No. 22-

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION TO VACATE THE ELEVENTH CIRCUIT'S STAY OF AN ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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PARTIES TO THE PROCEEDING

The applicant in this Court is Donald J. Trump, the Forty-Fifth President of the United States of America ("President Trump").

The respondent in this Court is the United States of America (the "Government").

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APPLICATION TO VACATE THE ELEVENTH CIRCUIT'S STAY OF AN ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

To: The Honorable Clarence Thomas, Circuit Justice for the Eleventh Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court, President Trump respectfully applies for an order vacating to a limited extent the order issued on September 21, 2022, by the United States Court of Appeals for the Eleventh Circuit (the "Stay Order"), a copy of which is appended to this application (App. A). The Eleventh Circuit's order (1) stayed a temporary injunction (the "Injunction" or "Injunction Order") issued on September 5, 2022, by the United States District Court for the Southern District of Florida, *Trump v. United States of America*, No. 9:22cv-81294-AMC at ECF No. 64, 2022 WL 4015755 (S.D. Fla. Sept. 5, 2022) (App. B);[1] and (2) stayed the District Court's September 15, 2022, order specifically authorizing a special master to review seized materials with classification markings (the "Special Master Order"), *id.* at ECF No. 91 (App. C), even though that order was not jurisdictionally before the Court. Indeed, all that was before the Eleventh Circuit was the Injunction Order, which contained only the District Court's statement of prospective intent regarding the appointment of a special master, but specifically did ***not*** set forth the Special Master's duties and scope of review.[2]

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[1] The Government sought a stay of the District Court's Injunction Order in the Eleventh Circuit. The Government's brief is attached as Appendix D.

[2] As set forth below, the Eleventh Circuit lacked jurisdiction to review the September 15, 2022, Special Master Order (App. C). While the District Court's statement of prospective intent to appoint a special master was mentioned in the Injunction Order (App. B), the District Court did not appoint a special master or set forth his/her duties

INTRODUCTION

The unprecedented circumstances presented by this case—an investigation of the Forty-Fifth President of the United States by the administration of his political rival and successor—compelled the District Court to acknowledge the significant need for enhanced vigilance and to order the appointment of a Special Master to ensure fairness, transparency, and maintenance of the public trust. That appointment order is simply not appealable on an interlocutory basis and was never before the Eleventh Circuit. Nonetheless, the Eleventh Circuit granted a stay of the Special Master Order, effectively compromising the integrity of the well-established policy against piecemeal appellate review and ignoring the District Court's broad discretion without justification. This unwarranted stay should be vacated as it impairs substantially the ongoing, time-sensitive work of the Special Master. Moreover, any limit on the comprehensive and transparent review of materials seized in the extraordinary raid of a President's home erodes public confidence in our system of justice.

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and responsibilities until the court issued the September 15, 2022, Special Master Order (App. C). The Eleventh Circuit erred by citing repeatedly to both orders as the basis for its Stay Order. *See Trump*, 2022 WL 4366684, at *6 ("The next day, the United States . . . [sought] to stay the district court's **orders** with respect to only the roughly one-hundred documents bearing classification marks.") (emphasis added); *id.* at *7 ("And the district court relied on both Rule 41(g) and equitable jurisdiction in its **orders**.) (emphasis added); *id.* at *6 n.3 ("But our order does not address the special master's authority; it addresses the district court's **orders** as they require the United States to act and to refrain from acting.") (emphasis added). However, the Government's Notice of Appeal of the Injunction Order was filed September 9, 2022, six days before entry of the Special Master Order. The Government has not appealed the Special Master Order or otherwise followed the procedures set out in 28 U.S.C. § 1292(b).

President Donald J. Trump submits this application for limited review[3] of the Eleventh Circuit's Stay Order. The Eleventh Circuit lacked jurisdiction to review, much less stay, an interlocutory order of the District Court providing for the Special Master to review materials seized from President Trump's home, including approximately 103 documents the Government contends bear classification markings. This application seeks to vacate only that portion of the Eleventh Circuit's Stay Order limiting the scope of the Special Master's review of the documents bearing classification markings.

STANDARD OF REVIEW

"A Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010).

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2022, the Government executed a search warrant at the residence of President Donald J. Trump. Although details continue to evolve, the

[3] The Injunction Order is appealable as a matter of right and therefore that portion of the Eleventh Circuit's Stay Order is not included or addressed in this Application.

Government's latest report identifies 103 documents purportedly bearing classification markings, all of which were part of a haul of approximately 11,000 documents (estimated at 200,000 pages) and other materials seized from President Trump's residence (including more than 1,500 magazines and newspaper clippings, 20 gifts or articles of clothing, 89 empty envelopes, medical records, tax documents and various photographs. *See* Revised Detailed Inventory, ECF No. 116-1 (App. G).[4]

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[4] As Justice Jackson long ago recognized, the wheels of justice grind to an ignominious halt when a person—not just *the* political rival of the sitting administration— is targeted for "being attached to the wrong political views" or "being unpopular with the predominant or governing group." *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (quoting R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940). Here, the Government has chosen to treat President Trump in a manner apparently quite different from the deference and collegiality afforded to other former Presidents to manage and control their personal and Presidential Records. For instance, as part of a cooperative effort, truckloads of records from the Obama administration were relocated to what had previously been a furniture store in suburban Chicago and President George W. Bush had millions of documents transported from the White House to a warehouse in Texas. *See* Jennifer Schuessler, The Obama Presidential Library That Isn't, N.Y. TIMES, (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/arts/obama-presidential-center-library-national-archives-and-records-administration.html; *see e.g.,* David McMillen, Moving Out, Moving In (last accessed, October 1, 2022), *available at* https://www.archives.gov/publications/prologue/2016/winter/presidential-transitions.

The National Archives thoughtfully negotiated a Memorandum of Understanding with the Barack Obama Foundation concerning the management and digitization of Obama Administration records several years after his presidency. *See, e.g.*, U.S. National Archives, Memorandum of Understanding Between the Barack Obama Foundation and National Archives and Records Administration Regarding the Digitization of Obama Presidential Records, *available at* https://www.archives.gov/files/foia/obama-digitization-mou-executed-2-15-19.pdf (last accessed, October 1, 2022). In contrast, almost from the outset here, the Government feigned concern about purported classified records to justify commencement of a criminal investigation (not even contemplated under the Presidential Records Act) and then raided President Trump's personal residence (a

Immediately after the raid, President Trump's counsel asked the Government for: (1) a copy of the affidavit in support of the warrant; (2) the Government's consent to appoint a special master to "protect the integrity of privileged documents;" (3) a detailed list of what was taken from the residence and from where; and (4) an opportunity to inspect the seized property. App. B at 4–5. The Government declined President Trump's requests. *See* App. B at 5.

To safeguard his interest in the seized materials, President Trump filed the underlying civil action, moving for judicial oversight and additional relief from the District Court. *See* ECF Nos. 1, 28. In furtherance of his request to be protected from the consequences of an unlawful search and seizure of his property, President Trump requested the District Court: (1) appoint a special master; (2) enjoin further review of seized materials by the Government until a special master is appointed; (3) require the Government to supply a sufficiently detailed Receipt for Property; and (4) require the Government to return any item seized that was not within the scope of the search warrant. *See* ECF No. 28 at 10.

After thorough briefing by the parties, *see* ECF Nos. 1, 28, 48, 58, the District Court exercised its "equitable jurisdiction and inherent supervisory authority" to safeguard the rights of President Trump as a citizen subject to a potentially unlawful

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secure compound protected by U.S. Secret Service agents and used during the Trump Presidency to conduct the official business of the United States). This disparate treatment of President Trump is suggestive of a Government that has "pick[ed] the man and then search[ed] the law books . . . to pin some offense on him." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). But our courts "do not countenance" political judicial theater. *See United States v. North*, 910 F.2d 843, 865 (D.C. Cir. 1990).

search and seizure and granted President Trump's motion in part. *See* App. B at 1. "[M]indful of the need to ensure at least the appearance of fairness and integrity under the extraordinary circumstances," *id.*, the District Court entered a temporary Injunction, stating:

> The Government is **TEMPORARILY ENJOINED** from further review and use of any of the materials seized from Plaintiff's residence on August 8, 2022, for criminal investigative purposes pending resolution of the special master's review process as determined by this Court. The Government may continue to review and use the materials seized for purposes of intelligence classification and national security assessments.

Id. at 23–24. The Injunction Order did not require the Government to submit records to any special master as none had even been appointed. The Injunction Order did contain a separate statement of prospective intent to appoint a special master:

> A special master shall be **APPOINTED** to review the seized property, manage assertions of privilege and make recommendations thereon, and evaluate claims for return of property. The exact details and mechanics of this review process will be decided expeditiously following receipt of the parties' proposals as described below.

Id. at 23. The Injunction Order also made quite clear the identity, duties, and scope of review of any special master would be the subject of a separate order entered in accordance with Federal Rule of Civil Procedure 53(b). *Id.*

The next day, the Government filed its Notice of Appeal of the Injunction Order. *See* ECF No. 68 (App. E). Then, on September 8, 2022, the Government moved the District Court for a partial stay of the Injunction Order to the extent it: (1) enjoined the further review and use for criminal investigative purposes of records

bearing classification markings that were seized; and (2) required the Government to disclose purported "classified records" to a special master for review. *See* ECF No. 69 at 1. However, as noted above, the Injunction Order did not include any language identifying the special master, much less setting forth the scope of review and/or turnover of any seized materials. Rather, the Injunction Order simply precluded the Government from using any of the seized materials for criminal investigative purposes pending completion of the special master process.

On September 15, 2022, the District Court entered the Special Master Order, appointing the Honorable Raymond J. Dearie, Senior United States District Judge for the Eastern District of New York, who served on the Foreign Intelligence Surveillance Court ("FISA Court") for seven years. *See* App. C at 1. The Special Master Order conformed to the requirements of Federal Rule of Civil Procedure 53(b), including, *inter alia*, authorizing Judge Dearie to review all the seized materials and to adjudicate certain disputes between the parties. *See generally id.*

That same day, the District Court denied the Government's stay request, noting it was not inclined to hastily adopt the Government's contention that the approximately 100 purportedly "classified" documents were, in fact, classified. ECF No. 89 at 3–4. Specifically, the District Court held:

> [E]venhanded procedure does not demand unquestioning trust in the determinations of the Department of Justice. Based on the nature of [the] action, the principles of equity require the Court to consider the specific context at issue, and that consideration is inherently impacted by the position formerly held by Plaintiff. The Court thus continues to endeavor to serve the public interest, the principles of civil and criminal procedure, and the

> principles of equity. And the Court remains firmly of the view that appointment of a special master to conduct a review of the seized materials . . . is fully consonant with the foregoing principles and with the need to ensure at least the appearance of fairness and integrity under unprecedented circumstances.

Id. at 9–10.

On September 16, 2022, the Government filed a Motion for Partial Stay Pending Appeal in the Eleventh Circuit. App. D. The Government's motion did not identify a basis for appellate jurisdiction. President Trump's response in the Eleventh Circuit ("Response to Appeal") noted, in addition to his substantive arguments, the Eleventh Circuit lacked jurisdiction to review the Special Master's appointment and authority because the Special Master Order was not an appealable interlocutory order. *See* Response to Appeal at 20–27. Citing 28 U.S.C. § 1292(a)(1), along with numerous cases interpreting the statute, President Trump argued the appointment of a special master is a procedural order—not an injunction—and therefore not subject to interlocutory review. *See id.* at 20–23. Therefore, as the requirements of 28 U.S.C. § 1292(b) were not met, the appellate court lacked authority to exercise jurisdiction. *See id.* at 23–25. The Government's reply ("Gov't Reply") argued: (1) the court of appeals had jurisdiction to review the appointment of a special master because it was included in the same "order" as the Injunction; and (2) because the Injunction is "inextricably intertwined" with the appointment of the Special Master, the Eleventh Circuit could review both decisions. Gov't Reply at 7–8 (App. F).

The Eleventh Circuit granted the Government's motion, finding the

Government had established its entitlement to the stay "to the extent that it (1) requires the government to submit for the special master's review the documents with classification markings and (2) enjoins the United States from using that subset of documents in a criminal investigation." *Trump v. United States*, No. 22-13005, 2022 WL 4366684, *1 (11th Cir. Sept. 21, 2022). In addressing President Trump's jurisdictional argument, the Eleventh Circuit found it had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), "which provides courts of appeals with jurisdiction over interlocutory orders granting injunctions." *Id.* at *6. In an accompanying footnote, the Eleventh Circuit stated it was not reviewing the District Court's appointment of a special master but was instead addressing "the district court's orders as they require the United States to act and refrain from acting." Then, the Eleventh Circuit "[n]evertheless" found that the appointment of the Special Master was "otherwise nonappealable" but subject to review because it was "inextricably intertwined" with an appealable order, or was "'necessary to ensure meaningful review of an appealable decision." *Id.* at *6 n.3 (quoting *Jones v. Fransen*, 857 F.3d 843, 850 (11th Cir. 2017)).[5]

ARGUMENT

The Eleventh Circuit's Stay Order should be vacated in part.[6] First, this Court's decision in *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 49–50 (1995) compels vacatur of the stay as to the Special Master Order. As a result, this is a

[5] Pursuant to Eleventh Circuit Rule 35-4(a), a petition for rehearing en banc of a stay or injunction pending appeal will not be considered by the court *en banc*.

[6] Applicant's references to vacatur of the Eleventh Circuit's Stay Order are limited to vacatur only of that portion of the Stay Order staying the Special Master Order, which authorized review of seized documents bearing classification markings.

case that would very likely be reviewed by this Court upon final disposition in the Eleventh Circuit if the District Court is reversed. Second, under the extraordinary circumstances presented here, the District Court did not abuse its discretion in appointing a Special Master to review the materials seized from President Trump's residence.

I. The Eleventh Circuit Lacked Jurisdiction to Stay the Special Master Order Authorizing the Review of Seized Documents Bearing Classification Markings.

Courts of Appeals, like all federal courts, are courts of limited jurisdiction. Generally, federal courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. "A final decisio[n] is typically one by which a district court disassociates itself from a case." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (cleaned up).

Congress has authorized interlocutory review only in limited instances. 28 U.S.C. § 1292. Relevant here, courts of appeals have jurisdiction to review interlocutory orders of the "district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." 28 U.S.C. § 1292(a)(1). They also have jurisdiction to consider interlocutory orders pertaining to receivers or the rights and liabilities of parties in admiralty. *See id.* § 1292(a)(2)–(3). If an order does not satisfy the enumerated criteria in § 1292(a), a district court can certify an order to the court of appeals if "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the

ultimate termination of the litigation . . . ." *Id.* § 1292(b). If the district court certified its interlocutory order as appealable, the court of appeals would then have discretion whether to permit such appeal to be taken. *Id.* Lastly, as it pertains to the regional courts of appeals, Congress also authorized the Supreme Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under" the statute. *Id.* § 1292(e).

Here, the Eleventh Circuit lacked jurisdiction to review the Special Master Order because it is not appealable under § 1292, not subject to pendent appellate jurisdiction, and not a collateral order.

A. The Eleventh Circuit Lacked Jurisdiction to Review the Special Master's Authority Under 28 U.S.C. § 1292(a)(1).

1. The Special Master Order Is Not An Injunction Qualifying for Review Under 28 U.S.C. § 1292(a)(1).

The Eleventh Circuit improperly expanded the scope of § 1292(a)(1) by reviewing the "district court's orders as they require the United States to act and refrain from acting." *Trump*, 2022 WL 4366684, at *6 n.3. Section 1292(a)(1), an exception to the finality rule in § 1291, permits interlocutory appeals over orders pertaining to injunctions. 28 U.S.C. § 1292(a)(1). Because § 1292(a) is an exception to the finality rule and policy against piecemeal appeals, it is narrowly construed. *See, e.g.*, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981); *Switz. Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) ("[F]ederal law expresses the policy against piecemeal appeals. Hence we approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." (citation

omitted)). Thus, the exception in § 1292(a)(1) "does not embrace orders that have no direct or irreparable impact on the *merits* of the controversy." *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 482 (1978) (emphasis added) (holding that allowing orders relating only to pretrial procedures to fall within § 1292(a)(1) "would compromise 'the integrity of the congressional policy against piecemeal appeals.'" (quoting *Switz. Cheese*, 385 U.S. at 25)).

Further, "[i]t is not enough to qualify for appeal under this statute that a requested order be addressed to a party and command action, or even that it be enforceable by contempt." 15B C. Wright, A. Miller, & E. Cooper, Fed. Prac. & Proc. Juris. § 3922 (2d ed.). "There are, of course, many orders entered by a trial court during the pendency of a suit, requiring the parties to act . . . in a particular way. However, not all such orders, regardless of how they are characterized . . . are 'injunctions' for the purposes of 28 U.S.C. § 1292(a)(1)." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005).

The appointment of a special master is interlocutory and not immediately appealable. *See Deckert v. Indep. Shares Corp.*, 311 U.S. 282, 291 (1940) (compiling cases). Thus, although appointment of a special master ordinarily requires some action by the parties, this does not transform it from a procedural order into an immediately appealable injunction under § 1292(a)(1). *See Bogard v. Wright*, 159 F.3d 1060, 1063 (7th Cir. 1998) ("The appointment of a special master . . . although it is an order to do . . . is deemed a procedural order, and procedural orders, though they often have the form of an injunction, are not classified as injunctions for

purposes of section 1292(a)(1)." (citing *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377–78 (1981)); *United States v. Nixon,* 418 U.S. 683, 690–91 (1974))). Moreover, lower courts have routinely found the appointment of a special master is not appealable under § 1292(a)(1). *See, e.g.*, *Shakman v. Clerk of Cook Cnty.*, 994 F.3d 832, 838 (7th Cir. 2021) ("Nor does § 1292(a)(1) provide us jurisdiction, as '[t]he appointment of a special master' is a procedural order, and 'procedural orders, though they often have the form of an injunction, are not classified as injunctions for purposes of section 1292(a)(1).'" (quoting *Bogard*, 159 F.3d at 1063)); *Nat'l Org. for the Reform of Marijuana Laws v. Mullen,* 828 F.2d 536, 540 (9th Cir. 1987) (stating that appointment of special master was not an appealable order under 28 U.S.C. § 1292(a)(1)); *Thompson v. Enomoto,* 815 F.2d 1323, 1326–27 (9th Cir. 1987) (same). Here, the Eleventh Circuit's characterization of the appointment of the Special Master as an order "to act"—making it immediately appealable—is legally infirm. *Trump*, 2022 WL 4366684, at *6 n.3.

a. The Government Did Not Appeal the Special Master Order.

The Government limited its Notice of Appeal (App. E) to the District Court's September 5, 2022, Injunction Order. *See* App. B. As noted, the Injunction Order contained a separate statement of prospective intent to appoint a special master and solicited the parties to propose a list of candidates for the appointment and a proposed order of appointment. App. B. at 23–24. However, the Special Master Order, which conformed to the requirements of Federal Rule of Civil Procedure 53(b), was not entered until ten days later. *See* App. C. Thus, the Special Master Order,

not the Injunction Order, appointed Judge Dearie and authorized him to review the seized materials, including any documents bearing classification markings. Yet, the Eleventh Circuit nonetheless stayed the Special Master Order even though (1) it was not included in the Notice of Appeal[7] and (2) it was not an appealable interlocutory order.

The Injunction also did not require the Government to furnish documents to the Special Master. Rather, the Special Master Order appointed Judge Dearie to review the seized materials and make recommendations to the District Court concerning their ultimate disposition under Federal Rule of Criminal Procedure 41. App. B. Although the Injunction Order was the basis for the Government's appeal,[8]

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[7] Federal Rule of Appellate Procedure 3(c)(1)(B) requires a notice of appeal to "designate the . . . appealable order . . . from which the appeal is taken . . . ." Fed. R. App. P. 3(c)(1)(B). "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." *Smith v. Barry*, 502 U.S. 244, 248 (1992). Further, "[a]lthough courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." *Id.*; *cf. Gonzalez v. Thaler,* 565 U.S. 134, 147 (2012). Here, the Government did not—and obviously could not—designate the Special Master Order in its September 8, 2022, Notice of Appeal. The recent amendments to Rule 3 do not change this. *See* Fed. R. App. P. 3 cmt. (2021 amendments designed to eliminate need to list every order for which appeal is taken as related to the merger rule). This is not a situation where the Government did not list an older order in appealing a more recent order. Here, the Government sought to add an order to its notice of appeal that ***did not exist*** when it filed its notice of appeal.

[8] The Government's attempted sleight of hand has created this jurisdictional morass. The Government's Notice of Appeal (App. E) cited only to the Injunction Order, ECF No. 64 (App. B), as the basis for the appeal. Then, in the Eleventh Circuit, the Government argued the Special Master Order authorizing review of classified documents would cause irreparable harm. *See* App. D at 20 ("Finally, requiring disclosure of classified records to a special master and to Plaintiff's counsel, *see* D.E. 91 at 4, would impose irreparable harm on the government and public . . . ."). However, after President Trump identified the jurisdictional deficiency, the

the Injunction Order did not appoint a special master and did not establish the scope of review of the seized materials. Indeed, the Injunction Order could not have done so as it did not follow the requirements of Federal Rule of Civil Procedure 53(b). The Eleventh Circuit's decision to the contrary creates an unmanageable standard for what qualifies as an "injunction" for appealability purposes, expanding interlocutory review under § 1292(a)(1) into a morass of limitless appeals.[9]

For example, under the Eleventh Circuit's view, *every* discovery order granting a motion to compel to produce records would be an order directing a party "to act," conferring appellate jurisdiction. But as this Court has repeatedly stated, discovery orders are generally not final and therefore not appealable. *Mohawk Indus.*, 558 U.S. at 108 (citing *Risjord*, 449 U.S. at 374); *see also* 15B Wright & Miller, *supra*, § 3914.23 ("[T]he rule remains settled that most discovery rulings are not final.").

b. The Injunction Order Does Not Adjudicate the Merits of the Controversy.

Several courts of appeals have adopted tests for when an interlocutory order of a district court, although not labeled as injunctive, nonetheless qualifies as an

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Government's Reply argued the Injunction Order provided the basis for its appeal (App. F).

[9] Relying on the Government's argument that it was effectively appealing both the Injunction Order and the Special Master Order, the Eleventh Circuit further muddied the water by repeatedly citing to both orders as the basis for its Stay Order. *See Trump*, 2022 WL 4366684, at *6 ("The next day, the United States . . . [sought] to stay the district court's **orders** with respect to only the roughly one-hundred documents bearing classification marks.") (emphasis added); *id.* at *7 ("And the district court relied on both Rule 41(g) and equitable jurisdiction in its **orders**.) (emphasis added); *id.* at *6 n.3 ("But our order does not address the special master's authority; it addresses the district court's **orders** as they require the United States to act and to refrain from acting.") (emphasis added).

order granting, denying, dissolving or modifying, or refusing to dissolve or modify an injunction. *See, e.g.*, *Alabama*, 424 F.3d at 1128–29; *In re Deepwater Horizon*, 793 F.3d 479, 491 (5th Cir. 2015); *United States v. Samueli*, 582 F.3d 988, 993 (9th Cir. 2009); *I.A.M. Nat. Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir. 1986); *Bogosian v. Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir. 1991). Under this test, "[a] district court 'grants' an injunction when an action it takes is 'directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought in the complaint in more than a temporary fashion.'" *In re Deepwater Horizon*, 793 F.3d 479, 491 (5th Cir. 2015) (alteration adopted) (quoting *Police Ass'n of New Orleans ex rel. Cannatella v. New Orleans*, 100 F.3d 1159, 1166 (5th Cir. 1996)). Moreover, as stated by the Eleventh Circuit:

> We think it better . . . to continue to read § 1292(a)(1) as relating to injunctions which *give or aid in giving some or all of the substantive relief sought by a complaint* . . . and not as including restraints or directions in orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial . . . . [S]uch a construction provides a better fit with the language of the statute . . . and with the policy considerations which led Congress to create this exception to the federal final judgment rule.

Alabama, 424 F.3d at 1129 n.17 (quoting *Int'l Prod. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963)) (emphasis in original). Lastly, the district court order must have a "direct or irreparable impact on the *merits* of the controversy." *Id.* at 1129 (emphasis added) (quoting *Gardner*, 437 U.S. at 482). This limited definition of what constitutes an injunction is consistent with this Court's precedent in cases involving

injunctions where the appellate courts exercised their jurisdiction to address the merits of the dispute. *See, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) ("Thus, as these cases indicate, if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.").

Here, the Special Master Order fails to satisfy this test. First, this was not an action directed to a party—it appointed a third-party as special master pursuant to Federal Rule of Civil Procedure 53. To the extent the appointment impliedly requires the Government to act, the Special Master Order does not have a "direct or irreparable impact on the merits of the controversy." *See id.* Rather, the Special Master Order relates only to the conduct of the litigation. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) ("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)."). Stated differently, providing documents to a special master is not the ultimate relief sought—it is an intermediary procedural step to conduct an orderly, transparent, and fair review of the seized materials. Indeed, the District Court issued the Special Master Order to facilitate resolution of the actual merits.[10] Moreover, all orders appointing special

[10] Although President Trump sought appointment of a special master in his initial request for relief, the Government cannot seriously contend the Special Master Order adjudicated the "merits of the controversy." *See Alabama*, 424 F.3d at 1129. The District Court could itself review the seized materials and any decision to do so would simply not have been appealable on an interlocutory basis. The appointment of a

masters require to some extent the submission of materials for review. This however does not transform such orders into appealable injunctions under § 1292(a)(1).

2. A Single Interlocutory-Appealable Issue Included Within An Order Containing Rulings Regarding Non-Interlocutory-Appealable Issues Does Not Render All Rulings Immediately Appealable.

Federal courts should be hesitant to unnecessarily expand appellate jurisdiction. *See, e.g.*, *Mohawk Indus.*, 558 U.S. at 113–14. The Government argued in its reply before the Eleventh Circuit that all rulings in a single *order* can be bootstrapped into an appeal so long as at least one issue ruled upon is immediately appealable under 28 U.S.C. § 1292(a)(1). App. F at 7. This argument misses the mark. *See Abney v. United States*, 431 U.S. 651, 655 (1977). In *Abney*, this Court reviewed the jurisdiction of the court of appeals in the context of a motion to dismiss an indictment. *Id.* In the motion to dismiss, the petitioners made two arguments: "(a) that retrial would expose them to double jeopardy; and (b) that the indictment, as modified by the election [of offenses], failed to charge an offense[,]" *i.e.*, that the indictment was insufficient. *Id.* "The District Court denied *the motion*." *Id.* (emphasis added). This Court held the denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable. *Id.* at 662. However, the Court, "[did] not hold that other *claims* contained in the motion to dismiss are immediately appealable as well." *Id.* at 663.

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special master to perform the documentary review is therefore just a procedural order related to the conduct of the proceedings and does not itself adjudicate the merits of the controversy.

Applying *Abney's* reasoning to § 1292 makes sense. *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 49–50 (1995) (holding that the *Abney* rule "bears on civil cases as well."). Otherwise, every ruling on a request for an injunction would necessarily render all other aspects of an injunction order appealable. But, as recognized in *Swint*, separate rulings in an order containing at least one appealable ruling are not immediately appealable. *Id.* at 50–51 ("We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one *ruling*, to review, conjunctively, related *rulings* that are not themselves independently appealable.").

To be sure, this Court has interpreted a neighboring provision, § 1292(b), to allow review of all issues in an order. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996); *see also BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1540 (2021). But § 1292(b)'s text—specifically requiring a controlling question of law as to which there is substantial ground for difference of opinion—recognizes a wholly different purpose than § 1292(a), rendering *Yamaha* and *BP P.L.C.* inapplicable to § 1292(a)(1). However, section 1292(b) specifies certain prerequisites to interlocutory appealability simply not met here.

Both § 1292(a)(1) and § 1292(b) are limited exceptions to the final judgment rule. But § 1292(b) is permissive,[11] providing a court of appeals with discretion to

[11] In contrast, Section 1292(a)(1), provides mandatory jurisdiction: "the courts of appeals *shall have jurisdiction* of appeals from . . . interlocutory orders . . . granting . . . injunctions . . . ." *See* § 1292(a)(1) (emphasis added). There is no discretion to refuse review of interlocutory orders granting injunctions. The purpose of § 1292(a)(1) is not judicial economy, it is to protect a litigant because an injunction impacts a

allow an appeal. § 1292(b). This discretion is triggered *only if* the district court certifies the issue. *Id.* Both the district court and the court of appeals must find the *order* contains an unsettled controlling question of law that "may materially advance the ultimate termination of the litigation." *Id.* Expanding jurisdiction to allow the court of appeals to review the entire certified order comports with judicial economy because this process is designed to "materially advance the ultimate termination of the litigation." § 1292(b); *see McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1256 (11th Cir. 2004) ("[T]he appeal from interlocutory orders thus provided should and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation . . . ." (cleaned up)); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865–66 (2d Cir. 1996) ("The use of § 1292(b) is reserved for those cases where an intermediate appeal may avoid protracted litigation.").

Permitting appeals under § 1292(a)(1) of all rulings in a single order would foster gamesmanship by litigants and create unnecessary labor for district courts. For example, litigants could file a single motion seeking to modify an injunction and rule on discovery. If the district court ruled on the single motion with a single order, the non-appealable discovery ruling would conceivably transform it into an appealable issue by the sheer virtue that it was ruled upon in the same order as an appealable issue. In other contexts, the Supreme Court has narrowly interpreted

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party's rights without a full trial on the merits. *See Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988). Thus, allowing review of rulings besides those pertaining to injunctive relief does not further the need to protect from "serious, perhaps irreparable consequence[s]." *Id.*

provisions affording appellate jurisdiction to avoid such gamesmanship. *See Abney*, 431 U.S. at 663 (restricting appellate jurisdiction to avoid frivolous double jeopardy claims); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714–15 (2017) (interpreting narrowly appellate jurisdiction to prevent "inventive litigation ploys" to obtain interlocutory review of order striking class allegations). To avoid unnecessarily expanding the scope of appellate review, district courts would need to ensure that any order concerning any ruling possibly constituting injunctive relief be entirely separate from other rulings regardless of whether those issues were presented simultaneously. Surely, neither Congress nor this Court intended as much.

B. Pendent Appellate Jurisdiction is Inappropriate Here.

In a footnote, the Eleventh Circuit found it had jurisdiction to review the appointment of the Special Master because the ruling was "inextricably intertwined" with the Injunction. *See* App. A at 15 n.3. This holding—rendered without explanation of why an Injunction against use of records for criminal investigative purposes and a separate order appointing a special master are inextricably intertwined—contravenes this Court's precedent.

Although this Court has authorized the use of pendent appellate jurisdiction, *see Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997) (finding that court of appeals properly invoked pendent appellate jurisdiction because appealable issue was inextricably intertwined with non-appealable issue), the propriety of such expansion of non-final appealability here is questionable at best. *See Mohawk Indus.*, 558 U.S. at 114–15 (Thomas, J., concurring) (stating that "Congress's designation of the

rulemaking process" and not judicial decisions, is "the way to define or refine . . . when an interlocutory order is appealable"). Interlocutory review of a separate order appointing a special master is simply not in any way necessary to "ensure meaningful review of" the decision enjoining the Government from use of the purportedly classified materials in its ongoing investigation. *See Swint,* 514 U.S. at 50–51. This Court's treatment of pendent appellate jurisdiction since *Swint* has been both cursory and narrow and would in no way countenance the expansive overreach undertaken here by the Eleventh Circuit.[12]

Moreover, every decision by this Court acknowledging—at least as a possibility—the concept of pendent appellate jurisdiction has been as part of the

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[12] *See Vt. Agency of Nat. Res. V. U.S. ex rel. Stevens*, 529 U.S. 765, 770 n.2 (2000) (stating that the Second Circuit exercised pendent appellate jurisdiction over a non-appealable statutory question and citing *Swint*, 514 U.S. at 50–51); *Jones v. Clinton*, 72 F.3d 1354, 1357 n.4 (8th Cir. 1996) ("It is difficult to imagine issues more 'intertwined' than these, where answering one question of law resolves them all."). As in *Swint* and *Clinton*, the interlocutory order that was immediately appealable in *Stevens* was based on denial of a motion to dismiss asserting immunity from suit. *See Stevens*, 529 U.S. at 770 n.2. Then in *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009), this Court held that an appeal of another order denying qualified immunity—affording appellate jurisdiction under the collateral order doctrine—also authorized appellate review of whether the complaint stated a claim. *Id.* In so holding, this Court held that "the sufficiency of respondent's pleadings is both 'inextricably intertwined with,' [*Swint*, 514 U.S. at 51], and 'directly implicated by,' [*Hartman v. Moore*, 547 U.S. 250, 257, n.5 (2006)], the qualified-immunity defense." *Iqbal*, 556 U.S. at 673. Most recently, in *Whole Woman's Health v. Jackson*, the Court, "stand[ing] in the shoes of the Court of Appeals" stated that its review of an order denying a motion to dismiss was limited to that order "and any other ruling 'inextricably intertwined with' or 'necessary to ensure meaningful review of' [the order on the motion to dismiss]." 142 S. Ct. 522-531 (2021). However, the Court made no further reference whether it was reviewing rulings beyond those appropriately under review. *Id.* Critically, this acknowledgment of pendent appellate jurisdiction was once again related to an appeal concerning the denial of an immunity defense. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 445 (5th Cir. 2021).

collateral order doctrine. The collateral order doctrine is a judicially created exception to the final judgment rule enacted in § 1291. This Court, for good reason, has seemingly not authorized pendent appellate jurisdiction where appellate jurisdiction could be conferred by § 1292.

The collateral order doctrine was first established by this Court in 1949. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). It "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Swint*, 514 U.S. at 41–42 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). In interpreting § 1291, *Cohen* authorized "appeals not only from a final decision by which a district court disassociates itself from a case, but also from a small category of decisions that, although they do not end the litigation, must nonetheless be considered 'final.'" *Id.* at 42 (quoting *Cohen*, 337 U.S. at 546). Thus, the expansion of the collateral order doctrine stems from an interpretation of § 1291. Section 1292 is a limited statutory exception to § 1291; courts cannot expand the congressionally limited exception in § 1292(a)(1) via judicial decision. This notion is supported by the other subsections in § 1292 that provide courts with other methods to expand appellate jurisdiction. *See* § 1292(b) (providing discretion to district courts and courts of appeals to certify and accept appeals over significant issues); § 1292(e) (authorizing the Supreme Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [§ 1292]").

Congress has clearly defined the permissible exceptions to the final judgment

rule. *See* §§ 1291–1292. If further exceptions to the final judgment rule are warranted, Congress provided this Court authority to do so. *See* § 1292(e); *Swint*, 514 U.S. at 48 ("Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect."); *see also Mohawk*, 558 U.S. at 114 (same); *id.* at 114–115 (Thomas, J., concurring) (same).

Even if pendent appellate jurisdiction could apply to an appeal under § 1292(a)(1), the District Court's Special Master Order was not "inextricably intertwined" with the Injunction to warrant pendent jurisdiction.[13] "A pendent claim may be considered 'inextricably intertwined' only if it is 'coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well.'" *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1148 (10th Cir. 2011)

[13] Pendent appellate jurisdiction should be "rare," *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009), "extremely limited," *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1109–10 (9th Cir. 2016), exercised only in "exceptional circumstances," *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010); *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 844–45 (8th Cir. 2012), "used sparingly," *O'Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 765 (3d Cir. 2021); *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199 (D.C. Cir. 2004), and "carefully circumscribed," *Pickett v. Texas Tech Univ. Health Scis. Ctr.*, 37 F.4th 1013, 1019 (5th Cir. 2022) (citation omitted). It is "an exception of limited and narrow application driven by considerations of need, rather than of efficiency." *Lyons v. PNC Bank, Nat'l Ass'n*, 26 F.4th 180, 190–91 (4th Cir. 2022) (quoting *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006)). And it "should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order." *Abelesz v. Erste Grp. Bank AG*, 695 F.3d 655, 660 (7th Cir. 2012). "The exercise of pendent appellate jurisdiction is often suggested, occasionally tempting, but only rarely appropriate." *Price*, 389 F.3d at 199.

(quoting *Moore v. City of Wynnewood,* 57 F.3d 924, 930 (10th Cir. 1995)); *see Reid*, 701 F.3d at 845; *Lyons*, 26 F.4th at 191. "[T]he pendent appellate jurisdiction standard is not satisfied when we are confronted with two similar, but independent, issues . . . ." *Myers*, 624 F.3d at 553. "Issues are not 'inextricably intertwined' when courts apply different legal standards to each issue." *Arpaio*, 821 F.3d at 1109 (citation omitted). Importantly, "such jurisdiction d[oes] not exist when resolution of the nonappealable issue [is] not necessary to resolve the appealable one." *King*, 562 F.3d at 1379.

Here, the Injunction Order is not "inextricably intertwined" with the appointment of the Special Master. Resolution of the Injunction request does not "necessarily resolve" the Special Master issue. *See id.*; *Stidham*, 640 F.3d at 1148; *Reid*, 701 F.3d at 845; *Lyons*, 26 F.4th at 191. The Injunction Order relates to the Government's ability to use seized materials for criminal investigative purposes. Resolution of whether the separate Special Master Order was legally appropriate turns on a separate legal question: whether the District Court abused its discretion in appointing a special master under Federal Rule of Civil Procedure 53. *See Gary W. v. Louisiana*, 601 F.2d 240, 244 (5th Cir. 1979). In determining whether a District Court abused its discretion in appointing a special master, courts look at whether the special master's authority exceeds that authorized by Rule 53, if special masters have been appointed in similar circumstances, *id.*, or if the appointment displaces the court or impairs a party's right to trial, *see La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). None of these factors require the reviewing court to assess the merits of the case. These are distinct issues—and each can certainly be decided independent

from the other. *See Stidham*, 640 F.3d at 1148; *Reid*, 701 F.3d at 845; *Lyons*, 26 F.4th at 191. Thus, interlocutory review of the Injunction Order is not "inextricably intertwined" with review of the Special Master Order as it is not intertwined at all.

C. The District Court's Special Master Order Was Not Immediately Appealable as a Collateral Order.

In its reply before the Eleventh Circuit, the Government made a fleeting statement that orders to disclose classified information are immediately appealable as collateral orders. App. F at 10 (citing *Mowhawk Indus.*, 558 U.S. at 113 n.4; *Al Odah v. United States*, 559 F.3d 539, 542–44 (D.C. Cir. 2009)). This assertion is without merit.

The collateral order exception, as formulated in *Cohen*, states that "'an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.'" *Mohawk Indus.*, 558 U.S. at 105 (quoting *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1052 (11th Cir. 2008) (*per curiam*)). While the Government did not expand on its theory or even mention the three-pronged test used to determine whether a collateral order appeal is appropriate in its Reply, neither of the two cases it cited, nor a full application of the *Cohen* test invokes appellate jurisdiction in this case.

