

# NEXT STEPS IN THE TRUMP STOLEN DOCUMENTS INVESTIGATION

A number of people have gotten impatient that the search of the former President's golf resort has not yet yielded an indictment. "If you or I did what he did," a common refrain goes, "we'd already be in prison."

I often point to the example of Joshua Schulte, the former CIA coder convicted last month of the Vault 7 and 8 leaks. He wasn't jailed until almost nine months after the initial search of his apartment, and only then because he violated bail conditions on charges related to Child Sexual Abuse Materials allegedly found on his server. He wasn't charged on the Espionage Act charges until 15 months after that initial search.

And it sounds like Trump won't be charged anytime soon. At a hearing before Magistrate Judge Bruce Reinhart last week, the head of DOJ's counterintelligence section, Jay Bratt, said the investigation is in its "early stages." That may suggest that Trump or others are suspected of more than just storing classified information in insecure conditions and refusing to give it back. Perhaps the people entering and exiting the storage closet at Mar-a-Lago did something more than just hide stuff from DOJ. Or perhaps the obstruction investigation – which may be obstruction of *this* investigation or others – is more complex than we imagine (which isn't hard, because most journalists are simply ignoring that suspected crime).

Whatever the reason Bratt stated that DOJ will need to do significant further investigation, there are steps that would be required in any case. There are four steps that the FBI would take before considering charges.

# Filter Review

There are two kinds of reviews that the FBI will do of this material: A filter review and a scope review (though these words are getting muddled in the coverage, including in this piece, which is the only one that has reported on the process).

The filter review is done by agents who are not part of the investigative team. They make sure that nothing privileged gets to the investigative team.

According to reports – and Bratt’s email to Trump’s lawyers – at least some of the agents who did the search at Mar-a-Lago were a filter team (which makes sense, because they were sorting through the contents of boxes onsite). According to Fox News, the materials on one of two receipts – what I call the SSA receipt – included privileged material.

In other words, the FBI had cause to seize stuff that involves Trump’s communications with his lawyers. That’s not surprising. Among the crimes under investigation is the destruction, alteration, or concealment of materials to obstruct an or multiple investigations. I’ve previously pointed to a number of instances where Trump did that with the assistance of lawyers (I’ve taken out a paragraph of Trump Organization examples, because only government documents were permitted to be seized on the search warrant):

- One thing Trump is likely to have withheld is the Perfect Transcript between him and Volodymyr Zelenskyy, which is something Congress was entitled to get during impeachment. That transcript was hidden from Congress by White House lawyer John

Eisenberg, among other lawyers, thereby according the transcript a weak privilege claim, but one easily overcome by the obstructive nature of the choice to withhold it.

- While one draft of Trump's termination letter to Jim Comey was ultimately turned over to Mueller (after reports that the only extant copy was one preserved by DOJ lawyers), the Mueller Report narrative surrounding it makes it clear that Trump and Stephen Miller worked over several drafts before the one shared with others. Those earlier drafts were likely not turned over, in part because White House Counsel lawyers advised Trump that these drafts should "[n]ot [see the] light of day." Again, that's legal advice, but also proof of documents that were illegally withheld from the Mueller investigation.
- I don't want to even imagine what advice from Rudy Giuliani that Trump has withheld from various investigations, particularly pertaining to January 6.

Most of that would be (shitty) legal advice. If it was also withheld from proper investigations, though, it'd also be proof of obstruction under 18 USC 1519.

Given the Fox News report of ongoing filter review, it's likely those materials, at least, will be reviewed a second time to make sure they're proof of obstruction before being shared with investigators.

## **Scope Review**

Then there's a separate review, usually by agents who are part of the investigative team, to pull out only the documents that are relevant to the investigation.

In this case, however, and because the warrant permitted the seizure of materials stored with classified information but the crimes under investigation all pertain to Federal documents, there may be an initial review to pull out anything that is not a government record, so that can be returned to the Former.

Then a team will review the seized materials to see if it is evidence of a crime – either that Trump took documents that should have been sent to the Archives, he kept classified documents at Mar-a-Lago after being asked and subpoenaed for them, or that Trump attempted to destroy, alter, or conceal records relating to an or several investigations. The first category – government documents that would be evidence of 18 USC 2071 but not other crimes – might be copied and catalogued and sent to the Archives.

## **Classification Review**

As part of the process both of determining whether something is classified and assessing

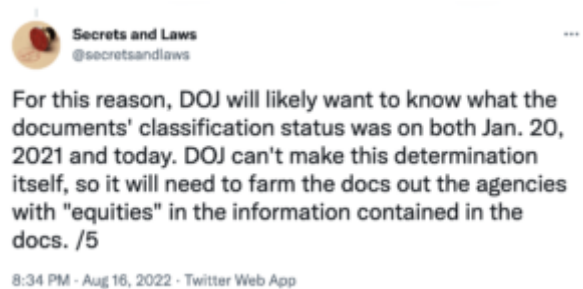
whether a viable prosecution could be pursued, the agencies whose classified information ended up in a poorly protected closet at a golf resort will need to conduct classification reviews to make sure the information really is classified.

A former CIA lawyer did a long thread the other day describing this process; I've included three key points below.



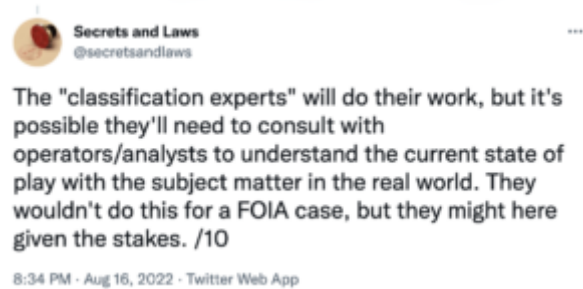
After the filter team completes its review, FBI agents will comb through the materials to ID any potentially classified records. Some records should be clear from their markings, but FBI will closely review handwritten notes & everything else, which could also be classified. /2

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For this reason, DOJ will likely want to know what the documents' classification status was on both Jan. 20, 2021 and today. DOJ can't make this determination itself, so it will need to farm the docs out the agencies with "equities" in the information contained in the docs. /5

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The "classification experts" will do their work, but it's possible they'll need to consult with operators/analysts to understand the current state of play with the subject matter in the real world. They wouldn't do this for a FOIA case, but they might here given the stakes. /10

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That's all part of the process of figuring out whether Trump committed a crime. Before DOJ ever charged Trump for any of this, they would also have to work with the agencies to find documents that the agencies would be willing to expose to the prosecution process, which would involve sharing with Trump and his cleared defense attorneys. If Trump went to trial on Espionage Act charges, DOJ would have to declassify or "substitute" classified information (I wrote about that process here; here's another good overview). And the agencies would not want to do this with the most sensitive documents.

If Trump were ever charged, DOJ would likely pick a subset of the documents that conveyed the gravity of what Trump had taken but that the agencies were willing to subject to this process. In the case of Hal Martin, who *also* took stacks and stacks of classified documents home from work, he was indicted for twenty documents out of the stacks and stacks of stuff he took.

## Inventory

Trump is suspected not just of stealing classified documents, there are known documents that he was suspected of hoarding at his home – according to the WaPo, including documents about nuclear weapons.

So in addition to all the other reviews and an inventory that the FBI will make of what it seized, between FBI and NARA, they're going to need to compare the seized documents with the existing catalog to see whether all the documents known to be missing were seized and whether the seized documents identify other missing documents.

If there are known documents that witnesses say had been at Mar-a-Lago but they weren't found in the search ... then things will get really interesting.

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