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Legal Sidebar

The Mar-a-Lago Search Warrant: A Legal Introduction

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The Federal Bureau of Investigation (FBI) recently executed a search warrant at former President Donald Trump's Mar-a-Lago property in Palm Beach, Florida. A magistrate judge of the U.S. District Court for the Southern District of Florida later unsealed the warrant at the Department of Justice's request, which the former President did not oppose. The warrant authorized government officials to seize all "documents and records constituting evidence, contraband, fruits of crime, or other items illegally possessed in violation" of three federal statutes—18 U.S.C. §§ 793, 2071, and 1519. In addition to the warrant itself and its attachments, the court unsealed other material related to the search, including the cover sheet to the warrant application, an inventory of property seized, and a redacted version of the affidavit supporting the warrant. Former President Trump filed a separate action asking the court, among other things, to appoint a special master to oversee the government's handling of the seized material.

This Sidebar describes the process for and implications of obtaining a search warrant. It then examines the criminal offenses identified in the Mar-a-Lago warrant. Finally, this Sidebar analyzes presidential authority to declassify documents and the role of declassification for the crimes at issue.

Obtaining Search Warrants

The Fourth Amendment protects against "unreasonable searches and seizures." When law enforcement conducts a search, the Supreme Court has said that the preferred process under the Fourth Amendment is to do so pursuant to a search warrant, although warrantless searches are reasonable in some circumstances. Rule 41 of the Federal Rules of Criminal Procedure and the Fourth Amendment itself establish a number of requirements for obtaining a search warrant.

Pursuant to the Fourth Amendment, a warrant must be based on probable cause, a standard the Supreme Court has described as "incapable of precise definition or quantification into percentages." Exact formulations vary, but the Supreme Court has characterized the probable-cause standard as "the kind of 'fair probability' on which 'reasonable and prudent'" people act. Probable cause is a higher standard than "reasonable suspicion" but does not require proof that something is "more likely true than false." To satisfy the probable-cause standard to obtain a search warrant, law enforcement must generally show a likelihood that (1) the materials sought are "seizable by virtue of being connected with criminal activity" and (2) the materials "will be found in the place to be searched."

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Under Rule 41 of the Federal Rules of Criminal Procedure, law enforcement may make the probable-cause showing through a written affidavit or, if "reasonable under the circumstances," by sworn testimony—both of which embody the Fourth Amendment requirement that a warrant must be supported by "oath or affirmation." Once law enforcement provides the affidavit or testimony to a judge in the correct venue—for example, a federal magistrate judge in the district where the property to be searched is located—that judge "must issue the warrant if there is probable cause to search for and seize" the property.

The Fourth Amendment dictates that the resulting warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." Although a purpose of this requirement is to prohibit "general searches" permitting seizure of "one thing under a warrant describing another," in practice warrants will sometimes use broad terms. For example, in *Andresen v. Maryland*, the Supreme Court rejected a particularity challenge to a warrant to search for and seize "other fruits, instrumentalities and evidence of crime at this [time] unknown." The Court concluded that the phrase should be read in conjunction with the particular crime specified in the warrant—specifically in *Andresen*, a violation of a state false pretenses statute connected to a real estate transaction. In other words, the warrant's particularity may be limited not only by the description of the materials to be seized but *also* by the specified crime to which they must pertain.

Search warrants are common tools for investigating crime. Their issuance indicates there was probable cause that items to be searched for and seized in a particular location are contraband or evidence of a crime. However, a search warrant does not necessarily mean that a prosecution will follow. At the federal level, the decision of whether or not to initiate prosecution is subject to the executive branch's discretion as informed by a number of Justice Department policies.

Statutes Identified in the Mar-a-Lago Warrant

The Mar-a-Lago warrant separately describes the premises to be searched (Attachment A) and the property to be seized (Attachment B). The warrant authorized the search of all rooms in the Mar-a-Lago resort that were used or available to former President Trump and his staff and in which boxes or documents could be stored, but it excluded guest suites and private member areas. The warrant authorized the government to seize all physical documents and records connected with three offenses defined in Title 18 of the *U.S. Code*.

18 U.S.C. § 793

The first statute identified in the Mar-a-Lago warrant is 18 U.S.C. § 793. This provision is part of the Espionage Act of 1917—a statute originally enacted two months after the United States entered World War I. Congress has amended elements of Section 793 several times, but the bulk of the text has remained the same since Section 793's enactment. A different section of the Espionage Act focuses on "classic spying" cases when an individual sends information to a foreign government or military, but Section 793 captures a broader range of activity than traditional espionage. Because Section 793 predates the modern system of classifying sensitive material, it does not use the phrase *classified information*. Instead, the statute protects information and material "relating to" or "connected with" national defense—often called *national defense information*.