First, *Mohawk*, was a collateral appeal of an order compelling disclosure of attorney-client communications based upon waiver—not an appeal of an order denying a stay. *See* 558 U.S. at 104. The Eleventh Circuit dismissed the appeal for lack of jurisdiction under 28 U.S.C. § 1291. Affirming the dismissal, this Court—

after explaining in detail that effective appellate review could be had by other means—specifically addressed the potential floodgate consequences of an adverse ruling when it noted that were it to "approve collateral order appeals in the attorney-client privilege context, many more litigants would choose that route." *Id.* at 113. This Court continued that these litigants would, in a sense, attempt to stretch the coil, and "likely seek to extend such a ruling to disclosure orders implicating many other categories of sensitive information, raising an array of line-drawing difficulties." *Id.*

In fact, this Court explicitly expressed no opinion as to an argument by the Government participating as *amicus curiae* proposing that "collateral order appeals should be available for rulings involving certain government privileges 'in light of their structural constitutional grounding under the separation of powers, relatively rare invocation, and unique importance to government functions.'" *Id.* at 113 n.4. This Court's refusal to entertain the extension of collateral order appellate jurisdiction suggested by the Government in *Mohawk* cannot be interpreted as support for the Government's claim as to the appealability of the Special Master Order.

In *Al Odah*, the Government appealed from an order granting defendant's counsel access to unredacted "classified" information. 559 F.3d at 543. The District of Columbia Circuit, applying the *Cohen* test, determined it had jurisdiction to hear the appeal of the collateral order in that case. *Id.* at 543-44. However, the present case is distinguishable from *Al Odah*, primarily due to whom the "classified" or

"privileged" documents are being disclosed. Unlike in *Al Odah*, where the unredacted classified documents were ordered to be disclosed to defendant's counsel, here the materials in question will be provided to the Special Master—a Senior United States District Judge with years of FISA court experience. As Special Master, Judge Dearie will effectively act as an arm of the District Court. It can hardly be suggested that Judge Dearie's review of these records is in any way akin to dissemination of previously unshared, unredacted, classified information to counsel for Guantanamo Bay detainees.

Additionally, the fact this dispute involves potential Presidential records[14] creates a fundamental and significant distinction. Since any purported "classified records" may be Presidential records, President Trump (or his designee, including a neutral designee such as a special master) has an absolute right of access to same under the Presidential Records Act ("PRA"). 44 U.S.C. § 2205(3). Accordingly, President Trump (and, by extension, the Special Master) cannot in any event be denied access to those documents. Given this absolute right of access under the PRA, there is therefore no valid basis to preclude such review. Moreover, there cannot possibly be any valid claim of injury resulting from a statutorily authorized grant of access to a former President and/or his designee.

The Government argued on appeal, without explanation, that showing the purportedly classified documents to Judge Dearie would harm national security. App.

[14] Even the Government's own Motion for Stay in the Eleventh Circuit acknowledged the obvious, that any purported "classified records" may be Presidential records. App. D at 10.

D at 17. However, in seeking to stay the Injunction Order pending appeal, the Government then argued it needed to use those same documents to interview witnesses and submit to the grand jury. ECF No. 69 at 17. These positions cannot be reconciled.

Furthermore, a straight application of the *Cohen* test shows the Special Master Order is not an appealable collateral order. The appointment of the Special Master satisfies the first prong, as the court does not intend to revisit that determination. However, the order fails to satisfy the other two prongs. Second, there is no particularly important issue that needs to be addressed regarding the appointment of the Special Master. Special masters are appropriate in cases like this, where a review of thousands of documents for privilege determinations is necessary. Third, the Special Master Order is reviewable on appeal. Thus, the balance of factors weighs against employing the collateral order doctrine.

Ultimately, the Eleventh Circuit did not have jurisdiction to review the Special Master Order. As such, the Government *cannot* prevail on the merits of its appeal regarding the Special Master Order. Without being able to show *any* likelihood of success on the merits as to this discrete issue, review of the other stay factors is unnecessary. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

II. The District Court Did Not Abuse its Discretion in Authorizing the Special Master to Review Documents Bearing Classification Markings.

Even assuming the Eleventh Circuit had jurisdiction to review any aspect of the Special Master Order, the District Court did not abuse its discretion in issuing

that Order as it is reasonably tailored given the significance of this investigation.

As noted above, the unprecedented circumstances presented by this case compelled the District Court's entry of the Special Master Order. Indeed, in what is essentially a document storage dispute governed by the PRA, *see* 44 U.S.C. §§ 2201, *et seq.,* the Government has sought to criminalize President Trump's possession and management of his own personal and Presidential records. Acknowledging same, the District Court exercised its broad discretion by:

> [Taking] into account the undeniably unprecedented nature of the search of a former President's residence; Plaintiff's inability to examine the seized materials in formulating his arguments to date; Plaintiff's stated reliance on the customary cooperation between former and incumbent administrations regarding the ownership and exchange of documents; the power imbalance between the parties; the importance of maintaining institutional trust; and the interest in ensuring the integrity of an orderly process amidst swirling allegations of bias and media leaks.

App. B at 11. In identifying the need for further review of the seized materials, the District Court further stated:

> [T]he parties' submissions suggest the existence of genuine disputes as to (1) whether certain seized documents constitute personal or presidential records, and (2) whether certain seized personal effects have evidentiary value. Because those disputes are bound up with Plaintiff's Rule 41(g) request and involve issues of fact, the Court 'must receive evidence' from the parties thereon. . . . That step calls for comprehensive review of the seized property.

Id. at 14.

Finally, the District Court rejected the Government's conclusory approach in denying the motion to stay:

> The Government's position thus presupposes the content, designation, and associated interests in materials under its control—yet, as the parties' competing filings reveal, there are disputes as to the proper designation of the seized materials, the legal implications flowing from those designations, and the intersecting bodies of law permeating those designations.

ECF No. 89 at 4–5.

In sum, the District Court exercised its lawful discretion and denied the Government the ability to evade any oversight and to skip forward towards a preordained conclusion. Given the detailed support and findings, this discretion cannot be said to have been abused. Moreover, the Eleventh Circuit never even attempted to assert otherwise when granting the stay.

The ultimate disposition of the purportedly classified records and likely most of the seized materials is indisputably governed by the provisions of the PRA. *See* 44 U.S.C. §§ 2201, *et seq*. The PRA accords any President extraordinary discretion to categorize all his or her records as either Presidential or personal records, and established case law provides for very limited judicial oversight over such categorization. The PRA further contains no provision authorizing or allowing for any criminal enforcement. Rather, disputes regarding the disposition of any Presidential record are to be resolved between such President and the National Archives and Records Administration ("NARA").

The PRA "distinguishes Presidential records from 'personal records'" and "requires that all materials produced or received by the President, 'to the extent practicable, be categorized as Presidential records or personal records upon their

creation or receipt and be filed separately.'" *Jud. Watch, Inc. v. Nat'l Archives & Recs. Admin.*, 845 F. Supp. 2d 288, 291 (D.D.C. 2012) (quoting 44 U.S.C. § § 2203(b)); *see also* 44 U.S.C. § 2201(2)–(3). "*The categorization of the records during the Presidency controls what happens next* . . . . The statute assigns the Archivist *no role* with respect to personal records once the Presidency concludes." *Id.* (emphasis added). "The PRA contains no provision obligating or even permitting the Archivist to assume control over records that the President 'categorized' and 'filed separately' as personal records. At the conclusion of the President's term, the Archivist only 'assumes responsibility for the Presidential records." *Id.* (quoting 44 U.S.C. § 2203(f)(1)). "[T]he PRA does not confer any mandatory or even discretionary authority on the Archivist to classify records. Under the statute, this responsibility is left solely to the President." *Id.* at 301 (describing categorization decision made by former President Clinton as not within the discretion of the Archivist as the subject materials "were not provided to the Archives at" the end of the Clinton presidency). Critically important here, President Trump had sole discretion to classify a record as personal or Presidential. *See Jud. Watch, Inc.*, 845 F. Supp. 2d at 301.

The District Court's exercise of discretion to allow for a transparent and orderly process to facilitate resolution of the myriad preliminary disputes over the categorization of the seized materials was therefore not only authorized, but justified. The Special Master Order establishes an organized procedure allowing for categorization of the seized materials and the ultimate adjudication of any disputes regarding those categorizations and resultant possessory interests. Simply put, there

first needs to be a determination as to what portion of the seized materials constitute personal or Presidential records and the appointment of a special master facilitates that determination.

Additionally, President Trump was still the President of the United States when any documents bearing classification markings were delivered to his residence in Palm Beach, Florida. *See* Patricia Mazzei and Julia Echikson, *Trump has arrived in Palm Beach to begin life as a private citizen*, The New York Times, Jan. 20, 2021, available at https://www.nytimes.com/2021/01/20/us/trump-palm-beach.html (last accessed, October 2, 2022). At that time, he was the Commander in Chief of the United States. U.S. Const., Art. II, § 2. As such, his authority to classify or declassify information bearing on national security flowed from this constitutional investment of power in the President. *See Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961).

President Trump had broad authority governing classification of, and access to, classified documents. ECF No. 69 at 10, 18 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988)). In fact, "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." ECF No. 69 at 18 (quoting *Egan*, 484 U.S. at 529). Congress provided certain parameters for controlling classified information but primarily delegated to the President how to regulate classified information. 50 U.S.C. § 3161. At the same time, Congress exempted the President from complying with such requirements. *See id*. § 3163 ("Except as otherwise specifically provided, the provisions of this subchapter shall not apply to

the President . . .").

President Obama enacted the current Executive Order prescribing the parameters for controlling classified information in 2009. *See* Exec. Order 13526 (Dec. 29, 2009). That Executive Order, which controlled during President Trump's term in office, designates the President as an original classification authority. *See id*. § 1.3(a)(1). In turn, the Executive Order grants authority to declassify information to either the official who originally classified the information or that individual's supervisors—necessarily including the President. § 3.1(b)(1), (3). Thus, assuming the Executive Order could even apply to constrain a President, *cf*. 50 U.S.C. § 3163, President Trump had absolute authority under that Executive Order to declassify any information. There is no legitimate contention that the Chief Executive's declassification of documents requires approval of bureaucratic components of the executive branch. Yet, the Government apparently contends that President Trump, who had full authority to declassify documents, "willfully" retained classified information in violation of the law. *See* 18 U.S.C. § 793(e); ECF No. 69 at 9. Moreover, whether classified or declassified, the documents remain either Presidential records or personal records under the PRA.

Here, it simply cannot be an abuse of discretion for the District Court to refer these matters to a special master to determine whether documents bearing classification markings are in fact classified, and regardless of classification, whether those records are personal records or Presidential records, such that their disposition may be managed properly under the PRA. The Government's position presumes

certain documents are in fact classified, affording President Trump no opportunity to contend otherwise. This presumption is at the core of the dispute. Since President Trump had absolute authority over classification decisions during his Presidency, the current status of any disputed document cannot possibly be determined solely by reference to the markings on that document. This, again, is why the District Court exercised its discretion to appoint a special master. Otherwise, the unchallenged views of the current Justice Department would supersede the established authority of the Chief Executive.

As correctly stated by the District Court, President Trump "faces an unquantifiable potential harm by way of improper disclosure of sensitive information to the public." App. B at 9–10. This is evidenced by various media reports regarding the contents of purportedly classified documents seized by the Government.[15] Irreparable injury could most certainly occur if the Government were permitted to improperly use the documents seized. As the District Court aptly stated:

> As a function of [President Trump's] former position as President of the United States, the stigma associated with the subject seizure is in a league of its own. A future indictment, based to any degree on property that ought to be returned, would result in reputational harm of a decidedly different order of magnitude.

App. B at 10.[16] The District Court appointed the Special Master largely because

[15] Indeed, the District Court noted as much in the order denying the Government's motion for partial stay pending appeal. *See, e.g.*, ECF No. 89 at 8 ("Instead, and unfortunately, the unwarranted disclosures that float in the background have been leaks to the media *after* the underlying seizure [*see* ECF No. 64 pp. 9–11 n.11].").

[16] The Government's investigatory decisions should be disinterested. *See, e.g.*, U.S.

"[a] commitment to the appearance of fairness is critical, now more than ever." App. B at 16. The District Court therefore did not abuse its discretion in appointing a special master given the significance of this investigation. *See Reynolds v. McInnes*, 380 F.3d 1303, 1305, fn. 3 (11th Cir. 2004) (citing *Grilli v. Metropolitan Life Insurance Co.*, 78 F.3d 1533, 1538 (11th Cir.1996)); *Gary W.*, 601 F.2d at 245; *see also Macri v. U.S. ex. rel. John H. Maxwell & Co.*, 353 F.2d 804, 809 (9th Cir. 1965) ("[w]here trial court had power to enter an order of reference to a special master pursuant to Fed.R.Civ.P. 53, the only inquiry by Court of Appeals would center on question of whether trial court abused its discretion.").

In sum, the Government has attempted to criminalize a document management dispute and now vehemently objects to a transparent process that provides much-needed oversight. The Government's attempt to shield the purportedly classified documents from the ambit of a Senior United States District Judge who served for seven years on the FISA Court, and preclude review by a former President of his own personal and Presidential records, illustrates precisely why the District Court found a special master was appropriate and necessary under the circumstances. As such, even assuming these issues were properly before the

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Dep't of Justice, U.S. Attorneys' Manual, § 9-27.260 ("[F]ederal prosecutors and agents may never make a decision regarding an investigation or prosecution, or select the timing of investigative steps or criminal charges, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party"); *see also id.* (setting out impermissible considerations in charging decisions, including the defendant's political association, activities, or beliefs; the prosecutor's personal feelings about the defendant; and the possible effect of the charging decision on the prosecutor's own personal or professional circumstances).

Eleventh Circuit, the stay of the Special Master Order should be vacated.

CONCLUSION

The Eleventh Circuit lacked jurisdiction to review the Special Master Order, which authorized the review of all materials seized from President Trump's residence, including documents bearing classification markings. Moreover, entry of the Special Master Order was not in any event an abuse of discretion. Accordingly, President Trump respectfully requests the Court vacate the Eleventh Circuit's September 21, 2022, Stay Order as to the authority of the Special Master to review documents bearing classification markings.

October 4, 2022.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-13005

DONALD J. TRUMP,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cv-81294-AMC

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Following the execution of a search warrant at the residence of Plaintiff-Appellee, former President Donald J. Trump, Plaintiff moved for the appointment of a special master to review the documents that Defendant-Appellant United States of America seized. The district court granted that motion in substantial part. Now, the United States moves for a partial stay of the district court's order as it relates to the roughly one-hundred documents bearing classification markings. We decide only the narrow question presented: whether the United States has established that it is entitled to a stay of the district court's order, to the extent that it (1) requires the government to submit for the special master's review the documents with classification markings and (2) enjoins the United States from using that subset of documents in a criminal investigation. We conclude that it has.

We stress the limited nature of our review: this matter comes to us on a motion for a partial stay pending appeal. We cannot (and do not) decide the merits of this case. We decide only the traditional equitable considerations, including whether the United States has shown a substantial likelihood of prevailing on the merits, the harm each party might suffer from a stay, and where the public interest lies.

For the reasons we explain below, we grant the United States's motion for a partial stay pending appeal.

I. BACKGROUND

A. Factual Background

Plaintiff left the White House in January 2021, after serving as President of the United States. Upon leaving office, movers transferred boxes of documents to his personal residence in southern Florida. Doc. No. 1 at 4.

The record reveals that, throughout 2021 (and consistent with its responsibilities under the Presidential Records Act, 44 U.S.C. §§ 2201–09), the National Archives and Records Administration sought to obtain records in Plaintiff's possession. Doc. No. 48-1 at 2, 6.

In response to these requests, in January 2022, Plaintiff transferred fifteen boxes of documents to the National Archives. *Id.* The National Archives reviewed the contents of the boxes and found inside "newspapers, magazines, printed news articles, photos, miscellaneous print-outs, notes" but also "presidential correspondence, personal and post-presidential records, and a lot of classified records." Affidavit in Support of an Application Under Rule 41 for a Warrant to Search and Seize ¶ 24, *In re Sealed Search Warrant*, No. 22-MJ-8332 (S.D. Fla. Sept. 12, 2022) ("Warrant Affidavit") (quotation omitted). Consequently, the National Archives sent a referral by email to the Department of Justice on February 9, 2022. *Id.*

Upon learning about the classified materials, the Department sought access to the fifteen boxes in part "so that the FBI and others in the Intelligence Community could examine them." Doc. No. 48-1 at 6. The National Archives responded by advising Plaintiff, on April 12, 2022, that it intended to provide the FBI access to the records the week of April 18, 2022. *Id.* at 7. When Plaintiff requested an extension of the production date to April 29, 2022, the National Archives held off on sending the documents to the FBI. *Id.*

On that date, Plaintiff asked for another extension of time and informed the National Archives that, if it declined to grant the extension, he would make a protective assertion of executive privilege over the documents. Doc. No. 48 at 6. On May 10, the National Archives informed Plaintiff's representatives that it had decided not to honor Plaintiff's protective claim of executive privilege, and that it would provide the FBI access to the records as early as May 12, 2022. *Id.* at 9. That letter noted that President Biden had deferred to the National Archives's determination that executive privilege did not apply. *Id.* at 7. Despite this advance warning, Plaintiff made no effort to block the FBI's access to the documents at that time. Doc. No. 48 at 6–7.

During a preliminary review of the documents between May 16–18, 2022, the FBI found 184 documents marked at varying levels of classification (including twenty-five documents marked top secret). *Id.* at 7; Warrant Affidavit ¶ 47.

The FBI also developed evidence that more boxes containing classified information remained at Plaintiff's residence. Doc. No. 48 at 7. The Department obtained a grand-jury subpoena directed to Plaintiff's custodian of records, and requested all documents or writings in Plaintiff's custody or control bearing classification markings. Doc. No. 48 at 7–8. Plaintiff's counsel was served with the subpoena on May 11, 2022. *Id.* at 8.

Plaintiff sought (and received) an extension of time to produce the subpoenaed documents. *Id.* After initially denying the request, the government extended the compliance deadline until June 7, 2022. *Id.* On June 3, 2022, in response to the subpoena, Plaintiff's representatives produced an envelope containing thirty-eight such documents. Warrant Affidavit ¶ 58. At the same time, his representative stated that she was authorized to certify that a "diligent search was conducted" and that "[a]ny and all responsive documents" accompanied the certification. Doc. No. 48 at 9. The envelope contained classified documents, including seventeen marked top secret, and was double-wrapped in tape, consistent with handling procedures for classified documents. Warrant Affidavit ¶¶ 58, 60. Plaintiff made no claims of privilege with his production in response to the subpoena. Doc. No. 48 at 8.

Despite Plaintiff's production in response to the subpoena and counsel's representation that a diligent search had occurred and all responsive documents had been produced, the FBI developed evidence that more classified documents remained at Plaintiff's residence. *Id.* at 10. In August 2022 the Department, through

an FBI agent's sworn affidavit, informed a magistrate judge of the evidence it had developed, and the magistrate judge agreed that probable cause existed that evidence of possible violations of the law would be found in Plaintiff's residence. *Id.* at 11; *see also* Warrant Affidavit at 1, 32. Based on this evidence, the magistrate judge issued a search warrant for Plaintiff's residence. When the FBI executed the search warrant, it seized thirty-three items of evidence (mostly boxes) containing approximately 11,000 documents and 1,800 other items. Doc. No. 48 at 4, 12–13. Among the boxes, thirteen contained documents with classification markings, and three classified documents were found in Plaintiff's desks. All told, the search uncovered over one-hundred documents marked confidential, secret, or top secret. *Id.* at 13.

In accordance with the protocol that the magistrate judge had approved in the search warrant, the Department directed a "Privilege Review Team"—composed of agents not otherwise participating in the investigation—to review certain seized documents for attorney-client privilege. Doc. No. 48 at 14; *see* Warrant Affidavit ¶¶ 81–84.

Based on its review, the Privilege Review Team identified (and segregated) an initial subset of about 520 pages (not documents) that might contain privileged material. Doc. No. 64 at 14. Within the remaining documents, members of the investigative team found at least two instances of potentially privileged material, which they delivered to the Privilege Review Team. *Id.* at 15.

B. Procedural History

Two weeks after the execution of the search warrant, Plaintiff filed a motion in the district court asking for it to (1) appoint a special master, (2) enjoin further review of the seized materials until a special master was appointed, (3) require the United States to supply a more detailed Receipt for Property, and (4) require the United States to return any item seized that was not within the scope of the search warrant. Doc. No. 28 at 10.

Regarding jurisdiction, among other bases, Plaintiff asserted that the district court could appoint a special master under its "supervisory authority" and its "inherent power" and could enjoin the government's review under its "equitable jurisdiction." Doc. No. 28 at 5–6.

The United States made three primary arguments in opposition. *First*, the United States argued that Plaintiff lacked Fourth Amendment "standing" to seek relief because he did not have a possessory interest in the seized property. In support of this position, the United States asserted that the seized records were Presidential records, which properly belonged to the people of the United States, not to Plaintiff.

Second, as to the appointment of a special master, the United States contended that (1) appointment of a special master was the exception, not the rule; (2) a special master was neither necessary nor appropriate to address whether certain documents were subject to executive privilege because Plaintiff could not

assert executive privilege against the Executive Branch; (3) even if he could, the privilege would yield to the United States's need to investigate a possible crime and the United States's compelling interest in sensitive and highly classified documents; (4) appointment of a special master would be inconsistent with equitable principles given that Plaintiff had not, as required, turned the records over to Archives in the first instance; and (5) the case did not involve complex or voluminous records, so a privilege filter team was appropriate.

Third, as to injunctive relief, the United States argued that (1) Plaintiff had waited too long to seek relief, and the Department's review of the documents, which Plaintiff sought to avoid, had already occurred; (2) Plaintiff was not likely to succeed on the merits of his claims of executive privilege because he did not have any cognizable claim of executive privilege over the documents; and (3) the harm to the United States—in the delay in its investigation—far outweighed any injury to Plaintiff because of the risk to national security.

Plaintiff replied that he had Fourth Amendment standing because the characterization of the documents (whether personal or Presidential records) went to the merits of his claim—not his standing to raise it. While Plaintiff appears to view appointment of a special master as a predicate to filing a motion under Rule 41(g) (which allows a person to seek return of seized items), he disclaimed reliance on that Rule for the time being, saying that he "h[ad] not yet filed a Rule 41(g) motion, and [so] the standard for

relief under that rule [wa]s not relevant to the issue of whether the Court should appoint a Special Master." Doc. No. 58 at 6.

The district court granted Plaintiff's motion in part. As to jurisdiction, the district court first concluded that it enjoyed equitable jurisdiction because Plaintiff had sought the return of his property under Rule 41(g), which created a suit in equity.[1] Because its jurisdiction was equitable, the district court explained, it turned to the *Richey* factors to decide whether to exercise equitable jurisdiction.[2]

For the first *Richey* factor—callous disregard for Plaintiff's constitutional rights—the district court found no evidence that the

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[1] As we have noted, Plaintiff disclaimed having already filed a Rule 41(g) motion in his initial reply to the government. Doc. No. 58 at 6. Yet in the same filing, Plaintiff stated that he "intends" to assert that records were seized in violation of the Fourth Amendment and the Presidential Records Act and are "thus subject to return" under Rule 41(g). *Id.* at 8; *see also id.* at 18 ("Rule 41 exists for a reason, and the Movant respectfully asks that this Court ensure enough fairness and transparency, even if accompanied by sealing orders, to allow Movant to legitimately and fulsomely investigate and pursue relief under that Rule."). The district court resolved this situation by classifying Plaintiff's initial filing as a "hybrid motion" that seeks "ultimately the return of the seized property under Rule 41(g)." Doc. No. 64 at 6–7.

[2] *Richey v. Smith*, 515 F.2d 1239, 1243–44 (5th Cir. 1975) (outlining the standard for entertaining a pre-indictment motion for the return of property under Rule 41(g)). Because the Fifth Circuit issued this decision before the close of business on September 30, 1981, it is binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

United States had engaged in that type of behavior. As to the second factor—Plaintiff's interest in and need for the seized property—the district court determined that Plaintiff had an interest in at least some of the documents, like his medical documents, tax correspondence, and accounting information. But it made no finding that Plaintiff had a need for the classified documents. The third factor, the district court reasoned, weighed in favor of exercising jurisdiction because, in its view, Plaintiff suffered a likelihood of irreparable injury in the form of improper disclosure of sensitive information to the public and the threat of future prosecution and the associated stigma. Finally, the district court concluded that Plaintiff had no alternative remedy at law because otherwise, the United States might just retain the property indefinitely. Based on the four *Richey* factors, the district court agreed to exercise equitable jurisdiction.

Next, the district court held that Plaintiff had Fourth Amendment standing to seek a special master because he potentially had a possessory interest in the records. The district court reached this determination because, the court said, it was still undetermined whether the seized records were personal or Presidential.

On the merits, the district court deemed a special master warranted, given that (1) the United States had found at least two instances in which the Privilege Review Team reported that members of the investigative team had been exposed to privileged material, and (2) a special master might be perceived to be more

impartial than the Privilege Review Team. As to executive privilege, the district court posited that Plaintiff might be able to assert executive privilege against the current President. And, the court continued, the fact that the Privilege Review Team hadn't screened for executive privilege further militated towards appointment of a special master.

Finally, the district court enjoined the United States from further review and use of the seized materials for criminal investigative purposes—but allowed it to review and use the materials for the "purposes of intelligence classification and national security assessments."

After the district court issued its order, the United States moved for a partial stay of that order pending appeal as to the limited set of documents (just over one hundred) that were marked as classified. The United States argued that (1) Plaintiff did not have a possessory interest in the classified documents (because they belonged to the United States, not to him); (2) such documents could not possibly contain attorney-client privileged information; and (3) even if Plaintiff could exert executive privilege over some of the records, that privilege would be overcome by the United States's demonstrated, specific need to review the classified documents to see if and how much of a risk to national security existed.

As to executive privilege, the United States noted, Plaintiff had not asserted executive privilege in response to the May subpoena; instead, he had produced documents and his custodian had certified that he had produced all responsive documents, which

meant that he could not assert executive privilege over documents that he was supposed to have already produced (but did not). The United States argued that it needed a stay of the district court's injunction against the criminal investigation; the criminal investigation and national security were intertwined, the government emphasized, so the district court's order prevented the United States from effectively reviewing the documents for national-security risk.

In support of that position, the United States attached a declaration from Alan E. Kohler, Jr., the Assistant Director of the Counterintelligence Division of the FBI. Kohler's declaration explained that "since the 9/11 attacks, the FBI has integrated its intelligence and law enforcement functions when it exercises its national security mission." Declaration of Alan E. Kohler, Jr., Asst. Dir., Counterintelligence Div., FBI ("Kohler Decl."), Doc. No. 69-1 ¶ 8. Kohler explained that, as part of a classification review to assess the existence and extent of damage to the national-security interests of the United States from disclosure of the documents marked classified, the FBI needed to access evidence and disseminate it to other intelligence agencies to assess potential harm. *See id.* ¶ 7. Those assessments, Kohler continued, would "necessarily" inform the FBI's criminal investigation. *Id.* ¶ 9. For example, if an Intelligence agency were to obtain intelligence indicating that a classified document in the seized materials might have been compromised, the FBI would be responsible for taking some of the necessary steps to evaluate that risk. *Id.* Plus, Kohler attested, "the

FBI is the only [Intelligence Community] element with a full suite of authorities and tools to investigate and recover any improperly retained and stored classified information in the United States." *Id.*

Not only that, but as a practical matter, Kohler explained, "the same senior [Department of Justice] and FBI officials, such as [Kohler], are ultimately responsible for supervising the criminal investigation and for ensuring that the FBI is coordinating appropriately with the rest of the [Intelligence Community] on its classification review and assessment." *Id.* ¶ 10.

Plaintiff responded that "there still remains a disagreement as to the classification status of the documents." He emphasized that special-master review was temporary and asserted that he had a statutory right to access the documents.

On September 15, the district court denied a stay pending appeal and appointed a special master. Doc. No. 89. In explaining the basis for its decision, the district court first reasoned that it was not prepared to accept, without further review by a special master, that "approximately 100 documents isolated by the Government . . . [were] classified government records." Doc. No. 89 at 3. Second, the district court declined to accept the United States's argument that it was impossible that Plaintiff could assert a privilege for some of the documents bearing classification markings. Doc. No. 89 at 3–4.

The next day, the United States moved in this Court for a partial stay pending appeal, seeking to stay the district court's

orders with respect to only the roughly one-hundred documents bearing classification marks. Based on the United States's contention that these documents and the corresponding criminal investigation are "essential to the government's effort to identify and mitigate potential national-security risks," the United States asked this Court to "act on [its] motion as soon as practicable."

We directed Plaintiff to file an expedited response to the United States's motion for partial stay. Plaintiff responded that (1) we lack jurisdiction over the order appointing a special master; (2) he has Rule 41(g) standing; (3) that the United States has not proved that the documents that are marked "classified" are actually "classified"; and (4) the district court properly balanced the harms in enjoining the United States.

The United States replied that (1) Plaintiff's jurisdictional argument lacks merit; (2) Plaintiff lacks Rule 41(g) standing as it pertains to the classified documents; (3) The records bearing classification markings have no plausible case for being privileged, and even if Plaintiff had claimed to have declassified them, the United States would still need to assess them and (4) without a stay of the district court's order as it regards the classified documents, the government and the public will be irreparably harmed.

We have carefully reviewed the parties' briefs and the record.

II. JURISDICTION

We have appellate jurisdiction through 28 U.S.C. § 1292(a)(1), which provides courts of appeals with jurisdiction over interlocutory orders granting injunctions.[3] *Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005).

III. DISCUSSION

When deciding whether to grant a stay pending appeal, we evaluate four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v.*

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[3] Plaintiff argues that we "lack[] jurisdiction to review the special master's authority." But our order does not address the special master's authority; it addresses the district court's orders as they require the United States to act and to refrain from acting. Nevertheless, we note that the district court "enjoin[ed] the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further Court order," "in natural conjunction with [the appointment of the special master]." Doc. No. 64 at 1. And our pendent jurisdiction allows us to address an otherwise nonappealable order when it is inextricably intertwined with an appealable decision, or when review of an otherwise-nonappealable order "is necessary to ensure meaningful review" of an appealable decision. *Jones v. Fransen*, 857 F.3d 843, 850 (11th Cir. 2017) (citation omitted).

Braunskill, 481 U.S. 770, 776 (1987)). After considering the four factors here, we conclude that the United States is entitled to a stay.

A. The United States has established a substantial likelihood of success on the merits.

The United States argues that the district court likely erred in exercising its jurisdiction to enjoin the United States's use of the classified records in its criminal investigation and to require the United States to submit the marked classified documents to a special master for review. We agree.

Our binding precedent states that when a person seeks return of seized property in pre-indictment cases, those actions "are governed by equitable principles, whether viewed as based on [Federal Rule of Criminal Procedure] 41[(g)] or on the general equitable jurisdiction of the federal courts." *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975). Here, while Plaintiff disclaimed that his motion was for return of property as specified in Rule 41(g), he asserted that equitable jurisdiction existed. And the district court relied on both Rule 41(g) and equitable jurisdiction in its orders. Doc. No. 64 at 8–12. Either way, *Richey* teaches that equitable principles control.

Whether a court should exercise its equitable jurisdiction in this context "is subject to the sound discretion of the district court." *Richey*, 515 F.2d at 1243. But that discretion is not boundless. The factors a court should consider when deciding whether to exercise jurisdiction include (1) whether the government "displayed a

callous disregard for . . . constitutional rights" in seizing the items at issue; (2) "whether the plaintiff has an individual interest in and need for the material whose return he seeks;" (3) "whether the plaintiff would be irreparably injured by denial of the return of the property;" and (4) "whether the plaintiff has an adequate remedy at law for the redress of his grievance." *Id.* at 1243–44 (footnotes and quotation omitted). We consider each in turn.

We begin, as the district court did, with "callous disregard," which is the "foremost consideration" in determining whether a court should exercise its equitable jurisdiction. *United States v. Chapman*, 559 F.2d 402, 406 (5th Cir. 1977). Indeed, our precedent emphasizes the "indispensability of an accurate allegation of callous disregard." *Id.* (alteration accepted and quotation omitted).

Here, the district court concluded that Plaintiff did not show that the United States acted in callous disregard of his constitutional rights. Doc. No. 64 at 9. No party contests the district court's finding in this regard. The absence of this "indispensab[le]" factor in the *Richey* analysis is reason enough to conclude that the district court abused its discretion in exercising equitable jurisdiction here. *Chapman*, 559 F.2d at 406. But for the sake of completeness, we consider the remaining factors.

The second *Richey* factor considers "whether the plaintiff has an individual interest in and need for the material whose return he seeks." 515 F.2d at 1243. The district court concluded that Plaintiff had an interest in some of the seized material because it included "medical documents, correspondence related to taxes, and

accounting information." Doc. No. 64 at 9. But none of those concerns apply to the roughly one-hundred classified documents at issue here. And the district court made no mention in its analysis of this factor as to why or how Plaintiff might have an individual interest in or need for the classified documents.

For our part, we cannot discern why Plaintiff would have an individual interest in or need for any of the one-hundred documents with classification markings. Classified documents are marked to show they are classified, for instance, with their classification level. *Classified National Security Information*, Exec. Order No. 13,526, § 1.6, 3 C.F.R. 298, 301 (2009 Comp.), *reprinted in* 50 U.S.C. § 3161 app. at 290–301. They are "owned by, produced by or for, or . . . under the control of the United States Government." *Id.* § 1.1. And they include information the "unauthorized disclosure [of which] could reasonably be expected to cause identifiable or describable damage to the national security." *Id.* § 1.4. For this reason, a person may have access to classified information only if, among other requirements, he "has a need-to-know the information." *Id.* § 4.1(a)(3). This requirement pertains equally to former Presidents, unless the current administration, in its discretion, chooses to waive that requirement. *Id.* § 4.4(3).

Plaintiff 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. And even if he had, that, in

and of itself, would not explain why Plaintiff has an individual interest in the classified documents.

Plaintiff suggests that he may have declassified these documents when he was President. But the record contains no evidence that any of these records were declassified. And before the special master, Plaintiff resisted providing any evidence that he had declassified any of these documents. *See* Doc. No. 97 at 2–3., Sept. 19, 2022, letter from James M. Trusty, *et al.*, to Special Master Raymond J. Dearie, at 2–3. In any event, at least for these purposes, 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.

This factor—the Plaintiff's personal interest (or lack thereof) in the documents—also weighs against exercising jurisdiction.

Third, *Richey* asks "whether the plaintiff would be irreparably injured by denial of the return of the property." 515 F.2d at 1243. The district court identified potential harm that could arise based on (1) improper disclosure of "sensitive information" to the public; (2) the United States's retention and use of privileged materials; and (3) the stigma associated with future prosecution. *See* Doc. No. 64 at 9–10.

We cannot conclude that Plaintiff would be irreparably injured by a stay regarding the documents marked classified. Plaintiff

suggests that he could be harmed by the disclosure of sensitive information. Doc. No. 84 at 8. But permitting the United States to retain the documents does not suggest that they will be released; indeed, a purpose of the United States's efforts in investigating the recovered classified documents is to *limit* unauthorized disclosure of the information they contain. Not only that, but any authorized official who makes an improper disclosure risks her own criminal liability. *See, e.g.*, 18 U.S.C. § 798. We also doubt that Plaintiff risks irreparable injury in the form of disclosure of privileged information; he has not, for example, asserted attorney-client privilege over any of the classified documents.

The remaining potential injury identified by the district court is "the threat of future prosecution and the serious, often indelible stigma associated therewith." Doc. No. 64 at 10. No doubt the threat of prosecution can weigh heavily on the mind of someone under investigation. But without diminishing the seriousness of that burden, "if the mere threat of prosecution were allowed to constitute irreparable harm . . . every potential defendant could point to the same harm and invoke the equitable powers of the district court." *United States v. Search of Law Office, Residence, and Storage Unit Alan Brown*, 341 F.3d 404, 415 (5th Cir. 2003) (quotation omitted). If this concern were sufficient to constitute irreparable harm, courts' "exercise of [their] equitable jurisdiction would not be extraordinary, but instead quite ordinary." *Id.*

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." *Douglas v. City of Jeannette*, 319

U.S. 157, 163 (1943); *see also Deaver v. Seymour*, 822 F.2d 66, 71 (D.C. Cir. 1987) (Silberman, J.) (rejecting civil suit to enjoin government from indicting plaintiff and explaining that "[p]rospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure."); *United States v. McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016) ("In almost all federal criminal prosecutions, injunctive relief . . . will not be appropriate. Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions.").[4]

In sum, the third *Richey* factor also weighs against exercising equitable jurisdiction.

Finally, *Richey* asks "whether the plaintiff has an adequate remedy at law for the redress of his grievance." 515 F.2d at 1243–44. The district court found that this factor weighed in favor of

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[4] The Supreme Court has recognized an exception to this general rule—where "the threats to enforce the statutes against appellants are not made with any expectation of securing valid convictions, but rather are part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants." *Younger v. Harris*, 401 U.S. 37, 48 (1971) (citing *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965)). Plaintiff has not made such an allegation here, nor do we see any evidence in the record to support one. And though *Younger* involved a state prosecution, many courts have applied the basic principles in *Younger* to federal prosecutions. *See*, *e.g.*, *Deaver*, 822 F.2d at 69–70 ("[I]n no case that we have been able to discover has a federal court enjoined a federal prosecutor's investigation or presentment of an indictment. . . . Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors.").

Plaintiff because otherwise, "Plaintiff would have no legal means of seeking the return of his property for the time being." Doc. No. 64 at 10. But Plaintiff has been clear that he is not seeking the return of the classified documents. *See* Doc. No. 58 at 6 ("In general, the Government's argument is premature. Movant has not yet filed a Rule 41(g) motion, and the standard for relief under that rule is not relevant to the issue of whether the Court should appoint a Special Master."). And even if he were, he has not identified any reason that he is entitled to them.

This factor then, also weighs against exercising equitable jurisdiction.

In sum, none of the *Richey* factors favor exercising equitable jurisdiction over this case. Consequently, the United States is substantially likely to succeed in showing that the district court abused its discretion in exercising jurisdiction over Plaintiff's motion as it concerns the classified documents.[5]

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[5] The district court referred fleetingly to invoking its "inherent supervisory authority," though it is unclear whether it utilized this authority with respect to the orders at issue in this appeal. Doc. No. 64 at 1, 7 n.8. Either way, the court's exercise of its inherent authority is subject to two limits: (1) it "must be a reasonable response to the problems and needs confronting the court's fair administration of justice," and (2) it "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016) (quotation omitted). The district court did not explain why the exercise of its inherent authority concerning the documents with classified markings would fall within these

B. The United States would suffer irreparable injury in the absence of a stay.

We next consider the second *Nken* factor: whether the United States would suffer irreparable injury in the absence of a stay. *See* 556 U.S. at 426. We conclude that it would.

The motion for a partial stay distinguishes the roughly one-hundred seized records with classification markings from the remaining seized materials without any such markings. Because the classified nature of these documents bears on our analysis, we begin with a (brief) overview of the United States's system of classification.

Since World War I, the Executive Branch "has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In practice, Presidents have often used Executive Orders to "protect sensitive information and to ensure its proper classification throughout the Executive Branch." *Id.* at 528.[6] The current operative classification protocols

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bounds, other than its reliance on its *Richey*-factor analysis. We have already explained why that analysis was in error.

[6] For its part, Congress has recognized the importance of a national security classification system and has directed that "the President shall, by Executive order or regulation, establish procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices of the executive branch of Government." 50 U.S.C. § 3161.

are described in Executive Order 13,526. Exec. Order No. 13,526, 3 C.F.R. 298.

