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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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IN THE MATTER OF:) Grand Jury
Grand Jury Subpoenas) Case No. 23-10
GJ42-17 and GJ42-69)
)
INTERESTED PARTIES:)
United States of America,) March 9, 2023
██████████,) 10:02 a.m.
and Donald J. Trump.) Washington, D.C.

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TRANSCRIPT OF SEALED HEARING
(Various Portions are Redacted)
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES:

FOR THE UNITED STATES:
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(Appearances Continued)

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ALSO PRESENT: [REDACTED], Interested Party

LINDSEY HALLIGAN

[REDACTED]

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

Proceedings reported by machine shorthand.
Transcript produced by computer-aided transcription.

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P R O C E E D I N G S

1
2 THE COURTROOM DEPUTY: Matter before the Court,
3 Grand Jury Case No. 23-10. In the Matter of: Grand Jury
4 Subpoena GJ42-17 and GJ42-69; Interested Parties: United
5 States of America, [REDACTED], and Donald J. Trump.

6 THE COURT: Let's start with the government,
7 assuming everybody is at the table.

8 MR. PELLETTIERI: Good morning, Your Honor.
9 John Pellettieri on behalf of the United States.

10 I am available to talk and answer any of the
11 Court's questions about any legal issues in the sealed
12 filings.

13 THE COURT: Let's just introduce yourself for the
14 record.

15 MR. PELLETTIERI: Yes. John Pellettieri on behalf
16 of the United States.

17 THE COURT: Yes. Who else is there?

18 MR. PELLETTIERI: We have James Pearce, Cecil van
19 Devender, and Julie Edelstein.

20 THE COURT: All right. Thank you.

21 Now I am going to turn to the other side. You may
22 sit down.

23 MR. TRUSTY: Good morning, Your Honor.

24 THE COURT: Let me just say, I like to start every
25 proceeding by knowing exactly who is in the room,

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1 particularly since this is a sealed hearing. You look
2 confused.

3 MR. PELLETTIERI: No.

4 THE COURT: Just to be clear.

5 MR. TRUSTY: I will try to help out on my side
6 with that.

7 THE COURT: Excellent.

8 MR. TRUSTY: Your Honor, Jim Trusty, on behalf of
9 President Trump as well as the office of the former
10 President.

11 I am joined at counsel table by John Rowley, who
12 is one of the similarly-situated counsel.

13 THE COURT: Good morning.

14 MR. TRUSTY: In the row that's associated with the
15 table, I am joined by [REDACTED], the second seat in, who
16 the Court is familiar with.

17 THE COURT: I know [REDACTED].

18 MR. TRUSTY: [REDACTED] represented by Michael Levy,
19 who is to our left, to his right.

20 THE COURT: Michael Levy, got it.

21 MR. TRUSTY: I'm sorry. Remind me, Counsel.

22 Elizabeth --

23 MS. MARTIN: Elizabeth Martin.

24 MR. TRUSTY: -- Martin, with Mr. Levy's firm.

25 MR. ENZINNA: I am Paul Enzinna, with Mr. Levy's

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1 firm.

2 THE COURT: Paul Enzinna, okay.

3 MR. TRUSTY: And then we have an associate from
4 [REDACTED] who is here as well.

5 And, Your Honor, just because all of us struggled
6 getting here today, we have two other lawyers -- not out of
7 any mental struggle, but out of the traffic and the front --
8 unfortunately, using the front gate was not a great choice
9 this morning because jurors, cadets, and all sorts of other
10 people were coming in. Two other lawyers will, hopefully,
11 be joining us, if that's all right with the Court. I
12 understand, if the door is locked, it may or may not work
13 out.

14 Tim Parlatore and Lindsey Halligan are both set to
15 be here -- set to be here about a half an hour ago, but --

16 THE COURT: Well, they can knock on the door, but
17 I am not sure we will hear. Even though hearing in this
18 courtroom -- I don't know whether you have noticed -- is
19 much better than the second floor courtroom; it doesn't have
20 the air blowing through -- I don't know if they can text you
21 or something when they get to the door. Ms. Gumiel can --

22 MR. TRUSTY: We'll just try to keep an eye out,
23 and try to be as least disruptive as we can when they
24 arrive.

25 THE COURT: But all of the windows are sealed; I

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1 don't know how you are going to keep an eye out. You are
2 certainly welcome to keep a phone on. I'd hate to have them
3 standing outside --

4 MR. TRUSTY: They may be here.

5 THE COURT: -- when they want to be inside.

6 MR. TRUSTY: Sure, Judge. Thank you.

7 THE COURT: All right. Thank you for that fairly
8 lengthy introduction.

9 Let me just say there are *ex parte* parts of this
10 briefing, in connection with this matter. Consequently, if
11 I ask a question that -- the response to which requires
12 something that the party feels should be done on an *ex parte*
13 basis, just let me know; I will mark that.

14 If, at some point during these proceedings, I need
15 to hear from one side -- one party or the other on an
16 *ex parte* basis, I am going to invite the other parties to
17 sit in my jury room which is right around the corner; you
18 don't have to brave the masses outside.

19 I want to let you know that I am just going to ask
20 my questions. I am going to leave it up to you to tell me
21 whether you think a response requires an *ex parte* answer to
22 be as fulsome as I need it to be on this -- what I view as a
23 fairly weighty matter.

24 So let me start, Mr. Pellettieri, with you.

25 (Whereupon, additional counsel enter the

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1 courtroom.)

2 THE COURT: Okay. Are we missing anybody else?
3 Is everybody here who is supposed to be here now?

4 MR. TRUSTY: We're all set. Thank you.

5 THE COURT: Okay. For the record -- excuse me,
6 Mr. Pellettieri.

7 Can you just put on the record who else is in this
8 sealed hearing?

9 MR. TRUSTY: Sure. We are joined now by Tim
10 Parlatore and Lindsey Halligan.

11 THE COURT: Okay. Thank you. Now the record is
12 clear.

13 All right.

14 MR. PELLETTIERI: To the extent we go into some of
15 the facts that are *ex parte*, Ms. Edelstein will be
16 addressing that. But I will be addressing the sealed
17 portions that are available to all of the parties which
18 largely address the legal standards and the legal issues
19 here.

20 THE COURT: Okay. Let me start with something
21 that has puzzled me. And that is, I have had, since October
22 through December of 2022, a couple of sealed hearings. I
23 have gotten, on the docket in this case, about five
24 different documents, some called "status reports," some
25 called "certifications"; but five, in total, regarding the

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1 Office's compliance with the May 11, 2022, subpoena. The
2 government doesn't mention any of those proceedings that
3 occurred before this Court.

4 Is it the government's position that the
5 proceedings that have happened over the last six or so
6 months before this Court, including the eventual production
7 of classified marked documents, I think, in October and
8 again in December, is irrelevant to evaluating whether there
9 was any sufficient evidence of criminal conduct for
10 application of the crime-fraud exception? Is it irrelevant,
11 what happened in front of this Court?

12 MR. PELLETTIERI: I think I will just speak
13 briefly, I mean, broadly and kind of more in the abstract,
14 rather than getting into the nitty-gritty of why it might be
15 factually relevant. But categorically it's not irrelevant.
16 I just think that our presentation in this case is
17 sufficient to find and apply the crime fraud section -- the
18 exception. So I don't think categorically, as a factual or
19 legal matter, it's necessarily totally -- can be totally
20 irrelevant but we're not emphasizing those proceedings.

21 THE COURT: Well, I mean, are you not emphasizing
22 those proceedings because of the Office's later efforts to
23 comply with the subpoena with the production of additional
24 classified marked documents -- is exculpatory?

25 MR. PELLETTIERI: No --

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1 THE COURT: -- and so, therefore, I shouldn't
2 consider it?

3 How can I focus on one part of the factual
4 predicate here and actually try and strike out of my mind
5 and not focus and wear blinders on what's occurred in front
6 of me? Does that make sense, in evaluating the crime-fraud
7 exception?

8 MR. PELLETTIERI: Well, we certainly don't see
9 anything that's happened as exculpatory, Your Honor. We can
10 talk about that, I suppose, in an *ex parte* session to get
11 into the nitty-gritty of the facts and how they relate to
12 the *ex parte* showing we have made here if Your Honor would
13 like to do that.

14 THE COURT: Well, let's turn to the specific
15 statutory violations that the government is citing for
16 invocation of the crime-fraud exception; and it's citing
17 18 U.S.C. Section 793, 1001, 1512 and 1519 -- 1001 -- you
18 know. And all of those, I think, generally have to do with
19 concealing classified marked documents, national defense
20 information under 793, and relaying false information or
21 being -- engaging in obstructive conduct to the government
22 recovering, for proper storage and handling, those
23 classified marked documents.

24 And so I know the government is focusing on the
25 period before execution of the search warrant at Mar-a-Lago

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1 August 8, 2022, as the key period I should focus all of my
 2 attention on in evaluating whether or not there is prima
 3 facie evidence that that crime-fraud exception should apply.
 4 But as I have said, I, then, over a series of hearings, four
 5 additional certifications in addition to the first one in
 6 June of 2022, I had a number of searches done; more
 7 classified marked documents produced.

8 So does that really -- doesn't that undercut, as a
 9 factual matter, or undermine a view that there is some kind
 10 of obstructive conduct in concealing these classified
 11 records?

12 MR. PELLETTIERI: No, Your Honor. I think if you
 13 look at -- and, again, I don't want to get too much into the
 14 *ex parte* filing. But even if you just look at all the facts
 15 in the purely sealed filing, which establishes that the
 16 former President possessed boxes of documents at Mar-a-Lago
 17 with classification markings; he received a subpoena for all
 18 documents with classification markings. According to

19 [REDACTED]
 20 [REDACTED] [REDACTED]
 21 [REDACTED] -- to respond to
 22 the subpoena, [REDACTED] [REDACTED]
 23 [REDACTED]
 24 [REDACTED] --

25 THE COURT: I am familiar with the facts. I am

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1 very familiar with these facts.

2 MR. PELLETTIERI: Right. I think if you just look
3 at that, and the fact that there were boxes moved out of
4 that storage room and were not in that storage room when
5 [REDACTED]
6 [REDACTED], that is enough
7 to establish a prima facie showing of criminality, of
8 criminal conduct, or a crime or a fraud here.

9 THE COURT: So is it the government's position
10 that -- to the extent there was some kind of obstructive
11 conduct or criminal conduct, that it went on until about
12 August 8, 2022, and then stopped? And that's why you don't
13 want to focus on anything that happened after that?

14 MR. PELLETTIERI: We're not making any
15 representations about when any criminality ended here,
16 Your Honor. This is focused on -- this is certainly not the
17 only potential motion we could or maybe will in the future
18 file in this case obviously.

19 We're focused on [REDACTED] grand jury
20 testimony and the testimony [REDACTED] withheld in the grand
21 jury, and why we think we can pierce that testimony under
22 the crime-fraud exception to get the answers to the
23 questions we posed before the grand jury; that's the focus
24 of our presentation here. It's not the most exhaustive
25 presentation that we may ever make in this case in the

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1 future; but I think that's what we're focused on here.

2 THE COURT: Well, let's go to the standard, prima
3 facie standard.

4 So the government makes a statement in its
5 briefing that: The prima facie standard and reliance on the
6 D.C. Circuit's 1985 *In re Sealed* opinion is that there is
7 little practical difference between a probable cause
8 standard and a prima facie standard that must be met for the
9 crime-fraud exception to apply.

10 So is it the government's view that for the
11 crime-fraud exception to apply I essentially have to apply a
12 probable cause standard?

13 MR. PELLETTIERI: We don't think that -- as we
14 read the D.C. Circuit's standards here -- it obviously has
15 the standard of a factual basis adequate to support a good
16 faith conclusion. But, in our view, probable cause is, at a
17 minimum, sufficient to satisfy that standard.

18 There may be a delta between the D.C. Circuit
19 standard and probable cause. But anything that meets
20 probable cause will automatically meet the D.C. Circuit
21 standard and, for that reason, we think there is ample basis
22 to find probable cause. If the Court did find probable
23 cause, it would absolutely satisfy any potential reading of
24 the D.C. Circuit standard. That's our view of what the case
25 law --

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1 THE COURT: Well, in assessing -- I mean, clearly,
2 you have had other courts -- Southern District of Florida
3 found probable cause for the Mar-a-Lago search warrant. So,
4 in your view, with that finding and the withholding of
5 information by [REDACTED] before the grand jury, is it
6 your view that that's enough to satisfy piercing the
7 attorney-client privilege here?

8 MR. PELLETTIERI: Well, it's obviously two
9 components of the prima facie crime-fraud exception. But if
10 you --

11 THE COURT: Right. Putting aside the nexus.

12 MR. PELLETTIERI: Exactly. We think that would
13 have been sufficient. We obviously didn't rest on that.
14 But the --

15 THE COURT: And that's why I come back to my first
16 question to you. What the magistrate judge in Florida
17 didn't have is what I have in front of me, which is six
18 months of searches being conducted, uncovering some
19 additional classified-marked documents. And so to the
20 extent that that information is exculpatory, shouldn't I be
21 considering that too?

22 MR. PELLETTIERI: I guess there are two points.

23 THE COURT: And I don't know everything the
24 government knows, and perhaps you need to tell me. Is it
25 not all exculpatory?

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1 MR. PELLETTIERI: Well, we don't view it as
2 exculpatory at all, Your Honor. But I certainly -- Your
3 Honor, it would be appropriate to take into account any
4 information before the Court in the larger context to
5 determine whether there has been a finding of a prima facie
6 crime or fraud.

7 That said, potentially exculpatory explanations --
8 while certainly within the Court's purview, I think that:
9 In order to defeat a probable cause determination or --
10 whether you call it a prima facie or probable cause
11 determination has to be strong enough, basically, largely
12 undisputed to truly defeat the substantial showing we have
13 made here.

