Legal Sidebar

The Mar-a-Lago Indictment: A Legal Introduction

Updated June 9, 2023

On June 8, 2023, President Trump stated on social media that he had been informed a federal grand jury had returned an indictment against him. The indictment, which was unsealed on June 9, 2023, includes a total of 38 counts related to government documents found at the former President's Mar-a-Lago property in Palm Beach, FL, and the investigation arising from the retention of those documents. The indictment names both former President Trump and an associate as defendants.

The Federal Bureau of Investigation (FBI) previously executed a search warrant at Mar-a-Lago, which a magistrate judge unsealed along with an inventory of property seized and a redacted version of the warrant's supporting affidavit. The warrant authorized government officials to seize all documents and records constituting evidence of possible violations of several federal statutes related to unlawful retention, removal, destruction, or alteration of government documents.

The charges in the indictment fall into three categories. Those categories are

- willful retention of documents related to the national defense in violation of the Espionage Act (18 U.S.C. § 793(e));
- obstruction-based charges, including destruction, alteration, or falsification of records in federal investigations (18 U.S.C. § 1519), witness tampering (18 U.S.C. § 1512), and conspiracy to violate the witness tampering statute (18 U.S.C. § 1512(k)); and
- false statement offenses (18 U.S.C. § 1001).

The indictment also includes 18 U.S.C. § 2 in several of the counts; that provision specifies, among other things, that whoever "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The former President is charged in 37 of the 38 counts in the indictment, with a final false-statement count naming the former President's associate alone. The majority of the counts against the former President fall under the Espionage Act, 18 U.S.C. § 793(e). This Sidebar thus focuses on that provision. (Other CRS products provide more information on some of the other federal obstruction of justice provisions, false statement offenses, and the conspiracy charge in the indictment.) This Sidebar also analyzes presidential authority to declassify documents and the role of declassification for the crimes at issue. Finally, this Sidebar discusses three developments related to the warrant and case against the former

Congressional Research Service
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LSB10810

President—the former President's request for a special master, ongoing grand jury investigations, and the appointment of a special counsel to oversee the government's investigation.

18 U.S.C. § 793

The primary statute involved in the indictment—comprising 31 of the 37 counts against the former President—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 indictment charges violations of subsection (e), which applies when an individual is in unauthorized possession of certain national defense information. Section 793(e) prohibits, among other things, 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; and CRS Video WVB00578, *National Security and Classified Information: Procedures and Penalties*, by Jennifer K. Elsea, Andreas Kuersten, and Stephen P. Mulligan.

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, former President Trump 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 in the indictment 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; and CRS In Focus IF12318, *Rules and Statutes Relevant to Safeguarding Classified Materials*, by Jennifer K. Elsea and Andreas Kuersten.

The Special Master, Grand Juries, and Special Counsel

Shortly after the FBI executed the search warrant in August 2022, former President Trump filed a motion in the U.S. District Court for the Southern District of Florida asking the court to appoint a special master to oversee the government's handling of the seized material. A federal district judge granted that request, but the U.S. Court of Appeals for the Eleventh Circuit overturned the decision and held that the district court lacked jurisdiction to make the appointment. The Eleventh Circuit concluded that the appointment would have required the court to create a new exception to its jurisdictional rules that applied only to former Presidents. The court declined to adopt that new exception based on the reasoning that a rule only for former Presidents would defy the principle that the law applies "to all without regard to numbers, wealth, or rank." Based on the Eleventh's Circuit's opinion, the U.S. District Court for the Southern District of Florida dismissed the case for lack of jurisdiction.

Separate from the special master proceedings that originated in the Southern District of Florida, there is an ongoing and related grand jury investigation in the D.C. District Court. Because grand juries, which are discussed in this CRS report, generally conduct their work in secret, most information about the D.C. District Court proceedings is not publicly available—although some documents related to the grand jury have been unsealed. In particular, DOJ sought and received the D.C. District Court's permission to reveal, among other things, a May 2022 grand jury subpoena issued to the Custodian of Records for the Office of Donald J. Trump. The grand jury subpoena called for production of "all documents or writings in the

custody or control of Donald J. Trump and/or the Office of Donald J. Trump bearing classification markings[.]"

The former President produced some material in response to the subpoena in June 2022, but DOJ contends that the response was incomplete and that classified records remained in the former President's possession. According to DOJ, it was against this backdrop that the government applied for the warrant in August 2022 to search Mar-a-Lago. Various media outlets report that the D.C. District Court continues to preside over the grand jury investigation and the former President's responses to subpoenas, but those proceedings remain under seal as of June 2023.

In November 2022, the Attorney General appointed Jack Smith as Special Counsel to oversee the government's investigation of the alleged retention of classified information and presidential records. The Special Counsel is also authorized to continue a separate investigation into "whether any person or entity violated the law in connection with efforts to interfere with the lawful transfer of power the following the 2020 presidential election...." According to the order, "the Special Counsel is authorized to prosecute federal crimes arising from the investigation of these matters." (For additional background on the history of and authorities for special counsel investigations, see CRS Report R44857, *Special Counsel Investigations: History, Authority, Appointment and Removal*, by Jared P. Cole.)

In June 2023, media outlets reported that another grand jury had been convened in a federal court in Miami related to the Mar-a-Lago documents. It is this Miami-based grand jury, rather than the grand jury convened in Washington, DC, that returned the indictment against former President Trump and his associate.

Author Information

Stephen P. Mulligan
Legislative Attorney

Jennifer K. Elsea
Legislative Attorney

Peter G. Berris
Legislative Attorney

Michael A. Foster
Section Research Manager

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