magistrate in the First Circuit, acknowledge the value of government information but limit § 641’s reach due to First Amendment concerns.” *Id.* In relation to information, “The government has prosecuted government employees, government contractors, and members of the public. The government has applied criminal sanctions to disclosure of information related to procurement, grand jury proceedings, criminal investigations, customs impoundments, and DEA agent identities. This statute criminalizes many different dispositions of information, including disclosure, transmission, acquisition, and retention. Those who receive improperly disclosed information are also criminally liable. Finally, it allows prosecution of those who disclose information without any intent to harm the United States or its interests.” *Id.* at 1200. For appellate cases holding that Section 641 applies to intangible government property, including classified information, see *United*

Importantly, the content of any classified or NDI document is unnecessary to establish whether a document should be considered Government property.<sup>172</sup>

## Element 2: Conversion

The statute criminalizes a broad range of behavior.<sup>173</sup> We focus on conversion, which under § 641 has a broader meaning than under common law including “misuse or abuse” and “use in an

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*States v. Fowler*, 932 F.2d 306, 308 (4th Cir. 1991) (classified documents belonging to the Department of Defense and the National Security Council); *United States v. Zettl*, 889 F.2d 51 (4th Cir. 1987) (U.S. Navy Book classified as “secret”); *United States v. Morison*, 844 F.2d 1057, 1076-77 (4th Cir. 1988) (secret navy documents and photographs); *United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991) (sensitive DEA information); *United States v. Jeter*, 775 F.2d 670, 679-82 (6th Cir. 1985) (secret grand jury information); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (confidential law enforcement information); *United States v. Matzkin*, 14 F.3d 1014, 1020 (4th Cir. 1994) (confidential bid information); *United States v. Collins*, 56 F.3d 1416, 1419-21 (D.C. Cir. 1995) (computer time and services); *United States v. Croft*, 750 F.2d 1354, 1359-62 (7th Cir. 1984) (employee time); *United States v. Wilson*, 636 F.2d 225, 227-28 (8th Cir. 1980) (employee time); *United States v. Collins*, 56 F.3d 1416, 1419 (D.D.C. 1995). Conversely, the Ninth Circuit has maintained that Section 641 does not apply to intangible goods. *See, e.g., United States v. Tobias*, 836 F.2d 449, 450-51 (9th Cir. 1988) (“Our circuit has adopted an even broader limitation on the scope of section 641. In *Chappell v. United States*, 270 F.2d 274 (9th Cir. 1959), we held, after an extensive discussion of the legislative history, that section 641 should not be read to apply to intangible goods. This interpretation has the advantage of avoiding the first amendment problems which might be caused by applying the terms of section 641 to intangible goods — like classified information. *See Truong Dinh Hung*, 629 F.2d at 924-28 (Winter, J., concurring as to this issue). Thus, while our rationale is different, we, like Judge Winter, construe section 641 as being generally inapplicable to classified information.”). *See also* Department of Justice, Criminal Resources Manual, CRM 1664. Protection of Government Property—Theft of Government Information (updated January 17, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/10/1664.-Protection-Of-Government-Property-Theft-Of-Government-Information-JM-Department-of-Just.pdf> (The Justice Department Criminal Manual states that it would be “inappropriate to bring a prosecution under 18 U.S.C. § 641 when: (1) the subject of the theft is intangible property, i.e., government information owned by, or under the care, custody, or control of the United States; (2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public; and (3) the property was not obtained as a result of wiretapping, (18 U.S.C. § 2511) interception of correspondence (18 U.S.C. §§ 1702, 1708), criminal entry, or criminal or civil trespass.”).

<sup>172</sup> *See United States v. Zettl*, 889 F.2d 51, 54 (4th Cir. 1987) (“We have referred throughout the opinion, from time to time, to ‘the documents’ or have used words of like import. By use of those words in that style is meant the content of the documents involved so that when we have said, for example, that the documents are irrelevant, we mean, of course, that the content of the documents is irrelevant. Our understanding of this case is that the Navy PEDs is, in fact, a book of supporting data for the 1984 Navy Defense Appropriation. It is classified SECRET. It is charged that Zettl, having obtained one of these books, sold or conveyed or disposed of it without authority to someone else. The fact that the book is classified SECRET is, of course, relevant to the proceeding, as would be the fact that a given number of papers in the book might individually also be classified as SECRET. But neither the content of the book, nor any of the individual papers therein, is relevant. Zettl is charged with the unauthorized conveyance of classified documents. While the fact that the documents are classified is relevant, their content is irrelevant.”).

<sup>173</sup> *United States v. Zettl*, 889 F.2d 51, 53 (4th Cir. 1987) (“Section 641 prohibits two separate acts. The first is to embezzle, steal, or knowingly convert United States property and the second is to sell, convey, or dispose of United States property without authority. *United States v. Scott*, 789 F.2d 795, 798 (9th Cir. 1986); *United States v. Jeter*, 775 F.2d 670, 681 (6th Cir. 1985), cert. denied, 475 U.S. 1142, 106 S.Ct. 1796, 90 L.Ed.2d 341 (1986); *Hawkins v. United States*, 458 F.2d 1153, 1155 (5th Cir. 1972).”). In the landmark Supreme Court case, *Morissette v. United States*, the Court confirmed that Section 641 applies “to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions.” 342 U.S. 246, 266 n. 28 (1952). The Court further stated, “What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men

unauthorized manner” of Government property.<sup>174</sup> Conversion for purposes of § 641 means to “knowingly convert money or property means to use the property in an unauthorized manner in a way that seriously interferes with the government’s right to use and control its own property, knowing that the property belonged to the United States, and knowing that such use was unauthorized.”<sup>175</sup> As noted, the Government must prove that the defendant’s conversion “substantially” or “seriously” interfered with the Government’s property rights.<sup>176</sup>

The Supreme Court has given instructive comments on “conversion” under § 641:

“Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one’s custody for limited use. Money rightfully taken into one’s custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian’s own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or

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have escaped through the breaches. ... The codifiers wanted to reach all such instances.” *Morissette*, 342 U.S. at 271.

<sup>174</sup> *Morissette v. United States*, 342 U.S. 246, 272 (1952). See also *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (per curiam) (concluding that the statute’s language and Supreme Court’s interpretation lead to broader definition than common law tort of conversion); *United States v. Lambert*, 446 F. Supp. 890, 895 (D. Conn. 1978) (concluding that crimes under Section 641 are “independent of the constraints, and the vagaries, of particular common-law doctrines” such as conversion), *aff’d sub nom.*, *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979); *contra Chappell v. United States*, 270 F.2d 274, 277 (9th Cir. 1959) (presuming Congress understood and intended the existing meaning of “conversion”).

<sup>175</sup> Modern Federal Jury Instructions, § 23A.01, Instruction 23A-4, p.14, <https://www.justsecurity.org/wp-content/uploads/2022/10/1-Modern-Federal-Jury-Instructions-Criminal-P-23A.01-Theft-of-Government-Property-18-U.S.C.-%C2%A7-641.pdf>. See also *Wilson v. SunTrust Bank*, 119 Fed. App’x. 291, 292 (D.C. Cir. 2004) (holding that “conversion requires unlawful exercise of ownership, dominion or control over the personal property of another in denial or repudiation of his rights thereto” (internal quotation marks omitted)).

<sup>176</sup> While the scope of conversion under Section 641 is wider than at common law, the courts have held that the “serious interference” standard for tortious conversion applies to conversion cases under Section 641. See, e.g., *United States v. Collins*, 56 F.3d 1416, 1420 (D.C. Cir. 1995); *United States v. May*, 625 F.2d 186, 192 (8th Cir. 1980); *United States v. Blaszcak*, 947 F.3d 19, 38 (2d Cir. 2019), *cert. granted*, judgment vacated on other grounds by *Blaszcak v. United States*, 141 S. Ct. 1040 (2021), all of which refer to *Restatement (Second) of Torts § 222A* (1965) (updated October 2022) p. 1, <https://www.justsecurity.org/wp-content/uploads/2022/10/222A-What-Constitutes-Conversion-1.pdf>, which states that “In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important: (a) the extent and duration of the actor’s exercise of dominion or control; (b) the actor’s intent to assert a right in fact inconsistent with the other’s right of control; (c) the actor’s good faith; (d) the extent and duration of the resulting interference with the other’s right of control; (e) the harm done to the chattel; (f) the inconvenience and expense caused to the other.” The factors listed are non-exhaustive and do not all apply in every case. As such, the jury is free to consider the most applicable and relevant factor(s). See also *United States v. Kueneman*, 94 F.3d 653 (9th Cir. 1996) (unpublished table opinion); *United States v. Maisel*, 12 F.3d 423, 425 (4th Cir. 1993); *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991); *United States v. Zettl*, 889 F.2d 51, 52-53 (4th Cir. 1989); *United States v. Scott*, 789 F.2d 795, 798 (9th Cir. 1986); *United States v. Wilson*, 636 F.2d 225 (8th Cir. 1980).

purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.”<sup>177</sup>

Importantly, the Government need not prove that it was, in fact, permanently deprived of its property, and as such, copies of government documents are captured by § 641.<sup>178</sup>

Element 3: Knowingly and willfully, with intent to deprive, without right, the United States of the use or benefit of the document

The statute makes clear that the Government must prove that the defendant “knowingly” converted the property; that she acted intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness. In *Morrisette*, the Supreme Court held that “knowing conversion requires more than knowledge that [the] defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.”<sup>179</sup> Though “knowledge” does not necessarily require knowledge of the law, “willfulness” does. Meaning, the defendant must act with knowledge that her conduct is unlawful and with the intent to do something the law forbids, with the bad purpose to disobey or disregard the law.<sup>180</sup>

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<sup>177</sup> *Morrisette*, 342 U.S. at 272.

<sup>178</sup> See *United States v. DiGilio*, 538 F.2d 972, 977 (3d Cir. 1976) (“A duplicate copy is a record for purposes of the statute, and duplicate copies belonging to the government were stolen.”) (citing *United States v. Friedman*, 445 F.2d 1076, 1087 (9th Cir. 1971) and *United States v. Rosner*, 352 F. Supp. 915, 922 (S.D.N.Y. 1922), *modified*, 485 F.2d 1213 (2d Cir. 1973). The *DiGilio* court also referred at n. 9 to a 1975 Senate Committee report which “indicated a belief that existing federal criminal statutes reach the theft of copies of documents containing confidential information.” *Id.* (citing Senate Comm. on the Judiciary, Report on the Criminal Justice Reform Act of 1975, 94th Cong., 1st Sess. 675 (1975)). *DiGilio* has been cited as authority in *Morison*, 604 F. Supp. 655, 664 and *United States v. Hitselberger*, 991 F. Supp. 2d 108, 124 (D.D.C. 2014); *cf.* Department of Justice Criminal Resource Manual, sec. 1638, <https://www.justice.gov/archives/jm/criminal-resource-manual-1638-embezzlement-government-property-18-usc-641>.

<sup>179</sup> *Morrisette v. United States*, 342 U.S. 246, 270-71 (1952). See also *United States v. Lanier*, 920 F.2d 887, 895 (11th Cir. 1991) (“In this circuit, to establish the requisite criminal intent, the government need only prove that defendants knowingly used government property for their own purposes in a manner that deprived the government of the use of the property.”).

<sup>180</sup> Although “willfulness” is not expressly stated in the statute, the majority of the circuits, as well as (but less affirmatively) the Supreme Court in *Morrisette*, have read into Section 641 a requirement to prove willfulness. See, e.g., *United States v. Baker*, 693 F.2d 183, 186 (D.C. Cir. 1982) (“In *Morrisette* the Supreme Court held that intent, although not mentioned in the statute defining theft and sale of government property, is nevertheless a necessary element of each offense. While not indicating that any specific language is necessary to allege intent, the Court did endorse ‘unlawfully, wilfully and knowingly’ as sufficient. 342 U.S. at 270 n. 30, 72 S. Ct. at 253 n. 30.”); *United States v. Bowser*, 318 F. Supp. 3d 154, 166 (D.D.C. 2018), *aff’d*, 964 F.3d 26 (D.C. Cir. 2020); *United States v. McRee*, 7 F.3d 976, 982 (11th Cir. 1993) (“the government must still prove beyond a reasonable doubt that the defendants acted ‘knowingly and willfully with the intent to either temporarily or permanently deprive the government of its property’”); *United States v. Howard*, 30 F.3d 871, 875 (7th Cir. 1994) (also requiring “willfulness” to be proved); *United States v. Dowl*, 619 F.3d 494, 501 (5th Cir. 2010) (citing *Howard*, and *McRee* with approval); *United States v. Dalalli*, 651 F. App’x 389, 399 (6th Cir. 2016) (citing *McRee* with approval). But *cf.* *Langbord v. United States Dep’t of Treasury*, 832 F.3d 170, 201 n. 18 (3d Cir. 2016) (“The Langbords also insist the District Court erred by refusing to instruct the jury that a violation of § 641 had to be ‘willful.’ A linguistic

Importantly, under § 641, the Government does not need to prove that the defendant intended to permanently deprive the Government of its property, nor is it necessary to show that the property was initially acquired through any wrongdoing.<sup>181</sup> Intent, here as elsewhere, may be proven by the defendant's conduct and by all the circumstances surrounding the case.<sup>182</sup>

#### Element 4: Value over \$1,000

Under § 641, if the value of the property exceeds \$1,000, the offense is a felony and maximum punishment is imprisonment for ten years. If the value of the property is \$1,000 or less, the offense is a misdemeanor, and the maximum punishment is imprisonment for one year.

The statute defines value as the “face, par, or market value, or cost price, either wholesale or retail, whichever is greater.” Effectively, there are two measures of value: the measure of value in exchange (face, par, or market) and the measure of value as calculated by the cost to the Government for creation or acquisition (wholesale or retail).<sup>183</sup>

Where there is no existing commercial market for a particular type of document or goods, value has been established by reference to a “thieves’ market”: how much would those who would benefit from such information, for example foreign nations, be willing to pay for the information.<sup>184</sup> This approach usually requires the Government to disclose the content of the

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‘chameleon,’ the word ‘willful’ is not found in the statute. It is therefore unsurprising that a number of our sister circuits have declined to promulgate model instructions that include a willfulness charge.”).

<sup>181</sup> *Morissette v. United States*, 342 U.S. 246, 270-71 (1952) (“Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful.”). *See also United States v. Dowl*, 619 F.3d 494, 500-02 (5th Cir. 2010); *United States v. Rehak*, 589 F.3d 965, 973-74 (8th Cir. 2009); *United States v. Howard*, 30 F.3d 871, 875 (7th Cir. 1994). Notably, the Ninth Circuit has taken the view that knowledge that the property belonged to the U.S. Government is not a substantive element of the offense. *See, e.g., Baker v. United States*, 429 F.2d 1278 (9th Cir. 1970) (“Knowledge that stolen property belonged to the government is not an element of the offense. The sole reason for including the requirement that the property belongs to the government is to state the foundation for federal jurisdiction.”).

<sup>182</sup> *Morissette*, 341 U.S. at 271-72. *See also United States v. Koss*, 769 F.3d 558, 562-63 (8th Cir. 2014); *United States v. Moore*, 504 F.3d 1345, 1347-50 (11th Cir. 2007) (reversing convictions for lack of evidence on this element); *United States v. Donato-Morales*, 382 F.3d 42, 47 (1st Cir. 2004); *United States v. McGahee*, 257 F.3d 520, 531 (6th Cir. 2001); *United States v. Fowler*, 932 F.2d 306, 316-17 (4th Cir. 1991); *United States v. Scott*, 789 F.2d 795, 798-99 (9th Cir. 1986); *United States v. Croft*, 750 F.2d 1354, 1362-63 (7th Cir. 1984); *United States v. Shackelford*, 677 F.2d 422, 425 (5th Cir. 1982); *United States v. Wilson*, 636 F.2d 225, 228 (8th Cir. 1980).

<sup>183</sup> *United States v. Kroesser*, 731 F.2d 1509, 1516-17 (11th Cir. 1984).

<sup>184</sup> *United States v. DiGilio*, 538 F.2d 972, 979 (3rd Cir. 1976). *DiGilio* concerned official FBI investigation files concerning the agency's investigations into the defendant. The court held that “[t]here would appear to be sufficient evidence to sustain a finding that a thieves’ market for the stolen records existed. We are not persuaded, however, that proof of the existence of a thieves’ market satisfied the government's burden of proof as to the value of the misappropriated records. For most tangible objects, some market exists, and proof of that fact alone is not enough to establish value in the market. Since there is no proof regarding exchange price in the thieves’ market generally, evidence showing only the existence of that market is insufficient on the question of value for felony sentences under § 641.” *Id.* at 979. In *United States v. Manning*, 78 M.J. 501 (A. Ct. Crim. App. 2018), the defendant was an intelligence analyst in the Army, and uploaded classified significant activity reports (SIGACTs) onto WikiLeaks. The Army Court of Criminal Appeals said: “we find the classified information that accounts for Specifications 4, 6, 8, and 12 of Charge II has value in a thieves’ market clearly in excess of \$1,000.00.” *Id.* at 518. *See also United*

document in order to prove its intrinsic value to others, something the Government is often reluctant to do with respect to particularly sensitive documents due to national security concerns.<sup>185</sup> For classified and similar material, prosecutors have instead sought to “prove value by showing the cost of preparing the documents without relying on their intrinsic value.”<sup>186</sup>

The question of value is one for the jury to determine.

#### 4. Additional Possible Statutory Approaches to Document Mishandling

Based upon recent reports that Trump may have shown classified documents to others, charges could be considered under 18 U.S.C. § 798. This is similar to 18 U.S.C. § 793(e) for disseminating NDI to third parties, which we discuss briefly above. Section 798 prohibits the knowing and willful disclosure of certain categories of classified information to any unauthorized person, or use “in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States.” Unlike § 793, which applies to NDI generally, § 798 applies only to classified information,<sup>187</sup> including, for our purposes, documents or information “concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government,” or

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*States v. Langston*, 903 F.2d 1510, 1514 (11th Cir. 1990) (“The value of stolen property in a ‘thieves’ market’ is a legitimate measure of market value in a section 641 prosecution.” *United States v. Wright*, 661 F.2d 60 (5th Cir. Unit B 1981)); *United States v. Robie*, 166 F.3d 444, 551 (2d Cir. 1999) (“We have no doubt that the going price among the dishonest for ill-gotten merchandise can establish its value, as the cases in this circuit cited by the government confirm.”); *United States v. Brookins*, 52 F.3d 615, 619 (7th Cir. 1995) (“This Court measures the ‘market value’ of stolen goods as ‘the price a willing buyer will pay a willing seller either at the time and the place the property was stolen or at any time during the receipt or concealment of the property.’ *United States v. Bakken*, 734 F.2d 1273, 1278 (7th Cir. 1984). Furthermore, the Court allows the use of a ‘thieves’ market’ as “an appropriate method for determining the ‘market value’ of [stolen] goods ....” [*United States v. Oberhardt*, 887 F.2d [790,] 792 [(7th Cir. 1989)].”).

<sup>185</sup> See, e.g., *Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act* (Congressional Research Service, Report R41742, April 2, 2012), <https://www.justsecurity.org/wp-content/uploads/2022/11/R41742-2.pdf>.

<sup>186</sup> *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991) (Fowler was charged under Section 641 for taking classified secret documents belonging to DOD and NSC. He contended that “the contents of the documents were relevant to ... show that the documents had a value of less than \$100. [...] The government opposed disclosing the contents of the documents on the ground that the contents were irrelevant. The prosecutor also explained that he would prove value by showing the cost of preparing the documents without relying on their intrinsic value.”); *United States v. Zettl*, 889 F.2d 51, 54 (4th Cir. 1987) (“The government plans to prove the value exceeded \$100 by the ‘cost price’ of photocopying, transportation, and the other actual costs of the documents Zettl allegedly conveyed without authority. Given the government’s method of proving value, the classified documents are not relevant. Even if Zettl could prove the PED was worthless on the thieves’ market, if the government proved a greater value through cost price, the greater value controls under the statute.”). Section 641 now requires a threshold of \$1,000 for the conduct to be a felony.

<sup>187</sup> § 798(b); see also *United States v. Hoffman*, 995 F. Supp. 2d 555, 566 (E.D. Va. 2014) (contrasting the elements of 18 U.S.C. § 794(a), which the court noted required proof “the information relates to the national defense,” with § 798(a)(3), which the court explained required “the Government to prove that the defendant transmitted ‘classified information’”).

“concerning the communication intelligence activities of the United States or any foreign government.”<sup>188</sup>

Under § 798, “the propriety of the classification is irrelevant. The fact of classification of a document or documents is enough to satisfy the classification element of the offense.”<sup>189</sup> However, the documents must in fact be classified at the time.

The Government must prove the following elements beyond a reasonable doubt:<sup>190</sup>

1. The defendant knowingly and willfully (1) communicated, furnished, transmitted, or otherwise made available information to an unauthorized person, or (2) published that information, or (3) used the information in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States;
2. The information was classified, and the defendant knew that it was classified; and
3. The classified information concerned a matter set out in § 798(a)(1)-(4), namely (1) the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or (2) the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or (3) the communication intelligence activities of the United States or any foreign government; or (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes.

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<sup>188</sup> § 798(a)(1).

<sup>189</sup> *United States v. Boyce*, 594 F.2d 1246, 1251 (9th Cir. 1979) (interpreting similar language in 50 U.S.C. § 798, citing *Scarbeck v. United States* (1963) 115 U.S.App.D.C. 135, 317 F.2d 546). *See also*, *Fondren v. United States*, 63 F. Supp. 3d 601, 608 (E.D. Va. 2014) (citing *Boyce*).

<sup>190</sup> Title 18, United States Code, Section 798 provides:

“Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or (3) concerning the communication intelligence activities of the United States or any foreign government; or (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—Shall be fined under this title or imprisoned not more than ten years, or both.”

Section 798(b) further notes, *inter alia*, that “[t]he term ‘classified information’ means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.”

A § 798 offense is a felony punishable by a fine of up to \$250,000, by imprisonment not more than ten years, or both.

## **Section B. Obstruction, Contempt, False Information**

### **1. Obstruction of Justice (18 U.S.C. § 1519)<sup>191</sup>**

Title 18, United States Code, § 1519, makes it a crime for a person to destroy, alter, mutilate, conceal, falsify, or make a false entry in any record with a specific intention to obstruct an investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. The offense is a felony punishable by fine, imprisonment not more than 20 years, or both.

The statute is often dubbed the “anti-shredding” provision of the Sarbanes-Oxley Act given its genesis,<sup>192</sup> but spans much more, including concealment of documents.<sup>193</sup> We focus on concealment in relation to the obstruction of an FBI and grand jury investigation as well as concealment in relation to impeding or obstructing the proper administration of any matter within the jurisdiction of any department or agency of the United States, to wit, NARA and the Department of Justice.

Section 1519 has been construed as criminalizing three scenarios involving a matter within the jurisdiction of a federal agency where a defendant acts with an obstructive intent: “(1) when a defendant acts directly with respect to the investigation or proper administration of any matter, that is, a pending matter, (2) when a defendant acts in contemplation of any such matter, and (3) when a defendant acts in relation to any such matter.”<sup>194</sup>

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<sup>191</sup> Title 18, United States Code, Section 1519, provides:

“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”

<sup>192</sup> See, e.g.: *United States v. Lessner*, 498 F.3d 185, 196 (3d Cir. 2007); *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities* (Congressional Research Service, Report RL34303, updated April 17, 2014), p. 58, <https://www.justsecurity.org/wp-content/uploads/2022/10/RL34303.pdf>.

<sup>193</sup> *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities* (Congressional Research Service, Report RL34303, updated April 17, 2014), p. 60, (“the section clearly reaches the destruction of evidence, but it is used with at least equal frequency to prosecute the falsification of evidence,” citing at n.403, “*United States v. Fontenot*, 611 F.3d 734, 735-36 (11th Cir. 2010); *United States v. Holden*, 557 F.3d 698, 700 (6th Cir. 2009); *United States v. Moore*, 708 F.3d 639, 648-49 (5th Cir. 2013).”).

<sup>194</sup> *United States v. McRae*, 702 F.3d 806, 837 (5th Cir. 2012); *United States v. Lanham*, 617 F.3d 873, 887 (6th Cir. 2010) (“Lanham also argues that there had to be an ongoing or imminent federal investigation at the time reports were written to meet the requirements of the statute. The language in 18 U.S.C. §1519 clearly states that the falsification could be done ‘in relation to or contemplation of any’ investigation or matter within United States

The Government must prove the following elements beyond a reasonable doubt:<sup>195</sup>

1. Defendant's concealment of, or false statement within, any record or document;
2. was done so knowingly;
3. with the specific intent to obstruct, impede, or influence; and
4. an investigation or proper administration of any matter within the jurisdiction of any U.S. department or agency.

#### Element 1: Concealment, falsification, and false statements

"Concealment" is a sufficiently clear term addressed above. In relation to concealment, § 1519 applies to "tangible objects," objects that "one can use to record or preserve information," but not "all objects in the physical world."<sup>196</sup>

Importantly, unlike under § 1001, the Government need not prove that evidence concealed was material to the proceeding,<sup>197</sup> but lack of materiality may undermine the ability of the Government to prove factually that the defendant intended to obstruct the investigation.

#### Element 2: Knowingly

The meaning of knowingly has been addressed above. "A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness."<sup>198</sup>

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jurisdiction. The conspiracy to harm J.S. was within the jurisdiction of the United States, and the falsification was presumably done in contemplation of an investigation that might occur.").

<sup>195</sup> Modern Federal Jury Instructions, § 46.13, Instruction 46-79, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-46.13-Destruction-or-Alteration-of-Evidence-in-Federal-Investigation-18-U.S.C.-%C2%A7-1519.pdf>. See also *Yates v. United States*, 574 U.S. 528 (2015); *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008); *United States v. Moyer*, 726 F. Supp. 2d 498, 508 (M.D. Pa. 2010); *United States v. Powell*, 680 F.3d 350, 356 (4th Cir. 2012); *United States v. Yielding*, 657 F.3d 688, 710-12 (8th Cir. 2011).

<sup>196</sup> *Yates v. United States*, 574 U.S. 528, 536 (2015) (in reversing conviction under § 1519 for destruction of fish, held that "tangible object" under § 1519 covers "only objects one can use to record or preserve information, not all objects in the physical world.")

<sup>197</sup> In *United States v. Powell*, 680 F.3d 350, 356 (4th Cir. 2012), the court stated:

"Our interpretation accords with those of our sister circuits, which, when construing § 1519, have omitted a materiality requirement. The Eleventh Circuit has stated that § 1519 'rather plainly criminalizes the conduct of an individual who (1) knowingly (2) makes a false entry in a record or document (3) with intent to impede or influence a federal investigation.' *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). Likewise, the Eighth Circuit has approved a jury instruction on § 1519 that imposed no materiality element. See *United States v. Yielding*, 657 F.3d 688, 710-12 (8th Cir. 2011). Accordingly, we hold that the government need not prove the materiality of the falsification for an offense under 18 U.S.C. § 1519 and that the district court did not err in failing to instruct the jury on such an element." (footnote omitted).

<sup>198</sup> Modern Federal Jury Instructions, § 46.13, Instruction 46-82, p.9, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-46.13-Destruction-or-Alteration-of-Evidence-in-Federal-Investigation-18-U.S.C.-%C2%A7-1519.pdf>.

### Element 3: Specific intent to obstruct or impede

A defendant must act with the specific intent to impede, obstruct or influence an investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.<sup>199</sup> However, “[t]he government is not required to prove that the defendant knew his conduct would obstruct a federal investigation, or that a federal investigation would take place, or that he knew of the limits of federal jurisdiction. However, the Government is required to prove that the investigation that the defendant intended to impede, obstruct, or influence did, in fact, concern a matter within the jurisdiction of an agency of the United States.”<sup>200</sup> The statute does not apply to “innocent conduct such as routine destruction of documents that a person consciously and in good faith determines are irrelevant to a foreseeable federal matter.”<sup>201</sup>

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[Evidence-in-Federal-Investigation-18-U.S.C.-§-1519.pdf](#). See also *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012).

<sup>199</sup> *United States v. Scott*, 979 F.3d 986, 993 (2d Cir. 2020) (holding that “a defendant must knowingly act with the intent to impede an investigation to be liable under the statute”); *United States v. Kernell*, 667 F.3d 746, 752 (6th Cir. 2012). Note, the Government is not required to prove that the defendant acted “willfully,” i.e., that the defendant knew that falsifying records with the intent to obstruct a federal investigation was unlawful. See, e.g., *United States v. Hassler*, 992 F.3d 243, 247 (4th Cir. 2021); *United States v. McQueen*, 727 F.3d 1144, 1151–52 (11th Cir. 2013); *United States v. Moyer*, 674 F.3d 192, 208–09 (3d Cir. 2012); *United States v. Kernell*, 667 F.3d 746, 752–56 (6th Cir. 2012); *United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011).

<sup>200</sup> Modern Federal Jury Instructions, § 46.13, Instruction 46-82, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-46.13-Destruction-or-Alteration-of-Evidence-in-Federal-Investigation-18-U.S.C.-§-1519.pdf>. See also *United States v. Yielding*, 657 F.3d 688, 710–12 (8th Cir. 2011) (concluding that §1519 has no nexus requirement such as found by the Supreme Court in *United States v. Aguilar*, 515 U.S. 593 (1995) (addressing 18 U.S.C. § 1503), and *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005), which addressed 18 U.S.C. § 1512(b)). The *Yielding* court said: “The text of § 1519 requires only proof that the accused knowingly committed one of several acts, including falsification of a document, and did so ‘with the intent to impede, obstruct, or influence, the investigation or proper administration’ of a federal matter. The requisite knowledge and intent can be present even if the accused lacks knowledge that he is likely to succeed in obstructing the matter. It presumably will be easier to prove that an accused intended to obstruct an investigation if the obstructive act was likely to affect the investigation. But we do not think the statute allows an accused with the requisite intent to avoid liability if he overestimated the importance of a falsified record or shredded a document for the purpose of eliminating a small but appreciable risk that the document would lead investigators to discover his wrongdoing.” 657 F.3d at 712; *United States v. McQueen*, 727 F.3d 1144, 1152 (11th Cir. 2013) (noting that “[t]his statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter.” (quoting S.Rep. No. 107–146, at 14–15 (2002))); *United States v. Hassler*, 992 F.3d 243, 247 (4th Cir. 2021); *United States v. Moyer*, 674 F.3d 192, 208–09 (3d Cir. 2012); *United States v. Kernell*, 667 F.3d 746, 752–56 (6th Cir. 2012); *United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011).

<sup>201</sup> *United States v. Yielding*, 657 F.3d 688, 711 (8th Cir. 2011).

Element 4: An investigation or proper administration of any matter within the jurisdiction of any U.S. department or agency

There is no requirement that an investigation be pending at the time of the obstruction, only that the acts were taken in relation to or in contemplation of any such matter or case.<sup>202</sup>

As above, the defendant need not know that the investigation that the defendant intended to impede fell within the jurisdiction of federal authorities. However, the Government must prove that the investigation did fall within such jurisdiction, which is a question of law (a jurisdictional matter).<sup>203</sup>

In line with the Supreme Court’s dictum in *Yates*,<sup>204</sup> the Eleventh Circuit has said that an obstructive act committed with intent to impede a grand jury investigation can be construed as “any matter within the jurisdiction of any department or agency of the United States” under the statute.<sup>205</sup> The court in *Hoffman-Vaile* held that since the investigation in question originated in the Department of Health and Human Services, which forwarded it to the Justice Department for criminal investigation, a grand jury subpoena for the missing records remained a “matter within the jurisdiction” of a department or agency and so met the statutory language.<sup>206</sup>

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<sup>202</sup> *United States v. Lanham*, 617 F.3d 873, 877 (6th Cir. 2010); *United States v. Taohim*, 817 F.3d 1215, 1222 (11th Cir. 2013). See also S.Rep. No. 107-146, at pp.14-15 (2002), <https://www.justsecurity.org/wp-content/uploads/2022/10/CRPT-107srpt146.pdf>.

