

Mar-a-Lago Model Prosecution Memo

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Executive Summary

This model prosecution memorandum (or “pros memo”) assesses the potential charges against former President Donald Trump 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 there is a strong basis to charge Trump.

Before indicting a case, prosecutors prepare a 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 prosecution. Before a decision is made about this matter, prosecutors will prepare such a memo.

But such a DOJ memo will be confidential, in part because it will contain information derived through the grand jury and attorney work product. Since that document will not be publicly available, we offer this analysis. Ours is likely more detailed than what DOJ may prepare internally. 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:

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, False Information, Contempt

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)

Based on the publicly available information to date, a powerful case exists for charging Trump under several of these federal criminal statutes.

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.”¹ 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,”² 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 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 ultimate charging decision. Instead, we stop at noting that there is a strong basis to charge based upon the public record, and that charges would be called for by Department precedent in like cases.³

Substance

The model prosecution memo proceeds in five parts.

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

² Department of Justice, *Attorney General Merrick Garland Delivers Remarks* (Aug. 11, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-garland-delivers-remarks>.

³ 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, and the U.S. Court of Appeals for the Eleventh Circuit, related to the criminal investigation mentioned in this report. For more information, please see (<https://democracy21.org/category/news-press/press-releases>).

Part I. Known and Reported 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 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

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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' 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.

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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 Section 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 Section 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 Sections 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

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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.

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Part I: Summary of 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.⁴ 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.”⁵

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 totalling 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.⁶ The highly classified documents reportedly included information, for example, on a foreign country’s nuclear weapons

⁴ 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.

⁵ 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>.

⁶ 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,⁷ Iran’s missile program, and highly sensitive intelligence work aimed at China.⁸ The FBI also recovered 46 empty folders with classified banners.⁹

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.”¹⁰ “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.”¹¹ 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.”¹²

⁷ 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/>.

⁸ 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/>.

⁹ 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>.

¹⁰ 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/>.

¹¹ *Id.*

¹² 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.”).

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“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.”¹³ 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.”¹⁴ 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.”¹⁵ “Archives officials made clear that even newspaper clippings and printouts of articles seen by Mr. Trump in office were considered presidential records.”¹⁶ In addition, “top Archives officials continued to believe there was more material than they were being told about”¹⁷ and “throughout the fall of 2021, Stern continued to urge multiple Trump advisers to help the Archives get the records back.”¹⁸

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.¹⁹ “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.”²⁰

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.”²¹ “Trump only

¹³ 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>.

¹⁴ 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/>.

¹⁵ 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>.
¹⁶ *Id.*

¹⁷ 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/>.

¹⁸ 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/>.

¹⁹ 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>.
²⁰ *Id.*

²¹ 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>.

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

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.”²⁴ 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.”²⁵ 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.”²⁶

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.”²⁷ Cannon refused on the ground that he was not sure the statement was true.²⁸ “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.”²⁹

²² 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/>.

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

²⁴ 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>
²⁵ 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>.

²⁶ 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/>.

²⁷ 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/>.

²⁸ *Id.*

²⁹ 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/>.

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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 markings.”³⁰ On June 3, 2022, Trump responded by providing the Justice Department with only 37 documents marked as classified,³¹ 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.”³²

Trump’s counsel told the Department and FBI officials that “based upon the information that has been provided to me” (Christina Bobb),³³ and based on what he was “advised” (Evan Corcoran³⁴), 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.”³⁵

³⁰ 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>.

³¹ 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).

³² 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>.

³³ 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>.

³⁴ 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>.

³⁵ 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.”

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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.”³⁶

“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 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.”³⁷

During the June 3 search, 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.”³⁸ As the Government previously explained, “Critically, however, the former President’s counsel explicitly prohibited government personnel from opening or looking inside any of the boxes that remained in the storage room, giving no opportunity for the government to confirm that no documents with classification markings remained.”³⁹

“[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

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>.

“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 Bobbs 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-rena51459>.

³⁶ 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>.

³⁷ 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/>.

³⁸ 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>

³⁹ 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>.

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."⁴⁰

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."⁴¹

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 Administration."⁴² "He and others put briefing books, gifts, news clippings and other possessions into boxes."⁴³ 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."⁴⁴

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."⁴⁵ Nevertheless, Trump elected "to go through them."⁴⁶ "Trump himself eventually packed the boxes that were returned

⁴⁰ *Id.* at p. 10-11.

⁴¹ 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/>.

⁴² 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/>.

⁴³ 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/>.

⁴⁴ 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.").

⁴⁵ 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>.

⁴⁶ *Id.*

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in January [2022], people familiar with the matter said.”⁴⁷ “Trump had overseen the packing process himself with great secrecy, declining to show some items even to top aides.”⁴⁸ “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.”⁴⁹

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.”⁵⁰ “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.”⁵¹ “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.”⁵² “[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.”⁵³ 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.”⁵⁴

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,”⁵⁵ showing at a minimum Trump’s personal familiarity with the content of these records. Similarly, among the 37 documents

⁴⁷ 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/>.

⁴⁸ 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* (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

⁴⁹ Josh Dawsey, Carol D. Leonnig, Jacqueline Alemany & Rosalind S. Helderman, *FBI’s Mar-a-Lago search followed months of resistance, delay by Trump* (Aug. 23, 2022), <https://www.washingtonpost.com/national-security/2022/08/23/trump-records-mar-a-lago-fbi/>.

⁵⁰ 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/>.

⁵¹ 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/>.

⁵² 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/>.

⁵³ *Id.*

⁵⁴ 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>.

⁵⁵ 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>.

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recovered on June 3, 2022, “[m]ultiple documents also contained what appears to be FPOTUS's handwritten notes,”⁵⁶ 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.”⁵⁷ He repeated essentially that same statement twice more before the court.⁵⁸

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.⁵⁹ 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.”⁶⁰ Some of the personal belongings obtained along with the documents marked as classified in the FBI search postdated January 20, 2021,⁶¹ 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 with other records” including “post-presidential records.”⁶² 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.”⁶³

⁵⁶ *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).

⁵⁷ 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>.

⁵⁸ *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.”)

⁵⁹ 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>.

⁶⁰ 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>.

⁶¹ 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/>.

⁶² 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>.

⁶³ 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>.

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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.”⁶⁴

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?”⁶⁵

“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.’”⁶⁶

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.”⁶⁷

Note: In February 2022, “Trump asked his team to release a statement he had dictated. The statement said Trump had returned ‘everything’ the Archives had requested.”⁶⁸ “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

⁶⁴ 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>.

⁶⁵ 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>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 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/>.

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giving all documents over.”⁶⁹ The final statement is available online.⁷⁰

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.”⁷¹

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.”⁷²

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.

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.⁷³ The following week, McGahn issued a

⁶⁹ 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>.

⁷⁰ 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>.

⁷¹ 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>.

⁷² Donald J. Trump, Remarks at Mesa, Arizona Political Rally (Oct. 9, 2022), available at <https://twitter.com/Acyn/status/1579267214838231040>.

⁷³ 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>.

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“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.⁷⁴

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.”⁷⁵ 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.”⁷⁶

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.”⁷⁷

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 — 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

⁷⁴ 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>.

⁷⁵ 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/>.

⁷⁶ 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>.

⁷⁷ 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/>.

administration.⁷⁸ 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.⁷⁹ 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.”⁸⁰

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.⁸¹ The referral was widely reported in the national news media on that date.⁸² 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.”⁸³ 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 this request.”⁸⁴ On April 29, 2022, the Justice Department’s National Security Division alerted

⁷⁸ 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>.

⁷⁹ *Id.*

⁸⁰ 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>.

⁸¹ 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>.

⁸² Matt Zapposky, Jacqueline Alemany, Ashley Parker and 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/>.

⁸³ 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>.

⁸⁴ 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* (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.”).

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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 2022.⁸⁵

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.’”⁸⁶ The following day, May 11, 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 markings.”⁸⁷ 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.⁸⁸ 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 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.⁸⁹

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

⁸⁵ 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>.

⁸⁶ 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>.

⁸⁷ 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>.

⁸⁸ 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).

⁸⁹ 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>.

the Mar-a-Lago property ... from the time period of January 10, 2022 to present.”⁹⁰ Following the FBI search on August 8, 2022, “investigators have sought additional surveillance footage from the club.”⁹¹

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.”⁹² “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.”⁹³

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.”⁹⁴ In late 2021, 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.”⁹⁵

⁹⁰ 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>.

⁹¹ 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>.

⁹² 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>.

⁹³ 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>.

⁹⁴ 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>.

⁹⁵ 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>.

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

Section B. Obstruction, False Information, Contempt

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. Mishandling of Government Documents

1. Retention of National Defense Information (18 U.S.C. § 793(e))⁹⁶

Title 18, United States Code, Section 793(e), is one of several offenses under the Espionage Act,⁹⁷ a statute generally associated with classic leaking cases and foreign government spies.⁹⁸ It is generally thought to involve leaking classified information, although technically it requires the information to be “national defense information.”⁹⁹ The Act prohibits conduct that encompasses information and documents that relate to the national defense of the United States (“National Defense Information,” or “NDI”).¹⁰⁰ As discussed in Part IV below, significant precedent exists for the Department of Justice successfully prosecuting willful retention cases under 793(e).

⁹⁶ Title 18, United States Code, Section 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.”

⁹⁷ Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793 *et seq.*).

⁹⁸ 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; *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>.

⁹⁹ 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.

¹⁰⁰ *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 retention, of classified information by unauthorized possessors. 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

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Congress specifically addressed in Section 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 doubt¹⁰¹:

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].”¹⁰² Conversely, a person’s possession is “unauthorized” if she is “not entitled to have it.”¹⁰³ Essentially, “unauthorized possession” can 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

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.”).

¹⁰¹ 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.

¹⁰² *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.

¹⁰³ *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.”). 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.

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(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.¹⁰⁴

A defendant’s authorization status should be assessed as at 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 Section 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 Section 793(e) concern the retention of “classified information,” the gravamen of the offense is whether the document or information was related to national defense, not specifically whether it was classified.¹⁰⁵ The two terms are legally distinct:

¹⁰⁴ 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.

¹⁰⁵ 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

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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.”¹⁰⁶ However, not all defense-related information counts as NDI. It must be “directly and reasonably” connected with the U.S. national defense¹⁰⁷ and be “closely held,” meaning not available to members of the public at the time of the alleged retention.¹⁰⁸ 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.¹⁰⁹

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.”).

¹⁰⁶ *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).

¹⁰⁷ *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).

¹⁰⁸ *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”).

¹⁰⁹ *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”);

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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.¹¹⁰

Element 3: Willful retention

In relation to a defendant’s mens rea under the “document clause” of Section 793(e),¹¹¹ the Government must prove that the defendant intentionally retained documents that she knew she was prohibited by law from retaining.¹¹²

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.¹¹³ Retention due to mistake, negligence or inadvertence will not suffice.¹¹⁴ The Government must prove that the defendant knew her conduct was unlawful as a general matter

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.”).

¹¹⁰ *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985) (“*Morison II*”) (“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”).

¹¹¹ The “document clause” of Section 793(e) is addressed at Part II.A.1 n. 98.

¹¹² 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. Hitzelberger*, 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.

¹¹³ *Bryan v. United States*, 524 U.S. 184, 191-192 (1998). See also *Ratzlaf v. United States*, 510 U.S. 135 (1994); *United States v. Morison*, 844 F.2d 1057, 107 (4th Cir. 1988) (approving the following jury instruction defining willfulness: “An act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law.”); *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985) (“The government[] must show a bad purpose to break the law by delivering or retaining the items”); *United States v. Truong Dinh Hung*, 629 F.2d 908, 919 (4th Cir. 1980).

¹¹⁴ *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 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>.

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but is not required to show that the defendant knew the entire detail of *why* her conduct was unlawful,¹¹⁵ or the exact content of documents retained.¹¹⁶

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.”¹¹⁷

Additionally, the Government need not prove that the defendant’s actions were done with ill-intent to harm the United States or others.¹¹⁸

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

¹¹⁵ *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”).

¹¹⁶ 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.”).

¹¹⁷ 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.”).

¹¹⁸ *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985) (“*Morison II*”) (“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. McGuinness*, C.M.A. 1992, 35 M.J. 149, *cert. denied*, 113 S. Ct. 1364, 507 U.S. 951, 122 L. Ed. 2d 743.

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authorized location.¹¹⁹ Finally, acts of deception to evade detection are relevant evidence of the defendant's willfulness.¹²⁰

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.¹²¹ 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.

2. Concealing Government Records (18 U.S.C. § 2071(a))¹²²

Title 18, United States Code, Section 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

¹¹⁹ *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.”).

¹²⁰ *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><https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-of-America-v-Harold-T-Martin-III.pdf>.

¹²¹ *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))).

¹²² 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

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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, Section 2071(b), effectively criminalizes the same conduct as Section 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.¹²³

The legislative history of Section 2071, originally enacted in 1853, is “sparse,” with little in-depth discussion of the parameters of the statute’s reach.¹²⁴ The following principles can be drawn from the case law.

The courts have made clear that Section 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.”¹²⁵ 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;”¹²⁶ to preserve and protect those documents “as evidence relating to things which concern the public and the government;”¹²⁷ and to punish “the rendering of information unavailable to the

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.”

¹²³ *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 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>.

¹²⁴ *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.*

¹²⁵ *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)).

¹²⁶ *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.”).

¹²⁷ *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.”).

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Government.”¹²⁸ 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.”¹²⁹

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 a government record with the intent to conceal it.¹³⁰ 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.¹³¹

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.”¹³²

Most appellate courts have concluded that Section 2071 does not apply to photocopies or other duplicates of public records because the original document still exists and the Government was

¹²⁸ *United States v. Rosner*, 352 F. Supp. 915, 921 (S.D.N.Y. 1972).

¹²⁹ *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)).

¹³⁰ 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>.

¹³¹ 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.

¹³² *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>.

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never actually deprived of its use.¹³³ Those courts have held that the record must effectively be permanently removed or destroyed.¹³⁴ One Circuit Court has held – in an opinion that was subsequently reversed on other grounds – that Section 2071 does apply in situations where the document in question has not been essentially “obliterated” from the public record.¹³⁵

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 Section 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.¹³⁶

For the purposes of Section 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.¹³⁷ Importantly, two D.C. district courts have held that presidential records materials, including National Security Council documents, fall within the meaning of public record.¹³⁸

¹³³ *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.”).

¹³⁴ 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”).

¹³⁵ 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”).

¹³⁶ *McInerney v. United States*, 143 F. 729, 730-31 (1st Cir. 1906) (construing predecessor statute).

¹³⁷ See, e.g., *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951).

¹³⁸ *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

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.”¹³⁹ A deposited object is something “intrusted to the care of another, either for a permanent or a temporary disposition.”¹⁴⁰

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.¹⁴¹

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.”)

¹³⁹ See *United States v. De Groat*, at 765.

¹⁴⁰ *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 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>.

¹⁴¹ *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.”).

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.¹⁴² 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 documents themselves serve as notice to North that such papers should not be destroyed.”¹⁴³

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.”¹⁴⁴ Regardless, that intention need not be motivated by a bad purpose.¹⁴⁵

3. Conversion of Government Property (18 U.S.C. § 641)¹⁴⁶

Under Title 18, United States Code, Section 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

¹⁴² 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).

¹⁴³ *United States v. North*, 708 F. Supp. 364, 368-69 (D.D.C. 1988).

¹⁴⁴ 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*).

¹⁴⁵ *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).

¹⁴⁶ 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

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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.¹⁴⁷ 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 Section 641.

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.¹⁴⁸

The Government must prove the following elements beyond a reasonable doubt¹⁴⁹:

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;

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.”

¹⁴⁷ 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”).

¹⁴⁸ *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, (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).”).

¹⁴⁹ 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>.

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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.”¹⁵⁰ The essential element of the crime, then, is a “thing of value,” where the Government must have an “interest” in the property.¹⁵¹

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.”¹⁵² The Modern Federal Jury Instructions state that “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,¹⁵³ in which the Government need not prove that it suffered an actual property loss.¹⁵⁴

¹⁵⁰ *Morissette v. United States*, 342 U.S. 246, 248 (1952).

¹⁵¹ *United States v. Long*, 706 F.2d 1044 (9th Cir. 1983).

¹⁵² *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).”).

¹⁵³ 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).

¹⁵⁴ *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

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Whether the statute covers intangible information has never been answered by the Supreme Court.¹⁵⁵ 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.”¹⁵⁶

United States v. Howard, 787 F. Supp. 769, 771 (S.D. Ohio 1992), which suggested that a loss must be suffered by the Government).

¹⁵⁵ 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).

¹⁵⁶ *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 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.C. Cir. 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.”).

Importantly, the content of any classified or NDI document is unnecessary to establish whether a document should be considered Government property.¹⁵⁷

Element 2: Conversion

The statute criminalizes a broad range of behavior.¹⁵⁸ We focus on conversion, which under Section 641 has a broader meaning than under common law including “misuse or abuse” and “use in an unauthorized manner” of Government property.¹⁵⁹ Conversion for purposes of Section 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.”¹⁶⁰ As noted, the Government must prove that the defendant’s conversion “substantially” or “seriously” interfered with the Government’s property rights.¹⁶¹

¹⁵⁷ 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.”).

¹⁵⁸ *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 have escaped through the breaches. ... The codifiers wanted to reach all such instances.” *Morissette*, 342 U.S. at 271.

¹⁵⁹ *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”).

¹⁶⁰ 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)).

¹⁶¹ 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.

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The Supreme Court has given instructive comments on “conversion” under Section 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 purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.”¹⁶²

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 Section 641.¹⁶³

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,

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).

¹⁶² *Morrisette*, 342 U.S. at 272.

¹⁶³ *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>.

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that made the taking a conversion.”¹⁶⁴ 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.¹⁶⁵

Importantly, under Section 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.¹⁶⁶ Intent, here as elsewhere, may be proven by the defendant’s conduct and by all the circumstances surrounding the case.¹⁶⁷

Element 4: Value over \$1,000

Under Section 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.

¹⁶⁴ *Morissette 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.”).

¹⁶⁵ Although “willfulness” is not expressly stated in the statute, the majority of the circuits, as well as (but less affirmatively) the Supreme Court in *Morissette*, 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 *Morissette* 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 ‘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.”).

¹⁶⁶ *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.”).

¹⁶⁷ *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).

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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).¹⁶⁸

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.¹⁶⁹ This approach usually requires the Government to disclose the content of the 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.¹⁷⁰ 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.”¹⁷¹

¹⁶⁸ *United States v. Kroesser*, 731 F.2d 1509, 1516-17 (11th Cir. 1984).

¹⁶⁹ *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 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)].”).

¹⁷⁰ *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>.

¹⁷¹ *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.

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

Section B. Obstruction, False Information, Contempt

1. Obstruction of Justice (18 U.S.C. § 1519)¹⁷²

Title 18, United States Code, Section 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,¹⁷³ but spans much more, including concealment of documents.¹⁷⁴ 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.”¹⁷⁵

¹⁷² 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.”

¹⁷³ 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>.

¹⁷⁴ *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).”).

¹⁷⁵ *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

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The Government must prove the following elements beyond a reasonable doubt¹⁷⁶:

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
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, Section 1519 applies to “tangible objects,” objects that “one can use to record or preserve information,” but not “all objects in the physical world.”¹⁷⁷

Importantly, unlike under Section 1001, the Government need not prove that evidence concealed was material to the proceeding,¹⁷⁸ 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.”¹⁷⁹

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.”)

¹⁷⁶ 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).

¹⁷⁷ *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.”)

¹⁷⁸ 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).

¹⁷⁹ 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>. See also *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012).

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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.¹⁸⁰ 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.”¹⁸¹ 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.”¹⁸²

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.¹⁸³

¹⁸⁰ *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).

¹⁸¹ 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).

¹⁸² *United States v. Yielding*, 657 F.3d 688, 711 (8th Cir. 2011).

¹⁸³ *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>.

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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).¹⁸⁴

In line with the Supreme Court's dictum in *Yates*,¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

The Senate Report accompanying Section 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

¹⁸⁴ 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>.

¹⁸⁵ *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*.").

¹⁸⁶ *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>.

¹⁸⁷ *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).").

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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.”¹⁸⁸

2. Criminal Contempt (18 U.S.C. § 402)¹⁸⁹

Title 18, United States Code, Section 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 Section 401(3) in that it focuses on contemptuous acts committed outside of court (indirect contempt).¹⁹⁰ Unlike defendants charged under Section 401(3), defendants charged under Section 402 are generally statutorily entitled to a jury trial.¹⁹¹ Some case law on Section 402 suggests that if the contemptuous act also constitutes a criminal offense then the contempt must, as opposed to may, be prosecuted under 18 U.S.C. § 402.¹⁹²

¹⁸⁸ S.Rep. No. 107-146, (2002) at 14-15, <https://www.justsecurity.org/wp-content/uploads/2022/10/CRPT-107srpt146-1.pdf>.

¹⁸⁹ 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.”

¹⁹⁰ *United States v. Rangolan*, 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.

¹⁹¹ See 18 USC §§ 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).

¹⁹² 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*).