14 So, for example, just in general -- the general
15 law of probable, cause, it's just kind of black letter law
16 that probable cause does not require ruling out innocent
17 explanations for suspicious facts. I mean, that's just
18 recently in the --

19 THE COURT: I have to say, it is interesting to me
20 that the government takes the position that it can
21 establish -- that probable cause is the standard to apply
22 here.

23 I think the Circuit has -- 12 years after the *In*
24 *re Sealed* case from 1985, it criticized that dicta and
25 backed away from that dicta. And the Circuit essentially

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1 said: You don't really have to -- you certainly don't have
2 to show beyond a reasonable doubt for finding applicability
3 of the crime-fraud exception. You don't have to pretend you
4 are a grand jury and find probable cause to believe a crime
5 was committed; the Circuit said that also.

6 So the Circuit has basically said whatever that
7 prima -- reasonable -- good reason to believe that there is
8 a prima facie case established with some facts, it's less
9 than probable cause.

10 MR. PELLETTIERI: We agree, Your Honor.

11 THE COURT: But are you asking the Court only to
12 apply the probable cause standard here?

13 MR. PELLETTIERI: No. We're not asking you to
14 apply it.

15 We're saying that if the probable cause
16 standard -- the probable cause standard is above and beyond
17 what we need to establish for the prima facie fraud or
18 crime.

19 THE COURT: I think that the government is trying
20 to point to the probable cause standard because you have a
21 probable cause finding by a magistrate judge so you think
22 you are done. I don't think you are done at all because I
23 have got lots of other -- six months, seven months of other
24 activity in front of me that could cut, to my view, both
25 ways; but no one has addressed it. It's not just the

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1 government that has ignored what's happened over the last
2 seven months; no other party in this case -- not former
3 President Trump's counsel, not [REDACTED] counsel, and,
4 I guess, [REDACTED] hasn't even appeared anywhere. No one has
5 addressed what has happened over the last seven months and
6 the four additional reports or certifications after the
7 June 2022 certification in evaluating the prima facie case
8 here and facts here in assessing whether any of the
9 different criminal statutes cited by the government are
10 sufficient.

11 MR. PELLETTIERI: Your Honor, I know I said
12 Ms. Edelstein would address some largely *ex parte*, but I
13 think it might be appropriate now for her to discuss some of
14 these post-August 8 issues that Your Honor is addressing.
15 So if you wouldn't mind her perhaps speaking to this right
16 now, she can address that.

17 THE COURT: Okay.

18 MS. EDELSTEIN: Thank you, Your Honor.

19 I will note that [REDACTED] attorneys weren't
20 privy to our motion to compel proceedings with respect to
21 the other locations. So I can address that now, but I don't
22 know if you have any concerns about who is present in the
23 courtroom for me to address that.

24 THE COURT: No. I mean, I think the government --
25 I know there are lots of things that happened that I have --

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1 I don't need to know about, so I really -- that's why I
2 invited the parties at the outset. You tell me whether some
3 parties should or shouldn't be privy, and I will respect
4 that. You tell me.

5 MS. EDELSTEIN: So I think my view on this is
6 that -- what I am going to say was established in that
7 litigation with only the former President's attorneys, so I
8 think it would be appropriate for them to be in the
9 courtroom for what I can say they know from those
10 proceedings. But I think it probably doesn't make sense for
11 [REDACTED] attorneys to be in the courtroom for that.
12 But I do want to explain why I think that, actually, those
13 proceedings support our position and are not evidence of
14 anything exculpatory.

15 THE COURT: Okay. So this is what we're going to
16 do. This is going to be a little bit of musical chairs;
17 everybody is going to have to be patient with that.

18 Ms. Edelstein, I do want to hear this question.
19 But let me finish on the legal matters where everybody can
20 hear before I start playing a little bit of musical chairs.
21 I do assure you, the jury room here is actually quite
22 comfortable; it has a window even.

23 Let me finish talking to Mr. Pellettieri first,
24 and then I will excuse [REDACTED] counsel, and
25 hear from you on the other matter.

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1 MS. EDELSTEIN: Thank you, Your Honor.

2 THE COURT: We may be going back and forth a
3 little bit with other chairs.

4 Okay. So we're going to come back to
5 Ms. Edelstein on the post-August 8 matters.

6 I take it that -- I think you can answer this
7 here. You are not planning on asking [REDACTED] anything
8 about what happened after August 8, 2022; is that correct?

9 MR. PELLETTIERI: Currently, no. We didn't ask
10 that [REDACTED] initial appearance, and this motion to compel
11 does not seek that testimony.

12 THE COURT: All right. Well, one of the things
13 that -- one of the topics that the government wants to cover
14 with [REDACTED]
15 [REDACTED] with the former President. And it was
16 at that time, as I have tracked the timeline here, [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED].

20 I take it that the government isn't wanting to
21 inquire of [REDACTED] about any [REDACTED]
22 [REDACTED]
23 [REDACTED]; is that right?

24 MR. PELLETTIERI: I think this would probably be
25 more appropriate *ex parte*, Your Honor.

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1 THE COURT: Okay. Because I have seen nothing
2 about any potential obstruction with the June 24th subpoena.
3 It was issued June 24. You got the hard drive with video
4 evidence, I think, in early July. I haven't heard about any
5 obstructive conduct or questionable conduct in terms of
6 failure to comply fully with that subpoena. And so if

7 [REDACTED]
8 [REDACTED], I think there would have
9 been a draft form -- in earlier communications about the
10 subpoena being forthcoming before June 24.

11 But if that was the nature of [REDACTED]
12 conversations with [REDACTED], all about the

13 [REDACTED] [REDACTED]
14 [REDACTED]
15 [REDACTED] about if any crime-fraud exception were found
16 here?

17 MR. PELLETTIERI: I think I will say in this open
18 session that our view is that those communications further
19 facilitated a crime and fraud that we've -- prima facie
20 crime and fraud that we have identified in our papers. And
21 we can get into some of the factual predicates for that in
22 the *ex parte*; but we believe that those communications are
23 part and parcel of the 793(e), the 1001(a)(1), (a)(2).

24 THE COURT: All right. So if I ascertain from
25 [REDACTED] that -- in [REDACTED] *ex parte* conversation with

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1 me -- [REDACTED]
2 [REDACTED]
3 [REDACTED], you would say the government still
4 believes that would be --

5 MR. PELLETTIERI: Yes.

6 THE COURT: -- there would be a sufficient
7 nexus -- let me finish my question -- there would be a
8 sufficient nexus to the crime-fraud exception here that the
9 government would want to inquire of [REDACTED] about [REDACTED]
10 [REDACTED]?

11 Do I understand you correctly?

12 MR. PELLETTIERI: That's correct, Your Honor.

13 THE COURT: All right. So I will have to hear
14 about that *ex parte*.

15 Let's talk about the criminal violations alleged
16 since, for any application of the crime-fraud exception, all
17 the elements of each of the crimes triggering crime-fraud
18 exception have to be met with some *prima facie* foundation.

19 And the government has cited in its motion to
20 compel 18 U.S.C. Section 793, 1001, 1512, and 1519.

21 1519 is pretty clear.

22 1001 is pretty clear.

23 Two of the statutes, 793 and 1512, have a number
24 of different subsections. And the government's motion to
25 compel, at page 16, is pointing to the particular criminal

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1 statutes that it's invoking; it doesn't tell me which
2 subsection of 793 or 1512 it's pointing to.

3 So don't you have to be more precise than
4 identifying which statutory provision you are relying on?

5 MR. PELLETTIERI: Well, we're happy to be a little
6 bit more precise here, Your Honor. 793(e) we believe would
7 be the correct predicate to look at.

8 THE COURT: Well, that was certainly the portion
9 of 793 that was cited in the Mar-a-Lago search warrant. But
10 I just wanted to be clear that that was what you are also
11 relying on in the motion to compel.

12 MR. PELLETTIERI: Correct.

13 THE COURT: And as to 793(e), that provides for a
14 violation when: The violator has unauthorized possession of
15 the national defense information materials, and then
16 willfully retains the same.

17 One reading of that -- and I haven't actually
18 dealt with this statute before. But one reading of that is
19 a person has to, at the outset, have unauthorized possession
20 of the documents.

21 Is the government claiming that the former
22 President had unauthorized access at the outset to any
23 national defense information, and that's why you are relying
24 on 793(e)?

25 And, if so, you are going to have to point me

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1 either now or in your *ex parte* to where in your papers it
2 says that the former President of the United States had
3 unauthorized possession of this information at the outset.

4 MR. PELLETTIERI: I think it might be more
5 appropriate to talk about that *ex parte*, Your Honor.

6 THE COURT: Okay. Well, I just need clarification
7 of what I understand only implicitly because it's not really
8 explained. And you don't, in your motion nor in your
9 *ex parte*, go through element by element, which is the
10 analysis that's required for invocation and application of
11 the crime-fraud exception. But you are going to have to
12 clarify the basis for why 793(e) applies.

13 I mean, Section 793(d) applies to a violator who
14 has lawful possession, access, or control relating to
15 national defense information, and then willfully retains the
16 same and fails to deliver it on demand to a U.S. officer,
17 employee entitled to receive it; but you don't invoke
18 793(d).

19 Why are you relying on (e) and not (d)?

20 MR. PELLETTIERI: We think that's the most apt
21 here. And we're happy to walk through with Your Honor
22 element by element the various offenses. I mean, rather
23 than thread the needle between at what might be appropriate
24 *ex parte* and not appropriate *ex parte*, we think it's best to
25 probably do that all *ex parte*. But we're happy to do that

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1 with each of the offenses and every element for each
2 offense.

3 THE COURT: Do you think that this is an excessive
4 request on my part?

5 I expected to see that in your briefing because
6 the law is pretty clear; I have to go element by element.

7 The prima facie standard is: You have to have a
8 factual basis for a reasonable person to believe that
9 element is met under whatever standard applies. And you
10 didn't do that.

11 Did I miss that in your briefing?

12 MR. PELLETTIERI: Well, we think that the
13 presentation establishes the elements of the offenses
14 considered in their totality which is similar to, again, a
15 probable cause determination. When you look to the totality
16 of the evidence in the prima facie showing, it does
17 establish the elements.

18 I will say there is some out-of-circuit case law
19 saying that, for a prima facie case, you don't have to do it
20 element by element. But we accept that. We do meet that
21 standard here, and we're happy to walk you through that.

22 THE COURT: All right. And also -- okay. And,
23 also, which subsection of 1512 are you relying on?

24 MR. PELLETTIERI: 1512(b) and (c)(1), Your Honor.

25 THE COURT: (b) and (c)(1)?

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1 MR. PELLETTIERI: Yes.

2 THE COURT: All right. Well, that's helpful to
3 have, that clarification.

4 Okay. Let me turn to [REDACTED].

5 The government indicates that [REDACTED] counsel has
6 informed the government that [REDACTED]
7 [REDACTED].

8 Have you gotten a privilege log for that?

9 MR. PELLETTIERI: We have not, Your Honor.

10 THE COURT: Okay. And since you haven't gotten a
11 privilege log for [REDACTED], do you believe any
12 privilege is waived for failure to provide a privilege log?

13 MR. PELLETTIERI: We have not taken that position,
14 Your Honor.

15 In order to expedite and facilitate these
16 proceedings, we communicated with counsel for [REDACTED]; we
17 identified the topic areas. We were informed that there was
18 [REDACTED] withhold. And in order to
19 streamline this, rather than [REDACTED] in the grand jury or
20 require what we thought were unnecessary proceedings and
21 hoops to jump through, we accepted that and then included
22 that in our motion. We think that that is -- we're not
23 asserting that there is a waiver because of that -- because
24 of something that we accepted moving forward.

25 THE COURT: I see. If I find the crime-fraud

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1 exception applies here, do you think you are just going to
2 be entitled to get [REDACTED]?

3 MR. PELLETTIERI: We think it's appropriate to
4 order [REDACTED] and all the documents listed in
5 [REDACTED] privilege log for *in camera* review under the
6 *Zolin* standard, which is less than the prima facie crime
7 fraud standard.

8 We think the correct procedure here would be to
9 enter the proposed order that we included with our reply,
10 which orders the production of all of the documents in
11 [REDACTED] earlier January privilege log plus the [REDACTED]
12 [REDACTED] withheld by [REDACTED] for *in camera* review under
13 the *Zolin* standard.

14 And the Court can take those documents into
15 account together with our *ex parte* submission, which we
16 think is adequate in itself but you are entitled to take it
17 into account in connection with it, and then enter an order
18 permitting the questioning of testimony on the topics we
19 identified, plus turning over any -- first, [REDACTED]
20 [REDACTED], insofar as it furthers or facilitates the crime
21 fraud that we established, and then any documents by
22 [REDACTED] that further facilitate the crime fraud that we
23 established, excising opinion attorney work product.

24 THE COURT: But you don't know as you stand here
25 today whether the withheld [REDACTED] from [REDACTED] is

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1 attorney-client privilege or fact work product or opinion
2 work product?

3 MR. PELLETTIERI: No. And we don't think it
4 matters with respect to [REDACTED] has not
5 independently asserted the work-product privilege, so that's
6 an irrelevant consideration with respect [REDACTED]. It's just
7 a pure crime-fraud exception application [REDACTED].

8 THE COURT: All right. What else do you want to
9 tell me?

10 MR. PELLETTIERI: I think we can leave the rest
11 for an *ex parte* presentation, Your Honor. But we are happy
12 to answer any additional questions.