<sup>203</sup> Modern Federal Jury Instructions, § 46.13, Instruction 46-82, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-46.13-Destruction-or-Alteration-of-Evidence-in-Federal-Investigation-18-U.S.C.-%C2%A7-1519.pdf>.

<sup>204</sup> *Yates v. United States*, 574 U.S. 528, 542 n.5 (2015) (“Despite this sweeping ‘in relation to’ language, the dissent remarkably suggests that §1519 does not ‘ordinarily operate in th[e] context [of] federal court[s],’ for those courts are not ‘department[s] or agenc[ies].’ That suggestion, which, as one would expect, lacks the Government’s endorsement, does not withstand examination. The Senate Committee Report on §1519, on which the dissent elsewhere relies, explained that an obstructive act is within §1519’s scope if ‘done ‘in contemplation’ of or in relation to a matter or investigation.’ S. Rep. No. 107-146, at 15. The Report further informed that §1519 ‘is . . . meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title.’ *Ibid*. If any doubt remained about the multiplicity of contexts in which §1519 was designed to apply, the Report added, [t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.’ *Ibid*.”).

<sup>205</sup> *United States v. Hoffman-Vaile*, 568 F.3d 1335 (11th Cir. 2009). See also *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities* (Congressional Research Service, Report RL34303, updated April 17, 2014), p.61, <https://www.justsecurity.org/wp-content/uploads/2022/10/RL34303.pdf>.

<sup>206</sup> *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1343 (11th Cir. 2009) (“Because the Department of Health and Human Services, which is a ‘department or agency of the United States,’ conducted the investigation of Dr. Hoffman-Vaile and the grand jury subpoenaed the missing records ‘in relation to or in contemplation of’ this investigation, her failure to produce the records with the photographs intact is obstructive conduct under section 1519. Although we need not consider legislative history when the statutory language is clear, *United States v. Williams*, 425 F.3d 987, 989 (11th Cir. 2005) (per curiam), our conclusion that the broad language of section 1519 encompasses proceedings before the grand jury is also confirmed by the legislative history of the statute. See S.Rep. No. 107-146, at 14-15 (2002).”).

The Senate Report accompanying § 1519 stated:

“This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. ... It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute. ... The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.”<sup>207</sup>

## **2. Criminal Contempt (18 U.S.C. § 402)<sup>208</sup>**

Title 18, United States Code, § 402, allows for criminal contempt charges to be brought for anyone who willfully disobeys a court order, including a grand jury subpoena. The offense is punishable by a fine of up to \$1,000, imprisonment not more than 6 months, or both. The statute is similar to § 401(3) in that it focuses on contemptuous acts committed outside of court (indirect contempt).<sup>209</sup> Unlike defendants charged under § 401(3), defendants charged under § 402 are generally statutorily entitled to a jury trial.<sup>210</sup> Some case law on § 402 suggests that if the

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<sup>207</sup> S.Rep. No. 107-146, (2002) at 14-15, <https://www.justsecurity.org/wp-content/uploads/2022/10/CRPT-107srpt146-1.pdf>.

<sup>208</sup> Title 18, United States Code, Section 402 provides:

“Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.”

<sup>209</sup> *United States v. Rangelan*, 464 F.3d 321, 325 (2d Cir. 2006). Direct attempts take place in the court’s presence and so can be dealt with summarily, without the protest of the right to a jury.

<sup>210</sup> See 18 U.S.C. §§ 402, 3691 & 3692; *International Union, United Mineworkers v. Bagwell*, 512 U.S. 821, 832, 827 n.2 (1994); *United States v. Britton*, 731 F.3d 745, 749 (7th Cir. 2013).

contemptuous act also constitutes a criminal offense then the contempt must, as opposed to may, be prosecuted under 18 U.S.C. § 402.<sup>211</sup>

Unjustified failure to comply with a grand jury subpoena requesting the production of documents can be charged as a criminal contempt.<sup>212</sup>

The Government must prove the following elements beyond a reasonable doubt:<sup>213</sup>

1. A reasonably specific order was made to the defendant;
2. that order was violated by the defendant; and
3. done so willfully and unlawfully.

#### Element 1: Specific order made to the defendant

Critically, an order of the court must be specific and clear.<sup>214</sup> The Modern Federal Jury Instructions state: “[i]n determining whether an order was sufficiently specific or definite, the court should consider the entire background behind the order, including the conduct that the order was meant to enjoin or secure, the interests it was trying to protect, the manner in which it was trying to protect them, and any past violations and warnings.”<sup>215</sup> Although a defense to a criminal contempt charge does exist where the order is insufficiently specific or definite, it is no defense that an order is likely to be reversed on appeal.<sup>216</sup>

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<sup>211</sup> See *United States v. Pyle*, 518 F. Supp. 139, 145-46 (E.D. Pa. 1981), *aff’d mem.* 722 F.2d 736 (3d Cir. 1983) (charging under section 401 instead of section 402 denied defendants their constitutional right to jury trial); *United States v. Sweeney*, 226 F.3d 43, 44-46 (1st Cir. 2000) (approving of reasoning in *Pyle*).

<sup>212</sup> Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rules of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon her may be deemed a contempt of the court.

<sup>213</sup> *United States v. Allen*, 587 F.3d 246, 255 (5<sup>th</sup> Cir. 2009) (“[T]he elements of criminal contempt under 18 U.S.C. § 401(3) are (1) a reasonably specific order; (2) violation of the order; and (3) the willful intent to violate the order.”). See also *United States v. Hernandez*, 600 F.3d 333, 338-39 (4<sup>th</sup> Cir. 2010).

<sup>214</sup> See, e.g., *NLRB v. Express Publishing Co.*, 312 U.S. 426, 433 (1941); *United States v. Rapone*, 131 F.3d 188, 192 (D.C. Cir. 1997) (“clear and reasonably specific”); *United States v. Young*, 107 F.3d 903, 907 (D.C. Cir. 1997); *In re Levine*, 27 F.3d 594, 596 (D.C. Cir. 1994); *United States v. Straub*, 508 F.3d 1003, 1011 (11<sup>th</sup> Cir. 2007) (both “reasonably specific” and “clear, definite, and unambiguous”).

<sup>215</sup> Modern Federal Jury Instructions, § 20.02, Comment to Instruction 20-13, <https://www.justsecurity.org/wp-content/uploads/2022/11/1-Modern-Federal-Jury-Instructions-Criminal-P-20.02.pdf>. See also *United States v. Bernardine*, 237 F.3d 1279, 1282 (11<sup>th</sup> Cir. 2001); *United States v. Straub*, 508 F.3d 1003, 1011 (11<sup>th</sup> Cir. 2007); *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7<sup>th</sup> Cir. 1974); *United States v. McMahon*, 104 F.3d 638, 642 (4<sup>th</sup> Cir. 1997) (quoting *Greyhound Corp.*).

<sup>216</sup> *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *In re Criminal Contempt Proceedings Against Crawford*, 329 F.3d 131, 138 (2d Cir. 2003); *United States v. Mourad*, 289 F.3d 174, 177-78 (1st Cir. 2002).

## Element 2: Order was violated

The defendant must disobey, without lawful excuse, the order.<sup>217</sup> A court may punish a party for criminal contempt even though they eventually comply with the order.<sup>218</sup>

## Element 3: Unlawfully and willfully

A defendant must act unlawfully and willfully,<sup>219</sup> meaning the defendant must have known of the order and have deliberately or recklessly violated it.<sup>220</sup> However, intent to obstruct justice is not an element of contempt.<sup>221</sup>

### **3. False Statements to Federal Authorities (18 U.S.C. § 1001)<sup>222</sup>**

Title 18, United States Code, § 1001, makes it a crime for a person to make a false statement, orally or in writing, to federal investigators. The offense is a felony, punishable by fine, imprisonment no more than 5 years, or both.

The Department of Justice routinely brings charges under this statute, and where the proof allows, alongside a principal offense that led to the federal investigation.

The Government must prove the following elements beyond a reasonable doubt:<sup>223</sup>

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<sup>217</sup> *United States v. Lowery*, 733 F.2d 441, 448 (7th Cir. 1984); *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979); *Ager v. Jane C. Stormont Hospital & Training School for Nurses*, 622 F.2d 496, 499-500 (10th Cir. 1980).

<sup>218</sup> *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 452 (1911).

<sup>219</sup> *United States v. Rapone*, 131 F.3d 188, 192-195 (D.C. Cir. 1997); *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1242 (11th Cir. 2007); *United States v. Mourad*, 289 F.3d 174, 180 (1st Cir. 2002).

<sup>220</sup> *United States v. Young*, 107 F.3d 903, 909 (D.C. Cir. 1997); *United States v. Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997); *United States v. Straub*, 508 F.3d 1003, 1012 (11th Cir. 2007); *United States v. Allen*, 587 F.3d 246, 255 (5th Cir. 2009) (“For a criminal contempt conviction to stand, the evidence must show both a contemptuous act and a willful, contumacious, or reckless state of mind. ‘Willfulness’ in the context of the criminal contempt statute at a minimum requires a finding of recklessness, which requires more than a finding that an individual ‘reasonably should have known’ that the relevant conduct was prohibited.” (internal quotations and alterations omitted)).

<sup>221</sup> *United States v. Britton*, 731 F.3d 745, 749 (7th Cir. 2013).

<sup>222</sup> Title 18, United States Code, Section 1001(a) provides:

“Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.”

<sup>223</sup> Modern Federal Jury Instructions, § 36.01, Instructions 36-9 & 36-15, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-36.01-False-Statements-18-U.S.C.-%C2%A7-1001.pdf>. See also *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities* (Congressional Research Service, Report RL34303, April 17, 2014), pp. 71-75; *False Statements and Perjury: An Overview of Federal Criminal Law* (Congressional

1. The defendant made a statement or representation, or used a document containing such;
2. the statement, representation, or document was false;
3. the falsity concerned a material matter;
4. the defendant acted willfully, knowing that the statement, representation, or document was false; and
5. the false statement or document was made or used for a matter within the jurisdiction of a department or agency of the United States.

#### Element 1: Statements made, or documents used

The defendant must have made a statement, either orally or in writing, or used a document which had statements in it. However, “the government need not prove that the defendant physically made or otherwise personally prepared the statement in question. It is sufficient if [the] defendant caused the statement charged in the indictment to have been made.”<sup>224</sup>

#### Element 2: False, fictitious, or fraudulent statement

The statements made or within a document must, in fact, be false, fictitious, or fraudulent.<sup>225</sup> “A statement or representation is ‘false’ or ‘fictitious’ if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made. A statement or representation is ‘fraudulent’ if it was untrue when made and was made or caused to be made with the intent to deceive the government agency to which it was submitted.”<sup>226</sup>

#### Element 3: Materiality

The false statement or document made or used must relate to a material fact. “A fact is material if it was capable of influencing the government’s decisions or activities. However, proof of actual reliance on the statement by the government is not required.”<sup>227</sup>

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Research Service, Report 98-808, May 11, 2018), pp. 1-5, <https://www.justsecurity.org/wp-content/uploads/2022/11/98-808-2.pdf>.

<sup>224</sup> For relevant case law, see: Modern Federal Jury Instructions, § 36.01, Instructions 36-10 & 36-16, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-36.01-False-Statements-18-U.S.C.-%C2%A7-1001.pdf>.

<sup>225</sup> For relevant case law, see: Modern Federal Jury Instructions, § 36.01, Instruction 36-12.

<sup>226</sup> Modern Federal Jury Instructions, § 36.01, Instruction 36-12 & 36-17.

<sup>227</sup> Modern Federal Jury Instructions, § 36.01, Instructions 36-5 & 36-11. See also *United States v. Gaudin*, 515 U.S. 506 (1995); *United States v. Safavian*, 644 F. Supp. 2d 1, 9-10 (D.D.C. 2009), *aff’d*, 649 F.3d 688 (D.C. Cir. 2011); *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956); *United States v. Stadd*, 636 F.3d 630 (D.C. Cir. 2011); *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010); *United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991); *United States v. House*, 684 F.3d 1173, 1203 (11th Cir. 2012); *United States v. Boffil-Rivera*, 607 F.3d 736 (11th Cir. 2010); Department of Justice, Criminal Resources Manual, CRM 911. Materiality (updated January 21, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/11/911.-Materiality-JM-Department-of-Justice.pdf>.

The matter is one for the jury to decide.<sup>228</sup>

#### Element 4: Knowingly and willfully

A false statement for the purposes of § 1001 must be deliberate, knowing, and willful, or at least have been made with a reckless disregard of the truth and a conscious purpose to avoid telling the truth.<sup>229</sup>

#### Element 5: Matter within the jurisdiction of a department or agency of the United States

There is no requirement that any statement be actually directed to or given to a government department or agency. All that is necessary is that the jury find that the defendant contemplated that the document or statement was to be used in a matter that was within the jurisdiction of the Government.

A matter that is “within the jurisdiction of a department or agency of the United States government means that the statement must concern an authorized function of that department or agency.”<sup>230</sup> Further, “it is not necessary for the government to prove that the defendant had actual knowledge that (e.g., the false statement) was to be used in a matter that was within the jurisdiction of the government of the United States.” It is sufficient to satisfy this element if the Government can prove “that the false statement was made with regard to a matter within the jurisdiction of the government of the United States.”<sup>231</sup>

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<sup>228</sup> *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

<sup>229</sup> For relevant case law, see: Modern Federal Jury Instructions, § 36.01, Instruction 36-13, & Comment to Instruction 36-7, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-36.01-False-Statements-18-U.S.C.-%C2%A7-1001.pdf>.

<sup>230</sup> Modern Federal Jury Instructions, § 36.01, Instruction 36-14, <https://www.justsecurity.org/wp-content/uploads/2022/10/2-Modern-Federal-Jury-Instructions-Criminal-P-36.01-False-Statements-18-U.S.C.-%C2%A7-1001.pdf>.

<sup>231</sup> *Id.*

### **Part III: Application of the Facts to the Law**

#### **Section A. Proving Trump Acted Knowingly and Intentionally**

##### **Section B. Mishandling of Government Documents**

1. Retention of National Defense Information (18 U.S.C. § 793(e))
2. Concealing Government Records (18 U.S.C. § 2071)
3. Conversion of Government Property (18 U.S.C. § 641)
4. Additional Statutes Applying to Document Mishandling Including Disclosure of Classified Information (18 U.S.C. § 798)

##### **Section C. Obstruction, Contempt, False Information**

1. Obstruction of Justice (18 U.S.C. § 1519)
2. Criminal Contempt (18 U.S.C. § 402)
3. False Statements to Federal Investigators (18 U.S.C. § 1001)

#### **Section A. Proving Trump Acted Knowingly and Intentionally**

To prove Trump is guilty of taking or retaining government documents, a key issue will be the Government's establishing beyond a reasonable doubt Trump's knowledge and intent. Did Trump know that he had government documents in his possession, custody, or control (hereafter referred to as "possession" for ease of reference) at MAL (or elsewhere), and did he intentionally take or retain them?<sup>232</sup>

##### **1. Trump's knowledge that he possessed the MAL documents<sup>233</sup>**

The Government will need to establish that Trump was aware he possessed the MAL documents. We address, in Part III.A.3 and Part V.B.1, the proof that Trump was aware that these MAL documents were government documents (as opposed to personal ones).

There appears to be direct proof that Trump was aware that some or all of the MAL documents were in his possession because, among other things, the documents were taken to MAL at his

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<sup>232</sup> Other potential crimes that could be charged similarly require knowledge of possession of the MAL documents. The taking or removal is an element only for a subset of offenses under 18 U.S.C. § 2071 (unlawful removal of government documents) and not relevant to other offenses under that provision (e.g. unlawful concealment or mutilation) or 18 U.S.C. § 793(3) and 18 U.S.C. § 641 (unlawful conversion). To the extent the law requires that Trump also acted "willfully," ample evidence exists of Trump's awareness that it was wrong and even unlawful to take the documents. Numerous legal advisers told Trump that the documents needed to be returned to NARA and Trump's own belated return of a portion of the government documents revealed as much, among other evidence discussed herein regarding Trump's knowledge and intent.

<sup>233</sup> As mentioned above, "MAL documents" refers to documents recovered by the government in three tranches: in January 2022 by NARA, in June 2022 pursuant to a grand jury subpoena, and in August 2022 pursuant to a court-authorized search warrant.

direction. Indeed, it would be logical that staffers at any level would need direction from Trump before packing up what on their face look like government documents, many bearing classification markings. There is a report that in January 2022, “Trump had overseen the packing process himself with great secrecy, declining to show some items even to top aides, said a person familiar with the process.”<sup>234</sup> FBI “[a]gents were told that Trump was a pack rat who had been personally overseeing his collection of White House records since even before leaving Washington and had been reluctant to return anything,” according to one report.<sup>235</sup>

Conspicuously, just before leaving office Trump requested some presidential records which were later found at MAL. NARA General Counsel Gary Stern, in an email to Trump’s representatives, “cite[d] the correspondence between Trump and Kim as an example of an item the former president requested ‘just prior to the end of the administration.’”<sup>236</sup> All of this comports with the concern of certain White House staff about the proper handling and return of presidential documents.<sup>237</sup> In his May 10, 2023, Town Hall on CNN, Trump also appears to have acknowledged that he knew he was taking government documents with him when he left the White House, stating, “I was there and I took what I took and it gets declassified.” He went on to say, “I didn’t make a secret of it. You know, the boxes were stationed outside the of White House.”<sup>238</sup> This revelation is also important for the potential venue of the case, as Laurence Tribe and Dennis Aftergut recently noted. Trump’s admission that he knowingly and intentionally initiated the removal of government documents in Washington, D.C. provides significant support to establish Washington, D.C., rather than Florida, as the proper venue for the indictment and trial (and may establish the separate offense under 18 USC § 1924).<sup>239</sup>

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<sup>234</sup> Rosalind S. Helderman, *Trump and the Mar-a-Lago documents: A timeline*, Washington Post (Sept. 8, 2022), <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>.

<sup>235</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany and Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>236</sup> Josh Dawsey and Jacqueline Alemany, *Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says*, Washington Post (Aug. 24, 2022), <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/>.

<sup>237</sup> Luke Broadwater, Katie Benner & Maggie Haberman, *Inside the 20-Month Fight to Get Trump to Return Presidential Material*, New York Times (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/politics/trump-documents-search-timeline.html>. Mark Meadows assured them that he would speak to Trump and make efforts to ensure compliance with the Presidential Records Act, but it is not clear that this Meadows statement will be admissible against Trump unless a conspiracy is charged involving Trump and Meadows; Maggie Haberman, Katie Benner and Glenn Thrush, *The Final Days of the Trump White House: Chaos and Scattered Papers*, New York Times (Aug. 20, 2022), <https://www.nytimes.com/2022/08/20/us/politics/trump-fbi-search.html>. The precise role former White House officials played, such as Meadows, in the determination of what to send to MAL is unclear. Importantly, any charge that is predicated on the unlawful *taking* of government documents – as opposed to the unlawful *retention* of such documents – will need proof beyond a reasonable doubt of Trump’s involvement in the taking of the documents from the White House.

<sup>238</sup> CNN Town Hall Transcript, <https://edition.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html>.

<sup>239</sup> See Laurence H. Tribe & Dennis Aftergut, *Trump’s Most Pivotal, Incriminating Admission on CNN, Just Security* (May 17, 2023). Federal crimes are charged in the district where the essential conduct of the crime occurred. See *United States v. Rodriguez-Moreno*, 526 U.S. at 280. Publicly available information, including

Moreover, an audio recording, which federal prosecutors have obtained, of a July 2021 meeting at Trump’s golf club in Bedminster reveals Trump acknowledged that he “held onto a classified Pentagon document about a potential attack on Iran.” The recording shows that Trump knew that he had in his possession highly classified NDI—even after leaving the White House—which had not been declassified.<sup>240</sup> He was also recorded “discussing” the “sensitive military document he had kept after leaving the White House.”<sup>241</sup>

Even if there was no evidence that Trump himself was personally aware of the packing up of the MAL documents from the White House, the Government will have ample proof of Trump’s awareness that he possessed such documents after he left the White House. That proof will support a charge of the unlawful *retention* of government documents.

To begin, several witnesses will attest that when Trump’s representatives to NARA tried to have the material from MAL retrieved, Trump did not say that he was unaware of the MAL documents. Instead, he told his advisers, “it’s not theirs; it’s mine.”<sup>242</sup> Trump repeated that same erroneous sentiment on October 9, 2022.<sup>243</sup> These statements – while they may be used by Trump to say that he believed the documents were all personal and not government records (addressed in the next section) – are damning proof of his knowledge that the documents were at Mar-a-Lago in his possession.

This evidence is consistent with Corcoran’s notes that he advised Trump that he would need to return all documents bearing classification markings pursuant to the subpoena, to which Trump reportedly asked if there was a way around that, and did not feign ignorance of any such documents being at MAL.

Moreover, in late October or early November 2021, “Trump told advisers[] he would return to the National Archives the boxes of material he had taken to Mar-a-Lago” in exchange for NARA releasing documents related to the FBI’s investigation into his 2016 campaign’s ties to Russia.<sup>244</sup> Further, Trump indicated during the CNN Town Hall on May 10, 2023, that holding on to the

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Trump’s own words, suggests that some essential conduct for even the obstruction charges may have taken place in Washington, D.C. See e.g. Savage, Charlie, “Dissecting Charges That Could Arise From the Trump Investigations,” Mar. 19, 2023.

<sup>240</sup> Katelyn Polantz, Paula Reid and Kaitlan Collins, *EXCLUSIVE: Trump captured on tape talking about classified document he kept after leaving the White House*, CNN (May 31, 2023), <https://edition.cnn.com/2023/05/31/politics/trump-tape-classified-document-iran-milley/index.html>.

<sup>241</sup> Maggie Haberman, Jonathan Swan & Alan Feuer, *Trump Was Taped Discussing Sensitive Document He Had Kept After Leaving Office*, New York Times (May 31, 2023), <https://www.nytimes.com/2023/05/31/us/politics/trump-tape-document.html>.

<sup>242</sup> Maggie Haberman, *F.B.I. Interviewed Top White House Lawyers About Missing Trump Documents*, New York Times (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/trump-cipollone-philbin-interviews-fbi.html>.

<sup>243</sup> Donald Trump, Mesa, Arizona political rally remarks (Oct. 9, 2022), <https://twitter.com/Acyn/status/1579267214838231040>.

<sup>244</sup> Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

documents was a negotiating tactic he was using against NARA – stating, “I went by the Presidential Records Act, and we were negotiating with NARA.”<sup>245</sup> Trump’s statement on CNN contradicts what Trump’s lawyers told Congress, that the removal of documents was due to staff error and inadvertence.<sup>246</sup>

Witnesses’ statements about Trump declarations to the effect that “it’s not theirs; it’s mine” will be corroborated by substantial other evidence. First, the Government will point to the lengthy period of time in which NARA and the DOJ sought the return of the documents. Over 18 months passed from the time that Trump left office and when the government recovered documents pursuant to a court-authorized search. During that time, Trump’s counsel was in communication with NARA and the DOJ with respect to the return of the documents. The fact that the first tranche of documents were sent to NARA a year after Trump left office, in January 2022, is evidence that their retention was not a mistake or accidental.

This inference will be reinforced by the sheer volume of documents that were returned: 15 boxes, which may constitute tens of thousands of hard-copy pages. That is, the Government will argue that this is not a stray document here or there that may have gone unnoticed or slipped through the cracks.

And the content of the documents in those 15 boxes may provide additional strong proof of Trump’s knowledge and intent of their existence. The contents may be about topics that were known to be of interest to the former president (such as the letter from North Korean leader Kim Jong-un). Indeed, there are reports that Trump had discussed with third parties the content and location of the documents. That includes “Trump show[ing] off the letters from Mr. Kim, waving them at people in his office, where some boxes of material from the White House are being stored.”<sup>247</sup> Prosecutors have also “gathered evidence indicating that Trump at times kept classified documents in his office in a place where they were visible and sometimes showed them to others,” including aides and visitors.<sup>248</sup> Prosecutors have also been investigating

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<sup>245</sup> CNN Town Hall Transcript, <https://edition.cnn.com/2023/05/11/politics/transcript-cnn-town-hall-trump/index.html>.

<sup>246</sup> Trump Lawyers’ letter to House Intelligence Committee Chair Mike Turner (R-Ohio) (April 26, 2023), <https://www.justsecurity.org/wp-content/uploads/2023/05/letter-from-the-parlatore-law-group.pdf>, (“White House staff simply swept all documents from the President’s desk and other areas into boxes, where they have resided ever since.”)

<sup>247</sup> Luke Broadwater, Katie Benner and Maggie Haberman, *Inside the 20-Month Fight to Get Trump to Return Presidential Material*, New York Times (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/politics/trump-documents-search-timeline.html>; see also Maggie Haberman, *Confidence Man: The Making of Donald Trump and the Breaking of America* (2022).

<sup>248</sup> Spencer S. Hsu, Josh Dawsey and Devlin Barrett, Mar-a-Lago prosecutors eye July episode with Trump surveillance cameras, Washington Post (May 30, 2023), <https://www.washingtonpost.com/national-security/2023/05/30/trump-mar-a-lago-surveillance-camera/>.

whether “Trump showed off to aides and visitors a map he took with him when he left office that contains sensitive intelligence information.”<sup>249</sup>

Further, the first tranche of documents contained highly sensitive documents that would be unlikely to go unnoticed: 14 of the 15 boxes contained classified documents. Specifically, 184 documents were marked Classified, including 92 marked Secret, and 25 Top Secret, including Sensitive Compartmented Information and Special Access Program materials.<sup>250</sup> The Government will be able to credibly argue that staffers would not transport such documents on their own. And if Trump seeks to argue that he declassified these documents such that it would not be so unlikely for a staffer to transport them, that argument would work only if the staffers knew the documents had been declassified. Aside from Kash Patel, there is no evidence that any such declassification order was known within the White House and there are a myriad of witnesses (including over 18 former top Trump administration officials) who were unaware of such a declassification order.<sup>251</sup> This includes FBI interviews with Trump’s Deputy White House Counsels Pat Philbin and John Eisenberg, who were also designated by Trump as his official representatives to NARA.<sup>252</sup>

Importantly, the return of the first tranche of 15 boxes to NARA will constitute incontrovertible proof that Trump was aware at least at that point that such documents had been taken from the White House and had been in his possession at MAL. Thus, any argument that he had delegated the packing and storing of the MAL documents and was unaware of what had been taken to MAL becomes impossible at this juncture. This means he was also aware by this point, at the latest, that these types of presidential records did not belong to him and had to be returned to NARA. Indeed, the Government can point to the statement Trump issued on February 18, 2022, seeking to downplay the whole affair as routine. In that statement, Trump said: “The National Archives did not ‘find’ anything, they were given, upon request, Presidential Records in an ordinary and routine process to ensure the preservation of my legacy and in accordance with the Presidential Records Act.”<sup>253</sup>

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<sup>249</sup> Maggie Haberman, Adam Goldman and Alan Feuer, *Witnesses Asked About Trump’s Handling of Map With Classified Information*, New York Times (April 12, 2023), <https://www.nytimes.com/2023/04/12/us/politics/trump-map-classified-documents-justice-department.html>.

<sup>250</sup> Government Response to Trump Motion for Return of Property and Special Master, 9:22-cv-81294-AMC, ECF No. 48 (Aug. 30, 2022), p. 7, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>251</sup> Jamie Gangel, Elizabeth Stuart & Jeremy Herb, *CNN Exclusive: ‘Ludicrous.’ ‘Ridiculous.’ ‘A complete fiction.’: Former Trump officials say his claim of ‘standing order’ to declassify is nonsense*, CNN (Aug. 18, 2022), <https://www.cnn.com/2022/08/18/politics/trump-claim-standing-order-declassify-nonsense-patently-false-former-officials/index.html>.

<sup>252</sup> Carol D. Leonnig, Devlin Barrett & Josh Dawsey, *Trump loyalist Kash Patel questioned before Mar-a-Lago grand jury*, Washington Post (Nov. 4, 2022), <https://www.washingtonpost.com/national-security/2022/11/03/kash-patel-grand-jury-trump/>.

<sup>253</sup> Matt Zapotosky, *National Archives confirms classified material was in boxes at Trump’s Mar-a-Lago residence*, Washington Post (Feb 18, 2022), <https://www.washingtonpost.com/national-security/2022/02/18/archives-classified->

That so many documents remained at MAL after the return of the first tranche will be strong circumstantial proof that Trump was aware of their existence. The second tranche was a Redweld of documents, including 37 documents marked classified, some bearing what appeared to be Trump's handwritten notes. It will be particularly damning proof if the Government has direct witnesses who can testify that it was Trump who chose which documents to return, and which to retain. Alex Cannon may be such a witness. In February 2022, Trump asked Cannon, who had been acting as an intermediary with NARA, to make a false statement to NARA "that Trump had returned all materials requested by the agency." Cannon refused on the ground that he was not sure the statement was true.<sup>254</sup>

That Trump, yet again, in June returned only a small fraction of what remained, will be proof that he knowingly retained those documents after January 2022. And once again, the passage of time during which he retained them (January 2022-June 2022), the volume of documents, and perhaps their content, will be evidence of his knowledge and intent. Of course, Trump himself was present, albeit not for a long time, when DOJ came to MAL to retrieve the documents responsive to its May grand jury subpoena, making it harder (but not impossible) to claim that he left the entire matter to his underlings to handle.<sup>255</sup> Trump's court filings and his own statements describe him, time and again, as making the decisions on whether to invite NARA to recover documents in January,<sup>256</sup> to accept the subpoena in May,<sup>257</sup> to have his staff conduct a search for more documents in response to the subpoena,<sup>258</sup> to invite the FBI to MAL in June to retrieve responsive documents<sup>259</sup> and to secure the storage room in response to a DOJ admonition in early June.<sup>260</sup>

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[mar-a-lago](https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf); cited in <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>, at pp. 8-9.

<sup>254</sup> Josh Dawsey and Jacqueline Alemany, *Trump's lawyer refused his request in February to say all documents returned*, Washington Post (Oct. 3, 2022), <https://www.washingtonpost.com/national-security/2022/10/03/trump-alex-cannon-documents/>.

<sup>255</sup> Motion for Judicial Oversight and Additional Relief, Case No. 9:22-cv-81294, SD Florida, (Aug. 22, 2022), at p. 5 <https://s3.documentcloud.org/documents/22161730/trump-request-for-judicial-review-of-search.pdf> "[On] June 3, 2022, Jay Bratt, Chief of the Counterintelligence and Export Control Section in the DOJ's National Security Division, came to Mar-a-Lago, accompanied by three FBI agents. President Trump greeted them in the dining room at Mar-a-Lago.").

<sup>256</sup> *Id.* at p. 4 ("Movant voluntarily asked NARA movers to come to Mar-a-Lago to receive 15 boxes of documents.").

<sup>257</sup> *Id.* at p. 5 ("Movant voluntarily accepted service of a grand jury subpoena addressed to the custodian of records for the Office of Donald J. Trump.").

<sup>258</sup> *Id.* at p. 5 ("President Trump determined that a search for documents bearing classification markings should be conducted – even if the marked documents had been declassified – and his staff conducted a diligent search of the boxes that had been moved from the White House to Florida.").

<sup>259</sup> *Id.* at p. 5 ("President Trump, through counsel, invited the FBI to come to Mar-a-Lago to retrieve responsive documents.").