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Unjustified failure to comply with a grand jury subpoena requesting the production of documents can be charged as a criminal contempt.¹⁹³

The Government must prove the following elements beyond a reasonable doubt¹⁹⁴:

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.¹⁹⁵ 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.”¹⁹⁶ 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.¹⁹⁷

Element 2: Order was violated

The defendant must disobey, without lawful excuse, the order.¹⁹⁸ A court may punish a party for criminal contempt even though they eventually comply with the order.¹⁹⁹

¹⁹³ 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.

¹⁹⁴ *United States v. Allen*, 587 F.3d 246, 255 (5th 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 (4th Cir. 2010).

¹⁹⁵ 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 (11th Cir. 2007) (both “reasonably specific” and “clear, definite, and unambiguous”).

¹⁹⁶ 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 (11th Cir. 2001); *United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007); *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir.1974); *United States v. McMahon*, 104 F.3d 638, 642 (4th Cir. 1997) (quoting *Greyhound Corp.*).

¹⁹⁷ *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *In re Criminal Contempt Proceedings Against Crawford*, 329 F.3d 131, 138 (2^d Cir. 2003); *United States v. Mourad*, 289 F.3d 174, 177-78 (1st Cir. 2002).

¹⁹⁸ *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).

¹⁹⁹ *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 452 (1911).

Element 3: Unlawfully and willfully

A defendant must act unlawfully and willfully,²⁰⁰ meaning the defendant must have known of the order and have deliberately or recklessly violated it.²⁰¹ However, intent to obstruct justice is not an element of contempt.²⁰²

3. False Statements to Federal Authorities (18 U.S.C. § 1001)²⁰³

Title 18, United States Code, Section 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:²⁰⁴

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.

²⁰⁰ *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).

²⁰¹ *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)).

²⁰² *United States v. Britton*, 731 F.3d 745, 749 (7th Cir. 2013).

²⁰³ 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.”

²⁰⁴ 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 Research Service, Report 98-808, May 11, 2018), pp. 1-5, <https://www.justsecurity.org/wp-content/uploads/2022/11/98-808-2.pdf>.

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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.”²⁰⁵

Element 2: False, fictitious, or fraudulent statement

The statements made or within a document must, in fact, be false, fictitious, or fraudulent.²⁰⁶ “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.”²⁰⁷

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.”²⁰⁸

The matter is one for the jury to decide.²⁰⁹

Element 4: Knowingly and willfully

A false statement for the purposes of Section 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.²¹⁰

²⁰⁵ 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>.

²⁰⁶ For relevant case law, see: Modern Federal Jury Instructions, § 36.01, Instruction 36-12.

²⁰⁷ Modern Federal Jury Instructions, § 36.01, Instruction 36-12 & 36-17.

²⁰⁸ 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>.

²⁰⁹ *United States v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

²¹⁰ 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>.

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.”²¹¹ 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.”²¹²

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²¹¹ 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>.

²¹² *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)

Section C. Obstruction, False Information, Contempt

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 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, and did he intentionally take or retain them?²¹³

1. Trump’s knowledge that he possessed the MAL documents²¹⁴

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 may be direct proof that Trump was aware that some or all of the MAL documents were in his possession because the documents were taken to MAL at his 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. That would be even more applicable to documents

²¹³ 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.

²¹⁴ 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.

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bearing classification covers and 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.”²¹⁵ 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.²¹⁶ 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.’”²¹⁷ All of this comports with the concern of certain White House staff about the proper handling and return of presidential documents.²¹⁸

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.

Even if there is a dearth of proof that Trump himself was personally involved in the packing up of the MAL documents, 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.”²¹⁹ Trump repeated that same

²¹⁵ 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/>.

²¹⁶ 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/>.

²¹⁷ 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/>.

²¹⁸ 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>.

²¹⁹ 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>.

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erroneous sentiment on October 9, 2022.²²⁰ 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 MAL in his possession. What’s more, 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.²²¹

All those witnesses’ statements will be corroborated by substantial 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.”²²²

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 marked classified, including 92 marked Secret, and 25 Top Secret, including

²²⁰ Donald Trump, Mesa, Arizona political rally remarks (Oct. 9, 2022), <https://twitter.com/Acyn/status/1579267214838231040>.

²²¹ 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>.

²²² 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).

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Sensitive Compartmented Information and Special Access Program materials.²²³ 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 is a myriad of witnesses (including over 18 former top Trump administration officials) who were unaware of such a declassification order.²²⁴ 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.²²⁵

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 what had been taken to MAL becomes impossible at this juncture. He was thus also at the latest by this point in time aware that these types of presidential records do not belong to him and had to be returned to NARA. Indeed, the Government will 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."²²⁶

That so many documents still 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

²²³ 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>.

²²⁴ 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>.

²²⁵ 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/>.

²²⁶ 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-mar-a-lago>; 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.

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returned all materials requested by the agency.” Cannon refused on the ground that he was not sure the statement was true.²²⁷

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.²²⁸ 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,²²⁹ to accept the subpoena in May,²³⁰ to have his staff conduct a search for more documents in response to the subpoena,²³¹ to invite the FBI to MAL in June to retrieve responsive documents,²³² and to secure the storage room in response to a DOJ admonition in early June.²³³

Trump told Walt Nauta to move boxes to his personal residence from the storage room before and after his advisers received the subpoena. At least some of that movement of the boxes is corroborated by the security-camera footage showing Nauta and others moving the boxes. “After they were taken to the residence, Trump looked through at least some of them and removed some

²²⁷ 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/>.

²²⁸ 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.”

²²⁹ *Id.* at p. 4 (“Movant voluntarily asked NARA movers to come to Mar-a-Lago to receive 15 boxes of documents.”).

²³⁰ *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.”).

²³¹ *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.”).

²³² *Id.* at p. 5 (“President Trump, through counsel, invited the FBI to come to Mar-a-Lago to retrieve responsive documents.”).

²³³ *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 (“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.”).

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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.”²³⁴

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.²³⁵ 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).²³⁶ 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.²³⁷ Notably, in February 2022, NARA publicly stated that it had asked the Trump team to continue to search for additional presidential records,²³⁸ but until DOJ went to MAL in 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

²³⁴ 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-nautamaralago-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>.

²³⁵ 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>

²³⁶ 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>.

²³⁷ 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>.

²³⁸ 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>

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that Trump was hiding the content from the DOJ, since a couple months later boxes in the storage room contained government documents, including 76 documents marked as classified, that should have been returned.²³⁹

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 DOJ, and made a "protective" assertion of executive privilege to prevent disclosure of material to the DOJ, an assertion that was denied.²⁴⁰ In addition, the retention of the 15 boxes, the discovery of classified information in them, and the DOJ communications were reported to Congress.²⁴¹

That DOJ referral thus would provide 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 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.

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.²⁴² Indeed, in August, the execution of the search warrant revealed beyond peradventure the existence of government documents including in Trump's personal

²³⁹ 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.

²⁴⁰ 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).

²⁴¹ 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>.

²⁴² 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).

office. Such proof will further cement the Government's case that Trump knew he possessed the MAL documents.

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,²⁴³ and that based on information provided to counsel, all known responsive documents had been returned.²⁴⁴ Further, Trump's motion on Aug. 22, 2022 claims that Trump himself sought to have a search of MAL conducted for all documents bearing classification markings.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ The testimony of Alex Cannon may be particularly valuable,

²⁴³ 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.

²⁴⁴ Justice Department Attachments (Aug. 30, 2022) <https://www.justsecurity.org/wp-content/uploads/2022/09/departments-of-justice-attachments-mar-a-lago-mal-subpoena-fbi-photograph-august-30-2022.pdf>.

²⁴⁵ 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>.

²⁴⁶ 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.

²⁴⁷ 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),

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 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.

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.²⁴⁸ 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

<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.

²⁴⁸ 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.

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pages,²⁴⁹ with a total of 184 documents marked as classified in the January batch.²⁵⁰ 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.

Trump's course of dealing with NARA and the 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 the DOJ in May, "No legal objection was asserted about the transfer" to NARA.²⁵¹ 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.²⁵²

The Government will likely be able to show that the documents found in the search and the documents turned over to NARA and the 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

²⁴⁹ 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.

²⁵⁰ 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.").

²⁵¹ 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>.

²⁵² 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.

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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 resort 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.

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 can be used to establish 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.²⁵³ 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.”²⁵⁴

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;²⁵⁵ McGahn had been so appointed by Trump from February 2017 to January 2021.²⁵⁶) Other Trump counsel and representatives may also have evidence to provide about alerting

²⁵³ 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*, North Carolina (Aug. 18, 2016), <https://factba.se/transcript/donald-trump-speech-charlotte-nc-august-18-2016>.

²⁵⁴ 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>.

²⁵⁵ 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-cippolone-eisenberg-gast-purpura-engel-january-19-2021.pdf>.

²⁵⁶ 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>.

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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.”²⁵⁷

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.²⁵⁸

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.”²⁵⁹ 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.”²⁶⁰

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.”²⁶¹

²⁵⁷ 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>.

²⁵⁸ 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/>.

²⁵⁹ Remarks by President Trump Before Marine One Departure (Feb. 7, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-marine-one-departure-82/>.

²⁶⁰ 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>.

²⁶¹ 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>.

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

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
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 authorization to retain presidential records, especially classified material, after leaving office. What’s more, on May 25, 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 2022.²⁶² 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 authorization 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.”²⁶³ 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,²⁶⁴ and at best they argue Trump had a right to

²⁶² 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>.

²⁶³ 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>).

²⁶⁴ 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-

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“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”²⁶⁵).

Trump’s counsel also admit 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 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.”²⁶⁶ 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.”²⁶⁷

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.²⁶⁸ 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.”²⁶⁹ He repeated the statement two more times.²⁷⁰ Trump had actual possession of the documents at MAL, in that he knowingly had direct

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.

²⁶⁵ 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>.

²⁶⁶ 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.

²⁶⁷ *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..>

²⁶⁸ 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).

²⁶⁹ 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>.

²⁷⁰ *Id.* at p. 9.

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 closet and desk drawers in his personal office during the August search.²⁷¹ 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.²⁷² 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.

²⁷¹ 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.

²⁷² *Gorin v. United States*, 312 U.S. 19, 28, 61 (1941); *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988).

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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 documents including material concerning a foreign country's nuclear weapons readiness,²⁷³ Iran's missile program, and highly sensitive intelligence work aimed at China.²⁷⁴

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.²⁷⁵ 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.²⁷⁶

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.²⁷⁷ Even their public claims of declassification include

²⁷³ 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](#).

²⁷⁴ 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/>.

²⁷⁵ 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 the national security.
- 2) "Secret" – if the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.
- 3) "Confidential" – if the unauthorized disclosure of which reasonably could be expected to cause damage to the 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>.

²⁷⁶ 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/>.

²⁷⁷ 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

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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."²⁷⁸

Separately, even documents which 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

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

²⁷⁸ *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>.

Department investigation. It required the grand jury subpoena and FBI search to recover the documents at MAL.

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 in 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 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 section 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."²⁷⁹ Presidential records are to be held at NARA as legally required for proper preservation.²⁸⁰ They are, indeed, often unique in character as the official

²⁷⁹ 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>.

²⁸⁰ 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.'")

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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."²⁸¹

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 section 2071.²⁸² 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 section 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."²⁸³

[...] see also H.Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S. CODE CONG. ADMIN.NEWS 5732, 5733.").

²⁸¹ 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>.

²⁸² *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).

²⁸³ 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>.

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Accordingly, the referral by NARA’s Office of the Inspector General to the Justice Department included section 2071 as one of the grounds for the referral.²⁸⁴

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.”²⁸⁵ Additionally, the White House usually has a “chain of custody” process through which classified documents are officially logged and given numbers for tracking.²⁸⁶ 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 the “‘clearinghouse’ through which literally every piece of paper pass[es].”²⁸⁷ It is the “last substantive control point before papers reach the Oval Office.”²⁸⁸ 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.”²⁸⁹

Element 4: Willfully

We address intent in Part III.A.

²⁸⁴ 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>.

²⁸⁵ 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.”).

²⁸⁶ 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/>.

²⁸⁷ 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>.

²⁸⁸ *Id.* at p. 5.

²⁸⁹ 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>.

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 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.”²⁹⁰ 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.”²⁹¹

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

²⁹⁰ PRA, section 2202.

²⁹¹ Exec. Order No. 13526, § 1.1(2), 75 Fed. Reg. at 707.

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and a thing of value.²⁹² 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 own²⁹³ the presidential records recovered in the August search and that presidential records should be returned to NARA.²⁹⁴ 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 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”²⁹⁵) 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

²⁹² 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>.

²⁹³ 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>.

²⁹⁴ *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.”).

²⁹⁵ 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>.

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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.”²⁹⁶

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.

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.

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 section 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 section 402. However, to establish a section 1519 charge, the Government needs to prove that Trump intended to interfere with the NARA or 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.

²⁹⁶ 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>.

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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” – appears 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

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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.²⁹⁷

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 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

²⁹⁷ 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>.

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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.²⁹⁸

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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²⁹⁸ 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 fit into the Department's own precedents.²⁹⁹ Would a prosecution be treating Trump worse than other cases that have been brought? Would a 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 section 793(e) or section 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.³⁰⁰ 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

²⁹⁹ 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>.

³⁰⁰ 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.

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brought by the DOJ between 1945 and present which alleged, charged, or included evidence of dissemination of NDI.³⁰¹

Table 1 addresses cases where section 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 section 1924 but was initially charged with section 793(e) retention. Table 2 addresses only cases where section 1924 was charged or pleaded, not section 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 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 to the principles of the Justice Manual.³⁰²

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.

³⁰¹ 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>.

³⁰² Department of Justice, Principles of Federal Prosecution 9-27.220, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>.

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Trump's retention of illegal documents persisted for over 18 months.³⁰³ Trump persisted during this time in spite of direct communications with him or his counsel seeking the return of such documents and his 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 legal process. Of course, compliance with legal process is neither voluntary nor entitles a person to credit in 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.³⁰⁴ Second, his

³⁰³ 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.

³⁰⁴ 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.”),

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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.³⁰⁵ 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.³⁰⁶

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.³⁰⁷

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 section 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 as 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

<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.uscc.gov/gl/§3B1.3>.

³⁰⁵ Justice Department Manual, 9-27.230 - *Initiating and Declining Charges—Substantial Federal Interest* (updated July 2020).

³⁰⁶ United States Sentencing Commission, §3B1.1 - *Aggravating Role* (Guidelines Manual, 2021),

<https://guidelines.uscc.gov/gl/§3B1.1>.

³⁰⁷ 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).

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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 section 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 section 1924. She was a DOD employee who removed classified information and took the documents home. Later, Lavarello 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. Lavarello pleaded to one count of unauthorized removal and retention of classified documents or material under section 1924. The Government agreed that no “Top Secret” documents were involved, and that Lavarello’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 section 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

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classified at the Secret level. Kemp pleaded to one count of section 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 section 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 section 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."

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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 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 section 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

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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 section 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 section 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 section 793(e) and 2071(a). In 2014, he pleaded guilty to a single count of section 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

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classified documents in violation of section 1924. He received a presidential pardon on January 20, 2001 before his plea agreement was submitted to 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

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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 section 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, section 1924 imposed only a maximum one-year prison sentence. In 2018, it was made a felony offense with a maximum 5-year prison sentence.³⁰⁸

- Samuel “Sandy” Berger, former National Security Advisor, was charged and pleaded guilty to a violation of section 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 year’s 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

³⁰⁸ The Petraeus case includes elements of dissemination involving his intentionally providing classified information to his biographer and paramour.

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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, section 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 section 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, section 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 sections 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.³⁰⁹

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.³¹⁰ 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.³¹¹ 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.”³¹² In response, Clinton’s lawyers produced approximately 30,490 emails that her team believed to be related to official business.³¹³

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.³¹⁴ Mills then instructed Paul Combetta—an employee of the

³⁰⁹ 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.”].

³¹⁰ OIG Report – Clinton at p. 37.

³¹¹ OIG Report – Clinton at p. 37–38.

³¹² OIG Report – Clinton at p. 38.

³¹³ OIG Report – Clinton at p. 38.

³¹⁴ OIG Report – Clinton at p. 38.

company that administered Clinton’s server—to change Clinton’s email retention policy accordingly.³¹⁵

In March 2015, the House Benghazi Committee sent a preservation notice to Clinton instructing her to retain all emails.³¹⁶ Combetta realized later that month—after he had received the preservation notice—that he had failed to implement the 60-day retention policy.³¹⁷ Despite the preservation notice, Combetta unilaterally decided to permanently delete all emails from Clinton’s servers.³¹⁸ That action resulted in the deletion of 31,830 emails.³¹⁹

The FBI and the DOJ later sought to recover the deleted emails from other sources to determine what was contained therein.³²⁰ 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.”³²¹ The FBI obtained access to more than 30 devices.³²² The FBI also reviewed emails from State Department employees, “including the three senior aides with whom Clinton had the most email contact.”³²³ 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.³²⁴

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.³²⁵ 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.³²⁶

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

³¹⁵ OIG Report – Clinton at p. 38–39.

³¹⁶ OIG Report – Clinton at p. 39.

³¹⁷ OIG Report – Clinton at p. 38–39.

³¹⁸ OIG Report – Clinton at p. 39.

³¹⁹ OIG Report – Clinton at p. 39. 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.

³²⁰ OIG Report – Clinton at p. 72.

³²¹ OIG Report – Clinton at p. 81.

³²² OIG Report – Clinton at p. 73.

³²³ OIG Report – Clinton at p. 72.

³²⁴ OIG Report – Clinton at p. 74.

³²⁵ OIG Report – Clinton at p. 74.

³²⁶ OIG Report – Clinton at p. 75.

classified information from Confidential to Top Secret levels (but, except for the three email chains, none bore classification markings).³²⁷ Of those 81 email chains, 12 were not among the 30,490 emails Clinton’s lawyers had provided the State Department.³²⁸ However, all emails containing Top Secret information were among those initially turned over.³²⁹ Seven email chains contained information associated with a Special Access Program (“SAP”)³³⁰—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.³³¹ “[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.”³³² 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.”³³³ The three email chains were also included in the 30,490 that Clinton’s lawyers provided the State Department in 2014.³³⁴

Declination to prosecute

Numerous factors went into the decision not to prosecute, which the Attorney General announced on July 6, 2016.³³⁵ 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

³²⁷ OIG Report – Clinton at p. 74.

³²⁸ OIG Report – Clinton at p. 74.

³²⁹ OIG Report – Clinton at p. 74.

³³⁰ OIG Report – Clinton at p. 74.

³³¹ OIG Report – Clinton at p. 74, 137.

³³² OIG Report – Clinton at p. 137.

³³³ OIG Report – Clinton at p. 261 n. 161.

³³⁴ OIG Report – Clinton at p. 74, 137.

³³⁵ 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>.

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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.³³⁶

- 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.³³⁷ 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.³³⁸

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

³³⁶ 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.

³³⁷ 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.

³³⁸ OIG Report – Clinton at p. 255.

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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 Summary D. “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.³³⁹ Trump’s own counsel Alex Cannon, who had been interfacing with NARA, provided Trump a similar warning in Fall 2021.³⁴⁰ 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.³⁴¹ 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.³⁴²

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.³⁴³ 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.”³⁴⁴ 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.³⁴⁵

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.

³³⁹ See supra Part I.D sec. 4. (“Trump’s attorneys’ warnings and notifications”).

³⁴⁰ See supra Part I.D sec. 4. (“Trump’s attorneys’ warnings and notifications”).

³⁴¹ See supra Part I.B (“Trump resisted government attempts to recover the documents”).

³⁴² 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”).

³⁴³ See generally U.S. Special Master Opposition.

³⁴⁴ OIG Report – Clinton, at p. 81.

³⁴⁵ See generally U.S. Special Master Opposition.

* * *

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.³⁴⁶

The Office of Inspector General reached the same conclusion in its review of DOJ's declination decision.³⁴⁷ 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."³⁴⁸ 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."³⁴⁹

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

³⁴⁶ 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>.

³⁴⁷ See especially OIG Report – Clinton, at pp. 260-63

³⁴⁸ OIG Report – Clinton, at pp. 262–263.

³⁴⁹ OIG Report – Clinton, at p. 263.

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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.³⁵⁰ 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.³⁵¹ 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.³⁵²

The IG report references only the section 1924 misdemeanor statute as relevant and placed an emphasis on Gonzales’s having brought the notes to his residence.³⁵³ 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)³⁵⁴ and may have brought them back and placed them in the OAG office safe a day or so later.³⁵⁵ Finally, there is no evidence that Gonzales lied or otherwise obstructed the IG or DOJ in their investigation.

³⁵⁰ 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>.

³⁵¹ OIG Report – Gonzales, at p. 14.

³⁵² OIG Report – Gonzales, at pp. 17-18.

³⁵³ 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).

³⁵⁴ OIG Report – Gonzales, at p. 23.

³⁵⁵ 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 Misconduct

1. Planted Evidence
2. Unreasonable Search

Section D. Advice of Counsel

Section E. Defense of Lack of Knowledge of Subordinates' Actions

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;³⁵⁶ (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,"³⁵⁷ 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

³⁵⁶ 44 U.S.C. § 2201 *et seq.*

³⁵⁷ Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 12, 2022, 14:19), <https://truthsocial.com/@realDonaldTrump/posts/108811278444540886>.