13 THE COURT: All right. I am going to invite
14 [REDACTED] and your crew to just follow Ms. Gumiel to my
15 jury room.

16 MR. TRUSTY: Your Honor, for the record, may I
17 just lodge an exception to the exclusion -- I would just
18 object. And I will speak more about *ex parte* submissions
19 and strategy here, but there is no reason why [REDACTED]
20 [REDACTED] counsel should be excluded from comments regarding
21 privilege. I mean, [REDACTED] a party to this -- a party in
22 interest. [REDACTED] a representative of President Trump and the
23 Office as well.

24 I haven't heard anything other than: We don't
25 want [REDACTED] wasn't here before. But it would

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1 be more robust for this Court if we can at least see some
2 glimmers of what is being presented by the government in
3 this respect.

4 THE COURT: Well, you are going to be here.

5 MR. TRUSTY: Sure. But [REDACTED] has separate
6 interests, and [REDACTED] representative; so to exclude
7 their ability to even hear something that directly applies
8 to the arguments at hand seems unwarranted at this point.

9 THE COURT: And yet, at the same time, with
10 knowledge of otherwise confidential information comes
11 enormous responsibility. [REDACTED] may not know want to
12 know [REDACTED] doesn't need to know and what the government
13 believes [REDACTED] doesn't need to know because everything you know
14 you have a responsibility to keep your mouth shut about
15 outside of the court. So [REDACTED] not want to hear what the
16 government feels [REDACTED] heard before and [REDACTED] not want
17 to know.

18 MR. TRUSTY: Well, I'd like [REDACTED] have the choice
19 rather than the government make it [REDACTED].

20 MS. EDELSTEIN: Can I clarify that?

21 In discussing the motion to compel proceedings --
22 because [REDACTED]
23 [REDACTED], I am not objecting to [REDACTED] being
24 present if [REDACTED] to be present in [REDACTED] capacity as one of
25 the former President's attorneys. It's [REDACTED]

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1 attorneys who were not privy to those proceedings.

2 MR. LEVY: Your Honor, if I may be heard.

3 THE COURT: Mr. Levy.

4 MR. LEVY: On behalf of Silverman, Thompson,
5 Slutkin & White -- and [REDACTED].

6 The attorney-client privilege that the government
7 is seeking to pierce is a privilege that belongs to the
8 client, and not to the lawyer. So we have no objection.

9 We have actually no stake in the fight over the
10 actual application of the crime-fraud exception to the
11 attorney-client privilege, so we have no objection to
12 leaving for that reason.

13 THE COURT: Right. So please follow Ms. Gumiel.

14 [REDACTED], do you want to stay or do you want
15 to accompany your lawyers?

16 (Whereupon, [REDACTED] confers with counsel.)

17 MR. LEVY: [REDACTED] going to come with me.

18 THE COURT: Thank you.

19 For the record, [REDACTED] has decided to
20 accompany [REDACTED] counsel to sit comfortably in my jury room.

21 (Whereupon, Mr. Levy, [REDACTED], and an
22 associate exit the courtroom.)

23 (Whereupon, an *ex parte* proceeding was held.)

24 THE COURT: Yes.

25 MR. TRUSTY: I probably should have asked that

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1 first.

2 THE COURT: That's okay. I thought of it.

3 MR. TRUSTY: Thank you.

4 THE COURT: Sometimes I add value.

5 MR. TRUSTY: I don't think there is any issue
6 there. Your Honor, I hope that I can add some value today
7 too.

8 THE COURT: Well, I think -- you know, I think,
9 before I turn to you, I wanted to hear the government.

10 Just so you see this from where I am sitting --
11 because it's a little bit confused -- I think [REDACTED]
12 is going to want to hear everything that you say. So before
13 I turn to you, I wanted to finish with the government and
14 hear their *ex parte* explanations. It's not your turn yet;
15 although, I do want to hear from you.

16 When I do hear from you, I think I am going to
17 have [REDACTED] come back.

18 MR. TRUSTY: That makes sense.

19 Where do you want us to go during the *ex parte*?

20 THE COURT: I think you are welcome to stay, so
21 you can be seated right where you are, unless you would
22 prefer to leave.

23 MR. TRUSTY: No. To finally hear some of the
24 government's evidence, by way of an *ex parte*, would be a
25 welcome moment. Obviously, we are not *ex parte* at that

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1 juncture.

2 THE COURT: Okay. Just be seated, Mr. Trusty.

3 You are welcome to stay.

4 MS. EDELSTEIN: To be clear, the only thing that I
5 can address with them present is the motion to compel
6 proceedings.

7 The other things that Mr. Pellettieri referenced
8 that will have to be held *ex parte*, we strongly object to
9 them being here for.

10 THE COURT: Okay. So I do like to keep this as
11 adversarial as possible where possible.

12 So, Ms. Edelstein, please share the information
13 that you feel that you can share comfortably with former
14 President Trump's counsel present. And then, when you have
15 to turn to other matters, I will excuse you all, too; and
16 then I will hear the rest of that. And then, when we finish
17 that, you-all will come back; and I will hear your
18 presentation.

19 For the record, so the record is absolutely clear
20 at this moment, [REDACTED] counsel have left the
21 sealed proceedings. Mr. Trusty and former President Trump's
22 counsel remain here.

23 (Present are: Government counsel, James Trusty,
24 John Rowley, Timothy Parlatore, and Lindsey Halligan.)

25 THE COURT: Okay. Now, the record is clear.

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1 Ms. Edelstein.

2 MS. EDELSTEIN: So the one thing that I can
3 address with them present is that Your Honor had some
4 questions about how the motion to compel proceedings, with
5 respect to the government's concerns that there was not a
6 full recovery of the classified material after August 8 --
7 which there was not; and they were privy to those
8 proceedings. There were a couple of things that I can say
9 in front of them about those proceedings.

10 I would find there to be nothing exculpatory about
11 them. As Your Honor may recall, the government moved at
12 some point to hold them in contempt over those proceedings;
13 and I would reference Your Honor to a few things.

14 First of all, one of the things that has been
15 discussed in these proceedings is that [REDACTED] has
16 represented to the government that [REDACTED] understanding on
17 June 3rd was that all of the responsive documents to the
18 government's May 11 subpoena were located in the storage
19 room; and what happened after August 8th simply confirms
20 that [REDACTED] belief was mistaken.

21 And in the motion to compel proceedings, as Your
22 Honor is well aware, the government was informed that
23 counsel for the former President located classified
24 documents in two additional locations; one of them was a
25 storage unit and the other one was actually Mar-a-Lago. But

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1 they have admitted that that classified information was not
2 actually present at Mar-a-Lago when the government searched
3 on August 8, further supporting the government's theory that
4 there is intentional misconduct in this case.

5 Your Honor will also recall that, when we
6 expressed concerns about there not having been full
7 compliance with the May 11th subpoena to the former
8 President's counsel, they did not eagerly conduct these
9 searches. Instead, they fought our motion to compel in
10 court. They only searched Mar-a-Lago after you,
11 essentially, ordered them to do so.

12 So there is -- in my mind, this only reinforces
13 that the former President was eager to hang on to additional
14 classified materials at a time where he had no authority to
15 retain them.

16 THE COURT: So why didn't the government review
17 all of those proceedings in its pending motion because the
18 absence of it was -- to put it mildly -- surprising.
19 Unless -- and that's why I wanted to have this hearing.

20 I know some of the parties asked for the hearing.
21 But, believe me, I wanted to have this hearing to find out:
22 Did you view everything that happened as exculpatory, and
23 that's why you just left it out? -- so I would have a
24 blinkered view of what I should be looking at for invocation
25 of the crime-fraud exception?

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1 MS. EDELSTEIN: Not at all, Your Honor.

2 The reason that it was not a big focus of these
3 proceedings is that our understanding is that [REDACTED] was
4 not at all involved at that point, and that [REDACTED]
5 involvement at the -- with the additional searches that
6 occurred after August 8 was minimal, if any. So we focused
7 our motion on the time period where we felt that we could
8 best establish a nexus between [REDACTED] involvement
9 and the crime fraud that occurred.

10 THE COURT: So -- okay. Well, that's interesting.

11 So could it be that [REDACTED], having been
12 hired to [REDACTED],
13 which culminated in the execution of a search warrant on
14 August 8, 2022, was then sidelined, and then other lawyers
15 were brought in to ensure full compliance? And so is this
16 just a matter of a lawyer perhaps doing an inadequate job,
17 or some kind of purposeful misleading?

18 MS. EDELSTEIN: I can address in a fully *ex parte*
19 setting why we strongly believe that it was not [REDACTED]
20 not doing an adequate job on June 3rd that led to the
21 presence of classified information still being at Mar-a-Lago
22 after [REDACTED] search.

23 THE COURT: Okay. So there were two issues we
24 were going to address *ex parte* -- *ex parte* from
25 [REDACTED]. One issue was, the huge vacuum of any party

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1 in this -- related to this particular motion addressing
2 anything that happened after August 2022.

3 I am going to have the same question for you,
4 Mr. Trusty.

5 But the second was on your [REDACTED]
6 [REDACTED]. And is that something you can address with
7 the former President's counsel here? -- or do you have to do
8 that in a complete *ex parte* proceeding?

9 MS. EDELSTEIN: No, Your Honor. It has to be
10 addressed in a complete *ex parte* proceeding.

11 THE COURT: Okay. All right. And going through
12 the elements, is that something you want to do in a fully
13 *ex parte* proceeding?

14 MS. EDELSTEIN: Yes, Your Honor.

15 THE COURT: All right. So, Counsel, this is what
16 we're going to do -- because I don't want them, the lawyers,
17 to be sitting in my jury room while I am going through all
18 of the elements. It's going to be tedious for me because it
19 wasn't briefed, and it's going to be a long wait for them.

20 What I plan to do is: I am going to excuse you
21 now so that I can hear what they must tell me only in
22 completely *ex parte* proceedings about the facts.

23 I am then going to bring everybody back, and I am
24 going to turn to you and [REDACTED] for my questions. And
25 then, before we get to the elements, I am going to excuse

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1 you completely so that you won't be sitting in my jury room
2 waiting for that. I am presuming that this part is going to
3 be shorter than going through all of the elements.

4 So, with that plan, I will ask Ms. Gumiel to take
5 you back to my jury room.

6 MR. TRUSTY: Your Honor, can I just raise one very
7 small procedural point?

8 THE COURT: Yes, of course. As I am making up the
9 procedure as we go, if anybody has comments let me know
10 now -- or better ideas.

11 MR. TRUSTY: If you tell me to come or go, I am
12 coming or going. I haven't figured out what the pattern is;
13 but you tell me, and I will leave.

14 The real quick preview is, in terms of our
15 division of labor on our side of argument, the intention I
16 had was to address some of the new things I have been
17 hearing, the crime-fraud exception, prima facie, in
18 furtherance of --

19 THE COURT: I want to hear all of that from you.

20 MR. TRUSTY: And then, in terms of anything really
21 relating to [REDACTED] -- the work-product
22 privilege, opinion fact, all of the issues that were kind of
23 borne out through some supplemental orders by the Court
24 recently -- that would all be Mr. Levy. If the Court is
25 okay with that division of labor -- obviously, I think that

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1 makes sense.

2 THE COURT: Absolutely.

3 MR. TRUSTY: Great.

4 THE COURT: Just follow Ms. Gumiel.

5 (Whereupon, all Trump counsel exit the courtroom.)

6 MS. EDELSTEIN: Your Honor, I assure you that we
7 came here prepared today to discuss element by element. I
8 hope that it will not take as long as you think because I
9 have it all spelled out in front of me.

10 THE COURT: Okay. Perfect. It would have been
11 nice to have it in writing. Perhaps maybe you should just
12 put it in writing for me. If you have it already written --
13 it already looks, from the document you were holding up --
14 it's all written, typed. Perhaps it would just be easier
15 and save us all time if go you put a caption on that and
16 submit it.

17 MS. EDELSTEIN: As is your preference, Your Honor.

18 THE COURT: That would be my preference.

19 MS. EDELSTEIN: Yes, Your Honor.

20 One point of clarification that I will make here
21 with respect to 793(e). With respect to unauthorized
22 possession, courts have defined it as consisting of three
23 possibilities; one of them is that an individual possesses
24 documents in an unauthorized location and that, in large
25 part, is our theory of unauthorized possession. And there

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1 are, in our search warrants, citations to information
2 supporting that Mar-a-Lago was not an authorized location
3 for the storage of classified information.

4 THE COURT: Well, I actually am much more familiar
5 with the crime fraud statute. And there there is a clear
6 demarcation between people who have authorized access and
7 then exceed their authorized access, and people who have
8 unauthorized access from the beginning because they're
9 hackers.

10 I sort of viewed 793 as written with the
11 authorized access and then you exceed it or you unwillfully
12 retain it versus (d), which is: You start off with
13 authorized access. And so I haven't done a legislative
14 history search.

15 As I have said, I never have had an opportunity to
16 interpret 793(e). But just looking at that statute and the
17 CFAA statute, in terms of how they're written, I would say
18 that there have been a lot of courts that have interpreted
19 the CFAA the way I have been looking at 793.

20 So why aren't you using 793(d)?

21 MS. EDELSTEIN: Because the actus reus in 793 is
22 the retention. So we look at unauthorized possession or,
23 conversely, lawful possession under (d) as what the person's
24 possession was at the time it was retained.

25 So when we charge individuals who retain

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1 classified information in their homes, we always charge them
2 under (e) rather than (d) because at that time the
3 individual was in unauthorized possession.

4 THE COURT: Has the D.C. Circuit ever interpreted
5 793?

6 MS. EDELSTEIN: So I can't think of a D.C. Circuit
7 case. There are D.C. District Court cases such as
8 *United States versus Kim*, before Judge Kotelly, in which the
9 elements of the statute have been analyzed.