The Espionage Act does not define national defense information, but courts have elaborated on its meaning. In a 1941 decision, *Gorin v. United States*, the Supreme Court agreed with the interpretation that national defense is a "generic concept of broad connotations, relating to the military and naval establishments and the related activities of national preparedness." Lower courts have since stated that, to qualify as national defense information, the information must be "closely held" and its disclosure "potentially damaging" to the United States or useful to its adversaries. Those accused of violating the

Espionage Act have argued that the statute is unconstitutionally vague because it does not provide sufficiently clear standards for people of common intelligence to determine whether information in their possession qualifies as national defense information. In *Gorin*, however, the Supreme Court concluded that the statute's state-of-mind (or mens rea) requirements had a delimiting effect that gave what was otherwise potentially problematic language enough definitiveness to pass constitutional muster.

Section 793 is divided into several subsections with technical and legal distinctions. The affidavit supporting the warrant focuses on subsection (e), which applies when an individual is in unauthorized possession of certain national defense information. Section 793(e) creates penalties for willfully disclosing or attempting to disclose that information. It also prohibits willfully retaining national defense information and failing to deliver it to the proper official. (For further analysis of the Espionage Act and its mens rea requirements, see CRS Report R41404, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information*, by Stephen P. Mulligan and Jennifer K. Elsea.)

18 U.S.C. § 2071

Another statute cited in the Mar-a-Lago search warrant and affidavit is 18 U.S.C. § 2071, which generally prohibits, among other things, willfully and unlawfully concealing, removing, mutilating, obliterating, or destroying a "record," "paper," or "document" that is "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." A violation of the statute is punishable by up to three years' imprisonment. Separately, if a person "having the custody of any such record," paper, or document takes one of the aforementioned actions with the requisite willful and unlawful intent, he may be imprisoned for up to three years *and* "shall forfeit his office and be disqualified from holding any office under the United States."

Whether a person could be charged with violating the statute could depend on, among other things, whether any of the records or documents recovered would be considered "filed or deposited ... in any public office, or with any ... public officer of the United States." There is little caselaw on what it means for a record or document to be "filed or deposited" with a relevant office or officer, though a 1923 Third Circuit opinion interpreting a predecessor statute suggested that a document "deposited" may include one "intrusted to [the] care" of another. As to the term *public office*, in the prosecution of a co-conspirator involved in the Iran-Contra affair for conspiring to alter certain memoranda of the National Security Council (NSC), the federal district court for the District of Columbia suggested that the term broadly covers "a governmental office, as distinguished from a private one." In the case involving the Iran-Contra co-conspirator who altered the NSC documents, Oliver North, the court in a footnote rejected North's argument that "'Presidential' material is exempt" from the statute, citing the Presidential Records Act.

A second consideration under Section 2071 is when a covered record or document may be considered to have been concealed, removed, mutilated, obliterated, or destroyed within the meaning of the statute. On this question, it seems clear that the statute applies to the destruction or removal from its proper place, for example, of an *original* version of an official record or document. For instance, one of the Iran-Contra cases noted that the NSC documents at issue were "originals" that should have been included either in NSC institutional records or presidential records. A more recent circuit court case affirmed the conviction of a man convicted of destroying Immigration and Naturalization Service documents that were "official public records required to be placed in ... the permanent record files of persons seeking to gain citizenships in the United States[.]" Whether the statute also applies to mere *copies* of records or documents is less clear. In a subsequently vacated 2004 opinion, the Tenth Circuit held that "a copy of an officially filed document falls within the statutory language" of Section 2071, and thus the statute applied to the removal of a copy of a sealed affidavit from a court clerk's office. In a later case, however, the federal district court for the District of Columbia disagreed with the Tenth Circuit, ruling that the statute as a whole extends only to circumstances where a person's actions with respect to a covered record or document "obliterated information from the public record."

To be convicted of a violation of Section 2071, one must also act with the requisite state of mind—"willfully and unlawfully." This requirement appears stringent. According to the Ninth Circuit, the standard requires one to act "intentionally, with knowledge that he was breaching the statute." Under this standard, belief in the lawfulness of one's actions could negate the state-of-mind requirement.

Finally, for purposes of the provision mandating disqualification from public office, a person must have had "custody" of covered records or documents. In the Iran-Contra cases, the D.C. district court took a broad view of this term, rejecting the argument that the statute applies "only [to] those who are the custodians of records in the technical sense" and writing that the statute's "obvious purpose ... is to prohibit the impairment of sensitive government documents by those officials who have access to and control over them."

The public office disqualification provision in Section 2071 could raise difficult constitutional questions if applied to the presidency. Article II, Section 1, of the Constitution establishes the qualifications for the presidency: a person must be (1) a natural-born citizen, (2) at least 35 years of age, and (3) a resident of the United States for at least 14 years. Article I contains similar provisions setting out the qualifications for Senators and Members of the House of Representatives. In *Powell v. McCormack* and *U.S. Term Limits v. Thornton*, the Supreme Court recognized that the constitutional qualifications for service in *Congress* are "fixed and exclusive." The Court has not directly addressed whether *presidential* qualifications are exclusive, but in reliance on *Powell* and *Thornton*, some lower courts have deemed that they are. As such, if Section 2071's statutory disqualification provision were viewed as establishing a substantive qualification for the presidency beyond what is required in the Constitution, it might be argued (as at least one scholar has done) that the provision cannot bar a person from serving as President. (Whether and when a person might be barred from public office under the Fourteenth Amendment may raise distinct issues and is discussed in this Legal Sidebar.)