<sup>260</sup> *Id.* at p. 6 ("In response [to the letter from Jay Bratt], President Trump directed his staff to place a second lock on the door to the storage room, and one was added."); Just Security, *Trump's Knowledge of MAL Classified Documents – Truth Social Posts*, [www.justsecurity.org/wp-content/uploads/2022/09/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social.pdf](https://www.justsecurity.org/wp-content/uploads/2022/09/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social.pdf) ("The DOJ and FBI asked my legal representatives to put an extra

Other evidence suggests that Trump told Walt Nauta to move boxes to his personal residence from the storage room before and after his advisers received the subpoena.<sup>261</sup> At least some of that movement of the boxes is corroborated by the security-camera footage showing Nauta and others moving the boxes. Importantly, “[a]fter they were taken to the residence, Trump looked through at least some of them and removed some of the documents. At least some of the boxes were later returned to the storage room, while some of the documents remained in the residence.”<sup>262</sup> Indeed, Deoliveira allegedly helped Nauta on June 2, 2022 – the day before DOJ came to retrieve the documents – move boxes of papers to a storage room “using a dolly or hand truck.”<sup>263</sup>

Moreover, the alleged movement of boxes of papers appears to have been a well-planned scheme. Even before the May subpoena, Trump instructed his aides to undertake what Judge Howell termed a “dress rehearsal” for moving sensitive documents that he did not want to give back to the government. The “dress rehearsal” was reportedly performed because Trump “wanted to make sure he could keep papers that he considered his property.”<sup>264</sup> The movement of boxes is also consistent with Evan Corcoran’s notes from the spring of 2022 “memorializing [his] conversations” with Trump after the May 2022 subpoena and before the June 3 meeting with DOJ. These notes “revealed how Trump and Nauta had unusually detailed knowledge of the botched subpoena response, including where Corcoran intended to search and not search for classified documents at Mar-a-Lago, as well as when Corcoran was actually doing his search.”<sup>265</sup> Corcoran testified before the grand jury “that several Trump employees had told him that the Mar-a-Lago storage room was the only place where the documents were kept.” “Mr. Corcoran

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lock on the door leading to the place where boxes were stored in Mar-a-Lago - We agreed. They were shown the secured area, and the boxes themselves.”).

<sup>261</sup> Devlin Barrett, Josh Dawsey, Spencer S. Hsu, and Perry Stein, *Trump workers moved Mar-a-Lago boxes a day before FBI came for documents*, Washington Post, (May 25, 2023), <https://www.washingtonpost.com/national-security/2023/05/25/trump-classified-documents-mar-a-lago/>.

<sup>262</sup> Devlin Barrett, Josh Dawsey & Shane Harris, *Key Mar-a-Lago witness said to be former White House employee*, Washington Post (Oct. 14, 2022), <https://www.washingtonpost.com/national-security/2022/10/13/walt-nauta-maralago-trump-documents/>; Maggie Haberman & Alan Feuer, *Trump Aide Was Seen on Security Footage Moving Boxes at Mar-a-Lago*, New York Times (Oct. 12, 2022), <https://www.nytimes.com/2022/10/12/us/politics/trump-mar-a-lago-walt-nauta.html>.

<sup>263</sup> Devlin Barrett, Josh Dawsey, Spencer S. Hsu, and Perry Stein, *Trump workers moved Mar-a-Lago boxes a day before FBI came for documents*, Washington Post (May 25, 2023), <https://www.washingtonpost.com/national-security/2023/05/25/trump-classified-documents-mar-a-lago/>.

<sup>264</sup> Id. See also, Alan Feuer & Maggie Haberman, *Mar-a-Lago Worker Provided Prosecutors New Details in Trump Documents Case*, New York Times (May 25, 2023).

<sup>265</sup> In fact, contemporaneous notes taken last spring by Corcoran suggest that he may have left a storage room of the classified documents unattended while he took breaks elsewhere on the premises. Hugo Lowell, *Trump was warned about retaining classified documents, notes reveal*, The Guardian (May 22, 2023), <https://www.theguardian.com/us-news/2023/may/22/trump-warning-classified-documents-mar-a-lago>, (“The notes also suggested to prosecutors that there were times when the storage room might have been left unattended while the search for classified documents was ongoing, one of the people said, such as when Corcoran needed to take a break and walked out to the pool area nearby.”).

also recounted to the grand jury how Mr. Trump did not tell his lawyers of any other locations where the documents were stored, which may have effectively misled the legal team.”<sup>266</sup>

While we do not here assay the prospect of conspiracy charges because the public record remains too inconclusive, evidence regarding the involvement of other individuals in moving classified documents at critical times and “whether Mr. Trump and some of his aides sought to interfere with the Government’s attempt to obtain security camera footage from Mar-a-Lago” raise that distinct possibility.<sup>267</sup>

The Government can also prove Trump’s knowledge and intent of the documents being at MAL by resorting to the volume and location of the documents found during the August search. Thirty-three boxes of material were recovered, which included approximately 13,000 documents comprising approximately 22,000 pages.<sup>268</sup> Numerous government documents were found in Trump’s own office and desk, including 27 classified documents and 43 empty folders with classified banners (plus another 76 classified documents and 3 empty folders in a storage room).<sup>269</sup> Those documents may also have been interspersed with personal items of interest to Trump (including passports) and concern topics that are to be of known interest to him.

If the second and third tranches of documents had truly been inadvertently overlooked in the January 2022 first tranche, one would expect only a small volume of material to be discovered. And one would not expect the material to be so easy to find in a matter of a few hours by the FBI when Trump’s team had claimed to have conducted a “diligent search” in the weeks following the subpoena.<sup>270</sup> Notably, in February 2022, NARA publicly stated that it had asked the Trump team to continue to search for additional presidential records,<sup>271</sup> but until DOJ went to MAL in

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<sup>266</sup> Maggie Haberman, Adam Goldman, Alan Feuer, Ben Protess and Michael S. Schmidt, Justice Dept. Intensifying Efforts to Determine if Trump Hid Documents, New York Times (May 4, 2023), <https://www.nytimes.com/2023/05/04/us/politics/trump-documents-subpoenas-justice-department.html>.

<sup>267</sup> Barrett, Josh Dawsey, Spencer S. Hsu, and Perry Stein, Trump workers moved Mar-a-Lago boxes a day before FBI came for documents, The Washington Post, (May 25, 2023), <https://www.washingtonpost.com/national-security/2023/05/25/trump-classified-documents-mar-a-lago/>,

Alan Feuer, Maggie Haberman & Ben Protess, Prosecutors Scrutinize Handling of Security Footage by Trump Aides in Documents Case, New York Times (May 31, 2023).

<sup>268</sup> Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 9 <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf>

<sup>269</sup> Revised Detailed Inventory of Aug. 8 search, Sept. 26, 2022, <https://www.justsecurity.org/wp-content/uploads/2022/09/Revised-Detailed-Inventory-Sept-26-2022.pdf>; Government Response to Trump Motion for Return of Property and Special Master, 9:22-cv-81294-AMC, ECF No. 48 (Aug. 30, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>270</sup> Government Response to Trump Motion for Return of Property and Special Master, 9:22-cv-81294-AMC, ECF No. 48 (Aug. 30, 2022), p. 13 (“That the FBI, in a matter of hours, recovered twice as many documents with classification markings as the “diligent search” that the former President’s counsel and other representatives had weeks to perform calls into serious question the representations made in the June 3 certification and casts doubt on the extent of cooperation in this matter.”) <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>271</sup> National Archives letter to Chairwoman Maloney (Feb. 18, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-ferriero-response-to-maloney-february-18-2022.pdf>

June 2022 following the issuance of the grand jury subpoena, no documents were returned. The Government will argue that one would expect if these documents were innocently retained, the Trump team would have volunteered their return upon discovery, and not had to be forced to return them only after service of a grand jury subpoena in May 2022 or being taken by the government pursuant to a court-authorized search. And the fact that Trump’s counsel said Trump authorized him to take government personnel to the MAL storage room after they requested to do so in the June meeting, but his counsel explicitly prohibited government personnel from opening or looking inside any of the boxes in the room will be additional proof that Trump was hiding the content from the DOJ since a couple of months later boxes in the storage room contained government documents, including 76 documents marked as classified, that should have been returned.<sup>272</sup>

And the importance of such a search was also known to Trump. NARA officials were in regular communication with Trump’s counsel about the return of the documents. Further, the Trump team was aware that NARA viewed this as so serious that they were referring the matter to the DOJ. The Trump team sought to delay making the documents available to the DOJ and made a “protective” assertion of executive privilege to prevent disclosure of material to the DOJ, an assertion that was denied.<sup>273</sup> In addition, the retention of the 15 boxes, the discovery of classified information in them, and the DOJ communications were reported to Congress.<sup>274</sup>

That DOJ referral would provide a strong incentive for Trump and his counsel to know whether any additional material was extant at MAL or elsewhere. And it might also have been the impetus for Trump to engage in obstructive conduct to interfere with both the work of NARA and DOJ by illegally retaining the documents and making a series of false statements about them.

Indeed, for Trump to be unaware of the second and third tranches, either he would have had to have failed to ask if all documents had been returned to NARA (something an innocent person would of course ask) or his staff would have had to lie to Trump in response to his inquiry (for which there is no proof, and would be exceedingly unlikely in any event). It is particularly unlikely that attorneys for Trump acted without the express direction of their client, the former president, especially in a matter of this importance.

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<sup>272</sup> Government reply to Trump motion for return of property and Special Master (Aug. 30, 2022), at p. 13, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>. However, the government may need to show that it was Trump who made the decision to disallow the government to access the content of the material in the storage room in order for it to be admissible against him.

<sup>273</sup> Letter from Debra Steidel Wall, Acting Archivist of the United States, to Evan Corcoran (May 10, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/08/National-Archives-letter-to-President-Trump-attorney-May-10-2022-1.pdf> (quoting April 29 Corcoran letter).

<sup>274</sup> National Archives letter to Chairwoman Maloney (Feb. 18, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/national-archives-ferriero-response-to-maloney-february-18-2022.pdf>; Letter from Rep. Carolyn B. Maloney to David S. Ferriero (Feb. 9, 2022), <https://www.archives.gov/files/foia/2022-02-09.maloney-to-ferriero-nara-re-trump-mar-a-lago.pdf>.

Finally, the Government clearly has evidence that after the return of the second tranche of MAL documents, additional government documents remained at MAL—including from surveillance tapes or witnesses, or both.<sup>275</sup> Indeed, in August, the execution of the search warrant revealed beyond peradventure the existence of government documents including in Trump’s personal office. Such proof will further cement the Government’s case that Trump knew he possessed the MAL documents.

Furthermore, in a March 2023 opinion, Judge Howell noted “that a further search of Trump properties late last year, conducted by experts on Mr. Trump’s behalf after pressure from prosecutors, turned up additional documents with classified markings in his bedroom at Mar-a-Lago, the person briefed on the document said.” According to a person familiar with the opinion, Judge Howell wrote, “Notably, no excuse is provided as to how the former president could miss the classified-marked documents found in his own bedroom at Mar-a-Lago.”<sup>276</sup>

## **2. False exculpatory evidence**

False exculpatory statements are frequently used to show “consciousness of guilt” – the Government uses the proof that a defendant lied to ask the jury why the defendant would lie if she had nothing to hide and had done nothing wrong. In this instance, such false statements can be used to show Trump knew holding onto remaining government documents was wrong.

It appears that various false statements were made to NARA and DOJ. Specifically, NARA and/or DOJ were told by Trump’s representatives that he retained only newspaper clippings and no sensitive information, that a search for remaining documents had been conducted, that they had been told that all responsive documents were located exclusively in a storage room at MAL<sup>277</sup> and that based on information provided to counsel, all known responsive documents had been returned.<sup>278</sup> Further, Trump’s motion on Aug. 22, 2022 claims that Trump himself sought

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<sup>275</sup> FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 23 <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf> (noting that on June 24, 2022, after the early June DOJ meeting at MAL, DOJ served a grand jury subpoena for all surveillance records from cameras located on the ground floor of MAL, where the storage room is located).

<sup>276</sup> Alan Feuer and Maggie Haberman, Mar-a-Lago Worker Provided Prosecutors New Details in Trump Documents Case, New York Times (May 25, 2023), <https://www.nytimes.com/2023/05/25/us/politics/mar-a-lago-trump-classified-documents.html>.

<sup>277</sup> FBI Search Warrant Affidavit, 9:22-mj-08332-BER, ECF No. 125 (S.D. Fla. Sept. 12, 2022), [https://storage.courtlistener.com/recap/gov.uscourts.flstd.617854/gov.uscourts.flstd.617854.125.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flstd.617854/gov.uscourts.flstd.617854.125.0_1.pdf).

<sup>278</sup> Justice Department Attachments (Aug. 30, 2022) <https://www.justsecurity.org/wp-content/uploads/2022/09/departement-of-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

to have a search of MAL conducted for all documents bearing classification markings.<sup>279</sup> Thus, to the extent this claim is accurate, Trump knew what the subpoena required of him.

All these representations came from Trump's attorneys, and thus the challenge for the Government in using them against Trump will be whether the Government can establish that Trump knew and authorized the representations. The Government can argue that it would be unusual, to say the least, for counsel to make these representations without such authorization. Indeed, Trump and his counsel appear to have had that attorney-client relationship of authorization. For instance, Trump appears to have learned from his counsel what happened at MAL in June.<sup>280</sup> For purposes of a criminal trial, however, additional proof will need to be adduced that the specific false statements at issue were known to Trump and authorized to be made before they were made.<sup>281</sup> The testimony of Alex Cannon may be particularly valuable, however, in supporting a Government application to obtain evidence from these attorneys and to establish direct evidence against Trump that he was personally involved in procuring the eventual certification given to the Government and other false representations made to the Government. The episode with Cannon is itself significant in this regard because Trump unsuccessfully pressed Cannon to make a false statement to NARA that all documents have been returned in the January 2022 batch. Trump then dictated a draft public statement making the same claim, but his aides persuaded him not to release it.

Notably, there are some potential challenges to relying on the false certification of June 3, 2022, as evidence that Trump himself made a false exculpatory statement. See the Section on Obstruction Charges below for an analysis of the May 11 grand jury subpoena having been served on the entity of the Office of Donald J. Trump, rather than on Trump personally.

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<sup>279</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>280</sup> Trump was not acting like an absentee landlord, who had relegated the MAL documents to his staff. For instance, on Truth Social, Trump stated: "The DOJ and FBI asked my legal representatives to put an extra lock on the door leading to the place where boxes were stored in Mar-a-Lago - We agreed. They were shown the secured area, and the boxes themselves." Just Security, *Trump's Knowledge of MAL Classified Documents – Truth Social Posts*, [www.justsecurity.org/wp-content/uploads/2022/09/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social.pdf](https://www.justsecurity.org/wp-content/uploads/2022/09/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social.pdf).

<sup>281</sup> A model for obtaining such information was provided by the prosecution of Paul Manafort and Rick Gates, and the DC district court decision permitting prosecutors to ask Manafort's and Gates' counsel well-specified lines of questions. Beryl A. Howell, Memorandum Opinion, No. 17-2336-BAH (Oct. 2, 2017), <https://s3.documentcloud.org/documents/4164059/17-Mc-2336-MEMvf-OP-REDACTED-for-UNSEALING-20171030.pdf>. Of note, the Government there made three principal arguments for obtaining evidence from counsel to Manafort and Gates: that she was acting as a mere conduit in providing statements from her clients to the DOJ, that the communications were not seeking legal advice, and that the crime fraud exception applied (which does not require showing that the attorney was complicit in the crime). *Id.* at pp. 8-9.

### 3. Trump's knowledge that the MAL documents were government and not personal documents

The government will need to establish not just that the documents were, in fact, government documents, but that Trump knew they were government documents.<sup>282</sup> If Trump thought he was retaining only personal documents that he had every right to possess then he would not be guilty of the charges.

The proof noted above that Trump was aware that he possessed the MAL documents will be strong proof that he was aware that these were not his own personal documents. The physical documents themselves, without regard to their substance, may be some of the best evidence here, as documents bearing classification markings and bold-colored classification covers are plainly not personal documents. And the content of the documents will surely make plain that they are government records and not personal items like a diary. The first tranche of documents contained over 100 documents bearing classification markings, comprising more than 700 pages,<sup>283</sup> with a total of 184 documents marked as classified in the January batch.<sup>284</sup> In addition, evidence of Trump's secretive nature of packing the boxes in January 2022 and the proof of Trump's consciousness of guilt noted above in section B will be relevant to establish this knowledge element.

Also relevant here is the audio recording of Trump's meeting at his Bedminster golf club where he discussed the document containing the plans for a potential attack on Iran. "On the recording, Trump's comments suggest he would like to share the information but he's aware of limitations on his ability post-presidency to declassify records."<sup>285</sup> That evidence provides corroboration that he did not consider the documents personal.

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<sup>282</sup> Aside from any personal documents authorized to be seized by the search warrant because of their proximity to government documents, the fact that the documents are in fact government documents will be readily established by the documents themselves.

<sup>283</sup> Letter from Debra Steidel Wall, Acting Archivist of the United States, to Evan Corcoran (May 10, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/08/National-Archives-letter-to-President-Trump-attorney-May-10-2022-1.pdf> (quoting April 29 DOJ letter) ("[A]mong the materials in the boxes are over 100 documents with classification markings, comprising more than 700 pages."). The Government may point to Trump's handwriting and potentially his fingerprints being on the MAL documents. Several of the documents in the first tranche contain what appears to be Trump's handwritten notes. Such proof will be corroborative of his knowing about the governmental nature of the documents, but will not itself be proof that he was aware that they were at MAL, given that his handwriting and fingerprints could date from his time in the White House, before the documents were transported to MAL.

<sup>284</sup> Government Response to Trump Motion for Return of Property and Special Master, 9:22-cv-81294-AMC, ECF No. 48 (Aug. 30, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf> at p. 7 ("Between May 16-18, 2022, after finally obtaining access to the Fifteen Boxes, FBI agents conducted a preliminary review of the documents ... [which] revealed the following: 184 unique documents bearing classification markings.").

<sup>285</sup> Katelyn Polantz, Paula Reid and Kaitlan Collins, *EXCLUSIVE: Trump captured on tape talking about classified document he kept after leaving the White House*, CNN (May 31, 2023), <https://edition.cnn.com/2023/05/31/politics/trump-tape-classified-document-iran-milley/index.html>.

Trump's course of dealing with NARA and DOJ will again be strong proof that Trump did not consider the MAL documents to be personal. Trump returned to the government two tranches of documents in January and June 2022 and did not seek to withhold them as personal. Trump's attorney emphasized in a letter to DOJ in May, "No legal objection was asserted about the transfer" to NARA.<sup>286</sup> The return of these tranches to NARA will constitute strong proof that Trump knew and agreed that these types of presidential records did not belong to him and had to be returned to NARA.

The Government will also be able to show that the third tranche of documents—those found at MAL in the search—were not personal either, and that is not why Trump failed to turn them over previously. In other words, the Government will need to establish, to rely on the third tranche, that Trump did not keep that tranche because he believed that the tranche constituted solely personal documents not required to be returned.<sup>287</sup> Indeed, Trump was also reportedly advised by Corcoran multiple times, with respect to the May 2022 subpoena, that he "would need to return all records marked classified to the government." Trump's response was to ask "if there was any way to fight it."<sup>288</sup>

The Government will likely be able to show that the documents found in the search and the documents turned over to NARA and DOJ are not different in kind. In other words, the nature of the documents will not credibly support the conclusion that the documents found in the search were not returned to the government because they were believed to be personal (or ever registered as such before Trump left office). And the fact that the second tranche of documents had to be pried out of Trump's possession by resorting to a subpoena will tend to show that Trump was seeking to withhold as much as he could, and not making a good faith factual determination that what he retained was legally not required to be returned. After all, a person acting in good faith would have told the government that the remaining documents were all personal in nature and, further, could have welcomed the government to inspect them so that the entire document issue could be resolved amicably and expeditiously.

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<sup>286</sup> Trump counsel Evan Corcoran, Letter to Justice Department (May 25, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/evan-corcoran-letter-to-jay-bratt-may-25-2022.pdf>.

<sup>287</sup> Trump could point to the following to show his belief that the documents were personal. "Trump resisted handing over some of the boxes for months, some people close to the president said, and believed that many of the items were his personally and did not belong to the government. He eventually agreed to hand over some of the documents, 'giving them what he believed they were entitled to,' in the words of one adviser." Devlin Barrett, Josh Dawsey, Rosalind S. Helderman, Jacqueline Alemany & Spencer S. Hsu, *Mar-a-Lago search appears focused on whether Trump, aides withheld items*, Washington Post (Aug. 9, 2022), <https://www.washingtonpost.com/national-security/2022/08/09/trump-fbi-search-mar-a-lago/>. Of course, such proof would simultaneously serve to undercut any attempt by Trump to show that he was unaware that the documents were at MAL—addressed in Section A, above.

<sup>288</sup> Paula Reid, Kaitlan Collins, Katelyn Polantz, Kristen Holmes and Sara Murray, Trump's attorney took notes that say the former president wanted to fight subpoena for classified docs, CNN (May 22, 2023), <https://amp.cnn.com/cnn/2023/05/22/politics/trump-subpoena-classified-documents-mar-a-lago/index.html>.

The Government will have proof to establish that Trump was aware of the legal and factual distinction between government and personal documents. Trump's obsession with the Hillary Clinton emails which he used to great political advantage establishes his understanding that government documents on a personal email server still belong to the government. Trump described what Clinton did as criminal and far worse than what General Petraeus did.<sup>289</sup> He taunted Clinton about the supposedly 30,000+ emails that she deleted that she claimed were personal in nature, clearly suspicious that she had deleted material because they were personal as opposed to politically embarrassing. Additional evidence from Trump's own mouth to show the importance of having a president aware of the law and rules includes his statement – now relevant to all the MAL documents bearing classification markings – that “We can't have someone in the Oval Office who doesn't understand the meaning of the word confidential or classified.”<sup>290</sup>

In addition, at least four former White House lawyers may have both circumstantial and direct evidence regarding communications with Trump about his obligation to return all presidential records to NARA: Don McGahn, Pat Cippolone, Pat Philbin, and Eric Herschmann. (Cippolone and Philbin were appointed by Trump in January 2021 to be two of his seven representatives to NARA;<sup>291</sup> McGahn had been so appointed by Trump from February 2017 to January 2021.<sup>292</sup>) Other Trump counsel and representatives may also have evidence to provide about alerting Trump to the need to return the documents, including Cannon, who refused to attest to NARA that Trump had returned all responsive documents.

In February 2017, McGahn issued a memorandum to all White House personnel stating:

“When you leave EOP employment, you may not take any presidential records with you. You also may not take copies of any presidential records without prior authorization from the Counsel's office. The willful destruction or concealment of federal records is a federal crime punishable by fines and imprisonment.”<sup>293</sup>

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<sup>289</sup> Adam Sneed, *Trump: Clinton's private email practice 'criminal'*, Politico (July 26, 2022), <https://www.politico.com/story/2015/07/donald-trump-hillary-clintons-private-email-120630>; Anna Giaritelli, *Trump: Clinton's sins 20 times worse than Petraeus'*, Washington Examiner (Jan. 20, 2022), <https://www.washingtonexaminer.com/tag/donald-trump?source=%2Ftrump-clintons-sins-20-times-worse-than-petraeus%2Farticle%2F2581073>; Factbase, *Donald Trump speech in Charlotte, North Carolina* (Aug. 18, 2016), <https://factba.se/transcript/donald-trump-speech-charlotte-nc-august-18-2016>.

<sup>290</sup> Zachary Cohen & Eli Watkins, *What Trump has said about sharing classified information*, CNN (May 16, 2017), <https://www.cnn.com/2017/05/15/politics/donald-trump-classified-information/index.html>.

<sup>291</sup> White House, Trump letter designating representatives to Archives (Jan. 19, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/09/trump-letter-representatives-national-archives-meadows-philbin-cipollone-eisenberg-gast-purpura-engel-january-19-2021.pdf>.

<sup>292</sup> White House, Trump letter designating representatives to Archives (Feb. 16, 2017), <https://www.justsecurity.org/wp-content/uploads/2022/10/President-Trump-letter-designating-representatives-to-Archives-don-mcgahn-february-2017.pdf>.

<sup>293</sup> Memorandum through Donald F. McGahn III, from Stefan Passantino, Scott Gast and James D. Schultz, *Presidential Records Act Obligations Memorandum*, White House (Feb. 22, 2017), at p. 3,

That Trump was aware of the need to preserve such presidential records is clear from several sources. He was repeatedly advised by White House personnel – including his chiefs of staff and White House counsels– that he could not destroy presidential records and had an obligation by law to preserve them.<sup>294</sup>

Trump’s awareness of this rule was evidenced by his reaction to Nancy Pelosi ripping up a copy of Trump’s presidential address to Congress: “I thought it was a terrible thing when she ripped up the speech. First of all, it’s an official document. You’re not allowed – it’s illegal what she did. She broke the law... .And actually very illegal, what she did.”<sup>295</sup> In making allegations that his former National Security Adviser “took classified” information, Trump stated, “it’s so important, whether it’s knowingly or unknowingly, but in his case, it was knowingly.”<sup>296</sup>

And former White House counsel Eric Herschmann specifically advised Trump about the applicability of the law to his not returning government records to the government. Herschmann “warned [the former president] late last year that Mr. Trump could face legal liability if he did not return government materials he had taken with him when he left office, three people familiar with the matter said. ... Herschmann, sought to impress upon Mr. Trump the seriousness of the issue and the potential for investigations and legal exposure if he did not return the documents, particularly any classified material, the people said.”<sup>297</sup>

## **Section B. Mishandling of Government Documents (18 U.S.C. §§ 793(e), 641, 2071(a) and other statutes)**

### **1. Retention of National Defense Information (18 U.S.C. § 793(e))**

The Government must prove beyond a reasonable doubt that:

1. Trump had unauthorized possession of, access to, or control over;
2. a document related to national defense information (“NDI”);
3. willfully retained the document; and

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<https://www.justsecurity.org/wp-content/uploads/2022/10/White-House-Counsel-Don-McGahn-Memo-to-WH-Staff-Re-Presidential-Records-Act-02-22-2017.pdf>.

<sup>294</sup> Deb Reichmann, *Will Trump’s mishandling of records leave a hole in history?*, AP News (Jan. 16, 2021), <https://www.pbs.org/newshour/politics/will-trumps-mishandling-of-records-leave-a-hole-in-history>; Ashley Parker, Josh Dawsey, Tom Hamburger & Jacqueline Alemany, *‘He never stopped ripping things up’: Inside Trump’s relentless document destruction habits*, Washington Post (Feb. 5, 2022), <https://www.washingtonpost.com/politics/2022/02/05/trump-ripping-documents/>.

<sup>295</sup> Remarks by President Trump Before Marine One Departure (Feb. 7, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-marine-one-departure-82/>.

<sup>296</sup> Factbase, *Brian Kilmeade of Fox News interviews Donald Trump* (June 22, 2020), <https://factba.se/transcript/donald-trump-interview-brian-kilmeade-fox-news-june-22-2020>.

<sup>297</sup> Maggie Haberman, *Trump Was Warned Late Last Year of Potential Legal Peril Over Documents*, New York Times (Sept. 19, 2022), <https://www.nytimes.com/2022/09/19/us/politics/trump-herschmann-documents.html>.

4. failed to deliver the document to an officer or employee of the United States entitled to receive it.

#### Element 1: Unauthorized possession, control, or access

This element focuses on whether Trump actually possessed, had control over, or access to the documents. Based on many of the facts noted above with respect to the proof of Trump's intent, as well as additional facts noted below, Trump indisputably had unauthorized possession of, control over, or access to government documents at MAL following January 20, 2021.

Trump did not have the authorization to retain presidential records, especially classified material, after leaving office. What's more, on May 25, 2022, Trump's counsel Evan Corcoran admitted in a letter to the Justice Department, "No legal objection was asserted about the transfer" of records to NARA in January 2022.<sup>298</sup> That is correct, and no legal objection was asserted for the documents recovered on June 3, 2022, pursuant to the grand jury subpoena. In other words, Trump and his counsel did not dispute that the records were required to be returned to, and possessed, by the government. Indeed, following the May 11, 2022, grand jury subpoena demanding the return of all documents marked as classified, it was clearer than ever that Trump had no authority whatsoever to possess or control the documents. On June 8, the Department of Justice also warned Trump's counsel, "As I previously indicated to you, Mar-a-Lago does not include a secure location authorized for the storage of classified information."<sup>299</sup> In reference to the documents recovered on August 3, Trump's counsel admitted in court filings that documents that are presidential records belong to NARA,<sup>300</sup> and at best they argue Trump had a right to "access" presidential records. They acknowledge in essence that Trump had no right to possess and control such documents (e.g., "a former President has an unfettered right of access to his Presidential records even though he may not 'own' them"<sup>301</sup>).

Trump's counsel also admits this case is governed by President Obama's Executive Order 13526. Section 4.4 of the E.O. requires a former president to obtain a waiver of the need to know for

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<sup>298</sup> Trump counsel Evan Corcoran, Letter to Justice Department (May 25, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/evan-corcoran-letter-to-jay-bratt-may-25-2022.pdf>.

<sup>299</sup> Jay Bratt, Chief of Counterintelligence and Export Control Section, National Security Division, Department of Justice, Letter to Trump Counsel Evan Corcoran, Jun. 8, 2022 (quoted in FBI Affidavit (less redacted) accompanying search warrant application (Aug. 5, 2022) (less redacted version released Sept. 13, 2022), at p. 22, <https://www.justsecurity.org/wp-content/uploads/2022/09/just-security-fbi-mar-a-lago-afidavit-with-fewer-redactions-less-redacted.pdf>).

<sup>300</sup> They state: "What is clear regarding all of the seized materials is that they belong with either President Trump (as his personal property to be returned pursuant to Rule 41(g)) or with NARA, but not with the Department of Justice." Donald J. Trump's Response in Opposition to the United States' Motion for a Partial Stay Pending Appeal, 9:22-cv-81294-AMC, ECF No. 84 (S.D. Fla. Sept. 12, 2020), <https://www.documentcloud.org/documents/22279259-donald-j-trumps-response-in-opposition-to-the-united-states-motion-for-a-partial-stay-pending-appeal> at p. 3.

<sup>301</sup> Donald J. Trump's Response in Opposition to the United States' Motion for a Partial Stay Pending Appeal, 9:22-cv-81294-AMC, ECF No. 84 (S.D. Fla. Sept. 12, 2020), at p. 13, <https://www.documentcloud.org/documents/22279259-donald-j-trumps-response-in-opposition-to-the-united-states-motion-for-a-partial-stay-pending-appeal>.

access to classified information. Such a waiver would require the agency head or senior agency official of the agency which created the classified information, in writing, to have (1) determined that Trump's access is "consistent with the interest of the national security," and (2) taken "appropriate steps" to protect the classified information from "unauthorized disclosure or compromise," ensuring that the information is "safeguarded."<sup>302</sup> As the Eleventh Circuit observed in reference to the E.O.'s waiver rules, Trump "has not even attempted to show that he has a need to know the information contained in the classified documents. Nor has he established that the current administration has waived that requirement for these documents."<sup>303</sup>

In terms of possession, control, and access, it was only after prolonged negotiations that on January 17-18, 2022, NARA recovered 15 boxes of the government's documents from MAL. On June 3, 2022, the Department of Justice recovered 37 documents from Trump's counsel under a DC grand jury subpoena.<sup>304</sup> And on August 8, 2022, the FBI recovered approximately 13,000 government documents. Until each of the points at which the government recovered the documents, Trump had possession, control over, or access to the documents.

The evidence of his possession, control, or access is overwhelming. Indeed, Trump's own counsel Christopher Krise told the federal district court in Florida, with reference to the documents recovered in the August 8 search, "What we are talking about here, in the main, are Presidential records in the hands of the 45th President."<sup>305</sup> He repeated the statement two more times.<sup>306</sup> Trump had actual possession of the documents at MAL, in that he knowingly had direct physical control over the documents and could at any given time access them at MAL. They were kept at the property under his power of command.

Additional evidence indicates Trump's possession of, control over, and access to the documents. As discussed earlier, government documents, including documents with classification markings, were found intermingled with an array of personal belongings in boxes recovered during the August search. The FBI also found classified documents intermingled with personal belongings, including Trump's passports, in the desk drawers of his personal office. In total, 27 documents with classification markings and 43 empty folders with classified banners were found in the

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<sup>302</sup> Exec. Order No. 13526, 75 Fed. Reg. at 707, <https://www.archives.gov/isoo/policy-documents/ensi-eo.html#four>. The waiver also applies to former Presidential appointees, but in addition to the two aforementioned requirements, the agency head or senior agency official of the originating agency must also limit any access "to items that the person originated, reviewed, signed, or received while serving" as the Presidential appointee.