Under Executive Order 13,526, there are three classification levels: Confidential, Secret, and Top Secret. *Id.* § 1.2. The standard for the level at which particular information should be classified turns on whether "the unauthorized disclosure" of the information "reasonably could be expected to cause" either "damage" (Confidential), "serious damage" (Secret), or "exceptionally grave damage" (Top Secret) to national security. *Id.* Once so designated, classified materials may remain classified for up to ten years, unless the original classification authority determines that the duration should be extended up to twenty-five years. *Id.* § 1.5.

Executive Order 13,526 also sets forth how documents can be declassified. In general, information can be declassified or downgraded by the official who authorized the original classification, her successor, her supervisor, or other officials with express declassification authority. *Id.* § 3.1(b). Classified records are also subject to automatic declassification if they are more than twenty-five years old and have permanent historical value, unless they fall into certain enumerated categories such that their declassification could harm national security. *Id.* § 3.3. For example, information that could reveal the identity of a confidential human source or that relates to weapons of mass destruction is exempted from automatic disclosure. *See id.*

Returning to the case before us, under the terms of the district court's injunction, the Office of the Director of National

Intelligence is permitted to continue its "classification review and/or intelligence assessment" to assess "the potential risk to national security that would result from disclosure of the seized materials." Doc. No. 64 at 1–2, 6. But the United States is enjoined "from further review and use of any of the materials seized from Plaintiff's residence on August 8, 2022, for criminal investigative purposes pending resolution of the special master's review process." *Id.* 23–24.

This distinction is untenable. Through Kohler's declaration, the United States has sufficiently explained how and why its national-security review is inextricably intertwined with its criminal investigation. When matters of national security are involved, we "must accord substantial weight to an agency's affidavit." *See Broward Bulldog, Inc. v. U.S. Dep't of Justice*, 939 F.3d 1164, 1182 (11th Cir. 2019) (quoting *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)).

The engrained principle that "courts must exercise the traditional reluctance to intrude upon the authority of the Executive in military and national security affairs" guides our review of the United States's proffered national-security concerns. *United States v. Zubaydah*, 142 S. Ct. 959, 967 (2022) (alteration and citation omitted). No party has offered anything beyond speculation to undermine the United States's representation—supported by sworn testimony—that findings from the criminal investigation may be critical to its national-security review. *See* Kohler Decl. ¶ 9. According to the United States, the criminal investigation will seek to

determine, among other things, the identity of anyone who accessed the classified materials; whether any particular classified materials were compromised; and whether additional classified materials may be unaccounted for. As Plaintiff acknowledges, backwards-looking inquiries are the domain of the criminal investigators. Doc. No. 84 at 15–16. It would be difficult, if not impossible, for the United States to answer these critical questions if its criminal investigators are not permitted to review the seized classified materials.

Precisely because the United States's criminal investigation is focused on past events, Plaintiff responds that the United States is not irreparably harmed because it can be distinguished from prospective national-security review. We are not persuaded.

The United States explains that there are circumstances where its national-security assessment of the classified materials is inextricably intertwined with the criminal investigation. Plaintiff acknowledges that the two "may relate," but contends that any tension between these functions can be resolved because the district court's order permits national-security assessments that "truly are, in fact, inextricable from criminal investigative use of the seized materials." But discerning when an assessment becomes "truly" inextricable is far more easily said than done. Under that theory, officials charged with overseeing both national security and criminal investigations would risk contempt of court, undoubtedly chilling their national-security duties. Thus, an injunction delaying (or perhaps preventing) the United States's criminal investigation

from using classified materials risks imposing real and significant harm on the United States and the public.

The United States also argues that allowing the special master and Plaintiff's counsel to examine the classified records would separately impose irreparable harm. We agree. The Supreme Court has recognized that for reasons "too obvious to call for enlarged discussion, the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan*, 484 U.S. at 529 (quotation omitted). As a result, courts should order review of such materials in only the most extraordinary circumstances. The record does not allow for the conclusion that this is such a circumstance.

In sum, given the long-recognized "compelling interest in protecting . . . the secrecy of information important to our national security," *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), we conclude that the United States would suffer irreparable harm from the district court's restrictions on its access to this narrow—and potentially critical—set of materials, as well as the court's requirement that the United States submit the classified records to the special master for review.

C. Plaintiff has not shown that he will suffer a substantial injury as a result of the limited stay.

We next turn to the third *Nken* factor, "whether issuance of the stay will substantially injure the other parties interested in the

proceeding." 556 U.S. at 426. Here, we analyze whether Plaintiff would be "substantially injure[d]" by a stay. Largely for reasons we have already discussed, we conclude that he would not.

First, as we have explained, Plaintiff does not have a possessory interest in the documents at issue, so he does not suffer a cognizable harm if the United States reviews documents he neither owns nor has a personal interest in.

Second, we find unpersuasive Plaintiff's insistence that he would be harmed by a criminal investigation. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

Third, because of the nature of the classified materials at issue here and based on the record, we have no reason to expect that the United States's use of these records imposes the risk of disclosure to the United States of Plaintiff's privileged information.

Given the limited scope of the stay—applying to only approximately one-hundred classified documents—we conclude that Plaintiff has not shown he will be substantially injured by a stay.

D. The public interest favors a stay.

We now come to the fourth and final *Nken* factor: "where the public interest lies." 556 U.S. at 426. The documents at issue contain information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the

national security." Exec. Order No. 13,526, § 1.2(a)(1), 3 C.F.R. 298. It is self-evident that the public has a strong interest in ensuring that the storage of the classified records did not result in "exceptionally grave damage to the national security." Ascertaining that necessarily involves reviewing the documents, determining who had access to them and when, and deciding which (if any) sources or methods are compromised. *See* Kohler Decl. ¶¶ 6–9. For these reasons, we conclude that the public interest favors a stay.

IV. CONCLUSION

For the reasons we have explained, we **GRANT** the stay pending appeal. The district court order is **STAYED** to the extent it enjoins the government's use of the classified documents and requires the government to submit the classified documents to the special master for review.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon Plaintiff's Motion for Judicial Oversight and Additional Relief (the "Motion") [ECF No. 1], filed on August 22, 2022. The Court has reviewed the Motion, Plaintiff's Supplemental Filing [ECF No. 28], the Government's Response in Opposition [ECF No. 48], Plaintiff's Reply [ECF No. 58], and the related filings [ECF Nos. 31, 39, 40 (sealed)]. The Court also held a hearing on the Motion on September 1, 2022.

Pursuant to the Court's equitable jurisdiction and inherent supervisory authority, and mindful of the need to ensure at least the appearance of fairness and integrity under the extraordinary circumstances presented, Plaintiff's Motion [ECF No. 1] is **GRANTED IN PART**. The Court hereby authorizes the appointment of a special master to review the seized property for personal items and documents and potentially privileged material subject to claims of attorney-client and/or executive privilege. Furthermore, in natural conjunction with that appointment, and consistent with the value and sequence of special master procedures, the Court also temporarily enjoins the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further Court order. This Order shall not impede the classification review and/or intelligence assessment by the Office of the Director of

National Intelligence ("ODNI") as described in the Government's Notice of Receipt of Preliminary Order [ECF No. 31 p. 2].

RELEVANT BACKGROUND

The following is a summary of the record based on the parties' submissions and oral presentation.[1] Throughout 2021, former President Donald J. Trump ("Plaintiff") and the National Archives and Records Administration ("NARA") were engaged in conversations concerning records from Plaintiff's time in office [ECF No. 1 p. 4; ECF No. 48-1 p. 2].[2] In January 2021, as a product of those conversations, Plaintiff transferred fifteen boxes (the "Fifteen Boxes") from his personal residence to NARA [ECF No. 1 pp. 4–5; ECF No. 48 p. 5; ECF No. 48-1 p. 6]. Upon initial review of the Fifteen Boxes, NARA identified the items contained therein as newspapers, magazines, printed news articles, photos, miscellaneous printouts, notes, presidential correspondence, personal records, post-presidential records, and classified records [ECF No. 48 p. 5]. NARA subsequently informed the Department of Justice ("DOJ") of the contents of the boxes, claiming that some items contained markings of "classified national security information" [ECF No. 48 p. 5].

On April 12, 2022, NARA notified Plaintiff that it intended to provide the Fifteen Boxes to the Federal Bureau of Investigation ("FBI") the following week [ECF No. 48 p. 5]. Plaintiff then requested an extension on the contemplated delivery so that he could determine the existence of any privileged material [ECF No. 48-1 p. 7]. The White House Counsel's Office granted the request [ECF No. 48-1 p. 7]. On May 10, 2022, NARA informed Plaintiff that it would proceed

[1] Neither party requested an evidentiary hearing on the Motion, and under the circumstances, the Court finds resolution of the Motion sufficient and prudent on the present record.

[2] NARA is an independent federal agency within the Executive Branch that is responsible for the preservation and documentation of government and historical records.

with "provid[ing] the FBI access to the records in question, as requested by the incumbent President, beginning as early as Thursday, May 12, 2022" [ECF No. 48-1 p. 9]. The Government's filing states that the FBI did not obtain access to the Fifteen Boxes until approximately May 18, 2022 [ECF No. 48 p. 7].

On May 11, 2022, during the period of ongoing communications between Plaintiff and NARA, and before DOJ received the Fifteen Boxes, DOJ "obtained a grand jury subpoena, for which Plaintiff's counsel accepted service" [ECF No. 48 pp. 7–8; *see* ECF No. 1 p. 5]. The subpoena was directed to the "Custodian of Records [for] [t]he Office of Donald J. Trump" and requested "[a]ny 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" [ECF No. 48-1 p. 11]. Plaintiff contacted DOJ on June 2, 2022, and requested that FBI agents visit his residence the following day to pick up responsive documents [ECF No. 1 p. 5; ECF No. 48 p. 8]. Upon the FBI's arrival, Plaintiff's team handed over documents and permitted the three FBI agents and an accompanying DOJ attorney to visit the storage room where the documents were held [ECF No. 1 pp. 5–6; ECF No. 48 p. 9].

The Government contends that, after further investigation, "the FBI uncovered multiple sources of evidence indicating that the response to the May 11 grand jury subpoena was incomplete," and that potentially classified documents remained at Plaintiff's residence [ECF No. 48 p. 10]. Based on this evidence and an affidavit that remains partially under seal, on August 5, 2022, the Government applied to a United States Magistrate Judge for a search and seizure warrant of Plaintiff's residence, citing Title 18, Sections 793, 1519, and 2701 of the United States Code. Finding probable cause for each offense, the Magistrate Judge authorized law enforcement to (1) search Plaintiff's office, "all storage rooms, and all other rooms or areas within

the premises used or available to be used by [Plaintiff] and his staff and in which boxes or documents could be stored," and (2) seize the following: "[a]ny physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes"; "[i]nformation, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material"; "[a]ny government and/or Presidential records created" during Plaintiff's presidency; or "[a]ny evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings." *USA v. Sealed Search Warrant*, No. 22-08332-MJ-BER-1, ECF No. 17 pp. 3–4 (S.D. Fla. Aug. 11, 2022).

On August 8, 2022, pursuant to the search warrant, the Government executed an unannounced search of Plaintiff's residence. As reflected in the "Detailed Property Inventory" submitted by the Government in this action, agents seized approximately 11,000 documents and 1,800 other items from the office and storage room [ECF No. 39-1].[3] The seized property is generally categorized on the inventory as twenty-seven boxes containing documents, with and without classification markings, along with photographs, other documents, and miscellaneous material [ECF No. 1 pp. 24–26].[4]

Shortly after the search of the residence, Plaintiff's counsel spoke with the Government and requested the following: a copy of the affidavit in support of the warrant; the Government's

[3] These figures are drawn collectively from the Government's Detailed Property Inventory [ECF No. 39-1].

[4] Based on the Detailed Property Inventory, of the approximately 11,000 documents seized, roughly 100 contain classification markings [ECF No. 39-1 pp. 2–8].

consent to the appointment of a special master "to protect the integrity of privileged documents"; a detailed list of what was taken from the residence and from where exactly; and an opportunity to inspect the seized property [ECF No. 1 pp. 8–9]. The Government denied those requests [ECF No. 1 p. 9].[5]

In the absence of any agreement between the parties, on August 22, 2022, Plaintiff filed the Motion for Judicial Oversight and Additional Relief, seeking (1) the appointment of a special master to oversee the review of seized materials regarding identification of personal property and privilege review; (2) the enjoinment of further review of the seized materials until a special master is appointed; (3) a more detailed receipt for property; and (4) the return of any items seized in excess of the search warrant [ECF No. 1 p. 21; ECF No. 28 p. 10].

Following receipt of the Motion, the Court ordered Plaintiff to elaborate on the basis for the Court's jurisdiction and the relief sought [ECF No. 10]. Plaintiff did so via a Supplement to the Motion on August 26, 2022 [ECF No. 28]. Consistent with Rule 53(b)(1) of the Federal Rules of Civil Procedure, the Court issued a preliminary order indicating its intent to appoint a special master [ECF No. 29]. Shortly thereafter, the Government appeared in this action and filed the Notice of Receipt of Preliminary Order [ECF No. 31]. Plaintiff executed service that same day [ECF No. 32]. The Government then filed under seal the Notice by Investigative Team of Status Review (the "Investigative Team Report") [ECF No. 39], attaching the "Detailed Property Inventory" as ordered by the Court [ECF No. 39-1]. The Investigative Team Report, now fully

[5] The exact date of that conversation is unclear, but all agree that the conversation took place soon after the search. Plaintiff references August 11, 2022, in the Motion, three days after the search (and eleven days prior to the filing of the Motion). The Government does not offer a different view in its Response or otherwise challenge the substance of the rejected requests. Counsel for the Government stated during the hearing that Plaintiff's request for a special master was rejected on August 9, 2022, the morning after the search.

unsealed, indicates that the Investigative Team has "reviewed the seized materials in furtherance of its ongoing investigation," and that "[t]he seized materials will continue to be used to further the government's investigation . . . as it takes further investigative steps, such as through additional witness interviews and grand jury practice" [ECF No. 39 p. 2]. While acknowledging that investigators have "already examined every item seized (other than materials that remain subject to the filter protocols)," the Government clarifies that "'review' of the seized materials is not a single investigative step but an ongoing process in this active criminal investigation" [ECF No. 39 p. 2]. The Government also states in its Investigative Team Report that DOJ and ODNI are "facilitating a classification review of materials recovered pursuant to the search warrant, and ODNI is leading an intelligence community assessment of the potential risk to national security that would result from disclosure of the seized materials" [ECF No. 39 pp. 2–3]. Additionally, the Government filed under seal its Notice of Status of Privilege Review Team's Filter Process and Production of Itemized List of Documents Within Privilege Review Team's Custody (the "Privilege Review Team's Report") [ECF No. 40 (sealed)]. The Privilege Review Team's Report remains under seal in accordance with the parties' joint request at the hearing. This Order refers to the content of that report in general terms.

On August 30, 2022, the Government filed the Response to Plaintiff's Motion [ECF No. 48], and on August 31, 2022, Plaintiff filed the Reply [ECF No. 58]. The Court then held a hearing on the Motion. This Order follows.

DISCUSSION

I. Jurisdiction

As previewed, Plaintiff initiated this action with a hybrid motion that seeks independent review of the property seized from his residence on August 8, 2022, a temporary injunction on any

further review by the Government in the meantime, and ultimately the return of the seized property under Rule 41(g) of the Federal Rules of Criminal Procedure.[6] Though somewhat convoluted, this filing is procedurally permissible[7] and creates an action in equity. *See Richey v. Smith*, 515 F.2d 1239, 1245 (5th Cir. 1975) ("[A] motion [for return of property] prior to [a] criminal proceeding[] . . . is more properly considered simply a suit in equity rather than one under the Rules of Criminal Procedure."); *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th 1235, 1245 n.6 (11th Cir. 2021) ("[Rule 41] is the proper way to come before the court to seek an injunction regarding the government's use of a filter team to review seized documents."). In other words, to entertain Plaintiff's requests, the Court first must decide to exercise its equitable jurisdiction, *see United States v. Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001), which "derives from the [Court's] inherent authority" over its officers (including attorneys) and processes, *see Hunsucker v. Phinney*, 497 F.2d 29, 32 (5th Cir. 1974); *Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997).[8] In general, Rule 41(g) proceedings are

[6] Prior to 2002, what is now Rule 41(g) was codified as Rule 41(e). "[E]arlier cases interpreting Rule 41(e) also apply to the new Rule 41(g)." *United States v. Garza*, 486 F. App'x 782, 784 n.3 (11th Cir. 2012); *see De Almeida v. United States*, 459 F.3d 377, 380 n.2 (2d Cir. 2006).

[7] Rule 41(g) allows movants, prior to the return of an indictment, to initiate standalone actions "in the district where [their] property was seized." *See* Fed. R. Crim. P. 41(g); *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) ("Property which is seized . . . either by search warrant or subpoena may be ultimately disposed of by the court in that proceeding or in a subsequent civil action."); *In the Matter of John Bennett*, No. 12-61499-CIV-RSR, ECF No. 1 (S.D. Fla. July 31, 2012) (initiating an action with a "petition to return property"); *see also In re Grand Jury Investigation of Hugle*, 754 F.2d 863, 865 (9th Cir. 1985) ("[A] court is not required to defer relief [relating to privileged material] until after issuance of the indictment.").

[8] To the extent the Motion seeks relief totally distinct from the return of property itself, the Motion invokes the Court's inherent supervisory authority directly. *See generally Gravel v. United States*, 408 U.S. 606, 628 (1972); *In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) (the government initiating a new action by requesting that the Court, pursuant to its supervisory authority, appoint a special master

"rooted in equitable principles" and served by "flexibility in procedural approach." *Smith v. Katzenbach*, 351 F.2d 810, 817 (D.C. Cir. 1965).

Importantly, equitable jurisdiction is reserved for "exceptional" circumstances, *see Hunsucker*, 497 F.2d at 32, and must be "exercised with caution and restraint," *Matter of Sixty-Seven Thousand Four Hundred Seventy Dollars ($67,470.00)*, 901 F.2d 1540, 1544 (11th Cir. 1990). Mindful of its limited power in this domain, the Court endeavors to fulfill its obligations under the law with due care.

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Upon full consideration of the parties' arguments and the exceptional circumstances presented, the Court deems the exercise of equitable jurisdiction over this action to be warranted. In making this determination, the Court relies in part on the factors identified in *Richey v. Smith*. 515 F.2d at 1245.[9] In that case, the former Fifth Circuit counseled courts to consider, for equitable jurisdiction purposes, whether the government displayed a callous disregard for the movant's constitutional rights, whether the movant has an individual interest in and need for the seized property, whether the movant would be irreparably injured by denial of the return of the seized property, and whether the movant otherwise has an adequate remedy at law. *Id.* (describing these factors as "some of the considerations" that should inform the decision of whether to exercise equitable jurisdiction); *see also Mesa Valderrama v. United States*, 417 F.3d 1189, 1197 (11th Cir.

to conduct filter review of materials potentially subject to attorney-client privilege and/or executive privilege).

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209–11 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2005) (characterizing the *Richey* factors as guiding considerations). Those factors, although mixed, ultimately counsel in favor of exercising jurisdiction.

With respect to the first factor, the Court agrees with the Government that, at least based on the record to date, there has not been a compelling showing of callous disregard for Plaintiff's constitutional rights. This factor cuts against the exercise of equitable jurisdiction.

The second factor—whether the movant has an individual interest in and need for the seized property—weighs in favor of entertaining Plaintiff's requests. According to the Privilege Review Team's Report, the seized materials include medical documents, correspondence related to taxes, and accounting information [ECF No. 40-2; *see also* ECF No. 48 p. 18 (conceding that Plaintiff "may have a property interest in his personal effects")]. The Government also has acknowledged that it seized some "[p]ersonal effects without evidentiary value" and, by its own estimation, upwards of 500 pages of material potentially subject to attorney-client privilege [ECF No. 48 p. 16; ECF No. 40 p. 2]. Thus, based on the volume and nature of the seized material, the Court is satisfied that Plaintiff has an interest in and need for at least a portion of it, even if the underlying subsidiary detail as to each item cannot reasonably be determined at this time based on the information provided by the Government to date.[10]

The same reasoning contributes to the Court's determination that the third factor—risk of irreparable injury—likewise supports the exercise of jurisdiction. In addition to being deprived of potentially significant personal documents, which alone creates a real harm, Plaintiff faces an unquantifiable potential harm by way of improper disclosure of sensitive information to the

[10] To the extent the Government challenges Plaintiff's standing to bring this action, the Court addresses that argument below. *See infra* Discussion II.

public.[11] Further, Plaintiff is at risk of suffering injury from the Government's retention and potential use of privileged materials in the course of a process that, thus far, has been closed off to Plaintiff and that has raised at least some concerns as to its efficacy, even if inadvertently so. *See infra* Discussion III. Finally, Plaintiff has claimed injury from the threat of future prosecution and the serious, often indelible stigma associated therewith. As the *Richey* court wrote, "a wrongful indictment is no laughing matter; it often works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal." 515 F.2d at 1244 n.10; *see also In the Matter of John Bennett*, No. 12-61499-CIV-RSR, ECF No. 22 pp. 26–27 (S.D. Fla. July 23, 2013) (explaining that, although some courts have rejected *Richey*'s observation as to the harm posed by indictments, *Richey* remains binding on district courts in the Eleventh Circuit). As a function of Plaintiff's former position as President of the United States, the stigma associated with the subject seizure is in a league of its own. A future indictment, based to any degree on property that ought to be returned, would result in reputational harm of a decidedly different order of magnitude.

As to the fourth *Richey* factor, Plaintiff has persuasively argued that there is no alternative adequate remedy at law. Without Rule 41(g), Plaintiff would have no legal means of seeking the return of his property for the time being and no knowledge of when other relief might become available. *See United States v. Ryan*, 402 U.S. 530, 533 (1971) (expressing concern that the denial to consider Rule 41(g) requests "would mean that the Government might indefinitely retain the

[11] When asked about the dissemination to the media of information relative to the contents of the seized records, Government's counsel stated that he had no knowledge of any leaks stemming from his team but candidly acknowledged the unfortunate existence of leaks to the press.

property without any opportunity for the movant to assert . . . his right to possession"); *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 601 (5th Cir. 2021) (explaining that motions to suppress and motions for return of property serve different functions); *United States v. Dean*, 80 F.3d 1535, 1542 (11th Cir. 1996), *opinion modified on reconsideration,* 87 F.3d 1212 (11th Cir. 1996) (making clear that the principle behind the doctrine of equitable jurisdiction—"that the state should not be permitted to deny individuals their property without recourse simply because there is no jurisdiction at law"—applies even when the seizure was lawful).

In combination, these guideposts favor the careful exercise of equitable jurisdiction under the circumstances. This determination is reinforced by the broader landscape of relevant equitable considerations. *See generally Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 73 (1935) (explaining that courts' discretion in the realm of equity "may properly be influenced by considerations of the public interests involved" and the consequences of any grant of relief); *Smith*, 351 F.2d at 817–18 (elaborating on the breadth and flexibility of equitable considerations); *Richey*, 515 F.2d at 1245 (noting that the four identified factors are "some of the considerations" that should inform courts' determinations); *Mesa Valderrama*, 417 F.3d at 1197 (characterizing the *Richey* factors as guiding considerations). Hence, the Court takes into account the undeniably unprecedented nature of the search of a former President's residence; Plaintiff's inability to examine the seized materials in formulating his arguments to date; Plaintiff's stated reliance on the customary cooperation between former and incumbent administrations regarding the ownership and exchange of documents; the power imbalance between the parties; the importance of maintaining institutional trust; and the interest in ensuring the integrity of an orderly process amidst swirling allegations of bias and media leaks. Measuring the *Richey* factors along with all

of the other considerations pertinent to a holistic equitable analysis, the scales tip decidedly in favor of exercising jurisdiction.[12]

The Court pauses briefly to emphasize the limits of this determination. Plaintiff ultimately may not be entitled to return of much of the seized property or to prevail on his anticipated claims of privilege. That inquiry remains for another day. For now, the circumstances surrounding the seizure in this case and the associated need for adequate procedural safeguards are sufficiently compelling to at least get Plaintiff past the courthouse doors.

II. Standing

There is another threshold argument the Court must consider, and that is the Government's assertion as to Plaintiff's lack of standing [ECF No. 48 pp. 2, 14–16]. The Government posits that Plaintiff lacks standing to bring a Rule 41(g) action or even to seek a special master, because the seized property consists of "Presidential records" over which Plaintiff lacks a "possessory interest" [ECF No. 48 pp. 14–15]. The Government relies on the definition of "Presidential records" under the Presidential Records Act (the "PRA"), *see* 44 U.S.C. § 2201(2), and on the Eleventh Circuit's decision in *Howell*, 425 F.3d at 974; *see supra* note 12.

Plaintiff opposes the Government's standing argument as premature and fundamentally flawed [ECF No. 58 p. 2]. In Plaintiff's view, what matters now is his authority to seek the

[12] At the hearing, the Government argued that the equitable concept of "unclean hands" bars Plaintiff from moving under Rule 41(g), citing *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005) ("[I]n order for a district court to grant a Rule 41(g) motion, the owner of the property must have clean hands."). *Howell* involved a defendant who pled guilty to conspiring to distribute cocaine and then sought the return of $140,000 in government-issued funds that were seized from him following a drug sale to a confidential source. *Id.* at 972–73. That case is not factually analogous to the circumstances presented and does not provide a basis to decline to exercise equitable jurisdiction here. Plaintiff has not pled guilty to any crimes; the Government has not clearly explained how Plaintiff's hands are unclean with respect to the personal materials seized; and in any event, this is not a situation in which there is no room to doubt the immediately apparent incriminating nature of the seized material, as in the case of the sale of cocaine.

appointment of a special master—not his underlying legal entitlement to possess the records or his definable "possessory interest" under Rule 41(g) [ECF No. 58 pp. 4–6]. Moreover, Plaintiff adds, even assuming the Court were inclined at this juncture to consider Plaintiff's potential claim of unreasonableness under the Fourth Amendment, settled law permits him, as the owner of the premises searched, to object to the seizure as unreasonable [ECF No. 58 pp. 2, 4–6].

Having considered these crisscrossing arguments, the Court concludes that Plaintiff is not barred as a matter of standing from bringing this Rule 41(g) action or from invoking the Court's authority to appoint a special master more generally. To have standing to bring a Rule 41(g) motion, a movant must allege "a colorable ownership, possessory or security interest in at least a portion of the [seized] property." *United States v. Melquiades*, 394 F. App'x 578, 584 (11th Cir. 2010) (quoting *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001)). Once that preliminary showing is made, the standing requirement is satisfied, because "[the] owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998). Contrary to the Government's reading of *Howell*, Plaintiff need not prove ownership of the property but rather need only allege facts that constitute a colorable showing of a right to possess at least some of the seized property. *Melquiades*, 394 F. App'x at 584. Although the Government argues that Plaintiff has no property interest in any of the presidential records seized from his residence, that position calls for an ultimate judgment on the merits as to those documents and their designations. Further, the Government concedes that the seized property includes "personal effects," 520 pages of potentially privileged material, and at least some material that is in fact privileged [ECF No. 48 pp. 15–16]. This is sufficient to satisfy the standing requirement for the Rule 41(g) request and the request for a special master.

See generally United States v. Stewart, No. 02-CR-395, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (implicitly accepting that a party has standing to seek review by a special master when at least some of the seized materials are privileged); *United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995) (same).

III. The Need for Further Review

Having determined that the exercise of jurisdiction is appropriate and that Plaintiff has standing to bring the instant requests, the Court next considers the need for further review of the seized material, as relates to Rule 41(g) and matters of privilege.

Although some of the seized items (e.g., articles of clothing) appear to be readily identifiable as personal property, the parties' submissions suggest the existence of genuine disputes as to (1) whether certain seized documents constitute personal or presidential records, and (2) whether certain seized personal effects have evidentiary value. Because those disputes are bound up with Plaintiff's Rule 41(g) request and involve issues of fact, the Court "must receive evidence" from the parties thereon. *See* Fed. R. Crim. P. 41(g) ("The court must receive evidence on any factual issue necessary to decide the motion."). That step calls for comprehensive review of the seized property.

Review is further warranted, as previewed, for determinations of privilege. The Government forcefully objects, even with respect to attorney-client privilege, pointing out that the Privilege Review Team already has screened the seized property and is prepared to turn over approximately 520 pages of potentially privileged material for court review pursuant to the previously approved ex parte filter protocol [ECF No. 48 p. 14]. In plain terms, the Government's position is that another round of screening would be "unnecessary" [ECF No. 48 p. 22]. The Court takes a different view on this record.

To begin, the Government's argument assumes that the Privilege Review Team's initial screening for potentially privileged material was sufficient, yet there is evidence from which to call that premise into question here. *See In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1249–51; *see also Abbell*, 914 F. Supp. at 520 (appointing a special master even after the government's taint attorney already had reviewed the seized material). As reflected in the Privilege Review Team's Report, the Investigative Team already has been exposed to potentially privileged material. Without delving into specifics, the Privilege Review Team's Report references at least two instances in which members of the Investigative Team were exposed to material that was then delivered to the Privilege Review Team and, following another review, designated as potentially privileged material [ECF No. 40 p. 6]. Those instances alone, even if entirely inadvertent, yield questions about the adequacy of the filter review process.[13]

[13] In explaining these incidents at the hearing, counsel from the Privilege Review Team characterized them as examples of the filter process working. The Court is not so sure. These instances certainly are demonstrative of integrity on the part of the Investigative Team members who returned the potentially privileged material. But they also indicate that, on more than one occasion, the Privilege Review Team's initial screening failed to identify potentially privileged material. The Government's other explanation—that these instances were the result of adopting an overinclusive view of potentially privileged material out of an abundance of caution—does not satisfy the Court either. Even accepting the Government's untested premise, the use of a broad standard for potentially privileged material does not explain how qualifying material ended up in the hands of the Investigative Team. Perhaps most concerning, the Filter Review Team's Report does not indicate that any steps were taken after these instances of exposure to wall off the two tainted members of the Investigation Team [*see* ECF No. 40]. In sum, without drawing inferences, there is a basis on this record to question how materials passed through the screening process, further underscoring the importance of procedural safeguards and an additional layer of review. *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) ("In *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), for instance, the government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This *Noriega* incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion.").

The Government's argument that another round of initial screening is unnecessary also disregards the value added by an outside reviewer in terms of, at a minimum, the appearance of fairness. Even if DOJ filter review teams often pass procedural muster, they are not always perceived to be as impartial as special masters. *See In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("It is a great leap of faith to expect that members of the general public would believe any [wall between a filter review team and a prosecution team] would be impenetrable; this notwithstanding our own trust in the honor of an [Assistant United States Attorney]."). Concerns about the perception of fair process are heightened where, as here, the Privilege Review Team and the Investigation Team contain members from the same section within the same DOJ division, even if separated for direct-reporting purposes on this specific matter. "[P]rosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done." *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 183 (4th Cir. 2019), *as amended* (Oct. 31, 2019). A commitment to the appearance of fairness is critical, now more than ever.[14]

Though the foregoing analysis focuses on attorney-client privilege, the Court is not convinced that similar concerns with respect to executive privilege should be disregarded in the manner suggested by the Government. The Government asserts that executive privilege has no

[14] The Government implies that additional independent review for attorney-client privilege, such as by a special master, is appropriate only when a search of a law firm occurred [ECF No. 48 pp. 30–32]. Whatever the extent of this argument, it fails decisively here. True, special masters ordinarily arise in the more traditional setting of law firms and attorneys' offices. But the Court does not see why these concerns would not apply, at least to a considerable degree, to the office and home of a former president. Moreover, at least one other court has authorized additional independent review for attorney-client privilege outside of the law firm context, in politicized circumstances. *See In re Search Warrant dated November 5, 2021*, No. 21-Misc-813, 2021 WL 5845146, at *1 (S.D.N.Y. Dec. 8, 2021) (appointing a special master to conduct review of materials seized from the homes of employees of Project Veritas for potentially attorney-client privileged materials).

role to play here because Plaintiff—a former head of the Executive Branch—is entirely foreclosed from successfully asserting executive privilege against the current Executive Branch [ECF No. 48 pp. 24–25]. In the Court's estimation, this position arguably overstates the law. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), a case involving review of presidential communications by a government archivist, the Supreme Court expressly recognized that (1) former Presidents may assert claims of executive privilege, *id.* at 439; (2) "[t]he expectation of the confidentiality of executive communications . . . [is] subject to erosion over time after an administration leaves office," *id.* at 451; and (3) the incumbent President is "in the best position to assess the present and future needs of the Executive Branch" for purposes of executive privilege, *id.* at 449. The Supreme Court did not rule out the possibility of a former President overcoming an incumbent President on executive privilege matters. Further, just this year, the Supreme Court noted that, at least in connection with a congressional investigation, "[t]he questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns." *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022); *see also id.* at 680 (Kavanaugh, J., respecting denial of application for stay) ("A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications.").[15] Thus, even if any assertion of executive privilege by Plaintiff ultimately fails in this context, that possibility, even if

[15] On the current record, having been denied an opportunity to inspect the seized documents, Plaintiff has not formally asserted executive privilege as to any specific materials, nor has the incumbent President upheld or withdrawn such an assertion.

likely, does not negate a former President's ability to raise the privilege as an initial matter. Accordingly, because the Privilege Review Team did not screen for material potentially subject to executive privilege, further review is required for that additional purpose.[16]

IV. Appointment of a Special Master

An independent special master should conduct the additional review that is warranted here. Rule 53(a) of the Federal Rules of Civil Procedure empowers courts to appoint a special master to "address pretrial . . . matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a). Here, as noted, the Government's inventory reflects a seizure of approximately 11,000 documents and 1,800 other items from Plaintiff's residence [*see* ECF No. 39-1]. Considering the volume of seized materials and the parties' expressed desire for swift resolution of this matter, a special master would be better suited than this Court to conduct the review. The appointment of a special master is not uncommon in the context of attorney-client privilege. *See, e.g.*, *In re Search Warrant dated November. 5, 2021*, 2021 WL 5845146, at *2; *Stewart*, 2002 WL 1300059, at *10; *Abbell*, 914 F. Supp. at 520. Nor is the appointment of a special master unheard of in the context of potentially executive privileged material. In fact, the Government itself recently contemplated and requested the appointment of a special master to review for both attorney-client and executive privilege. *See In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) ("[U]nder certain exceptional circumstances, the appointment of a special master to review materials seized from an attorney may be appropriate. Those circumstances may exist

[16] The Court recognizes that, under the PRA, "[t]he United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist" to permit public dissemination of presidential records "violates the former President's [constitutional] rights or privileges." 44 U.S.C. § 2204.

where . . . the attorney represents the President of the United States such that any search may implicate not only the attorney-client privilege but the executive privilege."). Most importantly, courts recognize that special masters uniquely promote "the interests and appearance of fairness and justice." *United States v. Gallego*, No. CR-18-01537-001, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018); *see also In re Search Warrants Executed on April 28, 2021*, No. 21-MC-425 (JPO), 2021 WL 2188150, at *4 (S.D.N.Y. May 28, 2021) ("The Court agrees that the appointment of a special master is warranted here to ensure the perception of fairness."). Special effort must be taken to further those ends here.

V. Temporary Injunctive Relief

As a final matter, the Court determines that a temporary injunction on the Government's use of the seized materials for investigative purposes—but not ODNI's national security assessment—is appropriate and equitable to uphold the value of the special master review.[17] It is not entirely clear whether courts must perform an additional analysis under Rule 65 of the Federal Rules of Civil Procedure in this context, seeing as how a temporary restraint on use naturally furthers and complements the appointment of a special master. *See, e.g.*, *Stewart*, 2002 WL 1300059, at *10 (instructing the government not to review the seized documents pending further instruction). To appoint a special master to make privilege determinations while simultaneously allowing the Government, in the interim, to continue using potentially privileged material for

[17] Although the Motion asks the Court to enjoin the Government's review of the seized materials pending the appointment of a special master, it is clear that this request is meant to cover the Government's temporary use of the seized materials and extend into the special master's review process as appropriate. Any uncertainty on this point was clarified by Plaintiff's presentation at the hearing. *See United States v. Potes Ramirez*, 260 F.3d 1310, 1315 (11th Cir. 2001) ("In the context of Rule 41[(g)] motions, several circuit courts have remarked on a district court's authority to fashion an equitable remedy[] when appropriate . . . .").

investigative purposes would be to ignore the pressing concerns and hope for the best.[18] Moreover, many courts that have explicitly issued injunctions relating to special master review have done so without discussing Rule 65. *See USA v. Gallego et al*, No. 18-01537-CR-RM-BGM-1, ECF Nos. 26, 36 (Aug. 9 & 10, 2018). In any event, the Government reasonably maintains (without objection from Plaintiff) that the Court must engage with Rule 65, and so for the sake of completeness and prudence, the Court proceeds accordingly.[19]

Rule 65 recognizes the power of courts to issue injunctive relief. Such relief is considered "extraordinary," and to obtain it, a movant must "clearly carr[y] the burden of persuasion" as to the following factors: (1) a substantial likelihood of success on the merits; (2) irreparable injury unless the injunction is issued; (3) the threatened injury to the movant outweighs whatever damage the injunction may cause to the opposing party; and (4) the injunction would not be adverse to the public interest. *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983) (quoting *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). "When the government is the opposing party, as it is here, the third and fourth factors merge." *Georgia v. President of the United States*, No. 21-14269, 2022 WL 3703822, at *3 (11th Cir. Aug. 26, 2022).

As discussed above, *see supra* Discussion III, the Court is satisfied that Plaintiff has "a likelihood of success on the merits of [his] challenge to the [Privilege Review Team] and its [p]rotocol." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 171; *see also In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1248–49 (assessing "likelihood of success on the merits" in terms of the sufficiency of the filter

[18] Even without a temporary injunction as described herein, the Court would exercise its discretion to appoint a special master despite the considerably diminished utility of such an appointment.

[19] Because this part of the Order relies on much of the same reasoning articulated above, the Court uses internal cross-references where appropriate to minimize repetition.

team's review). For the same reasons—chiefly, the risk that the Government's filter review process will not adequately safeguard Plaintiff's privileged and personal materials in terms of exposure to either the Investigative Team or the media—Plaintiff has sufficiently established irreparable injury.

With regard to the injury factor, the Government contends that the timing of the Motion—filed two weeks after the subject seizure occurred—"militates against a finding of irreparable harm" [ECF No. 48 p. 20 (quoting *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016))]. The Court disagrees. As the Government acknowledges, denials of injunctive relief based on a party's delay usually arise in the context of considerably longer periods of time than the fourteen-day span implicated here. *Wreal*, 840 F.3d at 1244, 1248. Nor has the Government offered any authority denying injunctive relief on the basis of a two-week span. On the contrary, courts have held that delays of two or three weeks are not sufficiently long to undercut a showing of irreparable harm. *See, e.g.*, *Tom Doherty Assocs. v. Saban Ent, Inc.*, 60 F.3d 27, 39–40 (2d Cir. 1995); *Fisher-Price Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 125 (2d Cir. 1994), *abrogated on other grounds by Belair v. MGA Ent., Inc.*, 503 F. App'x 65 (2d Cir. 2021). The Government thus is left to suggest that two weeks, perhaps ordinarily acceptable, is too long here because requests for special masters to review privileged material are typically made on a more expedited basis [ECF No. 48 pp. 20–21]. On balance, the Court is not persuaded. It is undisputed that Plaintiff's counsel attempted to resolve Plaintiff's request for a special master and other relief informally with the Government almost immediately after the search, without judicial intervention [*see* ECF No. 1 pp. 8–9]. In view of Plaintiff's timely attempt toward a negotiated resolution of this issue, along with Plaintiff's inability to know the extent of what was seized, the Court is satisfied that Plaintiff did not "slumber[] on [his] rights." *In re Search Warrant Issued June 13,*

2019, 942 F.3d at 182. While Plaintiff perhaps did not act as promptly as he could have, the two-week delay does not now preclude Plaintiff from seeking or being entitled to injunctive relief.