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Declassified!”³⁵⁸ In subsequent interviews with Hugh Hewitt and Sean Hannity, Trump stated that “everything” was declassified.³⁵⁹ 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.³⁶⁰

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.³⁶¹ 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.”³⁶²

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.³⁶³ 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.”³⁶⁴

³⁵⁸ Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 31, 2022, 08:38 AM), <https://truthsocial.com/@realDonaldTrump/posts/108917523934541907>.

³⁵⁹ 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>.

³⁶⁰ 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>.

³⁶¹ 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>.

³⁶² 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).

³⁶³ Exec. Order No. 13526, § 1.3(a)(1).

³⁶⁴ *Id.* § 3.1(b)(1)-(3).

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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.”³⁶⁵ 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.”³⁶⁶ Although Trump’s attorneys have stopped short of ever actually asserting before any court that Trump declassified any of the seized documents,³⁶⁷ 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.³⁶⁸

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, section 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 section 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.³⁶⁹ Although the classification status of the information may be relevant, it is not determinative.³⁷⁰ 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.³⁷¹ In any case, declassifying the documents would not mean that the document is not “national defense information” or that Trump was permitted to

³⁶⁵ As discussed below, certain information, including information relating to nuclear weapons, is classified pursuant to a separate statutory scheme.

³⁶⁶ *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

³⁶⁷ And indeed, as discussed below, they have resisted making such a representation.

³⁶⁸ 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 11th 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.

³⁶⁹ See, e.g., *United States v. Rosen*, 445 F. Supp. 2d 602, 643 (E.D. Va. 2006).

³⁷⁰ 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).

³⁷¹ 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”).

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possess them. 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.”³⁷²

A violation of section 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;”³⁷³ 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.³⁷⁴

Finally, section 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, section 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.”³⁷⁵

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.”³⁷⁶ The officials who disputed Trump’s

³⁷² 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>.

³⁷³ 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>.

³⁷⁴ 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).

³⁷⁵ 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.

³⁷⁶ 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),

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claim included two former chiefs of staff, John Kelly and Mick Mulvaney, and former national security advisor John Bolton.³⁷⁷ 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.³⁷⁸ 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.³⁷⁹ 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.³⁸⁰ 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,³⁸¹ 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,³⁸² and argued that the Government has not proven that the documents bearing classification markings remain classified,³⁸³ 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.³⁸⁴ (They argue it would “force[] the Plaintiff to fully and specifically disclose a defense to the merits of any subsequent indictment.”³⁸⁵) Taken together, his lawyers’ reticence is further evidence that the documents were never declassified.

<https://www.cnn.com/2022/08/18/politics/trump-claim-standing-order-declassify-nonsense-patently-false-former-officials/index.html>.

³⁷⁷ *Id.*

³⁷⁸ 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>.

³⁷⁹ Agency Cooperation With Attorney General’s Review of Intelligence Activities Relating to the 2016 Presidential Campaigns, 84 Fed. Reg. 24971 (May 29, 2019).

³⁸⁰ 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/>.

³⁸¹ 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/>.

³⁸² 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.

³⁸³ Trump 11th Cir. Stay Opp. at p. 11-13.

³⁸⁴ 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.

³⁸⁵ *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.”³⁸⁶ 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.”³⁸⁷

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.³⁸⁸ 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.”³⁸⁹ The absence of any such procedures and formalities here is telling.

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.³⁹⁰ In their filings, Trump’s counsel have made references to “classified materials” contained in the documents Trump turned over to NARA in January 2022.³⁹¹ 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).³⁹² 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,

³⁸⁶ 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>.

³⁸⁷ *Id.*

³⁸⁸ Declassification of Certain Material Related to the FBI’s Crossfire Hurricane Investigation, 86 Fed Reg. 6843 (Jan. 25, 2021).

³⁸⁹ *Id.* The memorandum also acknowledges that the FBI objected to declassification.

³⁹⁰ 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>.

³⁹¹ 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 . . .”).

³⁹² 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/>.

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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.”³⁹³

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,”³⁹⁴ and may not be declassified unilaterally by a president.³⁹⁵ Thus Trump would not have had the authority to declassify documents concerning nuclear weapons found at MAL.

Trump’s claim is illogical

On a practical level, Trump’s claim makes little sense. The classification regime concerns information, not documents.³⁹⁶ 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 13526³⁹⁷ controls the case;³⁹⁸ section 1.7(c) of the Executive Order requires numerous specific procedures to reclassify information that has been declassified.³⁹⁹ Furthermore, Trump’s claimed “standing order” apparently makes no

³⁹³ 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.flsd.617854/gov.uscourts.flsd.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>.

³⁹⁴ 42 U.S.C. § 2014(y).

³⁹⁵ 42 U.S.C. § 2162(d)-(e).

³⁹⁶ See generally Exec. Order No. 13526.

³⁹⁷ *Id.*

³⁹⁸ 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. Trump S.D. Fla. Stay Opp. (Sept. 20, 2022) at p. 12.

³⁹⁹ 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

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,⁴⁰⁰ sets up a scheme for the preservation of “Presidential records.” Under the PRA, the United States—and not the President—owns all Presidential records.⁴⁰¹ During a President’s term, the President is responsible for identifying and preserving Presidential records.⁴⁰² 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.”⁴⁰³

1. Personal Records

In his filings before Judge Cannon, Trump contended that he was permitted to retain⁴⁰⁴ at least some of the documents found in the search of MAL if he had categorized them as “personal”

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 ...”).

⁴⁰⁰ 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/>.

⁴⁰¹ 44 U.S.C. § 2202.

⁴⁰² 44 U.S.C. § 2203(a).

⁴⁰³ 44 U.S.C. § 2203(g)(1).

⁴⁰⁴ 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

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records, which, under the PRA, are not required to be turned over to NARA.⁴⁰⁵ 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.⁴⁰⁶ 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.”⁴⁰⁷ None of these arguments would provide a defense to the potential charges.

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.”⁴⁰⁸ 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.⁴⁰⁹

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 section 1519 or 402.

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”).

⁴⁰⁵ Trump S.D. Fla. Stay Opp. at pp. 3, 13-15; Trump 11th Cir. Stay Opp. at pp. 14-15.

⁴⁰⁶ *Id.*

⁴⁰⁷ Trump Special Master Mot. at p. 12; Trump S.D. Fla. Stay Opp. at p. 15.

⁴⁰⁸ 44 U.S.C. § 2203(b) (emphasis added).

⁴⁰⁹ *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.

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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.⁴¹⁰

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.⁴¹¹ 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) that he might have designated relevant records as “personal.”⁴¹² 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.”⁴¹³ 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.⁴¹⁴ 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.”⁴¹⁵

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.⁴¹⁶ That decision considered a somewhat different question than presented here, as it arose from a lawsuit by a third party seeking a declaration that

⁴¹⁰ See Search Warrant; U.S. 11th Cir. Brief at pp. 35-36.

⁴¹¹ Corcoran Letter, at p. 1.

⁴¹² U.S. 11th Cir. Brief, at p. 47.

⁴¹³ 44 U.S.C. § 2201(3) (emphasis added).

⁴¹⁴ *Id.*

⁴¹⁵ 44 U.S.C. § 2201(2) (defining “Presidential records”).

⁴¹⁶ Trump S.D. Fla. Stay Opp. at p. 14-15; Trump 11th Cir. Stay Opp. at p. 14-15.

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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.⁴¹⁷ 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.⁴¹⁸ 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.”⁴¹⁹ 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.”⁴²⁰ That decision explained, in reasoning applicable to Trump’s case, that “[s]uch 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.’”⁴²¹

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.”⁴²² 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.⁴²³ 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.

⁴¹⁷ *Jud. Watch, Inc. v. Nat’l Archives & Recs. Admin.*, 845 F. Supp. 2d 288, 290-91 (D.D.C. 2012).

⁴¹⁸ *Id.* at 296 (quoting *Armstrong v. Exec. Office of the President, Office of Admin.*, 1 F.3d 1274, 1294 (D.C. Cir. 1993)).

⁴¹⁹ *Id.* at 298.

⁴²⁰ *Am. Historical Ass’n v. Peterson*, 876 F. Supp. 1300, 1313-14 (D.D.C. 1995)

⁴²¹ *Id.* at 1314 (quoting 44 U.S.C. § 2203(f)(1)).

⁴²² 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

⁴²³ 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

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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 president⁴²⁴ 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 that by moving documents from one room in the White House to another served to declassify the documents).⁴²⁵

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.⁴²⁶

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

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.").

⁴²⁴ 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).

⁴²⁵ 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 ("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.").

⁴²⁶ 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>.

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simply by taking them with him when he leaves office.”⁴²⁷ 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.”⁴²⁸ No mention of the documents being personal; in fact, quite the opposite since personal documents 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.”⁴²⁹ (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.⁴³⁰)

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.⁴³¹

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.⁴³² 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

⁴²⁷ 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>.

⁴²⁸ 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>.

⁴²⁹ 44 U.S.C. § 2201(3).

⁴³⁰ 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>

⁴³¹ 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.

⁴³² 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/>.

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[] 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.”⁴³³

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.⁴³⁴

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.

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.⁴³⁵

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).⁴³⁶ 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).⁴³⁷

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

⁴³³ Maggie Haberman & Michael S. Schmidt, How Trump Deflected Demands for Documents, Enmeshing Aides, N. Y. Times (Oct. 8, 2022), <https://www.nytimes.com/2022/10/08/us/politics/trump-documents-lawyers.html>.

⁴³⁴ 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>.

⁴³⁵ 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>.

⁴³⁶ Kathy Geisler, GSA, Email to Desiree Thompson, Apr. 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>.

⁴³⁷ 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>.

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.⁴³⁸ 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,⁴³⁹ it follows that if Trump had the right under the PRA to possess the seized documents, his retention of them would not be “unauthorized” for purposes of section 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.⁴⁴⁰ 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.”⁴⁴¹ 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.⁴⁴² Under the Executive Order that Trump’s court filings acknowledge controls this case,⁴⁴³ 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.⁴⁴⁴ As the Eleventh Circuit noted, Trump “has not even attempted to show that he has a need to know the

⁴³⁸ Trump S.D. Fla. Stay Opp. at pp. 8, 13.

⁴³⁹ *See id.* at pp. 8.

⁴⁴⁰ 44 U.S.C. § 2205(3).

⁴⁴¹ 44 U.S.C. § 2203(g)(1).

⁴⁴² *See* Exec. Order No. 13526 § 4.1(a)(3).

⁴⁴³ Trump 11th Cir. Stay Opp., at p. 12

⁴⁴⁴ Exec. Order No. 13526 § 4.4.

information contained in the classified documents. Nor has he established that the current administration has waived that requirement for these documents.”⁴⁴⁵ 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.⁴⁴⁶

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 sections 1519 (obstruction), 2071 (concealment), or 402 (contempt). Furthermore, when Trump responded to the grand jury subpoena, his custodian 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.⁴⁴⁷

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.⁴⁴⁸ Among other things, executive privilege protects confidential communications between the President and his advisers that relate to presidential decision-making.⁴⁴⁹ 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.

⁴⁴⁵ 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>.

⁴⁴⁶ 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>.

⁴⁴⁷ Warrant Affidavit, ¶ 55.

⁴⁴⁸ 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>.

⁴⁴⁹ 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.

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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.⁴⁵⁰ 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.⁴⁵¹ Setting aside whether and to what extent Trump as a former President can assert executive privilege against the current executive,⁴⁵² 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.”⁴⁵³ 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.⁴⁵⁴

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.”⁴⁵⁵ 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

⁴⁵⁰ Transcript of Hearing, S.D. Fla. Case No. 9:22-cv-81294-AMC (Sept. 1, 2022), at p. 17:7-9.

⁴⁵¹ *United States v. Nixon*, 418 U.S. 683, 707 (1974).

⁴⁵² 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.

⁴⁵³ *Nixon v. GSA*, 433 U.S. 425, 447-48 (1977).

⁴⁵⁴ *United States v. Nixon*, 418 U.S. 683, 713 (1974).

⁴⁵⁵ *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>.

definition controlled by the Executive Branch and critical to national security.”⁴⁵⁶ 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.”⁴⁵⁷

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.”⁴⁵⁸ 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.”⁴⁵⁹ 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.

⁴⁵⁶ *Id.* (emphasis in original, citation omitted).

⁴⁵⁷ *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/>.

⁴⁵⁸ 44 U.S.C. § 2205(2)(B).

⁴⁵⁹ 44 U.S.C. § 2205(2).

The documents were “not otherwise available” to the FBI

The documents that were placed in an unsecure 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.”⁴⁶⁰ The August search found documents stored in a similar manner.⁴⁶¹ 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 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”).⁴⁶² Moreover, any challenge on this ground would also need to be brought in the District of D.C.⁴⁶³ Trump brought no such challenge even though the Government purposefully 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.⁴⁶⁴

⁴⁶⁰ Warrant Affidavit, ¶ 24.

⁴⁶¹ 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/>.

⁴⁶² 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.*

⁴⁶³ 44 U.S.C. § 2204(e).

⁴⁶⁴ See generally *United States v. Leon*, 468 U.S. 897 (1984).

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.”⁴⁶⁵ That provision is not subject to the condition that the records be “not otherwise available.”

Section C. FBI 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 or, hopefully not, ‘planting.’”⁴⁶⁶ 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.⁴⁶⁷ 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.⁴⁶⁸ 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 do 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.

⁴⁶⁵ 44 U.S.C. § 2205(2)(A).

⁴⁶⁶ Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 10, 2022, 06:56), <https://truthsocial.com/@realDonaldTrump/posts/108798211943189544>.

⁴⁶⁷ Donald J. Trump (@realDonaldTrump), Truth Social (Aug. 31, 2022, 17:14), <https://truthsocial.com/@realDonaldTrump/posts/108919551852852903>.

⁴⁶⁸ 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>.

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 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,"⁴⁶⁹ and contended that the warrant was "facially overbroad"⁴⁷⁰ and that the warrant affidavit may have contained material misstatements or omissions.⁴⁷¹ 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."⁴⁷² 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."⁴⁷³ Even seeking the defense can be extremely risky for a defendant, because raising the defense waives attorney-client privilege.⁴⁷⁴ 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).

Additionally, the defense of advice of counsel does not apply in circumstances where the lawyer is found to be an accomplice.⁴⁷⁵ It is likely that any of the lawyers who Trump would claim

⁴⁶⁹Motion 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>.

⁴⁷⁰ *Id.* at p. 11.

⁴⁷¹ *Id.* at p. 12-13.

⁴⁷² 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>.

⁴⁷³ *United States v. West*, 392 F.3d 450, 457 (D.C. Cir. 2004).

⁴⁷⁴ *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).

⁴⁷⁵ *United States v. West*, 392 F.3d 450, 456-57 (D.C. Cir. 2004).

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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.⁴⁷⁶ 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.”⁴⁷⁷ In spring 2022, Trump “insist[ed] to his advisers that he has returned everything and is unwilling to discuss the matter further.”⁴⁷⁸ In October 2022, Christina Bobb, Trump’s counsel who acted as his custodian of records,⁴⁷⁹ told investigators she had been led to believe there were no other responsive documents and no responsive documents retained.⁴⁸⁰

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;⁴⁸¹ 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,”⁴⁸² and in a court filing his counsel said that presidential records recovered in the August search should be returned to the Archives rather than remain in Trump’s custody.⁴⁸³

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.⁴⁸⁴ In Fall 2021, Trump’s lawyer who was acting as his

⁴⁷⁶ *Sec. & Exch. Comm’n v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981).

⁴⁷⁷ 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/>.

⁴⁷⁸ 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>.

⁴⁷⁹ 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>.

⁴⁸⁰ 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>.

⁴⁸¹ Corcoran Letter, at p. 1.

⁴⁸² Transcript of Hearing, S.D. Fla. Case No. 9:22-cv-81294-AMC (Sept. 1, 2022), at pp. 8:23-24.

⁴⁸³ 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).

⁴⁸⁴ 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->

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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.”⁴⁸⁵ 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.”⁴⁸⁶ 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.”⁴⁸⁷ 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.”⁴⁸⁸ 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.⁴⁸⁹ 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.⁴⁹⁰

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 in retaining such documents (including repeatedly being placed on notice by NARA and the Justice Department’s Chief of Counterintelligence and Export Control⁴⁹¹). 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 reason to doubt the

[security/2022/08/24/trump-records-archives-2021/](https://www.nytimes.com/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).

⁴⁸⁵ 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>.

⁴⁸⁶ 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>.

⁴⁸⁷ *Id.*

⁴⁸⁸ 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>.

⁴⁸⁹ 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. Helderan, *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/>.

⁴⁹⁰ 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>.

⁴⁹¹ 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.

advice, he cannot hide behind counsel's advice to escape the consequences of his violation."⁴⁹²

Section E. 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 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."⁴⁹³
- In January 2021, Trump personally helped pack the boxes with presidential records to be sent to MAL.⁴⁹⁴
- 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."⁴⁹⁵
- 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

⁴⁹² *United States v. Philpot*, 733 F.3d 734, 745 (7th Cir. 2013) (citations of other cases omitted).

⁴⁹³ 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/>.

⁴⁹⁴ 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/>.

⁴⁹⁵ 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).

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contained nothing sensitive but only “news clippings.”⁴⁹⁶ Meadows obtained that information directly from Trump.⁴⁹⁷

- 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.⁴⁹⁸
- 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.”⁴⁹⁹ Nevertheless, Trump elected “to go through them.”⁵⁰⁰ “Trump himself eventually packed the boxes that were returned in January [2022], people familiar with the matter said.”⁵⁰¹
- In December 2021, “Trump had overseen the packing process himself with great secrecy, declining to show some items even to top aides.”⁵⁰² “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.”⁵⁰³
- 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.”⁵⁰⁴ Cannon refused on the ground that he

⁴⁹⁶ 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/>.

⁴⁹⁷ 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>.

⁴⁹⁸ 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>.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ 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/>.

⁵⁰² 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/>.

⁵⁰³ 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/>.

⁵⁰⁴ 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/>.

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did not believe the statement to be true.⁵⁰⁵ As a result, Cannon was excluded from documents-related discussions.⁵⁰⁶

- Trump instructed staff “to move boxes to his residence after his advisers received the subpoena.”⁵⁰⁷ “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.”⁵⁰⁸ “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.”⁵⁰⁹ “[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.”⁵¹⁰
- 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.”⁵¹¹ “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.”⁵¹²
- 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.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ 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/>.

⁵⁰⁸ 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/>.

⁵⁰⁹ 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/>.

⁵¹⁰ *Id.*

⁵¹¹ 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>.

⁵¹² 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/>.

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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 Precedent in Simple Retention Cases (Absence of Charges or Allegations of Dissemination)

I. Table 1 – 18 U.S.C. 793 (Retention charged)

1. **Jeremy Brown** (ongoing)
2. **Kendra Kingsbury** (ongoing)
3. **Yen Cham Yung** (ongoing)
4. **Ahmedelhadi Yassin Serageldin**
5. **Weldon Marshall**
6. **Nghia Hoang Pho**
7. **Harold Martin III**
8. **Kristian Saucier**
9. **Christopher Glenn**
10. **John Norman Sims**
11. **James Hitselberger**
12. **Abraham Lesnik**
13. **Noureddine Malki**
14. **Kenneth Wayne Ford**
15. **Henry Otto Spade**

II. Table 2 – 18 U.S.C. 1924 (Removal and Retention charged)

1. **Asia Lavarello**
2. **Izaak Vincent Kemp**
3. **Reynaldo Regis**
4. **David Petraeus***
5. **David Paul Kirby**
6. **Jessica Lynn Quintana**
7. **Sohail Yunas Uppal**
8. **Everett Ashley Blauvelt**
9. **Samuel Berger**
10. **John Deutch**

*The Petraeus case includes allegations of intentional dissemination of classified information to his biographer and paramour who did not have a security clearance.

Table 1 – 18 U.S.C. 793 (Retention Charged)

<u>NAME</u>	<u>DATE CHARGED</u>	<u>DETAILS OF CASE</u>	<u>OBSTRUCTION ALLEGED</u>
1. Jeremy Brown	April 2022	<p><u>Background</u></p> <p>Jeremy Brown, a member of the extremist Oath Keepers group, was an active member of the U.S. Army Special Services between 1992 and 2012. Brown is set to stand trial for, among other things, retaining at least five National Defense Information (NDI) documents at his residence, specifically within a briefcase in a RV, where his girlfriend also lived.</p> <p>Brown’s case stems initially from his participation in the storming of the U.S. Capitol Building on January 6, 2021. An initial arrest warrant had been issued related to a misdemeanor charge for his trespassing of the Capitol.¹ FBI agents traveled to Brown’s girlfriend’s residence in Tampa, Florida, where Brown also resided. The residence consisted of a single-family home (where Brown and his partner lived) as well as an attached apartment (occupied by a tenant). During his arrest on September 30, 2021, agents searched the home, but not the apartment, as well as an RV and trailer on the property belonging to Brown’s partner. Agents found firearms and grenades belonging to Brown. Also, FBI agents found at least five documents and a CD in a briefcase in the RV, all classified at “Secret” level and related to national defense.²</p> <p><u>Charges/Trial</u></p>	No mention

¹ The Criminal Complaint concerned 18 U.S.C. § 1752(a)(1) and (2), which makes it a crime to (1) knowingly enter or remain in any restricted building or grounds without lawful authority to do; and (2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engage in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions. See Criminal Complaint (Sept. 29, 2021), https://www.justsecurity.org/wp-content/uploads/2022/11/brown_jeremy_-_complaint_-_sept_2021_redacted_0.pdf; Statement of Facts accompany Criminal Complaint (Sept. 29, 2021), https://www.justsecurity.org/wp-content/uploads/2022/11/brown_jeremy_statement_of_facts_redacted_0.pdf; Derek Hawkins, *Former Special Forces Soldier and Onetime Congressional Candidate Arrested in Capitol Riot Case*, Washington Post (Oct. 2, 2022), <https://www.washingtonpost.com/nation/2021/10/02/jeremy-brown-capitol-riot-arrest/>.