<sup>303</sup> *Trump v. United States*, Case No. 22-13005 (11th Cir. Sept. 21, 2022), at p. 18, <https://www.documentcloud.org/documents/22671434-11th-cir-opinion-granting-partial-stay-trump-v-us..>

<sup>304</sup> Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 7 n. 3 <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf> (explaining the accurate number is 37, not 38 documents).

<sup>305</sup> Judge Aileen M. Cannon, Transcript of motion to appoint special master hearing (Sept. 1, 2022), p. 8-9, <https://www.justsecurity.org/wp-content/uploads/2022/09/transcript-hearing-judge-cannon-september-1-2022.pdf>.

<sup>306</sup> *Id.* at p. 9.

closet and desk drawers in his personal office during the August search.<sup>307</sup> Trump also had direct control over the storage room, which held 76 classified documents recovered in the August search and which had held, according to Trump’s counsel, the 37 classified documents recovered on June 3, 2022. Trump instructed his staff to move boxes with classified documents out of the storage room and to his residence at MAL, authorized Corcoran to allow the DOJ and FBI officials to see inside the storage room (but not inside the boxes) on June 3, and instructed staff to secure the storage room door with an extra lock following the DOJ letter on June 8. Trump’s access to the documents was also demonstrated by his personally sorting through the boxes before returning 15 boxes to NARA in January 2022, and his personally sorting through the boxes removed from the storage room and brought to his residence.

#### Element 2: Document(s) related to NDI

The Government must prove that documents found at MAL related to information concerning the national defense in order to establish this proposed charge.

It is beyond any doubt that documents retained at MAL contained NDI, including materials concerning military “related activities of national preparedness” and “directly and reasonably connected” with the United States defending itself against its enemies.<sup>308</sup> The materials included nearly 325 documents marked as classified, including the highest levels of classification such as Top Secret - Special Access Programs. The January recovery contained, for example, 25 Top Secret documents including documents marked with HCS, FISA, ORCON, NOFORN, and SI. The June recovery contained, for example, 17 Top Secret documents including documents marked with HCS, SI, and FISA. The August recovery contained, for example, 18 Top Secret

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<sup>307</sup> Brief of United States, full appeal to 11th Circuit (October 14, 2022), at p. 9, <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf>; Government Response to Trump Motion for Return of Property and Special Master, 9:22-cv-81294-AMC, ECF No. 48 (Aug. 30, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf> at p. 12, n.6 (“the government seized the contents of a desk drawer that contained classified documents and governmental records commingled with other documents. The other documents included two official passports, one of which was expired, and one personal passport, which was expired. The location of the passports is relevant evidence in an investigation of unauthorized retention and mishandling of national defense information.”). See also *Id.* at p. 13; Revised Detailed Property Inventory Pursuant to Court’s Preliminary Order, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 116-1 (Sept. 26, 2022), at p. 4-10, <https://www.justsecurity.org/wp-content/uploads/2022/09/Revised-Detailed-Inventory-Sept-26-2022.pdf>; Justice Department application for subpoena.

<sup>308</sup> *Gorin v. United States*, 312 U.S. 19, 28, 61 (1941); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

documents including material concerning a foreign country's nuclear weapons readiness,<sup>309</sup> Iran's missile program, and highly sensitive intelligence work aimed at China.<sup>310</sup>

The documents marked as classified were "closely held" and their disclosure could definitely create a "potential" threat to national security. Indeed, they include some of this nation's most sensitive information.<sup>311</sup> Notably, during the August 8 search, FBI investigators were not initially permitted to look through documents because they did not have sufficient clearances above the Top Secret level.<sup>312</sup>

Trump and his attorneys have themselves tried to argue that documents were kept secure and that there is no evidence they were disclosed to others; in other words, their own admission indicates these materials were to be closely held.<sup>313</sup> Even their public claims of declassification include

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<sup>309</sup> Devlin Barrett & Carol D. Leonnig, *Material on foreign nation's nuclear capabilities seized at Trump's Mar-a-Lago*, Washington Post (Sept. 6, 2022), <https://www.washingtonpost.com/national-security/2022/09/06/trump-nuclear-documents/>; Revised Detailed Property Inventory Pursuant to Court's Preliminary Order, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 116-1 (Sept. 26, 2022), at p. 4-10. <https://www.justsecurity.org/wp-content/uploads/2022/09/Revised-Detailed-Inventory-Sept-26-2022.pdf>; Justice Department application for subpoena.

<sup>310</sup> Devlin Barrett, *Mar-a-Lago classified papers held U.S. secrets about Iran and China*, Washington Post (Oct. 21, 2022), <https://www.washingtonpost.com/national-security/2022/10/21/trump-documents-mar-a-lago-iran-china/>.

<sup>311</sup> Pursuant to Executive Order 12958 signed on April 17, 1995, as amended by Executive Order 13292 on March 25, 2003, and Executive Order 13526 on December 29, 2009, National Security Information is classified as "Top Secret," "Secret," or "Confidential." National Security Information (hereinafter "classified information") shall be classified at one of the following three levels:

- 1) "Top Secret" – if the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to national security.
- 2) "Secret" – if the unauthorized disclosure of which reasonably could be expected to cause serious damage to national security.
- 3) "Confidential" – if the unauthorized disclosure of which reasonably could be expected to cause damage to national security.

Further, access to classified information at any level can be further restricted through compartmentation in Sensitive Compartmented Information ("SCI") categories. Only individuals with the appropriate security clearance and additional SCI permissions can have authorized access to such information. For further information on the legal framework of classified information in the United States, see, e.g.: *The Protection of Classified Information: The Legal Framework* (Congressional Research Service Report, RS21900, updated August 12, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/10/RS21900.pdf>; *Classified Information Policy and Executive Order 13526* (Congressional Research Report, R41528, December 10, 2010), <https://www.justsecurity.org/wp-content/uploads/2022/10/R41528.pdf>.

<sup>312</sup> Devlin Barrett and Carol D. Leonnig, *Material on foreign nation's nuclear capabilities seized at Trump's Mar-a-Lago*, Washington Post (Sept. 6, 2022) ("One government filing alluded to this information when it noted that counterintelligence FBI agents and prosecutors investigating the Mar-a-Lago documents were not authorized at first to review some of the material seized."), <https://www.washingtonpost.com/national-security/2022/09/06/trump-nuclear-documents/>.

<sup>313</sup> Donald J. Trump's Response in Opposition to the United States' Motion for a Partial Stay Pending Appeal, 9:22-cv-81294-AMC, ECF No. 84 (S.D. Fla. Sept. 12, 2020), <https://www.documentcloud.org/documents/22279259-donald-j-trumps-response-in-opposition-to-the-united-states-motion-for-a-partial-stay-pending-appeal> at pp. 2-3; see also Donald J. Trump, Remarks, at Mesa, Arizona Political Rally (October 9, 2022), available at <https://twitter.com/Acyn/status/1579267214838231040>.

that such alleged steps were taken in private and not known to others in the executive branch, once again, underscoring the materials being closely held. What's more, even a so-called declassification of the documents would not change the substance of the NDI information contained therein. As the Eleventh Circuit observed, "the declassification argument is a red herring because declassifying an official document would not change its content or render it personal."<sup>314</sup>

Separately, even documents that have never been classified (which is not the case here, even assuming a blanket declassification order) may still relate to national defense and be considered sensitive information to be guarded from public disclosure.

### Element 3: Willful retention

The Government must prove that Trump knew he had retained the documents at MAL (or other locations), and that retention was not due to negligence or oversight. Additionally, the Government must prove that Trump knew the law forbid him from retaining the documents. Trump's knowledge is addressed in full in Part III.A, but it is worth noting that the Government need not prove that Trump knew the exact details of documents, nor that he had any reason to believe the information, if disclosed, could be harmful to the United States, though the latter issue is helpful evidence for proving willfulness. It is also worth noting one of the most egregious facts, which is Trump's proposal to his aides to hold onto the documents to try to press NARA to release government records related to the FBI's investigation of the 2016 presidential campaign.

### Element 4: Failure to deliver the document to an officer or employee of the United States entitled to receive it

NARA was entitled to receive the presidential records retained at MAL. For over 18 months, Trump failed to deliver approximately 13,000 government documents including 103 documents marked as classified, at which point the FBI needed to recover them through a court-authorized search warrant. For over 16 months, Trump failed to deliver 37 documents marked as classified until his counsel turned them over to the Justice Department on June 3, 2022, due to a grand jury subpoena. For nearly 12 months, Trump failed to deliver presidential records including 184 documents marked as classified. The Justice Department was also entitled to receive documents retained at MAL marked as classified pursuant to the May 11, 2022, grand jury subpoena. Trump failed to deliver them voluntarily after he and his counsel were informed of the ongoing Justice Department investigation. It required the grand jury subpoena and FBI search to recover the documents at MAL.

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<sup>314</sup> *Trump v. United States*, Case No. 22-13005 (11th Cir. Sept. 21, 2022), at p. 19, <https://www.documentcloud.org/documents/22671434-11th-cir-opinion-granting-partial-stay-trump-v-us>.

Note: Additional possible application of § 793(e)

As an alternative to Elements 3 (Willful retention) and 4 (Failure to deliver the document to an officer or employee of the United States entitled to receive it), the Government might instead try to prove beyond a reasonable doubt that Trump willfully communicated such a document containing national defense information to a person not entitled to receive it.

Such an alternative would depend on whether the evidentiary record is developed beyond what is currently in the publicly available record. Recent reporting indicates that Trump may have satisfied this alternative element by showing classified documents to “aides and visitors” in his Florida resort.<sup>315</sup> Prosecutors reportedly also may have evidence that Trump showed a map containing sensitive intelligence information on a plane after leaving office.<sup>316</sup> Although relatively little is publicly known about these actions—including to whom the documents were shown and whether these documents contained NDI—if Trump did, in fact, show documents to others knowing they contained NDI after leaving office, then this prong of § 793(e) is another potential avenue to prosecution. The Bedminster recording of Trump discussing a classified Pentagon document with individuals who did not have security clearance provides further evidence for this potential offense.

## **2. Concealing Government Records (18 U.S.C. § 2071(a))**

The Government must prove beyond a reasonable doubt that Trump:

1. concealed;
2. a government document or record;
3. filed or deposited in a public office of the United States; and
4. did so willfully.

### Element 1: Concealment

Regardless of Trump’s actions before leaving the White House on January 20, 2021, he concealed government documents at MAL over the following 12-18 months.

Trump’s concealment included directly or through his agents: concealing documents at different locations at MAL (including in a storage room and his personal office by or on August 8, 2022); concealing documents despite repeated requests by NARA for missing presidential records; concealing documents from Justice Department and FBI officials on and after June 3, 2022; concealing documents in removing them from the MAL storage facility; falsely claiming all

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<sup>315</sup> Devlin Barrett, Josh Dawsey, Spencer S. Hsu and Perry Stein, Trump workers moved Mar-a-Lago boxes a day before FBI came for documents, Washington Post (May 25, 2023), <https://www.washingtonpost.com/national-security/2023/05/25/trump-classified-documents-mar-a-lago/>.

<sup>316</sup> Maggie Haberman, Adam Goldman and Alan Feuer, Witnesses Asked About Trump’s Handling of Map With Classified Information, New York Times (Apr. 12, 2023), <https://www.nytimes.com/2023/04/12/us/politics/trump-map-classified-documents-justice-department.html>.

documents had been returned in response to NARA requests; falsely claiming all documents had been returned in response to a grand jury subpoena.

As discussed in Part II, some case law suggests that § 2071 does not apply when an individual takes only photocopies of a record from a public office, because the government would still be able to access the original and not be deprived of its use.

Even assuming that narrow construction is valid, documents, in this case, would still satisfy the statutory elements of the offense. NARA reported missing specific presidential records, including “original correspondence.”<sup>317</sup> Presidential records are to be held at NARA as legally required for proper preservation.<sup>318</sup> They are, indeed, often unique in character as the official records of the President, handled by him or her in the course of their administration. Trump deprived NARA of documents for which there may be only one presidential record as seen and reviewed by the President of the United States at the time. Documents that include a president’s handwritten notes are also singular records to be held by the government. (The absence of handwritten notes on such records could also be historically important.)

#### Element 2: Government document or record

Documents concealed at MAL included government records such as those government documents contained in 15 boxes recovered in January 2022, 37 documents marked as classified recovered on June 3, 2022, and approximately 13,000 government documents recovered in the August 8 search. As Trump’s counsel stated in his opening remarks before the federal district court in Florida in reference to the documents recovered in the August search, “What we are talking about here, in the main, are Presidential records in the hands of the 45th President.”<sup>319</sup>

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<sup>317</sup> National Archives General Counsel Gary M. Stern, Email to Patrick Philbin, Mike Purpura, and Scott Gast “Need for Assistance re Presidential Records” (May 6, 2021), at p. 1, (e.g., NARA General Counsel’s letter to Trump representatives referencing “original correspondence between President Trump and North Korean leader Kim Jong-un”), <https://www.justsecurity.org/wp-content/uploads/2022/10/Email-from-National-Archives-General-Counsel-Gary-M.-Stern-to-Patrick-Philbin-Mike-Purpura-and-Scott-Gast-Need-for-Assistance-re-Presidential-Records-May-6-2021.pdf>.

<sup>318</sup> PRA, section 2203(g)(1) (“Upon the conclusion of a President’s term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.”). See also: *Armstrong v. Bush*, 924 F.2d 282, 287 (D.C. Cir. 1991) (“Congress enacted the PRA ‘to insure the preservation of and public access to the official records of the President.’ [...] see also H.Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. CODE CONG. ADMIN. NEWS 5732, 5733.”).

<sup>319</sup> Hearing transcript, *Trump v. United States*, Southern District of Florida (Sept. 1, 2022), at p. 8, <https://www.justsecurity.org/wp-content/uploads/2022/09/transcript-hearing-judge-cannon-september-1-2022.pdf>.

### Element 3: Filed or deposited in a public office of the United States

As mentioned in Part II.A.2, two D.C. district court decisions have held that presidential records, including National Security Council documents, fall within the meaning of records filed or deposited in a public office for § 2071.<sup>320</sup> Indeed, presidential records of the kind at issue in this case, including those bearing classification markings, are among the most closely tracked filings within the executive branch.

Soon after President Trump designated White House Counsel Don McGahn as a representative to NARA, McGahn issued a memorandum “Presidential Records Act Obligations,” which stated in the words of § 2071:

“When you leave EOP [Executive Office of the President] employment, you may not take any presidential records with you. You also may not take copies of any presidential records without prior authorization from the Counsel’s office. The willful destruction or concealment of federal records is a federal crime punishable by fines and imprisonment.”<sup>321</sup>

Accordingly, the referral by NARA’s Office of the Inspector General to the Justice Department included § 2071 as one of the grounds for the referral.<sup>322</sup>

The PRA makes plain that upon receipt or creation of government documents with the EOP, they must as soon as practicable be categorized as presidential records or personal records and “filed separately.”<sup>323</sup> Additionally, the White House usually has a “chain of custody” process through which classified documents are officially logged and given numbers for tracking.<sup>324</sup> As part of the filing system, the Office of the Staff Secretary, which includes the Office of Records Management, has a “primary job” to “control the paper flow to and from” the President; to act as

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<sup>320</sup> *United States v. Poindexter*, 725 F.Supp. 13, 20, n.7 (D.D.C. 1989); *United States v. North*, 708 F.Supp. 364, 369, n.3 (D.D.C. 1988).

<sup>321</sup> White House Counsel Don McGahn, Memorandum - Presidential Records Act Obligations (Feb. 22, 2017), at p. 3, <https://www.justsecurity.org/wp-content/uploads/2022/10/White-House-Counsel-Don-McGahn-Memo-to-WH-Staff-Re-Presidential-Records-Act-02-22-2017.pdf>.

<sup>322</sup> Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>323</sup> PRA, section 2203(b) (“Documentary materials produced or received by the President, the President’s staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.”).

<sup>324</sup> Shane Harris, Josh Dawsey, Ellen Nakashima, & Jacqueline Alemany, *In Trump White House, classified records routinely mishandled, aides say*, Washington Post (Oct. 4, 2022), (“The White House normally establishes a ‘chain of custody’ for classified documents, said Larry Pfeiffer, the senior director of the White House Situation Room in the Obama administration and a former CIA chief of staff. ‘They log [the documents], track them, give them numbers. If anyone says, ‘Hey, whatever happened to that memo given to the president?’ the [staff secretary] can say, ‘Hey, it’s in the national security adviser’s office.’”)), <https://www.washingtonpost.com/national-security/2022/10/04/trump-classified-documents-meadows/>.

the “‘clearinghouse’ through which literally every piece of paper pass[es].”<sup>325</sup> It is the “last substantive control point before papers reach the Oval Office.”<sup>326</sup> In August 2017, White House Chief of Staff John F. Kelly “issued written guidance requiring that any document sent to the president for his review first be cleared by the staff secretary, the official in charge of keeping track of documents, as well as the chief of staff. Kelly also set up rules for what to do after Trump had seen a document.” The guidance stated, “All paper leaving the Oval Office must be submitted to the Staff Secretary for appropriate processing,” and it “was the staff secretary’s job to mark the document ‘President Has Seen’ and submit it to the Office of Records Management.”<sup>327</sup>

#### Element 4: Willfully

We address intent in Part III.A.

### **3. Conversion of Government Property (18 U.S.C. § 641)**

The Government must prove beyond a reasonable doubt that:

1. Documents found at MAL were government property;
2. Trump converted the documents to his use, or concealed or retained the documents with the intent to convert them to his use;
3. Trump did so knowingly and willfully, with the intent to deprive, without right, the United States of the use or benefit of the documents; and
4. For a felony, the documents had a value of more than \$1,000.

#### Element 1: Government property

The government must prove that documents found at MAL were property belonging to the United States Government. This requires the government to prove that the documents were “things of value” to the government, which it had both a property and possessory interest in. We also rely on the evidence regarding the value being over \$1000, element 4 below.

It is without dispute that presidential records including classified documents are things of value to the United States Government and can only be properly understood as belonging to the government. President records have value as things which record vital presidential activities, government analyses and decisions which the government has an interest in protecting and

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<sup>325</sup> Kathryn Dunn Tenpas and Karen Hult, *The Office of the Staff Secretary*, The White House Transition Project Report 2021-22, at p. 7, <https://www.justsecurity.org/wp-content/uploads/2022/11/WHTP2021-22-Staff-Secretary-1.pdf>.

<sup>326</sup> *Id.* at p. 5.

<sup>327</sup> Shane Harris, Josh Dawsey, Ellen Nakashima and Jacqueline Alemany, *In Trump White House, classified records routinely mishandled, aides say*, Washington Post (Oct. 4, 2022), <https://www.washingtonpost.com/national-security/2022/10/04/trump-classified-documents-meadows>.

archiving. Protecting documents relating to foreign nations' military and nuclear capabilities, as well as high-level policy decision-making matters, is critical for the government.

The law expressly recognizes the government's ownership over these types of documents. The PRA makes clear that only "the United States shall reserve and retain complete ownership, possession, and control of Presidential records."<sup>328</sup> When a President's term of office ends the Archivist "shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." Further, E.O. 13526 states that information may be classified only if "the information is owned by, produced by or for, or is under the control of the United States Government."<sup>329</sup>

Although some of the documents may have been copies, this does not deprive them of their qualities as things of value to the government. Each copy made is a record for the information it contains. The loss or disclosure of copies of classified information would be as injurious to the United States as the loss or disclosure of the original version. Both are things of value, and neither the PRA nor E.O. 13526 provide any exception. Further, any suggestion that documents have been declassified is immaterial to the issue of establishing government possessory interest and a thing of value.<sup>330</sup> As the Eleventh Circuit observed, "the declassification argument is a red herring because declassifying an official document would not change its content or render it personal. So even if we assumed that Plaintiff did declassify some or all of the documents, that would not explain why he has a personal interest in them."

As already noted, Trump admitted in court filings that he did not own<sup>331</sup> the presidential records recovered in the August search and that presidential records should be returned to NARA.<sup>332</sup> In short, the plain fact is that the government has a possessory interest in the presidential records, an interest which the Eleventh Circuit held Trump lacked.

## Element 2: Conversion

To establish that Trump's taking and storing of presidential records including classified documents amounts to a conversion, the government must prove that Trump used government

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<sup>328</sup> PRA, section 2202.

<sup>329</sup> Exec. Order No. 13526, § 1.1(2), 75 Fed. Reg. at 707.

<sup>330</sup> Opinion of the Court, 11th Cir. Case No. 22-13005 (Sept. 21, 2022), at p. 19, <https://www.justsecurity.org/wp-content/uploads/2022/11/Opinion-of-the-Court-11th-Circuit-Sept.-21-2022.pdf>.

<sup>331</sup> Donald J. Trump's Response in Opposition to the United States' Motion for a Partial Stay Pending Appeal (Sept. 12, 2022), at p. 15 ("[A] former President has an unfettered right of access to his Presidential records even though he may not 'own' them."), <https://www.justsecurity.org/wp-content/uploads/2022/11/trump-vs-doj-response-to-motion-for-partial-stay.pdf>.

<sup>332</sup> *Id.* at p. 3 ("What is clear regarding all of the seized materials is that they belong with either President Trump (as his personal property to be returned pursuant to Rule 41(g)) or with NARA, but not with the Department of Justice.").

property in an unauthorized manner in a way that seriously or substantially interfered with the government’s right to use and control its own property.

Trump’s conduct meets this threshold, and evidence of his clear intention to convert into his own use government documents is addressed at Part III.A and C. The extent and duration of Trump’s exercise of control over government documents was significant. During that period he seriously and substantially interfered with the government’s ability to maintain presidential records at NARA, as required by law. That includes original versions of records (e.g., “original correspondence between President Trump and North Korean leader Kim Jong-un”<sup>333</sup>) and potentially singular, unique documents such as records with the then-president’s handwritten notes.

Trump also so seriously and substantially interfered with the government’s right to use and control its own property that the U.S. intelligence community remains engaged in one of the largest-scale damage assessments of the national security risks of the improper storage and retention of the classified documents, and the Government must take steps to mitigate those risks. As the Government noted, in a citation, before the federal district court, “‘Once the government loses positive control over classified material, the government must often treat the material as compromised and take remedial actions as dictated by the particular circumstances.’”<sup>334</sup>

Element 3: Knowingly and willfully, with intent to deprive, without right, the United States of the use or benefit of the document

We address knowledge and intent in Part III.A.

Element 4: Value over \$1,000

The aggregate value of all documents found at MAL must exceed \$1,000 for the offense to be a felony. Value is ultimately a question for the jury to determine. As explained in Part II.A.3, courts have provided for the Government to show value in one of two ways: (a) a “thieves’ market,” namely, how much would those who would benefit from such information, for example foreign nations, be willing to pay for the information; or (b) the cost of preparing the documents.

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<sup>333</sup> National Archives General Counsel Gary M. Stern, Email to Patrick Philbin, Mike Purpura, and Scott Gast “Need for Assistance re Presidential Records” (May 6, 2021), at p. 1, <https://www.justsecurity.org/wp-content/uploads/2022/10/Email-from-National-Archives-General-Counsel-Gary-M.-Stern-to-Patrick-Philbin-Mike-Purpura-and-Scott-Gast-Need-for-Assistance-re-Presidential-Records-May-6-2021.pdf>.

<sup>334</sup> Exhibit A to Sentencing Memorandum, United States v. Pho, No. 1:17-cr-631 (D. Md. Sept. 18, 2018), D.E. 20-1 (letter from Adm. Michael S. Rogers, Director, National Security Agency), cited in The United States’ Mot. for a Partial Stay Pending Appeal, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 69 (Sept. 8, 2022), at p. 14, n. 4, <https://www.justsecurity.org/wp-content/uploads/2022/11/trump-doj-motion-for-partial-stay-pending-appeal.pdf>.

On both measures of value, the Government would likely establish that the value of the documents converted far exceeded \$1,000. It would have cost the government, and all the different originating agencies, in excess of \$1,000 to create the documents, particularly taking into account the cost to compile the information the documents contain. This includes the costs to produce at least approximately 13,000 government documents containing presidential records and 324 classified documents. Separately, the market value of such documents to enemies, adversaries, and even allies and partners of the United States would far exceed \$1,000.

#### **4. Additional Statutes Applying to Document Mishandling Including Disclosure of Classified Information (18 U.S.C. § 798)**

The Government must here prove beyond a reasonable doubt that:

1. Trump knowingly and willfully communicated to an unauthorized person;
2. Classified information that he knew to be classified; and
3. Concerning a matter set out in § 798(a)(1)-(4)

As with the dissemination prong of 18 U.S.C. § 793(e) above, sufficient proof of this offense this statute would depend on whether the evidence is developed beyond what is currently in the publicly available record. That additional evidence would need to establish that Trump willfully showed classified documents to at least one other individual who was not authorized to receive such information. What is reported is that Trump “kept classified documents out in the open in his Florida office, where others could see them, ... and sometimes showed them to people, including aides and visitors.”<sup>335</sup> At his golf club in Bedminster, New York, Trump also reportedly discussed a classified document containing plans for a potential attack on Iran with four individuals who had no security clearance.<sup>336</sup>

#### **Section C. Obstruction Offenses (18 U.S.C. §§ 1519, 402 and 1001)**

As with the substantive crimes addressed above, the central issue with respect to the suite of obstruction crimes will be the Government’s proof of Trump’s intent. That intent varies depending on the crime charged, of course. For instance, to establish the mens rea element for a simple false statement charge in violation of § 1001, the Government need only prove that the statement by Trump or his agent was made knowingly and intentionally. It need not show that Trump intended to obstruct the NARA or DOJ investigation. The same is true with respect to failing to comply with the grand jury subpoena in violation of § 402. However, to establish a § 1519 charge, the Government needs to prove that Trump intended to interfere with the NARA or

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<sup>335</sup> Spencer S. Hsu, Josh Dawsey and Devlin Barrett, *Mar-a-Lago prosecutors eye July episode with Trump surveillance cameras*, Washington Post (May 30, 2023), <https://www.washingtonpost.com/national-security/2023/05/30/trump-mar-a-lago-surveillance-camera/>.

<sup>336</sup> 18 U.S.C. § 798(b).

DOJ investigation, i.e., that interference with the investigation was one of his motivations, as distinct from, for instance, seeking solely to influence public opinion.

Regardless of the specific crime, however, the key evidence of Trump's mens rea in this case derives from Trump's course of dealing with his legal advisers and staff, with NARA, and with the Justice Department. These exchanges – as set out in the Factual Summary in Part I and Part III.A (“Trump's Knowledge and Intent”) – appear to establish decision-making by Trump himself in setting out a course of clearly obstructive conduct.

The Government will contrast Trump's awareness that the documents at MAL were government documents that he should not have possessed as a private citizen with the results of the search warrant in August 2022. (Thus, all the proof noted above about Trump's awareness of the government documents at MAL will again be relied on to prove intent here.) The results of the search will show the retention of thousands of pages of government documents, including highly sensitive documents that could not legally be kept at MAL.

With that clear evidence from what was extant at Trump's Florida residence in August 2022, a jury will be asked to consider whether that retention was a mere accident on his part, or was a result of intentional conduct. The answer to that question is clear: this was purposeful.

First, by 2021, Trump appears to have been told by his White House legal advisers that the documents belonged to the government, yet he chose to take them from the White House and to retain them for a substantial period of time at MAL. After a year of negotiations with NARA, Trump eventually decided to return documents to NARA. Particularly damning, however, he handed over only a portion of the government documents. In other words, not only had Trump retained the returned documents, he then chose to keep documents from NARA.

This pattern of crabbed compliance repeated itself, again further proof of lack of mistake. When the Department served a grand jury subpoena in May 2022 to require the return of all documents bearing classification markings—no longer satisfied with mere voluntary compliance—Trump, again, appears to have been the animating force in deciding not to produce all responsive documents. Indeed, not only was a small portion of additional responsive documents returned in June 2022, Trump appears to have sought a false certification be given to the Department that full compliance was made, a certification that at least one of his attorneys refused to sign.

And, of course, the August 2022 search revealed that Trump, in fact, retained thousands of government documents, including highly sensitive ones. They were in a storage room in the estate's basement that Trump refused to allow the Government to review in June, and in his office. The precise testimony of his various counsel and staff about his instructions behind the scenes suggests a course of clearly obstructive conduct, including moving responsive documents from the storage room and lying to his own counsel or to the Department (or to both).

Finally, Trump's own statements are evidence of his intentionality. His statements that he viewed these documents as his own, in spite of being repeatedly told that they were not, will be strong mens rea proof. Even a good faith belief that the documents were his would not have constituted a legal reason to defy the grand jury subpoena for all documents bearing classification markings. Grand jury subpoenas frequently call for production of personal documents. A good faith claim that the responsive documents belong to the subpoena recipient is more reason that they must be produced because a subpoena legally calls for responsive documents that are within the possession, custody or control of the subpoena recipient.

Indeed, it is notable that in spite of numerous statements by Trump regarding the search, Trump has never claimed in court or elsewhere that he was unaware of the existence of the responsive documents or thought he had returned all responsive documents.

In short, much of the same proof that will be powerful with respect to mens rea concerning the substantive charges in Section A of this Part will again be compelling evidence that Trump's conduct was not accidental, but was motivated.

Finally, because it has received considerable attention, we spend some time on the June certification by one of Trump's lawyers (apparently Christina Bobb) drafted primarily by another of his counsel (Evan Corcoran). That certification was in response to the May 11, 2022 grand jury subpoena that was issued to the Offices of Donald J. Trump and sought documents bearing classification markings. The certification said that based on information provided to the affiant:

- a. A diligent search was conducted of the boxes that were moved from the White House to Florida;
- b. This search was conducted after receipt of the subpoena, in order to locate any and all documents that are responsive to the subpoena;
- c. Any and all responsive documents accompany this certification; and
- d. No copy, written notation, or reproduction of any kind was retained as to any responsive document.<sup>337</sup>

There are a couple issues the Government will need to address to use that certification as proof against Trump. First, as noted, it will need to adduce evidence that the statement was approved by Trump. As the certification says that the affiant has been informed that the documents being produced are all responsive documents ("Based upon the information that has been provided to me"), the Government will also need to establish that Trump was aware of this representation (Trump may in fact have been the one to provide the "information" to the affiant) and that it was false (that no such information was provided or that such information was false). Cannon's testimony about a prior effort to have him make a false certification or attestation may be a

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<sup>337</sup> Justice Department Attachments (Aug. 30, 2022), at p. 16, <https://www.justsecurity.org/wp-content/uploads/2022/09/departments-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

source of evidence to establish these facts, at least through circumstantial evidence. In addition, the fact that Bobb was asked to sign the certification, apparently at the last minute, that she had to insist on inserting caveats into the certification, and that she falsely represented she was the custodian of records for the Office of Donald J. Trump when she appears to have had no knowledge of its workings are all facts that suggest an awareness that the certification was going to be misleading, at best. These factors may provide a means for the Government to ferret out the truth from Bobb and Corcoran.<sup>338</sup>

Notably, the certification is carefully worded in a manner that poses additional proof issues for the Government. The Government's grand jury subpoena in May 2022 was addressed solely to The Office of Donald J. Trump and the certification carefully noted that it was responding for that entity, not for any other entity or person. Although the grand jury subpoena called for documents bearing classified markings in the possession of the entity and Trump personally, there is no known evidence that a separate subpoena was served on Trump personally. Accordingly, only if the *entity* had in its possession documents bearing classification markings would they be called for by the subpoena.