Lastly, with respect to the merged third and fourth factors, Plaintiff has shown, all in all, that the public and private interests at stake support a temporary enjoinment on the use of the seized materials for investigative purposes, without impacting the Government's ongoing national security review. As Plaintiff articulated at the hearing, the investigation and treatment of a former president is of unique interest to the general public, and the country is served best by an orderly process that promotes the interest and perception of fairness. *See supra* Discussion III–IV; *see also In re Search Warrant Issued June 13, 2019*, 942 F.3d at 182 ("[A]n award of injunctive relief in these circumstances supports the 'strong public interest' in the integrity of the judicial system." (quoting *United States v. Hasting*, 461 U.S. 499, 527 (1983) (Brennan, J., concurring in part and dissenting in part))). The Government's principal objection is that an injunction pending resolution of the special master's review would delay the associated criminal investigation and national security risk assessment [ECF No. 48 pp. 29–30]. With respect to the referenced national security concerns, the Court understands and does not impact that component. But with respect to the Government's ongoing criminal investigation, the Court does not find that a temporary special master review under the present circumstances would cause undue delay.[20] "[E]fficient criminal investigations are certainly desirable," *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181, but so too are countervailing considerations of fair process and public trust. "[T]he [G]overnment chose to proceed by securing a search warrant for [the former President's home and office] and seeking and obtaining [a] magistrate judge's approval of the [f]ilter [p]rotocol. The

[20] The Government represents that it completed a preliminary review of the seized property in approximately three weeks [ECF Nos. 39, 40].

[G]overnment should have been fully aware that use of a filter team in these circumstances was ripe for substantial legal challenges, and should have anticipated that those challenges could delay its investigations." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181. None of this should be read to minimize the importance of investigating criminal activity or to indicate anything about the merits of any future court proceeding.

For all of these reasons, upon full consideration of the Rule 65 factors, the Court determines that a temporary injunction on the Government's use of the seized materials for criminal investigative purposes pending resolution of the special master's review process is warranted. The Court is mindful that restraints on criminal prosecutions are disfavored[21] but finds that these unprecedented circumstances call for a brief pause to allow for neutral, third-party review to ensure a just process with adequate safeguards.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. A special master shall be **APPOINTED** to review the seized property, manage assertions of privilege and make recommendations thereon, and evaluate claims for return of property. The exact details and mechanics of this review process will be decided expeditiously following receipt of the parties' proposals as described below.
2. The Government is **TEMPORARILY ENJOINED** from further review and use of any of the materials seized from Plaintiff's residence on August 8, 2022, for criminal investigative purposes pending resolution of the special master's review process as

[21] *See Younger v. Harris*, 401 U.S. 37, 43–44 (1971) ("[C]ourts of equity should not . . . act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) (explaining that "[t]he maxim that equity will not enjoin a criminal prosecution" applies with greatest force in the context of the federal government interfering with state prosecutions).

determined by this Court. The Government may continue to review and use the materials seized for purposes of intelligence classification and national security assessments.

3. On or before **September 9, 2022**, the parties shall meaningfully confer and submit a joint filing that includes:
    a. a list of proposed special master candidates; and
    b. a detailed proposed order of appointment in accordance with Rule 53(b), outlining, *inter alia*, the special master's duties and limitations consistent with this Order, ex parte communication abilities, schedule for review, and compensation.
4. Any points of substantive disagreement as to 3(a) or (b) should be identified in the forthcoming joint filing.
5. The Court **RESERVES RULING** on Plaintiff's request for return of property pending further review.
6. This Order is subject to modification as appropriate.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 5th day of September 2022.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER APPOINTING SPECIAL MASTER

Following the provision of a notice and opportunity to be heard as required by Rule 53(b) of the Federal Rules of Civil Procedure [*see* ECF Nos. 29, 62], for the reasons set forth in the Order dated September 5, 2022 [ECF No. 64], and upon review of the parties' special master proposals [ECF Nos. 83, 85–86],[1] it is hereby

ORDERED AND ADJUDGED as follows:

1. Pursuant to Rule 53(a)(1)(C) of the Federal Rules of Civil Procedure and this Court's inherent powers and authority, the Honorable Raymond J. Dearie, Senior United States District Judge for the Eastern District of New York, is appointed Special Master.
2. The Special Master shall review all of the materials seized during the August 8, 2022 execution of a court-authorized search warrant on the premises located at 1100 S. Ocean Boulevard, Palm Beach, Florida 33480 (the "Seized Materials"). The specific duties of the Special Master are as follows and will include all powers necessary to carry out these duties:

[1] The Court also has considered the various proposals submitted by non-parties to this action [ECF Nos. 35, 77–78, 80–81].

a. Verifying that the property identified in the "Detailed Property Inventory" [ECF No. 39-1] represents the full and accurate extent of the property seized from the premises on August 8, 2022, including, if deemed appropriate, by obtaining sworn affidavits from Department of Justice personnel;

b. Conducting a privilege review of the Seized Materials and making recommendations to the Court as to any privilege disputes between the parties (including any formal assertions of executive privilege);

c. Identifying personal items/documents and Presidential Records in the Seized Materials and making recommendations to the Court as to any categorization disputes between the parties;

d. Evaluating claims for return of property under Rule 41(g) of the Federal Rules of Criminal Procedure; and

e. Any additional duties assigned to the Special Master by the Court pursuant to subsequent orders, upon notice to the parties and an opportunity to be heard with regard to such additional duties.

3. In categorizing Seized Materials as personal items/documents or Presidential Records, the Special Master may consult with the National Archives and Records Administration ("NARA").

4. The Special Master will have the full authority set forth in Rule 53(c) of the Federal Rules of Civil Procedure.

5. In reviewing the Seized Materials, the Special Master will follow a precise workflow:

   a. For Seized Materials identified by the Privilege Review Team as potentially privileged –

      i. The Privilege Review Team shall provide copies of the potentially privileged documents to Plaintiff's counsel.

      ii. Plaintiff's counsel shall review the potentially privileged documents and provide to the Special Master a privilege log stating, for each document, whether Plaintiff claims that the document is privileged and, if so, on what basis.

      iii. The Special Master shall provide the privilege log to the Privilege Review Team and solicit the Privilege Review Team's position on each document contained therein.

      iv. If the Privilege Review Team agrees with Plaintiff's position, the subject document shall be handled in accordance with the parties' agreement. If the Privilege Review Team disagrees with Plaintiff's position, the dispute shall go to the Special Master for a report and recommendation and, if either party objects to the report and recommendation, to the Court for de novo review and decision. Failure to object to a report and recommendation within **five (5) calendar days** shall result in waiver of that objection.

   b. For Seized Materials excluding materials identified by the Privilege Review Team as potentially privileged –

      i. The Government shall do as follows:

aa. Provide to Plaintiff's counsel copies of documents not marked as classified;

bb. Make available for inspection by Plaintiff's counsel, with controlled access conditions (including necessary clearance requirements) and under the supervision of the Special Master, the documents marked as classified and the papers attached to such documents; and

cc. Make available for inspection by Plaintiff's counsel any non-documentary items.

ii. Plaintiff's counsel shall review the materials, allocate each of them to one of four mutually exclusive categories listed below, and prepare and provide to the Special Master a log stating, for each item or document, the particular category claimed and on what basis. The four categories are as follows:

aa. Personal items and documents not claimed to be privileged;

bb. Personal documents claimed to be privileged;

cc. Presidential Records not claimed to be privileged; and

dd. Presidential Records claimed to be privileged.

iii. The Special Master shall provide the information contained in the log to the Government (either the Investigative Team or the Privilege Review Team, as appropriate) and solicit the Government's position on each item or document.

iv. If the Government agrees with Plaintiff's position, the subject item or document shall be handled in accordance with the parties' agreement. If the

Government disagrees with Plaintiff's position, the dispute shall go to the Special Master for a report and recommendation and, if either party objects to the report and recommendation, to the Court for de novo review and decision. Failure to object to a report and recommendation within **five (5) calendar days** shall result in waiver of the objection.

6. The Special Master and the parties shall prioritize, as a matter of timing, the documents marked as classified, and the Special Master shall submit interim reports and recommendations as appropriate. Upon receipt and resolution of any interim reports and recommendations, the Court will consider prompt adjustments to the Court's orders as necessary.

7. Within **ten (10) calendar days** following the date of this Order, the Special Master shall consult with counsel for the parties and provide the Court with a scheduling plan setting forth the procedure and timeline—including the parties' deadlines—for concluding the review and adjudicating any disputes.

8. As required by Rule 53(b)(2) of the Federal Rules of Civil Procedure, the Court directs the Special Master to proceed with all reasonable diligence and to conclude his review and classifications by **November 30, 2022**, subject to modification if necessary as proposed by the Special Master.

9. The Special Master shall file on the docket all written scheduling plans, orders, reports, and recommendations, along with any additional information that the Special Master believes will assist the Court in reviewing those scheduling plans, orders, reports, and recommendations. Any potentially privileged, confidential, or national security material that is submitted shall be filed under seal. The Special Master shall, during the pendency

of this matter, including any appeals, preserve any and all documents or other materials received from the parties.

10. The Special Master shall make ex parte reports to the Court on an ongoing basis concerning the progress of resolving the issues above.

11. The parties may file objections to, or motions to adopt or modify, the Special Master's scheduling plans, orders, reports, or recommendations no later than **five (5) calendar days** after the service of each, and the Court shall review those objections or motions, and any procedural, factual, or legal issues therein, de novo. Failure to timely object shall result in waiver of the objection.

12. The Special Master shall have access to individuals, information, documents, and materials relevant to the orders of the Court that are required for the performance of the Special Master's duties, subject to the terms of this Order. Such materials shall be provided to the Special Master on an ex parte basis as the Special Master sees fit. The Special Master may communicate ex parte with the Court or either party to facilitate the review; provided, however, that all final decisions will be served simultaneously on both parties to allow either party to seek the Court's review.

13. At a minimum, the Government shall make available to the Special Master the Seized Materials, the search warrant executed in this matter, and the redacted public versions of the underlying application materials for the search warrant.

14. Plaintiff shall bear 100% of the professional fees and expenses of the Special Master and any professionals, support staff, and expert consultants engaged at the Special Master's request. The procedures for establishing and paying the Special Master's compensation and expenses shall be determined in a later order. Within **ten (10) calendar days** following

the date of this Order, the Special Master and counsel for the parties shall confer on this issue, and the Special Master shall submit a proposal for the Court's approval as to the procedures for paying the Special Master's compensation and expenses.

15. If the Special Master determines that the efficient administration of the Special Master's duties requires the assistance of additional professionals, support staff, or expert consultants, the Special Master may submit a work proposal to the parties, who will have **two (2) calendar days** to submit comments, after which time the Special Master may submit the proposal to the Court for consideration and approval.
16. As an agent and officer of the Court, the Special Master and those working at the Special Master's direction shall enjoy the same protections from being compelled to give testimony and from liability for damages as enjoyed by other federal judicial adjuncts performing similar functions.
17. The Special Master shall be discharged or replaced only upon order of this Court. The Court reserves the right to remove the Special Master.
18. The parties and their agents and employees shall faithfully observe the requirements of this Order and fully cooperate with the Special Master in the performance of their duties.
19. Consistent with and in furtherance of this Order, the Court will separately enter a judicial protective order that sets forth restrictions on disclosure for both the Special Master and the parties, and any agents or employees thereof. The parties shall submit a proposed protective order within **five (5) calendar days** following the date of this Order.
20. The Non-Party Motions for Consideration for Special Master [ECF Nos. 77–78] are **DENIED**.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 15th day of September 2022.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX D

No. 22-13005-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

MOTION FOR PARTIAL STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLSOURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendants-Appellants certify that the following have an interest in the outcome of this appeal:

American Broadcasting Companies, Inc. (DIS)

Associated Press

Bloomberg, LP

Bratt, Jay I.

Brill, Sophia

Cable News Network, Inc. (WBD)

Cannon, Hon. Aileen M.

Caramanica, Mark Richard

CBS Broadcasting, Inc. (CBS)

Corcoran, M. Evan

Cornish, Sr., O'Rane M.

Cunningham, Clark

Dearie, Hon. Raymond J.

Dow Jones & Company, Inc. (DJI)

Edelstein, Julie

Eisen, Norman Larry

E.W. Scripps Company (SSP)

Finzi, Roberto

Fischman, Harris

Former Federal and State Government Officials

Fugate, Rachel Elise

Gonzalez, Juan Antonio

Gray Media Group, Inc. (GTN)

Gupta, Angela D.

Halligan, Lindsey

Inman, Joseph M.

Karp, Brad S.

Kessler, David K.

Kise, Christopher M Knopf, Andrew Franklin

Lacosta, Anthony W.

LoCicero, Carol Jean

McElroy, Dana Jane

Minchin, Eugene Branch

NBC Universal Media, LLC (CMCSA)

Patel, Raj K.

Rakita. Philip

Reeder, Jr., L. Martin

Reinhart, Hon. Bruce E.

Rosenberg, Robert

Seidlin-Bernstein, Elizabeth

Shapiro, Jay B.

Shullman, Deanna Kendall

Smith, Jeffrey

The New York Times Company (NYT)

The Palm Beach Post

Times Publishing Company

Tobin, Charles David

Trump, Donald J.

Trusty, James M.

United States of America

Wertheimer, Fred

WP Company. LLC.

Dated: September 16, 2022

/s/ Juan Antonio Gonzalez
Juan Antonio Gonzalez
United States Attorney

INTRODUCTION AND SUMMARY

The district court has entered an unprecedented order enjoining the Executive Branch's use of its own highly classified records in a criminal investigation with direct implications for national security. In August 2022, the government obtained a warrant to search the residence of Plaintiff, former President Donald J. Trump, based on a judicial finding of probable cause to believe that the search would reveal evidence of crimes including unlawful retention of national defense information. Along with other evidence, the search recovered roughly 100 records bearing classification markings, including markings reflecting the highest levels of classification and extremely restricted distribution. Two weeks later, Plaintiff filed an action seeking the appointment of a special master to review the seized materials and an injunction barring the government from continuing to use them in the meantime. The court granted that extraordinary relief, enjoining further review or use of any seized materials "for criminal investigative purposes" pending a special-master process that will last months. A36-A37.[1]

Although the government believes the district court fundamentally erred in appointing a special master and granting injunctive relief, the government seeks to stay only the portions of the order causing the most serious and immediate harm to the government and the public by (1) restricting the government's review and use of records bearing classification markings and (2) requiring the government to disclose those

[1] References to "A__" refer to the Addendum to this motion.

records for a special-master review process. This Court should grant that modest but critically important relief for three reasons.

First, the government is likely to succeed on the merits. The district court appointed a special master to consider claims for return of property under Federal Rule of Criminal Procedure 41(g) and assertions of attorney-client or executive privilege. All of those rationales are categorically inapplicable to the records bearing classification markings. Plaintiff has no claim for the return of those records, which belong to the government and were seized in a court-authorized search. The records are not subject to any possible claim of personal attorney-client privilege. And neither Plaintiff nor the court has cited any authority suggesting that a former President could successfully invoke executive privilege to prevent the Executive Branch from reviewing its own records. Any possible assertion of executive privilege over these records would be especially untenable and would be overcome by the government's "demonstrated, specific need" for them, *United States v. Nixon*, 418 U.S. 683, 713 (1974), because they are central to its ongoing investigation.

Second, the government and the public would suffer irreparable harm absent a stay. The district court recognized the government's overriding interest in assessing and responding to the national-security risk from the possible unauthorized disclosure of the records bearing classification markings. The court thus stated that its order was not intended to "impede" an ongoing "classification review and/or intelligence assessment" of those records by the Intelligence Community (IC). A14-A15. But as the head of the

Counterintelligence Division of the Federal Bureau of Investigation (FBI) explained in a sworn declaration, the criminal investigation is itself essential to the government's effort to identify and mitigate potential national-security risks. A38-A43. The court's order hamstrings that investigation and places the FBI and Department of Justice (DOJ) under a Damoclean threat of contempt should the court later disagree with how investigators disaggregated their previously integrated criminal-investigative and national-security activities. It also irreparably harms the government by enjoining critical steps of an ongoing criminal investigation and needlessly compelling disclosure of highly sensitive records, including to Plaintiff's counsel.

Third, the limited stay sought here would impose no cognizable harm on Plaintiff. It would not disturb the special master's review of other materials, including records potentially subject to attorney-client privilege. Nor would a stay infringe any interest in confidentiality: The government's criminal investigators have already reviewed the records bearing classification markings, and the district court's order contemplates that the IC may continue to review and use them for certain national-security purposes.

Finally, because the government and the public will suffer irreparable injury absent a stay, the United States respectfully asks that the Court act on this motion as soon as practicable.

STATEMENT

A. Background

1. In the year after Plaintiff left office, the National Archives and Records Administration (NARA) endeavored to recover what appeared to be missing records subject to the Presidential Records Act (PRA). A44. The PRA provides that the United States retains "complete ownership, possession, and control of Presidential records," 44 U.S.C. § 2202, which the law defines to include all records "created or received by the President" or his staff "in the course of conducting activities which relate to or have an effect upon" the President's official duties, *id.* § 2201(2). The PRA specifies that when a President leaves office, NARA "shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." *Id.* § 2203(g)(1).

Plaintiff ultimately provided NARA with 15 boxes of records in January 2022. A44. NARA discovered that the boxes contained "items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials." *Id.* Material is marked as Top Secret if its unauthorized disclosure could reasonably be expected to cause "exceptionally grave damage" to national security. Exec. Order 13,526 § 1.2(1) (Dec. 29, 2009).

NARA referred the matter to DOJ, noting that highly classified records appeared to have been improperly transported and stored. A63-A64. DOJ then sought access to

the 15 boxes under the PRA's procedures governing presidential records in NARA's custody. A44-A45; *see* 44 U.S.C. § 2205(2)(B). Plaintiff, after receiving notification of DOJ's request, neither attempted to pursue any claim of executive privilege in court, *see* 44 U.S.C. § 2204(e), nor suggested that any documents bearing classification markings had been declassified. *See* A45.

2. The FBI developed evidence that additional boxes remaining at Plaintiff's residence at the Mar-a-Lago Club in Palm Beach, Florida, were also likely to contain classified information. On May 11, 2022, Plaintiff's counsel was served with a grand-jury subpoena for "[a]ny 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." A48.

In response, Plaintiff's counsel and his custodian of records produced an envelope containing 38 documents bearing classification markings. A76-A77. Plaintiff's counsel represented that the records came from a storage room at Mar-a-Lago, where all records removed from the White House had been placed, and that no such records were in any other location. A76-A77. Plaintiff's custodian also certified, "on behalf of the Office of Donald J. Trump," that a "diligent search was conducted of the boxes that were moved from the White House to Florida" and that "[a]ny and all responsive documents accompany this certification." A50. Again, Plaintiff did not assert any claim

of privilege, and did not suggest that any documents bearing classification markings had been declassified.

3. The FBI uncovered evidence that the response to the grand-jury subpoena was incomplete, that classified documents likely remained at Mar-a-Lago, and that efforts had likely been undertaken to obstruct the investigation. On August 5, 2022, the government applied to a magistrate judge for a search warrant, citing 18 U.S.C. § 793 (willful retention of national defense information), 18 U.S.C. § 2071 (concealment or removal of government records), and 18 U.S.C. § 1519 (obstruction). A54. The magistrate judge found probable cause that evidence of those crimes would be found at Mar-a-Lago and authorized the government to seize, among other things, "[a]ny physical documents with classification markings, along with any containers/boxes ... in which such documents are located." A96, A98. The magistrate judge also approved the government's proposed filter protocols for handling any materials potentially subject to personal attorney-client privilege. A87-A88.

The government executed the warrant on August 8, 2022. The search recovered roughly 11,000 documents from the storage room as well as Plaintiff's private office, roughly 100 of which bore classification markings, including markings indicating the highest levels of classification. A17 & n.4; *see* A51 (photograph); A115-A121 (inventory). In some instances, even FBI counterintelligence personnel required additional clearances to review the seized documents. Dist. Ct. Docket Entry (D.E.) 48 at 12-13.

B. Proceedings below

1. Two weeks later, Plaintiff filed a "Motion for Judicial Oversight and Additional Relief" asking the district court to appoint a special master to adjudicate potential claims of executive and attorney-client privilege, to enjoin DOJ from further review and use of the seized documents, and to order the government to return certain property under Rule 41(g). The district court granted Plaintiff's motion in part, authorizing appointment of a special master to "review the seized property," make recommendations on "assertions of privilege," and "evaluate claims for return of property." A36. Pending the special-master review, the court enjoined the government from "further review and use" of all seized materials "for criminal investigative purposes." *Id.* The court stated that the government "may continue to review and use the materials seized for purposes of intelligence classification and national security assessments." A37.

The district court acknowledged that the exercise of equitable jurisdiction to restrain a criminal investigation is "reserved for 'exceptional' circumstances." A21 (quoting *Hunsucker* v. *Phinney*, 497 F.2d 29, 32 (5th Cir. 1974)). The court also concluded that Plaintiff had not shown that the court-authorized search violated his constitutional rights. A22. But the court concluded that the other considerations set forth in *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975), favored the exercise of jurisdiction, principally because the seized materials included some "personal documents." *Id.*; *see* A22-A25. The court similarly found that Plaintiff had standing because he had made "a colorable

showing of a right to possess at least some of the seized property," namely, his personal effects and records potentially subject to personal attorney-client privilege. A26.

The district court then held that "review of the seized property" was necessary to adjudicate Plaintiff's claims for return of property and potential assertions of privilege. A27-A32. As to attorney-client privilege, the court concluded that further review would ensure that the attorney-client filter process approved in the warrant had not overlooked privileged material. A28-A29. The court did not resolve the government's arguments that a former President cannot assert executive privilege to prevent the Executive Branch from reviewing its own records and that any assertion of privilege here would in any event be overcome. A29-A30. Instead, the court stated only that "even if any assertion of executive privilege by Plaintiff ultimately fails," he should be allowed "to raise the privilege as an initial matter." A30-A31.

2. The government appealed and sought a partial stay of the order as it applied to records bearing classification markings. D.E. 69. The court denied the motion. A4-A13. The court declined to address the government's argument that those records are not subject to any plausible claim for return or assertion of privilege, instead referring generally to "factual and legal disputes as to precisely which materials constitute personal property and/or privileged materials." A7. The court reiterated that its order does not bar the IC's review and assessment of the records bearing classification markings and suggested that even criminal investigative steps are permitted if they are "truly ... inextricable" from the IC's activities. A11-A12. But the

court gave little further guidance on distinguishing between permitted and prohibited investigative steps.

Finally, the district court confirmed that as part of its special-master review, the government must allow Plaintiff's counsel to inspect the records bearing classification markings. D.E. 91 at 4. The court directed the master to prioritize review of those records, and directed him to submit all recommendations by November 30, 2022, subject to extensions. *Id.* at 5.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers (1) the likelihood of success on appeal; (2) whether the movant will suffer irreparable injury; (3) the balance of hardships; and (4) the public interest, which merges with harm to the government. *Nken v. Holder*, 556 U.S. 418, 434-435 (2009); *Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018). "Ordinarily the first factor is the most important." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). Here, all factors strongly support a partial stay.

I. The government is likely to succeed on the merits as to the records bearing classification markings.

The district court erred in exercising jurisdiction as to the records bearing classification markings. Even if the exercise of jurisdiction were proper, there would be no basis for preventing the government from using its own records. And the court's

suggestion that there are "factual and legal disputes" about the records bearing classification markings, A7, is incorrect and not relevant in any event.

A. The district court erred by exercising jurisdiction as to records bearing classification markings.

1. "In order for an owner of property to invoke Rule 41(g), he must show that he had a possessory interest in the property seized by the government." *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005). The district court held that Plaintiff had standing because he had made "a colorable showing of a right to possess at least some of the seized property." A26. But "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Plaintiff lacks standing at least as to the discrete set of records with classification markings because those records are government property, over which the Executive Branch has exclusive control and in which Plaintiff has no property interest. *See* 44 U.S.C. § 2202; Exec. Order 13,526, § 1.1(2); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

2. Likewise, the district court's exercise of equitable jurisdiction regarding an ongoing criminal investigation—which is reserved for "exceptional" circumstances, *Hunsucker*, 497 F.2d at 32—cannot extend to these records. Under *Richey*, four factors guide the exercise of that jurisdiction: (1) whether the government has "displayed 'a callous disregard for the constitutional rights'" of the search's subject; (2) "whether the plaintiff has an individual interest in and need for the material"; (3) "whether the

plaintiff would be irreparably injured by denial of the return of the property"; and (4) "whether the plaintiff has an adequate remedy at law." 515 F.2d at 1243-44 (citation omitted). None of those factors favors exercising jurisdiction as to the records with classification markings.

On the "[f]irst, and perhaps foremost" factor, *id.* at 1243, the district court correctly found that Plaintiff has not shown any violation of his rights. A22. The remaining factors apply only to "material whose return [plaintiff] seeks" and to injury resulting from "denial of the return of the property." *Richey*, 515 F.2d at 1243. Plaintiff has no right to the "return" of records with classification markings, which are not his property. *Id.* The district court reasoned that other materials in which Plaintiff might have a cognizable interest cannot readily be separated from those in which he does not. A22. But that rationale is inapplicable to records with classification markings, which are easily identifiable and already segregated from the other seized materials. D.E. 48 at 13.

3. Plaintiff has observed that the PRA generally provides that presidential records from his tenure shall be "available" to him. 44 U.S.C. § 2205(3). But a right to *access* records in NARA's custody does not support any claim for the *return* of records owned by the government. *Id.* § 2202. And Plaintiff is in any event poorly positioned to invoke the PRA in seeking extraordinary equitable relief because he failed to comply with his PRA obligation to deposit the records at issue with NARA in the first place.

B. The records bearing classification markings are not subject to any plausible claim of privilege that would prevent the government from reviewing and using them.

The district court restrained the government's review and use of seized materials to allow the special master to consider claims for return of personal property and assertions of attorney-client or executive privilege. None of those rationales applies to the records bearing classification markings: The markings establish on the face of the documents that they are not Plaintiff's personal property, and neither Plaintiff nor the court has suggested that they might be subject to attorney-client privilege. Plaintiff has never even attempted to make or substantiate any assertion of executive privilege. Even if he did, no such assertion could justify restricting the Executive Branch's review and use of these records for multiple independent reasons.

1. Executive privilege exists "not for the benefit of the President as an individual, but for the benefit of the Republic." *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 449 (1977) (*GSA*). Consistent with the privilege's function of protecting the confidentiality of Executive Branch communications, it may be invoked to prevent the sharing of materials *outside* the Executive Branch. *Cf. Trump v. Thompson*, 142 S. Ct. 680, 680 (2022) (per curiam). But neither Plaintiff nor the district court cited any case in which executive privilege has been successfully invoked to prohibit the sharing of documents within the Executive Branch itself.

To the contrary, in what appears to be the only case in which such an assertion was made, the Supreme Court rejected former President Nixon's claim that a statute

requiring the GSA to review documents and recordings created during his presidency violated executive privilege. *GSA*, 433 U.S. at 446-55. The Court emphasized that the former President was attempting to assert "a privilege against the very Executive Branch in whose name the privilege is invoked." *Id.* at 447-48. And the Court "readily" rejected that assertion because the review at issue was "a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns." *Id.* at 451.

This case similarly involves potential assertions of executive privilege by a former President against "the very Executive Branch in whose name the privilege is invoked." *Id.* at 447-48. Here, too, review and use of the records in a criminal investigation is a "limited intrusion by personnel in the Executive Branch sensitive to executive concerns." *Id.* at 451. And an executive privilege claim would be especially implausible as to records like those at issue here because the Constitution vests the incumbent President, as "head of the Executive Branch and as Commander in Chief," with the authority "to classify and control access to information bearing on national security." *Egan*, 484 U.S. at 527. Accordingly, even if an assertion of privilege might justify withholding the records at issue from Congress or the public, there would be no basis for withholding them from the Executive Branch itself.

2. Even if a former President could assert executive privilege against the Executive Branch's review and use of its own documents, any such assertion would inevitably fail as to the records bearing classification markings. Executive privilege is qualified, not absolute. In *United States v. Nixon*, the Supreme Court emphasized that

privilege claims "must be considered in light of our historic commitment to the rule of law." 418 U.S. at 708. The Court thus held that executive privilege "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713; *see also In re Sealed Case*, 121 F.3d 729, 754-56 (D.C. Cir. 1997) (applying *United States v. Nixon* in the context of a grand-jury subpoena). This case does not involve a pending trial, but the need for the records bearing classification markings is even more clearly "demonstrated" and "specific": The government is investigating potential violations of 18 U.S.C. § 793(e), which prohibits unauthorized retention of national defense information. The records here are not merely relevant evidence; they are the very objects of the offense. Similarly, the government's investigation of potential violations of 18 U.S.C. § 1519, prohibiting obstruction of justice, requires assessing the adequacy of the response to a grand-jury subpoena for all documents in Plaintiff's possession "bearing classification markings." A48. Again, the records at issue are central to that investigation.

Even more clearly than in *United States v. Nixon*, there is no risk that the government's review of the seized records would chill communications by future presidential advisors. *See* 418 U.S. at 712 (presidential advisors would not "be moved to temper the candor of their remarks by the infrequent occasions of disclosure" for a "criminal prosecution"). Just the opposite: The government seeks to ensure compliance with laws protecting the confidentiality and proper treatment of sensitive government

records—a process that should enhance, rather than undermine, the candor of future presidential communications.

3. Finally, Plaintiff declined to assert executive privilege when his custodian was served with a grand-jury subpoena seeking "[a]ny and all documents or writings" in his custody "bearing classification markings." A48. Instead, Plaintiff's counsel produced a set of classified records to the government, and Plaintiff's custodian certified that "[a]ny and all responsive documents" had been produced after a "diligent search." A50. Now that the government has discovered more than 100 additional responsive records, Plaintiff cannot claim that those records are shielded from review by a privilege that he failed to assert at the appropriate time.

C. No factual or legal disputes justify the district court's order as to the records bearing classification markings.

The district court did not identify any basis on which Plaintiff might successfully assert executive privilege—or any other legal ground—to prevent the government from reviewing the records bearing classification markings. Instead, it stated that the special-master process is needed to resolve "disputes as to the proper designation of the seized materials." A7-A8. That is doubly mistaken.

1. Plaintiff has never disputed that the government's search recovered records bearing classification markings. *See* A115-A121. Instead, the district court cited portions of Plaintiff's filings in which he suggested that he *could have* declassified those documents or purported to designate them as "personal" records under the PRA before

leaving office. A7-A8. But despite multiple opportunities, Plaintiff has never represented that he *in fact* took either of those steps—much less supported such a representation with competent evidence. The court erred in granting extraordinary relief based on unsubstantiated possibilities.

2. In any event, even if Plaintiff had asserted in court that he declassified the records, the government would still need to review the records to assess that claim, and they would still have been responsive to the grand-jury subpoena for all records "bearing classification markings." A48. Any assertion of executive privilege would thus plainly be overcome under *United States v. Nixon* because the government would still need to assess the records in investigating possible violations of Sections 793(e) and 1519. And if the records had actually been declassified, the government would have an additional compelling need to understand what had been declassified and why (and who has seen it) to protect intelligence sources and methods.

Similarly, Plaintiff only weakens his case by suggesting that he might have purported to categorize these records as "personal" records under the PRA. Such a categorization would be flatly inconsistent with the statute, which defines "personal records" as those "of a purely private or nonpublic character which do not relate to" the President's official duties. 44 U.S.C. § 2201(3). And if Plaintiff truly means to assert—implausibly—that records containing sensitive national-security information fit that description, he cannot maintain that the same records are protected by executive

privilege—*i.e.*, that they are "Presidential communications" made in furtherance of the "performance of" his official "duties." *United States v. Nixon*, 418 U.S. at 705.

II. Absent a partial stay, the government and the public will be irreparably harmed.

The district court's order irreparably harms the government and the public by (A) interfering with the government's response to the national-security risks arising from the mishandling and possible disclosure of records bearing classification markings; (B) impairing a criminal investigation into these critical national-security matters; and (C) forcing the government to disclose highly sensitive materials as part of the special-master review.

A. By enjoining the review and use of the records bearing classification markings for criminal-investigative purposes, the district court's order impedes the government's efforts to protect the Nation's security. As explained by the Assistant Director who oversees the FBI's Counterintelligence Division, the Bureau's national-security and law-enforcement missions cannot be bifurcated without impairing its work. A38-A43. Since the 9/11 attacks, the FBI has integrated its intelligence and law-enforcement functions when it pursues its national-security mission. A41. The FBI's investigation into mishandling of classified information is thus "an exercise both of the FBI's criminal investigation authority and of the FBI's authority to investigate threats to the national security." *Attorney General's Guidelines for Domestic FBI Operations* 6 (2008),

https://www.justice.gov/archive/opa/docs/guidelines.pdf. Enjoining criminal investigative activity in this area thus inevitably harms national security.

The district court specified that its order should not interfere with the IC's "classification review and/or intelligence assessment," A14, and later clarified that "to the extent that such intelligence review becomes truly and necessarily inseparable from criminal investigative efforts," the order "does not enjoin the Government from proceeding with its Security Assessments," A9. But that is not sufficient. The IC's review and assessment seek to evaluate the harm *that would* result from disclosure of the seized records. A40-A41. The court's injunction restricts the FBI—which has lead responsibility for investigating such matters in the United States—from using the seized records in its criminal-investigative tools to assess which if any records *were in fact disclosed*, to whom, and in what circumstances.

For example, the court's injunction bars the government from "using the content of the documents to conduct witness interviews." A9. The injunction also appears to bar the FBI and DOJ from further reviewing the records to discern any patterns in the types of records that were retained, which could lead to identification of other records still missing. *See* A42 (describing recovery of "empty folders with 'classified' banners"). And the injunction would prohibit the government from using any aspect of the seized records' contents to support the use of compulsory process to locate any additional records.

Disregarding a sworn declaration from a senior FBI official, the court dismissed such concerns as "hypothetical scenarios" and faulted the government for not identifying an "emergency" or "imminent disclosure of classified information." A11. But the record makes clear that the materials were stored in an unsecure manner over a prolonged period, and the court's injunction itself prevents the government from even beginning to take necessary steps to determine whether improper disclosures might have occurred or may still occur.

Furthermore, although the court purported to leave the IC's review and assessment undisturbed, those reviews involve DOJ and FBI personnel and are closely tied to the ongoing criminal investigation. A40-A42. The court offered little guidance on how FBI and DOJ personnel should bifurcate their efforts, forcing them to discern that line for themselves on pain of contempt should the court later disagree with their judgments—a threat that will inevitably chill their legitimate activities.

B. The injunction also unduly interferes with the criminal investigation. It prohibits the government from accessing the seized records to evaluate whether charges are appropriate and even from "bringing charges based on" those records. A9. "The notion that a district court could have *any* input on a United States Attorney's investigation and decision whether to ... bring a case" is "entirely incompatible with the constitutional assignment to the Executive Branch of exclusive power over prosecutorial decisions." *In re Wild*, 994 F.3d 1244, 1287 (11th Cir. 2021) (Tjoflat, J., concurring).

Moreover, the public has an "interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17 (1973); *see Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("[E]ncouragement of delay is fatal to the vindication of the criminal law."). The government's need to proceed apace is heightened where, as here, it has reason to believe that obstructive acts may impede its investigation. *See* A108-09 (finding of probable cause for violations of 18 U.S.C. § 1519 and discussing risks of "obstruction of justice"). And the prohibition on review and use of records bearing classification markings is uniquely harmful here, where the criminal investigation concerns retention and handling of *those very records*.

C. Finally, requiring disclosure of classified records to a special master and to Plaintiff's counsel, *see* D.E. 91 at 4, would impose irreparable harm on the government and public. The Supreme Court has emphasized that courts should be cautious before "insisting upon an examination" of records whose disclosure would jeopardize national security "even by the judge alone, in chambers." *United States v. Reynolds*, 345 U.S. 1, 10 (1952). In criminal proceedings, courts have routinely rejected arguments that cleared defense counsel are entitled to classified information without the requisite "need to know"—even after a prosecution has commenced. *See, e.g.*, *United States v. Daoud*, 755 F.3d 479, 483-85 (7th Cir. 2014) (reversing order requiring disclosure); *United States v. Asgari*, 940 F.3d 188, 191 (6th Cir. 2019) (similar). Indeed, in the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, which governs criminal proceedings, Congress aimed "to protect classified information from unnecessary disclosure at any

stage of a criminal trial," *United States v. O'Hara,* 301 F.3d 563, 568 (7th Cir. 2002), including by permitting the government to move the court *ex parte* to withhold classified information from the defense, *see* 18 U.S.C. App. III § 4; *United States v. Campa*, 529 F.3d 980, 994-96 (11th Cir. 2008). Yet the district court here ordered disclosure of highly sensitive material to a special master and to Plaintiff's counsel—potentially including witnesses to relevant events—in the midst of an investigation, where no charges have been brought. Because that review serves no possible value, there is no basis for disclosing such sensitive information.

III. A partial stay would impose no cognizable harm on Plaintiff.

Allowing the government to use and review the records bearing classification markings for criminal-investigative purposes would not cause any cognizable injury to Plaintiff. Plaintiff has no property or other legal interest in those records. None of the potential harms to Plaintiff identified by the district court, *cf.* A34, are applicable to those records. Criminal investigators have already conducted an initial review of the records, A19, and the court allowed other government officials to continue to review and use them for national-security purposes. Plaintiff has identified no cognizable harm from merely allowing criminal investigators to continue to review and use this same subset of the seized records.

Plaintiff's only possible "injury" is the government's investigation, but that injury is not legally cognizable. "[T]he cost, anxiety, and inconvenience of having to defend against" potential criminal prosecution cannot "by themselves be considered

'irreparable' in the special legal sense of that term." *Younger v. Harris*, 401 U.S. 37, 46 (1971). That is why courts have exercised great caution before interfering through civil actions with criminal investigations or cases. *See id.*; *see also, e.g.*, *Deaver v. Seymour*, 822 F.2d 66, 69-71 (D.C. Cir. 1987); *Ramsden v. United States*, 2 F.3d 322, 326 (9th Cir. 1993). The district court erred by departing from that fundamental principle of judicial restraint.

CONCLUSION

The district court's order should be stayed to the extent it (1) enjoins the further review and use for criminal-investigative purposes of the seized records bearing classification markings and (2) requires the government to disclose those records for a special-master review process.

Respectfully submitted,

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Dated: September 16, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,197 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6)because it was prepared using Microsoft Word in Garamond 14-point font, a proportionally spaced typeface.

