

# DOJ Unlikely To Charge Trump For Taking Top Secret Docs

By **Daren Firestone** (February 18, 2022)

The Espionage Act, the law used most frequently to punish mishandling of classified information, has been used to prosecute three types of offenders: leakers, who leak classified information to the media; keepers, who remove classified information to unauthorized locations, usually their homes; and spies, who pass classified information to foreign agents.

Former President Donald Trump may be a keeper.

The Washington Post reported this week that among the 15 boxes of documents he took home to Mar-a-Lago at the end of his term were a number of documents marked "top secret."<sup>[1]</sup>



Daren Firestone

Could Trump be prosecuted for mishandling confidential information? The short answer is yes, he could — but he probably won't be.

Understanding why requires looking at past prosecutions.

Keepers are not frequently prosecuted, which makes sense. Sending someone to prison for taking home classified documents, without more, is a bit extreme.

U.S. Department of State employees, intelligence analysts, soldiers and government contractors work with classified information every day. Some are more careless with that information than they should be and, if found out, are often reprimanded for it. Some are fired.

There have been almost no cases in civilian courts where a keeper was charged only for mishandling classified information, and no other crimes.

One exception is President Bill Clinton's former national security adviser, Sandy Berger, who pled guilty to removing from the National Archives several copies of a report on the Clinton administration's response to terrorist plots. His sentence, which included two years probation, fit the crime better than prison.

Military courts have occasionally taken a harder line.

In the early 1990s, Sgt. Rickie Roller, who handled classified information at the U.S. Marine Corps' Intelligence Division headquarters in Washington, was sentenced to three years in prison for taking classified documents home.<sup>[2]</sup>

Around the same time, James McGuinness, an operations specialist with 18 years in the U.S. Navy, received two years in prison for taking home 311 classified documents, which he said he intended to use as reference material for future assignments.<sup>[3]</sup>

Roller and McGuinness are outliers. More typically, in the relatively few cases in military or civilian courts where a keeper has ended up in prison, the alleged offenses went beyond merely mishandling information.

For example, in the late-2000s, Maj. Kendall Amazaki received six months in prison, in part

for taking home classified documents and in part for possessing child pornography.[4]

And in the mid-1970s, Sahag Dedeyan received three years in prison for taking home a classified report reexamining American plans to defend NATO from Russian attack in Western Europe.

Dedeyan's cousin photographed the information and provided it to the Soviets. The cousin paid Dedeyan \$1,000 to keep quiet about the scheme, which he did.[5]

When former FBI Director James Comey decided not to prosecute former Secretary of State Hillary Clinton for maintaining a small number of classified emails on a private server, he stated that after reviewing past prosecutions for mishandling or removal of classified information,

[a]ll the cases prosecuted involved some combination of: clearly intentional and willful mishandling of classified information; or vast quantities of materials exposed in such a way as to support an inference of intentional misconduct; or indications of disloyalty to the United States; or efforts to obstruct justice.[6]

Comey was right, even if he shouldn't have taken the unusual step of laying out his reasoning in public. Had the U.S. Department of Justice heeded then-candidate Trump's infamous campaign chant to "lock her up," it would have been a significant departure from past practice.

Now that the shoe is on the other foot, whether Trump could face charges under the Espionage Act depends on four things: the facts, the president's power to declassify, politics and intent.

First, the facts: Much remains unknown about the documents in the Mar-a-Lago boxes, including the contents of the documents, who packed them and Trump's role in packing them.

A threshold question is whether Trump knew that the boxes included documents marked "top secret." Those markings are typically hard to miss.

And prosecutors are extremely hesitant to bring Espionage Act charges for taking home unmarked classified documents, since a defendant can claim not to have known the documents were classified.

In choosing not to recommend charges against Clinton, Comey contemplated that "[o]nly a very small number of the e-mails containing classified information bore markings indicating the presence of classified information."[7]

Second, presidential declassification: The president has the authority to declassify any classified information, but how remains an open question.

This question typically arises when a president discloses classified information to the media, as Trump did several times during his presidency.[8]

Prosecution for such disclosures has never happened, not only because of DOJ policy against charging a sitting president, but also because such presidential actions may be considered de facto declassification for the purpose of the Espionage Act.

To be sure, there is a difference between the political decision to make classified information public and the personal decision to take confidential documents home. The latter may not represent a decision to declassify, only a decision to remove to an unauthorized location.

The mere fact, though, that this question remains unsettled as a matter of law is among the reasons the DOJ would almost certainly hesitate before bringing a case against the former president.

Third, politics: Berger was not president of the U.S. Even if Trump broke the law, as Berger did, prosecutors would likely be highly reluctant to take the unprecedented step of charging him with an Espionage Act violation, or even the less severe offense to which Berger pled guilty, unauthorized removal and retention of classified documents or material.

Attorney General Merrick Garland may not want to invite the inevitable comparisons to the Clinton investigation and accusations of a double standard, even if the Trump scenario turns out to be legally distinguishable from the Clinton one.

Fourth, intent — this is the key. We don't know why Trump took the documents to Mar-a-Lago. Was it a mistake? Were the documents mementos of his time in office?

Maybe they had nothing to do with the Jan. 6, 2021, Capitol insurrection or any other controversy. Though this is unlikely for someone who reportedly clogged the White House toilets with flushed documents and reportedly tore up records before transferring them to the National Archives, it's best to keep an open mind when considering prosecution.

On the other hand, if strong evidence arises that Trump intended to hide the classified information from investigators, the political calculus for the DOJ might shift.

If the classified Mar-a-Lago documents turn out to implicate Trump in a crime — related to Jan. 6 or otherwise — and there are multiple reliable witnesses to testify that Trump intended to hide them from investigations into his criminality, then a prosecution may be warranted, and conviction may be sufficiently likely to overcome political and legal liabilities.

As always, in Washington, it's the cover-up that matters.

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*Daren Firestone is a partner at Levy Firestone Muse LLP. He served as a trial attorney at the U.S. Department of Justice's Tax Division under Presidents George W. Bush and Barack Obama. During the Obama administration he served on behalf of the DOJ at the Office of Presidential Personnel and with the Working Group on Streamlining Paperwork for Executive Nominations.*

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[1] <https://www.washingtonpost.com/politics/2022/02/10/trump-records-classified/>.

[2] *United States v. Roller*, 42 M.J. 264, 266 (C.A.A.F. 1995).

[3] *United States v. McGuinness*, 35 M.J. 149, 150 (C.M.A. 1992).

[4] United States v. Amazaki, 67 M.J. 666, 670 (A. Ct. Crim. App. 2009).

[5] United States v. Dedeyan, 584 F.2d 36, 39 (4th Cir. 1978).

[6] <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system>.

[7] <https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system>.

[8] <https://www.nytimes.com/2022/02/09/us/politics/national-archives-trump-classified-material.html>.