Presumably, the Government had strong reason to believe that the MAL documents were in the possession of the legal entity and not also potentially in Trump's personal possession since otherwise it is inexplicable why the Government did not also serve a grand jury subpoena on Trump personally. The Government will be able to point to the fact that the Trump lawyers themselves appeared to believe that the second tranche of MAL documents were in the possession of The Office of Donald J. Trump since in returning the second tranche they were doing so in response to the subpoena. In order to effectively use the certification against Trump as a false exculpatory statement, however, the Government will need to show Trump's state of knowledge about the subpoena and the party that possessed the MAL documents.

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<sup>338</sup> It is important for the reader to note that Bobb has said in her interview with the government that before she signed the certification, "she heard Trump tell Mr. Corcoran that they should cooperate with the Justice Department and give prosecutors what they wanted." Glenn Thrush, Maggie Haberman & Michael S. Schmidt, *She Went Out on a Limb for Trump. Now She's Under Justice Dept. Scrutiny.*, New York Times (Oct. 11, 2022), <https://www.nytimes.com/2022/10/11/us/politics/christina-bobb-trump-lawyer-investigation.html>. That statement will need additional investigation by the government to get to the bottom of what in fact occurred. We note, however, the following: It is unclear if Bobb is telling the truth about that statement or whether she is lying or misremembering it. There is no question that the statement is at odds with Trump's statements then and now that the MAL documents are his and should be returned. But if Bobb is providing an accurate and truthful memory of what Trump said, it would be exceedingly odd if Bobb and Corcoran did not comply with it, since they would have no motive to do otherwise having had no independent personal interest in keeping the documents at MAL. It thus would suggest, if the statement is true, that Trump had not revealed to his attorneys his awareness of additional responsive government documents in his office and storage room.



## **Part IV: Department of Justice Precedent**

### **Section A: Prior Department of Justice Prosecutions**

#### **Section B: Prior Department of Justice Declinations to Prosecute**

1. Declination to Prosecute Former Secretary of State Hillary Clinton
2. Declination to Prosecute Former Attorney General Alberto Gonzales

### **Section A. Prior Department of Justice Prosecutions**

After the DOJ makes a determination that a crime can be charged, it will engage in the equally important task of determining whether a crime should be charged. There are numerous factors that the DOJ is required to consider pursuant to the Justice Manual. We focus here on one factor that we think will be of particular significance to the Attorney General and that is largely knowable at this juncture: how a prosecution of the crimes discussed above fits into the Department's own precedents.<sup>339</sup> Would a prosecution be treating Trump worse than other cases that have been brought? Would prosecution of Trump clearly pass the threshold of like cases being treated alike? We are limited, however, in our analysis as we of course do not know all the past cases in which the DOJ chose in its discretion not to prosecute. But by examining those where it did choose to go forward, we can determine whether bringing a criminal case against Trump would be consistent with other DOJ cases that were of equal or lesser merit.

The information we have drawn on is set out in full in two Tables of Precedents (see Appendix). The Tables are a comprehensive list of all known relevant DOJ cases where a § 793(e) or § 1924 unauthorized removal or retention charge was brought, but there is no charge, allegation, or evidence that the defendant disseminated the information or documents at issue.<sup>340</sup> No cases consisting of a dissemination element have been included (although many were initially reviewed). Such cases serve little comparative or precedential purpose on current facts available. Additionally, in contrast to retention-only prosecutions, there have been over 250 prosecutions

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<sup>339</sup> Another important discretionary factor is whether bringing a criminal case would unduly risk the public disclosure of NDI or classified information. That issue is beyond the scope of this memorandum. It is worth noting that myriad factors go into making that decision, including whether there are documents that do not pose the same risks that could form the gravamen of the prosecution, whether there are crimes that could be charged that reduce the risk of such disclosure (such as section 641 or 1519), whether the risk of disclosure exists regardless of whether a prosecution is brought, and whether the Classified Information Procedures Act (CIPA) provides sufficient means to mitigate the risk, among other factors. *See, e.g., Protecting Classified Information and the Rights of Criminal Defendants: The Classified Information Procedures Act*, Congressional Research Service, Report R41742 (April 2, 2012), <https://www.justsecurity.org/wp-content/uploads/2022/11/R41742-2.pdf>.

<sup>340</sup> We have used the word "dissemination" to broadly capture language within the Espionage Act relating to situations where an individual causes classified information or NDI to end up in the hands of another, be it the media, a foreign government, or anyone else not authorized to receive that specific information.

brought by the DOJ between 1945 and the present which alleged, charged, or included evidence of dissemination of NDI.<sup>341</sup>

Table 1 addresses cases where § 793(e) retention was charged or included in a plea agreement. As such, it includes cases where a person may have ultimately pleaded to a charge of § 1924 but was initially charged with § 793(e) retention. Table 2 addresses only cases where § 1924 was charged or pleaded, not § 793(e). Both tables list cases in reverse chronological order. If other relevant crimes are charged in addition to § 793(e) (retention) or § 1924, for example, obstruction or false statements, that is noted and discussed.

Our conclusion is that there is a strong precedent for the DOJ bringing a criminal case against Trump. The DOJ precedent indicates that to decline to bring a case against Trump would be treating Trump far more favorably than other defendants, which would be antithetical to the rule of law and the principles of the Justice Manual.<sup>342</sup>

In evaluating DOJ precedent we considered the salient facts about Trump's conduct in connection with the illegal retention of documents and his obstruction of NARA and the DOJ investigation. Trump, the former head of the intelligence community and law enforcement agencies, after he left office illegally retained thousands of government documents, hundreds of which are classified including at the highest possible levels. "Top Secret" material, by definition, means its "unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security." 18 CFR § 3a.11. Compartmented "Top Secret" information is even more sensitive, as even those people with a "Top Secret" clearance need special authorization to access such information. The documents were all apparently of such importance that they were presented to the then President of the United States.

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<sup>341</sup> Some dissemination cases we reviewed also included additional retention charges, but, in our view, the gravamen of the offensive conduct in those cases was dissemination and so has not been included in our analysis. Although it is unclear exactly how many prosecutions have been brought under the Espionage Act or other relevant statutes for the dissemination of NDI, some sources do offer insight into the vast number of cases brought by previous administrations as well as the current administration. See, e.g., *The Expanding Spectrum of Espionage by Americans, 1947-2015*, Defense Personnel and Security Research Center (Aug. 2017), <https://www.justsecurity.org/wp-content/uploads/2022/10/The-Expanding-Spectrum-of-Espionage-by-Americans-1947-2015-Defense-Personnel-and-Security-Research-Center-August-2017.pdf> (also accessible here: <https://www.dhra.mil/perserec/espionage-cases/>); *Espionage and Other Compromises of National Security, Case Summaries from 1975-2008*, Defense Personnel Security Research Center (Nov. 2009) <https://www.justsecurity.org/wp-content/uploads/2022/10/Espionage-and-Other-Compromises-of-National-Security-Case-Summaries-from-1975-2008-Defense-Personnel-Security-Research-Center-November-02-2009.pdf>. For recent charges brought, see: DOJ Press Release (Oct. 24, 2022) <https://www.justice.gov/opa/pr/two-arrested-and-13-charged-three-separate-cases-alleged-participation-malign-schemes-united>.

<sup>342</sup> Department of Justice, Principles of Federal Prosecution 9-27.220, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>.

Trump's retention of illegal documents persisted for over 18 months.<sup>343</sup> Trump persisted during this time in spite of direct communications with him or his counsel seeking the return of such documents and knowing he was required to do so. This intransigence connotes a particularly hardened commitment to violating the law. For instance, Trump did not return the first tranche of documents for a year, and then only returned some of the documents. Even after he knew of NARA's, DOJ's, and the intelligence community's interest in the return of all documents, he returned only a second tranche in response to the legal process. Of course, compliance with the legal process is neither voluntary nor entitles a person to credit for merely complying with what the law requires. Finally, over one hundred classified documents and thousands of government records were recovered involuntarily pursuant to a search warrant in August 2022, after 18 months of seeking full compliance.

During the course of this 18-month course of conduct, Trump may be proven to have attempted and caused his agents to make numerous false and misleading statements to NARA and DOJ to thwart their recovery of highly sensitive government documents. Trump's conduct since the search similarly evinces his flouting of the rule of law, publicly fomenting false narratives that documents were planted at MAL, that the documents belonged to him, and that the documents were declassified prior to his leaving office.

It is important to note that in evaluating the precedents below we are assuming that the investigation has found no meaningful evidence that Trump intentionally disseminated the government documents to third parties, even though an argument could be made that he in fact did so, in that it appears that both personal lawyers and his or MAL staff had been given access to the documents by the former President. But for the purposes of assessing DOJ precedent, we have not considered such conduct as dissemination.

Even with the benefit of that condition of non-dissemination, there are a series of felony cases that the DOJ pursued based on conduct that was significantly less egregious than the present set of facts in the Trump case.

We note here three factors that differentiate all these prior DOJ cases from Trump's. First, Trump held the highest position in the federal government. To the extent that his criminal conduct occurred while he was still in that position, he abused his position of trust to an extent far graver than any of the other DOJ cases discussed below, which always involved people holding positions far below that of president and often involved people holding relatively low-level positions. Abuse of position of trust is a recognized aggravating factor.<sup>344</sup> Second, his

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<sup>343</sup> Indeed, Trump's unlawful retention of government documents may still be ongoing, although we do not consider this possibility in evaluating the DOJ precedents as there is insufficient evidence at this juncture to establish this factor.

<sup>344</sup> Justice Department Manual, 9-27.230 - *Initiating and Declining Charges—Substantial Federal Interest* (updated July 2020), (“[C]ircumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.”),

position as a former president, which enabled his taking of the documents, makes the need to prosecute such criminal conduct that much greater in order to promote respect for the law by all for the proper handling of government documents. If low-level government employees are prosecuted, but not the leader of those people in an egregious case of unlawful conduct, respect for the law and deterrence will be gravely undermined.<sup>345</sup> Third, unlike the DOJ cases below, Trump involved numerous people in his illegal scheme, albeit some or all of them were unwitting participants. The US Sentencing Guidelines recognize such a leadership role of a defendant as an exacerbating factor.<sup>346</sup>

That said, we should be clear that the following comparisons of cases, on their own, demonstrate strong precedent for the DOJ bringing a criminal case against Trump, even without consideration of the above aggravating factors.<sup>347</sup>

Finally, there are several precedents that Trump will be able to point to that counsel leniency in terms of the sentence sought by the DOJ, and we note those cases below as well. Those cases, however, do not support the proposition that no criminal case should be brought; to the contrary, those cases were instituted by the DOJ, even though a lenient sentence was recommended by the DOJ.

- In May 2021, this DOJ, headed by Attorney General Garland, charged Kendra Kingsbury, an FBI analyst, under § 793(e) for illegal retention of NDI documents. Unlike Trump, she held a “Top Secret” security clearance at the time. She was alleged to have taken home FBI and another intelligence agency’s classified documents marked “Secret” during a 13-year period. Twenty such documents are referenced in the indictment, although whether that represents the total number of documents is not known, nor is it known the classification level of any such additional documents. Kingsbury is not alleged to have disseminated any of the information. She also is not alleged to have made false statements or otherwise obstructed justice. On October 13, 2022, she pleaded guilty to two counts of unlawfully retaining NDI documents. Her sentence is pending.

Although the time period is far greater than that at issue here, there is no doubt that is a result of the Government’s efforts in the Trump case to recover the documents, and not because of any fact pertinent to the level of culpability of the respective defendants.

Further, although the Government may have chosen to allege only the unlawful retention

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<https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.230>; United States Sentencing Commission, §3B1.3 - *Abuse of Position of Trust or Use of Special Skill* (Guidelines Manual, 2021) <https://guidelines.usc.gov/gl/§3B1.3>.

<sup>345</sup> Justice Department Manual, 9-27.230 - *Initiating and Declining Charges—Substantial Federal Interest* (updated July 2020).

<sup>346</sup> United States Sentencing Commission, §3B1.1 - *Aggravating Role* (Guidelines Manual, 2021), <https://guidelines.usc.gov/gl/§3B1.1>.

<sup>347</sup> All of the documentation and citations for cases addressed in this section, including court filings and other government records, are provided in the Tables (see Appendix).

of documents marked “Secret” in Kingsbury’s case, as opposed to ones she retained marked “Top Secret,” there is no evidence of that. In any event, even if DOJ did cull those from the charges to protect their risk of dissemination, it is unlikely that Kingsbury unlawfully retained top secret compartmented information and Special Access Program material (that would be unlikely to be available to an analyst in Kansas) in the volume at issue in the Trump case.

- In 2017, DOJ indicted Harold Martin III with violating § 793(e). Martin was a contractor who worked for a number of government agencies. A court-authorized search of his home was conducted in August 2016, and government documents in both hard and electronic copies were discovered in his home and car (although the precise number is not publicly known). The documents included “Top Secret” and “SCI” information. It appeared that Martin had taken such documents between the late 1990s and 2016. Martin pleaded guilty to one § 793(e) count, and in 2019 was sentenced to 9 years in prison. There is no suggestion that Martin obstructed the investigation or disseminated any of the documents, but the Government noted at the time that Martin’s retention of the documents in his personal possession created the risk of unauthorized disclosure, which results in the Government having to assess whether to take remedial action or abandon national security programs.

Although we do not know the precise volume of documents involved in the Martin case, it is notable that the type of documents are of equal or lesser significance than those improperly stored at MAL. Further, the risk of disclosure and the attendant harms identified in the Miller case by the DOJ are at least as grave as in the Trump case, and a compelling case can be made that the risks are graver given that MAL was a target of foreign adversaries.

- In 2021, Asia Lavarello was charged with violating § 1924. She was a DOD employee who removed classified information and took the documents home. Later, Laverello took notes of classified information at the “Confidential” and “Secret” levels and kept those notes improperly at her desk. She also emailed the notes to herself. She claimed she was using the documents for a thesis, and admitted she removed the classification markings. Laverello pleaded to one count of unauthorized removal and retention of classified documents or material under § 1924. The Government agreed that no “Top Secret” documents were involved and that Laverello’s false statements did not significantly impede the investigation. She was sentenced to 3 months imprisonment.
- Izaak Vincent Kemp was charged in 2021 with violating § 1924. Kemp was a contractor at an Air Force base in Ohio between 2016-2019. In May 2019, a state search warrant was executed at his home and a marijuana operation was discovered as well as more than 100 documents, which contained approximately 2,500 pages of documents classified at

the Secret level. Kemp pleaded to one count of § 1924, and in 2021, he was sentenced to a year and a day, which the Government had recommended.

- Kenneth Wayne Ford was a former NSA computer specialist between 2001 and 2003, holding a top secret security clearance. He was charged with § 793(e) unlawful retention of documents and with making a false statement to a potential employer to hide the allegations from them.

An FBI search of Ford's residence found sensitive classified information throughout his house, including numerous "Top Secret" documents in two boxes in his kitchen and bedroom closet. Evidence indicates Ford took home the classified information on his last day of employment at the NSA in December 2003. During the search, Ford admitted (and wrote a statement to the effect) that he sought to use the documents as reference points for his new job. Ford was arrested in January 2004. He went to trial and claimed he had been framed by the NSA and that his confession was coerced. Ford was convicted on December 15, 2005, and received a 6-year prison sentence.

Ford's conduct largely pales in comparison to that of Trump. His level within the government was far lower. The length of time in which he illegally possessed the documents was a matter of a few weeks (but again, this factor is not a strong indicator of a defendant's culpability, as here in Ford's case it had to do with the timing of a tip to the Government about the defendant's conduct). The volume of documents and their classification markings are comparable. And his false statements were of a singular form, and not made to the Government to thwart their investigation into the recovery of the documents. Then-United States Attorney Rod J. Rosenstein said at the time, "Government employees who betray the public trust and endanger national security must be held accountable."

- Weldon Marshall was in the Navy and later a defense contractor. He downloaded classified documents onto a CD labeled "My Secret TACAMO stuff" and shipped it and other hard drives to his Texas home from Afghanistan. He pleaded guilty to a one-count Information charging § 793(e) (illegal retention) and was sentenced in June 2018 to 3 years and 5 months in prison.

The Information charged that between 2002 and 2017, Marshall had "[u]nauthorised possession, access to, and control over documents and writings relating to the national defense, namely, a compact disk ['My Secret TACAMO Stuff'] containing documents and writings classified as the 'Secret' level about United States nuclear command, control, and communications, as well as several hard drives containing documents and writing is classified 'Secret' level about ground operations in Afghanistan."

As with Kingsbury, the length of retention is greater in Marshall's case than Trump's, but again has more to do with when the Government learned of the suspected misconduct than the defendant's culpability. Other than that, the other factors involving Marshall are less egregious than those present in Trump's case. The level of classification of the illegally retained documents is lower, and there is an absence of persistent resistance to the Government's efforts at retrieval, including any false or misleading statements.

- Kristian Saucier was a Navy mechanic for about five years. He used his phone to take a total of six photographs, on three separate dates, of classified sections of the *U.S.S. Alexandria*, a nuclear attack submarine. He retained the photographs from 2009-2012. When he learned of the investigation, Saucier destroyed various items (his phone, a memory card, and a laptop). He was charged with sections 793(e) and 1519 and pleaded guilty to the former. He was sentenced to a year in prison. Notably, in 2018, he was pardoned by Trump, who tweeted, "Congratulations to Kristian Saucier, a man who has served proudly in the Navy, on your newly found Freedom. Now you can go out and have the life you deserve!"

Saucier's conduct was less egregious than Trump's. The volume of material was a tiny fraction of what Trump illegally retained. Their obstruction was comparable, with the main difference being that Trump lied in order to avoid detection, and is not known to have destroyed any of the material he illegally retained, because he sought to keep the documents, whereas Saucier destroyed material so as not to be caught in his crimes.

- Ngia Hoang Pho worked for the NSA as a developer and held a "Top Secret" clearance. Between 2010 and 2015, Pho removed and retained in his home in Maryland numerous U.S. Government documents in hard copy and digital form, including documents marked "Top Secret" and "SCI." There is no public information about the volume of information Pho retained at his home. In October and November 2017, Pho pleaded guilty to willful retention of national defense information under § 793(e). He said that he had kept the material at his residence so he could work from home and that he was trying to obtain a promotion at work before his retirement. There is evidence that while the material was stored at Pho's home, Russian hackers were able to access some of the material. He was sentenced to 5 years and 5 months in prison.

It is hard to compare the two cases, Pho and Trump, with respect to the volume of documents stored improperly at their respective residences, as there is no public information about the volume involved in the Pho case. It seems unlikely that it could be materially more than, or more sensitive than, that at MAL. There is also no known evidence that any foreign agent has been able to access the information at MAL, but the risk of such infiltration is grave; in many ways, more grave given the public access that

foreign agents have to MAL and the known attempts of foreign actors to infiltrate the premises.

- Ahmedelhadi Yassin Serageldin was a contractor at defense contractor Raytheon. On two separate occasions in January and February 2017, he downloaded hundreds of documents and stored them on an external hard drive. The FBI searched Serageldin's house, vehicle, and person on May 3, 2017. More than 3,100 electronic files and 110 paper documents belonging to Raytheon or the DOD were recovered. More than 570 of those documents were marked as containing classified information. Court documents listed five documents pertaining to U.S. military programs involving missile defense and are classified at the "Secret" level. Serageldin had altered or obliterated the classification markings on approximately 50 documents, lied repeatedly about what he had done, and, according to the Government, "was thwarted only because of FBI surveillance and the execution of court ordered search and seizure warrants," which led to various obstruction charges. Serageldin pleaded guilty to § 793(e) and was sentenced to 18 months in prison. The Government explained that he would have been eligible for a higher sentence had the United States not agreed to dismiss the obstruction counts.

Serageldin's case involved far fewer government and classified documents than those at MAL and documents marked at a lower classification level. Both Serageldin and Trump engaged in obstructive conduct to thwart detection, although Serageldin's conduct was of a shorter duration.

- James Hitselberger was charged in 2012 in connection with removing government documents marked "Secret" from a naval base. He was caught after he printed "Secret" documents, placed them in his backpack, and left the naval base. He initially handed over one document he had taken and then soon after the remainder. The agents later found one other document at Hitselberger's home, also marked at the "Secret" level, although the classification markings had been cut off. In October 2012, he was initially indicted under § 793(e) - one count for retaining two documents classified as "Secret" and a second count for retaining one document classified as "Confidential." In February 2013, in a superseding indictment, he was charged with four more counts under §§ 793(e) and 2071(a). In 2014, he pleaded guilty to a single count of § 1924. The Government conceded that Hitselberger did not disseminate the documents to a foreign power, and Hitselberger told the agents he had taken the materials to his quarters to read. He was sentenced to time served (2 months), 8 months of home confinement, and 8 more months of electronic monitoring, as well as a fine.
- On January 19, 2001, former Director of Central Intelligence (DCI) John M. Deutch reportedly signed a plea agreement with the Department in which he agreed to plead guilty to a misdemeanor Information charging unauthorized removal and retention of

classified documents in violation of § 1924. He received a presidential pardon on January 20, 2001, before his plea agreement was submitted to the court, and thus the precise contours of the facts are not known other than through various reporting noted in the Tables of Precedents.

On December 17, 1996, a few days after Deutch left his position as DCI, CIA officials discovered he had been using his home computers to store classified information. A subsequent CIA investigation revealed he had routinely stored and processed highly classified information on home computers that were configured for unclassified use. The CIA Office of Inspector General (OIG) referred the matter to the DOJ. On April 14, 1999, Attorney General Janet Reno sent a letter to DCI George Tenet informing him, “The results of that [OIG] investigation have been reviewed for prosecutive merit and that prosecution has been declined.”

In May 2000, following an internal review, Reno reversed her position and appointed Paul Coffey as a special prosecutor to conduct a criminal investigation. In August 2000, the special prosecutor submitted a report recommending prosecution. DOJ officials were “considering whether Deutch should be charged with a number of possible violations, including gross negligence [under § 793(f)] – a felony – and improper handling of classified material [under § 1924] – a misdemeanor.” “If Ms. Reno accepts Mr. Coffey’s recommendation and seeks criminal charges against Mr. Deutch, her action would represent the first time in history that a Cabinet-level official has been charged with violations of the Espionage Act or a related statute for mishandling classified information,” according to a media report at the time.

The DOJ secured the signed plea agreement from Deutch in exchange for a recommendation of no prison time and a \$5,000 fine. President Clinton’s controversial pardon covered Deutch “for those offenses described in the Information dated January 19, 2001.” Notably, the Clinton pardon refers to multiple “offenses.” In congressional testimony, a DOJ official also referred to Deutch having “entered into a plea agreement on January 19 that he would plead guilty to an information, which set out various charges.”

- David Petraeus pleaded guilty to a § 1924 violation in connection with retaining at a private residence classified documents to be accessed by his biographer (and paramour) and his obstructing the investigation by lying to the FBI when questioned about the matter (denying he had provided classified information to the biographer). Petraeus had provided her with “black books” that contained classified information including the identities of covert officers, war strategy, intelligence capabilities, quotes and deliberative discussions from NSC meetings, and discussions with the President. Petraeus left the materials at a private residence “in order to facilitate his biographer's access to the Black

Books and the information contained therein to be used as source material for his biography. ... No classified information from the Black Books appeared in the aforementioned biography.”

On October 26, 2012, Petraeus was interviewed by FBI agents who advised him that they were doing so in the course of a criminal investigation— and thereafter lied to the agents. On November 9, 2012, Petraeus resigned as CIA Director.

Petraeus pleaded guilty to one count of § 1924, and per the plea agreement, he was sentenced to probation. The court imposed a fine of \$100,000, rejecting the plea agreement joint recommendation of \$40,000.

Although this case may be useful to Trump in terms of the punishment to be sought by the DOJ in his case, the Petraeus case supports the imposition of a criminal violation. Trump can use this case to argue that he should not receive jail time and that the Petraeus case is arguably worse since there was some knowing dissemination of the documents to another person. Nevertheless, like Trump, the dissemination in the two cases is similar in that it posed the risk of further dissemination but was limited in nature to the third party or parties with whom access to the information was most directly shared. And obstruction occurred in both cases, although arguably it was more persistent in Trump’s case. The lightness of Petraeus’s sentence was due in part to his having pleaded guilty and resigned from office.

At the time, § 1924 imposed only a maximum one-year prison sentence. In 2018, it was made a felony offense with a maximum 5-year prison sentence.<sup>348</sup>

- Samuel “Sandy” Berger, the former National Security Advisor, was charged and pleaded guilty to a violation of § 1924(a) in connection with his improper removal of five copies of one classified document from NARA and destroying three of the copies. Berger also took notes without allowing NARA to subject them to a classification review prior to his taking them out of the Archives. Berger apparently hid the documents in his socks to abscond with them and then was not candid with NARA when questioned about the removal. The documents were highly classified (“code word” restricted), and access was limited to NSC officials. The full extent of what Berger took is not known. Berger was sentenced to a fine of \$50,000 (the court rejected the joint recommendation of a \$10,000 fine), along with 100 hours of community service and two years’ probation.

Like the Petraeus case, Trump will be able to use the sentence in the Berger case to argue for leniency, but it does not serve as a basis to argue that the DOJ should decline to charge him with a federal crime. There are also some important apparent differences

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<sup>348</sup> The Petraeus case includes elements of dissemination involving his intentionally providing classified information to his biographer and paramour.

between the two cases involving the volume of documents and the persistent nature of the obstruction. Like Petraeus, the lightness of Berger's sentence was due in part to his having pleaded guilty.

At the time, as noted above, § 1924 imposed only a maximum one-year prison sentence. In 2018, it was made a felony offense with a maximum 5-year prison sentence.

- In 2007, Jessica Lynn Quintana pleaded guilty to violating § 1924. She had been employed at a company retained by the United States to archive classified information at Los Alamos National Laboratory. During a three-month period in 2006, she printed classified information and also downloaded classified information onto a thumb drive. She stored these documents and files in a backpack used to transport the materials to her home. According to news reports, she had a total of approximately 636 classified documents. The Government agreed to a non-custodial sentence and she was sentenced in 2008 to two years probation.

Trump will be able to use the sentence in the Quintana case to argue for leniency, but it does not serve as a basis to argue that the DOJ should decline to charge him with a federal crime. Quintana's position at the company pales in comparison to Trump's position of authority and public trust. Her case also apparently did not include obstructive acts, including false or misleading statements. The lightness of Quintana's sentence was due in part to her having pleaded guilty.

At the time, § 1924 imposed only a maximum one-year prison sentence. In 2018, it was made a felony offense with a maximum five-year prison sentence.

- In 2018, Reynaldo Regis pleaded guilty to violating §§ 1924 and 1001. Regis was a private government contractor assigned to the CIA between 2006-2016. As a result of a search executed at his home and car, the Government found 60 notebooks, containing several-hundred instances of notes containing classified information at the "Secret" level. Regis lied when asked about whether he took such information home or recorded classified information in his notebooks. The Government agreed that Regis did not disseminate the notebooks. The Government did not ask for jail time but said a guideline sentence was appropriate (which was calculated at 0-6 months). Regis was sentenced to 90-days in prison, with the court noting that the guidelines were not sufficiently severe for this type of crime.

Trump will be able to use the sentence in the Regis case to argue for leniency, but it does not serve as a basis to argue that the DOJ should decline to charge him with a federal crime. Regis's position at the contracting firm pales in comparison to Trump's position of authority and public trust. Regis retained notes classified at the "Secret" level, which also pales in comparison to the much more sensitive classified information Trump retained.

Trump also retained such records even after being compelled to provide them by a grand jury subpoena sent by the Justice Department’s Counterintelligence and Export Control Section.

For more information on these precedents, see Appendix of Tables of DOJ Precedent in Simple Retention Cases.

## **Section B. Prior Department of Justice Declinations to Prosecute**

### **1. Declination to Prosecute Former Secretary of State Hillary Clinton**

One prominent decision of the DOJ to decline to prosecute is worth discussing at greater length – the investigation of former Secretary of State Hillary Clinton for mishandling classified information. In the following, we explain the issues involved in Clinton’s email scandal. We explain why Trump’s malfeasance is significantly worse and merits prosecution where Clinton’s did not. Our analysis comports with the findings of the DOJ’s Office of the Inspector General (OIG) issued in its June 2018 report.<sup>349</sup>

#### **Background**

The criminal investigation involving Clinton’s emails concerned her use of private email servers during her tenure as Secretary of State from 2009 to 2013. Clinton claimed to have decided to use a personal mobile device that was linked to her personal email address to avoid carrying multiple handheld devices.<sup>350</sup> Her use of her private email address to conduct official business came to light during the investigation conducted by the 2014 U.S. House Select Committee on Benghazi.<sup>351</sup> Due to a request for documents from that committee, the State Department sent Clinton a letter requesting “copies of any federal records” in her possession, “such as emails sent or received on a personal email account while serving as Secretary of State.”<sup>352</sup> In response, Clinton’s lawyers produced approximately 30,490 emails that her team believed to be related to official business.<sup>353</sup>

According to Cheryl Mills—Clinton’s former Chief of Staff and Counselor—between November 2014 and January 2015, Clinton decided that she no longer wanted to retain any emails on her server that were older than 60 days.<sup>354</sup> Mills then instructed Paul Combetta—an employee of the

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<sup>349</sup> Office of the Inspector General, Department of Justice, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, (June 2018), available at <https://www.justsecurity.org/wp-content/uploads/2022/11/o1804.pdf> [hereinafter “OIG Rpt.”].

<sup>350</sup> *Id.* at p. 37.

<sup>351</sup> *Id.* at p. 37–38.

<sup>352</sup> *Id.* at p. 38.

<sup>353</sup> *Id.* at p. 38.

<sup>354</sup> *Id.* at p. 38.

company that administered Clinton’s server—to change Clinton’s email retention policy accordingly.<sup>355</sup>

In March 2015, the House Benghazi Committee sent a preservation notice to Clinton instructing her to retain all emails.<sup>356</sup> Combetta realized later that month—after he had received the preservation notice—that he had failed to implement the 60-day retention policy.<sup>357</sup> Despite the preservation notice, Combetta unilaterally decided to permanently delete all emails from Clinton’s servers.<sup>358</sup> That action resulted in the deletion of 31,830 emails.<sup>359</sup>

The FBI and the DOJ later sought to recover the deleted emails from other sources to determine what was contained therein.<sup>360</sup> According to the OIG, “Clinton’s attorneys contacted Department prosecutors numerous times to express Clinton’s willingness to cooperate by being interviewed and providing evidence voluntarily.”<sup>361</sup> The FBI obtained access to more than 30 devices.<sup>362</sup> The FBI also reviewed emails from State Department employees, “including the three senior aides with whom Clinton had the most email contact.”<sup>363</sup> In their review of the additional evidence collected, the FBI identified “approximately 17,448 unique work-related and personal emails from Clinton’s tenure” that were not included in Clinton’s initial disclosure presumably because they no longer were on her personal servers.<sup>364</sup>

Although FBI Director James Comey later stated in a press conference in 2016 that “several thousand” work-related emails were among those found in the FBI’s review, the OIG noted that the exact number of previously undisclosed work emails was unclear because the FBI was focused specifically on identifying classified emails.<sup>365</sup> Those additional work-related emails may not have been improperly withheld—according to the OIG, those emails could have been deleted from Clinton’s account or “overwritten in the ordinary course” before the review for production was completed.<sup>366</sup>

#### NDI contained in the emails

Only three recovered email chains contained classification markings of any kind. The FBI identified 81 email chains, containing approximately 193 emails, that were assessed to include

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<sup>355</sup> *Id.* at p. 38–39.

<sup>356</sup> *Id.* at p. 39.

<sup>357</sup> *Id.* at p. 38–39.

<sup>358</sup> *Id.* at p. 39.

<sup>359</sup> *Id.* The details of the deletion of the emails were unknown until Combetta was granted immunity in May 2016. *Id.* at p. 107. The grant of immunity explains why Combetta was not prosecuted for what seems to be a blackletter violation of 18 U.S.C. § 2071.

<sup>360</sup> *Id.* at p. 72.

<sup>361</sup> *Id.* at p. 81.

<sup>362</sup> *Id.* at p. 73.

<sup>363</sup> *Id.* at p. 72.