² Government Second Notice to Introduce Inextricably Intertwined and/or Rule 404(b) Evidence (Sept. 18, 2022) https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_.395204.216.0.pdf. A further search warrant was sought by the FBI the following day in order to seize the weapons. See Criminal Complaint and FBI Affidavit (Oct. 1, 2021), § 9 onwards, https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_.395204.1.0.pdf.

		<p>On October 19, 2021, Brown was indicted with weapons charges.³ Just over 6 months later, on April 12, 2022, a superseding indictment added a further four counts in violation of the retention clause of § 793(e),⁴ with a further count of § 793(e) retention added on November 8, 2022.⁵ The five counts relate specifically to four “Secret” documents as well as a memorandum found on a CD, which prosecutors allege he wilfully retained from an unknown date until his arrest on September 30.⁶</p> <p>The trial date has been delayed a few times. On September 21, 2022, a trial date of December 5, 2022, was set before Judge Susan C. Bucklew. It is unlikely the trial will start on this date, particularly given the November 8 second superseding indictment, for which Brown will be arraigned on November 17 before Magistrate Judge Sean P. Flynn.⁷</p> <p>It appears that Brown “intends to argue at trial that the classified documents and grenades were planted in his R.V. by federal agents, who he claims were upset that he would not provide information to them.”⁸</p> <p><u>Documents</u></p> <p>The total number of NDI documents found in the briefcase is unclear. The superseding indictment included 4 documents which were dated between 2004 and 2005, and reportedly related to a deployment to Afghanistan.⁹ The second superseding indictment added a fifth count relating to a report Brown wrote himself about an event, potentially in Afghanistan, apparently with “attachments,” dated September 2011. All five documents are classified at the “Secret” level.¹⁰</p> <p>The five counts list the documents as:</p>	
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³ Indictment (Oct. 19, 2021), https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_.395204.21.0.pdf.

⁴ Superseding Indictment (April 12, 2022), https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_.395204.159.0-2.pdf.

⁵ Second Superseding Indictment (Nov. 8, 2022), https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_.395204.250.0-2.pdf.

⁶ Government Second Notice to Introduce Inextricably Intertwined and/or Rule 404(b) Evidence (Sept. 18, 2022), at pp. 1-2.

⁷ A printout of Brown’s Dock Report can be found here: *United States v. Brown*, Docket-No.-821-cr-00348 (M.D-Fla. Oct. 19, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/11/USA-v.-Brown-Docket-No.-821-cr-00348-M.D.-Fla.-Oct-19-2021-Court-Docket.pdf>.

⁸ Government Second Notice to Introduce Inextricably Intertwined and/or Rule 404(b) Evidence (Sept. 18, 2022), at p. 2

⁹ *That Other Bitter Jan6er About To Start Trial For Bringing Classified Documents Home From Work*, emptywheel (Sept. 16, 2022) <https://www.emptywheel.net/2022/09/16/florida-jan6er-about-to-start-trial-for-bringing-classified-documents-home-from-work/>.

¹⁰ Second Superseding Indictment (November 8, 2022), at pp. 3-5.

		<p>“Count 6 – Threat Frequency report – Combined Explosives Exploitation Cell (CEXC) – Afghanistan dated October 13, 2004 Count 7 – IED Incident Report – CEXC and addendum dated January 6, 2005 Count 8 – Spider Device Testing Procedures and Results dated November 1, 2004 Count 9 – Fragmentary Order dated January 14, 2005 Count 10 – Trip Report dated September 2011, and Attachments.”¹¹</p> <p><u>Other matters</u></p> <p>Prosecutors are seeking to admit related evidence (under Rule 404(b)) regarding an October 2017 voluntary interview Brown gave to Air Force Office Special Agents (at the same Tampa address) concerning his suspected retention of classified information. The suspicion was prompted after former military colleagues reported that Brown had been boasting (while at the funeral of a former fellow soldier) that “he had taken several classified documents relating to a missing soldier and maintained them in his possession after retiring from the military.” One of his former military colleagues said Brown’s “intent in retaining this information appeared to be malicious.” During the interview, Brown denied possessing any classified information, though he “admitted that he had drafted a classified trip report about a missing soldier, and that he may have discussed that report with others.” “At the request of the interviewing agents,” Brown “consented to a search of the storage containers in his shed, which he stated contained all of the items that he had removed from his office upon his retirement from the military in 2012. Agents searched the storage containers, and they did not find any classified information. Agents requested permission to search the remaining residence and other areas on the property,” for which Brown refused.¹² It doesn’t appear agents took the matter any further.</p> <p>Prosecutors intend to use this 2017 search and interview as evidence that Brown knew he had NDI documents. However, Brown has objected to</p>	
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¹¹ *Id.*, at p.5.

¹² Government Notice to Introduce Inextricably Intertwined and/or Rule 404(b) Evidence (Sept. 6, 2022), pp. 2-3, <https://www.justsecurity.org/wp-content/uploads/2022/11/220906-404b-brown.pdf>.

		<p>admitting the evidence: he accepts that he spoke about a report in 2017 but contends that the document was not properly classified – he had himself marked it as classified. This report was also in the briefcase FBI agents found in the RV, but it is not a document included in the indictment.¹³</p> <p>Also, court filings offer some insight into how prosecutors intend to prove that the documents constitute NDI. They intend to call an expert witness to attest to the documents being classified and will share with the jury the full documents, unredacted and still classified, under Section 6(c)(1) of the Classified Information Procedures Act (CIPA) (or “silent witness rule”).¹⁴</p>	
2. Kendra Kingsbury	May 2021	<p><u>Background</u></p> <p>Kendra Kingsbury was an intelligence analyst of the FBI’s Kansas City Division for more than 12 years. She held a “Top Secret/SCI” security clearance and had access to NDI and classified information at a secure area of the FBI’s Kansas City offices and through secure government computer systems.¹⁵</p> <p>She is alleged to have taken home FBI classified documents marked “Secret,” including NDI, during a 13-year period. The indictment indicated that in addition to FBI documents, Kingsbury took the classified documents of an “OGA,” described as another “U.S. government intelligence agency.”¹⁶ While the indictment referenced 20 classified documents, recent reporting suggested that she, in fact, retained over 380 documents at her home.¹⁷</p>	No mention.

¹³ Defense’s Objections to The Government’s Notice to Introduce Inextricably Intertwined and/or Rule 404(b) Evidence (Sept. 9, 2022), https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_395204.209.0-2.pdf.

¹⁴ Government Motion to Use “Silent Witness Rule” at Trial Pursuant to CIPA Section 6(c) (Sep. 15, 2022), particularly at p. 4 onwards, https://www.justsecurity.org/wp-content/uploads/2022/11/gov.uscourts.flmd_395204.212.0.pdf.

¹⁵ Indictment (May 18, 2021), https://www.justsecurity.org/wp-content/uploads/2022/10/kingsbury_redacted_0-2.pdf; DOJ Press Release (May 21, 2021), <https://www.justice.gov/opa/pr/fbi-employee-indicted-illegally-removing-national-security-documents-taking-material-her-home>.

¹⁶ Indictment (May 18, 2021), § 7. Multiple reports suggest that the government intelligence agency is the CIA. *See, e.g.*, Christopher Burgess, *Former FBI Analyst Charged – 13 Years of Classified Secrets Stolen*, ClearanceJobs (May 22, 2021), <https://news.clearancejobs.com/2021/05/22/former-fbi-analyst-charged-13-years-of-classified-secrets-stolen/>; Kevin Gosztola, *Justice Department unlikely to charge Trump with violating the Espionage Act*, Shadow Proof (Aug. 11, 2022) <https://shadowproof.com/2022/08/11/justice-department-unlikely-to-charge-trump-with-violating-the-espionage-act/>.

¹⁷ Reports have suggested that Kingsbury admitted, as part of a recent plea agreement, to having retained over 380 documents. *See, e.g.*, *Missouri News Headlines Friday, October 14th, 2022*, KMA Land (Oct. 14, 2022), https://www.kmaland.com/news/regional/missouri-news-headlines-friday-october-14th-2022/article_165a0538-4bae-11ed-a1b6-dffa7f7375a.html; *Ex-analyst with Kansas City’s FBI pleads guilty to keeping national defense docs at her home*, KMBC (Oct. 14, 2022), <https://www.kmbc.com/article/former-kansas-city-fbi-analyst-kendra-kingsbury-pleads-guilty-keeping-national-defense-docs-at-home/41616706>.

		<p>Kingsbury is not alleged to have disseminated any of the information.¹⁸</p> <p><u>Charges/Documents</u></p> <p>On May 18, 2021, Kingsbury was charged in a two-count indictment which alleged that:</p> <p>(a) Between June 2004 and December 15, 2017, Kingsbury “improperly removed and unlawfully and willfully retained, in her personal residence, sensitive government materials, including National Defense Information and classified documents.”</p> <p>(b) Count one: “Numerous documents classified at the secret level that describe intelligence sources and methods related to U.S. government efforts to defend against counterterrorism, counterintelligence and cyber threats. The documents include details on the FBI’s nationwide objectives and priorities, including specific open investigations across multiple field offices. In addition, there are documents relating to sensitive human source operations in national security investigations, intelligence gaps regarding hostile foreign intelligence services and terrorist organizations, and the technical capabilities of the FBI against counterintelligence and counterterrorism targets.” These documents’ classification levels include S//NF (x4); S//NF/FISA (x2); S//OC/NF/FISA (x4).</p> <p>(c) Count two: “Numerous documents classified at the [S]ecret level from the OGA that describe intelligence sources and methods related to U.S. government efforts to collect intelligence on terrorist groups. The documents include information about al Qaeda members on</p>	
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¹⁸ Derek Hawkins, *FBI analyst took documents on bin Laden and al Qaeda and kept them for years, feds say. She’s now been charged*, New York Times (May 22, 2021), <https://www.washingtonpost.com/national-security/2021/05/22/fbi-agent-bin-laden-al-qaeda-kingsbury/>.

		<p>the African continent, including a suspected associate of Usama bin Laden. In addition, there are documents regarding the activities of emerging terrorists and their efforts to establish themselves in support of al Qaeda in Africa.” These documents’ classification levels include S//NF (x10).</p> <p>(d) The indictment alleges that the defendant knew that unauthorized removal of classified materials and transportation and storage of those materials in unauthorized locations risked disclosure and transmission of those materials, and therefore could endanger the national security of the United States and the safety of its citizens.</p> <p><u>Plea/Sentencing</u></p> <p>Kingsbury initially pleaded not guilty, but at a change of plea hearing on October 13, 2022, Kingsbury pleaded guilty to two counts on the indictment. Judge Stephen R. Bough set Kingsbury’s sentencing hearing for March 16, 2023.¹⁹</p>	
3. Yen Cham Yung	October 2020	<p><u>Background</u></p> <p>Yen Cham Yung was an FBI Special Agent from 1996 until July 2016. He was assigned to offices in Chicago, D.C., Honolulu, and Indonesia. For a time, he served as a Bureau liaison to the Defense Department’s Northern Command in Colorado Springs. Yung had “Top Secret/SCI” security clearance while at the Bureau.²⁰</p> <p>Yung is alleged to have taken home both “unclassified” and “Secret” materials (including papers and storage devices) during his time at the FBI, which he retained after leaving the Bureau.²¹</p>	No mention.

¹⁹ *United States v. Kingsbury* - Criminal Minutes - Change Of Plea (Oct. 13, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/10/Kingsbury-CRIMINAL-MINUTES-CHANGE-OF-PLEA-Oct-13-2022.pdf>.

²⁰ Complaint (May 12, 2020), §§ 13-14, <https://www.justsecurity.org/wp-content/uploads/2022/10/Yen-Cham-Yung-Complaint.pdf>. NB: DOJ has not released any press releases. There has also been very little media coverage of this story, except for in June 2020. See, e.g., *Ex-FBI agent accused of storing top-secret documents at home*, Associated Press (June 24, 2020), <https://apnews.com/article/d1d3298159ec9f511f7796e6a173d0be>.

²¹ Complaint (May 12, 2020), § 11.

		<p>The case is ongoing, and a trial date is yet to be set. Current charges do not suggest Yung sold or disseminated any of the information.²²</p> <p>The FBI was initially notified of Yung’s storing of classified material in September 2009 by the child of Yung’s then-wife (Individual B). Yung’s wife, her friends, and Individual B were searching Yung and his wife’s once-shared residence for documents related to their current separation proceedings. On multiple occasions they found boxes marked as property of the United States Government, some with classification markings.</p> <p><u>Documents</u></p> <p>Two search warrants were issued by the Northern District of Illinois in September which authorized the search of vast amounts of documents (including emails and FBI reports) and data storage devices. The first search “located at least fourteen documents that contained markings indicating that they were the property of the United States Government and marked as ‘Secret.’ Based upon their contents, the documents appear to relate to the time period extending between approximately 1997 and 2015, and appear to relate to matters on which ... [Yung] worked and coordinated, including counterintelligence, counterproliferation and drug trafficking. Further, some of the documents marked secret related to matters regarding the FBI’s use of tradecraft, and especially undercover agents.”²³ Documents which were marked as “Secret” were forensically analyzed. One document contained “sensitive information” about the FBI’s use of undercover agents and “contained the handwritten notation, ‘Yung’ and ‘Copy,’ among other notions.”²⁴ Another was an FBI email thread marked “Secret” as well as a Memorandum of Understanding between the FBI and CIA in relation to domestic and international activities, marked “Secret.”²⁵ A second search yielded further material of concern, including unclassified, printed out FBI email threads, and an FBI report documenting a sensitive security interview.²⁶</p>	
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²² *Ex-FBI agent accused of storing top-secret documents at home*, Associated Press (June 24, 2020).

²³ Complaint (May 12, 2020), §§ 26-27.

²⁴ *Id.*, § 28.

²⁵ *Id.*, §§ 29, 37.

²⁶ *Id.*, §§ 34-35.

		<p>In total, “law enforcement has identified what is believed to be United States Government materials on approximately fifty digital and magnetic storage devices Approximately five of these devices contain materials marked ‘Secret.’ Approximately eleven of these devices contain what is believed to be United States Government material which has been commingled with personal material relating to Yung.²⁷ As of May 2020, “over three hundred additional storage devices, approximately 36 which are marked U.S. Government Property, have been seized, and review is ongoing.”²⁸</p> <p><u>Charges</u></p> <p>A criminal complaint was filed on May 12, 2020, which contains the information detailed above. An indictment was entered on October 16, 2020, alleging two counts.²⁹ In violation of § 793(e), Yung is alleged to have taken the Memorandum of Understanding between the FBI and CIA in relation to domestic and international activities, marked “Secret.” In violation of § 641, Yung is alleged to have “retained ... unclassified FBI documents, magnetic and electronic media, and photographic equipment ... with intent to convert it to his own use.”</p>	
4. Ahmedelhadi Yassin Serageldin	November 2018	<p><u>Background</u></p> <p>Ahmedelhadi Yassin Serageldin worked for Raytheon Company, a defense contractor, from August 1997 to May 2017, on matters related to military radar technology. He had “Secret” level security clearance.³⁰</p> <p>On April 10, 2017, “Raytheon’s Ethics Office notified the company’s Global Security Services unit that they were investigating Serageldin for possible time-card fraud.”³¹ As part of the investigation, “Raytheon analyzed Serageldin’s history of electronic downloads on its computer network for any suspicious activity. Raytheon</p>	<p>Yes.</p> <p>The indictment stated that from “the very beginning of this investigation, in or about April 2017, Serageldin sought to mislead Raytheon personnel. Serageldin’s misleading conduct continued throughout the company’s investigation and until the Federal Bureau of</p>

²⁷ *Id.*, § 47.

²⁸ *Id.*

²⁹ Indictment (Oct. 16, 2020), https://www.justsecurity.org/wp-content/uploads/2022/10/Yen-Cham-Yung-Indictment-October-16-2020.pl_.pdf; Complaint (May 12, 2020), § 2.

³⁰ Indictment (Nov. 20, 2018), § 4 <https://www.justsecurity.org/wp-content/uploads/2022/10/Serageldin-Indictment-Nov-2018.pdf>.

³¹ *Id.*, § 5.

		<p>investigators determined that on or about January 29, 2017 and on or about February 25, 2017, Serageldin had downloaded hundreds of documents and downloaded them onto a Western Digital external hard drive in violation of Raytheon’s security and document control policies.”³² Raytheon “began to investigate Serageldin’s download activity because it appeared that he might have mishandled sensitive Raytheon information.”³³</p> <p><u>Charges/Documents</u></p> <p>Although the indictment only included one count for witness tampering (18 U.S.C. § 1512(b)(3)),³⁴ it mentioned that during searches of his premises investigators found “numerous documents” that were “Raytheon proprietary information and documents marked as containing classified information.”³⁵ It was said that his actions in relation to witness tampering were carried out with “intent to hinder, delay, and prevent the communication to a law enforcement officer of information relating to the commission and possible commission of a Federal offense, including time-card fraud and mishandling classified information,”³⁶ the only suggestion that at this point he was suspected of potential crimes under § 793.</p> <p>Internal negotiations between the government and Serageldin’s defense team are unclear, but the initial indictment was eventually waived in December 2019 with the parties reaching a plea agreement for one count of retention under § 793(e).³⁷ The Superseding Information accompanying the plea agreement alleged that Serageldin had “numerous” documents classified at “Secret” level “pertaining to U.S. military programs relating to missile defense,”³⁸ but offered no further insight into the content of the documents.</p>	<p>Investigation searched Serageldin’s house, vehicle, and person on or about May 3, 2017”.</p> <p>The indictment further accused Serageldin of lying repeatedly to the FBI about why, when, and how he had downloaded Raytheon files. Further, he delayed delivery of his external hard drive and personal laptop computer to Raytheon investigators, during which he conducted research on how to wipe his laptop’s data and altered the contents of a personal thumb drive despite having been instructed by investigators not to do so.⁴²</p> <p>Serageldin also altered or obliterated the classification markings on around 50 documents, and, according to the government, “was thwarted only because of FBI surveillance and the execution of court ordered search and seizure warrants.”⁴³</p>
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³² *Id.*, § 6.

³³ *Id.*, § 7. For further details on the prosecution, see Government’s Sentencing Memorandum (July 18, 2020), at p. 7, <https://www.justsecurity.org/wp-content/uploads/2022/11/serageldinsentence.pdf>.

³⁴ *Id.*, § 7.

³⁵ *Id.*, § 10.

³⁶ *Id.*

³⁷ Plea Agreement (Dec. 13, 2019) <https://www.justsecurity.org/wp-content/uploads/2022/10/Serageldin-Plea-Agreement.pdf>.

³⁸ Superseding Information (Dec. 12, 2019) <https://www.justsecurity.org/wp-content/uploads/2022/10/Superseding-indictment-Dec.-12-2019.pdf>.

⁴² Indictment (Nov. 20, 2018), § 7.

⁴³ Government’s Sentencing Memorandum (July 18, 2020), at p. 8, <https://www.justsecurity.org/wp-content/uploads/2022/11/serageldinsentence.pdf>.

		<p>The Centre for Development of Security Excellence said: “Raytheon investigators determined on two separate occasions Serageldin had downloaded hundreds of documents and stored them on an external hard drive in violation of Raytheon’s security and document control policies.” The FBI conducted a search of his house, vehicle and person in May 2017, during which “more than 3,100 electronic files and more than 110 paper documents belonging to Raytheon or the Department of Defense were recovered. More than 570 of those documents were marked as containing classified information.” “It was also determined Serageldin had altered or obliterated the classification markings on approximately 50 documents.”³⁹</p> <p><u>Sentence</u></p> <p>Serageldin was sentenced in July 2020 to 18 months’ imprisonment and ordered to pay a fine of \$10,000.⁴⁰</p> <p>The government noted that Serageldin would have been eligible for a higher sentence had the government not agreed to dismiss the obstruction counts.⁴¹</p>	
5. Weldon Marshall	March 2018	<p><u>Background</u></p> <p>Weldon Marshall served in the U.S. Navy between 1999 and 2004, where he had access to “highly sensitive classified material, including documents describing U.S. nuclear command, control and communications.”⁴⁴ After leaving the Navy, Marshall worked for various companies as a contractor for the Defense Department. “While employed with these companies, Marshall provided information technology services on military bases in Afghanistan, where he also had access to classified material. During his employment overseas, and particularly while he was located in Afghanistan, Marshall shipped hard drives to his Liverpool, Texas, home.”⁴⁵</p>	No mention.