10 I am relying on a case in the Fourth Circuit,
11 *United States versus Ford*, when I speak of unauthorized
12 possession including the retention of classified
13 information; actually, the statute uses the term "national
14 defense information" in an unauthorized location, falling
15 under unauthorized possession.

16 THE COURT: I think that is a really forced
17 reading of the statute, to be quite honest.

18 I mean, 793(d) is: Whoever, lawfully having
19 possession of, access to, control over, or being entrusted
20 with any document; and then: Willfully retains the same and
21 fails to deliver it on demand.

22 To me, that strikes me as: You lawfully possessed
23 it at the outset; you had lawful authorization to access it.
24 But then, when it was demanded to be returned, you didn't;
25 and you willfully retained it.

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1 To me, that -- but, you know, I may not have the
2 opportunity to interpret that here and spare you that
3 because I think, through all of your warrants and other
4 investigative efforts that you have made, you have used
5 793(e). But, I mean, it's not how some analogous statutes
6 have been interpreted, and I think it's a little bit of a
7 strained reading. But I am not interpreting it here.

8 But let's go back to what you can tell me in a
9 totally *ex parte* basis of why everything that happened in
10 front of me was not correctly interpreted to be exculpatory
11 but, in fact, bolsters a prima facie finding of crime fraud
12 being applied and why the [REDACTED] conversation has
13 sufficient nexus to whatever obstructive conduct may have
14 been going on with the classified marked documents,
15 warrants, application of the crime-fraud exception to the
16 [REDACTED].

17 Because I view a conversation by [REDACTED] with
18 the former President about compliance with the [REDACTED]
19 [REDACTED] for videotapes to be not necessarily a clear nexus
20 to compliance with the May 11th subpoena -- not only are
21 they separate subpoenas, they're after separate objects. So
22 you can explain both.

23 MS. EDELSTEIN: Which issue would you like me to
24 start with, Your Honor?

25 THE COURT: Why don't you start with the

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1 post-August 2022 events.

2 MS. EDELSTEIN: Sure, Your Honor.

3 Notably, when [REDACTED] testified before the
4 grand jury, [REDACTED]

5 [REDACTED]
6 [REDACTED] The government has no reason to doubt that.

7 It's the government's strong belief looking at the
8 evidence, including the fact that between May 24th and
9 June 2nd there were 64 boxes removed from the storage room;
10 showing the exodus concludes on June 1st.

11 And then, on June 2nd, there are only 25 to
12 30 boxes that are present -- that are returned to the
13 storage room prior and are, therefore, present during
14 [REDACTED] search. That lends strongly to the belief
15 that those classified documents -- or documents with
16 classification markings as the subpoena called for -- were
17 not located in the storage room on [REDACTED] when
18 [REDACTED] conducted [REDACTED] review; and extremely
19 intentionally so that [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED].

24 The subsequent proceedings have only reinforced
25 the government's theory that there were, in fact, documents

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1 with classification markings that were located outside the
2 storage room where [REDACTED] was led to believe all
3 responsive documents were located.

4 I don't see anything exculpatory about how those
5 proceedings went on. They clearly did not want to do
6 additional searches. They were only done after ordered to
7 do so by this Court. And quite frankly, Your Honor, the
8 government is not completely certain that all of the
9 documents with classification markings have still been
10 produced to the government.

11 THE COURT: All right. What about the [REDACTED]

12 MS. EDELSTEIN: Yes, Your Honor.

13 In the grand jury, [REDACTED]

14 [REDACTED]
15 [REDACTED]. And
16 what we think was obstructed after that, or part of this
17 scheme to conceal and further retention of national defense
18 information, is not that they didn't produce the CCTV
19 footage -- and that subpoena was issued to the Trump
20 organization, and we don't have any reason to believe they
21 didn't comply.

22 But what we want to establish from [REDACTED] is

23 [REDACTED] did, in fact, [REDACTED]
24 [REDACTED]
25 [REDACTED]

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[REDACTED].

So, right after we think the former President learned about the subpoena for CCTV footage, there is a series of events -- a very suspicious series of events, one that I would call misconduct that occurs immediately afterwards.

[REDACTED]

If Your Honor refers to the exhibits that are sealed, filed, and beginning at Exhibit 18, we see the manifest that, on the day before,

[REDACTED]

He then has a communication with [REDACTED] [REDACTED], in which he tells [REDACTED] that he has to [REDACTED]. That is also in the binder, in the exhibits that follow

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Exhibit 18.

THE COURT: [REDACTED]

[REDACTED]

MS. EDELSTEIN: [REDACTED]

THE COURT: [REDACTED]

MS. EDELSTEIN: [REDACTED] [REDACTED]

THE COURT: Okay. [REDACTED]

[REDACTED]

MS. EDELSTEIN: [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

So while he is saying that to certain individuals,
he reaches out to [REDACTED] I think [REDACTED] last name
is; and [REDACTED]

[REDACTED]. And [REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

What happens during this trip is also evidence of
misconduct. One of the first places that [REDACTED]

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1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 We have the footage from the relevant time period.

20 And at least on those cameras -- and we have requested

21 additional footage -- we never see the boxes or the

22 documents being returned to the storage room. So it's a

23 reasonable inference that they were taking steps to figure

24 out how to get the classified information back into the

25 storage room without being detected on the cameras after

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1 they had learned that we had subpoenaed the videotape
2 footage.

3 THE COURT: So that's your theory. Because I have
4 seen mentioned in both warrants and in your motion to
5 compel -- I can't remember whether it's *ex parte*, the other
6 part of it -- about this incident that I think occurred on
7 June 25, right? -- of the less than a minute footage of
8 [REDACTED], and
9 then leaving. I think they left. Or did they go into the
10 storage room --

11 MS. EDELSTEIN: Very briefly.

12 Again, we can't see them actually enter. But,
13 from what we see on the footage, it looks like they very
14 briefly entered the storage room.

15 THE COURT: I had no idea why are you telling me
16 that? -- what am I supposed to make of that?

17 This is the first time, from where I sit, that I
18 am understanding what your theory of that conduct is.

19 [REDACTED]
20 [REDACTED]
21 [REDACTED] [REDACTED]
22 [REDACTED]

23 MS. EDELSTEIN: [REDACTED]
24 [REDACTED]
25 [REDACTED] [REDACTED]

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[REDACTED]

[REDACTED]

THE COURT: [REDACTED] [REDACTED]

[REDACTED]

MS. EDELSTEIN: [REDACTED] [REDACTED]

THE COURT: [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

MS. EDELSTEIN: [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: [REDACTED] [REDACTED]

[REDACTED]

MS. EDELSTEIN: [REDACTED]

THE COURT: [REDACTED] [REDACTED]

MS. EDELSTEIN: [REDACTED]

THE COURT: [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

All right. Anything else before we bring the other parties back?

MS. EDELSTEIN: I don't think so, Your Honor, unless Your Honor has any additional questions.

THE COURT: No. But I am going to ask you if you can turn around your analysis of the evidence and how it relates to each of the elements in the criminal statutes you're invoking for application of the crime-fraud exception. I think you can turn that around by tomorrow morning, since you already have it written and typed up?

MS. EDELSTEIN: They are only bullet points, Your Honor, but --

THE COURT: I think you can turn that around by tomorrow.

MS. EDELSTEIN: I look to my colleagues because I am tied up with witnesses, basically, between now and then. As long as my colleagues tell me they can do it, then I will rely on their expertise.

THE COURT: All right. Okay. So I am now going to -- unless there is anything else that has to be done on an *ex parte* basis, I am going to ask the other parties to come back in.

Anything else?

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1 MS. EDELSTEIN: That's all, Your Honor. Thanks so
2 much.

3 THE COURT: And we're also going to take a
4 five-minute break.

5 (Whereupon, a recess was taken. The *ex parte*
6 portion continues.)

7 THE COURT: One last question I had also that,
8 probably, is more appropriate to be inquired about during
9 this *ex parte* session. That is: [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 MS. EDELSTEIN: [REDACTED]
25 [REDACTED] [REDACTED]

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[REDACTED]

THE COURT: [REDACTED]

MS. EDELSTEIN: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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1 MS. EDELSTEIN: [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 THE COURT: But it could clearly appear to be
7 exculpatory that they then went off and did all of these
8 searches and found more and produced more classified marked
9 documents.

10 MS. EDELSTEIN: Your Honor, there are over --

11 THE COURT: It is not a frivolous or a trivial
12 thing to break the attorney-client privilege; I view that as
13 an incredibly serious step to take. I want all of the
14 evidence I can get before I do that.

15 MS. EDELSTEIN: Your Honor --

16 THE COURT: What I have in front of me is six to
17 seven months of what appears, from where I sit, to be
18 multiple searches, multiple certifications, and -- you know,
19 that undermine a finding of obstructive intent or willful
20 concealing.

21 MS. EDELSTEIN: A few things on that, Your Honor.

22 First of all, my colleagues cited to you case law
23 that just because there is a merely innocent explanation
24 doesn't undermine a prima facie showing.

25 But what we are focusing our motion on isn't the

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1 evidence that was found in the storage unit or even in this
2 box that they didn't fully comply with the subpoena.

3 Our motion is focused on the fact that, on
4 August 8, there were over 100 documents at Mar-a-Lago that
5 were found that bore classification markings. And the
6 timeline here -- and I am happy to go through it with you
7 again -- but the timeline between the issuance of the
8 subpoena and the conduct on June 3rd speaks not of an
9 innocent explanation; it speaks of somebody who was trying
10 to retain classified information. And we have

11 [REDACTED] testimony in the grand jury that [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] [REDACTED]
15 [REDACTED]

16 THE COURT: I have read that.

17 MS. EDELSTEIN: [REDACTED]

18 THE COURT: I have read that.

19 MS. EDELSTEIN: And while after court order --
20 when they were ordered to conduct further searches and you
21 granted the motion to show cause, that, at that point, they
22 took steps to hire outside parties to conduct searches. And
23 we can't even be sure that they searched all of the areas
24 that had documents with classification markings. That
25 simply has no bearing on the intentional misconduct and the

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1 evidence that we have shown in the time period for which we
2 are seeking [REDACTED] testimony; that there was
3 something extremely intentional about the conduct.

4 While we're talking about a small set of
5 classified materials that were later produced after ordered
6 by this Court to take additional steps to make sure that
7 there weren't still classified materials in their possession
8 following August 8, nothing of that sort happened.

9 And I would also point Your Honor to the testimony
10 that [REDACTED] gave saying that [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 [REDACTED] -- they more than
17 establish a prima facie case and specifically link the
18 attorney conduct, [REDACTED] conduct, [REDACTED]

19 [REDACTED]
20 [REDACTED]

21 [REDACTED]. And [REDACTED], another attorney, who knew
22 nothing -- [REDACTED] literally said in the grand jury: [REDACTED]

23 [REDACTED]
24 [REDACTED].

25 And that additional searches were conducted after

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1 Your Honor ordered them to do so months later I see, under
2 no circumstances, that that could potentially be exculpatory
3 conduct even if that were something that Your Honor needed
4 to consider, which you don't based on the case law that
5 Mr. Pellettieri cited to you.

6 THE COURT: One of the cases that you-all cite --
7 and perhaps this is the *Feldberg* case, Judge Easterbrook's
8 case. And in that case he does what I think is a very, very
9 clear job of describing the logistics for which there is no
10 crime fraud, for which there is no privilege and, then,
11 communications where there might be.

12 Are there matters that [REDACTED] testified to
13 or withheld testifying to in the grand jury that you think
14 flunks the Easterbrook test in *Feldberg*?

15 MS. EDELSTEIN: So, arguably, we do think that --

16 THE COURT: Because it seems [REDACTED]
17 [REDACTED]. I want to be clear as to
18 what [REDACTED] withhold that you think relates to the mechanics
19 and the logistics?

20 MS. EDELSTEIN: So, Your Honor, [REDACTED] testify to

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] [REDACTED]
25 [REDACTED]

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1 Arguably, under *Feldberg*, a lot of this
2 information that we're seeking isn't even privileged. But

3 [REDACTED]
4 [REDACTED].

5 THE COURT: Okay. So I am going to pursue that
6 [REDACTED].

7 All right. Let's bring them in.

8 MS. EDELSTEIN: Thank you, Your Honor.

9 (Whereupon, the proceeding pauses.)

10 MS. EDELSTEIN: Sorry, Your Honor. Can I jump in
11 with -- I assure you, this will only take a few seconds.

12 My colleagues said that they want to accommodate
13 Your Honor; but if it's possible for the *ex parte* filing
14 regarding the elements to have to you tomorrow afternoon
15 that would be much appreciated.

16 THE COURT: That's fine. Why don't we say
17 4 o'clock.

18 MS. EDELSTEIN: Thank you.

19 (Whereupon, all counsel returned to the
20 courtroom.)

21 THE COURT: All right. I can begin with you
22 Mr. Trusty, and then I will turn to Mr. Levy. Or would
23 you -- one prefer a different order?

24 It doesn't matter to me.

25 MR. TRUSTY: I am happy to go.

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1 Your Honor, we are at a juncture -- at an
2 important juncture in this investigation. And I would
3 respectfully submit that this effort to fully pierce all
4 communications from the [REDACTED] is, essentially, a
5 bridge too far.

6 I will give the Court some reasons that talk about
7 the crime-fraud exception, and the frailty of relying on
8 unchallenged information. I understand that is part and
9 parcel of grand jury supervision; that the Court is not
10 going to line up a jury of discovery experts and have a
11 trial over every issue that can be raised by the parties.
12 But this is --

13 THE COURT: Let me just assure you, you know,
14 judges prefer adversarial proceedings; it makes sure we
15 don't make a mistake. It helps us.