<sup>364</sup> *Id.* at p. 74.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at p. 75.

classified information from Confidential to Top Secret levels (but, except for the three email chains, none bore classification markings).<sup>367</sup> Of those 81 email chains, 12 were not among the 30,490 emails Clinton’s lawyers had provided the State Department.<sup>368</sup> However, all emails containing Top Secret information were among those initially turned over.<sup>369</sup> Seven email chains contained information associated with a Special Access Program (“SAP”)<sup>370</sup>—a special category of Top Secret information that requires even greater access controls and is generally limited to an exceedingly small group of officials.

The three email chains that did contain classification markings had one or two paragraphs marked with a “(C),” which indicated the presence of information classified at the Confidential level.<sup>371</sup> “[P]rosecutors stated that the ‘(C)’ markings were somewhat ambiguous given their placement in the email chains and the fact that the classification marking ‘Confidential’ was not spelled out anywhere in the email, let alone in a readily apparent manner.”<sup>372</sup> The “emails in which some paragraphs were marked ‘(C)’ did not bear the required classification headers or footers, and Clinton testified that she did not recognize these paragraph markings as denoting classified information.”<sup>373</sup> The three email chains were also included in the 30,490 that Clinton’s lawyers provided the State Department in 2014.<sup>374</sup>

#### Declination to prosecute

Numerous factors went into the decision not to prosecute, which the Attorney General announced on July 6, 2016.<sup>375</sup> For purposes of comparison with the current investigation into Trump, we quote the factors described by the OIG Report in full:

- None of the emails contained clear classification markings as required under Executive Order 13526 and its predecessor. Only three email chains contained any classification markings of any kind. These email chains had one or two paragraphs that were marked “(C)” for “Confidential” but contained none of the other required markings, such as classification headers.
- There was no evidence that the senders or former Secretary Clinton believed or were aware at the time that the emails contained classified information. In the absence of clear

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<sup>367</sup> *Id.* at p. 74.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at p. 74, 137.

<sup>372</sup> *Id.* at p. 137.

<sup>373</sup> *Id.* at p. 261 n. 161.

<sup>374</sup> *Id.* at p. 74, 137.

<sup>375</sup> Loretta E. Lynch, Statement Regarding State Department Email Investigation (July 6, 2016), <https://www.justice.gov/opa/pr/statement-attorney-general-loretta-e-lynch-regarding-state-department-email-investigation>.

classification markings, the prosecutors determined that it would be difficult to dispute the sincerity of these witnesses' stated beliefs that the material was not classified.<sup>376</sup>

- The senders and former Secretary Clinton relied on the judgment of employees experienced in protecting sensitive information to properly handle classified information.
- The emails in question were sent to other government officials in furtherance of the senders' official duties.<sup>377</sup> There was no evidence that the senders or former Secretary Clinton intended that classified information be sent to unauthorized recipients, or that they intentionally sought to store classified information on unauthorized systems.
- There was no evidence that former Secretary Clinton had any contemporaneous concerns about the classified status of the information that was conveyed on her unclassified systems, nor any evidence that any individual ever contemporaneously conveyed such concerns to her.
- Although some witnesses expressed concern or surprise when they saw some of the classified content in unclassified emails, the prosecutors concluded that the investigation did not reveal evidence that any U.S. government employees involved in the SAP willfully communicated the information to a person not entitled to receive it, or willfully retained the same.
- The senders used unclassified emails because of "operational tempo," that is, the need to get information quickly to senior State Department officials at times when the recipients lacked access to classified systems. To accomplish this, senders often refrained from using specific classified facts or terms in emails and worded emails carefully in an attempt to avoid transmitting classified information.
- There was no evidence that Clinton set up her servers or private email account with the intent of communicating or retaining classified information, or that she had knowledge that classified information would be communicated or retained on it.<sup>378</sup>

#### Contrasting Clinton's emails to the MAL documents

Simply put, none of the reasons supporting declination of prosecution of Clinton apply to Trump. In contrast to Clinton's three email chains that each included a single "(C)" marker next to a few paragraphs, Trump retained 184 documents marked as classified, including at the highest levels, and retained some in his own office. Whereas Clinton could reasonably claim that she did not

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<sup>376</sup> The IG report also states: "All of the prosecutors and agents we asked told us that they could not prove that Clinton had actual knowledge that the emails in question were classified." OIG Report – Clinton at p. 261.

<sup>377</sup> The IG report also states: "The investigators did not find any emails in which the sender communicated information to someone not authorized to receive it." OIG Report – Clinton at p. 261.

<sup>378</sup> OIG Report – Clinton at p. 255.

knowingly send or retain any emails on personal servers containing NDI, the abundance of classification markings discovered on documents recovered from MAL is strongly indicative of an intent by Trump to retain classified information (see also Facts Section C. “Trump’s direct knowledge and involvement in handling the government documents”).

Unlike Clinton, Trump did not rely on the professional judgment of those experienced in handling classified information – on the contrary, Trump was told in late 2021 by his own former White House lawyer Eric Herschmann that he could face legal liability if he did not return the documents, particularly any classified materials.<sup>379</sup> Trump’s own counsel Alex Cannon, who had been interfacing with NARA, provided Trump a similar warning in Fall 2021.<sup>380</sup> Trump’s other legal counsel and senior aides, including his designated representatives to NARA such as Patrick Philbin, struggled to get the former president to return the documents to NARA.<sup>381</sup> Moreover, it is inconceivable that Trump’s handling of the documents would ever have been reasonably approved by anyone with experience handling classified information. As detailed at length in the Factual Summary, Trump was also repeatedly placed on notice by NARA and the DOJ’s National Security Division that the documents needed to be returned and the risks to national security.<sup>382</sup>

Whereas both Clinton and Trump retained documents not in government-approved locations, Clinton’s emails were made and retained in furtherance of official duties, whereas Trump’s retention of the documents was in direct contravention of the PRA – and in defiance of repeated official requests that he return them.<sup>383</sup> Clinton also had authority to receive classified information, up to and including Top Secret information. During the investigation of Clinton, the prosecutors involved described her as “cooperative” and expressed that there was “no concern that evidence [would] be destroyed to obstruct an investigation.”<sup>384</sup> With respect to Trump, on the other hand, he repeatedly withheld documents themselves in violation of federal criminal and other statutory law, failed to comply with a grand jury subpoena, and engaged in obstructive acts.<sup>385</sup>

In contrast to Clinton’s use of the emails for government purposes to perform her duties as Secretary of State, Trump had no justification as former President to retain or use the documents at MAL. Indeed, he has never publicly stated any reason for retaining the documents. In short, Trump’s willfulness and extensive malfeasance turns what might have potentially been a non-criminal misstep into what now should be a criminal indictment.

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<sup>379</sup> See *supra* Part I.D sec. 4. (“Trump’s attorneys’ warnings and notifications”).

<sup>380</sup> See *supra* Part I.D sec. 4. (“Trump’s attorneys’ warnings and notifications”).

<sup>381</sup> See *supra* Part I.B (“Trump resisted government attempts to recover the documents”).

<sup>382</sup> See *supra* Part I.D sec. 2 (“Government warnings and notifications in 2021”) and Part I.D sec. 2 (“Government warnings and notifications in 2022”).

<sup>383</sup> See *generally* U.S. Special Master Opposition.

<sup>384</sup> OIG Report – Clinton, at p. 81.

<sup>385</sup> See *generally* U.S. Special Master Opposition.

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Finally, we note that the declination decision in the Clinton case was consistent with the Department's past practices, including the precedents for prosecution detailed in this Part of our memorandum. At the time, FBI Director James Comey explained:

In looking back at our investigations into mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts. All the cases prosecuted involved some combination of: clearly intentional and willful mishandling of classified information; or vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; or indications of disloyalty to the United States; or efforts to obstruct justice. We do not see those things here.<sup>386</sup>

The Office of Inspector General reached the same conclusion in its review of DOJ's declination decision.<sup>387</sup> The Inspector General report stated, for example, that the prosecutors' interpretation of the mens rea requirement for 18 U.S.C. § 793(f) "used as a basis to decline prosecution of former Secretary Clinton was consistent with interpretations applied in prior cases under different leadership."<sup>388</sup> And more generally concluded, "We found no evidence that the conclusions by Department prosecutors were affected by bias or other improper considerations; rather, we concluded that they were based on the prosecutors' assessment of the facts, the law, and past Department practice."<sup>389</sup>

## **2. Declination to Prosecute Former Attorney General Alberto Gonzales**

The DOJ decision not to prosecute Alberto Gonzales is another precedent worth closer examination given his prominence. What is known about the case is primarily from a 2008 Inspector General report; there is little known about the DOJ's reasoning in declining to prosecute.

The IG found that Gonzales wrote notes about classified documents and then, in 2005, when Gonzales, who had been serving as the White House Counsel, became the Attorney General, he took those notes with him. The matter provoked an IG investigation because he improperly retained those notes in unapproved locations. For instance, he took the notes from the White House to his home in a briefcase, and did not put the documents in his home safe. After a short period of time, he took the notes to his DOJ office, but did not put them in a SCIF, but rather in his AG office safe, which was authorized to contain Top Secret information, but not authorized

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<sup>386</sup> James B. Comey, FBI Director, Statement on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016), <https://www.fbi.gov/news/press-releases/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system>.

<sup>387</sup> See especially OIG Report – Clinton, at pp. 260-63

<sup>388</sup> OIG Report – Clinton, at pp. 262–263.

<sup>389</sup> OIG Report – Clinton, at p. 263.

to contain more highly classified information. In the office safe, the IG found another 17 classified documents marked Top Secret/SCI, which should not have been kept there.

Although it is unclear why Gonzales was not prosecuted, there are important differences between his conduct and that of Trump. The volume of documents is vastly different, as only certain discrete segments of his notes contained classified information – 4 out of 21 paragraphs in the notes contained SCI information, and the remaining paragraphs were unclassified. Further, the proof of intentionality was far less clear and harder for the DOJ to establish: Gonzales himself said he had not thought his notes contained classified information. Aside from the notes being at his home for a short time, he stored the notes and the other 17 documents in a far more secure environment – a DOJ safe at Main Justice simply cannot be equated with an office and storage room in a resort. The safe was certified for storing materials classified up to the Top Secret level, but not for SCI materials.<sup>390</sup> Also, “Gonzales told the OIG he believed it was appropriate to store the documents in the safe outside his office, and that he had never been told otherwise,” according to the IG report.<sup>391</sup> At the time Gonzales had authorized possession of and access to the documents and did not fail to deliver them on demand to an officer of the United States entitled to receive them. Rather, Gonzales proactively provided the documents to the White House Counsel and Principal Deputy Assistant Attorney General for the Office of Legal Counsel.<sup>392</sup>

The IG report references only the § 1924 misdemeanor statute as relevant and placed an emphasis on Gonzales’s having brought the notes to his residence.<sup>393</sup> According to the IG report, Gonzales took his notes to his residence on the evening of February 3, 2005 (the day he left the White House for the DOJ after being sworn in as Attorney General)<sup>394</sup> and may have brought them back and placed them in the OAG office safe a day or so later.<sup>395</sup> Finally, there is no evidence that Gonzales lied or otherwise obstructed the IG or DOJ in their investigation.

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<sup>390</sup> Office of the Inspector General, Department of Justice, *Report of Investigation Regarding Allegations of Mishandling of Classified Documents by Attorney General Alberto Gonzales* (Sept. 2, 2008) (hereinafter OIG Report – Gonzales), at pp. 4-5, available at <https://oig.justice.gov/sites/default/files/legacy/special/s0809/final.pdf>.

<sup>391</sup> OIG Report – Gonzales, at p. 14.

<sup>392</sup> OIG Report – Gonzales, at pp. 17-18.

<sup>393</sup> OIG Report – Gonzales, at p. 28 (“The Federal Criminal Code contains statutes relating to the improper handling of classified documents. In light of Gonzales’s handling of these documents, and in particular the handwritten notes which we found he improperly brought to his residence, we provided our report to the Department’s National Security Division for its review. After reviewing the matter, the National Security Division declined prosecution.”) (citing and quoting 18 U.S.C. § 1924).

<sup>394</sup> OIG Report – Gonzales, at p. 23.

<sup>395</sup> The OIG Report states:

The OIG was unable to determine how long Gonzales kept the notes at his residence. Gonzales told us he had no specific recollection of bringing the notes from his residence to the Department, but said he would have returned them to the Department the following day. However, the Security Programs Manager told us that she was the only person in the OAG who knew the combination to the safe outside Gonzales’s office for some period of time, although she was unable to recall how long this remained the case. She stated that she did not open the safe for Gonzales on his first evening as Attorney General or at any other time. She told us that at

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some indeterminate point after Gonzales's arrival as Attorney General, others in the OAG obtained access to the safe and could have stored materials there for him. Gonzales's first special assistant upon his becoming the Attorney General told us she received the combination from the SPM within the first couple of days of Gonzales's arrival at the Department, and that she may have given the combination to Gonzales thereafter.

OIG Report – Gonzales, at pp. 24-25; *see also* George J. Terwilliger III, Counsel for Alberto R. Gonzales, Memorandum Concerning the Report of Investigation Regarding Allegations of Mishandling Of Classified Documents by Former Attorney General Alberto Gonzales (Aug. 26, 2008), at pp. 1-2 (“The record information suggests that it is most likely that Judge Gonzales may have transported the Notes in his personal possession to and from his home for a very brief period between the evening when he was sworn in as Attorney General and a short time later when the Security Programs Manager for the Office of the Attorney General provided access to the safe in his inner office suite where classified information could be stored” and contending that other information “gives rise to at least an equally probable inference that Judge Gonzales sought to secure the Notes at the Department of Justice as soon as he had access to a safe in his office”).

## **Part V: Assessing Potential Defenses**

### **Section A. Declassification**

#### **Section B. Presidential Records Act**

1. Personal Records
2. Presidential Records
3. Executive Privilege
4. The Subpoena and Search Were Properly Predicated

#### **Section C. FBI and DOJ Misconduct**

1. Planted Evidence
2. Unreasonable Search

#### **Section D. Advice of Counsel**

#### **Section E. Defense of Lack of Knowledge of Subordinates' Actions**

#### **Section F. Lack of Responsibility for Removal of Documents from the White House**

Trump and his legal counsel have asserted or insinuated that they might assert a range of potential defenses to federal offenses discussed in this memorandum. Although these defenses have been proffered by a variety of individuals including Trump in an often haphazard and inconsistent manner, it is important to assess each on its own terms. The potential line of defenses falls into five general categories: (1) a defense based on Trump's having declassified some or all of the documents bearing classification markings recovered from MAL; (2) defenses based on the PRA;<sup>396</sup> (3) defenses based on purported FBI misconduct in allegedly planting evidence at MAL; (4) a defense based on advice of counsel; and (5) a defense based on lack of knowledge of subordinates' actions. None of them would provide a complete or effective defense to any of the crimes discussed above.

### **Section A. Declassification**

Trump has claimed repeatedly in public but never before a court (under penalty of law) that he declassified some or all of the documents bearing classification markings that were recovered from MAL. In the days after the search, for instance, Trump posted on Truth Social "it was all declassified,"<sup>397</sup> and "Terrible the way the FBI, during the Raid of Mar-a-Lago, threw documents haphazardly all over the floor (perhaps pretending it was me that did it!), and then started taking pictures of them for the public to see. Thought they wanted them kept Secret? Lucky I

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<sup>396</sup> 44 U.S.C. § 2201 *et seq.*

<sup>397</sup> Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 12, 2022, 14:19), <https://truthsocial.com/@realDonaldTrump/posts/108811278444540886>.

Declassified!”<sup>398</sup> In subsequent interviews with Hugh Hewitt and Sean Hannity, Trump stated that “everything” was declassified.<sup>399</sup> Trump has further claimed that he had a verbal “standing order” that documents taken from the Oval Office to the White House residence were deemed to be declassified.<sup>400</sup>

Trump associates and surrogates have made similar claims. For example, former Trump administration official Kash Patel publicly stated that, in addition to Trump’s issuing formal written orders to declassify documents related to the FBI investigation into links between his 2016 presidential campaign and Russia, Trump also gave verbal orders to declassify broad swaths of information.<sup>401</sup> Patel asserted he was present at the time. In a September 15, 2022 interview with Hugh Hewitt, Trump appeared to confirm Patel’s account, stating, “That’s correct, and not only that, I think it was other people also were there.”<sup>402</sup>

In theory, Trump’s claims about the manner in which a President can declassify material are not entirely without merit. It is well-settled that an incumbent President has broad authority and discretion concerning classified information. Pursuant to Executive Order 13526, the most recent in a series of executive orders governing classified information, the President is an “original classification authority,” which permits him to determine on his own whether certain national security information should be classified.<sup>403</sup> EO 13526 indirectly provides for declassification by the sitting President, in that it allows information to be declassified by, among others, “the official who authorized the original classification,” “the originator’s current successor in function,” or “a supervisory official of either the originator or his or her successor in function.”<sup>404</sup>

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<sup>398</sup> Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 31, 2022, 08:38 AM), <https://truthsocial.com/@realDonaldTrump/posts/108917523934541907>.

<sup>399</sup> Julian Mark, *Trump says presidents can declassify docs ‘even by thinking about it’*, Washington Post (Sept. 22, 2022), <https://www.washingtonpost.com/national-security/2022/09/22/trump-hannity-declassify-documents/>; Tierney Sneed, *Trump claims he declassified Mar-a-Lago docs, but his lawyers avoid making that assertion*, CNN (Sept. 16, 2022), <https://www.cnn.com/2022/09/15/politics/trump-mar-a-lago-docs-declassified-claim/index.html>.

<sup>400</sup> Jamie Gangel, Elizabeth Stuart & Jeremy Herb, *CNN Exclusive: ‘Ludicrous.’ ‘Ridiculous.’ ‘A complete fiction.’: Former Trump officials say his claim of ‘standing order’ to declassify is nonsense*, CNN (Aug. 18, 2022), <https://www.cnn.com/2022/08/18/politics/trump-claim-standing-order-declassify-nonsense-patently-false-former-officials/index.html>.

<sup>401</sup> Alex Leary, Vivian Salama & Aruna Viswanatha, *Ex-White House Aide Kash Patel Presses View Trump Broadly Declassified Documents*, Wall Street Journal (Aug. 21, 2022), <https://www.wsj.com/articles/ex-white-house-aide-kash-patel-presses-view-trump-broadly-declassified-documents-11661083201>; Kristina Wong, *Documents at Mar-a-Lago Marked ‘Classified’ Were Already Declassified, Kash Patel Says*, Breitbart (May 5, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/08/May-5-2022-Kash-Patel-Breitbart-docx>.

<sup>402</sup> Tierney Sneed, *Trump claims he declassified Mar-a-Lago docs, but his lawyers avoid making that assertion*, CNN (Sept. 16, 2022), <https://www.cnn.com/2022/09/15/politics/trump-mar-a-lago-docs-declassified-claim/index.html>; Hugh Hewitt, *Donald Trump Returns to Talk Election 2022, Indictments* (Sept. 15, 2022) (transcript of interview).

<sup>403</sup> Exec. Order No. 13526, § 1.3(a)(1).

<sup>404</sup> *Id.* § 3.1(b)(1)-(3).

Ultimately, however, the President’s classification authority with respect to national security information derives from Article II of the Constitution, pursuant to which the President is the “Commander in Chief of the Army and Navy.”<sup>405</sup> As the Supreme Court has explained, the President’s “authority to classify and control access to information bearing on national security ... flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.”<sup>406</sup> Although Trump’s attorneys have stopped short of ever actually asserting before any court that Trump declassified any of the seized documents,<sup>407</sup> they have frequently pointed to his broad authority to do so and contended that the Government had not established that any of the documents remain classified.<sup>408</sup>

In all events, the thrust of these arguments is that Trump did not willfully retain or mishandle classified information. We believe this defense is unavailing for several reasons.

#### The criminal offenses at issue do not depend on classification status

As explained above, § 793(e) does not refer to classified information, but rather to “information relating to the national defense” (National Defense Information (NDI), as described in Part II.A). In fact, the Espionage Act predates the modern classification system by decades. Conviction under § 793(e) requires the Government to prove only that the information is (1) related to the national defense, (2) closely held by the Government and, (3) if disclosed, could harm the United States.<sup>409</sup> Although the classification status of the information may be relevant, it is not determinative.<sup>410</sup> As discussed at greater length in Part III.B, the fact that the documents found at MAL had been classified, and marked as classified, would be evidence that their disclosure could “harm the United States.” And the fact that their supposed declassification had not been communicated to other agencies, who continued to treat the information as classified, would be strong evidence that the information was “closely held.” Indeed, Trump and his attorneys have tried to argue that he himself kept the documents secure at MAL and that there is no evidence they were disclosed to others.<sup>411</sup> In any case, declassifying the documents would not mean that the document is not “national defense information” or that Trump was permitted to possess them.

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<sup>405</sup> As discussed below, certain information, including information relating to nuclear weapons, is classified pursuant to a separate statutory scheme.

<sup>406</sup> *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

<sup>407</sup> And indeed, as discussed below, they have resisted making such a representation.

<sup>408</sup> See, e.g., Plaintiff-Appellee Donald J. Trump’s Resp. to Appellant’s Mot. for a Partial Stay Pending Appeal, No. 22-13005 (11th Cir. Sept. 20, 2022) (“Trump 11<sup>th</sup> Cir. Stay Opp.”), 2022 U.S. 11TH CIR. MOTIONS LEXIS 4, at \*11-13; Donald J. Trump’s Resp. in Opposition to the United States’ Mot. for a Partial Stay Pending Appeal, No. 22-CV-81294 (S.D. Fla. Sept. 12, 2022) (“Trump S.D. Fla. Stay Opp.”), 2022 U.S. DIST. CT. MOTIONS LEXIS 298192, at \*11-12.

<sup>409</sup> See, e.g., *United States v. Rosen*, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006).

<sup>410</sup> See, e.g., *United States v. Dedeyan*, 584 F.2d 36, 41 (4th Cir. 1978) (finding that a document was related to the national defense based on its content, notwithstanding its improper classification).

<sup>411</sup> Trump S.D. Fla. Stay Opp. at pp. 2-3; see also Donald J. Trump, Remarks at Mesa, Arizona Political Rally (Oct. 9, 2022), available at <https://twitter.com/Acyn/status/1579267214838231040> (stating that boxes at Mar-a-Lago were “guarded by Secret Service” and “safe”).

And there is no reason to believe that Trump, while he was president, made an individualized assessment of each document to determine that each no longer contained national defense information. The situation is thus entirely different from DOJ precedent dealing with documents that were never classified or never determined to be national defense information. As the Eleventh Circuit succinctly explained, “the declassification argument is a red herring because declassifying an official document would not change its content or render it personal.”<sup>412</sup>

A violation of § 1519 would also not depend on the classification status of the documents found at MAL. As discussed in Part III.C above, and by way of example, the charge here could be based on Trump’s obstruction of the grand jury subpoena, which sought all documents “bearing classification markings.” Even if Trump had somehow “declassified” the seized documents, they would have remained responsive to the subpoena to the extent they were “bearing classification markings”—something Trump’s lawyers have never contested. Instead, Trump and his counsel effectively acknowledged this legal understanding in multiple ways including: stating that in response to the subpoena “Trump determined that a search for documents bearing classification markings should be conducted—even if the marked documents had been declassified;”<sup>413</sup> turning over documents marked as classified on June 3, 2022, as responsive to the subpoena; and drafting and signing a written certification that the 37 documents marked as classified were responsive to the subpoena.<sup>414</sup>

Finally, § 2071 does not refer to classified information, but rather to “government records.” Even if the documents recovered from MAL had been declassified, they would have remained “government records,” and thus their classification status would be of no relevance to whether Trump concealed, removed, or mutilated them in violation of the statute. Similarly, § 641 does not refer to classified information, but rather to “any record ... or thing of value of the United States or of any department or agency thereof, or any property.”<sup>415</sup>

### The weight of the evidence suggests that Trump did not declassify the documents

At least eighteen former top Trump administration officials have stated that they have never heard of Trump’s supposed standing declassification order, calling his claim “laughable,” “ridiculous,” “[t]otal nonsense,” and even “bullsh\*t.”<sup>416</sup> The officials who disputed Trump’s

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<sup>412</sup> Opinion of the Court, 11th Cir. Case No. 22-13005 (Sept. 21, 2022), at p. 19, <https://www.justsecurity.org/wp-content/uploads/2022/11/Opinion-of-the-Court-11th-Circuit-Sept.-21-2022.pdf>.

<sup>413</sup> Motion for Judicial Oversight and Additional Relief, Case No. 9:22-cv-81294, SD Florida, (Aug. 22, 2022), at p. 5 <https://s3.documentcloud.org/documents/22161730/trump-request-for-judicial-review-of-search.pdf>.

<sup>414</sup> Affidavit in Support of Application Under Rule 41 for a Warrant to Search and Seize, S.D. Fla. Case No. 9:22-mj-08332-BER, Doc. No. 125 (Sept. 12, 2022) (“Warrant Affidavit”), ¶ 55, 58; Brief of United States, full appeal to 11th Circuit (Oct. 14, 2022), at p. 7 n. 3 <https://www.justsecurity.org/wp-content/uploads/2022/10/DOJ-11th-circuit-appeal-october-14.pdf> (explaining accurate number is 37, not 38 documents).

<sup>415</sup> 18 U.S.C. § 641. The other statutes addressed in Part II, namely, 18 U.S.C. §§ 402 and 1001, also do not require the government documents to be classified.

<sup>416</sup> Jamie Gangel, Elizabeth Stuart & Jeremy Herb, *CNN Exclusive: ‘Ludicrous.’ ‘Ridiculous.’ ‘A complete fiction.’: Former Trump officials say his claim of ‘standing order’ to declassify is nonsense*, CNN (Aug. 18, 2022),

claim included two former chiefs of staff, John Kelly and Mick Mulvaney, and former national security advisor John Bolton.<sup>417</sup> Former attorney general Bill Barr has also stated that he is “skeptical” of Trump’s claim and that it is “highly improbable” that Trump declassified the documents.<sup>418</sup> Barr would be uniquely positioned to know about any declassification order because Trump had specially put him in charge of declassifying information concerning intelligence activities related to the 2016 presidential campaign.<sup>419</sup> In their interviews with the FBI, Trump’s Deputy White House Counsels Pat Philbin and John Eisenberg, who were also designated by Trump as his official representatives to NARA, also said they had no knowledge of any such mass declassification order.<sup>420</sup> In short, other than Kash Patel, a staunch Trump loyalist and purveyor of conspiracy theories who would be at best a problematic defense witness if he were willing to testify,<sup>421</sup> no former Trump administration officials have publicly stated that they were aware of any informal or standing declassification orders.

Moreover, Trump’s lawyers—who could be sanctioned for making false representations to the court—have conspicuously stopped short of stating that Trump in fact declassified any of the documents found at MAL. They have pointed to the broad authority and discretion of a President to declassify information<sup>422</sup> and argued that the Government has not proven that the documents bearing classification markings remain classified,<sup>423</sup> but they have not affirmatively made any factual allegation regarding declassification. Indeed, when pressed, Trump’s lawyers have resisted making such a representation, and objected to a provision in the Special Master’s proposed work plan apparently requiring them to state whether they claim documents bearing classification markings had been declassified.<sup>424</sup> (They argue it would “force[] the Plaintiff to fully and specifically disclose a defense to the merits of any subsequent indictment.”<sup>425</sup>) Taken together, his lawyers’ reticence is further evidence that the documents were never declassified.

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<https://www.cnn.com/2022/08/18/politics/trump-claim-standing-order-declassify-nonsense-patently-false-former-officials/index.html>.

<sup>417</sup> *Id.*

<sup>418</sup> Shawna Chen, *Barr: No “legitimate reason” for classified documents to be at Mar-a-Lago*, Axios (Sept. 2, 2022), <https://www.axios.com/2022/09/02/barr-trump-classified-documents>.

<sup>419</sup> Agency Cooperation With Attorney General’s Review of Intelligence Activities Relating to the 2016 Presidential Campaigns, 84 Fed. Reg. 24971 (May 29, 2019).

<sup>420</sup> Carol D. Leonnig, Devlin Barrett & Josh Dawsey, *Trump loyalist Kash Patel questioned before Mar-a-Lago grand jury*, Washington Post (Nov. 4, 2022), <https://www.washingtonpost.com/national-security/2022/11/03/kash-patel-grand-jury-trump/>.

<sup>421</sup> And in fact is reportedly himself under investigation for leaking classified information. David Ignatius, *How Kash Patel rose from obscure Hill staffer to key operative in Trump’s battle with the intelligence community*, Washington Post (Aug. 16, 2021), <https://www.washingtonpost.com/opinions/2021/04/16/kash-patel-trump-intelligence-community/>.

<sup>422</sup> Trump Special Master Mot. at p. 13; Trump S.D. Fla. Stay Opp. at p. 11-12; Trump 11th Cir. Stay Opp. at p. 11-13; Exhibit 1 to Warrant Affidavit (“Corcoran Letter”), at p. 35.

<sup>423</sup> Trump 11th Cir. Stay Opp. at p. 11-13.

<sup>424</sup> Letter from James M. Trusty to Raymond J. Dearie, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 97 (Sept. 19, 2022), at pp. 2-3.

<sup>425</sup> *Id.*

Indeed, in its decision granting a partial stay of Judge Cannon’s order with respect to documents bearing classification markings, the Eleventh Circuit found that “the record contains *no evidence* that any of these records were declassified.”<sup>426</sup> In reaching this conclusion, the Eleventh Circuit observed that Trump had merely “suggest[ed] that he may have declassified these documents,” rather than actually asserting that he had done so, and also “resisted providing any evidence that he had declassified any of these documents.”<sup>427</sup>

### Trump’s conduct undermines his claims about declassification

In contrast to his claims here of a verbal declassification order that went uncommunicated to the executive branch, Trump has, in other high-profile instances, followed ordinary procedures when declassifying information. For example, on January 19, 2021—on the final day of his presidency—then-President Trump issued a written memorandum declassifying certain documents related to the FBI’s “Crossfire Hurricane” investigation.<sup>428</sup> The memorandum, which is now properly found in the Federal Register, states that Trump made his decision after seeking input from the FBI “as part of the iterative process of the declassification review.”<sup>429</sup> The absence of any such procedures and formalities here is telling.

Moreover, the July 2021 Bedminster meeting reportedly caught on audio recording undercuts Trump’s defense that he could and did declassify everything, or that he automatically declassified documents that he brought with him. The recording indicates that Trump knew he lacked declassification powers in his post-presidency period. He discussed, with a group of individuals who did not possess security clearances, a classified document in his possession that outlined military plans to attack Iran. “On the recording, Trump’s comments suggest he would like to share the information but he’s aware of limitations on his ability post-presidency to declassify records.”<sup>430</sup>

In addition, Trump’s lawyers’ conduct undermines Trump’s claims. One of Trump’s lawyers was careful about who handled the boxes at MAL, seemingly at least in part out of concern that aides did not have sufficient security clearances.<sup>431</sup> In their filings, Trump’s counsel have made references to “classified materials” contained in the documents Trump turned over to NARA in

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<sup>426</sup> Opinion of the Court, 11th Cir. Case No. 22-13005 (Sept. 21, 2022), at p. 19 (emphasis added), <https://www.justsecurity.org/wp-content/uploads/2022/11/Opinion-of-the-Court-11th-Circuit-Sept.-21-2022.pdf>.

<sup>427</sup> *Id.*

<sup>428</sup> Declassification of Certain Material Related to the FBI’s Crossfire Hurricane Investigation, 86 Fed Reg. 6843 (Jan. 25, 2021).

<sup>429</sup> *Id.* The memorandum also acknowledges that the FBI objected to declassification.

<sup>430</sup> Katelyn Polantz, Paula Reid and Kaitlan Collins, EXCLUSIVE: Trump captured on tape talking about classified document he kept after leaving the White House, CNN (May 31, 2023), <https://edition.cnn.com/2023/05/31/politics/trump-tape-classified-document-iran-milley/index.html>.