³⁹ Ahmedelhadi Yassin Serageldin - *Unlawful Retention of National Defense Information*, Center for Development of Security Excellence, Case Study (undated), <https://www.cdse.edu/Portals/124/Documents/casestudies/case-study-serageldin.pdf>.

⁴⁰ Sentencing Judgment (July 22, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/10/Serageldin-Sentencing-Judgment.pdf>.

⁴¹ Government’s Sentencing Memorandum (July 18, 2020), at p. 3.

⁴⁴ DOJ Press Release (March 5, 2018), <https://www.justice.gov/opa/pr/former-defense-contractor-convicted-unlawfully-retaining-classified-information>.

⁴⁵ *Id.*

		<p><u>Documents</u></p> <p>The Information accompanying the plea agreement, which included one count of 793(e), alleged that between January 2002 and January 2017, Marshall had “unauthorized possession of, 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 at the ‘Secret’ level about United States nuclear command, control, and communications, as well as several hard drives containing documents and writings classified at the ‘Secret’ level about ground operations in Afghanistan”⁴⁶</p> <p>The plea agreement further detailed that Marshall shipped 7 hard drives from Bagram Air Base to his home in Texas. A further five Cisco switches were also found.⁴⁷</p> <p><u>Charges/Plea/Sentence</u></p> <p>Marshall was initially indicted in January 2017 for one count in violation of § 641 for stealing, purloining and converting five Cisco switches belonging to the government.⁴⁸ The indictment was waived in March 2018, with Marshall entering a plea agreement for a one-count Information for wilful retention under § 793(e).⁴⁹</p> <p>He was sentenced in June 2018 to 41 months in prison, followed by a year of supervised release.⁵⁰</p>	
6. Nghia Hoang Pho	November 2017	<p><u>Background</u></p> <p>Nghia Hoang Pho was a Tailored Access Operations (TAO) developer for the National Security Agency,⁵¹ which “involved operations and intelligence collection to gather data from target or foreign automated information systems or</p>	No mention.

⁴⁶ Information (March 5, 2018), https://www.justsecurity.org/wp-content/uploads/2022/10/USA_v_Marshall-Information-accompanying-Plea-March-5-2018.pdf; DOJ Press Release (March 5, 2018).

⁴⁷ Plea Agreement (March 5, 2018), https://www.justsecurity.org/wp-content/uploads/2022/10/USA_v_Marshall-Plea-AgreementMarch-5-2018.pdf, § 23.

⁴⁸ Indictment (March 5, 2017), https://www.justsecurity.org/wp-content/uploads/2022/10/USA_v_Marshall-Indictment-Jan-2017.pdf.

⁴⁹ Plea Agreement (March 5, 2018); Information (March 5, 2018); DOJ Press Release (March 5, 2018).

⁵⁰ Judgment (June 27, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/Marshall-sentencing-judgment.pdf>; DOJ Press Release (June 13, 2018), <https://www.justice.gov/opa/pr/former-defense-contractor-sentenced-unlawfully-retaining-classified-information>.

⁵¹ Information (Nov. 29, 2017), §§ 1, 7, <https://www.justsecurity.org/wp-content/uploads/2022/10/Nghia-Hoang-Pho-Information.pdf>.

		<p>networks.” TAO also involved prevention, detection, and response to unauthorized activity within Defense Department information systems and computer networks.⁵²</p> <p>Between 2010 and March 2015, Pho removed and retained government property, including documents and writings that contained NDI classified as “Top Secret” and “Top Secret/SCI.” The documents were in hard copy and digital form, and found in several locations within his residence in Maryland.⁵³</p> <p>At his sentencing hearing, Pho claimed that he took the documents “so he could work from home. He said he was trying to earn a promotion as he neared retirement.”⁵⁴ The New York Times reported that “Government officials [...] said that Mr. Pho took the classified documents home to help him rewrite his resume. But he had installed on his home computer antivirus software made by Kaspersky Lab, a top Russian software company, and Russian hackers are believed to have exploited the software to steal the documents, the officials said.”⁵⁵</p> <p><u>Charges</u></p> <p>In November 2017, he was charged with and pleaded guilty to one count of willful retention of NDI in violation of § 793(e).⁵⁶</p> <p><u>Sentence</u></p> <p>Pho was sentenced to 66 months (5.5 years) in prison followed by 3 years of supervised release.⁵⁷ According to CBS News, prosecutors had recommended 8 years.⁵⁸</p>	
<p>7. Harold Martin III</p>	<p>February 2017</p>	<p><u>Background</u></p>	<p>No mention.</p>

⁵² DOJ Press Release (Dec. 1, 2017), <https://www.justice.gov/opa/pr/maryland-man-pleads-guilty-willful-retention-national-defense-information>.

⁵³ Plea Agreement With Accompanying Stipulated Fact (Nov. 28, 2017), p. 13, <https://www.justsecurity.org/wp-content/uploads/2022/10/Nghia-Hoang-Pho-Plea-Agreement.pdf>; Information (Nov. 29, 2017).

⁵⁴ *Ex-NSA Employee Gets 5 Years In Prison For Taking Top Secret Info Home*, CBS News (Sept. 25, 2018), <https://www.cbsnews.com/news/nghia-hoang-pho-former-nsa-employee-who-kept-top-secret-information-at-home-sentenced-to-prison-today/>.

⁵⁵ Scott Shane and Adam Goldman, *Former N.S.A. Employee Pleads Guilty to Taking Classified Information*, New York Times (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/us/politics/nsa-nghia-pho-classified-information-stolen-guilty.html>.

⁵⁶ Information (Nov. 29, 2017), https://www.justsecurity.org/wp-content/uploads/2022/10/pho_information_0.pdf; Plea Agreement With Accompanying Stipulated Fact (Nov. 28, 2017).

⁵⁷ DOJ Press Release (Sept. 25, 2018), <https://www.google.com/url?q=https://www.justice.gov/opa/pr/former-nsa-employee-sentenced-prison-willful-retention-classified-national-defense&sa=D&source=docs&ust=1666291591519295&usq=AOvVaw127QM0xdgyswRvjdh8ikXh>.

⁵⁸ *Ex-NSA Employee Gets 5 Years In Prison For Taking Top Secret Info Home*, CBS News (Sept. 25, 2018).

		<p>Harold Martin was employed by at least seven different private companies and assigned as a contractor to work at a number of government agencies. In connection with his employment, Martin held various security clearances up to “Top Secret/SCI.”</p> <p>Between 1996 and 2016, Martin stole and retained classified and NDI documents.⁵⁹ The initial search warrant ordered a search to take place at his residence, including his house, two storage sheds, and a vehicle, for the “fruits, evidence and instrumentalities of” a § 641 violation.⁶⁰</p> <p>Despite no evidence of obstruction, or dissemination of documents, the government noted that Martin’s conduct created the risk of unauthorized disclosure, which results in the government having to assess whether to take remedial action or abandon national security programs.⁶¹</p> <p><u>Relevant documents/information</u></p> <p>The affidavit in support of the initial criminal complaint states that on August 27, 2016, a search warrant was executed where investigators “located hard copy documents and digital information stored on various devices and removable digital media. A large percentage of the materials recovered from Martin’s residence and vehicle bore markings indicating that they were property of the United States and contained highly classified information of the United States,” including material classified up to “Top Secret/SCI.” Six of the documents “appear to have been obtained from sensitive intelligence.”⁶²</p> <p>The subsequent indictment said that NSA, USCYBERCOM, NRO, CIA documents (in hard and digital) were taken, which were classified as</p>	
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⁵⁹ Indictment (Feb. 8, 2017), § 19, <https://www.justsecurity.org/wp-content/uploads/2022/10/Martin-Indictment-Feb-8-2017.pdf>.

⁶⁰ Criminal Complaint and Supporting Affidavit (Aug. 29, 2016), § 5, https://www.justsecurity.org/wp-content/uploads/2022/10/martin_criminal_complaint-Aug-29-2016.pdf.

⁶¹ DOJ Press Release (July 19, 2019), <https://www.justice.gov/opa/pr/former-government-contractor-sentenced-nine-years-federal-prison-willful-retention-national> (“In court documents and at today’s sentencing hearing, the government noted that crimes such as Martin’s not only create a risk of unauthorized disclosure of, or access to, highly classified information, but often require the government to treat the stolen material as compromised, resulting in the government having to take remedial actions including changing or abandoning national security programs.”).

⁶² Criminal Complaint and Supporting Affidavit (Aug. 29, 2016), §§ 6-7.

		<p>“Secret,” “Top Secret,” and “SCI,” including NDI.⁶³ The precise number is not stated.</p> <p><u>Charges/Plea/Sentence</u></p> <p>The initial criminal complaint included two counts for §§ 641 and 1924.⁶⁴ The indictment substituted those initial charges for 20 counts of retention under § 793(e).⁶⁵</p> <p>A plea agreement for one count of § 793(e) was reached in March 2019. In July 2019, Martin was sentenced to 9 years’ imprisonment.⁶⁶</p>	
8. Kristian Saucier	July 2015	<p><u>Background</u></p> <p>Kristian Saucier served as a machinist’s mate aboard the U.S.S. Alexandria, a U.S. Navy Los Angeles-class nuclear attack submarine based at the Naval Submarine Base New London in Groton, Connecticut, between September 2007 and March 2012. On at least three separate dates in 2009, Saucier used the camera on his personal cell phone to take photographs of classified spaces, instruments, and equipment of the U.S.S. Alexandria.</p> <p>In March 2012, his cellphone was found at a waste transfer station in Hampton, Connecticut. After Saucier was interviewed by the FBI and Naval Criminal Investigative Service (NCIS) in July 2012, he destroyed a laptop computer, a personal camera, and the camera’s memory card. Pieces of a laptop computer were subsequently found in the woods on a property in Connecticut owned by a member of Saucier’s family. He had “Secret” clearance at the time of the offense.⁶⁷</p> <p><u>Charges</u></p>	Yes. After being interviewed by federal agents, he destroyed a laptop, personal camera, and camera memory card to impede the federal investigation into the photographs. ⁷³

⁶³ Indictment (Feb. 8, 2017), §§ 20-21, 26.

⁶⁴ Criminal Complaint and Supporting Affidavit (Aug. 29, 2016).

⁶⁵ Indictment (Feb. 8, 2017), § 19.

⁶⁶ Plea Agreement (March 28, 2019), <https://www.justsecurity.org/wp-content/uploads/2022/10/Martin-Plea-Agreement-March-28-2019.pdf>; Judgment (July 19, 2019), <https://www.justsecurity.org/wp-content/uploads/2022/10/Martin-Judgment-July-19-2019.pdf>. See also DOJ Press Release (July 19, 2019), <https://www.justice.gov/opa/pr/former-government-contractor-sentenced-nine-years-federal-prison-willful-retention-national>.

⁶⁷ Plea Agreement (May 27, 2016), at p. 8, <https://www.justsecurity.org/wp-content/uploads/2022/10/Kristian-Saucier-Plea-Agreement.pdf>; FBI Press Release (July 24, 2015), <https://www.fbi.gov/contact-us/field-offices/newhaven/news/press-releases/u.s.-service-member-charged-with-illegal-retention-of-photos-taken-inside-nuclear-sub-obstructing-justice>.

⁷³ Plea Agreement (May 27, 2016), at p. 8.

		<p>The initial indictment included two counts:⁶⁸</p> <p>(a) Count 1 (§ 793): “From on or about January 19, 2009, through in or about March 2012, in the District of Connecticut and elsewhere,” Saucier, “having unauthorized possession of information relating to the national defense, to wit, six photographs of classified sections of the <i>U.S.S. Alexandria</i>, a <i>Los Angeles-class</i> nuclear attack submarine, which information the defendant had reason to believe could be used to the injury of the United States and to the advantage of any foreign nation[.]”</p> <p>(b) Count 2 (§ 1519): Between July 16, 2012, and October 31, 2012, Saucier did “knowingly destroy, mutilate and conceal a tangible object, that is, a laptop computer, with the intent to impede, obstruct and influence the investigation of a matter within the jurisdiction of the Federal Bureau of Investigation and the Naval Criminal Investigative Service[.]”</p> <p><u>Documents</u></p> <p>The plea agreement stated that photos contained information classified as “Confidential/Restricted Data”:⁶⁹</p> <p>“The defendant used his cellular telephone to take a number of photographs of the inside of classified sections of <i>U.S.S. Alexandria</i>, a <i>Los Angeles class</i> nuclear attack submarine on the following dates and times while the submarine was in port in Groton, Connecticut, including: (1) two photos containing Naval Nuclear Propulsion Information classified as Confidential/Restricted Data taken on January 19, 2009, between 3:55 a.m. and 4:00 a.m. (‘the January photos’); (2) two photos containing Naval Nuclear Propulsion Information classified as Confidential/Restricted Data taken on March 22, 2009, between 1:30 a.m. and</p>	
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⁶⁸ Indictment (July 23, 2015), <https://www.justsecurity.org/wp-content/uploads/2022/10/Kristian-Saucier-Indictment.pdf>.

⁶⁹ *Id.*

		<p>1:31 a.m. ('the March photos'); and (c) two photos containing Naval Nuclear Propulsion Information classified as Confidential/Restricted Data taken on July 15, 2009, at 12:47 p.m. ('the July photos'). The two January photos captured the auxiliary steam plant panel and the reactor compartment viewed through a portal. The two March photos provided a panoramic array of the Maneuvering Compartment. Similarly, the two July photos documented the reactor head configuration of the nuclear reactor and a view of the reactor compartment from within that compartment.”</p> <p><u>Plea/Sentence</u></p> <p>In May 2016, Saucier pleaded guilty to one count of § 793.⁷⁰ The Justice Department asked for five years and 3 months in prison, but the court ordered one year in prison, followed by six months of home confinement along with three years of supervised release. Additionally, he was ordered to complete 100 hours of community service following his period of home confinement.⁷¹</p> <p><u>Trump Pardon</u></p> <p>Trump pardoned Saucier on March 9, 2018, tweeting: “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!” Press Secretary Sarah Sanders said, “The sentencing judge found that Mr. Saucier’s offense stands in contrast to his commendable military service.” “The president is appreciative of Mr. Saucier’s service to the country.”⁷²</p>	
<p>9. Christopher Glenn</p>	<p>February 2014</p>	<p><u>Background</u></p>	<p>Yes. The superseding indictment alleged false</p>

⁷⁰ Plea Agreement (May 27, 2016); DOJ Press Release (May 27, 2016), <https://www.justice.gov/opa/pr/us-servicemember-admits-illegally-retaining-photos-taken-inside-nuclear-submarine-and>.

⁷¹ Government Sentencing Memorandum (Aug. 15, 2016), at p. 35, <https://www.justsecurity.org/wp-content/uploads/2022/11/Government-Sentencing-Memorandum-August-15-2016pdf.pdf>; Judgment (Sept. 18, 2016), <https://www.justsecurity.org/wp-content/uploads/2022/11/Judgment-September-18-2016-1.pdf>. See also *US Navy Sailor Jailed For Faking Photos Of Classified Areas Of Nuclear Submarine*, Associated Press (Aug. 20, 2016), <https://www.theguardian.com/us-news/2016/aug/20/us-navy-sailor-jailed-for-taking-photos-of-classified-areas-of-nuclear-submarine>.

⁷² Ryan Lucas, *Trump Pardons Ex-Navy Sailor Sentenced For Photos Of Submarine*, NPR (March 9, 2018), <https://www.npr.org/2018/03/09/592440282/trump-pardons-ex-navy-sailor-sentenced-for-photos-of-submarine>. See also *Executive Grant of Clemency* (March 9, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/Saucier-pardon.pdf>.

		<p>Christopher Glenn was a network system administrator for Harris Corporation at Joint Task Force Bravo, located at Soto Cano Air Base, Honduras.⁷⁴ He copied files classified up to the “Secret” level onto his own work account, burned them onto a DVD, and onto a network storage device later found at his house.⁷⁵ He had to go around safeguards that were designed to prevent classified information from being put on removable storage devices.⁷⁶</p> <p><u>Charges/Documents</u></p> <p>Proceedings included three indictments between February and July 2014. The initial indictment included counts for §§ 18 U.S.C. 641, 1030(a)(2)(B), 1001(a)(1), 1425(a), and 31 U.S.C. § 5324.⁷⁷</p> <p>The final, Second Superseding Indictment included:⁷⁸</p> <ul style="list-style-type: none"> ● Count 1 (§ 793(e)): electronic documents in a file labeled “JTFB PST.pst,” taken from a classified e-mail account of the JTF-B Commander, with at least 8 marked “Secret” on Qatar, Saudi Arabia, UAE, Bahrain and Iraq. ● Count 2 (§ 641): the same file and email mentioned in Count 1. ● Counts 3-4 (§ 641): electronic documents taken from the unclassified e-mail account of the JTF-B Commander and JTF-B deputy J2 Officer. ● Count 5 (§ 1030(a)(1) - computer intrusion): the same classified computer, file and email mentioned in Count 1. ● Counts 6-7 (§ 1030(a)(2)(B) - computer intrusion): the same unclassified computer, file and email mentioned in Count 2. ● Counts 8-9 (§ 5324(a)(3) - structuring financial transitions). 	<p>statements were made to a JTF-B technician investigating the suspected malware attack. Additionally, the second superseding indictment alleged obstruction under § 1512(c)(2).</p>
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⁷⁴ *Glenn v. United States*, No. 14-80031-CR, 2017 WL 6558627, at *2 (S.D. Fla. May 10, 2017), report and recommendation approved, No. 14-80031-CR, 2017 WL 6558412 (S.D. Fla. Oct. 20, 2017).

⁷⁵ *Id.*, at *4.

⁷⁶ *Id.*, at *3.

⁷⁷ Indictment (February 18, 2014), <https://www.justsecurity.org/wp-content/uploads/2022/10/Glenn-Indictment.pdf>.

⁷⁸ Second Superseding Indictment (July 15, 2014), <https://www.justsecurity.org/wp-content/uploads/2022/10/Christopher-Glenn-Second-Superseding-Indictment.pdf>. The superseding indictment did not mention § 793(e) but did include a false statement charge under § 1001(a)(1); charges otherwise remained the same. *See* Superseding Indictment (March 26, 2014), <https://www.justsecurity.org/wp-content/uploads/2022/10/Christopher-Glenn-Superseding-indictment.pdf>.

		<ul style="list-style-type: none"> • Counts 10-14 conspiracy (§ 371) to commit naturalization fraud (§ 1425(a)). • Count 15 (§ 1512(c)(2) - Obstruction): sending a message to another person directing the person to disconnect a computer network attached storage (NAS) server containing electronic evidence. <p><u>Plea Agreement/Sentence</u></p> <p>In January 2015, Glenn pleaded guilty to: count 1 (§ 793(e)); count 5 (§ 1030(a)(1) - computer intrusion), count 10 (§ 371 - conspiracy).⁷⁹ Glenn was sentenced in July 2015 to 120 months' imprisonment followed by 3 years of supervised release,⁸⁰ but was later sentenced to life in prison for separate offenses.⁸¹</p>	
10. John Norman Sims	July 2013	<p><u>Background</u></p> <p>John Norman Sims is a retired U.S. Air Force (USAF) officer, and at the time of the alleged offenses was a contractor and civilian employee of the USAF. Sims was indicted for accepting bribes from his two co-defendants (who each owned companies obtaining contracts from USAF). Most of the counts on the indictment pertained to actions of all three defendants in relation to the bribery scheme. However, Sims, alone, was additionally charged with willful retention under § 793(e) of classified information and NDI found at his home in Southern Pines, North Carolina, in 2012.⁸²</p> <p><u>Documents</u></p> <p>During a federal search warrant of Sim's residence on March 24, 2012, "Forty separate classified documents totaling 634 pages were found at the defendant's residence. The Department of Defense has reviewed each of the documents and has confirmed that every document - printed and electronic - is in fact classified and relates to the</p>	Yes. The initial indictment included three counts of making false statements to federal investigators. ⁸⁹

⁷⁹ Plea Agreement (Jan. 23, 2015), <https://www.justsecurity.org/wp-content/uploads/2022/10/Christopher-Glenn-Plea-Agreement.pdf>.

⁸⁰ DOJ Press Release (July 31, 2015), <https://www.justice.gov/opa/pr/florida-resident-sentenced-accessing-and-removing-classified-information-military-computers>. See also Glenn Sentencing Hearing Transcript (Oct. 15, 2015), <https://www.justsecurity.org/wp-content/uploads/2022/10/Glenn-Sentencing-Hearing-Transcript-October-15-2015.pdf>.

⁸¹ DOJ Press Release (July 21, 2017), <https://www.justice.gov/usao-sdfl/pr/government-contractor-sentenced-life-prison-trafficking-and-sexually-exploiting-minor-0>.

⁸² DOJ Press Release (Aug. 18, 2013), <https://www.justice.gov/usao-ndfl/pr/former-air-force-employee-and-two-contractors-charged-bribery-theft-government-funds>.

⁸⁹ Indictment (July 23, 2013), <https://www.justsecurity.org/wp-content/uploads/2022/10/John-Sims-Sealed-Indictment-July-23-2013.pdf>.