16 It is not -- this is not a comfortable position
17 that any judge in this country likes; and it's only done
18 under circumstances of necessity for grand jury secrecy in
19 an ongoing investigation. But you don't have to tell me all
20 of the problems with it. I am acutely aware of the
21 problems. In some ways, that just means you have me, in
22 some ways, being ultraskeptical in querying the
23 government -- not that that gives you much confidence
24 because you don't know what is going on.

25 But you don't have to talk about the discomfort

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1 that you-all have with *ex parte* proceedings because it is
2 not the preferred approach in our system, and it is not --
3 it's one that I think requires extraordinary caution,
4 particularly in a context of overcoming something like the
5 attorney-client privilege, which is sacrosanct. So you
6 don't have to tell me the policy reasons, I get it. I am
7 acutely aware of it.

8 MR. TRUSTY: I understand.

9 Your Honor, I don't intend to belabor the
10 institutional issues that you are identifying. I am here to
11 maybe sow additional jaded thoughts, in terms of the
12 reliability of this process specific to this investigation;
13 in other words, not just kind of waxing eloquent about the
14 systemic problems that come with this.

15 I will start with that, which is not where I was
16 going to start. I really have, kind of, two focal points;
17 one is the applicability of the crime-fraud exception, and
18 the general frailty of this particular *ex parte*-type
19 proceeding.

20 But also what has been overlooked so far, at least
21 in terms of the government's perspective, which is the idea
22 of in furtherance; that the communications -- part of the
23 prima facie presentation or proof that the Court would have
24 to be satisfied includes not just the general: We think
25 Donald Trump committed a crime, and here is why; but a

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1 causal link, a nexus to the actual comments.

2 And I will get to some of the case law on that in
3 a minute, I don't want the Court to lose track that that is
4 coming. I think it's a hugely important omission in the
5 government's theory here.

6 But I heard some things before we were excused
7 that I think were just astounding; and they really bring
8 home the fact that, in this particular case, there is an
9 extraordinary zeal that is accompanying this prosecution
10 that is inviting the Court to go down a road that ultimately
11 we believe would be a reckless road to go down.

12 I will be specific.

13 We heard from the government just now -- just
14 before the *ex parte* proceedings -- that when the Court asked
15 questions about the efforts of defense -- of counsel for the
16 President to comply with the subpoena, we heard, even just
17 in those five minutes of comments, misstatements --
18 significant misstatements or mischaracterizations of the
19 actual facts.

20 I will give you some examples.

21 Number one, Ms. Edelstein made comments about the
22 motion to compel. Remember, Your Honor, we had to file a
23 motion to compel; we all remember it. We all remember it
24 was not granted also.

25 She said to this Court -- reminded this Court:

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1 You had to order them to search Mar-a-Lago. That's not what
2 happened. I mean, the Court leaned heavily. I mean, the
3 Court, basically, said I am not -- my words --

4 THE COURT: I think what she said was that I
5 granted the motion for an order to show cause. I did grant
6 the motion for an order to show cause. And then, as part of
7 that process -- in that hearing where I had to start off by
8 clarifying was this a contempt hearing, where we needed to
9 invite all of the press that was sitting out in the
10 hallway? -- or was this consideration of whether there
11 should be a contempt hearing?

12 And it was a consideration of whether there should
13 be a contempt hearing because of all of the assurances from
14 counsel that the former President and the 45 Office were
15 serious about trying to comply with the subpoena --

16 MR. TRUSTY: We were.

17 THE COURT: -- and were proceeding apace to do
18 that --

19 MR. TRUSTY: Understood, Your Honor.

20 THE COURT: -- as reflected by the surprise
21 declaration we got that day.

22 MR. TRUSTY: I could quibble about timing and why
23 things are deemed surprises when they are actually factually
24 connected to events that had just happened.

25 But my point is the characterization -- I will,

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1 kind of, stand by the record ultimately that the record, in
2 terms of today --

3 THE COURT: It is clear that I issued no contempt
4 finding --

5 MR. TRUSTY: And no order to direct us to do the
6 search.

7 THE COURT: -- and no order to hold in contempt.

8 MR. TRUSTY: You indicated: I know your client
9 won't like it -- my words, but a good summary I think. I
10 know your client won't like it, I really think you should
11 consider it; and that was the end of the proceeding.

12 We went and we did the exact thing the Court urged
13 us to do, which was to do a thorough search of Mar-a-Lago
14 including places where there was no reasonable likelihood of
15 finding documents. We said: We're here; we need to do it.

16 One of the things that just came up -- and this
17 is, again, why I suggest to the Court that the reliability
18 of this *ex parte* process is particularly suspect. We had
19 counsel for the government announce that all of those
20 efforts to comply with the subpoena -- perhaps under the
21 shadow of Court contempt but, again, legitimate efforts;
22 complete efforts. [REDACTED]

23 [REDACTED]. We did everything they could ever
24 ask, including --

25 THE COURT: [REDACTED].

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1 MR. TRUSTY: [REDACTED]

2 [REDACTED] [REDACTED]

3 [REDACTED] [REDACTED]

4 [REDACTED]

5 [REDACTED]. But, Your Honor, we took it seriously.

6 To hear government counsel saying we were ordered
7 to do it when we weren't, that's a small flavoring thing. I
8 am not saying that's the big issue.

9 But we also heard government counsel tell the
10 Court that it's not -- first counsel -- that we didn't
11 really emphasize the compliance efforts, and then added: We
12 don't see anything exculpatory about it.

13 Now, the second counsel that stood up said: It's
14 not exculpatory, it's inculpatory -- which is astounding.
15 That tells me that this is the tunnel vision that's
16 infecting the process. We are unable to challenge --

17 THE COURT: But, Mr. Trusty, can I just say, it
18 was a puzzle to me that the government didn't talk about it,
19 but you didn't either.

20 MR. TRUSTY: We don't know the facts they're
21 alleging. How are we supposed to knock down factual
22 presentations from the government when we're not privy to
23 any of them, respectfully. I don't mean to raise my voice.

24 So that's our problem with briefing this. We're
25 sitting here saying: How do we file a compelling brief for

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1 the Court? We can talk about the law. We can talk about
2 the nexus. We can talk about how temporal proximity is not
3 enough. We can talk about, maybe hypothetically, how
4 [REDACTED] couldn't possibly be part of obstruction.

5 We don't even know the dates or the specifics of
6 the crimes that they're relying on for this. I think there
7 is some slay to hand when it comes to trying to rely on
8 Judge Reinhart signing off on a search warrant to say that
9 that is enough for crime-fraud exception because,
10 presumably, that -- we haven't been privy eight months later
11 to the warrant -- the affidavit. But presumably --

12 THE COURT: You haven't been privy to a redacted
13 one?

14 MR. TRUSTY: It is as redacted as the Gulf after
15 the Exxon spill -- maybe a little hyperbole -- but in the
16 ballpark. I mean, some of the most important things that
17 we're even talking about now, [REDACTED], there are big
18 portions that are redacted that are within our knowledge,
19 like it couldn't possibly harm an investigation. That's one
20 of the reasons for the relief we ask for, instead of --
21 certainly, before any ruling in favor of the government's
22 piercing, is for us to have access to the search warrant
23 unredacted and to the *ex parte* materials. So I make my
24 record on that.

25 But here is the development that I heard that,

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1 again, just, to me, drives home the unreliability of these
2 submissions. When you asked Ms. Edelstein questions about
3 compliance, she described a box showing up in the office of
4 President Trump with classified documents.

5 THE COURT: That's the December box --

6 MR. TRUSTY: I'm sorry?

7 THE COURT: I call it the December box. It was
8 revealed to me, the Court -- revealed to me in a December
9 certification.

10 MR. TRUSTY: Sure. And the suggestion -- not even
11 the "suggestion" -- the explicit comment made to this Court
12 said this was inculpatory; this was a moment of ongoing
13 obstruction. Nothing can be further from the truth. But,
14 also, the government knows it's far from the truth.

15 I will be specific.

16 There was a young woman that worked for President
17 Trump, I think about 24-years-old. She worked in the
18 correspondence area of the office of the presidency down on
19 North Flagler Street, if you remember that particular street
20 name from eventual searches. When she worked out at North
21 Flagler, another person, another employee said: I want you
22 to take this box and hold on to it. It's essentially daily
23 summaries of the President's activities. The box is a
24 banker's-size box, probably about 4,000 pages of material.

25 She has that box at North Flagler Street, under

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1 her desk or nearby, for some period of time before she moves
2 over to Mar-a-Lago because the President has now come down
3 from Bedminster, I think, in September, if I remember my
4 time frame. So the box comes with her. The box is sitting
5 under her desk. At some point she's advised: Hey, make
6 copies of everything in that box because the speechwriters
7 might want that to try to link up: Where was the President
8 on Day X or Day Y?

9 She undertakes this ridiculously laborious task of
10 scanning one by one, essentially, about, I guess -- rough
11 guess, 4,000 pages of material. It is a mind-numbing
12 exercise for anyone to do this kind of scanning of 4,000
13 pages. She goes through that. She sees nothing
14 extraordinary; daily summary, daily summary, daily summary.

15 As it turns out, there are seven pages within
16 there that have some form of marking on them. Not cover
17 sheets where it would grab your attention, but some internal
18 marking. One of which even said: If there is no
19 attachment, this isn't classified anymore. So even by its
20 own terms it might have been declassified. No evidence that
21 she knew that she was accessing anything criminal or
22 worrisome.

23 She takes the box on her own accord and decides:
24 I am just going to put it back in the little gift closet
25 room that is connected to the President's office, also known

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1 as the bridal suite. So the box appears there, and it is
2 after August 8. It's never been searched at Flagler; it's
3 never been searched at the office of the President.

4 We get down there, and the search agents
5 start going through -- we see this box in the middle of the
6 floor surrounded by all sorts of paraphernalia in the room,
7 and we go through it.

8 The agent goes through it. She goes: Wait a
9 minute; what about this? She says, You know what? This is
10 so mind-numbing, do it a second time. Go through it a
11 second time. She does that, no additional documents. That
12 stuff is immediately turned over. I mean, the email went
13 out to Jay Bratt. It was turned over, I think, the same
14 day, if not the next morning. Then we found out that she
15 had made a copy of these things by the process of scanning.
16 And so we made arrangements for her to, basically, turn over
17 her laptop within a couple days, which she did.

18 There is nothing from that story that suggests any
19 sort of crime-fraud exception -- criminality for her,
20 criminality for the President -- and we're being told that
21 this is evidence of ongoing obstruction. I mean, that's
22 literally how it was brought out here this afternoon.

23 It's nothing personal. But the government knows
24 the facts I have just told you. This young woman is now
25 represented; the attorneys have had contact. They have

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1 talked about the substance I just provided to the Court,
2 that's why I'm so comfortable doing it. And to know that,
3 at least in their collective knowledge -- I don't know if
4 she participated in the interview directly or not; I thought
5 she might have, but I don't know.

6 But it's certainly within their collective
7 knowledge that it's a completely unfair thing to stand up
8 here before this Court and try to take that little vignette,
9 that little factual scenario, and turn it into something
10 that's not just not exculpatory but is inculpatory, and to
11 present that type of information without real challenge; I
12 mean, that's when we stumble into the ability to challenge
13 it.

14 THE COURT: Well, it is my understanding, from the
15 [REDACTED] that are on the table to inquire of [REDACTED]

16 [REDACTED].

17 So all of the incidents with the box and everything that
18 happened after August 8, 2022, is really not covered in
19 these topics and not information that, from my
20 understanding, the government will pursue of [REDACTED] in
21 terms of [REDACTED] testimony in front of the grand jury. It's

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 So, you know, there is this demarcation of what

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1 they are going to inquire about. I don't think that they're
2 saying that there is something suspicious about that box
3 they need to inquire about. And they're not invoking the
4 crime-fraud exception to hear about any otherwise privileged
5 conversations that occurred in conducting those other
6 searches that resulted in the four additional certifications
7 in October through December. [REDACTED]

8 [REDACTED].
9 So my question was: How does what happened in
10 that October through December period affect my evaluation of
11 what occurred before?

12 MR. TRUSTY: Understood. And I would submit it is
13 exculpatory, or at least the instinct they seem to be
14 displaying in asking the question I think was correct, which
15 is: This is, kind of, undeniably noncriminal
16 exculpatory-type behavior.

17 My point still stands, which is: You are being
18 asked to accept, really, carte blanche information presented
19 by one side only to make an important historic
20 determination.

21 Again, remember -- I won't get political. I will
22 just say the overall context here is a sitting President
23 authorizing criminal investigative tools against a
24 competitor. We have to be blind to not recognize that's
25 weighty stuff. Your Honor, I think, referred to this as a

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1 weighty proceeding; it is. They're asking you to take a
2 leap.

3 They have even said, on page 13 of their brief,
4 that: The crime-fraud exception is something that is
5 regularly ordered. I thought: I don't know.

6 I was in Maryland as an AUSA for ten years; maybe
7 we're sleeping way out there in Greenbelt. I didn't see a
8 crime-fraud exception pass through there in ten years.

9 I know there is case law. Obviously, it's a
10 concept; it is one that can apply. I am going to talk about
11 the case law in a second.

12 But to act like this is some sort of a regular
13 ask, and then to know that -- even from the limited exposure
14 we have to their facts, that there are serious credibility
15 issues that infect this process, that should cause more than
16 institutional discomfort for the Court in terms of grappling
17 with this type of issue.

18 In our brief we raise three small points. But to
19 make this larger point, one is -- when they characterized
20 President Trump's turning over 15 boxes in January of 2022,
21 the way they phrased it is: The former President sought to
22 delay the Department's access to the 15 boxes -- brackets,
23 15 boxes -- and prevent access by claiming executive
24 privilege.

