



Constitutional Questions After the Raid on Mar-a-Lago

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. On August 8th, the FBI searched Mar-a-Lago, former President Donald Trump's home in Palm Beach. They seized 11 set of documents.

[00:00:33] And today, we're going to talk about the raid, the investigation, and the constitutional questions that arise out of it. Joining me are two of America's leading scholars on executive power, national security and federal courts, and two great friends of *We the People*. John Yoo is the Emanuel Heller Professor of Law at the University of California, Berkeley, an author of *Defender in Chief: Donald Trump's Fight for Presidential Power*. John, welcome back to *We the People*.

[00:00:59] John Yoo: Thanks, Jeff. And I wish I was with you in Philadelphia, my hometown.

[00:01:03] Jeffrey Rosen: It is always great to talk to you from Philadelphia or anywhere in the world. And Steve Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas Law School and is co-host of the *National Security Law* podcast. He's co-authored casebooks, uncovered terrorism law and national security law. Steve, it is wonderful to have you back on *We the People*.

[00:01:22] Steve Vladeck: Thanks for having me, Jeff. And, and I would also like to be in Philadelphia if only, because it's 103 in Austin today.

[00:01:27] Jeffrey Rosen: Ah, well, it is always sunny in Philadelphia. And, um-

[00:01:30] Steve Vladeck: [laughs]

[00:01:30] Jeffrey Rosen: ... it's great to be talking to you both here in cyberspace. Let's begin with a question of what the federal officials were investigating. John, what do we know from the warrant which has been unsealed about the object of the investigation?

[00:01:46] John Yoo: The basic set of documents that the government is looking for is, uh, classified documents that President Trump allegedly, uh, took with him. That's the basis of the

warrant, uh, the different criminal statutes that are issue all relate to those documents. The government is also saying that President Trump took presidential records with him. These are generally, uh, could be more. And I think, in this case, probably are more than classified documents. It's not a criminal violation to take those, uh, with him. So those by themselves couldn't be the basis for the warrant.

[00:02:26] And then the, there's a fear and that's also another federal statute that President Trump might destroy records, uh, particularly ones related to national defense, national security, which are classified. Um, and that itself is also a federal crime. So the important thing from the warrant, and the reason it's significant, is because in order to get a warrant, the Fourth Amendment requires that there be what we call probable cause that there's evidence there Mar-a-Lago that a federal crime has occurred. And that's really important for several reason.

[00:02:59] One is we've never indicted a former president before. And so that itself a, a major hurdle. That's a major statement to say we have probable cause, we, the government, have probable cause to believe that this former president, President Trump, has committed federal crime. And then the second thing is, if you look at the search warrant, the same thing I think is really important is the breadth of it. It says, essentially, you, the FBI, can look in President Trump's home for any document at all that was created by President Trump in the time period of his presidency.

[00:03:36] So it actually goes well beyond just searching for classified information. And so that, that's what causes, I think, a lot of the controversy over it, is one was this necessary, putting aside whether it's a constitutional search or not, I think it is, and we can get in that. But when was it necessary? And then two, why the breadth? Why look for a lot more than just the classified information?

[00:04:01] Jeffrey Rosen: Thank you so much for flagging those two questions. Steve, John mentions that the authorities had to have probable cause that a crime has occurred. And there are at least three statutes that they seem to be investigating. Those federal laws have the numbers, 793 and 1519 and 2071. Tell us about those three federal laws and, and what crimes might be under investigation.

[00:04:29] Steve Vladeck: Yeah, I mean, I, I would just add one more piece of context to, to John's question about necessity. It now seems pretty clear that this did not happen out of the blue, um, and that rather there had been this months' long process between the executive branch, the Justice Department, the National Archives and Records Administration, and President Trump and his team about the return of at least some of these materials, um, right, that there had been a grand jury subpoena issued for these materials earlier this year, that President Trump had at least attempted to comply with that subpoena.

[00:05:02] Uh, the New York Times at least has reported that one of his lawyers represented to the government that all of the responsive documents in the subpoena had been turned over. And apparently, it's only when the FBI became worried that that wasn't true, that it ratcheted up to this search. Um, I think that's relevant, Jeff, because it puts into context at least one of the three statutes you mentioned. So the warrant cites three provisions of Title 18 of the US Code. That's the criminal, uh, title. Um, Section 793, this got a lot of attention, I think, for the wrong reasons.

[00:05:34] Um, Section 793 is the Espionage Act, uh, this 1917 statute that has actually written so capriciously and so broadly, that it prohibits a lot more than simple espionage. I mean, yes, it prohibits espionage, but it also prohibits, among other things, the wrongful retention of what's called information relating to the National Defense if a government officer has asked for its return. So, not hard to imagine in the context of a grand jury subpoena and ongoing dialogue, that if President Trump was still possessing information relating to National Defense and had been asked to return it and had not, you could potentially see probable cause for a violation there.