/s/ Juan Antonio Gonzalez
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. Plaintiffs' counsel was also notified of this motion by email.

/s/ Juan Antonio Gonzalez
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ADDENDUM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Defendant in the above-captioned matter, appeals to the United States Court of Appeals for the Eleventh Circuit from the order of the district court entered on September 5, 2022, Docket Entry 64.

Date: September 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/Juan Antonio Gonzalez
Juan Antonio Gonzalez
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER DENYING MOTION FOR PARTIAL STAY PENDING APPEAL

THIS CAUSE comes before the Court upon the Government's Motion for Partial Stay Pending Appeal (the "Motion") [ECF No. 69], filed on September 8, 2022. The Court has reviewed the Motion, the Response in Opposition [ECF No. 84], the Reply [ECF No. 88], and the full record. For the reasons discussed below, the Government's Motion [ECF No. 69] is **DENIED**. Further, by separate order, and by agreement of the parties as a matter of selection [ECF Nos. 83, 86], the Honorable Raymond J. Dearie, Senior United States District Judge for the Eastern District of New York, is hereby appointed to serve as Special Master in this case. As further described in that order, the Special Master is directed to prioritize review of the documents at issue in the Motion and to issue interim reports and recommendations as appropriate.

RELEVANT BACKGROUND

Plaintiff Donald J. Trump initiated this action on August 22, 2022, seeking various forms of relief in connection with the search warrant executed on his residence on August 8, 2022 [ECF No. 1]. The Court held a hearing on Plaintiff's requests on September 1, 2022 [ECF No. 62]. Thereafter, pursuant to its equitable jurisdiction and inherent supervisory authority, and in light of the extraordinary circumstances presented, the Court granted Plaintiff's request for the

appointment of a special master and temporarily enjoined the Government from further review and use of the seized materials for criminal investigative purposes only (the "September 5 Order") [ECF No. 64]. The September 5 Order allows the Government to "continue to review and use the materials seized for purposes of intelligence classification and national security assessments" (the "Security Assessments") [ECF No. 64 p. 24].

On September 8, 2022, the Government filed a notice of appeal [ECF No. 68] followed by the instant Motion [ECF No. 69].[1] The Motion requests a stay of the September 5 Order to the extent it "(1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings that were recovered pursuant to a court-authorized search warrant and (2) requires the government to disclose those classified records to a special master for review" [ECF No. 69 p. 1]. The Motion is accompanied by the Declaration of Alan E. Kohler, Jr., Assistant Director of the Counterintelligence Division of the Federal Bureau of Investigation (the "Kohler Declaration") [ECF No. 69-1]. The Kohler Declaration states that the Government's Security Assessments are "inextricably linked" to the Government's criminal investigation, and that it would be "exceedingly difficult" to bifurcate the personnel involved [ECF No. 69-1 pp. 3–4]. On September 12, 2022, Plaintiff filed a response in opposition to the Motion [ECF No. 84], and on September 13, 2022, the Government filed a reply [ECF No. 88].

The Government advises in the Motion that it will seek relief from the United States Court of Appeals for the Eleventh Circuit "[i]f the Court does not grant a stay by Thursday, September 15" [ECF No. 69 p. 1]. Appreciative of the urgency of this matter, the Court hereby issues this Order on an expedited basis.

[1] The Government's appeal has been docketed as 11th Cir. No. 22-13005.

LEGAL STANDARD

In considering a motion to stay pending appeal, district courts must consider "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). "The first two factors of [this] standard are the most critical," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial discretion to stay an injunction]." *Nken*, 556 U.S. at 433–34.

DISCUSSION

The Motion primarily seeks a stay of the September 5 Order insofar as it temporarily enjoins, in conjunction with the Special Master's review of the seized materials, approximately 100 documents "marked as classified (and papers physically attached to them)" [ECF No. 69 p. 2 n.1]. In isolating the described documents from the larger set of seized materials, the Motion effectively asks the Court to accept the following compound premises, neither of which the Court is prepared to adopt hastily without further review by a Special Master. The first premise underlying the Motion is that all of the approximately 100 documents isolated by the Government (and "papers physically attached to them") are classified government records, and that Plaintiff therefore could not possibly have a possessory interest in any of them. The second is that Plaintiff has no plausible claim of privilege as to any of these documents [ECF No. 69 p. 7 (categorically asserting that the "classified records at issue in this Motion . . . do not include personal records or potentially privileged communications")]. The Court does not find it appropriate to accept the

Government's conclusions on these important and disputed issues without further review by a neutral third party in an expedited and orderly fashion.

To further expand the point, and as more fully explained in the September 5 Order, the Government seized a high volume of materials from Plaintiff's residence on August 8, 2022 [ECF No. 64 p. 4]; some of those materials undisputedly constitute personal property and/or privileged materials [ECF No. 64 p. 13]; the record suggests ongoing factual and legal disputes as to precisely which materials constitute personal property and/or privileged materials [ECF No. 64 p. 14]; and there are documented instances giving rise to concerns about the Government's ability to properly categorize and screen materials [ECF No. 64 p. 15]. Furthermore, although the Government emphasizes what it perceives to be Plaintiff's insufficiently particularized showing on various document-specific assertions [ECF No. 69 p. 11; ECF No. 88 pp. 3–7], it remains the case that Plaintiff has not had a meaningful ability to concretize his position with respect to the seized materials given (1) the ex parte nature of the approved filter protocol, (2) the relatively generalized nature of the Government's "Detailed Property Inventory" [ECF No. 39-1], and (3) Plaintiff's unsuccessful efforts, pre-suit, to gather more information from the Government about the content of the seized materials [ECF No. 1 pp. 3, 8–9 (describing Plaintiff's rejected requests to obtain a list of exactly what was taken and from where, to inspect the seized property, and to obtain information regarding potentially privileged documents)].[2]

In many respects, the Government's position thus presupposes the content, designation, and associated interests in materials under its control—yet, as the parties' competing filings reveal, there are disputes as to the proper designation of the seized materials, the legal implications

[2] *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 178–79 (4th Cir. 2019), *as amended* (Oct. 31, 2019) (referencing sensible benefits, in certain circumstances, of adversarial, pre-review proceedings on filter protocols).

flowing from those designations, and the intersecting bodies of law permeating those designations [*see* ECF No. 69 pp. 5, 8–12; ECF No. 84 pp. 11–15; ECF No. 88 pp. 3–7]. Under these circumstances, the Court declines to conduct a subset-by-subset, piecemeal analysis of the seized property, based entirely on the Government's representations about what is contained in a select portion of the property. *See United States v. Melquiades*, 394 F. App'x 578, 584 (11th Cir. 2010) (explaining that, to have standing to bring a Rule 41(g) action, a movant must allege "a colorable ownership, possessory or security interest in at least a portion of the [seized] property" (quoting *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001)). Indeed, if the Court were willing to accept the Government's representations that select portions of the seized materials are—without exception—government property not subject to any privileges, and did not think a special master would serve a meaningful purpose, the Court would have denied Plaintiff's special master request [*see* ECF No. 48 p. 3 (arguing that the "appointment of a special master is unnecessary" because the Government had already reviewed the materials and identified personal items and potentially privileged materials)].

Therefore, upon consideration of the full range of seized materials as described in the Government's submissions, and for the reasons explained in the September 5 Order and supplemented in part below, the Court does not find the requested partial stay to be warranted under the circumstances. The Court offers the following limited analysis on three additional areas, mindful of the Government's request for an expedited ruling.

I. The September 5 Order

First, accounting for the concerns raised in the Government's submissions [ECF No. 69 p. 17; ECF No. 88 p. 8], the Court finds that further elaboration on the September 5 Order is warranted. The September 5 Order temporarily enjoins the Government—as a component of the

special master process—only from further use of the content of the seized materials for criminal investigative purposes pending resolution of the Special Master's recommendations. This includes, for example, presenting the seized materials to a grand jury and using the content of the documents to conduct witness interviews as part of a criminal investigation. The September 5 Order does not restrict the Government from conducting investigations or bringing charges based on anything other than the actual content of the seized materials; from questioning witnesses and obtaining other information about the movement and storage of seized materials, including documents marked as classified, without discussion of their contents [ECF No. 69 p. 17]; from briefing "Congressional leaders with intelligence oversight responsibilities" on the seized materials [ECF No. 69 p. 17 n.5]; from reviewing the seized materials to conduct the Security Assessments; or from involving the FBI in the foregoing actions.[3] Moreover, as indicated in the September 5 Order, the temporary restraint does not prevent the Government from continuing "to review and use the materials seized for purposes of intelligence classification and national security assessments" [ECF No. 64 p. 24]. Hence, as Plaintiff acknowledges, to the extent that such intelligence review becomes truly and necessarily inseparable from criminal investigative efforts concerning the content of the seized materials, the September 5 Order does not enjoin the Government from proceeding with its Security Assessments [ECF No. 84 p. 16; ECF No. 39 pp. 2–3].

Again, the September 5 Order imposes a temporary restraint on certain review and use of the seized materials, in natural conjunction with the special master process, only for the period of

[3] Separately, the Court also clarifies a scrivener's error: the "January 2021" reference on page 2 of the September 5 Order should read "January 2022" [*see* ECF No. 64 p. 2 ("In January [2022], as a product of those conversations, Plaintiff transferred fifteen boxes (the "Fifteen Boxes") from his personal residence to NARA [ECF No. 1 pp. 4–5; ECF No. 48 p. 5; ECF No. 48-1 p. 6].")]. That typographical error did not affect the Court's analysis.

time required to resolve any categorization disputes and rule on Plaintiff's Rule 41(g) requests. This restriction is not out of step with the logical approach approved and used for special master review in other cases, often with the consent of the government, and it is warranted here to reinforce the value of the Special Master, to protect against unwarranted disclosure and use of potentially privileged and personal material pending completion of the review process, and to ensure public trust.[4]

II. Irreparable Injury

The Court is not persuaded that the Government will suffer an irreparable injury without the requested stay. With respect to the temporary enjoinment on criminal investigative use, the Government's main argument is that such use is "inextricably intertwined" with its Security Assessments and therefore the enjoinment at issue necessarily poses a risk to national security interests [ECF No. 69 pp. 3, 12–17]. Mindful of the traditional "reluctan[ce] to intrude upon the

[4] In general, when courts appoint a special master to review seized materials for potential claims of privilege, the government naturally (and often voluntarily) is temporarily prevented from further review and use of the subject materials. *See, e.g.*, *United States v. Abbell*, 914 F. Supp. 519, 521 (S.D. Fla. 1995) (appointing special master to review seized materials after government's taint team had completed a privilege review of some of the seized materials, and enjoining government from further examining seized materials until the court approved the "recommendations made by the Special Master as to the responsiveness and privilege issues"); *United States v. Stewart*, No. 02-CR-395, 2002 WL 1300059, at *10 (S.D.N.Y. June 11, 2002) (requiring government to place seized materials under seal and not review them until special master completed his review); *United States v. Gallego*, No. CR-18-01537-001, 2018 WL 4257967, at *3–4 (D. Ariz. Sept. 6, 2018) (same). *Cf. United States v. Ritchey*, No. 21-CR-6, 2022 WL 3023551, at *9 (S.D. Miss. June 3, 2022) (enjoining government's prosecution team from further review and use of seized materials until court approved a new filter review process to verify the filter review team's initial screening process); *In re Search Warrant dated November 5, 2021*, No. 21-MC-00813-AT, ECF No. 5 (S.D.N.Y. Nov. 12, 2021) (indicating that government voluntarily paused its "extraction and review" of seized contents pending consideration and appointment of special master); *In the Matter of Search Warrants Executed on April 9, 2018*, No. 18-MJ-03161-KMW, ECF No. 16 (S.D.N.Y. Apr. 9, 2018) (same); *In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 p. 2 (S.D.N.Y. May 4, 2021) (noting that government voluntarily did not begin review of seized materials pending consideration and appointment of special master).

authority of the Executive in military and national security affairs," *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988), the Court nonetheless cannot abdicate its control over questions of privilege and does not find the Government's argument sufficiently convincing as presented. First, there has been no actual suggestion by the Government of any identifiable emergency or imminent disclosure of classified information arising from Plaintiff's allegedly unlawful retention of the seized property. Instead, and unfortunately, the unwarranted disclosures that float in the background have been leaks to the media *after* the underlying seizure [*see* ECF No. 64 pp. 9–11 n.11]. Second, although it might be easier, in the immediate future, for the Government's criminal investigative work to proceed in tandem with the Security Assessments, the Government's submissions on the subject do not establish that pausing the criminal investigative review pending completion of the Special Master's work actually will impede the intelligence community's ability to assess "the potential risk to national security that would result from disclosure of the seized materials" [ECF No. 39 pp. 2–3]. The Kohler Declaration, for example, states that it would be "exceedingly difficult" to bifurcate the personnel involved in the described processes, and then it proceeds to posit hypothetical conflicts that could arise if the Security Assessments require criminal investigative efforts [ECF No. 69-1 ¶ 9; *see also* ECF No. 88 p. 9 (explaining that continued enjoinment of use and review of the seized materials for criminal investigative purposes would cause the intelligence community to "(at best) be limited in its ability to address and fully mitigate any national security risks presented")]. The Government's submissions, read collectively, do not firmly maintain that the described processes are inextricably intertwined, and instead rely heavily on hypothetical scenarios and generalized explanations that do not establish irreparable injury. Third, as noted above, to the extent that the Security Assessments truly are, in fact, inextricable from criminal investigative use of the seized materials, the Court makes clear

that the September 5 Order does not enjoin the Government from taking actions necessary for the Security Assessments.[5] And finally, in light of the Government's stated concerns, the Court will direct the Special Master to prioritize review of the approximately 100 documents marked as classified (and papers physically attached thereto), and thereafter consider prompt adjustments to the Court's Orders as necessary.

The Government also presents the argument, in passing, that making the full scope of the seized materials available to the Special Master would itself create irreparable harm [ECF No. 69 p. 18]. Insofar as the Government argues that disclosure to a Special Master of documents marked as classified necessarily creates an irreparable injury because the special master process in this case is unnecessary, the Court disagrees for the reasons previously stated. Separately, to the extent the Government appears to suggest that it would suffer independent irreparable harm from review of the documents by the Court's designee with appropriate clearances and controlled access, that argument is meritless.

III. Relevant Principles

Lastly, the Court agrees with the Government that "the public is best served by evenhanded adherence to established principles of civil and criminal procedure," regardless of the personal identity of the parties involved [ECF No. 88 p. 10]. It is also true, of course, that evenhanded procedure does not demand unquestioning trust in the determinations of the Department of Justice. Based on the nature of this action, the principles of equity require the Court to consider the specific

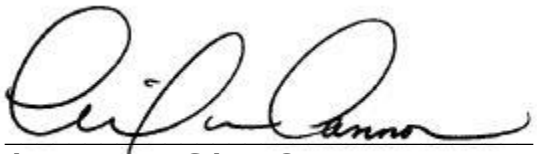
[5] Needless to say, the Court is confident that the Government will faithfully adhere to a proper understanding of the term "inextricable" and, where possible, minimize the use and disclosure of the seized materials in accordance with the Court's orders. Because the Court is not privy to the specific details of the Government's investigative efforts and national security review, the Court expects that the Government, in general, is best suited to assess whether contemplated actions are consistent with the standard described herein.

context at issue, and that consideration is inherently impacted by the position formerly held by Plaintiff. The Court thus continues to endeavor to serve the public interest, the principles of civil and criminal procedure, and the principles of equity. And the Court remains firmly of the view that appointment of a special master to conduct a review of the seized materials, accompanied by a temporary injunction to avoid unwarranted use and disclosure of potentially privileged and/or personal materials, is fully consonant with the foregoing principles and with the need to ensure at least the appearance of fairness and integrity under unprecedented circumstances.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Motion for Partial Stay Pending Appeal [ECF No. 69] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 15th day of September 2022.



AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-81294-CIV-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon Plaintiff's Motion for Judicial Oversight and Additional Relief (the "Motion") [ECF No. 1], filed on August 22, 2022. The Court has reviewed the Motion, Plaintiff's Supplemental Filing [ECF No. 28], the Government's Response in Opposition [ECF No. 48], Plaintiff's Reply [ECF No. 58], and the related filings [ECF Nos. 31, 39, 40 (sealed)]. The Court also held a hearing on the Motion on September 1, 2022.

Pursuant to the Court's equitable jurisdiction and inherent supervisory authority, and mindful of the need to ensure at least the appearance of fairness and integrity under the extraordinary circumstances presented, Plaintiff's Motion [ECF No. 1] is **GRANTED IN PART**. The Court hereby authorizes the appointment of a special master to review the seized property for personal items and documents and potentially privileged material subject to claims of attorney-client and/or executive privilege. Furthermore, in natural conjunction with that appointment, and consistent with the value and sequence of special master procedures, the Court also temporarily enjoins the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further Court order. This Order shall not impede the classification review and/or intelligence assessment by the Office of the Director of

National Intelligence ("ODNI") as described in the Government's Notice of Receipt of Preliminary Order [ECF No. 31 p. 2].

RELEVANT BACKGROUND

The following is a summary of the record based on the parties' submissions and oral presentation.[1] Throughout 2021, former President Donald J. Trump ("Plaintiff") and the National Archives and Records Administration ("NARA") were engaged in conversations concerning records from Plaintiff's time in office [ECF No. 1 p. 4; ECF No. 48-1 p. 2].[2] In January 2021, as a product of those conversations, Plaintiff transferred fifteen boxes (the "Fifteen Boxes") from his personal residence to NARA [ECF No. 1 pp. 4–5; ECF No. 48 p. 5; ECF No. 48-1 p. 6]. Upon initial review of the Fifteen Boxes, NARA identified the items contained therein as newspapers, magazines, printed news articles, photos, miscellaneous printouts, notes, presidential correspondence, personal records, post-presidential records, and classified records [ECF No. 48 p. 5]. NARA subsequently informed the Department of Justice ("DOJ") of the contents of the boxes, claiming that some items contained markings of "classified national security information" [ECF No. 48 p. 5].

On April 12, 2022, NARA notified Plaintiff that it intended to provide the Fifteen Boxes to the Federal Bureau of Investigation ("FBI") the following week [ECF No. 48 p. 5]. Plaintiff then requested an extension on the contemplated delivery so that he could determine the existence of any privileged material [ECF No. 48-1 p. 7]. The White House Counsel's Office granted the request [ECF No. 48-1 p. 7]. On May 10, 2022, NARA informed Plaintiff that it would proceed

[1] Neither party requested an evidentiary hearing on the Motion, and under the circumstances, the Court finds resolution of the Motion sufficient and prudent on the present record.

[2] NARA is an independent federal agency within the Executive Branch that is responsible for the preservation and documentation of government and historical records.

with "provid[ing] the FBI access to the records in question, as requested by the incumbent President, beginning as early as Thursday, May 12, 2022" [ECF No. 48-1 p. 9]. The Government's filing states that the FBI did not obtain access to the Fifteen Boxes until approximately May 18, 2022 [ECF No. 48 p. 7].

On May 11, 2022, during the period of ongoing communications between Plaintiff and NARA, and before DOJ received the Fifteen Boxes, DOJ "obtained a grand jury subpoena, for which Plaintiff's counsel accepted service" [ECF No. 48 pp. 7–8; *see* ECF No. 1 p. 5]. The subpoena was directed to the "Custodian of Records [for] [t]he Office of Donald J. Trump" and requested "[a]ny 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" [ECF No. 48-1 p. 11]. Plaintiff contacted DOJ on June 2, 2022, and requested that FBI agents visit his residence the following day to pick up responsive documents [ECF No. 1 p. 5; ECF No. 48 p. 8]. Upon the FBI's arrival, Plaintiff's team handed over documents and permitted the three FBI agents and an accompanying DOJ attorney to visit the storage room where the documents were held [ECF No. 1 pp. 5–6; ECF No. 48 p. 9].

The Government contends that, after further investigation, "the FBI uncovered multiple sources of evidence indicating that the response to the May 11 grand jury subpoena was incomplete," and that potentially classified documents remained at Plaintiff's residence [ECF No. 48 p. 10]. Based on this evidence and an affidavit that remains partially under seal, on August 5, 2022, the Government applied to a United States Magistrate Judge for a search and seizure warrant of Plaintiff's residence, citing Title 18, Sections 793, 1519, and 2701 of the United States Code. Finding probable cause for each offense, the Magistrate Judge authorized law enforcement to (1) search Plaintiff's office, "all storage rooms, and all other rooms or areas within

the premises used or available to be used by [Plaintiff] and his staff and in which boxes or documents could be stored," and (2) seize the following: "[a]ny physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes"; "[i]nformation, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material"; "[a]ny government and/or Presidential records created" during Plaintiff's presidency; or "[a]ny evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings." *USA v. Sealed Search Warrant*, No. 22-08332-MJ-BER-1, ECF No. 17 pp. 3–4 (S.D. Fla. Aug. 11, 2022).

On August 8, 2022, pursuant to the search warrant, the Government executed an unannounced search of Plaintiff's residence. As reflected in the "Detailed Property Inventory" submitted by the Government in this action, agents seized approximately 11,000 documents and 1,800 other items from the office and storage room [ECF No. 39-1].[3] The seized property is generally categorized on the inventory as twenty-seven boxes containing documents, with and without classification markings, along with photographs, other documents, and miscellaneous material [ECF No. 1 pp. 24–26].[4]

Shortly after the search of the residence, Plaintiff's counsel spoke with the Government and requested the following: a copy of the affidavit in support of the warrant; the Government's

[3] These figures are drawn collectively from the Government's Detailed Property Inventory [ECF No. 39-1].

[4] Based on the Detailed Property Inventory, of the approximately 11,000 documents seized, roughly 100 contain classification markings [ECF No. 39-1 pp. 2–8].

consent to the appointment of a special master "to protect the integrity of privileged documents"; a detailed list of what was taken from the residence and from where exactly; and an opportunity to inspect the seized property [ECF No. 1 pp. 8–9]. The Government denied those requests [ECF No. 1 p. 9].[5]

In the absence of any agreement between the parties, on August 22, 2022, Plaintiff filed the Motion for Judicial Oversight and Additional Relief, seeking (1) the appointment of a special master to oversee the review of seized materials regarding identification of personal property and privilege review; (2) the enjoinment of further review of the seized materials until a special master is appointed; (3) a more detailed receipt for property; and (4) the return of any items seized in excess of the search warrant [ECF No. 1 p. 21; ECF No. 28 p. 10].

Following receipt of the Motion, the Court ordered Plaintiff to elaborate on the basis for the Court's jurisdiction and the relief sought [ECF No. 10]. Plaintiff did so via a Supplement to the Motion on August 26, 2022 [ECF No. 28]. Consistent with Rule 53(b)(1) of the Federal Rules of Civil Procedure, the Court issued a preliminary order indicating its intent to appoint a special master [ECF No. 29]. Shortly thereafter, the Government appeared in this action and filed the Notice of Receipt of Preliminary Order [ECF No. 31]. Plaintiff executed service that same day [ECF No. 32]. The Government then filed under seal the Notice by Investigative Team of Status Review (the "Investigative Team Report") [ECF No. 39], attaching the "Detailed Property Inventory" as ordered by the Court [ECF No. 39-1]. The Investigative Team Report, now fully

[5] The exact date of that conversation is unclear, but all agree that the conversation took place soon after the search. Plaintiff references August 11, 2022, in the Motion, three days after the search (and eleven days prior to the filing of the Motion). The Government does not offer a different view in its Response or otherwise challenge the substance of the rejected requests. Counsel for the Government stated during the hearing that Plaintiff's request for a special master was rejected on August 9, 2022, the morning after the search.

unsealed, indicates that the Investigative Team has "reviewed the seized materials in furtherance of its ongoing investigation," and that "[t]he seized materials will continue to be used to further the government's investigation . . . as it takes further investigative steps, such as through additional witness interviews and grand jury practice" [ECF No. 39 p. 2]. While acknowledging that investigators have "already examined every item seized (other than materials that remain subject to the filter protocols)," the Government clarifies that "'review' of the seized materials is not a single investigative step but an ongoing process in this active criminal investigation" [ECF No. 39 p. 2]. The Government also states in its Investigative Team Report that DOJ and ODNI are "facilitating a classification review of materials recovered pursuant to the search warrant, and ODNI is leading an intelligence community assessment of the potential risk to national security that would result from disclosure of the seized materials" [ECF No. 39 pp. 2–3]. Additionally, the Government filed under seal its Notice of Status of Privilege Review Team's Filter Process and Production of Itemized List of Documents Within Privilege Review Team's Custody (the "Privilege Review Team's Report") [ECF No. 40 (sealed)]. The Privilege Review Team's Report remains under seal in accordance with the parties' joint request at the hearing. This Order refers to the content of that report in general terms.

On August 30, 2022, the Government filed the Response to Plaintiff's Motion [ECF No. 48], and on August 31, 2022, Plaintiff filed the Reply [ECF No. 58]. The Court then held a hearing on the Motion. This Order follows.

DISCUSSION

I. Jurisdiction

As previewed, Plaintiff initiated this action with a hybrid motion that seeks independent review of the property seized from his residence on August 8, 2022, a temporary injunction on any

further review by the Government in the meantime, and ultimately the return of the seized property under Rule 41(g) of the Federal Rules of Criminal Procedure.[6] Though somewhat convoluted, this filing is procedurally permissible[7] and creates an action in equity. *See Richey v. Smith*, 515 F.2d 1239, 1245 (5th Cir. 1975) ("[A] motion [for return of property] prior to [a] criminal proceeding[] . . . is more properly considered simply a suit in equity rather than one under the Rules of Criminal Procedure."); *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th 1235, 1245 n.6 (11th Cir. 2021) ("[Rule 41] is the proper way to come before the court to seek an injunction regarding the government's use of a filter team to review seized documents."). In other words, to entertain Plaintiff's requests, the Court first must decide to exercise its equitable jurisdiction, *see United States v. Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001), which "derives from the [Court's] inherent authority" over its officers (including attorneys) and processes, *see Hunsucker v. Phinney*, 497 F.2d 29, 32 (5th Cir. 1974); *Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319, 324 (S.D.N.Y. 1997).[8] In general, Rule 41(g) proceedings are

[6] Prior to 2002, what is now Rule 41(g) was codified as Rule 41(e). "[E]arlier cases interpreting Rule 41(e) also apply to the new Rule 41(g)." *United States v. Garza*, 486 F. App'x 782, 784 n.3 (11th Cir. 2012); *see De Almeida v. United States*, 459 F.3d 377, 380 n.2 (2d Cir. 2006).

[7] Rule 41(g) allows movants, prior to the return of an indictment, to initiate standalone actions "in the district where [their] property was seized." *See* Fed. R. Crim. P. 41(g); *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) ("Property which is seized . . . either by search warrant or subpoena may be ultimately disposed of by the court in that proceeding or in a subsequent civil action."); *In the Matter of John Bennett*, No. 12-61499-CIV-RSR, ECF No. 1 (S.D. Fla. July 31, 2012) (initiating an action with a "petition to return property"); *see also In re Grand Jury Investigation of Hugle*, 754 F.2d 863, 865 (9th Cir. 1985) ("[A] court is not required to defer relief [relating to privileged material] until after issuance of the indictment.").

[8] To the extent the Motion seeks relief totally distinct from the return of property itself, the Motion invokes the Court's inherent supervisory authority directly. *See generally Gravel v. United States*, 408 U.S. 606, 628 (1972); *In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) (the government initiating a new action by requesting that the Court, pursuant to its supervisory authority, appoint a special master

"rooted in equitable principles" and served by "flexibility in procedural approach." *Smith v. Katzenbach*, 351 F.2d 810, 817 (D.C. Cir. 1965).

Importantly, equitable jurisdiction is reserved for "exceptional" circumstances, *see Hunsucker*, 497 F.2d at 32, and must be "exercised with caution and restraint," *Matter of Sixty-Seven Thousand Four Hundred Seventy Dollars ($67,470.00)*, 901 F.2d 1540, 1544 (11th Cir. 1990). Mindful of its limited power in this domain, the Court endeavors to fulfill its obligations under the law with due care.

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Upon full consideration of the parties' arguments and the exceptional circumstances presented, the Court deems the exercise of equitable jurisdiction over this action to be warranted. In making this determination, the Court relies in part on the factors identified in *Richey v. Smith*. 515 F.2d at 1245.[9] In that case, the former Fifth Circuit counseled courts to consider, for equitable jurisdiction purposes, whether the government displayed a callous disregard for the movant's constitutional rights, whether the movant has an individual interest in and need for the seized property, whether the movant would be irreparably injured by denial of the return of the seized property, and whether the movant otherwise has an adequate remedy at law. *Id.* (describing these factors as "some of the considerations" that should inform the decision of whether to exercise equitable jurisdiction); *see also Mesa Valderrama v. United States*, 417 F.3d 1189, 1197 (11th Cir.

to conduct filter review of materials potentially subject to attorney-client privilege and/or executive privilege).

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209–11 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2005) (characterizing the *Richey* factors as guiding considerations). Those factors, although mixed, ultimately counsel in favor of exercising jurisdiction.

With respect to the first factor, the Court agrees with the Government that, at least based on the record to date, there has not been a compelling showing of callous disregard for Plaintiff's constitutional rights. This factor cuts against the exercise of equitable jurisdiction.

The second factor—whether the movant has an individual interest in and need for the seized property—weighs in favor of entertaining Plaintiff's requests. According to the Privilege Review Team's Report, the seized materials include medical documents, correspondence related to taxes, and accounting information [ECF No. 40-2; *see also* ECF No. 48 p. 18 (conceding that Plaintiff "may have a property interest in his personal effects")]. The Government also has acknowledged that it seized some "[p]ersonal effects without evidentiary value" and, by its own estimation, upwards of 500 pages of material potentially subject to attorney-client privilege [ECF No. 48 p. 16; ECF No. 40 p. 2]. Thus, based on the volume and nature of the seized material, the Court is satisfied that Plaintiff has an interest in and need for at least a portion of it, even if the underlying subsidiary detail as to each item cannot reasonably be determined at this time based on the information provided by the Government to date.[10]

The same reasoning contributes to the Court's determination that the third factor—risk of irreparable injury—likewise supports the exercise of jurisdiction. In addition to being deprived of potentially significant personal documents, which alone creates a real harm, Plaintiff faces an unquantifiable potential harm by way of improper disclosure of sensitive information to the

[10] To the extent the Government challenges Plaintiff's standing to bring this action, the Court addresses that argument below. *See infra* Discussion II.

public.[11] Further, Plaintiff is at risk of suffering injury from the Government's retention and potential use of privileged materials in the course of a process that, thus far, has been closed off to Plaintiff and that has raised at least some concerns as to its efficacy, even if inadvertently so. *See infra* Discussion III. Finally, Plaintiff has claimed injury from the threat of future prosecution and the serious, often indelible stigma associated therewith. As the *Richey* court wrote, "a wrongful indictment is no laughing matter; it often works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal." 515 F.2d at 1244 n.10; *see also In the Matter of John Bennett*, No. 12-61499-CIV-RSR, ECF No. 22 pp. 26–27 (S.D. Fla. July 23, 2013) (explaining that, although some courts have rejected *Richey*'s observation as to the harm posed by indictments, *Richey* remains binding on district courts in the Eleventh Circuit). As a function of Plaintiff's former position as President of the United States, the stigma associated with the subject seizure is in a league of its own. A future indictment, based to any degree on property that ought to be returned, would result in reputational harm of a decidedly different order of magnitude.

As to the fourth *Richey* factor, Plaintiff has persuasively argued that there is no alternative adequate remedy at law. Without Rule 41(g), Plaintiff would have no legal means of seeking the return of his property for the time being and no knowledge of when other relief might become available. *See United States v. Ryan*, 402 U.S. 530, 533 (1971) (expressing concern that the denial to consider Rule 41(g) requests "would mean that the Government might indefinitely retain the

[11] When asked about the dissemination to the media of information relative to the contents of the seized records, Government's counsel stated that he had no knowledge of any leaks stemming from his team but candidly acknowledged the unfortunate existence of leaks to the press.

property without any opportunity for the movant to assert . . . his right to possession"); *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 601 (5th Cir. 2021) (explaining that motions to suppress and motions for return of property serve different functions); *United States v. Dean*, 80 F.3d 1535, 1542 (11th Cir. 1996), *opinion modified on reconsideration,* 87 F.3d 1212 (11th Cir. 1996) (making clear that the principle behind the doctrine of equitable jurisdiction—"that the state should not be permitted to deny individuals their property without recourse simply because there is no jurisdiction at law"—applies even when the seizure was lawful).

In combination, these guideposts favor the careful exercise of equitable jurisdiction under the circumstances. This determination is reinforced by the broader landscape of relevant equitable considerations. *See generally Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 73 (1935) (explaining that courts' discretion in the realm of equity "may properly be influenced by considerations of the public interests involved" and the consequences of any grant of relief); *Smith*, 351 F.2d at 817–18 (elaborating on the breadth and flexibility of equitable considerations); *Richey*, 515 F.2d at 1245 (noting that the four identified factors are "some of the considerations" that should inform courts' determinations); *Mesa Valderrama*, 417 F.3d at 1197 (characterizing the *Richey* factors as guiding considerations). Hence, the Court takes into account the undeniably unprecedented nature of the search of a former President's residence; Plaintiff's inability to examine the seized materials in formulating his arguments to date; Plaintiff's stated reliance on the customary cooperation between former and incumbent administrations regarding the ownership and exchange of documents; the power imbalance between the parties; the importance of maintaining institutional trust; and the interest in ensuring the integrity of an orderly process amidst swirling allegations of bias and media leaks. Measuring the *Richey* factors along with all

of the other considerations pertinent to a holistic equitable analysis, the scales tip decidedly in favor of exercising jurisdiction.[12]

The Court pauses briefly to emphasize the limits of this determination. Plaintiff ultimately may not be entitled to return of much of the seized property or to prevail on his anticipated claims of privilege. That inquiry remains for another day. For now, the circumstances surrounding the seizure in this case and the associated need for adequate procedural safeguards are sufficiently compelling to at least get Plaintiff past the courthouse doors.

II. Standing

There is another threshold argument the Court must consider, and that is the Government's assertion as to Plaintiff's lack of standing [ECF No. 48 pp. 2, 14–16]. The Government posits that Plaintiff lacks standing to bring a Rule 41(g) action or even to seek a special master, because the seized property consists of "Presidential records" over which Plaintiff lacks a "possessory interest" [ECF No. 48 pp. 14–15]. The Government relies on the definition of "Presidential records" under the Presidential Records Act (the "PRA"), *see* 44 U.S.C. § 2201(2), and on the Eleventh Circuit's decision in *Howell*, 425 F.3d at 974; *see supra* note 12.

Plaintiff opposes the Government's standing argument as premature and fundamentally flawed [ECF No. 58 p. 2]. In Plaintiff's view, what matters now is his authority to seek the

[12] At the hearing, the Government argued that the equitable concept of "unclean hands" bars Plaintiff from moving under Rule 41(g), citing *United States v. Howell*, 425 F.3d 971, 974 (11th Cir. 2005) ("[I]n order for a district court to grant a Rule 41(g) motion, the owner of the property must have clean hands."). *Howell* involved a defendant who pled guilty to conspiring to distribute cocaine and then sought the return of $140,000 in government-issued funds that were seized from him following a drug sale to a confidential source. *Id.* at 972–73. That case is not factually analogous to the circumstances presented and does not provide a basis to decline to exercise equitable jurisdiction here. Plaintiff has not pled guilty to any crimes; the Government has not clearly explained how Plaintiff's hands are unclean with respect to the personal materials seized; and in any event, this is not a situation in which there is no room to doubt the immediately apparent incriminating nature of the seized material, as in the case of the sale of cocaine.

appointment of a special master—not his underlying legal entitlement to possess the records or his definable "possessory interest" under Rule 41(g) [ECF No. 58 pp. 4–6]. Moreover, Plaintiff adds, even assuming the Court were inclined at this juncture to consider Plaintiff's potential claim of unreasonableness under the Fourth Amendment, settled law permits him, as the owner of the premises searched, to object to the seizure as unreasonable [ECF No. 58 pp. 2, 4–6].

Having considered these crisscrossing arguments, the Court concludes that Plaintiff is not barred as a matter of standing from bringing this Rule 41(g) action or from invoking the Court's authority to appoint a special master more generally. To have standing to bring a Rule 41(g) motion, a movant must allege "a colorable ownership, possessory or security interest in at least a portion of the [seized] property." *United States v. Melquiades*, 394 F. App'x 578, 584 (11th Cir. 2010) (quoting *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001)). Once that preliminary showing is made, the standing requirement is satisfied, because "[the] owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998). Contrary to the Government's reading of *Howell*, Plaintiff need not prove ownership of the property but rather need only allege facts that constitute a colorable showing of a right to possess at least some of the seized property. *Melquiades*, 394 F. App'x at 584. Although the Government argues that Plaintiff has no property interest in any of the presidential records seized from his residence, that position calls for an ultimate judgment on the merits as to those documents and their designations. Further, the Government concedes that the seized property includes "personal effects," 520 pages of potentially privileged material, and at least some material that is in fact privileged [ECF No. 48 pp. 15–16]. This is sufficient to satisfy the standing requirement for the Rule 41(g) request and the request for a special master.

See generally United States v. Stewart, No. 02-CR-395, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (implicitly accepting that a party has standing to seek review by a special master when at least some of the seized materials are privileged); *United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995) (same).

III. The Need for Further Review

Having determined that the exercise of jurisdiction is appropriate and that Plaintiff has standing to bring the instant requests, the Court next considers the need for further review of the seized material, as relates to Rule 41(g) and matters of privilege.

Although some of the seized items (e.g., articles of clothing) appear to be readily identifiable as personal property, the parties' submissions suggest the existence of genuine disputes as to (1) whether certain seized documents constitute personal or presidential records, and (2) whether certain seized personal effects have evidentiary value. Because those disputes are bound up with Plaintiff's Rule 41(g) request and involve issues of fact, the Court "must receive evidence" from the parties thereon. *See* Fed. R. Crim. P. 41(g) ("The court must receive evidence on any factual issue necessary to decide the motion."). That step calls for comprehensive review of the seized property.

Review is further warranted, as previewed, for determinations of privilege. The Government forcefully objects, even with respect to attorney-client privilege, pointing out that the Privilege Review Team already has screened the seized property and is prepared to turn over approximately 520 pages of potentially privileged material for court review pursuant to the previously approved ex parte filter protocol [ECF No. 48 p. 14]. In plain terms, the Government's position is that another round of screening would be "unnecessary" [ECF No. 48 p. 22]. The Court takes a different view on this record.