<sup>431</sup> See, e.g., Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

January 2022.<sup>432</sup> When NARA gave Trump the opportunity to view documents recovered in January for any assertion of executive privilege, Trump and his counsel never contested the documents were classified nor did they contest that he needed to send representatives with sufficient security clearances to review those documents; instead, he made efforts to identify lawyers with sufficient security clearances (but at least two of his delegates refused to be involved).<sup>433</sup> When Trump's lawyers turned over additional materials on June 3, 2022 in response to the grand jury subpoena, they did not assert that the documents were declassified, and they provided the documents in a Redweld envelope double-wrapped in tape, which, the Government noted, "appears to be consistent with an effort to handle the documents as if they were still classified."<sup>434</sup>

Finally, NARA sent a letter dated May 16, 2023, to Trump revealing that it had found 16 presidential records which demonstrated that he and his top advisers were aware of the correct declassification process to follow. "The 16 records in question all reflect communications involving close presidential advisers, some of them directed to you personally, concerning whether, why, and how you should declassify certain classified records," wrote archivist Debra Steidel Wall.<sup>435</sup>

#### Trump never had the authority to declassify certain information

A sitting President's authority to classify and declassify information is not absolute. Certain information is classified pursuant to statute, rather than executive order. For example, under the Atomic Energy Act, "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy" is automatically classified as "Restricted Data,"<sup>436</sup> and may not be declassified unilaterally by a president.<sup>437</sup> Thus Trump would not have had the authority to declassify documents concerning nuclear weapons found at MAL.

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<sup>432</sup> Trump S.D. Fla. Stay Opp. at p. 16 n.8 ("While the discovery of classified material in files containing Presidential Records should not have been at all surprising . . .").

<sup>433</sup> Alan Feuer & Maggie Haberman, *Trump Kept Over 700 Pages of Classified Documents, Letter Says*, New York Times (Aug. 23, 2022), <https://www.nytimes.com/2022/08/23/us/politics/trump-classified-documents-fbi-letter.html>; Rosalind S. Helderman, *Trump and the Mar-a-Lago documents: A timeline*, Washington Post (Aug. 30, 2022), <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>.

<sup>434</sup> FBI Search Warrant Affidavit, 9:22-mj-08332-BER, ECF No. 125 (S.D. Fla. Sept. 12, 2022), at 60, [https://storage.courtlistener.com/recap/gov.uscourts.flstd.617854/gov.uscourts.flstd.617854.125.0\\_1.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flstd.617854/gov.uscourts.flstd.617854.125.0_1.pdf). See also Government Response to Trump Motion for Return of Property and Special Master (Aug. 30, 2022), at pp. 4, 9, <https://www.justsecurity.org/wp-content/uploads/2022/09/government-response-to-motion-for-special-master-august-30-2022.pdf>.

<sup>435</sup> Jamie Gangel, Zachary Cohen, Evan Perez and Paula Reid, *Exclusive: New evidence in special counsel probe may undercut Trump's claim documents he took were automatically declassified*, CNN (May 18, 2023), <https://edition.cnn.com/2023/05/17/politics/trump-letter-archives-special-counsel-declassification/index.html>.

<sup>436</sup> 42 U.S.C. § 2014(y).

<sup>437</sup> 42 U.S.C. § 2162(d)-(e).

## Trump's claim is illogical

On a practical level, Trump's claim makes little sense. The classification regime concerns information, not documents.<sup>438</sup> The vast majority of classified documents draw their status derivatively—that is, because they contain information that was directly classified elsewhere by an original classification authority. Thus, Trump's claim, if true, would mean that other documents containing the same information as in the documents found at MAL should also be declassified derivatively. But there is no evidence that any agencies possessing such documents were aware or advised of Trump's supposed declassification orders. For information to be properly and effectively declassified, that action would have to be communicated to the relevant parts of the intelligence community and executive branch. Trump has also acknowledged in court filings that President Obama's Executive Order 13526<sup>439</sup> controls the case;<sup>440</sup> section 1.7(c) of the Executive Order requires numerous specific procedures to reclassify information that has been declassified.<sup>441</sup> Furthermore, Trump's claimed "standing order" apparently makes no distinctions with respect to the content or classification level of the documents, let alone whether there is any need to declassify them, and is instead based solely on their location. There is, however, no such thing as information—as opposed to documents—being automatically declassified when moved to the White House residence, for example, and automatically reclassified when it is returned.

## **Section B. Presidential Records Act**

Trump has asserted a number of potential defenses based on various provisions of the PRA, but they are unavailing.

The PRA, which was enacted in response to Nixon's attempts to destroy materials from his presidency including the Watergate tapes,<sup>442</sup> sets up a scheme for the preservation of "Presidential records." Under the PRA, the United States—and not the President—owns all

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<sup>438</sup> See generally Exec. Order No. 13526.

<sup>439</sup> *Id.*

<sup>440</sup> Donald J. Trump's Principal Brief to the Special Master on Global Issues, Case No. 22-CV-81294-CANNON (S.D. Fla. Nov. 8, 2022), at p. 60 [https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.171.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.171.0_2.pdf). Trump S.D. Fla. Stay Opp. (Sept. 20, 2022) at p. 12.

<sup>441</sup> Exec. Order No. 13526, at section 1.7(c) ("Information may not be reclassified after declassification and release to the public under proper authority unless: (1) the reclassification is personally approved in writing by the agency head based on a document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security; (2) the information may be reasonably recovered without bringing undue attention to the information; (3) the reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office ...").

<sup>442</sup> See David S. Ferriero, Prologue, *NARA's Role under the Presidential Records Act and the Federal Records Act*, (Summer 2017), <https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra>; Gillian Brockell, *Presidential Records Act scandals, from Nixon's tapes to Trump's 'burn bags'*, Washington Post (Feb. 7, 2022), <https://www.washingtonpost.com/history/2022/02/07/presidential-records-act-trump-nixon/>.

Presidential records.<sup>443</sup> During a President’s term, the President is responsible for identifying and preserving Presidential records.<sup>444</sup> But when the President leaves office, the PRA directs NARA to “assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President.”<sup>445</sup>

## 1. Personal Records

In his filings before Judge Cannon, Trump contended that he was permitted to retain<sup>446</sup> at least some of the documents found in the search of MAL if he had categorized them as “personal” records, which, under the PRA, are not required to be turned over to NARA.<sup>447</sup> He has argued that a President has broad, nearly unfettered discretion under the PRA to categorize documents as “personal” or “presidential,” and that there is no judicial review of this determination.<sup>448</sup> Furthermore, he has asserted that the PRA has no enforcement mechanism that would permit the Government to take possession of such documents, even if they were improperly categorized, and contended that the warrant and seizure constitute an impermissible attempt to circumvent the PRA and contest Trump’s categorization of documents as “personal.”<sup>449</sup> None of these arguments would provide a defense to the potential charges.

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<sup>443</sup> 44 U.S.C. § 2202.

<sup>444</sup> 44 U.S.C. § 2203(a).

<sup>445</sup> 44 U.S.C. § 2203(g)(1).

<sup>446</sup> The question of whether Trump was permitted to possess certain documents is distinct from whether the Government was permitted to seize them pursuant to a validly issued search warrant. The search warrant—which the magistrate found to be supported by probable cause—permitted the Government to seize even clearly personal items if they were stored with or intermingled with documents bearing classification markings. *See* Attachment B to Search and Seizure Warrant, S.D. Fla. Case No. 9:22-cv—08332-BER, Doc. No. 17 (Aug. 11, 2022), at p. 4 (“Search Warrant”). As the Government has explained, such documents have important evidentiary value:

First, the contents of the unclassified records could establish ownership or possession of the box or group of boxes in which the records bearing classification markings were stored. For example, if Plaintiff’s personal papers were intermingled with records bearing classification markings, those personal papers could demonstrate possession or control by Plaintiff.

Second, the dates on unclassified records may prove highly probative in the Government’s investigation. For example, if any records comingled with the records bearing classification markings post-date Plaintiff’s term of office, that could establish that these materials continued to be accessed after Plaintiff left the White House. Third, the Government may need to use unclassified records to conduct witness interviews and corroborate information. For example, if a witness were to recall seeing a document bearing classification markings next to a specific unclassified document (e.g., a photograph), the Government could ascertain the witness’s credibility and potentially corroborate the witness’s statement by reviewing both documents.

Brief of the United States, 11th Cir. Case No. 22-13005 (Oct. 14, 2022), at pp. 35-36 (“U.S. 11th Cir. Brief”).

<sup>447</sup> Trump S.D. Fla. Stay Opp. at pp. 3, 13-15; Trump 11<sup>th</sup> Cir. Stay Opp. at pp. 14-15.

<sup>448</sup> *Id.*

<sup>449</sup> Trump Special Master Mot. at p. 12; Trump S.D. Fla. Stay Opp. at p. 15.

## Trump misconstrues the PRA

Trump’s argument that he has “unfettered” discretion to categorize documents as “personal” ignores important provisions of the PRA. For one, the PRA provides that all documentary materials “produced or received by the President, the President’s staff, or units or individuals in the Executive Office of the President the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records *upon their creation or receipt* and be filed separately.”<sup>450</sup> There is no evidence that Trump categorized any of the seized documents bearing classification markings as “personal” during his term as President, let alone “upon their creation or receipt.” Nor were the documents Trump now asserts are personal records “filed separately” or otherwise segregated from apparent Presidential records or other government records. Rather, the classified documents were intermingled in boxes with other government records, as well as press clippings, photographs, and Trump’s personal effects.<sup>451</sup>

## Allegedly “personal” documents that bear classification markings would still be subject to the grand jury subpoena

The grand jury subpoena sought all documents “bearing classification markings,” and categorizing a document as “personal” under the PRA would not remove it from the scope of the subpoena—and thus a “personal” designation would not be a defense to either §§ 1519 or 402.

Nor would categorizing a document as “personal” shield it from seizure pursuant to a valid warrant, or overcome the Government’s need to review such documents as part of its investigation into the potentially unlawful retention of national defense information. For all of the reasons discussed above, even truly personal, unclassified documents would have important evidentiary value and be subject to seizure.<sup>452</sup>

Moreover, Trump has never asserted that he withheld any of the documents marked as classified on this ground—neither at the time he turned over boxes of documents to NARA in January 2022, nor when providing a batch of documents in response to the grand jury subpoena. Indeed, Trump’s counsel wrote, “No legal objection was asserted about the transfer” of records to NARA in January 2022, and none was asserted for documents responsive to the May 11, 2022 subpoena either.<sup>453</sup> Moreover, Trump has never in his legal filings made any claim that he actually designated any of the relevant documents as a personal record prior to the search. In short, Trump cannot rely on “threadbare insinuations” (as the Department has previously described it)

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<sup>450</sup> 44 U.S.C. § 2203(b) (emphasis added).

<sup>451</sup> See, e.g., Revised Detailed Property Inventory Pursuant to Court’s Preliminary Order, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 116-1 (Sept. 26, 2022), at p. 4-10.

<sup>452</sup> See Search Warrant; U.S. 11th Cir. Brief at pp. 35-36.

<sup>453</sup> Corcoran Letter, at p. 1.

that he might have designated relevant records as “personal.”<sup>454</sup> Nor can he rely on that claim even if he had attempted to designate the records as personal.

### Classified documents are sure not to qualify as “personal” under the PRA

Pursuant to the PRA, “personal records” are documents “of a *purely* private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”<sup>455</sup> The PRA lists several examples including private diaries or journals, materials relating to “private political associations,” and materials relating to the President’s own election or others’ elections.<sup>456</sup> Classified documents, which were likely created by another agency and came into Trump’s possession “in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President,” thus would surely be properly categorized as “Presidential records.”<sup>457</sup>

### Trump’s categorizations may be subject to judicial review

In his filings, Trump relies heavily on dicta from a single case, *Judicial Watch, Inc. v. National Archives & Resources Administration*, 845 F. Supp. 2d 288 (D.D.C. 2012), to contend that the categorization of personal and Presidential records is committed to the President’s “sole discretion,” with no place for judicial review.<sup>458</sup> That decision considered a somewhat different question than presented here, as it arose from a lawsuit by a third party seeking a declaration that certain audio recordings created by President Clinton should have been categorized as Presidential records (as opposed to personal) and an order compelling NARA to assume custody of the tapes.<sup>459</sup> And the decision was not as clear cut as Trump suggests. For one, the court acknowledged D.C. Circuit precedent providing for limited judicial review of “the initial classification of existing materials” under the PRA.<sup>460</sup> And although it made numerous statements in dicta about the discretion afforded to a President to categorize documents under the PRA, the *Judicial Watch* court ultimately did not need to reach the issue of judicial review, because the relief the plaintiff sought was “not available under the PRA.”<sup>461</sup> Moreover, Trump’s position ignores that other courts have specifically held that it may be permissible to conduct “judicial review of a decision to denominate certain materials ‘personal records’ of a former President.”<sup>462</sup> That decision explained, in reasoning applicable to Trump’s case, that “[s]uch

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<sup>454</sup> U.S. 11th Cir. Brief, at p. 47.

<sup>455</sup> 44 U.S.C. § 2201(3) (emphasis added).

<sup>456</sup> *Id.*

<sup>457</sup> 44 U.S.C. § 2201(2) (defining “Presidential records”).

<sup>458</sup> Trump S.D. Fla. Stay Opp. at p. 14-15; Trump 11<sup>th</sup> Cir. Stay Opp. at p. 14-15.

<sup>459</sup> *Jud. Watch, Inc. v. Nat’l Archives & Recs. Admin.*, 845 F. Supp. 2d 288, 290-91 (D.D.C. 2012).

<sup>460</sup> *Id.* at 296 (quoting *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1294 (D.C. Cir. 1993)).

<sup>461</sup> *Id.* at 298.

<sup>462</sup> *Am. Historical Ass’n v. Peterson*, 876 F. Supp. 1300, 1313-14 (D.D.C. 1995)

judicial review may be available to ensure that Presidential records are not disposed of as personal records at the end of an Administration and that, instead, all Presidential records fall subject to the Archivist's 'affirmative duty to make such records available to the public.'"<sup>463</sup>

### Trump's new claim of automatic designation of "personal" records fails

In a recent filing before Judge Dearie, Trump's counsel put forth a new possible defense, that raises both a factual and legal issue.

Counsel claimed that Trump "did in fact—designate the seized materials as personal records while he served as President. President Trump was still serving his term in office when the documents at issue were packed, transported, and delivered to his residence in Palm Beach, Florida. Thus, when he made a designation decision, he was President of the United States."<sup>464</sup> It is not clear whether this assertion is intended to apply to all materials recovered by the Government from MAL (including in January 2022 and on June 3, 2022), documents with classification markings recovered in the August search, or only the documents at issue before Judge Dearie, such as records related to presidential pardons and commutations. It appears to at least refer to the 13,000 documents, not including documents marked as classified, recovered in the August search.<sup>465</sup> Regardless, Trump may at trial seek to raise this claim as to any and all documents that were recovered at any time from his Florida residence.

Any such claim by Trump would run into a number of the same problems identified above: a president's lack of unilateral authority to designate records as personal, including the certainty that classified documents will not qualify as "personal" under the PRA; the lack of evidence that he declassified the documents; and that the proper time to make the designation under the PRA was "upon their creation or receipt" and they were to be filed as such.

Trump's argument appears to boil down to the idea that the fact he moved the documents to MAL while president<sup>466</sup> is evidence that the documents are "presumptively personal," and he need not provide any documentary evidence that he made such a designation (akin to his claim

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<sup>463</sup> *Id.* at 1314 (quoting 44 U.S.C. § 2203(f)(1)).

<sup>464</sup> Donald J. Trump's Principal Brief to the Special Master on Global Issues, Case No. 22-CV-81294-CANNON (S.D. Fla. Nov. 8, 2022), at p. 5  
[https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.171.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.171.0_2.pdf)

<sup>465</sup> Brief of Appellee, On Appeal from the U.S. District Court for the Southern District of Florida, Case: 22-13005 (11th. Cir Nov. 10, 2022), at p. 15 n. 5 ("[T]he record now reveals the Government seized not only 100 purportedly classified documents, but (as noted previously, see App. at pp. 129-130) also many strictly personal items (passport, medical records, tax documents, etc.) and approximately 22,000 pages of (presumptively personal) records.").

<sup>466</sup> However, in a court filing before the Eleventh Circuit, within the same week, Trump's counsel said, "President Trump was still the President of the United States when, for example, *many* of the documents at issue were packed (presumably by the GSA), transported, and delivered to his residence in Palm Beach," Brief of Appellee, On Appeal from the U.S. District Court for the Southern District of Florida, Case: 22-13005 (11th. Cir Nov. 10, 2022), at p. 18 n. 6 (emphasis added).

that by moving documents from one room in the White House to another served to declassify the documents).<sup>467</sup>

The fact that he moved the highly classified and other government documents to MAL is instead evidence that he was absconding with them unlawfully. The lack of contemporaneous documentation that such papers were deemed personal is evidence that Trump's new claim is just that, a post hoc attempt to manufacture a fact that did not happen.

Legally, Trump's claim is flawed, even if he did seek to re-label government documents as belonging to him personally. As the Government stated in its response before Judge Dearie:

Plaintiff asserts that a law enacted by Congress in the wake of Watergate to preserve the public's access to Presidential records actually allows a President to (1) pack up and remove boxes full of Presidential records at the end of his term in office, and (2) convert those Presidential records into "personal" records through that simple act of removal. To state Plaintiff's position is to refute it.<sup>468</sup>

The Government's brief goes on to explain why Trump's "upside-down reading of the PRA" "is wholly inconsistent with the PRA's text," would render "pointless" any enforcement actions for Presidents leaving office with "records wrongfully removed," and leave the "PRA's core purpose ... nullified if a President could unreviewably convert his official records into 'personal' records simply by taking them with him when he leaves office."<sup>469</sup> Indeed, it would mean that a president could lawfully take anything and everything at the White House, including highly classified documents, by simply taking them with him when voted out of office.

Trump's claim is also problematic factually. Presumably, to prove this claim, Trump would have to testify to this at trial. He would be subject to significant cross-examination on this and other issues. For starters, Trump's claim is contradicted by his and his counsel's prior statements about the records. First, Trump's original motion for a special master stated that it was "needed to preserve the sanctity of executive communications and other privileged materials."<sup>470</sup> No mention of the documents being personal; in fact, quite the opposite since personal documents,

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<sup>467</sup> Donald J. Trump's Principal Brief to the Special Master on Global Issues, Case No. 22-CV-81294-CANNON (S.D. Fla. Nov. 8, 2022), at p. 5 [https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.171.0\\_2.pdf](https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.171.0_2.pdf) ("President Trump need not put forth documentary evidence of his designation decisions, because his conduct unequivocally confirmed that he was treating the materials in question as personal records.").

<sup>468</sup> United States' Response Brief to the Special Master on Global Issues, 22-CV-81294-CANNON (S.D. Fla. Nov. 14, 2022), at pp. 3-4, <https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.182.1.pdf>.

<sup>469</sup> United States' Response Brief to the Special Master on Global Issues, 22-CV-81294-CANNON (S.D. Fla. Nov. 14, 2022), at pp. 4-5, <https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.182.1.pdf>.

<sup>470</sup> Motion for Judicial Oversight and Additional Relief, Case No. 9:22-cv-81294, SD Florida, (Aug. 22, 2022), at p. 14, <https://s3.documentcloud.org/documents/22161730/trump-request-for-judicial-review-of-search.pdf>.

his counsel concedes, cannot be subject to executive privilege. As the government has reiterated in court filings, to state the obvious, presidential communications subject to executive privilege cannot also be personal records as defined under the PRA, namely “of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”<sup>471</sup> (Indeed, in a filing before Judge Dearie, the Government exposed the illogic of Trump’s counsel claiming the records are “personal” and, in the alternative, subject to executive privilege.<sup>472</sup>)

Second, Trump’s counsel Christopher Kise previously told the federal district court in Florida that the documents recovered in the August search were “in the main” presidential records.<sup>473</sup>

Third, Trump’s legal counsel – including his White House lawyers, representatives to NARA, and personal attorneys – considered the documents presidential records that needed to be returned to NARA. That includes “a determination by Pat Cipollone in the final days of the administration” that the two dozen boxes of original presidential records needed to be returned to NARA.<sup>474</sup> What’s more, when Trump told advisers he would return documents to NARA in exchange for NARA’s release of documents related to the Russia investigation, “Trump’s aides [] recogniz[ed] that such a swap would be a non-starter since the government had a clear right to the material Mr. Trump had taken from the White House.”<sup>475</sup>

Fourth, in response to NARA’s request for presidential records, Trump transferred 15 boxes from MAL in January 2022. In a letter to the Justice Department on May 25, 2022, Trump’s counsel Evan Corcoran stated, “No legal objection was asserted about the transfer,” and he asked the Department to provide his letter to any judicial officer asked to rule on any motion pertaining to the investigation.<sup>476</sup>

Fifth, in an April 29, 2022 letter to NARA, Trump’s counsel made “a protective assertion of executive privilege” in an attempt to block documents recovered from MAL being transferred to the U.S. intelligence community and Justice Department.

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<sup>471</sup> 44 U.S.C. § 2201(3).

<sup>472</sup> The United States’ Principal Brief to the Special Master on Global Issues, Case No. 22-CV-81294-CANNON, S.D. Fla. (Nov. 8, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.618763/gov.uscourts.flsd.618763.173.0.pdf>

<sup>473</sup> In opening remarks, he told the federal district court in Florida, “What we are talking about here, in the main, are Presidential records in the hands of the 45th President.” Transcript of Hearing, S.D. Fla. Case No. 9:22-cv-81294-AMC (Sept. 1, 2022), at pp. 8:23-24. He repeated the description of the documents thrice in his opening.

<sup>474</sup> Josh Dawsey & Jacqueline Alemany, Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says, Washington Post (Aug. 24, 2022), <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/>.

<sup>475</sup> Maggie Haberman & Michael S. Schmidt, How Trump Deflected Demands for Documents, Enmeshing Aides, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

<sup>476</sup> Trump counsel Evan Corcoran, Letter to Justice Department (May 25, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/09/evan-corcoran-letter-to-jay-bratt-may-25-2022.pdf>.

Sixth, following the August search, Trump stated that the Government could have had the documents, “all they had to do was ask,” and that the documents were in the storage room “for the asking” by the Government.<sup>477</sup>

Seventh, Trump (and his associate Kash Patel) have blamed GSA for packing government documents in the boxes that were sent to MAL. But GSA made it clear that it was not authorized to transfer any personal documents, as that is a personal expense to be borne by Trump. GSA Transition Funds cannot be used to ship personal property (as GSA told Trump’s staff at least in mid-2021).<sup>478</sup> Yet, Trump gave the documents to GSA to transfer to Florida (so he either was defrauding GSA or did not view the documents as personal).<sup>479</sup>

Eighth, Trump has conceded that a portion of the documents recovered in the August search are Presidential records. As the Government stated in its brief to Judge Dearie, “Plaintiff fails to explain how, if the act of packing and removing Presidential records transforms those records into ‘personal’ records, some of the seized records (69 out of 2,916, according to Plaintiff) are still Presidential records even under his own categorization scheme.” The same holds for other records the Government recovered in January 2022 and on June 3, 2022, including classified records.

In sum, substantial evidence indicates this new claim by Trump is a false factual assertion constructed after the fact.

## 2. Presidential Records

Trump has also claimed in his filings that the PRA grants him, as former President, an “absolute” or “unfettered” right of access to his Presidential records.<sup>480</sup> Although he has raised this claim primarily to argue that he has a possessory interest in the seized documents sufficient to invoke Rule 41(g) of the Federal Rules of Criminal Procedure,<sup>481</sup> it follows that if Trump had the right

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<sup>477</sup> Just Security, *Trump’s Knowledge of MAL Classified Documents – Truth Social Posts*, <http://www.justsecurity.org/wp-content/uploads/2022/09/Trumps-Knowledge-of-of-MAL-Classified-Documents-Truth-Social.pdf>; Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 12, 2022, 14:19), <https://truthsocial.com/@realDonaldTrump/posts/108811279834566814>.

<sup>478</sup> Kathy Geisler, GSA, Email to Desiree Thompson, April 22, 2021 (“Legal has advised that since this is personal property, GSA Transition funds cannot be used for this shipping.”), at p. 25 <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rIMR1MdnBBbU/v0>; Kathy Geisler, GSA, Email to Beau Harrison and Desiree Thompson, July 19, 2021 (“As a general rule, GSA cannot provide Transition funds to ship any items that are personal items of the Former President.”), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rIMR1MdnBBbU/v0>.

<sup>479</sup> Kristen Holmes & Jeremy Herb, *Newly released emails debunk Trump and allies’ attempts to blame the GSA for packing boxes that ended up in Mar-a-Lago*, CNN (October 10, 2022), <https://www.cnn.com/2022/10/10/politics/trump-documents-shipping-gsa>.

<sup>480</sup> Trump S.D. Fla. Stay Opp. at pp. 8, 13.

<sup>481</sup> See *id.* at p. 8.

under the PRA to possess the seized documents, his retention of them would not be “unauthorized” for purposes of § 793(e). We believe this defense, too, would fail.

The right to “access” is not the right to “possess”

Trump’s position misconstrues the PRA. The PRA provides that Presidential records in the custody of NARA “shall be available” to a former President, but it does not permit a former President to retain possession of such records at all, and certainly not a location of his choosing.<sup>482</sup> Rather, under the PRA all Presidential records must be turned over to NARA, which “[u]pon the conclusion of a President’s term of office . . . shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records.”<sup>483</sup> Furthermore, a former President only has a right of access to Presidential records *in the custody of NARA*, and so turning over the documents in the first place is a prerequisite to any such right.

A former President does not automatically have the right to access classified information

For the most part, access to classified information is permitted only for individuals with a “need to know” the information.<sup>484</sup> Under the Executive Order that Trump’s court filings acknowledge controls this case,<sup>485</sup> the requirement may be waived for any person who “served as President,” but any such waiver must be in writing by the agency head or senior agency official of the originating agency and would require guarantees against disclosure or compromise that no agency head or senior agency official would ever contemplate applies to MAL.<sup>486</sup> As the Eleventh Circuit noted, Trump “has not even attempted to show that he has a need to know the information contained in the classified documents. Nor has he established that the current administration has waived that requirement for these documents.”<sup>487</sup> Notably, President Biden has barred Trump from receiving intelligence briefings, which are often given to former presidents as a courtesy, stating that Trump has “no need” to know this information.<sup>488</sup>

This defense would not excuse Trump’s failure to comply with the grand jury subpoena

Even if Trump’s retention of the classified documents was somehow “authorized” for purposes of 793(e) or under the PRA, that would not excuse his failure to properly comply with the grand jury subpoena, and thus would not be a defense to §§ 1519 (obstruction), 2071 (concealment), or 402 (contempt). Furthermore, when Trump responded to the grand jury subpoena, his custodian

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<sup>482</sup> 44 U.S.C. § 2205(3).

<sup>483</sup> 44 U.S.C. § 2203(g)(1).

<sup>484</sup> See Exec. Order No. 13526 § 4.1(a)(3).

<sup>485</sup> Trump 11th Cir. Stay Opp., at p. 12

<sup>486</sup> Exec. Order No. 13526 § 4.4.

<sup>487</sup> Opinion of the Court, 11th Cir. Case No. 22-13005 (Sept. 21, 2022), at p. 18, <https://www.justsecurity.org/wp-content/uploads/2022/11/Opinion-of-the-Court-11th-Circuit-Sept.-21-2022.pdf>.

<sup>488</sup> David E. Sanger, *Biden Bars Trump From Receiving Intelligence Briefings, Citing ‘Erratic Behavior,’* New York Times (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/us/politics/biden-trump-intelligence-briefings.html>.

of records represented that his production consisted of all responsive documents, and at no point did she or Trump (or any other representative) state that he was withholding documents on this ground.<sup>489</sup>

### 3. Executive Privilege

Trump has suggested, in both his public statements and legal filings, that some of the seized documents may be protected by executive privilege.<sup>490</sup> Among other things, executive privilege protects confidential communications between the President and his advisers that relate to presidential decision-making.<sup>491</sup> A claim of executive privilege would not excuse Trump's allegedly unlawful retention of all documents in violation of §§ 793(e), 641, and 2071. But it could serve as a defense to the extent that Trump could successfully claim privilege over—and thereby prevent disclosure to both prosecutors and any jury—the specific documents the Government might use as the basis for such charges. It could serve also as a defense to the extent Trump could successfully claim privilege over documents that would otherwise be evidence for a § 402 or § 1519 charge, because a valid claim of privilege might be argued as grounds to withhold documents otherwise responsive to the grand jury subpoena. However, we believe Trump is unlikely to prevail on any claims of executive privilege.

#### Trump has not claimed to have withheld documents based on executive privilege

Although executive privilege, in theory, might have been grounds for withholding documents that were otherwise responsive to the grand jury subpoena, Trump has never claimed that he in fact withheld those documents for this reason—either at the time he turned over documents in response to the subpoena or in subsequent filings. Moreover, Trump's lawyers have claimed that they could not make any “specific assertion” of executive privilege because they “haven't had access to the actual materials” seized in the search.<sup>492</sup> This position is inconsistent with any claim that Trump had previously decided to withhold responsive documents because he considered them privileged.

#### Trump's claim of privilege would be highly unlikely to succeed

Executive privilege is qualified, not absolute, and can be overcome based on a sufficient showing of need.<sup>493</sup> Setting aside whether and to what extent Trump as a former President can assert

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<sup>489</sup> Warrant Affidavit, ¶ 55.

<sup>490</sup> Trump S.D. Fla. Stay Opp. at pp. 10-11; Trump Special Master Motion at pp. 3, 15-16; Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 14, 2022, 08:22), <https://truthsocial.com/@realDonaldTrump/posts/108821201066287577>.

<sup>491</sup> Department of Justice, Office of Legal Counsel, Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 116 (May 30, 1984), [https://www.justsecurity.org/wp-content/uploads/2022/11/op-olc-v008-p0101\\_0.pdf](https://www.justsecurity.org/wp-content/uploads/2022/11/op-olc-v008-p0101_0.pdf).

<sup>492</sup> Transcript of Hearing, S.D. Fla. Case No. 9:22-cv-81294-AMC (Sept. 1, 2022), at p. 17:7-9.

<sup>493</sup> *United States v. Nixon*, 418 U.S. 683, 707 (1974).

executive privilege against the current executive,<sup>494</sup> such a claim could plainly be overcome here. The Government has articulated a need for the FBI—an executive agency—to review the seized documents as part of an ongoing criminal investigation—a core executive function and here focused on crimes involving the Espionage Act and the nation’s most highly guarded secrets. In an analogous case, the Supreme Court rejected a former President’s “assertion of a privilege against the very Executive Branch in whose name the privilege is invoked.”<sup>495</sup> And in another case, the Supreme Court held that the “demonstrated, specific need for evidence in a pending criminal trial” outweighed a *sitting* President’s assertion of privilege.<sup>496</sup>

Trump’s claim as a former President is even weaker with respect to classified documents. As the Government explained in its filings, the authority to control access to classified information “falls upon the incumbent President, not on any former President, because it is the incumbent President who bears the responsibility to protect and defend the national security of the United States.”<sup>497</sup> Thus, “[e]ven if a former President’s invocation of executive privilege could prevent certain records from being disseminated outside the Executive Branch, such an invocation cannot plausibly prevent the Executive Branch itself from accessing *classified* information, which is by definition controlled by the Executive Branch and critical to national security.”<sup>498</sup> Furthermore, the Government’s need for the documents is even greater in this context: The classified documents at issue are the very objects of the potential § 793(e) and other violations, and are also important evidence of obstruction of the grand jury subpoena, which sought all documents “bearing classification markings.”