		<p>national defense. Additionally, the information possessed by the defendant originated with, or was owned or possessed by, the United States Government, concerning the national defense that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security.”⁸³ He also moved documents from his old residence to his new one in North Carolina in 2008. “The majority of the printed classified documents were located inside a briefcase that still contained a moving sticker and an index list number for a moving company that moved all of the defendant's belongings to North Carolina from Florida. A folder containing classified documents was located in a nightstand and a thumb drive containing classified information was found in the defendant's briefcase located in the kitchen. Agents obtained the moving company's records, and they include the inventory with the briefcase number, and a signed acknowledgement by the Defendant that the items were received in North Carolina from Florida on December 6, 2008.”⁸⁴</p> <p><u>Charges/Plea/Sentence</u></p> <p>In July 2013, an initial indictment included over thirty counts relating to the trio’s “exchanging the information for anything of value and obtaining and giving a competitive advantage in the award of a federal procurement contract.”⁸⁵ Importantly, the indictment included a count (count 34) for willful retention of information relating to NDI (§ 793 (e)). In July 2014, Sims pleaded guilty to, amongst other things, the willful retention charge. However, Sims subsequently filed a successful motion to vacate due to ineffective assistance of counsel.⁸⁶</p> <p>Subsequently, a plea agreement was reached in February 2020 for a single count under § 1924.⁸⁷</p>	
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⁸³ Statement of Facts accompanying Plea Agreement (Feb. 20, 2020), at pp. 1-2, <https://www.justsecurity.org/wp-content/uploads/2022/10/Statement-of-Facts-accompanying-Plea-Agreement-2020.pdf>.

⁸⁴ Statement of Facts accompanying Plea Agreement (Feb. 20, 2020), at pp. 2-3.

⁸⁵ Indictment (July 23, 2013).

⁸⁶ *United States v. Sims*, No. 3:13CR77/LAC/EMT, 2018 WL 1372361, at *9, (N.D. Fla. Jan. 4, 2018), report and recommendation adopted, No. 3:13CR77/LAC/EMT, 2018 WL 1371503 (N.D. Fla. Mar. 15, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Sims-2.pdf>, *aff'd*, 785 F. App'x 632 (11th Cir. 2019), <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Sims.pdf>.

⁸⁷ Plea Agreement (Feb. 20, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/10/Glen-Plea-Agreement-2020.pdf>; Information (Feb. 20, 2020), <https://www.justsecurity.org/wp-content/uploads/2022/10/Glenn-Information-2020.pdf>.

		Sims was sentenced in February 2020 to time served and ordered to pay a \$25 criminal penalty. ⁸⁸	
11. James Hitselberger	October 2012	<p><u>Background</u></p> <p>James Hitselberger was hired by Global Linguist Solutions to work as a linguist for the Joint Special Operations Task Force in Bahrain, at a naval base. His workplace was located in a Restricted Access Area (RAA), and he was trained to, and regularly did, work with classified information.</p> <p>Hitselberger was observed taking classified documents (stored on a classified computer system) from a “Secret” printer, placing them into an Arabic-English Dictionary in his backpack, and attempting to leave the building. The documents were marked “Secret.” His supervisors and commanding officer followed and confronted him outside the building which housed the RAA. They told him that they needed to see what was in his bag and asked him to produce the documents he had just printed. He “first took out only one classified document from inside the dictionary. When his supervisor asked what else he had, ... [he] finally surrendered the second classified document from his backpack.”⁹⁰</p> <p>When special agents later searched his living quarters, they found a further document classified as “Secret” with the “Secret” warning label cut off the top and bottom of the pages. This document related to U.S. troop movements, activities in the region, availability of improvised explosive devices, and gaps in U.S. intelligence of the political situation in Bahrain.⁹¹</p> <p><u>Documents/Charges</u></p> <p>The initial indictment alleged two counts of § 793(e):⁹²</p> <p>(a) Count 1: On April 11, 2012 “a Joint Special Operations Task Force (JSOTF) Situation Report (SITREP) dated April 11, 2012</p>	Nothing significant, except as noted, that he initially only turned over one document but quickly handed over the other.

⁸⁸ Judgment (Feb. 25, 2020), https://www.justsecurity.org/wp-content/uploads/2022/10/Judgment-Sims-Feb-25-2020.pl_.pdf.

⁹⁰ Criminal Complaint and Affidavit (Aug. 6, 2012), <https://www.justsecurity.org/wp-content/uploads/2022/10/Hitselberger-complaint-Aug-6-2012.pdf>.

⁹¹ Criminal Complaint and Affidavit (Aug. 6, 2012), § 14; *United States v. Hitselberger*, 991 F.Supp.2d 101 (D.D.C. 2013).

⁹² Indictment (Oct. 26, 2012), <https://www.justsecurity.org/wp-content/uploads/2022/10/Hitselberger-Indictment-Oct.-26-2012.pdf>.

		<p>(SITREP 104) and classified SECRET, and a Navy Central Command (NAVCENT) Regional Analysis dated April 9, 2012, and classified ‘Secret.’”</p> <p>(b) Count 2: on March 8, 2012 “a Joint Special Operations Task Force (JSOTF) Situation Report (SITREP) dated March 8, 2012 (SITREP 72) and classified “Confidential.”</p> <p>The superseding indictment alleged:⁹³</p> <p>(a) Counts 1 and 2 above</p> <p>(b) Count 3, in violation of § 793(e): on February 13, 2012, Hitselberger retained a “Bahrain Situation Update dated February 13, 2012, and classified ‘Secret.’”</p> <p>(c) Counts 4 to 6 charged Hitselberger under 18 USC §2071(a) in respect of the documents mentioned in Counts 1 and 2.</p> <p><u>Plea Agreement</u></p> <p>In April 2014, all counts in the superseding indictment were dismissed for a single count Information of unauthorized retention and removal of classified documents under 18 U.S.C. 1924,⁹⁴ to which he pleaded guilty.⁹⁵ The government conceded that Hitselberger “did not disseminate the classified information to a ‘foreign power.’”⁹⁶ Rather, Hitselberger told NCIS agents that “his sole purpose was to take the materials to his quarters to read,” and he “claimed not to know that the documents ... were classified, notwithstanding their clear markings.”⁹⁷</p> <p><u>Sentence</u></p> <p>On July 17, 2014, Hitselberger was sentenced to time already served (54 days at the D.C. Jail, eight months of home confinement, and eight more</p>	
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⁹³ Superseding Indictment (Feb. 28, 2013), <https://www.justsecurity.org/wp-content/uploads/2022/10/Hitselberger-Superseding-Indictment-Feb.-28-2013.pdf>.

⁹⁴ Criminal Information (April 24, 2014), at p.1, (“knowingly removed two classified documents, titled Joint Special Forces Task Force Situation Report 104 (JSOTF SITREP I04), dated April 11, 2012, and a NavyCentral Command Regional Analysis dated April 9, 2012, from a Restricted Access Area at Naval Support Activity Bahrain”), <https://www.justsecurity.org/wp-content/uploads/2022/10/Information-April-24-2014.pdf>.

⁹⁵ Plea Agreement (April 25, 2014), https://www.justsecurity.org/wp-content/uploads/2022/10/James-Hitselberger_Plea-Agreement-April-25-2014-.pdf.

⁹⁶ Memorandum of Findings of Fact and Statement of Reasons in Support of Order of Detention (Nov. 5, 2012), p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/10/findings.pdf>.

⁹⁷ Criminal Complaint and Affidavit (Aug. 6, 2012), § 15, <https://www.justsecurity.org/wp-content/uploads/2022/10/Hitselberger-complaint-Aug-6-2012.pdf>.

		months of electronic monitoring in Michigan) and a fine of \$250. ⁹⁸	
12. Abraham Lesnik	June 2008	<p><u>Background</u></p> <p>Abraham Lesnik was a Boeing scientist who specialized in anti-missile systems for aircrafts, holding a Department of Defense “Top Secret” security clearance. He pleaded guilty in July 2008 to one count of retention in violation of § 793(e) for taking “Secret” and “Top Secret” documents from his Boeing facility in El Segundo (approved by the government as a Sensitive Compartmented Information Facility) to his Valley Village residence.⁹⁹</p> <p><u>Documents</u></p> <p>While at Boeing, “Lesnik repeatedly brought defense-related classified information from his workplace to his home by using a flash drive, a small device that plugged into his work computer and allowed him to download information onto the device. He then took the information home with him on that flash drive. In this way, Lesnik accumulated a very large number of classified documents at his residence. Lesnik admitted today that he unlawfully retained 11 of these documents.”¹⁰⁰</p> <p>Documents included at least 10 marked at “Secret” and one as “Top Secret.” The documents included a table of technical details of radar payload performance parameters, briefing on missile and radar performance, as well as national defense satellite threats.¹⁰¹</p> <p>Although Lesnik admitted to retaining a relatively limited number of documents in his plea agreement, the government stated in a subsequent sentencing memorandum before the court that Lesnik illegally possessed approximately 2,000 classified</p>	Not charged. However, the government alleged that “Lesnik repeatedly lied on government security forms and, after he became a target of the investigation in this case, concealed and attempted to destroy evidence.” ¹⁰⁶

⁹⁸ Judgment (July 18, 2014), <https://www.justsecurity.org/wp-content/uploads/2022/10/judgment-july-18-2014.pdf>; Sentencing Memorandum (June 26, 2014), at p. 11, <https://www.justsecurity.org/wp-content/uploads/2022/10/Sentencing-Memorandum.pdf>.

⁹⁹ United States Attorney’s Office, Central District of California, Press Release (July 2, 2008), <https://www.justice.gov/archive/usao/cac/Pressroom/pr2008/092.html>. See also Eric Longabardi, *Boeing Scientist Charged with Mishandling Govt Info*, ABC News (undated), <https://abcnews.go.com/Blotter/story?id=5177855&page=1>.

¹⁰⁰ United States Attorney’s Office, Central District of California, Press Release (July 2, 2008).

¹⁰¹ Information (June 11, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Information-june-11-2008.pdf>.

¹⁰⁶ Government Reply to Abraham Lesnik’s Sentencing Memorandum (Dec. 2, 2008), at p. 2, <https://www.justsecurity.org/wp-content/uploads/2022/10/Government-Reply-Lesnicks-Sentencing-Memorandum-Dec-2-2008.pdf>.

		documents, including 400 at the “Top-Secret” level. ¹⁰²	
		<p><u>Charge/Plea/Sentence</u></p> <p>The indictment was waived,¹⁰³ and Lesnik pleaded guilty to one-count Information in violation of § 793(e).¹⁰⁴ He was sentenced to 3 years’ probation and a \$25,000 fine.¹⁰⁵</p>	
13. Nouredine Malki ¹⁰⁷	March 2006	<p><u>Background</u></p> <p>Nouredine Malki was a translator for the U.S. military’s L-3 Titan Corp., which provided translation services in Iraq for U.S. military personnel. In May 2006, Malki was indicted on four counts in violation of § 793(e) retention (Indictment 2).¹⁰⁸ He was earlier indicted in November 2005 for two counts of making false statements as well as using a false identity to obtain a position as an Arabic translator with the U.S. Army and to gain access to classified information (Indictment 1). Accessible court records give no reasons for why he took the documents, nor do they suggest that he planned to disclose any documents.</p> <p><u>Documents/Information</u></p> <p>During assignments in Iraq, Malki took classified documents. For example, while “assigned to an intelligence group in the 82nd Airborne Division of the U.S. Army” at Al Taqqadum Air Base, Iraq, “he downloaded a classified electronic document and took hard copies of several other classified documents. The documents detail the 82nd Airborne’s mission in Iraq in regard to insurgent activity, such as coordinates of insurgent locations upon which the U.S. Army was preparing to fire in January 2004 and U.S. Army plans for protecting</p>	Somewhat. He was charged with making false statements in order to get naturalization to enter the United States but this was not necessarily in order for him to obstruct justice.

¹⁰² Government Reply to Abraham Lesnik’s Sentencing Memorandum (December 2, 2008), at p. 11.

¹⁰³ Waiver of Indictment (June 16, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Indictment-waiver.pdf>.

¹⁰⁴ Plea Agreement (June 20, 2008, amended Dec. 10, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Plea-Agreement-Dec-10-2008.pdf>; Case Summary (June 11, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Case-Summary-June-11-2008.pdf>; Information (June 11, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Information-june-11-2008.pdf>.

¹⁰⁵ Judgment (Dec. 9, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Judgment-Dec-9-2008.pdf>. The government had asked for a sentence of 4 years’ imprisonment and a \$125,000 fine. See Government Reply to Abraham Lesnik’s Sentencing Memorandum (Dec 2, 2008), at p. 2, <https://www.justsecurity.org/wp-content/uploads/2022/10/Indictment-waiver.pdf>. See also Abraham Lesnik’s Sentencing Memorandum (Nov. 18, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Defendant-Abraham-Lesniks-Sentencing-Memorandum-Nov-18-2008.pdf>.

¹⁰⁷ Nouredine Malki, also known as “Fnu Lnu,” “Abdulhakeem Nour,” “Abu Hakim,” “Almaliki Nour,” and “Almalik Nour Eddin.”

¹⁰⁸ Indictment (March 29, 2006), <https://www.justsecurity.org/wp-content/uploads/2022/10/Indictment-March-29-2006.pdf>.

		<p>Sunni Iraqis traveling on their pilgrimage to Mecca, Saudi Arabia, in late January 2004. During a later deployment to a U.S. Army base near Najaf, Iraq,” Malki “obtained a photograph of a classified battle map identifying U.S. troop routes used in August 2004 during the battle of Najaf, where the U.S. and Iraqi security forces sustained serious casualties. In September 2005, the Federal Bureau of Investigation’s Joint Terrorism Task Force recovered these classified documents during a search of the” Malki’s Brooklyn, New York apartment.”¹⁰⁹</p> <p><u>Charges/Plea/Sentence</u></p> <p>He pleaded guilty to Indictment 1 in December 2005, and guilty to Indictment 2 in February 2007.¹¹⁰ In May 2008, he was sentenced to both at the same time, to a total of 121 months’ imprisonment: 12 months for Indictment 1, and 108 months for Indictment 2 (the § 793(e) counts) – to run consecutively.¹¹¹ Following two appeals to sentence,¹¹² Malki was eventually sentenced in 2012 to 108 months’ imprisonment.¹¹³</p>	
14. Kenneth Wayne Ford	May 2004	<p><u>Background</u>¹¹⁴</p> <p>Kenneth Wayne Ford was a former National Security Agency computer specialist in Maryland between June 2001 and late 2003,¹¹⁵ holding a “Top Secret” security clearance.¹¹⁶</p> <p>An anonymous tip-off in January 2004 (thought to be Ford’s girlfriend) notified NSA officials that Ford had a box of NSA classified documents which he intended to sell to foreign agents. Skeptical at first, officials quickly realized the call was not a</p>	<p>Yes.</p> <p>On October 5, 2004, Ford made a false statement in connection with his submission to Lockheed Martin of a government clearance form known as a Standard Form 86. Ford stated on that form that he had been falsely</p>

¹⁰⁹ FBI Press Release (Aug. 01, 2012), <https://archives.fbi.gov/archives/newyork/press-releases/2012/u.s.-army-translator-re-sentenced-to-108-months2019-imprisonment-for-unauthorized-possession-of-classified-documents-concerning-iraqi-insurgency-and-for-using-a-false-identity>. For the Defendant’s position on pertinent facts, see Defendant reply to Government memorandum on Sentencing (April 18, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Defendant-reply-to-Government-memorandum-on-sentencing-April-18-2008.pdf>.

¹¹⁰ New York Attorney’s Office Press Release (Feb. 14, 2007), <https://www.justice.gov/archive/usao/nye/pr/2007/2007Feb14.html>.

¹¹¹ Judgment (May 23, 2008) <https://www.justsecurity.org/wp-content/uploads/2022/10/Judgment-May-23-2008.pdf>; New York Attorney’s Office Press Release (May 19, 2008), <https://www.justice.gov/archive/usao/nye/pr/2008/2008may19.html>.

¹¹² *United States v. Malki*, 718 F.3d 178, 180 (2d Cir. 2013).

¹¹³ FBI Press Release (Aug. 01, 2012), <https://archives.fbi.gov/archives/newyork/press-releases/2012/u.s.-army-translator-re-sentenced-to-108-months2019-imprisonment-for-unauthorized-possession-of-classified-documents-concerning-iraqi-insurgency-and-for-using-a-false-identity>.

¹¹⁴ Information on Ford’s prosecution has been drawn from DOJ and FBI press releases, as well as the very limited accessible court records. See also *United States v. Ford*, PJM-05-0235 (D. Md.), Jury Instructions, at p. 41, <https://www.justsecurity.org/wp-content/uploads/2022/10/United-States-v-Ford-PJM-05-0235-D.-Md.-2005-Jury-Instructions.pdf>.

¹¹⁵ FBI Press Release (March 31, 2006), <https://archives.fbi.gov/archives/news/stories/2006/march/ford033106>.

¹¹⁶ *United States v. Ford*, 288 Fed. Appx. 54 (4th Cir. 2008).

		<p>hoax when “the person providing the tip read these officials the contents of actual classified documents.”¹¹⁷ It turned out that the tipster was wrong on one count: “Ford wasn’t planning on making any trips out of the country and didn’t even make the drive to the airport.”¹¹⁸</p> <p>Evidence at trial established that Ford had secreted “significant amounts” of “Top Secret/SCI” information out of the NSA and stored it at his personal residence. Some of the information “got into the hands of Tonya Tucker,” thought to be his girlfriend, who did not have security clearance to receive the information.¹¹⁹ At least one classified document was found in Tucker’s suitcase at the time of Ford’s arrest.¹²⁰</p> <p>The government was unclear as to whether it ever retrieved back all documents taken by Ford. No motive was clear.¹²¹</p> <p><u>Documents</u></p> <p>An FBI search of Ford’s residence found sensitive classified information throughout his house, including numerous “Top Secret” documents in 2 boxes in Ford’s Kitchen and bedroom closet. Evidence indicates Ford took home the classified information on his last day of employment at NSA in December 2013.¹²² 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.</p> <p>Trial witnesses from both the NSA and the Central Intelligence Agency (CIA) testified that the classified documents, some of which were displayed to the jury in edited form, were extremely sensitive</p>	<p>arrested by the FBI, had no police record and no pending charges against him. In addition to establishing that Ford had been arrested on January 12, 2004, the evidence at trial indicated that a federal magistrate judge had informed Ford as late as August 25, 2004 that he was to inform any prospective employer of the pending charges so the employer could determine whether Ford could have access to classified documents.¹²⁷</p>
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¹¹⁷ FBI Press Release (March 31, 2006), <https://archives.fbi.gov/archives/news/stories/2006/march/ford033106>.

¹¹⁸ FBI Press Release (March 31, 2006), <https://archives.fbi.gov/archives/news/stories/2006/march/ford033106>.

¹¹⁹ Government Memorandum on Sentencing (Feb. 28, 2006), at p. 1, <https://www.justsecurity.org/wp-content/uploads/2022/11/Lesnik-Exhibit-31-through-38-to-Cornehl-Decl.pdf> (at pp. 45-52).

¹²⁰ *Id.* See also Ruben Castaneda, *Ex-NSA Worker On Trial Over Secret Papers*, Washington Post (Nov. 30, 2005),

<https://www.washingtonpost.com/archive/local/2005/11/30/ex-nsa-worker-on-trial-over-secret-papers/617abf69-4086-4691-b213-79891262d3e1/>

¹²¹ *Id.*

¹²² DOJ Press Release (March 30, 2006),

<https://www.justice.gov/archive/usao/md/news/2006/Former%20Maryland%20Nsa%20Employee%20Sentenced%20For%20Wrongfully%20Possessing%20Classified%20Information.html>.

¹²⁷ DOJ Press Release (March 30, 2006),

<https://www.justice.gov/archive/usao/md/news/2006/Former%20Maryland%20Nsa%20Employee%20Sentenced%20For%20Wrongfully%20Possessing%20Classified%20Information.html>.

		<p>and related to the national defense of the United States.¹²³</p> <p><u>Charges</u></p> <p>A criminal complaint was filed in January 2004 for willful retention under § 793(e), and a further charge in October 2004 for making false statements under § 1001. Ford was convicted for both on December 15, 2005.¹²⁴ Ford appealed the conviction, but his appeal was dismissed on all grounds.¹²⁵</p> <p><u>Sentence</u></p> <p>Ford was sentenced to 72 months in prison (72 months for § 793(e) to run concurrently with 36 months for § 1001), followed by 3 years of supervised release.¹²⁶</p>	
15. Henry Otto Spade	1989	<p>Henry Otto Spade was a former Navy radio officer, who while in the Navy served aboard the U.S.S. Midway and the U.S.S. Bristol County.¹²⁸ He was arrested in 1988 and charged in 1989 with unauthorized possession and retention of NDI.</p> <p>The Justice Department said there was “no allegation that he attempted to sell or otherwise convey the documents” recovered by the FBI.¹²⁹ The charges related to two “Top Secret” items: one was a cryptographic key card and the other a document.¹³⁰</p>	No mention.

¹²³ DOJ Press Release (March 30, 2006); Eric Rich, *Ex-NSA Worker Guilty of Taking Documents*, Washington Post (Dec. 16, 2005), <https://www.washingtonpost.com/archive/local/2005/12/16/ex-nsa-worker-guilty-of-taking-documents/8097415f-8750-4f62-8ce8-16b1add5ba40/>.