To begin, the Government's argument assumes that the Privilege Review Team's initial screening for potentially privileged material was sufficient, yet there is evidence from which to call that premise into question here. *See In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1249–51; *see also Abbell*, 914 F. Supp. at 520 (appointing a special master even after the government's taint attorney already had reviewed the seized material). As reflected in the Privilege Review Team's Report, the Investigative Team already has been exposed to potentially privileged material. Without delving into specifics, the Privilege Review Team's Report references at least two instances in which members of the Investigative Team were exposed to material that was then delivered to the Privilege Review Team and, following another review, designated as potentially privileged material [ECF No. 40 p. 6]. Those instances alone, even if entirely inadvertent, yield questions about the adequacy of the filter review process.[13]

[13] In explaining these incidents at the hearing, counsel from the Privilege Review Team characterized them as examples of the filter process working. The Court is not so sure. These instances certainly are demonstrative of integrity on the part of the Investigative Team members who returned the potentially privileged material. But they also indicate that, on more than one occasion, the Privilege Review Team's initial screening failed to identify potentially privileged material. The Government's other explanation—that these instances were the result of adopting an overinclusive view of potentially privileged material out of an abundance of caution—does not satisfy the Court either. Even accepting the Government's untested premise, the use of a broad standard for potentially privileged material does not explain how qualifying material ended up in the hands of the Investigative Team. Perhaps most concerning, the Filter Review Team's Report does not indicate that any steps were taken after these instances of exposure to wall off the two tainted members of the Investigation Team [*see* ECF No. 40]. In sum, without drawing inferences, there is a basis on this record to question how materials passed through the screening process, further underscoring the importance of procedural safeguards and an additional layer of review. *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) ("In *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), for instance, the government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This *Noriega* incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion.").

The Government's argument that another round of initial screening is unnecessary also disregards the value added by an outside reviewer in terms of, at a minimum, the appearance of fairness. Even if DOJ filter review teams often pass procedural muster, they are not always perceived to be as impartial as special masters. *See In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("It is a great leap of faith to expect that members of the general public would believe any [wall between a filter review team and a prosecution team] would be impenetrable; this notwithstanding our own trust in the honor of an [Assistant United States Attorney]."). Concerns about the perception of fair process are heightened where, as here, the Privilege Review Team and the Investigation Team contain members from the same section within the same DOJ division, even if separated for direct-reporting purposes on this specific matter. "[P]rosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done." *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 183 (4th Cir. 2019), *as amended* (Oct. 31, 2019). A commitment to the appearance of fairness is critical, now more than ever.[14]

Though the foregoing analysis focuses on attorney-client privilege, the Court is not convinced that similar concerns with respect to executive privilege should be disregarded in the manner suggested by the Government. The Government asserts that executive privilege has no

[14] The Government implies that additional independent review for attorney-client privilege, such as by a special master, is appropriate only when a search of a law firm occurred [ECF No. 48 pp. 30–32]. Whatever the extent of this argument, it fails decisively here. True, special masters ordinarily arise in the more traditional setting of law firms and attorneys' offices. But the Court does not see why these concerns would not apply, at least to a considerable degree, to the office and home of a former president. Moreover, at least one other court has authorized additional independent review for attorney-client privilege outside of the law firm context, in politicized circumstances. *See In re Search Warrant dated November 5, 2021*, No. 21-Misc-813, 2021 WL 5845146, at *1 (S.D.N.Y. Dec. 8, 2021) (appointing a special master to conduct review of materials seized from the homes of employees of Project Veritas for potentially attorney-client privileged materials).

role to play here because Plaintiff—a former head of the Executive Branch—is entirely foreclosed from successfully asserting executive privilege against the current Executive Branch [ECF No. 48 pp. 24–25]. In the Court's estimation, this position arguably overstates the law. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), a case involving review of presidential communications by a government archivist, the Supreme Court expressly recognized that (1) former Presidents may assert claims of executive privilege, *id.* at 439; (2) "[t]he expectation of the confidentiality of executive communications . . . [is] subject to erosion over time after an administration leaves office," *id.* at 451; and (3) the incumbent President is "in the best position to assess the present and future needs of the Executive Branch" for purposes of executive privilege, *id.* at 449. The Supreme Court did not rule out the possibility of a former President overcoming an incumbent President on executive privilege matters. Further, just this year, the Supreme Court noted that, at least in connection with a congressional investigation, "[t]he questions whether and in what circumstances a former President may obtain a court order preventing disclosure of privileged records from his tenure in office, in the face of a determination by the incumbent President to waive the privilege, are unprecedented and raise serious and substantial concerns." *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022); *see also id.* at 680 (Kavanaugh, J., respecting denial of application for stay) ("A former President must be able to successfully invoke the Presidential communications privilege for communications that occurred during his Presidency, even if the current President does not support the privilege claim. Concluding otherwise would eviscerate the executive privilege for Presidential communications.").[15] Thus, even if any assertion of executive privilege by Plaintiff ultimately fails in this context, that possibility, even if

[15] On the current record, having been denied an opportunity to inspect the seized documents, Plaintiff has not formally asserted executive privilege as to any specific materials, nor has the incumbent President upheld or withdrawn such an assertion.

likely, does not negate a former President's ability to raise the privilege as an initial matter. Accordingly, because the Privilege Review Team did not screen for material potentially subject to executive privilege, further review is required for that additional purpose.[16]

IV. Appointment of a Special Master

An independent special master should conduct the additional review that is warranted here. Rule 53(a) of the Federal Rules of Civil Procedure empowers courts to appoint a special master to "address pretrial . . . matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a). Here, as noted, the Government's inventory reflects a seizure of approximately 11,000 documents and 1,800 other items from Plaintiff's residence [*see* ECF No. 39-1]. Considering the volume of seized materials and the parties' expressed desire for swift resolution of this matter, a special master would be better suited than this Court to conduct the review. The appointment of a special master is not uncommon in the context of attorney-client privilege. *See, e.g.*, *In re Search Warrant dated November. 5, 2021*, 2021 WL 5845146, at *2; *Stewart*, 2002 WL 1300059, at *10; *Abbell*, 914 F. Supp. at 520. Nor is the appointment of a special master unheard of in the context of potentially executive privileged material. In fact, the Government itself recently contemplated and requested the appointment of a special master to review for both attorney-client and executive privilege. *See In the Matter of Search Warrants Executed on April 28, 2021*, No. 21-00425-MC-JPO, ECF No. 1 (S.D.N.Y. May 4, 2021) ("[U]nder certain exceptional circumstances, the appointment of a special master to review materials seized from an attorney may be appropriate. Those circumstances may exist

[16] The Court recognizes that, under the PRA, "[t]he United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist" to permit public dissemination of presidential records "violates the former President's [constitutional] rights or privileges." 44 U.S.C. § 2204.

where . . . the attorney represents the President of the United States such that any search may implicate not only the attorney-client privilege but the executive privilege."). Most importantly, courts recognize that special masters uniquely promote "the interests and appearance of fairness and justice." *United States v. Gallego*, No. CR-18-01537-001, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018); *see also In re Search Warrants Executed on April 28, 2021*, No. 21-MC-425 (JPO), 2021 WL 2188150, at *4 (S.D.N.Y. May 28, 2021) ("The Court agrees that the appointment of a special master is warranted here to ensure the perception of fairness."). Special effort must be taken to further those ends here.

V. Temporary Injunctive Relief

As a final matter, the Court determines that a temporary injunction on the Government's use of the seized materials for investigative purposes—but not ODNI's national security assessment—is appropriate and equitable to uphold the value of the special master review.[17] It is not entirely clear whether courts must perform an additional analysis under Rule 65 of the Federal Rules of Civil Procedure in this context, seeing as how a temporary restraint on use naturally furthers and complements the appointment of a special master. *See, e.g.*, *Stewart*, 2002 WL 1300059, at *10 (instructing the government not to review the seized documents pending further instruction). To appoint a special master to make privilege determinations while simultaneously allowing the Government, in the interim, to continue using potentially privileged material for

[17] Although the Motion asks the Court to enjoin the Government's review of the seized materials pending the appointment of a special master, it is clear that this request is meant to cover the Government's temporary use of the seized materials and extend into the special master's review process as appropriate. Any uncertainty on this point was clarified by Plaintiff's presentation at the hearing. *See United States v. Potes Ramirez*, 260 F.3d 1310, 1315 (11th Cir. 2001) ("In the context of Rule 41[(g)] motions, several circuit courts have remarked on a district court's authority to fashion an equitable remedy[] when appropriate . . . .").

investigative purposes would be to ignore the pressing concerns and hope for the best.[18] Moreover, many courts that have explicitly issued injunctions relating to special master review have done so without discussing Rule 65. *See USA v. Gallego et al*, No. 18-01537-CR-RM-BGM-1, ECF Nos. 26, 36 (Aug. 9 & 10, 2018). In any event, the Government reasonably maintains (without objection from Plaintiff) that the Court must engage with Rule 65, and so for the sake of completeness and prudence, the Court proceeds accordingly.[19]

Rule 65 recognizes the power of courts to issue injunctive relief. Such relief is considered "extraordinary," and to obtain it, a movant must "clearly carr[y] the burden of persuasion" as to the following factors: (1) a substantial likelihood of success on the merits; (2) irreparable injury unless the injunction is issued; (3) the threatened injury to the movant outweighs whatever damage the injunction may cause to the opposing party; and (4) the injunction would not be adverse to the public interest. *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1519 (11th Cir. 1983) (quoting *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). "When the government is the opposing party, as it is here, the third and fourth factors merge." *Georgia v. President of the United States*, No. 21-14269, 2022 WL 3703822, at *3 (11th Cir. Aug. 26, 2022).

As discussed above, *see supra* Discussion III, the Court is satisfied that Plaintiff has "a likelihood of success on the merits of [his] challenge to the [Privilege Review Team] and its [p]rotocol." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 171; *see also In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, 11 F.4th at 1248–49 (assessing "likelihood of success on the merits" in terms of the sufficiency of the filter

[18] Even without a temporary injunction as described herein, the Court would exercise its discretion to appoint a special master despite the considerably diminished utility of such an appointment.

[19] Because this part of the Order relies on much of the same reasoning articulated above, the Court uses internal cross-references where appropriate to minimize repetition.

team's review). For the same reasons—chiefly, the risk that the Government's filter review process will not adequately safeguard Plaintiff's privileged and personal materials in terms of exposure to either the Investigative Team or the media—Plaintiff has sufficiently established irreparable injury.

With regard to the injury factor, the Government contends that the timing of the Motion—filed two weeks after the subject seizure occurred—"militates against a finding of irreparable harm" [ECF No. 48 p. 20 (quoting *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016))]. The Court disagrees. As the Government acknowledges, denials of injunctive relief based on a party's delay usually arise in the context of considerably longer periods of time than the fourteen-day span implicated here. *Wreal*, 840 F.3d at 1244, 1248. Nor has the Government offered any authority denying injunctive relief on the basis of a two-week span. On the contrary, courts have held that delays of two or three weeks are not sufficiently long to undercut a showing of irreparable harm. *See, e.g.*, *Tom Doherty Assocs. v. Saban Ent, Inc.*, 60 F.3d 27, 39–40 (2d Cir. 1995); *Fisher-Price Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 125 (2d Cir. 1994), *abrogated on other grounds by Belair v. MGA Ent., Inc.*, 503 F. App'x 65 (2d Cir. 2021). The Government thus is left to suggest that two weeks, perhaps ordinarily acceptable, is too long here because requests for special masters to review privileged material are typically made on a more expedited basis [ECF No. 48 pp. 20–21]. On balance, the Court is not persuaded. It is undisputed that Plaintiff's counsel attempted to resolve Plaintiff's request for a special master and other relief informally with the Government almost immediately after the search, without judicial intervention [*see* ECF No. 1 pp. 8–9]. In view of Plaintiff's timely attempt toward a negotiated resolution of this issue, along with Plaintiff's inability to know the extent of what was seized, the Court is satisfied that Plaintiff did not "slumber[] on [his] rights." *In re Search Warrant Issued June 13,*

2019, 942 F.3d at 182. While Plaintiff perhaps did not act as promptly as he could have, the two-week delay does not now preclude Plaintiff from seeking or being entitled to injunctive relief.

Lastly, with respect to the merged third and fourth factors, Plaintiff has shown, all in all, that the public and private interests at stake support a temporary enjoinment on the use of the seized materials for investigative purposes, without impacting the Government's ongoing national security review. As Plaintiff articulated at the hearing, the investigation and treatment of a former president is of unique interest to the general public, and the country is served best by an orderly process that promotes the interest and perception of fairness. *See supra* Discussion III–IV; *see also In re Search Warrant Issued June 13, 2019*, 942 F.3d at 182 ("[A]n award of injunctive relief in these circumstances supports the 'strong public interest' in the integrity of the judicial system." (quoting *United States v. Hasting*, 461 U.S. 499, 527 (1983) (Brennan, J., concurring in part and dissenting in part))). The Government's principal objection is that an injunction pending resolution of the special master's review would delay the associated criminal investigation and national security risk assessment [ECF No. 48 pp. 29–30]. With respect to the referenced national security concerns, the Court understands and does not impact that component. But with respect to the Government's ongoing criminal investigation, the Court does not find that a temporary special master review under the present circumstances would cause undue delay.[20] "[E]fficient criminal investigations are certainly desirable," *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181, but so too are countervailing considerations of fair process and public trust. "[T]he [G]overnment chose to proceed by securing a search warrant for [the former President's home and office] and seeking and obtaining [a] magistrate judge's approval of the [f]ilter [p]rotocol. The

[20] The Government represents that it completed a preliminary review of the seized property in approximately three weeks [ECF Nos. 39, 40].

[G]overnment should have been fully aware that use of a filter team in these circumstances was ripe for substantial legal challenges, and should have anticipated that those challenges could delay its investigations." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181. None of this should be read to minimize the importance of investigating criminal activity or to indicate anything about the merits of any future court proceeding.

For all of these reasons, upon full consideration of the Rule 65 factors, the Court determines that a temporary injunction on the Government's use of the seized materials for criminal investigative purposes pending resolution of the special master's review process is warranted. The Court is mindful that restraints on criminal prosecutions are disfavored[21] but finds that these unprecedented circumstances call for a brief pause to allow for neutral, third-party review to ensure a just process with adequate safeguards.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. A special master shall be **APPOINTED** to review the seized property, manage assertions of privilege and make recommendations thereon, and evaluate claims for return of property. The exact details and mechanics of this review process will be decided expeditiously following receipt of the parties' proposals as described below.
2. The Government is **TEMPORARILY ENJOINED** from further review and use of any of the materials seized from Plaintiff's residence on August 8, 2022, for criminal investigative purposes pending resolution of the special master's review process as

[21] *See Younger v. Harris*, 401 U.S. 37, 43–44 (1971) ("[C]ourts of equity should not . . . act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."); *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951) (explaining that "[t]he maxim that equity will not enjoin a criminal prosecution" applies with greatest force in the context of the federal government interfering with state prosecutions).

determined by this Court. The Government may continue to review and use the materials seized for purposes of intelligence classification and national security assessments.

3. On or before **September 9, 2022**, the parties shall meaningfully confer and submit a joint filing that includes:
    a. a list of proposed special master candidates; and
    b. a detailed proposed order of appointment in accordance with Rule 53(b), outlining, *inter alia*, the special master's duties and limitations consistent with this Order, ex parte communication abilities, schedule for review, and compensation.
4. Any points of substantive disagreement as to 3(a) or (b) should be identified in the forthcoming joint filing.
5. The Court **RESERVES RULING** on Plaintiff's request for return of property pending further review.
6. This Order is subject to modification as appropriate.

DONE AND ORDERED in Chambers at Fort Pierce, Florida this 5th day of September 2022.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
----------X

DONALD J. TRUMP,

Plaintiff,

- v -

UNITED STATES OF AMERICA

Defendant.
----------X

DECLARATION

No. 22-CV-81294-CANNON

DECLARATION OF
ALAN E. KOHLER, JR., ASSISTANT DIRECTOR,
COUNTERINTELLIGENCE DIVISION,
FEDERAL BUREAU OF INVESTIGATION

I, Alan E. Kohler, Jr., hereby declare the following:

1. I am the Assistant Director of the Counterintelligence Division ("the Division") of the Federal Bureau of Investigation ("FBI"), United States Department of Justice ("DOJ"). The Division oversees FBI efforts to deter, detect, and neutralize foreign intelligence threats to the United States and its interests, encompassing the national security operations of the China and Russia/Global/Iran Mission Centers. The Division also is responsible for all investigations involving mishandling of classified or national defense information.

2. As the Assistant Director of the Counterintelligence Division, I am responsible for, among other things, directing and overseeing the programs responsible for conducting counterintelligence investigations. I am also the accountable executive for the files and records of the Division. In my management and oversight capacity for the Division, which includes its national security investigations and operations, I am also responsible for the protection of

classified national security information and processes within the Division, including information in the Division's possession as a result of its investigative efforts. I have been delegated original classification authority by the Attorney General. *See* Executive Order 13526 § 1.3(c). As a result, and pursuant to all applicable Executive Orders, I am responsible for the protection of classified national security and law enforcement sensitive information. Thus, I have been authorized by the Attorney General and the Director of the FBI to execute declarations and affidavits in order to protect such information.

3. The matters stated herein are based on my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and information furnished by Special Agents and other employees of the FBI. My conclusions have been reached in accordance therewith.

Purpose of the Declaration

4. I submit this Declaration in support of the Government's Motion for a Partial Stay Pending Appeal. This matter relates to the FBI's execution of a search warrant at the premises of Plaintiff Donald J. Trump, based on a finding of probable cause that the search would uncover evidence of violations of 18 U.S.C. §§ 793 (willful retention of national defense information), 2071 (concealment or removal of government records), and 1519 (obstruction of a federal investigation). During the search, the FBI seized thirty-three boxes, containers, or other items of evidence, which contained just over one hundred records with classification markings, including records marked TOP SECRET and records marked as containing additional sensitive compartmented information. Plaintiff subsequently initiated proceedings in this Court, seeking an order appointing a special master to review all seized materials and manage potential claims of attorney-client and executive privilege, as well as an injunction barring the Government's review

and use of the seized materials. On September 5, 2022, the Court issued an Order "authoriz[ing] the appointment of a special master to review the seized property for personal items and documents and potentially privileged material subject to claims of attorney-client and/or executive privilege," and "enjoin[ing] the Government from reviewing and using the seized materials for investigative purposes pending completion of the special master's review or further Court order."

5. I understand that the Government's motion this Declaration supports seeks a stay to the extent the Court's Order (1) enjoins the further review and use for criminal investigative purposes of records bearing classification markings that were recovered pursuant to a court-authorized search warrant and (2) requires the government to disclose those classified records to a special master for review. This Declaration specifically addresses the irreparable harm to the national security that would result from enjoining the further review and use of records bearing classification markings for criminal investigative purposes.

The Intelligence Community's Classification Review and National Security Risk Assessment Are Inextricably Linked With the Criminal Investigation

6. As previously explained, the Counterintelligence Division, for which I am the responsible executive, conducts the FBI's investigations involving mishandling of classified or national defense information. Such investigations fundamentally require the FBI to understand the nature of the information at issue, including its proper classification. Thus, the FBI must conduct an assessment of the relevant information, including by obtaining a classification review. As part of a classification review, an original classification authority is asked to determine whether documents bearing classification markings are, in fact, properly classified—*i.e.*, whether "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." E.O. 13526 § 1.1(a)(4). The classification review is necessary to determine

whether harm would result if the materials were disclosed—*i.e.*, to conduct the national security risk assessment that has been described in this case by the Government and the Court.

7. In this matter, to effectuate the IC's classification review, the FBI must be able to access the evidence, duplicate it, discern the appropriate IC agency or agencies to which it should be provided, and deliver copies to the appropriate agency or agencies. Given the breadth of documents seized during the August 8, 2022, search of the Premises, and the number of relevant Departments and agencies with equities in those documents, the Office of the Director of National Intelligence ("ODNI") agreed to oversee and help coordinate the ongoing classification review. Such review, as noted, will enable the Government to assess the potential harms to national security resulting from any improper retention and storage of classified information. At the same time, however, this review will inform the FBI's ongoing criminal investigation into the potential mishandling of classified or national defense information.

8. The connection between the national security and criminal investigative aspects of this matter are grounded in the dual mission of the FBI. That is, the FBI itself is part of the United States Intelligence Community ("IC"), and since the 9/11 attacks, the FBI has integrated its intelligence and law enforcement functions when it exercises its national security mission. The FBI conducts investigations that may constitute an exercise both of the FBI's criminal investigation authority and of the FBI's authority to investigate threats to the national security.

9. Thus, the overlap of the FBI's criminal investigative and national security-related missions would make it exceedingly difficult to bifurcate the FBI personnel working on the criminal investigation from those working in conjunction with other departments or agencies in the IC. Moreover, as noted above, the IC assessments necessarily will inform the FBI's criminal investigation, including subsequent investigative steps that might be necessary. If, for example,

another IC element were to obtain intelligence indicating that a classified document in the seized materials might have been compromised, the FBI would be responsible for taking some of the necessary steps to evaluate that risk. The same is true of the empty folders with "'classified' banners" that were among the seized materials in this case: the FBI's investigative authorities could be instrumental in determining what materials may once have been stored in these folders and whether they may have been lost or compromised—steps that, again, may require the use of grand jury subpoenas, search warrants, and other criminal investigative tools, and investigative efforts that could lead to evidence that would also be highly relevant to advancing the FBI's criminal investigation. Significantly, while other IC elements may have certain limited investigative authorities, the FBI is the only IC element with a full suite of authorities and tools to investigate and recover any improperly retained and stored classified information in the United States. Given its broad counterintelligence and law enforcement mandates, the FBI is critical to the whole-of-government effort to address any national security risks at issue in this case.

10. Furthermore, even were it feasible to bifurcate the FBI personnel involved in the Government's national security risk assessment from those involved in its criminal investigation, in practical terms, doing so makes little sense, given that the same senior DOJ and FBI officials, such as myself, are ultimately responsible for supervising the criminal investigation and for ensuring that the FBI is coordinating appropriately with the rest of the IC on its classification review and assessment.

Conclusion

11. For all the reasons set forth herein, the Intelligence Community's classification review and national security risk assessment are inextricably linked with the criminal investigation.

I therefore submit this Declaration in support of the Government's Motion for a Partial Stay Pending Appeal.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2022.

Alan E. Kohler, Jr.
Assistant Director
Counterintelligence Division
Federal Bureau of Investigation

Archivist *of the*
United States

May 10, 2022

Evan Corcoran
Silverman Thompson
400 East Pratt Street
Suite 900
Baltimore, MD 21202
By Email

Dear Mr. Corcoran:

I write in response to your letters of April 29, 2022, and May 1, 2022, requesting that the National Archives and Records Administration (NARA) further delay the disclosure to the Federal Bureau of Investigation (FBI) of the records that were the subject of our April 12, 2022 notification to an authorized representative of former President Trump.

As you are no doubt aware, NARA had ongoing communications with the former President's representatives throughout 2021 about what appeared to be missing Presidential records, which resulted in the transfer of 15 boxes of records to NARA in January 2022. In its initial review of materials within those boxes, NARA identified items marked as classified national security information, up to the level of Top Secret and including Sensitive Compartmented Information and Special Access Program materials. NARA informed the Department of Justice about that discovery, which prompted the Department to ask the President to request that NARA provide the FBI with access to the boxes at issue so that the FBI and others in the Intelligence Community could examine them. On April 11, 2022, the White House Counsel's Office—affirming a request from the Department of Justice supported by an FBI letterhead memorandum—formally transmitted a request that NARA provide the FBI access to the 15 boxes for its review within seven days, with the possibility that the FBI might request copies of specific documents following its review of the boxes.

Although the Presidential Records Act (PRA) generally restricts access to Presidential records in NARA's custody for several years after the conclusion of a President's tenure in office, the statute further provides that, "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke," such records "shall be made 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." 44 U.S.C. §

Debra Steidel Wall · T: 202.357.5900 · F: 202.357.5901 · *debra.wall@nara.gov*
National Archives *and* Records Administration · 8601 Adelphi Road · College Park, MD 20740 · *www.archives.gov*

2205(2)(B). Those conditions are satisfied here. As the Department of Justice's National Security Division explained to you on April 29, 2022:

> There are important national security interests in the FBI and others in the Intelligence Community getting access to these materials. According to NARA, among the materials in the boxes are over 100 documents with classification markings, comprising more than 700 pages. Some include the highest levels of classification, including Special Access Program (SAP) materials. Access to the materials is not only necessary for purposes of our ongoing criminal investigation, but the Executive Branch must also 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. Accordingly, we are seeking immediate access to these materials so as to facilitate the necessary assessments that need to be conducted within the Executive Branch.

We advised you in writing on April 12 that, "in light of the urgency of this request," we planned to "provid[e] access to the FBI next week," i.e., the week of April 18. *See* Exec. Order No. 13,489, § 2(b), 74 Fed. Reg. 4,669 (Jan. 21, 2009) (providing a 30-day default before disclosure but authorizing the Archivist to specify "a shorter period of time" if "required under the circumstances"); *accord* 36 C.F.R. § 1270.44(g) ("The Archivist may adjust any time period or deadline under this subpart, as appropriate, to accommodate records requested under this section."). In response to a request from another representative of the former President, the White House Counsel's Office acquiesced in an extension of the production date to April 29, and so advised NARA. In accord with that agreement, we had not yet provided the FBI with access to the records when we received your letter on April 29, and we have continued to refrain from providing such access to date.

It has now been four weeks since we first informed you of our intent to provide the FBI access to the boxes so that it and others in the Intelligence Community can conduct their reviews. Notwithstanding the urgency conveyed by the Department of Justice and the reasonable extension afforded to the former President, your April 29 letter asks for additional time for you to review the materials in the boxes "in order to ascertain whether any specific document is subject to privilege," and then to consult with the former President "so that he may personally make any decision to assert a claim of constitutionally based privilege." Your April 29 letter further states that in the event we do not afford you further time to review the records before NARA discloses them in response to the request, we should consider your letter to be "a protective assertion of executive privilege made by counsel for the former President."

The Counsel to the President has informed me that, in light of the particular circumstances presented here, President Biden defers to my determination, in consultation with the Assistant Attorney General for the Office of Legal Counsel, regarding whether or not I should uphold the former President's purported "protective assertion of executive privilege." *See* 36 C.F.R. § 1270.44(f)(3). Accordingly, I have consulted with the Assistant Attorney General for the Office of Legal Counsel to inform my "determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege." Exec. Order No. 13,489, § 4(a).

The Assistant Attorney General has advised me that there is no precedent for an assertion of executive privilege by a former President *against an incumbent President* to prevent the latter from obtaining from NARA Presidential records belonging to the Federal Government where "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." 44 U.S.C. § 2205(2)(B).

To the contrary, the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), strongly suggests that a former President may not successfully assert executive privilege "against the very Executive Branch in whose name the privilege is invoked." *Id.* at 447-48. In *Nixon v. GSA*, the Court rejected former President Nixon's argument that a statute requiring that Presidential records from his term in office be maintained in the custody of, and screened by, NARA's predecessor agency—a "very limited intrusion by personnel in the Executive Branch sensitive to executive concerns"—would "impermissibly interfere with candid communication of views by Presidential advisers." *Id.* at 451; *see also id.* at 455 (rejecting the claim). The Court specifically noted that an "incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations." *Id.* at 452; *see also id.* at 441-46 (emphasizing, in the course of rejecting a separation-of-powers challenge to a provision of a federal statute governing the disposition of former President Nixon's tape recordings, papers, and other historical materials "within the Executive Branch," where the "employees of that branch [would] have access to the materials only 'for lawful Government use,'" that "[t]he Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch"; and concluding that "nothing contained in the Act renders it unduly disruptive of the Executive Branch").

It is not necessary that I decide whether there might be *any* circumstances in which a former President could successfully assert a claim of executive privilege to prevent an Executive Branch agency from having access to Presidential records for the performance of valid executive functions. The question in this case is not a close one. The Executive Branch here is seeking access to records belonging to, and in the custody of, the Federal Government itself, not only 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." These reviews will be conducted by current government personnel who, like the archival officials in *Nixon v. GSA*, are "sensitive to executive concerns." *Id.* at 451. And on the other side of the balance, there is no reason to believe such reviews could "adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking." *Id.* at 450. To the contrary: Ensuring that classified information is appropriately protected, and taking any necessary remedial action if it was not, are steps essential to preserving the ability of future Presidents to "receive the full and frank submissions of facts and opinions upon which effective discharge of [their] duties depends." *Id.* at 449.

Because an assertion of executive privilege against the incumbent President under these circumstances would not be viable, it follows that there is no basis for the former President to make a "protective assertion of executive privilege," which the Assistant Attorney General

informs me has never been made outside the context of a congressional demand for information from the Executive Branch. Even assuming for the sake of argument that a former President may under some circumstances make such a "protective assertion of executive privilege" to preclude the Archivist from complying with a disclosure otherwise prescribed by 44 U.S.C. § 2205(2), there is no predicate for such a "protective" assertion here, where there is no realistic basis that the requested delay would result in a viable assertion of executive privilege against the incumbent President that would prevent disclosure of records for the purposes of the reviews described above. Accordingly, the only end that would be served by upholding the "protective" assertion here would be to delay those very important reviews.

I have therefore decided not to honor the former President's "protective" claim of privilege. *See* Exec. Order No. 13,489, § 4(a); *see also* 36 C.F.R. 1270.44(f)(3) (providing that unless the incumbent President "uphold[s]" the claim asserted by the former President, "the Archivist discloses the Presidential record"). For the same reasons, I have concluded that there is no reason to grant your request for a further delay before the FBI and others in the Intelligence Community begin their reviews. Accordingly, NARA will provide the FBI access to the records in question, as requested by the incumbent President, beginning as early as Thursday, May 12, 2022.

Please note that, in accordance with the PRA, 44 U.S.C. § 2205(3), the former President's designated representatives can review the records, subject to obtaining the appropriate level of security clearance. Please contact my General Counsel, Gary M. Stern, if you would like to discuss the details of such a review, such as you proposed in your letter of May 5, 2022, particularly with respect to any unclassified materials.

Sincerely,

Debra Steidel Wall

DEBRA STEIDEL WALL
Acting Archivist of the United States

AO 110 (Rev. 06/09) Subpoena to Testify Before a Grand Jury

UNITED STATES DISTRICT COURT

for the

District of Columbia

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: Custodian of Records
The Office of Donald J. Trump
1100 South Ocean Blvd.
Palm Beach, FL 33480

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place:	Date and Time:
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA U.S. Courthouse, 3rd Floor Grand Jury #21-09 333 Constitution Avenue, N.W. Washington, D.C. 20001	May 24, 2022 9:00 a.m.

You must also bring with you the following documents, electronically stored information, or objects:

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, including but not limited to the following: Top Secret, Secret, Confidential, Top Secret/SI-G/NOFORN/ORCON, Top Secret/SI-G/NOFORN, Top Secret/HCS-O/NOFORN/ORCON, Top Secret/HCS-O/NOFORN, Top Secret/HCS-P/NOFORN/ORCON, Top Secret/HCS-P/NOFORN, Top Secret/TK/NOFORN/ORCON, Top Secret/TK/NOFORN, Secret/NOFORN, Confidential/NOFORN, TS, TS/SAP, TS/SI-G/NF/OC, TS/SI-G/NF, TS/HCS-O/NF/OC, TS/HCS-O/NF, TS/HCS-P/NF/OC, TS/HCS-P/NF, TS/HCS-P/SI-G, TS/HCS-P/SI/TK, TS/TK/NF/OC, TS/TK/NF, S/NF, S/FRD, S/NATO, S/SI, C, and C/NF.

Date: May 11, 2022

The name, address, telephone number and email of the prosecutor who requests this subpoena are:

Jay I. Bratt
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
jay.bratt2@usdoj.gov
[redacted]

Subpoena #GJ2022042790054

CO 293 (Rev. 8/91) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE (1)		
RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		
SERVED BY (PRINT NAME)		TITLE

STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER (2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

_____
Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of
certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

Subpoena #GJ2022042790054

CERTIFICATION

I hereby certify as follows:

1. I have been designated to serve as Custodian of Records for The Office of Donald J. Trump, for purposes of the testimony and documents subject to subpoena #GJ20222042790054.
2. I understand that this certification is made to comply with the subpoena, in lieu of a personal appearance and testimony.
3. Based upon the information that has been provided to me, I am authorized to certify, on behalf of the Office of Donald J. Trump, the following:
    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.

I swear or affirm that the above statements are true and correct to the best of my knowledge.

Dated: June 3, 2022

[redacted]


TOP SECRET//SCI
SECRET//SCI
CONTAINS SENSITIVE COMPARTMENTED INFORMATION
UP TO HCS-P/SI/TK
THIS IS A COVERSHEET
FOR CLASSIFIED INFORMATION
SECRET
CONFIDENTIAL
2A
BANKERS BOX
TIME

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-MJ-8332-BER

IN RE SEALED SEARCH WARRANT **FILED UNDER SEAL**

_____/

SECOND NOTICE OF FILING OF REDACTED DOCUMENTS

The United States hereby gives notice that it is filing the following document, which is a redacted version of material previously filed in this case number under seal:

- The criminal cover sheet associated with the August 5, 2022 warrant application (Docket Entry 1, page 1);
- The cover sheet to the August 5, 2022 warrant application (Docket Entry 1, page 4);
- The government's motion to seal the search warrant (Docket Entry 2); and
- The Court's order sealing the warrant and related materials (Docket Entry 3).

JUAN ANTONIO GONZALEZ
United States Attorney

By:_____
United States Attorney
Florida Bar No. 897388
99 NE 4th Street, 8th Floor
Miami, Fl 33132
Tel: 305-961-9001
Email: juan.antonio.gonzalez@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-mj-8332-BER

IN RE SEALED SEARCH WARRANT
_____/

CRIMINAL COVER SHEET

1. Did this matter originate from a matter pending in the Northern Region of the United States Attorney's Office prior to August 8, 2014 (Mag. Judge Shaniek Maynard)? No

2. Did this matter originate from a matter pending in the Central Region of the United States Attorney's Office prior to October 3, 2019 (Mag. Judge Jared Strauss)? No

Respectfully submitted,

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

BY: [redacted]
Assistant United States Attorney
[redacted]
99 Northeast 4th Street
Miami, Florida 33132-2111
Telephone: [redacted]
E-mail: [redacted]

AO 106A (08/18) Application for a Warrant by Telephone or Other Reliable Electronic Means

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)

the Premises Located at 1100 S. Ocean Blvd., Palm Beach, FL 33480, as further described in Attachment A

Case No. 22-mj-8332-BER

APPLICATION FOR A WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location):*

See Attachment A

located in the Southern District of Florida, there is now concealed *(identify the person or describe the property to be seized):*

See Attachment B

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more):*

- ☑ evidence of a crime;
- ☑ contraband, fruits of crime, or other items illegally possessed;
- ☐ property designed for use, intended for use, or used in committing a crime;
- ☐ a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section	*Offense Description*
18 U.S.C. § 793	Willful retention of national defense information
18 U.S.C. § 2071	Concealment or removal of government records
18 U.S.C. § 1519	Obstruction of federal investigation

The application is based on these facts:

See attached Affidavit of FBI Special Agent [redacted]

- ☑ Continued on the attached sheet.
- ☐ Delayed notice of ____ days *(give exact ending date if more than 30 days:* _____ *)* is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attac[redacted]

[redacted]

[redacted] Special Agent, FBI

Applicant's signature

Printed name and title

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by Phone (WhatsApp) *(specify reliable electronic means).*

Date: 08/05/2022

Judge's signature

City and state: West Palm Beach, Florida

Hon. Bruce E. Reinhart, U.S. Magistrate Judge

Printed name and title

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-mj-8332-BER

IN RE: SEARCH WARRANT

HIGHLY SENSITIVE DOCUMENT

_____/

MOTION TO SEAL

The United States of America, by and through the undersigned Assistant United States Attorney, hereby moves to seal this Motion, the Search Warrant, and all its accompanying documents, until further order of this Court. The United States submits that there is good cause because the integrity of the ongoing investigation might be compromised, and evidence might be destroyed.

The United States further requests that, pursuant to this Court's procedures for Highly Sensitive documents, all documents associated with this investigation not be filed on the Court's electronic docket because filing these materials on the electronic docket poses a risk to safety given the sensitive nature of the material contained therein.

Respectfully submitted,

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

BY: [redacted]
Assistant United States Attorney
[redacted]
99 Northeast 4th Street
Miami, Florida 33132-2111
[redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-mj-8332-BER

IN RE: SEARCH WARRANT

HIGHLY SENSITIVE DOCUMENT

_____/

SEALING ORDER

The United States of America, having applied to this Court for an Order sealing the Motion to Seal, the Search Warrant and all its accompanying documents, and this order and the Court finding good cause:

IT IS HEREBY ORDERED that the Motion to Seal, the Search Warrant and its accompanying documents, and this Order shall be filed under seal until further order of this Court. However, the United States Attorney's Office and the Federal Bureau of Investigation may obtain copies of any sealed document for purposes of executing the search warrant.

DONE AND ORDERED in chambers at West Palm Beach, Florida, this 5TH day of August 2022.

HON. BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN THE MATTER OF THE SEARCH OF:	)	
	)	Case No.
LOCATIONS WITHIN THE PREMISES	)	
TO BE SEARCHED IN ATTACHMENT A	)	**Filed Under Seal**

AFFIDAVIT IN SUPPORT OF AN APPLICATION UNDER RULE 41 FOR A WARRANT TO SEARCH AND SEIZE

I, [redacted], being first duly sworn, hereby depose and state as follows:

INTRODUCTION AND AGENT BACKGROUND

1. The government is conducting a criminal investigation concerning the improper removal and storage of classified information in unauthorized spaces, as well as the unlawful concealment or removal of government records. The investigation began as a result of a referral the United States National Archives and Records Administration (NARA) sent to the United States Department of Justice (DOJ) on February 9, 2022, hereinafter, "NARA Referral." The NARA Referral stated that on January 18, 2022, in accordance with the Presidential Records Act (PRA), NARA received from the office of former President DONALD J. TRUMP, hereinafter "FPOTUS," via representatives, fifteen (15) boxes of records, hereinafter, the "FIFTEEN BOXES." The FIFTEEN BOXES, which had been transported from the FPOTUS property at 1100 S Ocean Blvd, Palm Beach, FL 33480, hereinafter, the "PREMISES," a residence and club known as "Mar-a-Lago," further described in Attachment A, were reported by NARA to contain, among other things, highly classified documents intermingled with other records.

2. After an initial review of the NARA Referral, the Federal Bureau of Investigation (FBI) opened a criminal investigation to, among other things, determine how the documents with

classification markings and records were removed from the White House (or any other authorized location(s) for the storage of classified materials) and came to be stored at the PREMISES; determine whether the storage location(s) at the PREMISES were authorized locations for the storage of classified information; determine whether any additional classified documents or records may have been stored in an unauthorized location at the PREMISES or another unknown location, and whether they remain at any such location; and identify any person(s) who may have removed or retained classified information without authorization and/or in an unauthorized space.

3. The FBI's investigation has established that documents bearing classification markings, which appear to contain National Defense Information (NDI), were among the materials contained in the FIFTEEN BOXES and were stored at the PREMISES in an unauthorized location. Since the FIFTEEN BOXES were provided to NARA, additional documents bearing classification markings, which appear to contain NDI and were stored at the PREMISES in an unauthorized location, have been produced to the government in response to a grand jury subpoena directed to FPOTUS's post-presidential office and seeking documents containing classification markings stored at the PREMISES and otherwise under FPOTUS's control. Further, there is probable cause to believe that additional documents that contain classified NDI or that are Presidential records subject to record retention requirements currently remain at the PREMISES. There is also probable cause to believe that evidence of obstruction will be found at the PREMISES.

4. I am a Special Agent with the FBI assigned to the Washington Field Office [redacted]. During this time, I have received training at the FBI Academy located at Quantico, Virginia, specific to counterintelligence and espionage investigations. [redacted].