25 Even that -- there is a flavoring of obstruction

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1 to that kind of phrasing. Maybe I am being a little too
2 precise. But NARA sets their statutory deadlines for
3 ability to review and assert privilege. NARA believes
4 somehow that they have the discretion to shorten it; we
5 don't really see it in the statute, but whatever.

6 So they say the statute says 30; they tell us:
7 You have 15. We say, no, we should have 30. That's
8 described as: Seeking to delay the Department's access.
9 Well, it's also seeking to enforce the law and give us
10 enough time to actually reasonably assert or not assert
11 executive privilege. And preventing access by claiming
12 privilege -- well, okay, sure, that's the definition of
13 privilege in a sense. Any time a privilege is asserted, a
14 valid privilege, it is thwarting one side's ability to know
15 some sort of truth; I get that. But that's just a small
16 example from their pleading that I thought was interesting
17 advocacy in terms of phrasing things and framing things in
18 the most negative pejorative light they could.

19 The second one was more stark, which is the
20 June 3rd conversation. I mean, that's a centerpiece of
21 reliance, in a sense, for their motion; to say: This is
22 what happened on June 3rd. This is what [REDACTED] said.

23 They have two inconsistent representations -- or
24 at least incomplete -- of what [REDACTED] said to them.
25 And we will say to this Court -- we'll proffer to this Court

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1 as officers that [REDACTED] didn't say either of those as
2 quoted. So there is a real -- I mean, to be generous to
3 everyone, I think there is a little bit of an elephant and
4 the blind men parable of what exactly was the
5 conversation --

6 THE COURT: I'm sorry. What is the dispute over
7 what [REDACTED] said or didn't say?

8 MR. TRUSTY: Well, this goes to whether [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]
13 [REDACTED] [REDACTED]
14 [REDACTED] [REDACTED] That's not how the
15 conversation went.

16 So, again, I don't know the full representations
17 they made in their *ex parte*. But we know -- from the face
18 value of their pleading, we dispute a factual quote that
19 they're attributing to [REDACTED] on June 3rd. It's a
20 very important juncture, and we disagree. We included
21 something of --

22 THE COURT: And your view is that -- what did
23 [REDACTED] say? If there is a dispute, what is your
24 position about what [REDACTED] said?

25 MR. TRUSTY: Neither of the things that they have

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1 attributed [REDACTED] -- I am not in a position to start
2 providing factual testimony without having any idea what the
3 other side has, what we're not privy to.

4 I don't think it would be fair to [REDACTED] or
5 our client to start engaging in, kind of, our own one-sided
6 communications in a tit for tat when we are not able to see
7 the full picture.

8 We also provided the snippet of Mr. Parlatore's
9 testimony. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED] [REDACTED]
13 [REDACTED] [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] [REDACTED]
17 [REDACTED]
18 [REDACTED] [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 THE COURT: And you are talking about what -- what
22 document are you referring to?

23 MR. TRUSTY: I am talking about the government's
24 filing in this case. Well, I'm sorry, the transcript of
25 Mr. Parlatore's grand jury which was the only transcript we

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1 received, which was actually filed as part of, I think, a
2 previous motion; I can't remember if that was the motion to
3 show cause.

4 But that is -- I am happy to supplement the record
5 with a formal filing to make this part of the record if the
6 Court wants. But we received that transcript as part of
7 their pleading. [REDACTED]

8 [REDACTED]

9 THE COURT: Just remind me. Was the grand jury
10 transcript from Mr. Parlatore submitted as part of the
11 record in this matter?

12 No. Okay. That's why it's a little bit of a
13 surprise to me.

14 MR. TRUSTY: Okay. I am happy, again, to -- I
15 know we received it from the government as an attachment to
16 one of their motions. There have been so many motions I
17 can't remember exactly what the context was. But I am happy
18 to dig that up. And we can certainly file, under seal, a
19 supplement for the Court to see it. I would be happy for
20 the Court to see it.

21 THE COURT: Okay. You can do that today.

22 MR. TRUSTY: Thank you. We will.

23 But, Your Honor, the point of that is -- these are
24 the people trying to tell you it's a regular thing to pierce
25 the privilege. And, frankly, their piercing -- from what I

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1 have seen, their piercing is, basically, trying to take an
2 ax to all of the communications rather than a scalpel. I
3 mean, the case law does not support a blanket communications
4 are wide open, even if you say: I'm only asking
5 about [REDACTED].

6 THE COURT: Let me ask you a question, Mr. Trusty.

7 Would you agree that questions about logistical or
8 mechanical matters of complying with a court order including
9 for production of records, whether it's a subpoena or --
10 complying with a subpoena, that that is not privileged
11 information, even if it's a lawyer who conducts the search;
12 that who the lawyer -- what steps the lawyer took to figure
13 out where responsive records are; who the lawyers spoke to
14 in order to figure out where responsive documents are;
15 scope, volume, and other logistical matters; where the
16 lawyer went to recover responsive documents -- all of those
17 steps, logistical, mechanical matters -- and I am actually
18 quoting Judge Easterbrook in the *Feldberg* case, using those
19 terms -- are not privileged.

20 Would you agree with that?

21 MR. TRUSTY: I would agree that where he went
22 would not be privileged. But communications --

23 THE COURT: [REDACTED]

24 [REDACTED]
25 MR. TRUSTY: [REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

MR. TRUSTY: I don't believe I have case law that stands for that direct proposition.

THE COURT: I think I have case law that says exactly the opposite.

MR. TRUSTY: Understood. I will admit to the Court, my focus, in terms of protecting [REDACTED] and the President from disclosures here, is much more about the inability of the government to tie any communication to a crime fraud moment, which is really the sequence that you have to have -- that nexus that you have to have here.

I guess they're saying, maybe, there was just

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1 obstruction forever, and therefore --

2 THE COURT: Well, what I am saying is: Some of
3 this information may not require application of the
4 crime-fraud exception because some of this information might
5 not be privileged at all. And by asserting overbroad
6 privilege claims, you know, from the government's
7 perspective is, like, well, we could argue bit by bit
8 whether it's privileged or not privileged, but why don't we
9 just go full hog and ask for the crime-fraud exception and
10 get everything -- not just the identities, but get the
11 communications too?

12 MR. TRUSTY: I have a very --

13 THE COURT: I am not clear from your briefing
14 where you think the line is where crime-fraud exception is
15 required to get the information versus where it's not
16 privileged at all.

17 MR. TRUSTY: Right.

18 THE COURT: And I think the government has a
19 different view of where that line is, and you are confirming
20 that you have a different view of where the line is.

21 My role is to say: This is where the legal line
22 is, and certain things have to be disclosed without even
23 getting to crime-fraud exception. I am telling you right
24 now: [REDACTED]

25 [REDACTED]

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[REDACTED]
[REDACTED].

MR. TRUSTY: Your Honor, we're happy to kind of internally digest that, talk to the government, respond to an order, however this plays out in terms of --

THE COURT: Well, I think the government is going to be giving me a supplemental briefing by tomorrow.

MR. TRUSTY: I would be happy to supplemental.

THE COURT: I am going to ask you to -- give you the same opportunity.

MR. TRUSTY: Sure.

THE COURT: I have told you where my legal analysis has fallen. You can tell me where I am wrong. That's the beauty of the adversarial process; you tell me where I am wrong by 4 o'clock tomorrow.

MR. TRUSTY: All right. I don't know that you are wrong on anything yet. I don't know that I have heard a --

THE COURT: Well, you have take taken a position.

MR. TRUSTY: -- particular bottom line.

But let me just say this, Your Honor, in the middle of the comments you have just made, you said well: The government might have just decided, well, let's just go for the whole thing.

I really have a hard time accepting that somehow [REDACTED] assertion of privilege -- albeit conceivably

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1 from the Court's perspective overbroad, in terms of certain
2 elements of these [REDACTED] -- that we have somehow
3 baited the government into taking this approach.

4 THE COURT: I didn't mean that.

5 MR. TRUSTY: Okay. I just want to make
6 sure that's not -- that's a hard one to knock down if the
7 Court believes --

8 THE COURT: No. That would be a
9 mischaracterization of the government's position. They
10 feel -- they feel that they have ample evidence to support
11 invocation of the crime-fraud exception here.

12 MR. TRUSTY: Your Honor, let me just address where
13 I think there is, kind of, a qualitative difference in what
14 the Court has in front of it. Again, it's operating from
15 some guesswork necessarily. This ties in, frankly, to the
16 idea of the communications.

17 The prima facie case to pierce these
18 communications has to have an element of -- has to have a
19 nexus, a causation. In fact, the case law even makes it in
20 terms of subsequent -- the attorney who -- again, this is
21 the situation where the attorney is the innocent vessel of
22 fraud. But where the -- you have to be able to show at
23 least prima facie not just that there is some crime fraud
24 that applies in general but they're, in fact, relying on
25 information or conduct of that attorney the fraud was

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1 perpetuated.

2 For the life of us -- this is just one of the
3 necessary shortcomings of our brief. We can't imagine how
4 they have even briefed that. It does not really show in the
5 papers that are public, in terms of suggesting we have some
6 way of knowing that this communication led to fraud. I do
7 think there is a qualitative difference in a lot of cases
8 from both briefs.

9 If you will bear with me for just a quick moment
10 on this. In *In re Sealed* case 676 F.2d 793 D.C. Circuit,
11 1982 --

12 THE COURT: Yes. I go by years. There are so
13 many *In re Sealed* cases.

14 MR. TRUSTY: Yes. They're all going to start off
15 either sealed or grand jury.

16 THE COURT: Yes.

17 MR. TRUSTY: In 1982, the Circuit basically had
18 something that -- and I have had a hard time articulating
19 this. It's kind of qualitatively different than government
20 proffer. It's an internal investigation by the company
21 where they generate reports; the reports go to the
22 government. They look at affidavits from company executives
23 that are clearly at odds, at least one is pushing toward
24 fraud on behalf -- during this investigation.

25 And that kind of makes sense, right? -- because

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1 you are establishing the crime. But you are also showing:
2 Hey, this crime passed through the attorney. It's not just
3 me saying: I know Donald Trump is a horrible man, and he
4 has obstructed, and pulling together threads -- and maybe
5 very incomplete threads -- these are documents that had
6 nothing to do with the government's credibility. So that's
7 what you have in 1982.

8 In 1985, you had this -- I think it was a
9 religious group -- I forget the name, Synanon, or
10 something -- where they had sworn affidavits that basically
11 said: When we got Attorney X, we started getting rid of
12 papers. They are admitting to obstruction. Obviously, that
13 may be beyond a reasonable doubt high; I get that that's a
14 really high example. But that's where the court and where
15 the Circuit has been approving of this kind of unusual
16 intervention, where there is some sort of smoking gun
17 between the criminal activity and the communications with
18 the lawyer where that second prong can be met; and I am just
19 not seeing it.

20 I mean, you have got other examples -- I think it
21 was from the Third Circuit case that we cited -- where the
22 lawyer said: You have some pretty messed up tax returns.
23 If you wanted to fix them, you have to file a correction
24 that says A, B, and C. It was all, kind of, reeking of tax
25 fraud dishonesty. As it turns out, that case, I guess, was

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1 overturned on the piercing because there was no evidence
2 that the correction was ever filed. But the bottom-line was
3 kind of the same concept I am talking about, which is:

4 We're not just relying on very gung-ho, very zealous
5 prosecutors and agents. There is a lot that can be said --

6 THE COURT: You don't have to persuade me on the
7 standard. I understand prima facie case means you have got
8 to have specific facts -- not just specific facts; you have
9 got to have facts that would, to a reasonable person's
10 perspective, establish each element of each crime that you
11 allege was violated before I can apply the crime-fraud
12 exception. So I get the standard.

13 MR. TRUSTY: I understand. But I am applying it
14 specifically to kind of where we are here in saying I don't
15 think there is a submission to the Court that says: We have
16 reason to believe -- based on X-Y-Z, we have reason to
17 believe that [REDACTED] told President Trump the
18 following, which led to the following obstructive act. I
19 don't think they can with a straight face -- maybe they
20 allege it. But I don't think they're going to have the
21 evidence for that; and that's really the kind of level of
22 satisfaction for a prima facie case we have to have.

23 What we have in this case -- I do think I have to
24 make a brief record on this. We don't concede that there is
25 any underlying crime at all. We don't concede that there is

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1 knowing, willful, specific intent, any sort of scienter to
2 play with when it comes to President Trump. We believe that
3 there is heavy focus on the May 31st, June 1st time period
4 because of videos willingly turned over by our client. But
5 even the moving of boxes days before DOJ would be invited in
6 is not evidence of a crime. It's certainly not proof of a
7 crime. It might be suspicious; it might cause them to put
8 100 people in grand jury. It might cause them to threaten
9 people publicly. But it's not the type of stuff that should
10 satisfy this Court that we have even the crime-fraud
11 exception in general, much less the linkage to the
12 communications with counsel that I'm trying to help focus
13 the Court on.

14 I think that the search warrant in a lot of
15 ways -- I heard how it was argued, hey, this is way more
16 than prima facie; this is probable cause. Again, we are not
17 privy to all of the details of the search warrant, but it
18 remains an unchallenged warrant right now. We would love to
19 have full disclosure, possibly a *Franks* hearing if there is
20 evidence to support that. We think it's criminalized the
21 Presidential Records Act in a way that has never been done
22 in history and doesn't seem to be happening north of this
23 area.

24 So it's a very odd scenario to submit all these
25 allegations of federal obstruction when we're not even

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1 satisfied, from our eight -- six months of investigation
2 that there is an underlying crime or that even documents are
3 necessarily classified that they referred to. So there are
4 so many open challenges that we would love to be able to
5 make -- even if it's not a mini-trial, but to have some
6 ability to have some transparency in a case this important
7 that we are kind of at a loss for how we can argue against
8 the unknown.