It is important to distinguish between two types of executive privilege: the presidential communications privilege (having to do with confidentiality of advice from counselors) and state secrets privilege (having to do with military and diplomatic secrets). In the landmark case of *Nixon v. GSA*, even former president Nixon agreed that “the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters . . . may be asserted only by an incumbent President.”<sup>499</sup>

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<sup>494</sup> And for the most part, executive privilege has been construed to protect against disclosure outside of the executive branch, and not to prohibit disclosure within the executive branch. *See, e.g., Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 447-48, 451 (1977) (“*Nixon v. GSA*”); United States’ Resp. to Mot. for J. Oversight & Add’l Relief, No. 22-CV-81294, No. 48 (S.D. Fla. Aug. 30, 2022) (“U.S. Special Master Opposition”), at pp. 23-25; Mot. for Partial Stay Pending Appeal, 11th Cir. Case No. 22-13005 (Sept. 16, 2022) (“U.S. 11th Cir. Stay Mot.”), at pp. 12-13.

<sup>495</sup> *Nixon v. GSA*, 433 U.S. 425, 447-48 (1977).

<sup>496</sup> *United States v. Nixon*, 418 U.S. 683, 713 (1974).

<sup>497</sup> The United States’ Mot. for a Partial Stay Pending Appeal, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 69 (Sept. 8, 2022), at p. 11, <https://www.justsecurity.org/wp-content/uploads/2022/11/trump-doj-motion-for-partial-stay-pending-appeal.pdf>.

<sup>498</sup> *Id.* (emphasis in original, citation omitted).

<sup>499</sup> *Nixon v. GSA*, 433 U.S. 425, 440 (1977); *see also* Michael Stern, *The Absence of Any Executive Privilege by a Former President for National Security Secrets*, Just Security (Sept. 9, 2022), <https://www.justsecurity.org/83012/the-absence-of-any-executive-privilege-by-a-former-president-for-national-security-secrets/>.

#### 4. The Subpoena and Search Were Properly Predicated

There is an additional potential defense under the PRA that Trump has never raised, namely, that the grand jury subpoena and search of MAL were not properly predicated because NARA was not authorized to turn over to the FBI any materials it received from Trump. Without those documents, there would be no predicate for the subpoena or search. If it was unlawful for NARA to turn the documents over to the FBI, then Trump could argue that the materials recovered as part of the subpoena and search must be excluded from any potential criminal proceeding as fruit of the poisonous tree.

There are two arguments Trump could offer to suggest that the transfer of documents by NARA to the FBI was illegal. First, The PRA permits NARA to make Presidential records available “to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President’s office and that is not otherwise available.”<sup>500</sup>

Trump could have—but to date has not—argued that the government has never established that the documents he returned to NARA in January 2022 were “not otherwise available,” and therefore, NARA was not permitted to turn them over to the FBI. Second, the PRA permits documents to be made available for this reason “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke.”<sup>501</sup> Trump also could have—but to date also has not—argued that because the documents were subject to executive privilege, it was unlawful for the documents to be shared with the FBI.

##### The documents were “not otherwise available” to the FBI

The documents that were placed in an unsecured environment for twelve to eighteen months, were not otherwise available as the U.S. intelligence community needed to assess the damage from the potential disclosure of these specific documents and the Department of Justice needed to assess these specific documents as part of its criminal investigation, including forensic analysis. What’s more, with the January 2022 documents, many of the “highly classified records were unfolded, intermixed with other records, and otherwise improperly [sic] identified.”<sup>502</sup> The August search found documents stored in a similar manner.<sup>503</sup> The FBI had a need to assess the documents in the precise state and manner in which they were provided to NARA or found at MAL, including documents that appeared to have been altered or mutilated (by removing their classified cover sheets) or intermixed with other materials. Some documents were apparently unique in other ways as well, including documents marked with handwritten notes by the former

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<sup>500</sup> 44 U.S.C. § 2205(2)(B).

<sup>501</sup> 44 U.S.C. § 2205(2).

<sup>502</sup> Warrant Affidavit, ¶ 24.

<sup>503</sup> Revised Detailed Property Inventory Pursuant to Court’s Preliminary Order, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 116-1 (Sept. 26, 2022), at p. 4-10; Perry Stein & Jacqueline Alamany, *FBI list shows empty classified folders, secret items mixed with mundane*, Washington Post (Sept. 2, 2022), <https://www.washingtonpost.com/national-security/2022/09/02/fbi-inventory-mar-a-lago/>.

President. In these respects, the documents were “not otherwise available” and so were properly turned over to the FBI.

### Trump likely waived these defenses

Trump never raised these defenses during his lawyers’ extensive correspondence with NARA about the FBI referral. It is of particular note that disclosure by NARA under the PRA is subject to any privileges that a person with the right to do so “may invoke.” Trump never invoked privilege at the time when it might have mattered, despite having been specifically invited to do so over several weeks as indicated in NARA’s letter dated May 10, 2022 (other than by a blanket “protective assertion of executive privilege”).<sup>504</sup> Moreover, any challenge on this ground would also need to be brought in the District of D.C.<sup>505</sup> Trump brought no such challenge even though the Government purposely gave him a window of time to file a suit. Additionally, to the extent there is any merit to a potential fruit of the poisonous tree argument, a court is unlikely to exclude the evidence because the relevant government officers acted in good faith reliance on a court’s determination to sign the search warrant after being apprised of the material facts.<sup>506</sup>

### The FBI could have obtained the documents by subpoena

Even if Trump could somehow establish that NARA should not have turned over the documents to the FBI, any error would be harmless because the FBI had other available means for obtaining them—at least on the ground that they were “otherwise available.” Specifically, the PRA permits disclosure “pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding.”<sup>507</sup> That provision is not subject to the condition that the records be “not otherwise available.”

## **Section C. FBI and DOJ Misconduct**

### **1. Planted Evidence**

Trump has insinuated in public remarks (but never before a court) that the FBI could have planted some or all of the classified documents found at MAL in the August search. For example, shortly after the search, he posted on Truth Social, “Everyone was asked to leave the premises, they wanted to be left alone, without any witnesses to see what they were doing, taking

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<sup>504</sup> Letter from Debra Steidel Wall to Evan Corcoran, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 48-1 (Aug 30, 2022), at pp. 6–9. NARA’s May 10 letter made clear its final determination, which was made “in consultation with the Assistant Attorney General for the Office of Legal Counsel,” that the documents were not covered by executive privilege, and indeed that “[t]he question in this case is not a close one.” *Id.*

<sup>505</sup> 44 U.S.C. § 2204(e).

<sup>506</sup> See generally *United States v. Leon*, 468 U.S. 897 (1984).

<sup>507</sup> 44 U.S.C. § 2205(2)(A).

or, hopefully not, ‘planting.’”<sup>508</sup> If the documents were in fact planted, it would be a complete defense to each of the three potential charges.

#### The available evidence strongly undermines this defense

Trump has also claimed on Truth Social that the FBI “took [the documents] out of cartons and spread them around on the carpet,” which appears to concede that they were stored at MAL.<sup>509</sup> Trump’s lawyers have not even so much as suggested in their filings that any documents were planted.

Indeed, there would presumably be some evidence if documents were in fact planted, such as witnesses, a paper trail, or surveillance footage.<sup>510</sup> In all events, Trump has the opportunity to make this claim and present any supporting evidence to the Special Master, and his lawyers’ resistance to doing so is telling. It is also nonsensical that the FBI would plant documents that are of such a highly sensitive nature that the Bureau would not want to use them in proving a criminal case.

#### Trump was not unjustly singled out by the FBI or DOJ

Since the FBI search at Mar-a-Lago, Trump has claimed that he was unjustly targeted by the FBI and/or DOJ, especially compared to Biden and Pence. In numerous public references to the Biden and Pence classified documents, Trump has even suggested that the FBI “raid” Biden’s offices and home.<sup>511</sup> Should he be charged, Trump will surely make much of the fact that Biden and Pence also were in possession of classified documents, and do not appear to face imminent prosecution. Those other cases do not however feature the same pattern of repeated apparent obstruction. This argument, therefore, flies in the face of the well-documented fact that both Biden and Pence cooperated with government investigations while Trump repeated his pattern of obstruction, necessitating a search of his property.<sup>512</sup> It is for that reason unlikely to succeed.

#### Trump’s other defenses are inconsistent with the documents being planted

As discussed above, Trump has also suggested that the documents were declassified and/or privileged and/or designated as personal, that the FBI could have had the documents at any time

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<sup>508</sup> Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 10, 2022, 06:56), <https://truthsocial.com/@realDonaldTrump/posts/108798211943189544>.

<sup>509</sup> Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 31, 2022, 17:14), <https://truthsocial.com/@realDonaldTrump/posts/108919551852852903>.

<sup>510</sup> Gabby Orr, Sara Murray, Kaitlan Collins & Katelyn Polantz, *Trump considering releasing surveillance footage of FBI Mar-a-Lago search*, CNN (Aug. 17, 2022), <https://www.cnn.com/2022/08/17/politics/trump-release-surveillance-footage-fbi-mar-a-lago/index.html>.

<sup>511</sup> See e.g. Donald J. Trump (@realDonaldTrump), Truth Social, Jan 9, 2023, 18:44), <https://truthsocial.com/@realDonaldTrump/posts/109661904369525194>.

<sup>512</sup> Eisen, Norman, *Opinion: I worked on document handling issues in government. Here’s why Biden’s and Trump’s cases are different*, CNN (Jan. 13, 2023), <https://www.cnn.com/2023/01/13/opinions/appointment-special-counsel-biden-documents-case-eisen/index.html>.

if they had simply asked for them, and that he wants them returned to him. Each of these claims entails that Trump knew the documents were at MAL and found there during the search.

## **2. Unreasonable Search**

In his initial motion for appointment of a special master, Trump asserted that the Government's actions "raise[d] fundamental Fourth Amendment concerns,"<sup>513</sup> and contended that the warrant was "facially overbroad"<sup>514</sup> and that the warrant affidavit may have contained material misstatements or omissions.<sup>515</sup> If true, this could be grounds for suppression of any seized evidence under the fruit of the poisonous tree doctrine, discussed above. However, Trump has not pressed this claim in subsequent filings, and indeed even Judge Cannon found in her decision appointing a special master that "there has not been a compelling showing of callous disregard for Plaintiff's constitutional rights."<sup>516</sup> The search warrant was also conventional in its scope and application and the good faith exception would thus apply in any event.

### **Section D. Advice of Counsel**

Advice of counsel is an affirmative defense, that the defendant must prove by a preponderance of the evidence. The elements of the defense are that a defendant made "a complete disclosure to counsel, [sought] advice as to the legality of the contemplated action, [was] advised that the action is legal, and relie[d] on that advice in good faith."<sup>517</sup> Even seeking the defense can be extremely risky for a defendant, because raising the defense waives attorney-client privilege.<sup>518</sup> In this case, that would mean Trump's lawyers could be subpoenaed and questioned under oath as to what specific advice they provided Trump. That said, the Department may choose to do so in any case with some of Trump's attorneys on the basis of the crime-fraud exception (see analysis above in Part III.A.2 n. 247). Indeed, in March 2023 Trump counsel Corcoran was forced to give evidence before a federal grand jury after Judge Howell, in a sealed order, found that DOJ prosecutors had met the evidentiary threshold necessary to pierce attorney-client privilege.<sup>519</sup> Howell "made clear she believed the government had met the threshold, for both

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<sup>513</sup> Motion for Judicial Oversight and Additional Relief, Case No. 9:22-cv-81294, SD Florida, (Aug. 22, 2022), at p. 10, <https://s3.documentcloud.org/documents/22161730/trump-request-for-judicial-review-of-search.pdf>.

<sup>514</sup> *Id.* at p. 11.

<sup>515</sup> *Id.* at p. 12-13.

<sup>516</sup> Order, S.D. Fla. Case No. 9:22-cv-81294-AMC, Doc. No. 64 (Sept. 5, 2022), at p. 9, <https://www.justsecurity.org/wp-content/uploads/2022/09/order-by-federal-district-court-judge-cannon-special-master-september-5-2022.pdf>.

<sup>517</sup> *United States v. West*, 392 F.3d 450, 457 (D.C. Cir. 2004).

<sup>518</sup> *United States v. Crowder*, 325 F. Supp. 3d 131, 137-38 (D.D.C. 2018) (citing *United States v. White*, 887 F.2d 267, 270 (D.C. Cir. 1989)); *Cox v. Adm'r U.S. Steel*, 17 F.3d 1386, 1417-21 (11th Cir. 1994).

<sup>519</sup> Kaitlan Collins, Devan Cole and Katelyn Polantz, Trump attorney ordered to testify before grand jury investigating former president, CNN (March 18, 2023), <https://edition.cnn.com/2023/03/17/politics/evan-corcoran-testimony-trump-lawyer/index.html>.

obstructing the grand jury proceeding and ‘unauthorized retention of national defense information,’” according to the person familiar with what she wrote.<sup>520</sup>

Additionally, the defense of advice of counsel does not apply in circumstances where the lawyer is found to be an accomplice.<sup>521</sup> It is likely that any of the lawyers who Trump would claim provided him such advice may be accomplices in the criminal acts discussed above, including obstruction and retention of national defense information.

Trump would also have to establish, by a preponderance of the evidence, that he was fully forthcoming with attorneys about his acts of concealing and retaining national defense information to avail himself of this defense.<sup>522</sup> The evidence suggests that is not the case here. For example, as discussed above, in January 2022, “Trump had overseen the packing process himself with great secrecy, declining to show some items even to top aides.”<sup>523</sup> In spring 2022, Trump “insist[ed] to his advisers that he has returned everything and is unwilling to discuss the matter further.”<sup>524</sup> In October 2022, Christina Bobb, Trump’s counsel who acted as his custodian of records,<sup>525</sup> told investigators she had been led to believe there were no other responsive documents and no responsive documents retained.<sup>526</sup>

It is also highly unlikely an attorney would have provided an assessment that the retention of these government records was lawful. Indeed, in a letter to the Justice Department, Trump’s attorneys highlighted that they had posed “no legal objection” to NARA’s recovering the records in January 2022;<sup>527</sup> nor did they state any objections to turning over the documents marked as classified in response to a subpoena in June 2022. And in a court hearing concerning the August document, Trump’s counsel said, “What we are talking about here, in the main, are Presidential records in the hands of the 45th President,”<sup>528</sup> and in a court filing his counsel said that

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<sup>520</sup> Alan Feuer and Maggie Haberman, Mar-a-Lago Worker Provided Prosecutors New Details in Trump Documents Case, New York Times, (May 25, 2023), <https://www.nytimes.com/2023/05/25/us/politics/mar-a-lago-trump-classified-documents.html>.

<sup>521</sup> *United States v. West*, 392 F.3d 450, 456-57 (D.C. Cir. 2004).

<sup>522</sup> *Sec. & Exch. Comm’n v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981).

<sup>523</sup> Rosalind S. Helderman, *Trump and the Mar-a-Lago documents: A timeline*, Washington Post (Aug. 30, 2022), <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>.

<sup>524</sup> Luke Broadwater, Katie Benner & Maggie Haberman, *Inside the 20-Month Fight to Get Trump to Return Presidential Material*, New York Times (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/politics/trump-documents-search-timeline.html>.

<sup>525</sup> Certification signed by Christina Bobb and prepared by Christina Bobb and Evan Corcoran (Jun. 3, 2022), reprinted in Justice Department Attachments (Aug. 30, 2022), at p. 16, <https://www.justsecurity.org/wp-content/uploads/2022/09/departments-of-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

<sup>526</sup> Glenn Thrush, Maggie Haberman & Michael S. Schmidt, *She Went Out on a Limb for Trump. Now She’s Under Justice Dept. Scrutiny.*, New York Times (Oct. 11, 2022), <https://www.nytimes.com/2022/10/11/us/politics/christina-bobb-trump-lawyer-investigation.html>.

<sup>527</sup> Corcoran Letter, at p. 1.

<sup>528</sup> Transcript of Hearing, S.D. Fla. Case No. 9:22-cv-81294-AMC (Sept. 1, 2022), at pp. 8:23-24.

presidential records recovered in the August search should be returned to the Archives rather than remain in Trump's custody.<sup>529</sup>

In addition, Trump's legal advisers attempted to get the former president to return the documents to NARA. Trump's White House Counsel Pat Cipollone determined the documents should be returned before leaving office.<sup>530</sup> In Fall 2021, Trump's lawyer who was acting as his intermediary with NARA, Alex Cannon "warned Mr. Trump ... that officials at the archives were serious about getting their material back, and that the matter could result in a criminal referral."<sup>531</sup> Trump's former White House lawyer Eric Herschmann "warned him late last year that Mr. Trump could face legal liability if he did not return government materials he had taken with him when he left office."<sup>532</sup> Herschmann "sought to impress upon Mr. Trump the seriousness of the issue and the potential for investigations and legal exposure if he did not return the documents, particularly any classified material."<sup>533</sup> Trump's former Deputy White House Counsel Pat Philbin repeatedly tried to get Trump to return the documents to NARA, but he was rebuffed. "Philbin tried to help the National Archives retrieve the material, two of the people familiar with the discussions said. But the former president repeatedly resisted entreaties from his advisers."<sup>534</sup> Eventually, Philbin and another former White House lawyer, John Eisenberg, decided to distance themselves from the document dispute, refusing to go to the Archives to review the documents recovered in January.<sup>535</sup> Notably, three of these lawyers – Cipollone, Philbin, and Eisenberg – played a special role with NARA. Trump had designated them among a small group to represent him before NARA.<sup>536</sup>

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<sup>529</sup> Trump S.D. Fla. Stay Opp. at 3 ("What is clear regarding all of the seized materials is that they belong with either President Trump (as his personal property to be returned pursuant to Rule 41(g)) or with NARA, but not with the Department of Justice."); Trump 11th Cir. Stay Op. at p. 15 n.6 (same).

<sup>530</sup> Josh Dawsey & Jacqueline Alemany, *Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says*, Washington Post (Aug. 24, 2022), <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/> (reporting that former White House Counsel Pat Cipollone determined that "roughly two dozen boxes" of records should have been transferred to NARA in the final days of Trump's presidency, yet were not).

<sup>531</sup> Maggie Haberman & Michael S. Schmidt, *Lawyer Declined Trump Request to Tell Archives All Material Was Returned*, New York Times (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/us/politics/trump-alex-cannon-archives.html>.

<sup>532</sup> Maggie Haberman, *Trump Was Warned Late Last Year of Potential Legal Peril Over Documents*, New York Times (Sept. 19, 2020), <https://www.nytimes.com/2022/09/19/us/politics/trump-herschmann-documents.html>.

<sup>533</sup> *Id.*

<sup>534</sup> Maggie Haberman, *F.B.I. Interviewed Top White House Lawyers About Missing Trump Documents*, New York Times (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/trump-cipollone-philbin-interviews-fbi.html>.

<sup>535</sup> Josh Dawsey, et al, *FBI's Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>; and Rosalind S. Helderman, *Trump and the Mar-a-Lago documents: A timeline*, Washington Post (Aug. 30, 2022), <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>.

<sup>536</sup> Donald Trump, Letter to the Hon. David S. Ferriero, Archivist of the United States (Jan. 19, 2021), <https://www.archives.gov/files/foia/wh-ltr-to-u.s.-archivist-trump-pra-rep-1.19.2021.pdf>.

Furthermore, as noted above (Part I.D.4), Corcoran’s contemporaneous notes reveal that he advised Trump that the former president was obliged to turn over all classified documents in response to the May 2022 subpoena.<sup>537</sup> Indeed, Corcoran testified before the grand jury “that several Trump employees had told him that the Mar-a-Lago storage room was the only place where the documents were kept.”<sup>538</sup> “Mr. Corcoran also recounted to the grand jury how Mr. Trump did not tell his lawyers of any other locations where the documents were stored, which may have effectively misled the legal team.”<sup>539</sup>

Finally, even if Trump somehow found a lawyer to advise him differently, it would be to no avail in light of the overwhelming times he was told of the illegality of retaining such documents (including repeatedly being placed on notice by NARA and the Justice Department’s Chief of Counterintelligence and Export Control<sup>540</sup>). As the courts have held:

For reliance on a lawyer’s opinion to negate a mental state, that reliance must be reasonable and in good faith. “If a person is told by his attorney that a contemplated course of action is legal but subsequently discovers the advice is wrong or discovers a reason to doubt the advice, he cannot hide behind counsel’s advice to escape the consequences of his violation.”<sup>541</sup>

### **Section E. Lack of Responsibility for Removal of Documents from the White House**

Trump’s legal team has sought to defend his storing of classified documents by contending that the documents were accidentally transported from the White House to Mar-a-Lago amidst a rushed and hectic transition process. In an April 26, 2023 letter to the Chairman of the House Select Committee on Intelligence, Trump’s legal counsel argued that the removal of classified documents from the White House to Mar-a-Lago was due to “deficient document handling and storage procedures.” The letter claims that “due to other demands on his time,” Trump directed his staff to send the 15 boxes of documents to NARA in January 2022 without him or his staff personally reviewing the boxes. Two of Trump’s attorneys – Tim Parlatore and Jim Trusty – reviewed the 15 boxes of documents at NARA, and determined that the majority were “briefings for phone calls with foreign leaders that were located near the schedule for those calls.” This discovery and the “organization of materials” led to their assertion that “the White House staff

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<sup>537</sup> Paula Reid, Kaitlan Collins, Katelyn Polantz, Kristen Holmes and Sara Murray, *Trump’s attorney took notes that say the former president wanted to fight subpoena for classified docs*, CNN (May 22, 2023), <https://amp.cnn.com/cnn/2023/05/22/politics/trump-subpoena-classified-documents-mar-a-lago/index.html>.

<sup>538</sup> Maggie Haberman, Adam Goldman, Alan Feuer, Ben Protess and Michael S. Schmidt, Justice Dept. Intensifying Efforts to Determine if Trump Hid Documents, New York Times (May 4, 2023), <https://www.nytimes.com/2023/05/04/us/politics/trump-documents-subpoenas-justice-department.html>.

<sup>539</sup> *Id.*

<sup>540</sup> See Summary of Known Facts, Part I.D.2 Government Warnings and Notifications in 2021, and Part I.D.3 Government Warnings and Notifications in 2022.

<sup>541</sup> *United States v. Philpot*, 733 F.3d 734, 745 (7th Cir. 2013) (citations of other cases omitted).

simply swept all documents from the President’s desk and other areas into boxes, where they have resided ever since.”<sup>542</sup>

Further, the letter states that during the presidential transition process, NARA “declined to provide archival assistance to President Trump’s transition team,” and therefore NARA “did not take custody of the documents” which “made necessary the transfer of boxes of documents to President Trump’s heavily secured home at Mar-a-Lago.” The Trump lawyers contend that “had NARA offered President Trump the same assistance that it had provided to all previous Presidents, he would have accepted the offer and *there would have been no reason to transfer the documents to Mar-a-Lago*” (emphasis in original).<sup>543</sup>

The arguments in the letter, however, are irrelevant to the six central offenses discussed in this memorandum. Even if it is accepted that Trump lawfully or unknowingly took documents, it does not excuse his continued retention of them at Mar-a-Lago, nor his refusal to return them following numerous requests from the Government. Since the gravamen of charges as set out in this prosecution memo focuses on Trump’s willful retention of the documents as well as his obstruction of federal agencies’ attempts to retrieve them, the assertion that removal of the documents from the White House was by mistake or inadvertence offers no defense to the relevant charges. At best, it would offer an explanation as to his illegal taking of the documents but offers no defense for his continued retention, nor his refusal to comply with Government requests.

Further, it is of no legal significance whether NARA offered “archival assistance” to Trump’s transition team because it has no bearing on Trump’s knowledge. As to the letter’s claim that neither Trump nor his staff knew what was in the 15 boxes recovered by NARA in January 2022, that claim is also implausible given the background of the production. As described in Section I.B, the boxes were turned over following months of negotiation between NARA and members of Trump’s legal team. Despite the letter’s suggestion that Trump and his team were too busy to review the contents of the boxes before they were sent to NARA, the letter offers no explanation as to why those particular boxes were chosen—nor any explanation as to why so many other boxes would have been withheld. It also is contradicted by Trump’s own statements in the CNN Town Hall as well as the corpus of evidence discussed in Part I Section C (“Trump’s direct knowledge and involvement in handling the government documents”).

## **Section F. Defense of Lack of Knowledge of Subordinates’ Actions**

A common defense for a senior leader of an organization or group of individuals is that they lacked the requisite knowledge of their subordinates’ wrongful actions. The relevant statutes here require proof that a defendant acted willfully or with knowledge. Accordingly, if Trump lacked

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<sup>542</sup> Trump Lawyers’ letter to House Intelligence Committee Chair Mike Turner (R-Ohio) (April 26, 2023), <https://www.justsecurity.org/wp-content/uploads/2023/05/letter-from-the-parlatore-law-group.pdf>.

<sup>543</sup> *Id.*

knowledge of government documents or NDI being stored at MAL or was at most reckless in his oversight of the relevant matters, then he would have a defense to these statutes (with a caveat for willful blindness that is not necessary to our discussion).

The overwhelming evidence in this case suggests that this kind of defense is not available for Trump. We discussed the evidence of his knowledge and intentionality in Part III.A. For present purpose of evaluating this specific defense, we highlight some significant parts of the evidentiary record:

- Trump’s staff told FBI agents that he had been “personally overseeing his collection of White House records since even before leaving Washington and had been reluctant to return anything.”<sup>544</sup>
- In January 2021, Trump personally helped pack the boxes with presidential records to be sent to MAL.<sup>545</sup>
- In summer 2021, “Trump show[ed] off the letters from Mr. Kim, waving them at people in his office, where some boxes of material from the White House are being stored.”<sup>546</sup>
- In September 2021, Trump’s representative to NARA, Patrick Philbin, told NARA’s General Counsel Gary Stern that Mark Meadows had informed him that the boxes contained nothing sensitive but only “news clippings.”<sup>547</sup> Meadows obtained that information directly from Trump.<sup>548</sup>
- In late October or early November 2021, “Trump told advisers[] he would return to the National Archives the boxes of material he had taken to Mar-a-Lago” in exchange for NARA releasing documents related to the FBI’s investigation into his 2016 campaign’s ties to Russia.<sup>549</sup>

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<sup>544</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>545</sup> Shane Harris, Josh Dawsey, Ellen Nakashima & Jacqueline Alemany, *In Trump White House, classified records routinely mishandled, aides say*, Washington Post (Oct. 4, 2022), <https://www.washingtonpost.com/national-security/2022/10/04/trump-classified-documents-meadows/>.

<sup>546</sup> Luke Broadwater, Katie Benner and Maggie Haberman, *Inside the 20-Month Fight to Get Trump to Return Presidential Material*, New York Times (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/politics/trump-documents-search-timeline.html>; see also Maggie Haberman, *Confidence Man: The Making of Donald Trump and the Breaking of America* (2022).

<sup>547</sup> Jacqueline Alemany, Josh Dawsey & Rosalind S. Helderman, *Trump team claimed boxes at Mar-a-Lago were only news clippings*, Washington Post (Sept. 16, 2022), <https://www.washingtonpost.com/national-security/2022/09/16/trump-records-archives-clippings/>.

<sup>548</sup> Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

<sup>549</sup> Maggie Haberman & Michael S. Schmidt, *How Trump Deflected Demands for Documents, Enmeshing Aides*, New York Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

- In December 2021, after Trump decided to return some boxes to NARA, his attorney Alex Cannon “told associates that the boxes needed to be shipped back as they were, so the professional archivists could be the ones to sift through the material.”<sup>550</sup> Nevertheless, Trump elected “to go through them.”<sup>551</sup> “Trump himself eventually packed the boxes that were returned in January [2022], people familiar with the matter said.”<sup>552</sup>
- In December 2021, “Trump had overseen the packing process himself with great secrecy, declining to show some items even to top aides.”<sup>553</sup> “Philbin and another adviser ... have told others that they had not been involved with the process and were surprised by the discovery of classified records.”<sup>554</sup>
- In February 2022, Trump directed his legal counsel Alex Cannon, who had been acting as an intermediary with NARA, to make a false statement to NARA “that Trump had returned all materials requested by the agency.”<sup>555</sup> Cannon refused on the ground that he did not believe the statement to be true.<sup>556</sup> As a result, Cannon was excluded from documents-related discussions.<sup>557</sup>
- Trump instructed staff “to move boxes to his residence after his advisers received the subpoena.”<sup>558</sup> “A Trump employee [Walt Nauta] has told federal agents about moving boxes of documents at Mar-a-Lago at the specific direction of the former president.”<sup>559</sup> “The boxes that Nauta is said to have moved at Trump’s direction at Mar-a-Lago also contained classified documents mixed with newspaper articles, according to people

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<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> Josh Dawsey & Jacqueline Alemany, *Trump’s lawyer refused his request in February to say all documents returned*, Washington Post (Oct. 3, 2022), <https://www.washingtonpost.com/national-security/2022/10/03/trump-alex-cannon-documents/>.

<sup>553</sup> Rosalind S. Helderman, *Trump and the Mar-a-Lago documents: A timeline*, Washington Post (Sept. 8, 2022), <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>; Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>554</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

<sup>555</sup> Josh Dawsey & Jacqueline Alemany, *Trump’s lawyer refused his request in February to say all documents returned*, Washington Post (Oct. 3, 2022), <https://www.washingtonpost.com/national-security/2022/10/03/trump-alex-cannon-documents/>.

<sup>556</sup> *Id.*

<sup>557</sup> *Id.*

<sup>558</sup> Devlin Barrett, Josh Dawsey & Shane Harris, *Key Mar-a-Lago witness said to be former White House employee*, Washington Post (Oct. 13, 2022), <https://www.washingtonpost.com/national-security/2022/10/13/walt-nauta-maralago-trump-documents/>.

<sup>559</sup> Devlin Barrett & Josh Dawsey, *Trump worker told FBI about moving Mar-a-Lago boxes on ex-president’s orders*, Washington Post (Oct. 12, 2022), <https://www.washingtonpost.com/national-security/2022/10/12/maralago-witness-trump-boxes-moved/>.

familiar with the case.”<sup>560</sup> “[A]fter they were taken to the residence, Trump looked through at least some of them and removed some of the documents. At least some of the boxes were later returned to the storage room, this person said, while some of the documents remained in the residence.”<sup>561</sup>

- Trump attorney Corcoran's contemporaneous notes “revealed how Trump and Nauta had unusually detailed knowledge of the botched subpoena response, including where Corcoran intended to search and not search for classified documents at Mar-a-Lago, as well as when Corcoran was actually doing his search.”<sup>562</sup>
- Trump told his aides he wanted to retain documents requested by NARA. “‘It’s not theirs; it’s mine,’ several advisers say Mr. Trump told them.”<sup>563</sup> “Again and again, he reacted with a familiar mix of obstinance and outrage, causing some in his orbit to fear he was essentially daring the FBI to come after him.”<sup>564</sup>
- Government documents were commingled with personal belongings including in the desk drawers of Trump’s office at MAL.
- In a series of self-incriminating admissions following the August search (see Factual Summary), Trump admitted he held documents that the Government wanted, knew where they were stored at MAL, and how they were packaged.

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<sup>560</sup> Devlin Barrett, Josh Dawsey & Shane Harris, *Key Mar-a-Lago witness said to be former White House employee*, Washington Post (Oct. 13, 2022), <https://www.washingtonpost.com/national-security/2022/10/13/walt-nauta-maralago-trump-documents/>.

<sup>561</sup> *Id.*

<sup>562</sup> Hugo Lowell, Trump was warned about retaining classified documents, notes reveal, The Guardian (May 22, 2023), <https://www.theguardian.com/us-news/2023/may/22/trump-warning-classified-documents-mar-a-lago>.

<sup>563</sup> Maggie Haberman, *F.B.I. Interviewed Top White House Lawyers About Missing Trump Documents*, New York Times (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/trump-cipollone-philbin-interviews-fbi.html>.

<sup>564</sup> Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump*, Washington Post (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

## **Conclusion**

The Department's own precedent makes clear that charging Trump would be to treat him comparably to others who engaged in similar criminal behavior, often with far fewer aggravating factors than the former president. Based on the publicly available information to date, a powerful case exists for charging Trump under the federal criminal statutes discussed in this memorandum.

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**Appendix: Table of DOJ Precedents for Simple Retention Cases  
(In Absence of Charges or Allegations of Dissemination)**