Based on my experience and training, I am familiar with efforts used to unlawfully collect, retain, and disseminate sensitive government information, including classified NDI.

5. I make this affidavit in support of an application under Rule 41 of the Federal Rules of Criminal Procedure for a warrant to search the premises known as 1100 S Ocean Blvd, Palm Beach, FL 33480, the "PREMISES," as further described in Attachment A, for the things described in Attachment B.

6. Based upon the following facts, there is probable cause to believe that the locations to be searched at the PREMISES contain evidence, contraband, fruits of crime, or other items illegally possessed in violation of 18 U.S.C. §§ 793(e), 1519, or 2071.

SOURCE OF EVIDENCE

7. The facts set forth in this affidavit are based on my personal knowledge, knowledge obtained during my participation in this investigation, and information obtained from other FBI and U.S. Government personnel. Because this affidavit is submitted for the limited purpose of establishing probable cause in support of the application for a search warrant, it does not set forth each and every fact that I, or others, have learned during the course of this investigation.

STATUTORY AUTHORITY AND DEFINITIONS

8. Under 18 U.S.C. § 793(e), "[w]hoever having unauthorized possession of, access to, or control over any document . . . 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 do or causes 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" shall be fined or imprisoned not more than ten years, or both.

9. Under Executive Order 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.

10. Where such unauthorized disclosure could reasonably result in damage to the national security, the information may be classified as "Confidential" and must be properly safeguarded. Where such unauthorized disclosure could reasonably result in serious damage to the national security, the information may be classified as "Secret" and must be properly safeguarded. Where such unauthorized disclosure could reasonably result in exceptionally grave damage to the national security, the information may be classified as "Top Secret" and must be properly safeguarded.

11. Sensitive Compartmented Information (SCI) means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems.

12. Special Intelligence, or "SI," is an SCI control system designed to protect technical and intelligence information derived from the monitoring of foreign communications signals by other than the intended recipients. The SI control system protects SI-derived information and information relating to SI activities, capabilities, techniques, processes, and procedures.

13. HUMINT Control System, or "HCS," is an SCI control system designed to protect intelligence information derived from clandestine human sources, commonly referred to as

"human intelligence." The HCS control system protects human intelligence-derived information and information relating to human intelligence activities, capabilities, techniques, processes, and procedures.

14. Foreign Intelligence Surveillance Act, or "FISA," is a dissemination control designed to protect intelligence information derived from the collection of information authorized under the Foreign Intelligence Surveillance Act by the Foreign Intelligence Surveillance Court, or "FISC."

15. Classified information may be marked as "Not Releasable to Foreign Nationals/Governments/US Citizens," abbreviated "NOFORN," to indicate information that may not be released in any form to foreign governments, foreign nationals, foreign organizations, or non-U.S. citizens without permission of the originator.

16. Classified information may be marked as "Originator Controlled," abbreviated "ORCON." This marking indicates that dissemination beyond pre-approved U.S. entities requires originator approval.

17. Classified information of any designation may be shared only with persons determined by an appropriate United States Government official to be eligible for access, and who possess a "need to know." Among other requirements, in order for a person to obtain a security clearance allowing that person access to classified United States Government information, that person is required to and must agree to properly protect classified information by not disclosing such information to persons not entitled to receive it, by not unlawfully removing classified information from authorized storage facilities, and by not storing classified information in unauthorized locations. If a person is not eligible to receive classified information, classified information may not be disclosed to that person. In order for a foreign government to receive

access to classified information, the originating United States agency must determine that such release is appropriate.

18. Pursuant to Executive Order 13526, classified information contained on automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified information must be maintained in a manner that: (1) prevents access by unauthorized persons; and (2) ensures the integrity of the information.

19. 32 C.F.R. Parts 2001 and 2003 regulate the handling of classified information. Specifically, 32 C.F.R. § 2001.43, titled "Storage," regulates the physical protection of classified information. This section prescribes that Secret and Top Secret information "shall be stored in a [General Services Administration]-approved security container, a vault built to Federal Standard (FHD STD) 832, or an open storage area constructed in accordance with § 2001.53." It also requires periodic inspection of the container and the use of an Intrusion Detection System, among other things.

20. Under 18 U.S.C. § 1519:

> 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.

21. Under 18 U.S.C. § 2071:

> (a) 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.

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

22. Under the PRA, 44 U.S.C. § 2201:

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, 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. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code; (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

23. Under 44 U.S.C. § 3301(a), government "records" are defined as:

all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

PROBABLE CAUSE

NARA Referral

24. On February 9, 2022, the Special Agent in Charge of NARA's Office of the

Inspector General sent the NARA Referral via email to DOJ. The NARA Referral stated that according to NARA's White House Liaison Division Director, a preliminary review of the FIFTEEN BOXES indicated that they contained "newspapers, magazines, printed news articles, photos, miscellaneous print-outs, notes, presidential correspondence, personal and post-presidential records, and 'a lot of classified records.' Of most significant concern was that highly classified records were unfoldered, intermixed with other records, and otherwise unproperly [*sic*] identified."

25. On February 18, 2022, the Archivist of the United States, chief administrator for NARA, stated in a letter to Congress's Committee on Oversight and Reform Chairwoman The Honorable Carolyn B. Maloney, "NARA had ongoing communications with the representatives of former President Trump throughout 2021, which resulted in the transfer of 15 boxes to NARA in January 2022 . . . . NARA has identified items marked as classified national security information within the boxes." The letter also stated that, "[b]ecause NARA identified classified information in the boxes, NARA staff has been in communication with the Department of Justice." The letter was made publicly available at the following uniform resource locator (URL): https://www.archives.gov/files/foia/ferriero-response-to-02.09.2022-maloney-letter.02.18.2022.pdf. On February 18, 2022, the same day, the Save America Political Action Committee (PAC) posted the following statement on behalf of FPOTUS: "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 . . . ." An image of this statement is below.

SAVE AMERICA
PRESIDENT DONALD J. TRUMP

Statement by Donald J. Trump, 45th President of the United States of America

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. If this was anyone but "Trump" there would be no story here. Instead, the Democrats are in search of their next Scam. The Russia, Russia, Russia Hoax turned out to be a Democrat inspired fake story to help crooked Hillary Clinton. Impeachment Hoax #1, Impeachment Hoax #2, and so much more, has all been a Hoax. The Fake News is making it seem like me, as the President of the United States, was working in a filing room. No. I was busy destroying ISIS, building the greatest economy America had ever seen, brokering Peace deals, making sure Russia didn't attack Ukraine, making sure China didn't take over Taiwan, making sure there was no inflation, creating an energy independent country, rebuilding our military and Law enforcement, saving our Second Amendment, protecting our Border, and cutting taxes. Now, Russia is invading Ukraine, our economy is being destroyed, our Border is once again overrun, and the mandate continues. Instead of focusing on America, the media just wants to talk about their plan to "get" Trump. The people won't stand for it any longer!

[redacted]

26. [redacted]

[redacted]

27. [redacted]

[redacted]

[redacted]

28. [redacted]

29. [redacted]

[redacted]

Boxes Containing Documents Were Transported from the White House to Mar-a-Lago

30. 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. [redacted]

31. [redacted]

32. [redacted]

[redacted]

[redacted]

33. [redacted]

[redacted]

34. [redacted]

[redacted]

[redacted]

35. [redacted]

36. [redacted]

37. [redacted]

Provision of the Fifteen Boxes to NARA

38. [redacted]

[redacted]

39. On or about May 6, 2021, NARA made a request for the missing PRA records and continued to make requests until approximately late December 2021 when NARA was informed twelve boxes were found and ready for retrieval at the PREMISES. [redacted]

1 [redacted]

[redacted]

40. [redacted]

41. [redacted]

42. [redacted]

43. [redacted]

44. [redacted]

[redacted]

45. [redacted]

[redacted]

46. [redacted]

[redacted]

The FIFTEEN BOXES Provided to NARA Contain Classified Information

47. From May 16-18, 2022, FBI agents conducted a preliminary review of the FIFTEEN BOXES provided to NARA and identified documents with classification markings in fourteen of the FIFTEEN BOXES. A preliminary triage of the documents with classification markings revealed the following approximate numbers: 184 unique documents bearing classification markings, including 67 documents marked as CONFIDENTIAL, 92 documents marked as SECRET, and 25 documents marked as TOP SECRET. Further, the FBI agents observed markings reflecting the following compartments/dissemination controls: HCS, FISA, ORCON, NOFORN, and SI. Based on my training and experience, I know that documents classified at these levels typically contain NDI. Several of the documents also contained what appears to be FPOTUS's handwritten notes.

48. [redacted]

49. [redacted]

[redacted]

50. [redacted]

Grand Jury Subpoena, Related Correspondence, and Production of Additional Classified Documents

51. DOJ has advised me that, on May 11, 2022, an attorney representing FPOTUS, "FPOTUS COUNSEL 1," agreed to accept service of a grand jury subpoena from a grand jury sitting in the District of Columbia sent to him via email by one of the prosecutors handling this matter for DOJ, "DOJ COUNSEL." The subpoena was directed to the custodian of records for the Office of Donald J. Trump, and it requested the following materials:

> 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, including but not limited to the following: Top Secret, Secret, Confidential, Top Secret/SI-G/NOFORN/ORCON, Top Secret/SI-G/NOFORN, Top Secret/HCS-O/NOFORN/ORCON, Top Secret/HCS-O/NOFORN, Top Secret/HCS-P/NOFORN/ORCON, Top Secret/HCS-P/NOFORN, Top Secret/TK/NOFORN/ORCON, Top Secret/TK/NOFORN, Secret/NOFORN, Confidential/NOFORN, TS, TS/SAP, TS/SI-G/NF/OC, TS/SI-G/NF, TS/HCS-O/NF/OC, TS/HCS-O/NF, TS/HCS-P/NF/OC, TS/HCS-P/NF, TS/HCS-P/SI-G, TS/HCS-P/SI/TK, TS/TK/NF/OC, TS/TK/NF, S/NF, S/FRD, S/NATO, S/SI, C, and C/NF.

The return date of the subpoena was May 24, 2022. DOJ COUNSEL also sent FPOTUS COUNSEL 1 a letter that permitted alternative compliance with the subpoena by "providing any responsive documents to the FBI at the place of their location" and by providing from the custodian a "sworn certification that the documents represent all responsive records." The letter further stated that if no responsive documents existed, the custodian should provide a sworn certification to that effect.

52. On May 25, 2022, while negotiating for an extension of the subpoena, FPOTUS COUNSEL 1 sent two letters to DOJ COUNSEL. In the second such letter, which is attached as Exhibit 1, FPOTUS COUNSEL 1 asked DOJ to consider a few "principles," which include FPOTUS COUNSEL 1's claim that a President has absolute authority to declassify documents. In this letter, FPOTUS COUNSEL 1 requested, among other things, that "DOJ provide this letter to any judicial officer who is asked to rule on any motion pertaining to this investigation, or on any application made in connection with any investigative request concerning this investigation."

53. I am aware of an article published in *Breitbart* on May 5, 2022, available at https://www.breitbart.com/politics/2022/05/05/documents-mar-a-lago-marked-classified-were-already-declassified-kash-patel-says/, which states that Kash Patel, who is described as a former top FPOTUS administration official, characterized as "misleading" reports in other news organizations that NARA had found classified materials among records that FPOTUS provided to NARA from Mar-a-Lago. Patel alleged that such reports were misleading because FPOTUS had declassified the materials at issue. [redacted]

54. [redacted]

[redacted]

55. After an extension was granted for compliance with the subpoena, on the evening of June 2, 2022, FPOTUS COUNSEL 1 contacted DOJ COUNSEL and requested that FBI agents meet him the following day to pick up responsive documents. On June 3, 2022, three FBI agents and DOJ COUNSEL arrived at the PREMISES to accept receipt of the materials. In addition to FPOTUS COUNSEL 1, another individual, hereinafter "INDIVIDUAL 2," was also present as the custodian of records for FPOTUS's post-presidential office. The production included a single Redweld envelope, wrapped in tape, containing documents. FPOTUS COUNSEL 1 relayed that the documents in the Redweld envelope were found during a review of the boxes located in the STORAGE ROOM. INDIVIDUAL 2 provided a Certification Letter, signed by INDIVIDUAL 2, which stated the following:

> Based upon the information that has been provided to me, I am authorized to certify, on behalf of the Office of Donald J. Trump, the following: 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.

56. During receipt of the production, FPOTUS COUNSEL 1 stated he was advised all

the records that came from the White House were stored in one location within Mar-a-Lago, the STORAGE ROOM, and the boxes of records in the STORAGE ROOM were "the remaining repository" of records from the White House. FPOTUS COUNSEL 1 further stated he was not advised there were any records in any private office space or other location in Mar-a-Lago. The agents and DOJ COUNSEL were permitted to see the STORAGE ROOM and observed that approximately fifty to fifty-five boxes remained in the STORAGE ROOM. [redacted] Other 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.

57. [redacted]

58. A preliminary review of the documents contained in the Redweld envelope produced pursuant to the grand jury subpoena revealed the following approximate numbers: 38 unique documents bearing classification markings, including 5 documents marked as CONFIDENTIAL, 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. [redacted] Multiple documents also

contained what appears to be FPOTUS's handwritten notes.

59. Notably, although the FIFTEEN BOXES provided to NARA contained approximately 184 unique documents with classification markings, only approximately 38 unique documents with classification markings were produced from the remaining FPOTUS BOXES.

60. When producing the documents, neither FPOTUS COUNSEL 1 nor INDIVIDUAL 2 asserted that FPOTUS had declassified the documents.[2] The documents being in a Redweld envelope wrapped in tape appears to be consistent with an effort to handle the documents as if they were still classified.

61. On June 8, 2022, DOJ COUNSEL sent FPOTUS COUNSEL 1 a letter, which reiterated that the PREMISES are not authorized to store classified information and requested the preservation of the STORAGE ROOM and boxes that had been moved from the White House to the PREMISES. Specifically, the letter stated in relevant part:

> 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.

[2] 18 U.S.C. § 793(e) does not use the term "classified information," but rather criminalizes the unlawful retention of "information relating to the national defense." The statute does not define "information related to the national defense," but courts have construed it broadly. *See Gorin v. United States*, 312 U.S. 19, 28 (1941) (holding that the phrase "information relating to the national defense" as used in the Espionage Act is a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"). In addition, the information must be "closely held" by the U.S. government. *See United States v. Squillacote*, 221 F.3d 542, 579 (4th Cir. 2000) ("[I]nformation made public by the government as well as information never protected by the government is not national defense information."); *United States v. Morison*, 844 F.2d 1057, 1071-72 (4th Cir. 1988). Certain courts have also held that the disclosure of the documents must be potentially damaging to the United States. *See Morison*, 844 F.2d at 1071-72.

On June 9, 2022, FPOTUS COUNSEL 1 sent an email to DOJ COUNSEL, stating, "I write to acknowledge receipt of this letter."

[redacted]

62. DOJ COUNSEL has advised me that on or about June 22, 2022, counsel for the Trump Organization, a group of business entities associated with FPOTUS, confirmed that the Trump Organization maintains security cameras in the vicinity of the STORAGE ROOM and that on June 24, 2022, counsel for the Trump Organization agreed to accept service of a grand jury subpoena for footage from those cameras.

63. The subpoena was served on counsel on June 24, 2022, directed to the Custodian of Records for the Trump Organization, and sought:

> Any and all surveillance records, videos, images, photographs, and/or CCTV from internal cameras located on ground floor (basement) [redacted] on the Mar-a-Lago property located at 1100 S Ocean Blvd., Palm Beach, FL 33480 from the time period of January 10, 2022 to present.

64. On July 6, 2022, in response to this subpoena, representatives of the Trump Organization provided a hard drive to FBI agents. [redacted]

[redacted]

65. [redacted]

66. [redacted]

[redacted]

[redacted]

67. [redacted]

[redacted]

68. [redacted]

[redacted]

69. [redacted]

[redacted]

[redacted]

There is Probable Cause to Believe That Documents Containing Classified NDI and Presidential Records Remain at the Premises

70. As explained above, the FPOTUS BOXES contained numerous documents with classification markings, both in the FIFTEEN BOXES and in the remaining FPOTUS BOXES. As also explained above, the classified documents provided to the government in a Redweld envelope pursuant to the subpoena were represented to have been stored in boxes located in the STORAGE ROOM, [redacted]

71. [redacted]

[redacted]

72. [redacted]

[redacted]

73. [redacted]

[redacted]

[redacted]

74. [redacted]

[redacted]

75. [redacted]

[redacted]

76. [redacted]

[redacted]

[redacted]

77. Based upon this investigation, I believe that the STORAGE ROOM, FPOTUS's residential suite, Pine Hall, the "45 Office," and other spaces within the PREMISES are not currently authorized locations for the storage of classified information or NDI. Similarly, based upon this investigation, I do not believe that any spaces within the PREMISES have been authorized for the storage of classified information at least since the end of FPOTUS's Presidential Administration on January 20, 2021.

78. As described above, evidence of the SUBJECT OFFENSES has been stored in multiple locations at the PREMISES. [redacted]

Accordingly, this affidavit seeks authorization to search the "45 Office" and all storage rooms and

any other rooms or locations where boxes or records may be stored within the PREMISES, as further described in Attachment A. The PREMISES is currently closed to club members for the summer; however, as specified in Attachment A, if at the time of the search, there are areas of the PREMISES being occupied, rented, or used by third parties, and not otherwise used or available to be used by FPOTUS and his staff, the search would not include such areas.

CONCLUSION

79. Based on the foregoing facts and circumstances, I submit that probable cause exists to believe that evidence, contraband, fruits of crime, or other items illegally possessed in violation 18 U.S.C. §§ 793(e), 2071, or 1519 will be found at the PREMISES. Further, I submit that this affidavit supports probable cause for a warrant to search the PREMISES described in Attachment A and seize the items described in Attachment B.

REQUEST FOR SEALING

80. It is respectfully requested that this Court issue an order sealing, until further order of the Court, all papers submitted in support of this application, including the application and search warrant. I believe that sealing this document is necessary because the items and information to be seized are relevant to an ongoing investigation and the FBI has not yet identified all potential criminal confederates nor located all evidence related to its investigation. Premature disclosure of the contents of this affidavit and related documents may have a significant and negative impact on the continuing investigation and may severely jeopardize its effectiveness by allowing criminal parties an opportunity to flee, destroy evidence (stored electronically and otherwise), change patterns of behavior, and notify criminal confederates.

SEARCH PROCEDURES FOR HANDLING POTENTIAL ATTORNEY-CLIENT PRIVILEGED INFORMATION

The following procedures will be followed at the time of the search in order to protect against disclosures of attorney-client privileged material:

81. These procedures will be executed by: (a) law enforcement personnel conducting this investigation (the "Case Team"); and (b) law enforcement personnel not participating in the investigation of the matter, who will search the "45 Office" and be available to assist in the event that a procedure involving potentially attorney-client privileged information is required (the "Privilege Review Team").

82. The Case Team will be responsible for searching the **TARGET PREMISES**. However, the Privilege Review Team will search the "45 Office" and conduct a review of the seized materials from the "45 Office" to identify and segregate documents or data containing potentially attorney-client privileged information.

83. If the Privilege Review Team determines the documents or data are not potentially attorney-client privileged, they will be provided to the law-enforcement personnel assigned to the investigation. If at any point the law-enforcement personnel assigned to the investigation subsequently identify any data or documents that they consider may be potentially attorney-client privileged, they will cease the review of such identified data or documents and refer the materials to the Privilege Review Team for further review by the Privilege Review Team.

84. If the Privilege Review Team determines that documents are potentially attorney-client privileged or merit further consideration in that regard, a Privilege Review Team attorney may do any of the following: (a) apply *ex parte* to the court for a determination whether or not the documents contain attorney-client privileged material; (b) defer seeking court intervention and

continue to keep the documents inaccessible to law-enforcement personnel assigned to the investigation; or (c) disclose the documents to the potential privilege holder, request the privilege holder to state whether the potential privilege holder asserts attorney-client privilege as to any documents, including requesting a particularized privilege log, and seek a ruling from the court regarding any attorney-client privilege claims as to which the Privilege Review Team and the privilege-holder cannot reach agreement.

Respectfully submitted,

[redacted]
Special Agent
Federal Bureau of Investigation

Subscribed and sworn before me by telephone (WhatsApp) or other reliable electronic means this 5 day of August, 2022:

HON. BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 1

SILVERMAN THOMPSON
Silverman Thompson Slutkin White

ATTORNEYS AT LAW

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May 25, 2022

Via Electronic Mail

Jay I. Bratt, Esquire
Chief
Counterintelligence & Export Control Section
National Security Division
U.S. Department of Justice
950 Pennsylvania, Avenue, N.W.
Washington, D.C. 20530

Re: Presidential Records Investigation

Dear Jay:

I write on behalf of President Donald J. Trump regarding the above-referenced matter.

Public trust in the government is low. At such times, adherence to the rules and long-standing policies is essential. President Donald J. Trump is a leader of the Republican Party. The Department of Justice (DOJ), as part of the Executive Branch, is under the control of a President from the opposite party. It is critical, given that dynamic, that every effort is made to ensure that actions by DOJ that may touch upon the former President, or his close associates, do not involve politics.

There have been public reports about an investigation by DOJ into Presidential Records purportedly marked as classified among materials that were once in the White House and unknowingly included among the boxes brought to Mar-a-Lago by the movers. It is important to emphasize that when a request was made for the documents by the National Archives and Records Administration (NARA), President Trump readily and voluntarily agreed to their transfer to NARA. The communications regarding the transfer of boxes to NARA were friendly, open, and straightforward. President Trump voluntarily ordered that the boxes be provided to NARA. No legal objection was asserted about the transfer. No concerns were raised about the contents of the boxes. It was a voluntary and open process.

Unfortunately, the good faith demonstrated by President Trump was not matched once the boxes arrived at NARA. Leaks followed. And, once DOJ got involved, the leaks continued. Leaks about any investigation are concerning. Leaks about an investigation that involve the residence of a former President who is still active on the national political scene are particularly troubling.

It is important to note a few bedrock principles:

(1) A President Has Absolute Authority To Declassify Documents.

Under the U.S. Constitution, the President is vested with the highest level of authority when it comes to the classification and declassification of documents. *See* U.S. Const., Art. II, § 2 ("The President [is] Commander in Chief of the Army and Navy of the United States[.]"). His constitutionally-based authority regarding the classification and declassification of documents is unfettered. *See Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[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.").

(2) Presidential Actions Involving Classified Documents Are Not Subject To Criminal Sanction.

Any attempt to impose criminal liability on a President or former President that involves his actions with respect to documents marked classified would implicate grave constitutional separation-of-powers issues. Beyond that, the primary criminal statute that governs the unauthorized removal and retention of classified documents or material *does not apply* to the President. That statute provides, in pertinent part, as follows:

> Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined under this title or imprisoned for not more than five years, or both.

18 U.S.C. § 1924(a). An element of this offense, which the government must prove beyond a reasonable doubt, is that the accused is "an officer, employee, contractor, or consultant of the United States." The President is none of these. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497–98 (2010) (citing U.S. Const., Art. II, § 2, cl. 2) ("The people do not vote for the 'Officers of the United States.'"); *see also Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 518–19 (D.D.C. 1986), *aff'd*, 836 F.2d 561 (D.C. Cir. 1987) ("[a]n officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution."). Thus, the statute does not apply to acts by a President.

(3) DOJ Must Be Insulated From Political Influence.

According to the Inspector General of DOJ, one of the top challenges facing the Department is the public perception that DOJ is influenced by politics. The report found that "[o]ne important strategy that can build public trust in the Department is to ensure adherence to policies and procedures designed to protect DOJ from accusations of political influence or partial application of the law." *See* https://oig.justice.gov/reports/top-management-and-performance-challenges-facing-department-justice-2021 (last visited May 25, 2022). We request that DOJ adhere to long-standing policies and procedures regarding communications between DOJ and the White House regarding pending investigative matters which are designed to prevent political influence in DOJ decision-making.

(4) DOJ Must Be Candid With Judges And Present Exculpatory Evidence.

Long-standing DOJ policy requires that DOJ attorneys be candid in representations made to judges. Pursuant to those policies, we request that DOJ provide this letter to any judicial officer who is asked to rule on any motion pertaining to this investigation, or on any application made in connection with any investigative request concerning this investigation.

The official policy of DOJ further requires that prosecutors present exculpatory evidence to a grand jury. Pursuant to that policy, we request that DOJ provide this letter to any grand jury considering evidence in connection with this matter, or any grand jury asked to issue a subpoena for testimony or documents in connection with this matter.

Thank you for your attention to this request.

With best regards,

M. Evan Corcoran

cc: Matthew G. Olsen
Assistant Attorney General
National Security Division
Via Electronic Mail

ATTACHMENT A

Property to be searched

The premises to be searched, 1100 S Ocean Blvd, Palm Beach, FL 33480, is further described as a resort, club, and residence located near the intersection of Southern Blvd and S Ocean Blvd. It is described as a mansion with approximately 58 bedrooms, 33 bathrooms, on a 17-acre estate. The locations to be searched include the "45 Office," all storage rooms, and all other rooms or areas within the premises used or available to be used by FPOTUS and his staff and in which boxes or documents could be stored, including all structures or buildings on the estate. It does not include areas currently (i.e., at the time of the search) being occupied, rented, or used by third parties (such as Mar-a-Largo Members) and not otherwise used or available to be used by FPOTUS and his staff, such as private guest suites.

ATTACHMENT B

Property to be seized

All physical documents and records constituting evidence, contraband, fruits of crime, or other items illegally possessed in violation of 18 U.S.C. §§ 793, 2071, or 1519, including the following:

a. Any physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes;

b. Information, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material;

c. Any government and/or Presidential Records created between January 20, 2017, and January 20, 2021; or

d. Any evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-MJ-8332-BER

IN RE SEALED SEARCH WARRANT FILED UNDER SEAL

_____/

NOTICE OF FILING OF REDACTED DOCUMENTS

The United States hereby gives notice that it is filing the following document, which is a redacted version of material previously filed in this case number under seal:

- The search warrant (not including the affidavit) signed and approved by the Court on August 5, 2022, including Attachments A and B;
- The Property Receipt listing items seized pursuant to the search, filed with the Court on August 11, 2022.

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY
Florida Bar No. 897388
99 NE 4th Street, 8th Floor
Miami, Fl 33132
Tel: 305-961-9001
Email: juan.antonio.gonzalez@usdoj.gov

AO 93 (Rev. 11/13) Search and Seizure Warrant

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person by name and address)* the Premises Located at 1100 S. Ocean Blvd., Palm Beach, FL 33480, as further described in Attachment A	)	Case No. 22-mj-8332-BER

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the Southern District of Florida
(identify the person or describe the property to be searched and give its location):

See Attachment A

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal *(identify the person or describe the property to be seized)*:

See Attachment B

YOU ARE COMMANDED to execute this warrant on or before August 19, 2022 *(not to exceed 14 days)*
☑ in the daytime 6:00 a.m. to 10:00 p.m. ☐ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to Duty Magistrate .
(United States Magistrate Judge)

☐ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)*
☐ for ____ days *(not to exceed 30)* ☐ until, the facts justifying, the later specific date of ____ .

Date and time issued: 8/5/22 12:12 pm

Bruce Reinhart
Judge's signature

City and state: West Palm Beach, FL

Hon. Bruce Reinhart, U.S. Magistrate Judge
Printed name and title

ATTACHMENT A

Property to be searched

The premises to be searched, 1100 S Ocean Blvd, Palm Beach, FL 33480, is further described as a resort, club, and residence located near the intersection of Southern Blvd and S Ocean Blvd. It is described as a mansion with approximately 58 bedrooms, 33 bathrooms, on a 17-acre estate. The locations to be searched include the "45 Office," all storage rooms, and all other rooms or areas within the premises used or available to be used by FPOTUS and his staff and in which boxes or documents could be stored, including all structures or buildings on the estate. It does not include areas currently (i.e., at the time of the search) being occupied, rented, or used by third parties (such as Mar-a-Largo Members) and not otherwise used or available to be used by FPOTUS and his staff, such as private guest suites.

ATTACHMENT B

Property to be seized

All physical documents and records constituting evidence, contraband, fruits of crime, or other items illegally possessed in violation of 18 U.S.C. §§ 793, 2071, or 1519, including the following:

a. Any physical documents with classification markings, along with any containers/boxes (including any other contents) in which such documents are located, as well as any other containers/boxes that are collectively stored or found together with the aforementioned documents and containers/boxes;

b. Information, including communications in any form, regarding the retrieval, storage, or transmission of national defense information or classified material;

c. Any government and/or Presidential Records created between January 20, 2017, and January 20, 2021; or

d. Any evidence of the knowing alteration, destruction, or concealment of any government and/or Presidential Records, or of any documents with classification markings.

FD-597 (Rev. 4-13-2016) Page 1 of 1

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
RECEIPT FOR PROPERTY

Case ID: WF-[redacted]

On (date) 8/8/2022 item(s) listed below were:

- ☒ Collected/Seized
- ☐ Received From
- ☐ Returned To
- ☐ Released To

(Name) Mar-A-Lago

(Street Address) 1100 S OCEAN BLVD

(City) PALM BEACH, FL 33480

Description of Item(s):

4 - Documents

29 - Box labeled A-14

30 - Box Labeled A-26

31 - Box Labeled A-43

32 - Box Labeled A-13

33 - Box Labeled A-33

Received By: Christina Bobb (signature)

Received From: [redacted] (signature)

Printed Name/Title: Christina Bobb attorney

Printed Name/Title: [redacted] / SSA

6:19 pm on 8/8/22

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

RECEIPT FOR PROPERTY

Case ID: WF-[redacted]

On (date) 8/8/2022 item(s) listed below were:

- ☒ Collected/Seized
- ☐ Received From
- ☐ Returned To
- ☐ Released To

(Name) Mar-A-Lago

(Street Address) 1100 S OCEAN BLVD

(City) PALM BEACH, FL 33480

Description of Item(s):

1 - Executive Grant of Clemency re: Roger Jason Stone, Jr.

1A - Info re: President of France

2 - Leatherbound box of documents

2A - Various classified/TS/SCI documents

3 - Potential Presidential Record

5 - Binder of photos

6 - Binder of photos

7 - Handwritten note

8 - Box labeled A-1

9 - Box labeled A-12

10 - Box Labeled A-15

10A - Miscellaneous Secret Documents

11 - Box Labeled A-16

11A - Miscellanous Top Secret Documents

12 - Box labeled A-17

13 - Box labeled A-18

13A - Miscellaneous Top Secret Documents

14 - Box labeled A-27

14-A - Miscellaneous Confidential Documents

FD-597 (Rev. 4-13-2015)

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

RECEIPT FOR PROPERTY

15 - Box Labeled A-28

15A - Miscellaneous Secret Documents

16 - Box labeled A-30

17 - Box labeled A-32

18 - Box labeled A-35

19 - Box labeled A-23

19A - Confidential Document

20 - Box Labeled A-22

21 - Box labeled A-24

22 - Box Labeled A-34

23 - Box Labeled A-39

23A - Miscellaneous Secret Documents

24 - Box labeled A-40

25 - Box Labeled A-41

25A - Miscellaneous Confidential Documents

26 - Box Labeled A-42

26A - Miscellaneous Top Secret Documents

27 - Box Labeled A-71

28 - Box Labeled A-73

28A - Miscellaneous Top Secret Documents

Received By: [signature] (signature)

Received From: [redacted] (signature)

Printed Name/Title: Christina Bobb attorney

Printed Name/Title: [redacted] / Special Agent

6:19pm on 8/8/22

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-8332-BER

IN RE: SEALED SEARCH WARRANT

_____/

ORDER ON MOTIONS TO UNSEAL[1]

On August 8, 2022, the Government executed a search warrant at 1100 S. Ocean Boulevard, Palm Beach, Florida ("the Premises"). The Premises are a private club that is also the part-time residence of Former President Donald J. Trump.

Numerous intervenors ("Intervenors") now move to unseal materials related to the search warrant. ECF No. 17 at 2. The Intervenors are Judicial Watch (ECF No. 4), Albany Times Union (ECF No. 6), The New York Times Company (ECF No. 9), CBS Broadcasting, Inc. (ECF No. 20), NBCUniversal Media, LLC d/b/a NBC News, Cable News Network, Inc., WP Company, LLC d/b/a The Washington Post, and E.W. Scripps Company (ECF No. 22), The Palm Beach Post (ECF No. 23), The Florida Center for Government Accountability, Inc. (ECF No. 30), The McClatchy Company LLC d/b/a Miami Herald and Times Publishing Company d/b/a Tampa Bay Times (ECF No. 31), Dow Jones & Company, Inc. (ECF No. 32), The Associated Press (ECF No. 33), and ABC, Inc. (ECF No. 49). The Government opposes the request to unseal. ECF No. 59. Neither Former President Trump nor anyone else purporting to be the

[1] This Order memorializes and supplements my rulings from the bench at the hearing on August 18, 2022.

owner of the Premises has filed a pleading taking a position on the Intervenors' Motions to Unseal.

BACKGROUND

On August 5, 2022, the Court issued a search warrant for the Premises after finding probable cause that evidence of multiple federal crimes would be found at the Premises ("the Warrant"). An FBI Special Agent's sworn affidavit ("the Affidavit") provided the facts to support the probable cause finding. The Government submitted (1) a Criminal Cover Sheet, (2) an Application for Warrant by Electronic Means, (3) the Affidavit, (4) a proposed Warrant, (5) a Motion to Seal all of the documents related to the Application and the Warrant, and (6) a proposed Order to Seal (collectively the "Warrant Package"). The Government asserted there was good cause for sealing the entire Warrant Package because public disclosure might lead to an ongoing investigation being compromised and/or evidence being destroyed. ECF No. 2. The Motion to Seal the entire Warrant Package was granted. ECF No. 3. After the search on August 8, 2022, the Government filed an inventory of the seized items (the "Inventory"), as required by Federal Rule of Criminal Procedure 41(f)(1)(D). ECF No. 21.

Beginning on August 10, 2022, the Intervenors filed motions to intervene and to unseal the entire Warrant Package. On August 11, the Government moved to unseal (1) the Warrant and (2) a copy of the Inventory that had been redacted only to remove the names of FBI Special Agents and the FBI case number. ECF No. 18. The Court granted the Government's Motion to Unseal these materials on August 12,

2022. ECF No. 41. Those materials are now publicly available. Therefore, to the extent the Intervenors have moved to unseal the Warrant and the Inventory, the motions are DENIED AS MOOT.

On August 12, 2022, the Government filed under seal redacted copies of several other documents from the Warrant Package — the Criminal Cover Sheet, the Application for a Warrant by Telephone or Other Reliable Electronic Means, the Motion to Seal, and the Sealing Order. ECF No. 57. These materials are redacted only to conceal the identities of an Assistant United States Attorney and an FBI Special Agent. The Government does not oppose unsealing the redacted versions. ECF No. 59 at 2. The Intervenors do not object to the limited redactions. Hrg. Tr. at 8. I find that the redactions are appropriate to protect the identity and personal safety of the prosecutor and investigator. Therefore, to the extent the Intervenors move to unseal these redacted documents, their motions are GRANTED. *See* ECF No. 74.

All that remains, then, is to decide whether the Affidavit should be unsealed in whole or in part. With one notable exception that is not dispositive, the parties agree about the legal principles that apply.[2] They disagree only about how I should apply those principles to the facts. The Government concedes that it bears the burden of justifying why the Affidavit should remain sealed. Hrg. Tr. at 8; s*ee, e.g., DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997).

[2] As discussed below, the parties disagree whether a First Amendment right of public access applies to a sealed search warrant and related documents.

APPLICABLE LEGAL PRINCIPLES

It is a foundational principle of American law that judicial proceedings should be open to the public. An individual's right to access judicial records may arise from the common law, the First Amendment, or both. *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310-12 (11th Cir. 2001). That right of access is not absolute, however. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Where a sufficient reason exists, a court filing can be sealed from public view.

"The common law right of access may be overcome by a showing of good cause, which requires balanc[ing] the asserted right of access against the other party's interest in keeping the information confidential." *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (brackets in original) (quoting *Chicago Tribune,* 263 F.3d at 1309). In deciding whether good cause exists, "courts consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents." *Romero,* 480 F.3d at 1246. They also consider "whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, whether access is likely to promote public understanding of historically significant events, and whether the press has already been permitted substantial access to the contents of

the records." *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) (citing *Nixon,* 435 U.S. at 596-603 & n.11).

Despite the First Amendment right of access, a document can be sealed if there is a compelling governmental interest and the denial of access is "narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606 (1982).

The Eleventh Circuit has not resolved whether the First Amendment right of access applies to pre-indictment search warrant materials. The Government argues, "The better view is that no First Amendment right to access pre-indictment warrant materials exists because there is no tradition of public access to *ex parte* warrant proceedings." ECF No. 59 at 4 n.3. Nevertheless, the Government says that I need not resolve this question because, even under the First Amendment test, a compelling reason exists for continued sealing. *Id.* (citing *Bennett v. United States*, No. 12-61499-CIV, 2013 WL 3821625, at *4 (S.D. Fla. July 23, 2013) (J. Rosenbaum).

I do not need to resolve whether the First Amendment right of access applies here. As a practical matter, the analyses under the common law and the First Amendment are materially the same. Both look to whether (1) the party seeking sealing has a sufficiently important interest in secrecy that outweighs the public's right of access and (2) whether there is a less onerous (or, said differently, a more narrowly tailored) alternative to sealing. As discussed more fully below, in this case, both tests lead to the same conclusion.

DISCUSSION

1. Balancing the Parties' Interests[3]

The Government argues that unsealing the Affidavit would jeopardize the integrity of its ongoing criminal investigation. The Government's motion says, "As the Court is aware from its review of the affidavit, it contains, among other critically important and detailed investigative facts: highly sensitive information about witnesses, including witnesses interviewed by the government; specific investigative techniques; and information required by law to be kept under seal pursuant to Federal Rule of Criminal Procedure 6(e)." ECF No. 59 at 8.

Protecting the integrity and secrecy of an ongoing criminal investigation is a well-recognized compelling governmental interest. *See, e.g., United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993); *Bennett,* 2013 WL 3821625, at *4; *Patel v. United States*, No. 19-MC-81181, 2019 WL 4251269, at *4 (S.D. Fla. Sept. 9, 2019) (J. Matthewman). "Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly." *Press-*

[3] "As the Eleventh Circuit has explained, findings in a public order as to the need for sealing 'need not be extensive. Indeed, should a court say too much the very secrecy which sealing was intended to preserve could be impaired. The findings need only be sufficient for a reviewing court to be able to determine, *in conjunction with a review of the sealed documents themselves,* what important interest or interests the district court found sufficiently compelling to justify the denial of public access.'" *United States v. Steinger*, 626 F. Supp. 2d 1231, 1234 (S.D. Fla. 2009) (J. Jordan) (citing and adding emphasis to *United States v. Kooistra,* 796 F.2d 1390, 1391 (11th Cir. 1986)).

Enter. Co. v. Superior Court of Cal. for Riverside Cnty., 478 U.S. 1, 8-9 (1986). Criminal investigations are one such government operation. The Intervenors agree that protecting the integrity of an ongoing criminal investigation can, in the right case, override the common law right of access. Hrg. Tr. at 28.