¹²⁴ DOJ Press Release (Dec. 15, 2005), <https://www.justice.gov/archive/usao/md/news/2005/Former%20Maryland%20Nsa%20Employee%20Convicted.html>; DOJ Press Release (May 23, 2005), <https://www.justice.gov/archive/usao/md/news/2005/FordIndict.pdf>; *United States v. Ford*, 288 Fed. Appx. 54 (4th Cir. 2008).

¹²⁵ *United States v. Ford*, 288 Fed. Appx. 54 (4th Cir. 2008).

¹²⁶ Judgment (April 5, 2006), <https://www.justsecurity.org/wp-content/uploads/2022/10/Ford-Judgment-April-5-2006.pdf>; DOJ Press Release (March 30, 2006),

<https://www.justice.gov/archive/usao/md/news/2006/Former%20Maryland%20Nsa%20Employee%20Sentenced%20For%20Wrongfully%20Possessing%20Classified%20Information.html>.

¹²⁸ *Espionage and Other Compromises of National Security, Case Summaries from 1975-2008*, Defense Personnel Security Research Center (Nov. 02, 2009), at p. 56, <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>.

¹²⁹ *Ex-radioman charged for possession of classified documents*, UPI archives (Nov. 17, 1988), <https://www.upi.com/Archives/1988/11/17/Ex-radioman-charged-for-possession-of-classified-documents/9087595746000/>.

¹³⁰ Walter Pincus and Vernon Loeb, *U.S. Inconsistent When Secrets Are Loose*, Washington Post (March 18, 2000), <https://www.washingtonpost.com/archive/politics/2000/03/18/us-inconsistent-when-secrets-are-loose/6a928f72-d79b-430d-9c0b-93c67af05568/>; *Espionage and Other Compromises of National Security, Case Summaries from 1975-2008*, Defense Personnel Security Research Center (Nov. 02, 2009), at p. 56.

		He pleaded guilty to one count of § 793(e) for retaining classified documents related to national defense in January 1989. ¹³¹ On March 14, 1989, he was sentenced to three years probation. ¹³²	
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¹³¹ Walter Pincus and Vernon Loeb, *U.S. Inconsistent When Secrets Are Loose*, Washington Post (March 18, 2000).

¹³² See, e.g., Abraham Lesnik's Sentencing Memorandum (Nov. 18, 2008), at p. 11, <https://www.justsecurity.org/wp-content/uploads/2022/10/Defendant-Abraham-Lesniks-Sentencing-Memorandum-Nov-18-2008.pdf>; Government's Sentencing Memorandum in *United States v. Kristian Saucier*, at p. 29, <https://www.justsecurity.org/wp-content/uploads/2022/11/saucier-govt-sent-mem-081516.pdf>.

TABLE 2 – 18 U.S.C. 1924 (Removal and Retention charged)

<u>NAME</u>	<u>DATE CHARGED</u>	<u>DETAILS OF CASE</u>	<u>OBSTRUCTION ALLEGED</u>
<p>1. Asia Lavarello</p>	<p>July 2021</p>	<p><u>Background</u></p> <p>Asia Lavarello was a Defense Department civilian employee from January 2011. In March 2018, she worked as the Executive Assistant to the Commander for the United States Indo-Pacific Command (INDOPACOM) Joint Intelligence Operation Center (JIOC), holding “Top Secret/SCI” security clearance.¹³³</p> <p>She admitted to having removed and retained numerous classified documents, writings, and notes (some of which were marked “Secret” level), relating to the national defense or foreign relations of the United States.</p> <p><u>Documents</u></p> <p>On March 20, 2020, Lavarello removed classified documents that she had printed from the U.S. Embassy in the Philippines, Manila, Defense Attaché Office (DAO). She then hosted a dinner party that evening, attended by three Americans with whom she worked at the embassy, as well as two foreign nationals. One of the embassy employees found “stacks of documents” in Laverello’s room. She explained that she had intended to use them for her university thesis. She returned the documents two days later to a “Secret” safe and had said she would return to transfer the documents to a Sensitive Compartmented Information Facility (SCIF) at the DAO. However, on March 24, 2020, one of her embassy colleagues instead transferred the documents from the “Secret” safe to a “Top Secret” at the DAO SCIF.¹³⁴</p> <p>Following this, Lavarello also took from her base in the Philippines notes of classified information at</p>	<p>Yes, false statements. Lavarello was asked if she had reported the meeting with foreign nationals during the dinner party, and stated that she had, which was a lie. Lavarello also had two close contacts with foreign nationals while in the Philippines that she had not reported, which she then failed to mention when asked in an interview about any other contacts. The FBI also asked if she had removed classified documents since returning from the Philippines, which she falsely denied.¹⁴³</p> <p>As part of the plea agreement, it was accepted that the false statements to the FBI did not significantly impede or obstruct the investigation.¹⁴⁴</p>

¹³³ Plea Agreement (July 20, 2021), § 9c, <https://www.justsecurity.org/wp-content/uploads/2022/10/Lavarello-Plea-Agreement-July-20-2021.pdf>.

The criminal information contains relatively the same information as the plea agreement but is briefer. *See* Information accompanying Plea Agreement (July 14, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lavarello-Information-July-2021.pdf>.

¹³⁴ *Id.*, §§ 9g-k.

¹⁴³ Plea Agreement (July 20, 2021), §§ 9r-t.

¹⁴⁴ *Id.*, § 11c.

		<p>“Confidential” and “Secret” levels in a notebook which was then found in her desk top drawer at the INDOPACOM JIOC in Honolulu.¹³⁵ “Investigators determined that Lavarello personally transported the documents to Hawaii, unsecured, and kept the classified notebook at an unsecure location until at least April 13, 2020.”¹³⁶ “Investigators also discovered that Lavarello included information from the classified notebook in a Jan. 16, 2020, email from her personal Gmail account to her unclassified U.S. Government email account.”¹³⁷</p> <p><u>Plea Agreement</u></p> <p>A plea agreement was reached in July 2004 for one count of § 1924 – “unlawfully and knowingly removed a notebook containing classified material from the United States Embassy in Manila, Republic of the Philippines and retained it at her residence in Honolulu, Hawaii.”¹³⁸ The agreement further stated that the documents were not “Top Secret” information and that the false statements to the FBI did not significantly impede or obstruct the investigation.¹³⁹ However, the parties did not reach an agreement on if Lavarello had breached her position of trust.¹⁴⁰ There was an agreed downward adjustment of 2 levels for acceptance of responsibility.¹⁴¹</p> <p><u>Sentence</u></p> <p>On February 11, 2022, in the same week that the Archives raised concern about missing documents, Lavarello received 3 months’ imprisonment, one year’s supervised release, and a fine of \$5,500.¹⁴²</p>	
2. Izaak Vincent Kemp	January 2021	<p><u>Background</u></p> <p>Izaak Vincent Kemp, between July 2016 and May 2019, was a contractor at the Air Force Research Laboratory (AFRL) as well as the U.S. Air Force National Air and</p>	No mention.

¹³⁵ *Id.*, §§ 9l-o.

¹³⁶ DOJ Press Release (July 20, 2021), <https://www.justice.gov/opa/pr/woman-pleads-guilty-unauthorized-removal-and-retention-classified-material>.

¹³⁷ DOJ Press Release (July 20, 2021); Plea Agreement (July 20, 2021), §§ 9p-q.

¹³⁸ Information accompanying Plea Agreement (July 14, 2021).

¹³⁹ Plea Agreement (July 20, 2021), § 11c-d.

¹⁴⁰ *Id.*, § 13a.

¹⁴¹ *Id.*, § 11a.

¹⁴² Judgment (Feb. 11, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lavarello-Sentencing-Judgment-Feb.-11-2022.pdf>; DOJ Press Release (Feb. 10, 2022) <https://www.justice.gov/usao-hi/pr/honolulu-woman-receives-three-months-prison-removal-and-retention-classified-material>. Comparison between the Lavarello case and Mar-a-Lago were drawn during the week of Lavarello’s sentencing and concerns raised by the Archives. See, e.g., Steve Benen, *Justice Dept prosecutes woman for mishandling classified docs*, MSNBC (Feb. 14, 2022), <https://www.msnbc.com/rachel-maddow-show/maddowblog/justice-dept-prosecutes-woman-mishandling-classified-docs-rcna16111>; Tierney Sneed, *Amid scrutiny of Trump White House docs, DOJ secures prison term for ex-Defense employee who mishandled classified materials*, CNN (Feb. 11, 2022), <https://edition.cnn.com/2022/02/11/politics/justice-department-classified-info-hotel-home-sentence/index.html>; Wyatt Olson, *Indo-Pacific Command employee pleads guilty to mishandling classified documents after dinner party guest found them in her room*, Stars and Stripes (July 22, 2021), https://www.stripes.com/theaters/asia_pacific/2021-07-22/indo-pacific-command-guilty-plea-classified-information-2224182.html.

		<p>Space Intelligence Center (NASIC) at Wright-Patterson Air Force Base (WPAFB) in Fairborn, Ohio. Kemp had “Top Secret” security clearance whilst at both the AFRL and NASIC.¹⁴⁵</p> <p>In May 2019, police officers conducted a search of Kemp’s residence after having received information that he was maintaining a marijuana grow operation. The information was correct, a grow operation was found, along with over 100 classified documents from AFRL and NASIC. “In a voluntary interview conducted during execution of the search warrant, he admitted to printing the classified materials and bringing them home.”¹⁴⁶ He later pleaded guilty to taking and storing the documents at his residence.¹⁴⁷</p> <p><u>Documents</u></p> <p>“Kemp took over 100 clearly-marked documents home consisting of 2,500 pages,” some of which were marked at “Secret” level.¹⁴⁸</p> <p><u>Charges/Guilty Plea/Sentence</u></p> <p>In February 2021, Kemp pleaded guilty to a one-count Information in violation of § 1924.¹⁴⁹ In September 2021, he was sentenced to a year and a day imprisonment (as proposed by prosecutors).¹⁵⁰</p>	
3. Reynaldo Regis	May 2018	<p><u>Background</u></p> <p>Reynaldo Regis was a private government contractor assigned to the CIA between 2006 and 2016 (other than a two year period between 2010 and 2012). Regis held “Top Secret” security clearance including “SCI” access.¹⁵¹</p>	Yes. During the course of an interview with FBI agents, Regis stated that “(a) he never wrote down any classified information in his notebooks; and (b) he never removed any classified information

¹⁴⁵ Government’s Sentencing Memorandum (May 18, 2021), at p. 1, <https://www.justsecurity.org/wp-content/uploads/2022/10/Kemp-Governments-sentencing-memorandum.pdf>.

¹⁴⁶ *Id.*, at p. 2.

¹⁴⁷ *Id.*, at pp. 1-2

¹⁴⁸ *Id.*, at pp. 2-3. The Government’s Sentencing Memorandum does not specify how many of the 2,500 pages were marked “Secret,” whereas a Justice Department Press Release suggests all pages were marked “Secret.” DOJ Press Release (Sept. 21, 2021), <https://www.justice.gov/usao-sdoh/pr/former-air-force-contractor-sentenced-prison-illegally-taking-2500-pages-classified>. See also *Izaak Vincent Kemp - Unauthorized Removal and Retention of Classified Documents or Material*, Center for Development of Security Excellence (undated), <https://www.cdse.edu/Portals/124/Documents/casestudies/case-study-kemp.pdf>.

¹⁴⁹ Information (Jan. 22, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/10/Kemp-information-Jan-2021.pdf>.

¹⁵⁰ Judgment (Nov. 4, 2021), <https://www.justsecurity.org/wp-content/uploads/2022/10/Kemp-Sentencing-Judgment-Nov.-4-2021.pdf>; See also DOJ Press Release (Sept. 21, 2021).

¹⁵¹ Statement of Facts accompanying Plea Agreement, §§ 1, 3, <https://www.justsecurity.org/wp-content/uploads/2022/10/Regis-Statement-of-Facts-May-11-2018.pdf>.

	<p>Regis had “regular access to classified information relating to CIA programs, operations, methods, sources, and personnel. Regis’s job description included researching persons in classified databases.” Despite him only being “authorized to search the names that were assigned to him, throughout his time at the CIA Regis conducted unauthorized searches of unassigned persons in classified databases [...] [which] returned classified information regarding highly sensitive intelligence reports.”¹⁵²</p> <p>Federal search warrants were executed on his residence and vehicle in November 2016. “In total, the searches recovered approximately 60 notebooks. The CIA conducted a preliminary review and determined that there were several hundred instances of classified information represented in the seized notebooks, much of which were classified as Secret [...] The classified information contained in the notebooks included information relating to highly sensitive intelligence reports.”¹⁵³</p> <p>Regis did nothing with the information he took, he simply stored it in notebooks at his home. He did not give the information to anybody or use it for any financial gain. The motives of Regis were never established, he did not provide an answer and the court remained uninformed.</p> <p><u>Charges/Guilty Plea</u></p> <p>Regis pleaded guilty to a two-count information:¹⁵⁴</p> <ul style="list-style-type: none"> ● 18 U.S.C. 1924 - Count One (Unauthorized Removal and Retention of Classified Material) ● 18 U.S.C. 1001(a)(2)) - Count Two (False Statement) <p><u>Sentence</u></p> <p>Prosecutors were not insisting on jail time, instead satisfied with a sentence within federal sentencing guidelines, which called for zero to six months in prison.¹⁵⁵ However, District Judge Liam O’Grady imposed a 90-day sentence.¹⁵⁶ According to reports,</p>	<p>from his workspace at the CIA.”¹⁵⁸</p>
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¹⁵² *Id.*, § 10.

¹⁵³ *Id.*, § 12.

¹⁵⁴ Information (May 11, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/Regis-Information-May-11-2018.pdf>.

¹⁵⁵ Plea Agreement (May 11, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/Regis-Plea-Agreement.pdf>.

¹⁵⁶ Judgment (November 2, 2018), <https://www.justsecurity.org/wp-content/uploads/2022/10/Regis-judgment.pdf>.

¹⁵⁸ Statement of Facts accompanying Plea Agreement, § 15.

		O’Grady’s imposed jail time was due, in part, to Regis refusing to provide any reason or motive for his conduct. O’Grady also opined that sentencing guidelines were not sufficiently severe for this type of crime. ¹⁵⁷	
4. David Petraeus	March 2015	<p><u>Background/Documents</u></p> <p>David Petraeus was a four-star U.S. Army general. Between 2010 and 2011, he was at the Defense Department as Commander of International Security Assistance Force (ISAF) in Afghanistan, and subsequently he took the position of Director of Central Intelligence (DCI) at the CIA in September 2011.</p> <p>“During his tenure as Commander [...] Petraeus maintained bound, five-by-eight-inch notebooks that contained his daily schedule and classified and unclassified notes he took during official meetings, conferences, and briefings. The notebooks contained classified information regarding the identities of covert officers, war strategy, intelligence capabilities and mechanisms, diplomatic discussions, quotes and deliberative discussions from high-level National Security Council meetings,” as well as “discussions” between Petraeus and then President Obama.¹⁵⁹ The notebooks were referred to as “Black Books” and contained NDI, including “Top Secret/SCI” and “code word” information.¹⁶⁰</p> <p>Petraeus returned permanently from Afghanistan in summer 2011. In August of that year, just a few months prior to his swearing-in as DCI, Petraeus emailed his biographer Paula Broadwell, with whom he was also having an extramarital affair, promising her access to the Black Books. The indictment states that he had previously informed her in a conversation she recorded that the books were “highly classified” and contained “code word” information. On August 28, 2011, Petraeus went on to deliver the Books to Broadwell’s home in D.C., where he left them until September 1, 2011, “in order to facilitate” Broadwell’s “access to the Black Books and the information contained therein to be used as source material for his biography, titled <i>All In: The Education of General David Petraeus</i>. Thereafter,</p>	<p>“FBI special agents questioned Petraeus about the mishandling of classified information. In response to those questions, Petraeus stated that (a) he had never provided any classified information to his biographer, and (b) he had never facilitated the provision of classified information to his biographer. These statements were false.”¹⁶⁸</p> <p>Petraeus was not charged with this.</p>

¹⁵⁷ *Ex-CIA contractor gets 90 days in jail for having 60 notebooks of classified material in home*, NBC News (Nov. 2, 2018), <https://www.nbcnews.com/news/us-news/ex-cia-contractor-gets-90-days-jail-having-60-notebooks-n930531>.

¹⁵⁹ Factual Basis accompanying Plea Agreement (March 3, 2015), § 17, <https://www.justsecurity.org/wp-content/uploads/2022/10/petraeus-factual-basis.pdf>.

¹⁶⁰ Factual Basis accompanying Plea Agreement (March 3, 2015), § 18.

¹⁶⁸ *Id.*, § 32.

		<p>Petraeus kept the Black Books in his residence in Arlington, Virginia.¹⁶¹</p> <p>While at the DOD and CIA, Petraeus had signed several non-disclosure and secrecy agreements. Upon his resignation as DCI in November 2012, Petraeus also signed a Security Exit Form certifying that “there is no classified material in my possession, custody, or control at this time,” despite the Black Books still being in his home at this time.¹⁶²</p> <p>FBI agents interviewed Petraeus in October 2012 as part of what agents made clear was a criminal investigation. He told agents during the interview that he had never provided Broadwell with classified information, nor facilitated her access to such information. However, the agreed factual basis accompanying the plea agreement stated that Petraeus “then and there knew that he previously shared the Black Books” with Broadwell.¹⁶³</p> <p>In April 2013, the FBI seized the Black Books pursuant to a search warrant executed at his residence, “from an unlocked drawer in the first-floor study.”¹⁶⁴</p> <p><u>Plea/Sentence</u></p> <p>A plea agreement was reached on a one-count Information of unauthorized removal and retention of classified material in violation of § 1924, with no charges brought for the false statements under § 1001(a)(2). The government and Petraeus agreed to two years probation and a \$40,000 fine,¹⁶⁵ a decision that some DOJ officials and, especially, FBI agents, considered too lenient.¹⁶⁶ The judge agreed to the probation term, but increased the fine to \$100,000, stating that the increase was appropriate to “reflect the seriousness of the offense,” and “promote respect for the law, provide just punishment, and afford adequate deterrence.”¹⁶⁷</p>	
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¹⁶¹ *Id.*, §§ 22-26.

¹⁶² *Id.*, § 27.

¹⁶³ *Id.*, § 32.

¹⁶⁴ *Id.*, § 29.

¹⁶⁵ Plea Agreement (March 3, 2015), <https://www.justsecurity.org/wp-content/uploads/2022/10/petraeus-plea-agreement.pdf>; Bill of Information (March 3, 2015), <https://www.justsecurity.org/wp-content/uploads/2022/10/Bill-of-Info-MArch-3-2015.pdf>. See also Michael S. Schmidt and Matt Apuzzo, *Petraeus Reaches Plea Deal Over Giving Classified Data to His Lover*, New York Times (March 3, 2015), <https://www.nytimes.com/2015/03/04/us/petraeus-plea-deal-over-giving-classified-data-to-lover.html>.

¹⁶⁶ Adam Goldman, *How David Petraeus avoided felony charges and possible prison time*, Washington Post (Jan. 25, 2016), https://www.washingtonpost.com/world/national-security/how-david-petraeus-avoided-felony-charges-and-possible-prison-time/2016/01/25/d77628dc-bfab-11e5-83d4-42e3bceea902_story.html.

¹⁶⁷ Statement of Reasons for Sentencing (June 8, 2015), at p. 4, <https://www.justsecurity.org/wp-content/uploads/2022/10/Sentence-statement-of-reasons-Petraeus.pdf>. See also Judgment (April 29, 2015), <https://www.justsecurity.org/wp-content/uploads/2022/10/Judgment-April-29-2015.pdf>.

<p>5. David Paul Kirby</p>	<p>June 2007</p>	<p><u>Background</u></p> <p>David Kirby worked at the Defense Logistics Agency (DLA) and lost a DLA USB stick containing “Top-Secret/SCI” information in the DLA parking lot after removing the stick from the DLA office. He reported the lost USB stick to seniors but later produced a damaged drive claiming this to be the lost thumb drive. However, days later, the actual lost thumb drive was found in a parking lot.¹⁶⁹ Kirby later admitted that he had submitted the damaged second thumb drive “to avoid sanction.”¹⁷⁰</p> <p>Kirby admitted to the Federal Bureau of Investigation and the Defense Counterintelligence and Security Agency that he removed information, including on this USB, and documents from the DLA office on at least 50 occasions.¹⁷¹</p> <p>A subsequent search of Kirby’s residence found “Secret” and “Top-Secret/SCI” information on his home computers, including a desktop and laptop. Kirby had attempted to delete this information from his computers.¹⁷²</p> <p>No court records detail exactly how many documents were taken, nor what the information related to.</p> <p><u>Charge/Sentence</u></p> <p>Prior to being indicted, Kirby pleaded guilty to a one-count Information for violation of § 1924. Although the statement of facts accompanying the plea agreement included that Kirby had information on home computers, the Information to which Kirby pleaded guilty related to the lost USB stick only.¹⁷³</p> <p>Kirby received a \$500 fine and no jail time.¹⁷⁴</p>	<p>No mention.</p>
<p>6. Jessica Lynn Quintana</p>	<p>May 2007</p>	<p><u>Background/Documents</u></p>	<p>No mention.</p>

¹⁶⁹ Statement of Facts accompanying Plea Agreement (June 8, 2007), § 1-2, <https://www.justsecurity.org/wp-content/uploads/2022/10/Statement-of-Facts-accompanying-Plea-Agreement-June-8-2007.pdf>. NB: there are no media reports or DOJ Press releases.