9 THE COURT: I feel your pain.

10 MR. TRUSTY: Thank you.

11 Your Honor, if I can just check my notes for a
12 quick moment.

13 The Court had questions about [REDACTED]. The
14 Court is half judge, half investigator; you said: That's
15 the [REDACTED].

16 THE COURT: Well, when I put the timeline
17 together, I felt from [REDACTED] -- they're doing a
18 search. [REDACTED].
19 I mean, [REDACTED] really juggling a bunch of balls those few
20 days.

21 MR. TRUSTY: Yes. [REDACTED].

22 I would love to borrow the Court's timeline at
23 some point, but I am assuming you won't share it.

24 [REDACTED], I mean, the Court -- really what that
25 touches on, it was a factual kind of inquiry. Couldn't this

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1 be a communication that relates entirely to compliance with
2 a subpoena and, therefore, falls out of any fraud exception.
3 I think that's a perfectly great point. And it goes to the
4 notion that even asking a question shows they haven't
5 established that it's in furtherance of anything. They've
6 picked a date that they seemed to like, and they should have
7 to live and die by that date. [REDACTED]

8 [REDACTED]
9 [REDACTED].

10 Your Honor, I do want to leave time for
11 [REDACTED] counsel. I am happy to answer any questions
12 the Court has now or after hearing from [REDACTED].

13 THE COURT: Well, one of the things that you say
14 in your opposition is that the government effectively ended
15 the compliance conversation on [REDACTED]
16 [REDACTED],
17 and I just really didn't understand that.

18 What are you talking about there?

19 MR. TRUSTY: Sure. That's a great question
20 because there is a greater context that will get me to that.

21 In a normal situation where you are counsel for an
22 organization and there is a subpoena that is received from
23 the government, there is a give and take. Sometimes you
24 look at the subpoena, you go: You are going to shut down my
25 business for ten years if I do all of these things. There

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1 is always communications -- almost always communications
2 between the parties; that's what I was kind of talking about
3 with the elephant and the blind men misplaced parable, which
4 is [REDACTED] --

5 THE COURT: And I don't get it, to be honest with
6 you. I am pretty -- it's too subtle for me.

7 MR. TRUSTY: Thank you for that generous out. I
8 will take the out.

9 Here is the point, Your Honor. [REDACTED]

10 [REDACTED]
11 [REDACTED] [REDACTED] [REDACTED]
12 [REDACTED] [REDACTED]
13 [REDACTED] [REDACTED] [REDACTED]
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[REDACTED]

I mean, they keep investigating to be sure.

[REDACTED]; they're looking for videos and all of that.

But the next contact -- the next substantive contact with counsel that was in the process -- I would emphasize the word "process" -- of compliance is the raid on August 8. That's why we point to this kind of self-selected breakdown by the government when they could have taken up the President at his word. Come on over, we'll let you see stuff, or some form of communication or even court intervention. But, instead, they went with the search

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1 warrant.

2 We have never been able to see the whole warrant,
3 the affidavit. The Attorney General chose to publicize the
4 warrant and the inventory which was convenient. But we
5 would love as a remedy, if the government insists on going
6 forward with this ax instead of a scalpel -- to use another
7 analogy -- that we have an opportunity for fair play to
8 actually look at these things and be able to weigh it. And
9 maybe we'd look at them and say, man, they kind of got it
10 right; we underestimated. As officers of the Court, we'd
11 fold and say we don't have anything new.

12 But from everything I have seen including today,
13 we would have legitimate serious concerns about how the
14 facts are being slanted or completely understated.

15 THE COURT: Thank you, Mr. Trusty.

16 MR. TRUSTY: Thank you, Judge.

17 THE COURT: Mr. Levy.

18 MR. LEVY: Good afternoon, Your Honor.

19 I think it's very important, when the government
20 is seeking to invade the independent private work product of
21 an innocent attorney, I think what Judge Skelly Wright, in
22 1982, called "the blameless attorney" --

23 THE COURT: Okay. Let's just cut through this
24 because I think the government has agreed to assume and take
25 off the table any production of opinion work product.

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1 MR. LEVY: Yes.

2 THE COURT: So that's off the table.

3 MR. LEVY: Great.

4 THE COURT: And I think that one sort of
5 misunderstanding, I guess, between the parties -- between
6 whether it's a privilege log from the original privilege log
7 list versus [REDACTED] view or your view of what relates
8 to the [REDACTED] alone -- I think we have gotten that
9 clarified.

10 The government is interested in everything on the
11 original privilege log list with redactions of any opinion
12 work product. So that's one legal issue taken off the table
13 which I appreciate. And you-all have done the job of
14 figuring out what is severable, what isn't, at least for
15 your shorter privilege log list.

16 I want to hear from you specifically about why you
17 think contrary to the government, which views the [REDACTED]
18 as coterminous with the subpoena request for documents --
19 why you think it's not coterminous?

20 Because, frankly, I have looked -- I didn't have
21 the subpoena until the government gave it to me to see what
22 everybody was talking about, without understanding I didn't
23 have the subpoena to look at what the document request was.
24 So when I looked at that, it did appear to me that the
25 document requests were pretty coterminous with the [REDACTED]

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1 [REDACTED].

2 So I am a little bit puzzled about the difference
3 in why you see that there are differences and why the
4 government isn't right that what is at issue here is not --
5 I am going to call it the shorter list versus the original
6 list -- why it is that you think only the shorter list is
7 relevant.

8 MR. LEVY: Sure. I am happy to do that.

9 I would like to also briefly address the request
10 for testimony and the request --

11 THE COURT: Okay. I was drilling down on the
12 documents first.

13 MR. LEVY: Not a problem.

14 So one example we gave in our response to the
15 [REDACTED] was --

16 THE COURT: [REDACTED].

17 MR. LEVY: -- [REDACTED] is one.

18 The other one is, we took the position that it was
19 responsive to the subpoena, which asked for documents
20 related to [REDACTED] search of the storage room to provide, for
21 example, [REDACTED]. [REDACTED] don't
22 have anything to do with the [REDACTED] that they have
23 identified. Similarly, we provided [REDACTED]
24 [REDACTED] that relates to the search but does not
25 relate to the [REDACTED].

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1 Your Honor, you have identified communications
2 during this time period that may relate to the search but
3 don't relate to these six topics.

4 So, for example, on our privilege log -- and we
5 can provide more information about this perhaps in an ex
6 parte and speak to [REDACTED] -- there are a number of
7 materials after [REDACTED] engaged in [REDACTED] search that
8 relate to [REDACTED] search but do not relate to these [REDACTED].
9 And --

10 THE COURT: [REDACTED]?

11 MR. LEVY: Yes. In fact, the majority of the
12 items that were on the original privilege log but were not
13 on the revised privilege log are after [REDACTED]. So we took,
14 I think, appropriately a broad interpretation of the search.

15 THE COURT: So is that -- just dealing with dates,
16 so most -- so some of the difference between the shorter
17 privilege log versus the original, longer privilege log has
18 just to do with date cut off, is there anything post-[REDACTED]
19 [REDACTED], you did not put on your shorter privilege log?

20 MR. LEVY: No. We didn't cut that -- we cut it
21 based on the actual [REDACTED] they asked, to see if they
22 addressed those [REDACTED].

23 There are matters that are after [REDACTED] that we
24 concluded were responsive to those [REDACTED], and we
25 included those on the revised log. What dropped off were

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1 topics that were not part of -- were items that didn't
2 relate to the [REDACTED]. In fact, that is very instructive
3 here of something that I think is really important. We
4 should not be painting with a broad brush when we're talking
5 about these things. We should be very tangible and very
6 specific.

7 THE COURT: What's the total number of -- just
8 remind me. What's the total number of documents on the
9 shorter list, do you know?

10 MR. LEVY: I believe it's [REDACTED].

11 THE COURT: [REDACTED], okay. That sounds about right.

12 On the original longer list, how many documents
13 are there? About double that?

14 MR. LEVY: Apparently just -- I am told just over
15 [REDACTED]. I haven't reviewed either of them and counted.

16 But I think a lot of this is sort of getting ahead
17 of ourselves because if -- the only place in which my
18 argument arises at all is if the Court has already concluded
19 that the crime-fraud exception vitiates President Trump's
20 attorney-client privilege and President Trump's interest in
21 the work product or there is another basis for concluding
22 that responsive information about some or all of those [REDACTED]
23 [REDACTED] is not protected by that privilege. So all of this
24 is if that happens.

25 If that happens, [REDACTED], as an officer of

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1 the Court, would testify with respect to the topics that the
2 court orders and provide the facts and the communications
3 related to those six or fewer topics as ordered by the
4 Court.

5 THE COURT: I didn't doubt that.

6 MR. LEVY: And once that has happened, it's
7 unclear to me why the government would need to go further,
8 beyond that, to invade [REDACTED] work product. In other words --

9 THE COURT: So in addition to the government's
10 concession that they're not after opinion work product, you
11 also want to put off the table any fact work product.

12 Am I understanding you correctly?

13 MR. LEVY: Yes. Because at this point I think
14 there is a difference -- I will concede, the case law trying
15 to distinguish between the underlying facts -- what is fact
16 work product and what is opinion work product -- can be
17 confusing. Courts seem to deal with it differently, at
18 least the way I have looked at it.

19 [REDACTED] testify about the underlying facts. To
20 go beyond that, for example, to ask [REDACTED] to testify: [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]. That, many courts would say, is fact
24 work product. I think that's completely unnecessary to get
25 into. And once [REDACTED] testified to the underlying facts --

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1 THE COURT: That is the puzzle of the difference
2 between fact and opinion work product, isn't it?

3 MR. LEVY: Right.

4 THE COURT: [REDACTED]
5 [REDACTED], is that fact or is it opinion?
6 It's his opinion or her opinion about what is relevant or
7 particularly noteworthy.

8 MR. LEVY: I feel your pain. Yes.

9 But I think what I am saying is that with respect
10 to [REDACTED] work product, once the government has gotten [REDACTED]
11 testimony about what the facts are, perhaps then they can
12 either demonstrate a substantial need to go beyond what the
13 facts that [REDACTED] testified to to get [REDACTED] fact work
14 product or -- and this is important, Your Honor: The
15 D.C. Circuit has never held that the crime-fraud exception
16 of the client vitiates the lawyer's work product, period,
17 whether fact or opinion.

18 And even those courts that have held that it
19 vitiates fact work product require the government to
20 identify how the specific piece of work product was used by
21 the client to further the crime or fraud. There has been no
22 showing like that right now.

23 Essentially, they're just saying: Before we hear
24 what the facts are, we want the Court to order [REDACTED]
25 to, basically, produce [REDACTED] files to the Court; force you to

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1 review all [REDACTED] files; make some judgments, and then go
2 forward -- when [REDACTED] will provide the facts and the
3 communications, the things that they say they actually want.

4 THE COURT: So what you are proposing is a
5 staggered approach should -- and I am going to get to this,
6 exactly what is not privileged at all and the line of --
7 that I went over with Mr. Trusty and what actually requires
8 an application of the crime-fraud exception.

9 But once I get past that, you are saying I should
10 decide that in terms of [REDACTED] testimony and, then, in a
11 staggered approach then resolve what work product, if any,
12 whether it's opinion or fact, should be produced.

13 Is that what you are proposing?

14 MR. LEVY: Yes. Because they have not --
15 essentially, they have conceded by asking for everything;
16 that they don't have a substantial link between the use of a
17 particular piece of [REDACTED] work product that [REDACTED]
18 client sought to use a particular piece of work product in
19 furtherance of that crime or fraud.

20 So I believe that, once [REDACTED] has provided
21 the underlying facts in [REDACTED] testimony, the facts will be
22 there. There won't actually be a need to invade the work
23 product of an innocent attorney. And, frankly, if the
24 government believes at that point that they have a
25 substantial need for particular work product -- in the first

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1 instance, they should come to me and explain why they
2 believe they have a substantial need. We have had a
3 productive and professional working relationship with the
4 Office of Special Counsel from the time we got involved
5 here. We can assess that.

6 It would focus -- to the extent that there is a
7 dispute over that, it would be a much more focused dispute
8 and the government would presumably, at that point, be able
9 to identify a substantial need to go beyond the facts to get
10 [REDACTED] work product. Because otherwise they're just asking
11 to see everything, and there is not a basis for them to ask
12 to see everything at this point.

13 So essentially --

14 THE COURT: Would one benefit from your staggered
15 approach be that, under *Zolin*, I don't have to make a *Zolin*
16 finding and review a whole bunch of documents --

17 MR. LEVY: Yes.

18 THE COURT: -- as part of the crime-fraud analysis.

19 MR. LEVY: Yes. If Your Honor concludes based on
20 the information that's available to you that the prima facie
21 case for crime-fraud exception has been made or that there
22 is another basis for concluding that some of this
23 information is not privileged -- not protected by the
24 privilege -- then there is not a need to go through all of
25 these materials to draw that conclusion.

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1 [REDACTED] then would testify about the facts on
2 however many of these [REDACTED] you want [REDACTED]. It avoids
3 the risk of getting into other matters [REDACTED] engaged in on
4 behalf of [REDACTED] client, it avoids invading that topic --
5 right? -- because, again, as I said -- the government said
6 that they're largely coterminous. They are not coterminous
7 in some pretty significant ways that we can cite. It avoids
8 that question entirely. It focuses the testimony, as it
9 should be, on those topics; provides the facts on those
10 topics --

11 THE COURT: And how do you say that they are not
12 coterminous?

13 I am going to ask the government the same thing.
14 But I may have glossed over the fact that they said only
15 largely coterminous. I thought they looked, from my quick
16 read, as pretty coterminous.