In the context of an ongoing criminal investigation, the legitimate governmental concerns include whether: (1) witnesses will be unwilling to cooperate and provide truthful information if their identities might be publicly disclosed; (2) law enforcement's ability to use certain investigative techniques in the future may be compromised if these techniques become known to the public; (3) there will be an increased risk of obstruction of justice or subornation of perjury if subjects of investigation know the investigative sources and methods; and (4) if no charges are ultimately brought, subjects of the investigation will suffer reputational damage. *See Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 n.10 (1979) (discussing importance of secrecy to grand jury investigations) (quoting *United States v. Procter & Gamble*, 356 U.S. 677, 681-82 n.6 (1958)). Most of the cases discussing these principles arise in the grand jury setting. *See, e.g., Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (Grand jury secrecy "serves to protect the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like."); *see also Pitch v. United States*, 953 F.3d 1226, 1232 (11th Cir. 2020) (discussing "vital purposes" for grand jury secrecy). The same concerns also apply to a pre-indictment search warrant. At the pre-indictment stage, the Government's need to

conceal the scope and direction of its investigation, as well as its investigative sources and methods, is at its zenith. *Blalock v. United States*, 844 F.2d 1546, 1550 n.5 (11th Cir. 1988) ("The courts' concern for grand jury secrecy and for the grand jury's law enforcement function is generally greatest during the investigative phase of grand jury proceedings.") (quoting S. Beale & W. Bryson, *Grand Jury Law & Practice* § 10:18 (1986)). Maximizing the Government's access to untainted facts increases its ability to make a fully-informed prosecutive decision while also minimizing the effects on third parties.

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. Also, as some of the media Intervenors have reported, there have been increased threats against FBI personnel since the search. ECF No. 59 at 8 n.5 (citing news articles about threats to law enforcement); *see, e.g.*, Josh Campbell, et al., *FBI Investigating 'Unprecedented' Number of Threats Against Bureau in Wake of Mar-a-Lago Search,* CNN.COM (Aug. 13, 2022), https://www.cnn.com/2022/08/12/politics/fbi-threats-maralago-trump-search/index.html; Nicole Sganga, *FBI and DHS Warn of Increased Threats to Law Enforcement and Government Officials After Mar-a-lago Search*, CBSNEWS.COM (Aug. 15, 2022), https://www.cbsnews.com/news/mar-a-lago-search-fbi-threat-law-enforcement/. An armed man attempted to infiltrate the FBI Office in Cincinnati, Ohio on August 11, three days after the search. Elisha Fieldstadt, et al., *Armed Man Who was at Capitol on Jan. 6 is Fatally Shot After Firing into an FBI Field Office in*

Cincinnati, NBCNEWS.COM (Aug. 11, 2022), https://www.nbcnews.com/news/us-news/armed-man-shoots-fbi-cincinnati-building-nail-gun-flees-leading-inters-rcna42669. After the public release of an unredacted copy of the Inventory, FBI agents involved in this investigation were threatened and harassed. Alia Shoaib, *An Ex-Trump Aide and Right-wing Breitbart News Have Been Separately Accused of Doxxing [sic] the FBI Agents Involved in the Mar-a-Lago Raid*, BUSINESSINSIDER.COM (Aug. 13, 2022), https://www.businessinsider.com/breitbart-trump-aide-doxxing-mar-a-lago-raid-fbi-agents-2022-8. Given the public notoriety and controversy about this search, it is likely that even witnesses who are not expressly named in the Affidavit would be quickly and broadly identified over social media and other communication channels, which could lead to them being harassed and intimidated.

Balancing the Government's asserted compelling need for sealing against the public's interest in disclosure, I give great weight to the following factors:

- There is a significant likelihood that unsealing the Affidavit would harm legitimate privacy interests by directly disclosing the identity of the affiant as well as providing evidence that could be used to identify witnesses. As discussed above, these disclosures could then impede the ongoing investigation through obstruction of justice and witness intimidation or retaliation. This factor weighs in favor of sealing.

- The Affidavit discloses the sources and methods used by the Government in its ongoing investigation. I agree with the Government

that the Affidavit "contains, among other critically important and detailed investigative facts: highly sensitive information about witnesses, including witnesses interviewed by the government; specific investigative techniques; and information required by law to be kept under seal pursuant to Federal Rule of Criminal Procedure 6(e)." ECF No. 59 at 8. Disclosure of these facts would detrimentally affect this investigation and future investigations. This factor weighs in favor of sealing.

- The Affidavit discusses physical aspects of the Premises, which is a location protected by the United States Secret Service. Disclosure of those details could affect the Secret Service's ability to carry out its protective function. This factor weighs in favor of sealing.

- As the Government concedes, this Warrant involves "matters of significant public concern." ECF No. 59 at 7. Certainly, unsealing the Affidavit would promote public understanding of historically significant events. This factor weighs in favor of disclosure.

The Intervenors emphasize that the Court is required to consider if the press has "already been permitted substantial access to the contents of the records." *Newman,* 696 F.2d at 803. The Government acknowledges that the unsealed Warrant and Inventory already disclose "the potential criminal statutes at issue in this investigation and the general nature of the items seized, including documents marked as classified." ECF No. 59 at 7. One Intervenor argues that no privacy

interest remains because "Mr. Trump and his counsel have spoken repeatedly about the government's search and publicly disclosed information about the alleged subject matter of the warrant, including the potential mishandling of classified documents and violations of the Presidential Records Act." ECF No. 32 at 5. Another cites the Government's statement in its Motion to Unseal the Warrant that "the occurrence of the search and indications of the subject matter involved are already public." ECF No. 22 at 7 (citing ECF No. 18 at 3). A third argues:

> The investigation has been made public by the target of the warrant himself, details of the investigation have appeared in publications throughout the world, members of Congress have demanded that the Justice Department provide an explanation, and political commentary on the search continues unabated. In short, with so much publicity surrounding the search, the Court should be skeptical about government claims that disclosure of this true information will invade privacy, disturb the confidentiality of an investigation, tip off potential witnesses, or lead to the destruction of evidence.

ECF No. 8 at 8-9. No one disputes that there has been much public discourse about this Warrant and the related investigation. ECF No. 67 at 7-9 (summarizing issues of public discussion). Nevertheless, much of the information being discussed is based on anonymous sources, speculation, or hearsay; the Government has not confirmed its accuracy.

In any event, these arguments ignore that the contents of the Affidavit identify not just the facts known to the Government, but the sources and methods (i.e., the witnesses and the investigative techniques) used to gather those facts. That information is not known to the public. For the reasons discussed above, the Government has a compelling reason not to publicize that information at this time.

I do not give much weight to the remaining factors relevant to whether the common law right of access requires unsealing of the Affidavit. *See Romero, supra; Newman, supra.* Allowing access to the unredacted Affidavit would not impair court functions. Having carefully reviewed the Affidavit before signing the Warrant, I was — and am — satisfied that the facts sworn by the affiant are reliable. So, releasing the Affidavit to the public would not cause false information to be disseminated. There is no indication that the Intervenors seek these records for any illegitimate purpose.

After weighing all the relevant factors, I find that the Government has met its burden of showing good cause/a compelling interest that overrides any public interest in unsealing the full contents of the Affidavit.

2. Narrowly Tailoring/Least Onerous Alternatives

I must still consider whether there is a less onerous alternative to sealing the entire document. The Government argues that redacting the Affidavit and unsealing it in part is not a viable option because the necessary redactions "would be so extensive as to render the document devoid of content that would meaningfully enhance the public's understanding of these events beyond the information already now in the public record." ECF No. 59 at 10; *see also Steinger*, 626 F. Supp. 2d at 1237 (redactions not feasible because they would "be so heavy as to make the released versions incomprehensible and unintelligible."). I cannot say at this point that partial redactions will be so extensive that they will result in a meaningless disclosure, but I may ultimately reach that conclusion after hearing further from the Government.

The Government argues that even requiring it to redact portions of the Affidavit that could not reveal agent identities or investigative sources and methods imposes an undue burden on its resources and sets a precedent that could be disruptive and burdensome in future cases. I do not need to reach the question of whether, in some other case, these concerns could justify denying public access; they very well might. Particularly given the intense public and historical interest in an unprecedented search of a former President's residence, the Government has not yet shown that these administrative concerns are sufficient to justify sealing.

I therefore reject the Government's argument that the present record justifies keeping the entire Affidavit under seal. In its Response, the Government asked that I give it an opportunity to propose redactions if I declined to seal the entire Affidavit. I granted that request and gave the Government a deadline of noon on Thursday, August 25, 2022. ECF No. 74. Accordingly, it is hereby ORDERED that by the deadline, the Government shall file under seal a submission addressing possible redactions and providing any additional evidence or legal argument that the Government believes relevant to the pending Motions to Unseal.

DONE and ORDERED in Chambers this 22nd day of August, 2022, at West Palm Beach in the Southern District of Florida.

BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v. **UNDER SEAL AND *EX PARTE***

UNITED STATES OF AMERICA,

Defendant.
_____/

DETAILED PROPERTY INVENTORY
PURSUANT TO COURT'S PRELIMINARY ORDER

Item #1 – Documents from Office
1 US Government Document with SECRET Classification Markings
2 US Government Documents/Photographs without Classification Markings

Item #2 – Box/Container from Office
99 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2017-10/2018
2 US Government Documents with CONFIDENTIAL Classification Markings
15 US Government Documents with SECRET Classification Markings
7 US Government Documents with TOP SECRET Classification Markings
69 US Government Documents/Photographs without Classification Markings
43 Empty Folders with "CLASSIFIED" Banners
28 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #3 – Documents from Office
2 US Government Documents/Photographs without Classification Markings

Item #4 – Documents from Office

26 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2020-11/2020
1 US Government Document with CONFIDENTIAL Classification Markings
1 US Government Documents with SECRET Classification Markings
357 US Government Documents/Photographs without Classification Markings

Item #5 – Documents from Office
396 US Government Documents/Photographs without Classification Markings

Item #6 – Documents from Office
640 US Government Documents/Photographs without Classification Markings

Item #7 – Documents from Office
1 US Government Document/Photograph without Classification Markings

Item #8 – Box/Container from Storage Room
68 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2015-05/2017
1 Article of Clothing/Gift Item
1 Book
2 US Government Documents/Photographs without Classification Markings

Item #9 – Box/Container from Storage Room
91 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2019-09/2020
1 Article of Clothing/Gift Item
65 US Government Documents/Photographs without Classification Markings

Item #10 – Box/Container from Storage Room
30 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2008-12/2019
11 US Government Documents with CONFIDENTIAL Classification Markings
21 US Government Documents with SECRET Classification Markings

3 Articles of Clothing/Gift Items
1 Book
255 US Government Documents/Photographs without Classification Markings

Item #11 – Box/Container from Storage Room
116 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2019-08/2020
8 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with SECRET Classification Markings
2 US Government Document with TOP SECRET Classification Markings
104 US Government Documents/Photographs without Classification Markings

Item #12 – Box/Container from Storage Room
39 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2017-03/2020
71 US Government Documents/Photographs without Classification Markings

Item #13 – Box/Container from Storage Room
62 Magazines/Newspapers/Press Articles and Other Printed Media dated between 09/2018 -08/2019
2 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
708 US Government Documents/Photographs without Classification Markings

Item #14 – Box/Container from Storage Room
87 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2018-11/2019
2 US Government Documents with CONFIDENTIAL Classification Markings
438 US Government Documents/Photographs without Classification Markings

Item #15 – Box/Container from Storage Room
65 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2016-11/2018

1 US Government Documents with CONFIDENTIAL Classification Markings
4 US Government Document with SECRET Classification Markings
2 Books
78 US Government Documents/Photographs without Classification Markings
2 Empty Folders with "CLASSIFIED" Banners
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #16 – Box/Container from Storage Room
76 Magazines/Newspapers/Press Articles and Other Printed Media dated between 11/2017-12/2017
60 US Government Documents/Photographs without Classification Markings

Item #17 – Box/Container from Storage Room
67 Magazines/Newspapers/Press Articles and Other Printed Media dated between 7/2016 – 3/2017
5 Articles of Clothing/Gift Items
2 US Government Documents/Photographs without Classification Markings

Item #18 – Box/Container from Storage Room
4 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2018 – 12/2019
1 US Government Document with SECRET Classification Markings
1 Book
1571 US Government Documents/Photographs without Classification Markings
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #19 – Box/Container from Storage Room
53 Magazines/Newspapers/Press Articles and Other Printed Media dated between 05/2016 – 01/2020
1 US Government Documents with CONFIDENTIAL Classification Markings
5 Articles of Clothing/Gift Items
236 US Government Documents/Photographs without Classification Markings

Item #20 – Box/Container from Storage Room

121 Magazines/Newspapers/Press Articles and Other Printed Media dated between 08/2017-12/2017
16 US Government Documents/Photographs without Classification Markings

Item #21 – Box/Container from Storage Room
2 Magazines/Newspapers/Press Articles and Other Printed Media dated 11/2020
1406 US Government Documents/Photographs without Classification Markings

Item #22 – Box/Container from Storage Room
109 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2020 – 10/2020
29 US Government Documents/Photographs without Classification Markings

Item #23 – Box/Container from Storage Room
67 Magazines/Newspapers/Press Articles and Other Printed Media dated between 11/2016 – 06/2018
1 US Government Document with SECRET Classification Markings
1 Book
70 US Government Documents/Photographs without Classification Markings
8 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #24 – Box/Container from Storage Room
1 Magazines/Newspapers/Press Articles and Other Printed Media dated circa 2018
1603 US Government Documents/Photographs without Classification Markings

Item #25 – Box/Container from Storage Room
76 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2016 – 11/2017
1 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with SECRET Classification Markings
20 US Government Documents/Photographs without Classification Markings
1 Empty Folder with "CLASSIFIED" Banner

Item #26– Box/Container from Storage Room

8 Magazines/Newspapers/Press Articles and Other Printed Media dated between 12/2017 – 3/2020
3 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
1 Book
1841 US Government Documents/Photographs without Classification Markings

Item #27– Box/Container from Storage Room
1 Magazines/Newspapers/Press Articles and Other Printed Media dated between 07/2016 – 9/2020
1 Article of Clothing/Gift Items
23 Books
52 US Government Documents/Photographs without Classification Markings

Item #28 – Box/Container from Storage Room
2 Magazines/Newspapers/Press Articles and Other Printed Media dated between 2/2017 – 3/2017
2 US Government Documents with CONFIDENTIAL Classification Markings
8 US Government Document with SECRET Classification Markings
4 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
1 Book
795 US Government Documents/Photographs without Classification Markings

Item #29 – Box/Container from Storage Room
86 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/1995 – 05/2019
1 US Government Document with TOP SECRET Classification Markings
35 US Government Documents/Photographs without Classification Markings

Item #30 – Box/Container from Storage Room
29 Magazines/Newspapers/Press Articles and Other Printed Media dated between 05/2020 – 09/2020
82 US Government Documents/Photographs without Classification Markings

Item # 31– Box/Container from Storage Room
111 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2015 – 04/2019
41 US Government Documents/Photographs without Classification Markings

Item #32 – Box/Container from Storage Room
94 Magazines/Newspapers/Press Articles and Other Printed Media dated between 02/2008 – 04/2020
1 Book
88 US Government Documents/Photographs without Classification Markings

Item #33 – Box/Container from Storage Room
83 Magazines/Newspapers/Press Articles and Other Printed Media dated between 02/2017 – 02/2018
1 Book
44 US Government Documents/Photographs without Classification Markings
2 Empty Folders with "CLASSIFIED" Banners
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Defendant in the above-captioned matter, appeals to the United States Court of Appeals for the Eleventh Circuit from the order of the district court entered on September 5, 2022, Docket Entry 64.

Date: September 8, 2022

Respectfully submitted,

/s Juan Antonio Gonzalez
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/s Jay I. Bratt
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 8, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/Juan Antonio Gonzalez
Juan Antonio Gonzalez
United States Attorney

APPENDIX F

No. 22-13005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONALD J. TRUMP,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

REPLY IN SUPPORT OF MOTION FOR PARTIAL STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLSOURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendant-Appellant certify that the certificate of interested persons included in the stay motion is complete.

Dated: September 20, 2022

/s/ Jeffrey M. Smith
Jeffrey M. Smith

INTRODUCTION AND SUMMARY

The district court's injunction is preventing the government from using its own records with classification markings—including markings reserved for records of the highest sensitivity—in an ongoing criminal investigation into whether those very records were mishandled or compromised. The court entered that unprecedented relief to allow a special master to consider Plaintiff's claims of privilege or for "return" of records. A36. Plaintiff's response confirms that a partial stay is warranted because he cannot articulate any plausible claim for such relief as to the records with classification markings. Indeed, Plaintiff scarcely even attempts to explain how such records could be subject to a valid claim of executive privilege, attorney-client privilege, or return of property under Rule 41(g).

Instead, Plaintiff again implies that he *could* have declassified the records before leaving office. As before, however, Plaintiff conspicuously fails to represent, much less show, that he *actually* took that step. And Plaintiff is now resisting the special master's proposal that he identify any records he claims to have declassified and substantiate those claims with evidence. D.E. 97 at 2-3. In any event, Plaintiff's effort to raise questions about classification status is a red herring. As the government has explained (Mot. 15-17), even if Plaintiff could show that he declassified the records at issue, there would still be no justification for restricting the government's use of evidence at the center of an ongoing criminal investigation. Again, Plaintiff offers no response.

Plaintiff likewise fails to rebut the motion's showing that the injunction is irreparably harming the government and the public. He emphasizes that the district court allowed the government to continue to use the records for certain national-security purposes. But Plaintiff cannot deny that the injunction is impeding the criminal investigation, which is itself an essential component of the government's effort to identify and respond to the threats posed by the mishandling of records bearing classification markings reflecting their extreme sensitivity. And Plaintiff cannot show that he would suffer any cognizable injury from a partial stay.

ARGUMENT

I. The government is likely to succeed on the merits as to the records bearing classification markings.

A. Plaintiff has no claim of privilege or for return of property as to the records bearing classification markings.

The district court recognized that its "limited" equitable jurisdiction gave it no general authority to superintend the government's criminal investigation. A21. Instead, it enjoined the use of evidence recovered in a court-authorized search solely to allow a special master to consider "claims for return of property" and "assertions of privilege." A36. As the party seeking that "exceptional" relief, A21, Plaintiff bore the burden of justifying it. But Plaintiff has identified no plausible basis on which he could seek the return of, or assert privilege over, the records bearing classification markings.

1. The government explained that Plaintiff has no right to the return of those records—indeed, no standing to invoke Rule 41(g) at all—because they belong to the United States. 44 U.S.C. § 2202; *see* Mot. 10-11. Plaintiff offers no persuasive response.

First, Plaintiff asserts (at 10) that he owns *other* seized evidence, such as "personal effects." He may well have standing to seek return of that "portion" of the seized evidence. *United States v. Melquiades*, 394 Fed. Appx. 578, 584 (11th Cir. 2010). But he cites no authority supporting a claim for return of records that do not belong to him.

Second, Plaintiff implies (at 14-15) that the PRA gave him "sole discretion to classify a record as personal" before leaving office. But Plaintiff does not represent that he categorized any of the records bearing classification markings as personal. Any attempt to do so would have been flatly contrary to the statute, which limits personal records to those "of a purely private or nonpublic character." 44 U.S.C. § 2201(3).[1]

Third, Plaintiff asserts (at 15-16) that the PRA gives him a "cognizable interest" in presidential records owned by the government because the statute directs NARA to make those records "available" to him. 44 U.S.C. § 2205. But Plaintiff does not explain why a right of *access* constitutes an *ownership* interest justifying a claim for return of property—or how he can invoke the PRA after failing to comply with it. Mot. 11.

[1] Plaintiff relies on *Judicial Watch v. NARA*, 845 F. Supp. 2d 288 (D.D.C. 2012), which held that a court cannot compel NARA to revisit a President's categorization of records. *Id.* at 300-01. But that case provides no support for granting extraordinary equitable relief based on Plaintiff's unsubstantiated suggestion that he might have deemed records that indisputably qualify as Presidential records to be personal.

Finally, even if Plaintiff had established a property interest in the records bearing classification markings, he still would not be entitled to Rule 41(g) relief. Among other things, those records were recovered under a valid search warrant and are highly relevant to an ongoing criminal investigation. *See Richey v. Smith*, 515 F.2d 1239, 1243-1244 (5th Cir. 1975).

2. The records bearing classification markings are not subject to attorney-client privilege because they are not communications between Plaintiff and his personal lawyers. Mot. 12. Plaintiff does not argue otherwise.

3. The government explained that any assertion of executive privilege over the records bearing classification markings would fail for three independent reasons: Plaintiff cannot assert the privilege "against the very Executive Branch in whose name the privilege is invoked," *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 447-48 (1977); the privilege would in any event be overcome by the government's "demonstrated, specific need" for the evidence, *United States v. Nixon*, 418 U.S. 683, 713 (1974); and Plaintiff should not be heard to assert a privilege that he failed to raise in response to a grand-jury subpoena. Mot. 12-15.

Plaintiff does not respond to any of those arguments. Indeed, except for a brief footnote, his response does not mention executive privilege at all. And the footnote states only that other classified documents recovered before the search contained Plaintiff's handwritten notes and that those notes "could" contain privileged information. Resp. 13 n.5; *see* A73. But the question is not whether the records at issue

here might contain material that in other circumstances could give rise to valid claims of executive privilege against disclosure to Congress or the public. Instead, it is whether Plaintiff can assert the privilege to prevent the Executive Branch *itself* from reviewing records that are central to its investigation. The three independent—and unrefuted—reasons why he cannot do so apply equally to any handwritten notes those government records might contain.

B. Plaintiff's arguments about classification status are irrelevant.

Plaintiff asserts (at 11) that the government's motion "presupposes that the documents it claims are classified are, in fact, classified" and that the government has "not yet proven that critical fact" because Plaintiff had authority to declassify records while in office. That is doubly mistaken.

First, as the government explained (Mot. 16), nothing in its motion depends on the records' current classification status. The records' classification markings establish that they are government records and that responsible officials previously determined that their unauthorized disclosure would cause damage—including "exceptionally grave damage"—to the Nation's security. Exec. Order 13,526 § 1.2(1) (Dec. 29, 2009). Even if Plaintiff had actually declassified some or all of the records, that would not give rise to any claim of privilege or other basis for restricting the government's use of them. To the contrary, the government would still have a compelling need to review those records for its criminal investigation—and an additional compelling need to understand what

was declassified, who saw it, and what ameliorative measures might be necessary to safeguard the Nation's security. Mot. 16.

Second, even if classification status were relevant, Plaintiff gets the law backward by asserting that the government must "prove[]" that records with classification markings are classified. Resp. 11. The government has submitted a detailed inventory cataloguing the classification markings, as well as a redacted photograph showing some of the relevant markings. A51, A115-A121. Records marked as classified must be treated as such "in the absence of affirmative proof to the contrary." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975). And Plaintiff, as the party seeking relief, bore the burden of proof. Yet despite multiple opportunities, Plaintiff has never actually represented—much less offered evidence—that he declassified any of the relevant records. To the contrary, after persuading the district court to grant injunctive relief and appoint a special master to adjudicate purportedly "disputed issues" about the records' status, A6-A7, Plaintiff has now reversed course: In response to the special master's invitation to identify any records he claims to have declassified and offer evidence to support such claims, Plaintiff *objected* to "disclos[ing] specific information regarding declassification to the Court and to the Government." D.E. 97 at 2.

C. Plaintiff's jurisdictional argument lacks merit.

Plaintiff does not challenge this Court's jurisdiction over the portion of the district court's order enjoining further review and use of the records for criminal investigative purposes. A36-A37. But Plaintiff asserts (Resp. 20-26) that this Court

cannot stay the portion of the order requiring the government to disclose the documents bearing classification markings as part of the special-master review process because the Court lacks appellate jurisdiction under 28 U.S.C. 1292(a). That is incorrect.

Section 1292(a) provides that "the courts of appeals shall have jurisdiction of appeals from[] * * * [i]nterlocutory *orders* of the district courts * * * granting * * * injunctions." 28 U.S.C. 1292(a)(1) (emphasis added). It is thus the entire *order* that is appealable under Section 1292(a)(1)—not just particular issues within that order. The Supreme Court made exactly that point in construing a neighboring provision: "As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996); *see BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1537-1538 (2021) (similar). Here, the district court granted an injunction in its September 5 order. A14-A37. It follows that this Court has jurisdiction to review the entire order—including the portion directing that "[a] special master shall be appointed to review the seized property." A36. As to the government's invocation of the September 15 order specifying details of the review process, *see* Mot. 20; Resp. 23, that order simply clarified the "exact details and mechanics" of the review process mandated by the September 5 order. A36.

Moreover, the injunction's duration is tied to the special-master review process, and the district court explained that its purpose is "to reinforce the value of the Special Master," A23, A10—which demonstrates that the special-master review process is

"inextricably intertwined" with the injunction and that this court may exercise appellate jurisdiction to review that process. *Jones v. Fransen*, 857 F.3d 843, 850 (11th Cir. 2017). Indeed, a directive to disclose information that is classified or otherwise implicates national security may itself be immediately appealable as a collateral order even absent an injunction. *Cf. Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 113 n.4 (2009); *see Al Odah v. United States*, 559 F.3d 539, 543-44 (D.C. Cir. 2009).[2]

II. Absent a partial stay, the government and the public will be irreparably harmed.

The district court's order irreparably harms the government and the public by (A) interfering with the government's response to the national-security risks arising from the mishandling and possible disclosure of records bearing classification markings; (B) impairing a criminal investigation into these critical national-security matters; and (C) forcing the government to disclose highly sensitive materials. Mot. 19-21. To the extent Plaintiff addresses these harms, his arguments lack merit.

As the government explained—and as supported by a sworn declaration from the Assistant Director for the FBI's Counterintelligence Division—the Intelligence Community's (IC's) classification review and national-security assessment cannot uncover the full set of facts needed to understand which if any records bearing

[2] If the Court harbors any doubts about its jurisdiction over portions of the September 5 order, it should construe the government's appeal and stay motion as a petition for a writ of mandamus with respect to those portions and grant the petition. *See Suarez-Valdez v. Shearson Leahman/American Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988).

classification markings were disclosed, to whom, and in what circumstances. Mot. 18; A41-A42. The FBI has a critical role in using criminal investigative tools such as witness interviews, subpoenas, and search warrants in pursuit of these facts. A42. The injunction bars the FBI from using the seized records bearing classification markings to do just that. Plaintiff asserts that the government has shown only "that it would be *easier* . . . to conduct the criminal investigation and national security assessment in tandem." Resp. 17. But the injunction *prohibits* DOJ and the FBI from taking these investigative steps unless they are "inextricable" from what the court referred to as the IC's "Security Assessments," A11-A12—a standard that the government must discern on pain of contempt.

Plaintiff next dismisses the government's national-security concerns as "hypothetical." Resp. 17 (citing A11). But the injunction is preventing the government from taking some of the steps necessary to determine whether those concerns have or may become a reality. Moreover, Plaintiff fails to address the harms caused by the injunction's interference in the expeditious administration of the criminal laws, and by the possibility that the government's law-enforcement efforts will be obstructed (or perhaps further obstructed). Mot. 19-20. Plaintiff states only that the injunction will last for a "short period," Resp. 19. At the same time, Plaintiff is already attempting to delay proceedings before the special master. *See* D.E. 97 at 1-2 (seeking to extend deadlines and set hearings "on any Rule 41 or related filings" in "Late November").

Finally, Plaintiff offers no response to the irreparable harm that will occur if the government is forced to disclose classified information outside the Executive Branch, including to Plaintiff's counsel. Mot. 20-21. Plaintiff's assertion that the government "would presumably be prepared to share all [records bearing classification markings] publicly in any future jury trial," Resp. 16 n.8, is mistaken. In cases involving the unlawful retention of national defense information, nothing requires the government to pursue charges on the basis of *all* unlawfully retained information or to publicly disclose classified information at trial. To the contrary, the Classified Information Procedures Act provides mechanisms "to protect classified information from unnecessary disclosure at any stage of a criminal trial." Mot. 20-21 (internal quotation marks omitted).

III. A partial stay would impose no cognizable harm on Plaintiff.

Plaintiff makes little attempt to establish that he would suffer irreparable harm from a partial stay. He briefly asserts (at 19-20) that he could be harmed if the government's criminal investigation proceeds unimpeded. But merely being subject to a criminal investigation is not irreparable harm, and Plaintiff does not argue otherwise. Mot. 21-22. The appropriate time to litigate challenges to a criminal investigation, to a search, or to the government's use of particular evidence is through ordinary criminal motions practice if and when charges are ultimately filed—not through extraordinary civil actions seeking to enjoin aspects of an ongoing criminal investigation.

CONCLUSION

The district court's order should be stayed to the extent it (1) enjoins the further review and use for criminal-investigative purposes of the seized records bearing classification markings and (2) requires the government to disclose those records for a special-master review process.

Respectfully submitted,

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Counsel for Appellant

September 20, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,580 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6)because it was prepared using Microsoft Word in Garamond 14-point font, a proportionally spaced typeface.

/s/ Jeffrey M. Smith
Jeffrey M. Smith

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey M. Smith
Jeffrey M. Smith

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

AFFIDAVIT REGARDING DETAILED INVENTORY

I, [redacted], hereby declare the following:

1. I am a Supervisory Special Agent with the Federal Bureau of Investigation ("FBI"), United States Department of Justice ("DOJ"), currently assigned to the Counterintelligence Division of the FBI's Washington Field Office. As a Supervisory Special Agent, I lead a squad of FBI Special Agents, Intelligence Analysts, and other support personnel in conducting counterintelligence and espionage investigations, including investigations concerning the mishandling of classified or national defense information.

2. I make this declaration in response to the Special Master's Case Management Plan, filed September 22, 2022, which directed a "government official with sufficient knowledge of the matter [to] submit a declaration or affidavit as to whether the Detailed Property Inventory, ECF 39-1, represents the full and accurate extent of the property seized from the premises located at 1100 S. Ocean Boulevard, Palm Beach, Florida 33480 (the

'Premises') on August 8, 2022, excluding documents bearing classification markings (the 'Seized Materials')." Case Management Plan at 1 ¶ I.[1]

3. The squad that I supervise had primary responsibility for the execution of a search warrant at the Premises on August 8, 2022. I was present during the execution of that search warrant, which resulted in the seizure of thirty-three boxes, containers, or other items of evidence, which contained just over one hundred records with classification markings, including records marked TOP SECRET and records marked as containing additional sensitive compartmented information.

4. Since the execution of the search, the Seized Materials have remained in the custody of the FBI and have been maintained pursuant to FBI procedures governing the secure storage of evidence and chain of custody.

5. Following the execution of the search, I and FBI personnel working under my direction began to review the Seized Materials as part of our investigation. Pursuant to the Court's Preliminary Order, D.E. 29 at 2, Section 3.b.i, I and FBI personnel working under my direction reviewed all of the Seized Materials in order to draft the Detailed Property Inventory, which was filed as D.E. 39-1.

6. In order to ensure that the Detailed Property Inventory was accurate, I and FBI personnel working under my direction conducted an additional review and recount of the Seized Materials in order to make this declaration. That additional review and recount

[1] As the Special Master and the Court are aware, the search warrant executed at the Premises on August 8, 2022, set forth filter procedures concerning potentially privileged material. The materials addressed in this declaration do not include the materials filtered and segregated by the Privilege Review Team that remain in the Privilege Review Team's possession.

resulted in some minor revisions to the Detailed Property Inventory.[2] A Revised Detailed Property Inventory is attached hereto.

7. Based on my personal awareness and knowledge of the facts of this matter, as well as my review of FBI records and conversations with those working at my direction in this investigation, the Revised Detailed Property Inventory attached hereto represents the full and accurate extent of the property seized from the Premises on August 8, 2022. I am not aware of any documents or materials seized from the Premises on that date by the FBI that are not reflected in the Revised Detailed Property Inventory, other than materials that the Privilege Review Team has not provided to the Case Team, as described in footnote 1 above.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26th, 2022.

[redacted]
Supervisory Special Agent
Federal Bureau of Investigation

[2] The Case Management Plan's requirement that I provide this declaration afforded the FBI more time to conduct this additional review and recount than had the Preliminary Order, which required the Detailed Property Inventory to be completed in a single business day.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 22-CV-81294-CANNON

DONALD J. TRUMP,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

REVISED DETAILED PROPERTY INVENTORY
PURSUANT TO COURT'S PRELIMINARY ORDER

Item #1 – Documents from Office
1 US Government Document with SECRET Classification Markings
2 US Government Documents/Photographs without Classification Markings

Item #2 – Box/Container from Office
99 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2017-10/2018
2 US Government Documents with CONFIDENTIAL Classification Markings
15 US Government Documents with SECRET Classification Markings
7 US Government Documents with TOP SECRET Classification Markings
74 US Government Documents/Photographs without Classification Markings
43 Empty Folders with "CLASSIFIED" Banners
28 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #3 – Documents from Office
2 US Government Documents/Photographs without Classification Markings

Item #4 – Documents from Office

26 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2020-11/2020
1 US Government Document with CONFIDENTIAL Classification Markings
1 US Government Documents with SECRET Classification Markings
361 US Government Documents/Photographs without Classification Markings

Item #5 – Documents from Office
396 US Government Documents/Photographs without Classification Markings

Item #6 – Documents from Office
671 US Government Documents/Photographs without Classification Markings

Item #7 – Documents from Office
1 US Government Document/Photograph without Classification Markings

Item #8 – Box/Container from Storage Room
68 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2015-05/2017
1 Article of Clothing/Gift Item
1 Book
2 US Government Documents/Photographs without Classification Markings

Item #9 – Box/Container from Storage Room
91 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2019-09/2020
1 Article of Clothing/Gift Item
65 US Government Documents/Photographs without Classification Markings

Item #10 – Box/Container from Storage Room
30 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2008-12/2019
11 US Government Documents with CONFIDENTIAL Classification Markings
21 US Government Documents with SECRET Classification Markings

3 Articles of Clothing/Gift Items
1 Book
257 US Government Documents/Photographs without Classification Markings

Item #11 – Box/Container from Storage Room
116 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2019-08/2020
8 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with SECRET Classification Markings
2 US Government Document with TOP SECRET Classification Markings
110 US Government Documents/Photographs without Classification Markings

Item #12 – Box/Container from Storage Room
39 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2017-03/2020
71 US Government Documents/Photographs without Classification Markings

Item #13 – Box/Container from Storage Room
52 Magazines/Newspapers/Press Articles and Other Printed Media dated between 09/2018 -08/2019
2 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
710 US Government Documents/Photographs without Classification Markings

Item #14 – Box/Container from Storage Room
87 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2018-11/2019
2 US Government Documents with CONFIDENTIAL Classification Markings
438 US Government Documents/Photographs without Classification Markings

Item #15 – Box/Container from Storage Room
65 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2016-11/2018

1 US Government Documents with CONFIDENTIAL Classification Markings
4 US Government Document with SECRET Classification Markings
2 Books
78 US Government Documents/Photographs without Classification Markings
2 Empty Folders with "CLASSIFIED" Banners
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #16 – Box/Container from Storage Room
76 Magazines/Newspapers/Press Articles and Other Printed Media dated between 11/2017-12/2017
60 US Government Documents/Photographs without Classification Markings

Item #17 – Box/Container from Storage Room
67 Magazines/Newspapers/Press Articles and Other Printed Media dated between 7/2016 – 3/2017
5 Articles of Clothing/Gift Items
2 US Government Documents/Photographs without Classification Markings

Item #18 – Box/Container from Storage Room
4 Magazines/Newspapers/Press Articles and Other Printed Media dated between 01/2018 – 12/2019
1 US Government Document with SECRET Classification Markings
1 Book
1578 US Government Documents/Photographs without Classification Markings
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #19 – Box/Container from Storage Room
53 Magazines/Newspapers/Press Articles and Other Printed Media dated between 05/2016 – 01/2020
1 US Government Documents with CONFIDENTIAL Classification Markings
5 Articles of Clothing/Gift Items
236 US Government Documents/Photographs without Classification Markings

Item #20 – Box/Container from Storage Room

121 Magazines/Newspapers/Press Articles and Other Printed Media dated between 08/2017-12/2017
16 US Government Documents/Photographs without Classification Markings

Item #21 – Box/Container from Storage Room
2 Magazines/Newspapers/Press Articles and Other Printed Media dated 11/2020
1413 US Government Documents/Photographs without Classification Markings

Item #22 – Box/Container from Storage Room
114 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2020 – 10/2020
25 US Government Documents/Photographs without Classification Markings

Item #23 – Box/Container from Storage Room
68 Magazines/Newspapers/Press Articles and Other Printed Media dated between 11/2016 – 06/2018
1 US Government Document with SECRET Classification Markings
1 Book
69 US Government Documents/Photographs without Classification Markings
8 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"

Item #24 – Box/Container from Storage Room
1 Magazines/Newspapers/Press Articles and Other Printed Media dated circa 2018
1599 US Government Documents/Photographs without Classification Markings

Item #25 – Box/Container from Storage Room
76 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/2016 – 11/2017
1 US Government Documents with CONFIDENTIAL Classification Markings
1 US Government Document with SECRET Classification Markings
20 US Government Documents/Photographs without Classification Markings
1 Empty Folder with "CLASSIFIED" Banner

Item #26– Box/Container from Storage Room

8 Magazines/Newspapers/Press Articles and Other Printed Media dated between 12/2017 – 3/2020
3 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
1 Book
1844 US Government Documents/Photographs without Classification Markings

Item #27– Box/Container from Storage Room
1 Magazines/Newspapers/Press Articles and Other Printed Media dated between 07/2016 – 9/2020
1 Article of Clothing/Gift Items
23 Books
52 US Government Documents/Photographs without Classification Markings

Item #28 – Box/Container from Storage Room
2 Magazines/Newspapers/Press Articles and Other Printed Media dated between 2/2017 – 3/2017
2 US Government Documents with CONFIDENTIAL Classification Markings
8 US Government Document with SECRET Classification Markings
4 US Government Document with TOP SECRET Classification Markings
1 Article of Clothing/Gift Items
1 Book
793 US Government Documents/Photographs without Classification Markings

Item #29 – Box/Container from Storage Room
84 Magazines/Newspapers/Press Articles and Other Printed Media dated between 10/1995 – 05/2019
1 US Government Document with TOP SECRET Classification Markings
35 US Government Documents/Photographs without Classification Markings

Item #30 – Box/Container from Storage Room
29 Magazines/Newspapers/Press Articles and Other Printed Media dated between 05/2020 – 09/2020
82 US Government Documents/Photographs without Classification Markings

Item # 31– Box/Container from Storage Room
111 Magazines/Newspapers/Press Articles and Other Printed Media dated between 06/2015 – 04/2019
41 US Government Documents/Photographs without Classification Markings

Item #32 – Box/Container from Storage Room
98 Magazines/Newspapers/Press Articles and Other Printed Media dated between 02/2008 – 04/2020
1 Book
87 US Government Documents/Photographs without Classification Markings

Item #33 – Box/Container from Storage Room
83 Magazines/Newspapers/Press Articles and Other Printed Media dated between 02/2017 – 02/2018
1 Book
44 US Government Documents/Photographs without Classification Markings
2 Empty Folders Labeled "Return to Staff Secretary/Miliary Aide"