18 U.S.C. § 1519

The Mar-a-Lago warrant and affidavit also lists 18 U.S.C. § 1519—a statute criminalizing certain acts of destruction of evidence in obstruction of certain federal investigations or proceedings. Congress intended § 1519 to have a broad scope, and prosecutors have used it to charge an array of behaviors aimed at undermining investigations, including creating false reports, hiding objects, and shredding documents. It has been used to prosecute private and governmental actors alike. Enacted as part of the Sarbanes-Oxley Act of 2002, violations of § 1519 may incur fines, imprisonment of up to 20 years, or both.

To establish a § 1519 violation, the government must satisfy four elements. First, it must prove that the defendant knowingly altered, destroyed, mutilated, concealed, covered up, falsified, or made false entries. This list of seven prohibited behaviors is intended to reach "any acts to destroy or fabricate physical evidence." The knowledge requirement demands only that "the accused knowingly committed one of several acts" (e.g., concealment of documents), and not that he did so with knowledge that any "possible investigation [would be] federal in nature." Second, the government must show that the prohibited behavior was done to "any record, document, or tangible object," a phrase that can encompass objects such as computer hard drives and a wide array of documents such as contracts and government reports. Third, § 1519 applies only where the defendant acted with the "intent to impede, obstruct, or influence." According to one federal appellate court, the third element limits the statute from applying to "innocent conduct such as routine destruction of documents that a person consciously and in good faith determines are irrelevant to a foreseeable federal matter." Fourth, the government must demonstrate that the defendant sought to obstruct certain bankruptcy matters or "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." This phrase encompasses executive branch investigations, and at least one federal appellate court has concluded that it also includes federal grand jury proceedings to the extent they relate to an investigation by an executive branch agency into something within that agency's purview. There is some uncertainty regarding the

extent to which § 1519 includes congressional investigations. Notably, § 1519 does "not require that an investigation be pending or that the defendant be aware of one." This is because the statute also covers instances where an individual's behavior is "done in contemplation of an investigation that might occur."

Presidential Control over Access to Classified Information and Materials

The Supreme Court has stated that the President has responsibility for protecting national security information as part of his role as Commander in Chief and head of the executive branch. The Court indicated that the authority to control access to such information "exists quite apart from any explicit congressional grant," although it also suggested that Congress could play some role. Consequently, many argue that the President has broad authority to disclose or declassify such information, which could make it available to the public under the Freedom of Information Act (FOIA) by removing its exemption from disclosure. According to a letter provided as an attachment to the affidavit, the former President also claims that "[a]ny 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."

Executive Order 13526 sets the official procedures for the declassification of information. The relevant federal regulation, binding on all agencies, is 32 C.F.R. Part 2001. Typically, the agency that classified the information is the declassification authority, but the Director of National Intelligence (DNI) may also direct the declassification of information (see E.O. 13256 § 3.1). 32 C.F.R. § 2001.25 requires that declassified documents be marked in a certain way.

Former President Trump reportedly argues that the President, bound by neither the executive order nor the regulations, has the authority to declassify information without following the regular procedures and that he had declassified the documents in question under a standing order that automatically declassified all documents that he took out of the Oval Office. The U.S. Court of Appeals for the Second Circuit appears to have disagreed with the claim to such authority, stating, in the FOIA context: "[D]eclassification, even by the President, must follow established procedures." The court held that a FOIA litigant seeking to demonstrate that information had been declassified by presidential disclosure must show "first, that [the President's] statements are sufficiently specific; and second, that such statements subsequently triggered actual declassification." Some argue that declassification would entail communicating that change of status across federal agencies so that they can alter document markings on all materials that contain the newly declassified information.

The unauthorized disclosure of classified information does not result in its declassification, although officially acknowledged classified information may be subject to release under FOIA. Agency classification authorities, and presumably the President, may reclassify information, although if the information has already been made available to the public, certain criteria must be met. There do not appear to be any reports that the documents in question were subject to public release. If the documents were not declassified or have been reclassified by the Biden Administration, former President Trump could be permitted access to them if the head or a senior official of the originating agency grants a waiver.

None of the statutes listed in the Mar-a-Lago search warrant requires that the materials at issue be classified, although the classified status of such documents may be relevant to a court's determination under the Espionage Act as to whether the documents contain information that is closely held by the government and thus meet the definition of national defense information. Courts generally give great deference to the executive branch in matters related to security classification. (For more information about national security classification, see CRS Report RS21900, *The Protection of Classified Information: The Legal Framework*, by Jennifer K. Elsea.)

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