17 But how are they not? On what topics?

18 MR. LEVY: So I am not sure that I am comfortable
19 explaining the topic other than in an *ex parte* proceeding
20 because I do not want to run afoul of [REDACTED] ethical
21 obligation to maintain the privileges of [REDACTED] client barring
22 a ruling overcoming them.

23 THE COURT: Believe me, I would rather get [REDACTED]
24 [REDACTED]. So I am going to want to hear that *ex parte*.
25 Does it have to be -- it can be *ex parte* with the

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1 government. But Mr. Trump's counsel can be here for that?

2 MR. LEVY: Mr. Trump's counsel can be here for
3 that, that's not an issue. I believe, again, Your Honor has
4 already alluded to --

5 THE COURT: The government doesn't know what it
6 doesn't know either.

7 MR. LEVY: Exactly.

8 Part of this is [REDACTED] is a lawyer
9 representing a client in an investigation. [REDACTED] work
10 product -- unless there is some reason to believe [REDACTED] work
11 product was used in furtherance of a crime or fraud, [REDACTED]
12 work product should remain confidential.

13 Certainly, the government should not be asking [REDACTED]
14 to hand over to the Court or to them materials that go to
15 other aspects of [REDACTED] representation of [REDACTED] client that go
16 beyond the items they have specifically identified. So I am
17 happy to walk the Court through that, I don't think it's
18 terribly complicated.

19 Again, we were very --

20 THE COURT: Let me just ask the government. I am
21 going to interrupt you for a second and see if -- do we have
22 to -- maybe we don't have to talk about this topic much
23 more.

24 From the government's perspective, this is a very
25 troubling point, to have attorney work product in the middle

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1 of an investigation turned over to the government even if I
2 should find the crime-fraud exception applies when -- beyond
3 just getting the testimony from the lawyer.

4 So there are certain documents on the privilege
5 log that are just being withheld under attorney-client
6 privilege. Is there really a need for the government to
7 pursue any attorney work product withheld documents?

8 MR. PELLETTIERI: Well, the crime-fraud exception
9 applies to both attorney-client material and work product
10 material.

11 THE COURT: What's wrong with the staggered
12 approach Mr. Levy's proposing?

13 MR. PELLETTIERI: I think it's unprecedented, puts
14 the cart before the horse. And it would be totally the
15 opposite of what *Zolin* prescribes and permits.

16 The whole point of *Zolin* is that, yes, the
17 government doesn't know what is in there, so it has a lesser
18 showing. It just has to show a reasonable basis to conclude
19 that there may be crime fraud material in these documents.
20 We have gone far beyond that.

21 And then, once that very low threshold is crossed,
22 the documents go to the Court. This is a tried and true
23 procedure. The Court then, at that point, determines, well,
24 yes, is there the nexus between the crime fraud there? And
25 then another layer here, only because [REDACTED] is

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1 independently asserting the work-product privilege -- in
2 most of the cases -- all of the cases in the D.C. Circuit
3 dealing with the crime-fraud exception and work product,
4 this is not an issue. They just automatically vitiate any
5 kind of work-product privilege, both opinion or fact -- in
6 fact, the 1982 cases specifically regarding opinion work
7 product.

8 The only additional layer here --

9 THE COURT: All right. I get it. You are not
10 going to go for the staggered approach. Thank you.

11 MR. LEVY: Your Honor, if I may be heard.

12 It's really important to keep in mind *Zolin* was a
13 case involving the client's assertion of the client's
14 attorney work product and the client's attorney client
15 privilege. It was not an assertion by the innocent,
16 independent interest with respect to work product.

17 If the Court needs to review things for purposes
18 of *Zolin* to decide whether the client's privilege claim is
19 valid or not, that's what *Zolin* applies to.

20 When it comes to the independent interest and the
21 work product of an innocent lawyer, the government first
22 needs to make the showing it would need to make to get a
23 *Zolin* review of that, which is, they would have to show that
24 there is some basis to believe that the materials were used
25 in furtherance of the crime or fraud. And there is no

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1 indication here that any of the work product was used in
2 furtherance; the notes are a great example.

3 [REDACTED].
4 There is no indication [REDACTED] showed anybody else the
5 [REDACTED] intended to show anybody the [REDACTED]. They
6 were purely for [REDACTED] purposes. There is no evidence that [REDACTED]
7 client even knew [REDACTED] existed. So how can that be
8 shown to have furthered -- that the client intended to
9 further a crime or fraud through the use of [REDACTED] that he
10 had no idea even existed. It just can't be.

11 So the idea here is not putting the cart before
12 the horse but, rather, dealing with the overcoming of the
13 client's privilege first; that's what makes sense. The
14 client's privilege, to the extent it's vitiated by the
15 crime-fraud exception, should be addressed first in that he
16 can provide facts on. Only once that's been addressed
17 should the government have to go and establish why it needs
18 to go beyond that to invade the attorney's -- an innocent
19 attorney's independent interest in their work product. They
20 don't need to.

21 They will get what they want by getting what
22 they're going to get from [REDACTED] testimony,
23 which are the facts and the communications. That is the way
24 to ensure that if [REDACTED] client's privilege is overcome it does
25 not also invade the privilege of an innocent lawyer

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1 unnecessarily. And this would be unnecessary.

2 THE COURT: All right. Are you done?

3 MR. LEVY: Unless Your Honor has more for me.

4 THE COURT: No. Thank you.

5 MR. LEVY: Thank you.

6 THE COURT: All right. Does the government want
7 to respond?

8 MR. PELLETTIERI: I just want to make one quick
9 additional point about Mr. Levy's presentation.

10 The idea that a document could not be subject to
11 the crime-fraud exception because it was never given to the
12 client is not consistent with the scope of the crime-fraud
13 exception as it applies to work product.

14 What is at issue is whether the consultation
15 furthered or facilitated a -- or the material further or
16 facilitated a fraud. Sometimes you have a consultation that
17 results in work product material that reflects -- that
18 material reflects the consultation itself that furthered the
19 fraud.

20 The client himself doesn't need to actually obtain
21 that document, whatever it is, and then independently use
22 that document in furtherance of the crime or fraud. It's,
23 really: Does that document reflect the consultation that
24 furthered or facilitated the crime or fraud?

25 THE COURT: Okay. Could you just address this --

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1 what I understood to be the government's position that the
2 [REDACTED] are, basically, coterminous with the document
3 request? And Mr. Levy's pointed out that you said "largely
4 coterminous." Where are they not coterminous?

5 MR. PELLETTIERI: We believe they're coterminous.
6 We understand that Mr. Levy said: Well, I produced [REDACTED]
7 [REDACTED]. But when you add the other layer with what we're
8 asking is, it's only responsive documents in those
9 categories that actually are also communications and
10 consultations with [REDACTED] and the client. Clearly,
11 anything that is a communication or consultation with
12 [REDACTED] and that also falls within that subpoena is
13 necessarily coterminous with the six topics. We don't see
14 any daylight between them.

15 Even if you assume there was a little bit of
16 daylight, we think we're still, under *Zolin*, entitled to the
17 *ex parte* review. We have made that threshold showing that
18 the documents in that privilege log may contain crime fraud
19 material under the *Zolin* standard and, at that point, *in*
20 *camera* review is appropriate. And then the Court further
21 reviews those documents to determine whether they were each
22 in furtherance or facilitated the crime or fraud, and then
23 excises -- because we have accepted that opinion work
24 product is not covered here, excise [REDACTED] opinion work
25 product. That's consistent with the general practice for

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1 opinion work product totally outside the crime-fraud
2 exception in the FTC cases.

3 Courts regularly look to documents and then excise
4 the opinion work product. So this is just consistent with
5 really kind of established practice, what we're asking for
6 here.

7 THE COURT: All right. I want to do -- I want to
8 hear more detail from Mr. Levy about whether he thinks --
9 now that we have complete clarity that the "largely" doesn't
10 mean "largely." The government does think it's pretty
11 coterminous. I want to hear from Mr. Levy on an *ex parte*
12 basis. I will excuse the government to go to my jury room.

13 (Whereupon, government counsel exit the
14 courtroom.)

15 THE COURT: Mr. Levy.

16 So the record is clear, government counsel has now
17 left the courtroom during this *ex parte* portion of the
18 hearing. I have former President Trump's counsel and
19 [REDACTED] counsel.

20 MR. LEVY: Thank you, Your Honor, for letting me
21 be heard on this in an *ex parte* way.

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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10 [REDACTED] [REDACTED]
11 [REDACTED] [REDACTED] [REDACTED]

12 THE COURT: Okay. Can you get the government?
13 (Whereupon, government counsel returns to the
14 courtroom.)

15 THE COURT: All right. I think I have exhausted
16 all of us with argument, and I have another hearing coming
17 up. So let me just say that I am expecting from the
18 government a supplemental filing by 4 o'clock tomorrow as we
19 discussed.

20 Mr. Trusty, I am expecting, by 4 o'clock tomorrow,
21 a supplemental submission by former President Trump -- on
22 his behalf.

23 With respect to [REDACTED] and Mr. Levy, let me
24 just say that under *Zolin* there is not a stringent standard;
25 I think the Supreme Court has said that. It's, basically, a

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1 lesser evidentiary showing required, ultimately, to overcome
2 the attorney-client privilege, under *Zolin*, in order to have
3 *in camera* review of the withheld documents under privilege
4 or work-product doctrine.

5 I do find that based on what I understand from the
6 government's *ex parte* submission -- appreciating the debate
7 about whether the document production called for under the
8 subpoena is coterminous or not with the six topics -- having
9 heard the government's *ex parte* explanations regarding the
10 [REDACTED] subpoena, I will ask to have *in camera* submission
11 of the [REDACTED] documents, however many -- hopefully, not
12 too many over [REDACTED], that have been withheld on the
13 longer -- I think it's the January 11, 2023, privilege
14 log -- appreciating Mr. Levy's point that the distinction
15 between fact and opinion work product is difficult to
16 ascertain.

17 I would ask that you put in red text box all of
18 the material that you think is opinion work product just so
19 I can see what you are calling opinion work product, which I
20 will try and respect as much as possible, so that I can see
21 what gloss you are putting on the difference between the
22 two. In the end, should I find that the crime-fraud
23 exception is properly applied here, I would then ask you to
24 produce the attorney-client privilege and the fact work
25 product in those withheld documents; and you would then turn

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1 your red text box into blackout boxes. I think that's how I
2 am going to proceed here.

3 I would like you to be able to do that also by
4 4 o'clock tomorrow. Since you have already done the
5 severance -- severability, hopefully, that won't be too much
6 of a problem.

7 MR. LEVY: If I could approach the bench on one
8 matter.

9 THE COURT: Yes. Do you want to do this --

10 MR. LEVY: Side bar.

11 (Whereupon, a bench conference was held.)

12 MR. LEVY: Some of [REDACTED] we have
13 made a transcription of. It would be far easier for us to
14 be able to red box the transcript rather than the underlying
15 materials.

16 THE COURT: Please. Yes.

17 MR. LEVY: It would be easier for you to review
18 them that way, but it's not technically the actual document.
19 It's not formally transcribed. It's [REDACTED] effort
20 to be as accurate [REDACTED].

21 THE COURT: Okay. This is what you are going to
22 do. You are just going to give me the transcript. Thank
23 you. I appreciate that.

24 MR. LEVY: You're welcome.

25 THE COURT: Should the government ever want to

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1 have the original, they'll have to ask for it.

2 MR. LEVY: Okay. Thank you. I appreciate it.

3 THE COURT: Thank you.

4 (Whereupon, the bench conference concludes.)

5 THE COURT: Thank you.

6 All right. With that, I don't think there is
7 any -- yes.

8 MR. PELLETTIERI: Briefly, Your Honor.

9 Just so we don't have to separately file a motion,
10 can we have -- we'd like to have permission to order the
11 transcript.

12 THE COURT: Yes. All parties that want the
13 transcript, and that is granted.

14 MR. PELLETTIERI: Thank you, Your Honor.

15 MR. TRUSTY: One other very quick question, Your
16 Honor.

17 THE COURT: Yes, Mr. Trusty.

18 MR. TRUSTY: Just in terms of the supplemental
19 briefing on our side. I want to make sure I don't fail on
20 the expectation.

21 I know we talked about the Parlatore transcript as
22 being something to supplement.

23 THE COURT: Right. I haven't seen it, I don't
24 think.

25 MR. TRUSTY: That's what I am saying. We'll,

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1 basically, make that an exhibit for the supplement.

2 Is there any other specific thing you wanted us to
3 brief in the supplement? I didn't really catch a direct
4 instruction. I am happy to --

5 THE COURT: Well, if you see anything in the
6 transcript that you -- I can't think of anything offhand. I
7 thought there was a legal matter. My law clerk probably
8 made a note of it.

9 Hold on a second.

10 (Whereupon, the Court and staff confer.)

11 THE COURT: Yes. Any case law that you have that
12 says the identities of the people who were talked to in
13 executing a search is privileged.

14 MR. TRUSTY: Got you.

15 THE COURT: All right. I knew there was a
16 supplemental legal issue that there was a dispute about. I
17 wanted to make sure -- to the extent this is adversarial, I
18 want to make sure that I get everybody's position straight.

19 MR. TRUSTY: Sure. Much appreciated. Thank you.

20 THE COURT: Yes.

21 MR. PELLETTIERI: Nothing, Your Honor. We were
22 just going to remind you about the issue --

23 THE COURT: Yes. My law clerk -- my trusty law
24 clerk was on top of that. With that, you are all excused.

25 Thank you.

(Whereupon, the proceeding concludes, 12:45 p.m.)

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CERTIFICATE

I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability.

This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below.

Dated this 12th day of March, 2023.

/s/ Elizabeth Saint-Loth, RPR, FCRR
Official Court Reporter

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