¹⁷⁰ Statement of Facts accompanying Plea Agreement (June 8, 2007), § 3.

¹⁷¹ *Id.*

¹⁷² *Id.*, § 4.

¹⁷³ Information (June 5, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Information-June-5-2007.pdf>; Plea Agreement (June 8, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Plea-Agreement-June-8-2007.pdf>.

¹⁷⁴ Judgment (June 8, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Judgment-June-8-2007.pdf>.

		<p>Jessica Lynn Quintana was employed by Information Assets Management, Inc., which had contracted to archive classified information at Los Alamos National Laboratory (“LANL”). She had been granted a “Q” clearance and had access to classified information.¹⁷⁵</p> <p>In July 2006, Quintana used a printer at LANL to “print pages containing Classified Information, and used a computer at LANL to download other Classified Information to a San Disk Cruzer Micro 1.0 gb thumb drive.” She then stored the pages and thumb drive at her home.¹⁷⁶ Accessible court documents do not stipulate the quantity or classification markings of the documents. However, some reporting has suggested that there were 228 documents of classified intelligence and weapon data, plus thumb drives containing 408 classified documents.¹⁷⁷</p> <p><u>Charges</u></p> <p>The criminal Information included one count in violation of § 1924, alleging that Quintana “knowingly removed documents and computer files containing classified information of the United States from a vault type room at the Los Alamos National Laboratory and stored such documents and files at places outside Los Alamos National Laboratory, including but not limited to her residence.”¹⁷⁸</p> <p><u>Plea Agreement and Sentencing</u></p> <p>Quintana and prosecutors reached a plea agreement on the above criminal Information, in which it was agreed that “the United States will not oppose the Defendant's request that she receive a non-custodial Sentence.”¹⁷⁹ The court ordered two years probation and a \$25 assessment to be paid.¹⁸⁰</p>	
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¹⁷⁵ Plea Agreement and Factual Basis (May 15, 2007), § 7b, <https://www.justsecurity.org/wp-content/uploads/2022/10/Plea-Agreement-and-Factual-Basis-May-15-2007.pdf>; DOJ Press Release (May 15, 2007), https://www.justice.gov/archive/opa/pr/2007/May/07_crm_362.html.

¹⁷⁶ Plea Agreement and Factual Basis (May 15, 2007), § 7b.

¹⁷⁷ Ralph Vartabedian, *Breach at lab called significant*, Los Angeles Times, (Nov. 2, 2006) <https://www.latimes.com/archives/la-xpm-2006-nov-02-na-lab2-story.html>; Alfonso Serrano, *Exclusive: Los Alamos Breach Was Easy*, CBS News (May 20, 2007), <https://www.cbsnews.com/news/exclusive-los-alamos-breach-was-easy/>. The 636 documents were first reported by Nuclear Watch New Mexico, although this number has not been independently verified. See https://www.justsecurity.org/wp-content/uploads/2022/11/LANL_BreachOfClassifiedDocs.pdf.

¹⁷⁸ Information (May 15, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Information-May-15-2007.pdf>.

¹⁷⁹ Plea Agreement and Factual Basis (May 15, 2007).

¹⁸⁰ Judgment (Jan. 4, 2008), <https://www.justsecurity.org/wp-content/uploads/2022/10/Quintana-Judgment.pdf>

<p>7. Sohail Yunas Uppal</p>	<p>March 2007</p>	<p><u>Background</u></p> <p>Suhail Uppal was an engineer contractor for the Boeing Company at various locations in the United States. In 2002, at the time of his offense, he worked at Boeing’s Arlington, Virginia, location on missile defense systems. At all times he held a “Secret” security clearance.</p> <p>In 2002, Uppal began removing classified documents from Boeing, Arlington to his personal residence in Virginia. He later stored all these documents at a storage unit in Virginia.¹⁸¹</p> <p><u>Documents</u></p> <p>Documents related to the design and control of missiles, radar systems, and aircraft control systems.¹⁸² “Numerous boxes of documents” were stored at his residence (though the locations were not specified). “Approximately 15 of these documents, consisting of approximately 224 pages, were properly classified at the ‘Secret’ level and marked as such. Two documents, consisting of a total of 17 pages, were classified and marked at the ‘Confidential’ level.”¹⁸³</p> <p><u>Plea/Sentence</u></p> <p>In March 2007, Uppal pleaded guilty to a one-count Information in violation of § 1924.¹⁸⁴ He was sentenced to a one-year term of probation and a \$500 fine.¹⁸⁵</p>	<p>No mention.</p>
<p>8. Everett Ashley Blauvelt</p>	<p>June 2006</p>	<p><u>Background</u></p> <p>Everett Blauvelt was employed by BWXT, the National Nuclear Security Administration’s (NNSA) main contractor responsible for operation and management of NNSA’s Y-12 National Security Complex in Tennessee.¹⁸⁶ At the time of the offense, Blauvelt was a shift technical advisor and held “Secret” and “Q” security clearances, with access to material up to and including “Secret Restricted Data.”¹⁸⁷</p>	<p>No mention.</p>

¹⁸¹ Statement of Facts accompanying Information, §§ 1-2 <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Exhibit-4-through-20-to-Cornehl-Decl.pdf> (at pp. 74-75).

¹⁸² *Id.*, § 2.

¹⁸³ *Id.*, § 3.

¹⁸⁴ Information cover sheet (March 28, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Uppal-Information-March-28-2007.pdf>.

¹⁸⁵ Judgment (March 29, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Lesnik-Exhibit-4-through-20-to-Cornehl-Decl.pdf> (at pp. 77-80).

¹⁸⁶ Plea Agreement (Sept. 26, 2006), § 10A, *Id.*

<https://www.justsecurity.org/wp-content/uploads/2022/10/Blauvelt-Plea-Agreement-Sept-26-06.pdf>.

¹⁸⁷ *Id.*, § 10B.

		<p>Following allegations that he had compiled a database of personal and sensitive information on co-workers, NNSA officials visited his office in December 2000. There, they found, among other things, two diskettes: one containing “personal and potentially compromising information” on co-workers and another containing information classified at the “Secret Restricted Data” level. Neither of the diskettes were properly marked to indicate the presence of classified information therein.¹⁸⁸</p> <p>“Other irregularities” were found in his office, including an “unauthorized device on an unclassified and networked computer that would permit sending and receiving e-mails outside of the authorized and monitored system. Classified information was found on this unclassified and networked computer.”¹⁸⁹</p> <p>A federal search warrant of his house was executed days later by the FBI and the Department of Energy’s Counterintelligence units, where, upon arrival, agents found Blauvelt “attempting to erase data from his computer.” Classified information up to the “Secret Restricted Data” level was found on this home computer.¹⁹⁰</p> <p>He initially denied intentionally storing classified information on his home computer, but when told some of the information was classified, he later admitted to storing it.¹⁹¹</p> <p><u>Plea/Sentence</u></p> <p>Prior to being indicted, Blauvelt pleaded guilty to a one-count Information in violation of § 1924.¹⁹² He was sentenced to one year of probation and ordered to pay a \$5,000 fine.¹⁹³</p>	
<p>9. Samuel Berger</p>	<p>May 2005</p>	<p><u>Background</u></p> <p>Samuel Berger was the former National Security Adviser under President Bill Clinton. At the time of the offense, he served as a consultant, designated to conduct a review</p>	<p>No specific allegations of obstruction, although as noted he was alleged to have tried to evade detection by Archives staff.</p>

¹⁸⁸ *Id.*, § 10E.

¹⁸⁹ *Id.*, § 10F.

¹⁹⁰ *Id.*, § 10H.

¹⁹¹ *Id.*, § 10I.

¹⁹² Information (June 13, 2006), <https://www.justsecurity.org/wp-content/uploads/2022/10/Blauvelt-Information-June-13-06.pdf>.

¹⁹³ Amended Judgment (Oct. 25, 2006), <https://www.justsecurity.org/wp-content/uploads/2022/10/Blauvelt-Judgment-amended-Oct-25-06.pdf>.

		<p>into Clinton administration presidential records stored at the Archives.</p> <p>Berger visited the Archives on four occasions (May 2002 and July, September, and October 2003), reviewing presidential documents (which were classified) in connection with requests for documents made by the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission). On the final two visits, Berger concealed and removed a total of five copies of classified documents. The documents were different versions of a single document.¹⁹⁴</p> <p>During the last three visits, he made handwritten notes of classified materials he was reviewing, which he concealed and removed from the Archives, in violation of Archives rules and procedures. Those notes were not returned to the government.¹⁹⁵</p> <p>On the four visits, Archives officials allowed Berger to review highly classified documents outside of a Sensitive Compartmented Information Facility. On several occasions, Berger deliberately procured the absence of Archives staff so that he could conceal and remove classified documents.”¹⁹⁶</p> <p>Berger was apparently intentionally mislabeling documents in the Archives to cover up his tracks of removal.¹⁹⁷</p> <p>Berger took the documents to his office in the District of Columbia, cutting them into small pieces and discarding three of the copies. Following Berger’s final visit in October 2003, the Archives discovered that documents were missing and contacted Berger. Initially, Berger did not tell the Archives that he had taken the documents but later that night admitted to “accidentally misfil[ing]” two of them. The next day, he returned to Archives staff the two remaining copies. Each of the five copies of the document was produced to the 9-11 Commission in due course.¹⁹⁸</p>	
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¹⁹⁴ Factual Basis of Plea (April 1, 2005), <https://www.justsecurity.org/wp-content/uploads/2022/10/Factual-Basis-for-Plea-April-1-2005.pdf>; DOJ Press Release (April 1, 2005), https://www.justice.gov/archive/opa/pr/2005/April/05_crm_155.htm.

¹⁹⁵ *Id.*

¹⁹⁶ *Sandy Berger’s Theft of Classified Documents: Unanswered Questions*, House Committee on Oversight and Government Reform, Staff Report (Jan. 9, 2007), p. 5, <https://www.justsecurity.org/wp-content/uploads/2022/10/Committee-on-Oversight-and-Government-Reform-Staff-Report-January-9-2007.pdf>. See also NARA Inspector General Report (Nov. 2005) <https://www.justsecurity.org/wp-content/uploads/2022/10/Berger-NARA-Report.pdf>.

¹⁹⁷ *Id.* See also Deputy AG letter in response to Committee on Oversight and Government Reform, Staff Report dated Jan. 9, 2007 (Feb. 16, 2007), <https://www.justsecurity.org/wp-content/uploads/2022/10/Deputy-AG-letter-in-response-to-Committee-report-February-16-2007.pdf>.

¹⁹⁸ Factual Basis of Plea (April 1, 2005); DOJ Press Release (April 1, 2005).

		<p><u>Documents</u></p> <p>“The documents were ‘code word’ documents and only a very small number of people had security clearance to view them, namely NSC officials.”¹⁹⁹</p> <p>Berger’s visit allowed him “access to three categories of documents: original NSC numbered documents, printed copies of electronic mail messages and attachments, and uncopied, and original Staff Member Office Files (SMOFs). NSC numbered documents are briefing and position papers prepared by the staff of the National Security Council. The SMOFs contain the working papers of White House staff members, including Berger and terrorism advisor Richard Clarke. The contents of the SMOFs are not inventoried by the National Archives at the document level. The SMOFs provided to Berger during his first two visits to the National Archives - including the personal office files of Richard Clarke - contained only original documents.”²⁰⁰</p> <p>“The full extent of Berger’s document removal, however, is not known, and never can be known. The Justice Department cannot be sure that Berger did not remove original documents for which there were no copies or inventory. On three of Berger’s four visits to the Archives, he had access to such documents.”²⁰¹</p> <p><u>Charge/Sentence</u></p> <p>Prior to being indicted, Berger pleaded guilty to a one-count criminal Information for violation of § 1924.²⁰² In the plea agreement, the Justice Department and Berger agreed to seek a \$10,000 fine as part of his sentence. The DOJ also agreed not to oppose the defense requesting a non-custodial sentence.²⁰³ The court imposed a fine and supervision cost of \$56,905.52, along with 100 hours of community service and two years’ probation. Berger was also barred from access to classified material for three years.²⁰⁴</p>	
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¹⁹⁹ *Sandy Berger’s Theft of Classified Documents: Unanswered Questions*, House Committee on Oversight and Government Reform, Staff Report (Jan. 9, 2007), at p. 3.

²⁰⁰ *Id.*

²⁰¹ *Id.*, at p. 3.

²⁰² Information (March 31, 2005), https://www.justsecurity.org/wp-content/uploads/2022/10/Information-March-31-2005.pl_.pdf; Plea Agreement (April 1, 2005), https://www.justsecurity.org/wp-content/uploads/2022/10/Plea-Agreement-April-01-2005.pl_.pdf.

²⁰³ Plea Agreement, (April 1, 2005), § 10.

²⁰⁴ Judgment (Sept. 13, 2005), <https://www.justsecurity.org/wp-content/uploads/2022/10/Judgment-September-13-2005.pdf>.

<p>10. John Deutch</p>	<p>January 2001</p>	<p><u>Background</u></p> <p>John Mark Deutch served as Director of Central Intelligence (DCI) at the CIA between May 10, 1995, and December 14, 1996. Three days after Deutch retired as DCI, CIA officials, in the course of conducting an inventory, discovered classified material on his government-owned computer at his Bethesda, Maryland residence.</p> <p>An internal CIA investigation launched on January 6, 1997, revealed that he had routinely stored and processed highly classified information on home computers that were configured for unclassified use.²⁰⁵ Despite the findings of the investigation, the CIA Office of Inspector General (OIG) documented how officials throughout the agency’s ranks dragged their feet on how to proceed, reluctant to report the matter to the FBI or more formally to the DOJ via a submitted crime report.²⁰⁶ Although the true reason for the CIA’s failure to submit a crime report to the DOJ is unknown, the OIG report indicated that it was, at least in part, rooted in a failure to appreciate the “reasonable basis to believe that Deutch’s mishandling of classified information violated the standards prescribed by the applicable crimes reporting statute, Executive Order and Memorandum of Understanding.”²⁰⁷</p> <p>On March 19, 1998, the CIA Office of Inspector General (OIG) referred the matter to the DOJ via crime report.</p> <p>On April 14, 1999, Attorney General Janet Reno sent a letter to DCI George Tenet informing him that “[t]he results of that [OIG] investigation have been reviewed for prosecutive merit and that prosecution has been declined.”²⁰⁸ “Ms. Reno decided not to prosecute Mr. Deutch. Officials now say that decision was reached without any F.B.I. investigation and before the agency’s inspector general had issued its report on the case,” according to the New York Times.²⁰⁹</p> <p>In August 1999, Tenet stripped Deutch of his security clearances. “I respect the decision of the director to</p>	<p>No mention.</p>
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²⁰⁵ *Improper Handling Of Classified Information By John M. Deutch (1998-0028-Ig)*, CIA Inspector General Report of Investigation (Feb. 18, 2000), § 43, https://www.justsecurity.org/wp-content/uploads/2022/10/ig_deutch.pdf [hereinafter “CIA IG Report”]. See also Senate Select Committee on Intelligence, Special Report 107-51 (Aug. 3, 2001), <https://www.justsecurity.org/wp-content/uploads/2022/11/10751.pdf>.

²⁰⁶ CIA IG Report, §§ 6, 237, 238. Several officials were subsequently reprimanded for the handling of the internal investigation. See, e.g., *CIA Reprimands Senior Officials Over Probe of Deutch*, CNN (May 25, 2000), <https://edition.cnn.com/2000/US/05/25/cia.deutch/index.html>.

²⁰⁷ CIA IG Report, § 237.

²⁰⁸ *Id.*, § 229.

²⁰⁹ James Risen, *U.S., In A Reversal, Begins An Inquiry Into Ex-C.I.A. Head*, New York Times (May 6, 2000), <https://www.nytimes.com/2000/05/06/us/usin-a-reversal-begins-an-inquiry-into-ex-cia-head.html>.

		<p>suspend my CIA clearances,” Deutch said in a statement. “As for the future, I intend to do everything in my power to reassure my colleagues at the agency of my commitment to comply with the rules that safeguard classified information.”²¹⁰</p> <p><u>DOJ Reversal On Decision Not To Prosecute; Recommendation of Charges</u></p> <p>In May 2000, following an internal review that had been launched in February, Reno reversed her position and appointed Paul Coffey as a special prosecutor to conduct a criminal investigation.²¹¹</p> <p>In August 2000, special prosecutor Coffey 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.”²¹² “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.²¹³</p> <p><u>Pardoned Amidst A Potential Plea Agreement</u></p> <p>Deutch initially refused “to negotiate with prosecutors, but as [President] Clinton’s term drew to a close plea discussions began and took on a sense of urgency. Deutch’s lawyer hoped to strike a plea deal while Reno was still in office because a Bush administration attorney general might press for more serious felony charges, people familiar with the discussions said.”²¹⁴</p> <p>The Washington Post reported that Deutch had signed a written plea agreement on the evening of Friday, January 19, 2001, where he expressed his intention to plead guilty to a single charge of unauthorized removal and retention</p>	
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²¹⁰ *CIA Pulls Deutch’s Clearance*, CBS News (Aug. 21, 1999), <https://www.cbsnews.com/news/cia-pulls-deutchs-clearance/>.

²¹¹ James Risen, *U.S., In A Reversal, Begins An Inquiry Into Ex-C.I.A. Head*, New York Times (May 6, 2000).

²¹² Pierre Thomas, *Investigator Might Recommend that Former CIA Boss be Prosecuted*, CNN (Aug. 26, 2000), <https://edition.cnn.com/2000/US/08/26/deutch.prosecution/>.

²¹³ *Ex-CIA Director May Be Charged*, Newson6 (Aug. 26, 2000), <https://www.newson6.com/story/5e3684d42f69d76f6209a143/excia-director-may-be-charge>.

²¹⁴ Bill Miller and Walter Pincus, *Deutch Had Signed Plea Agreement, Sources Say*, Washington Post (Jan. 24, 2001), <https://www.washingtonpost.com/archive/politics/2001/01/24/deutch-had-signed-pleaagreement-sources-say/dcebcd40-24d5-47e9-8c3c-6fe2c3c3c8a0/>.

		<p>of classified documents or material under Section 1924 (a misdemeanor).²¹⁵ In a congressional hearing several years later, a DOJ official testified that Deutch “entered into a plea agreement on January 19 that he would plead guilty to an Information, which set out various charges.”²¹⁶</p> <p>According to a law enforcement source at the time, the plea agreement was contingent on the court accepting the agreed terms: no prison time and a \$5,000 fine.²¹⁷</p> <p>DOJ had intended to file the criminal Information and the signed agreement on Monday, January 22, 2001. However, on Saturday, January 20, 2001, President Clinton issued several pardons, including for Deutch, before leaving office. The pardon covered Deutch “for those offenses described in the Information dated January 19, 2001.”²¹⁸</p> <p>Clinton’s pardon was controversial. The Senate Select Intelligence Committee opened an inquiry on February 15, 2001.²¹⁹ “I am very disturbed by what appears to be a subverting of the judicial process in the case of former director Deutch,” Sen. Richard C. Shelby (R-Ala.), chairman of the intelligence committee, said ‘If John Deutch had already agreed to plead guilty to criminal violation, I just don’t understand why the president would undermine his own Department of Justice.’”²²⁰</p> <p>Note: The Clinton pardon referred to multiple “offenses” in the Information. The DOJ official’s testimony referred to “an Information, which set out various charges.”</p>	
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²¹⁵ *Id.* See also *Congress Probes Pardon of Ex-CIA Chief*, ABC News (undated), <https://abcnews.go.com/Politics/story?id=121775&page=1>.

²¹⁶ Hearing before The House Comm. on the Judiciary (One Hundred Tenth Congress, First Session, July 11, 2017, Serial No. 110-57), at p. 28, <https://www.justsecurity.org/wp-content/uploads/2022/11/USE-AND-MISUSE-OF-PRESIDENTIAL-CLEMENCY-POWER-FOR-EXECUTIVE-BRANCH-OFFICIALS.pdf>.

²¹⁷ Bill Miller and Walter Pincus, *Deutch Had Signed Plea Agreement, Sources Say*, Washington Post (Jan. 24, 2001).

²¹⁸ *Clinton Pardons McDougal, Hearst, Others*, ABC News (undated), <https://abcnews.go.com/Politics/story?id=122001&page=1>; *President Clinton’s Pardons, January 2001* (DOJ Office of Public Affairs), <https://www.justice.gov/archives/opa/president-clintons-pardons-january-2001>.

²¹⁹ Vernon Loeb, *Senate Committee Questions Clinton’s Pardon of Deutch*, Washington Post (Feb. 16, 2001), <https://www.washingtonpost.com/archive/politics/2001/02/16/senate-committee-questions-clintons-pardon-of-deutch/dd820330-824b-45f0-b7fe-6f020b2f4bdb/>.

²²⁰ Vernon Loeb, *Senate Committee Questions Clinton’s Pardon of Deutch*, Washington Post (February 16, 2001).