

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

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DONALD J. TRUMP,

DECLARATION

Plaintiff,

- v -

No. 22-CV-81294-CANNON

UNITED STATES OF AMERICA

Defendant.

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

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

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

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

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

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

Purpose of the Declaration

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

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

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

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

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

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

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

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

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

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

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

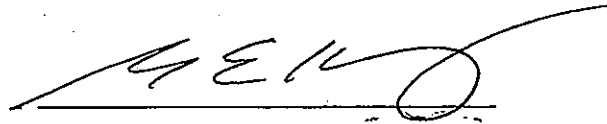
Conclusion

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

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

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

Executed on September 8, 2022.

A handwritten signature in black ink, appearing to read 'A E Kohler, Jr.', written over a horizontal line.

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