[00:06:14] Um, this also, I think, really helps to explain Section 1519. Section 1519, um, is actually a statute that was written in response to the accounting scandals in the early 2000s. Um, and what it prohibits, as relevant here, um, is it prohibits the retention or concealment of information that is relevant to an ongoing investigation. Basically, it's a form of obstruction of justice, where the government has asked for in- information through a lawfully valid demand here of subpoena where you have not actually complied and have instead taken steps to conceal.

[00:06:50] That's where 1519 comes into play. And then 2071, um, is a statute more generally about the wrongful mutilation or altering or doctrine of government documents. That one's not tied, right, to whether there's an ongoing investigation like 1519 is. And just the last thing I'd say, Jeff, before sort of, uh, uh, sitting on the floor, it's also interesting what statutes are not on the face of the warrant. So, I was actually really interested that 18 USC Section 1924 was not one of the offenses that formed the basis for the warrant.

[00:07:22] 1924 is the statute that makes it a crime, simply to wrongfully retain classified information as such. And what that tells me, Jeff, and I think this is a key point about all three of the statutes that are in that warrant, is that the Justice Department doesn't really want to fight over whether information was or was not properly classified since none of the three statutes that were cited actually turn on that question, whereas 1924 would.

[00:07:49] **Jeffrey Rosen:** Thanks so much for that. John, what are your thoughts on what Steve said? And then let's dig into the first of the statutes that he mentioned, which was 793, the Espionage Act. What do you think the possible charges there might involve?

[00:08:02] **John Yoo:** Jeff, you have, again, the powers of prediction. I was just about to try to jump in and address that point. Because there's a real disjuncture between the media's discussion of what's happening here and then what legally is happening here. So in the public discussion, you're hearing a lot of claims, uh, so the information classified did President Trump's h- how declassify it. But the statutes that are listed in the warrant are not strictly about classification. It's about keeping and retaining unlawfully what's called National Defense Information.

[00:08:33] Now, it's only the ... I'm sure all classify- almost all classified information would fit into National Defense Information. But National Defense Information is, you know, much broader than classified information. And so what the government did here, I think, is clever in the sense that, uh, they anticipated that President Trump would say, as presidents have done in the past, as President, I can classify and I can declassify.

[00:09:04] So President Trump has said, uh, "Any documents I take to Mar-a-Lago are automatically declassified the minute they get into the moving van and start heading to Florida." He does have that power. And we can argue about how you do it and whether it's appropriate to do and how you even know and keep a record of it. But the criminal statutes are actually much broader than that. And so it's possible, for example, uh, when, so one thing we've seen now that had been released by the court is these not just a search warrant, but the inventory, the inventory documents.

[00:09:38] And most of them say, box one, box two, but that's weird. There are some files that Trump or somebody had taken out of the boxes and was looking at. And one of them says, information about the president of France. [laughs] So, you know, some of that might be classified, but some of it might just be gossip [laughs] that people have heard at the Embassy in Paris about, uh, Emmanuel Macron. That's not going to be necessarily classified. But it could be National Defense Information, because it could help us with our negotiations with NATO.

[00:10:09] You know, Macron gi- you know, was really giving Trump a hard time during his presidency. And, uh, you know, that, that could have been helpful to Trump. He might have wanted to keep it, might have photos of Macron in there, you know, compromi- you know, unfortunate photos that Macron wouldn't want to make public. But it wouldn't be classified. So that's an important thing, is that these criminal statutes, I'm sorry it goes, response to your question, these criminal statutes are actually very broad.

[00:10:34] Some people have suggested the Espionage Act itself is too broad because it does, sort of, create this problem for people in the government, and people not even in the government. You know, do you know you have National Defense Information? What is, how broad does the phrase National Defense Information go? The Espionage Act has pretty much been upheld by the courts every time it has been challenged. But I think that's what's getting, gonna get Trump in hot water, is this broader category that goes well beyond classified information that he was supposed to leave in the White House or with the archives.

[00:11:10] Jeffrey Rosen: Thanks so much for that. Steve, what are your thoughts about the potential Espionage Act charges, of the Espionage Act creates, uh, three different classes of defenses, it's been criticized as being extremely broad, uh, for many years dating back to a 1973 article that you've cited in the Columbia Law Review by Benno Schmidt. Tell us about what the most serious espionage act potential charge might be that, that would, would have justified the search in the first place and the criticisms that it's really too broad.

[00:11:39] Steve Vladeck: You know, Jeff, I think the important thing to understand about the Espionage Act is that it was written in a time before virtually all of the Supreme Court's modern First Amendment jurisprudence, um, and virtually all of the Supreme Court's modern jurisprudence about vague criminal statutes and sort of disfavoring, right, via criminal statutes. And so if you actually look at Section 793, I, I think it would be a real exercise for listeners to pull it up and look at it.

[00:12:02] You'll see, first, six different crimes, um, right, that there are six different subsections, A through F, they have different criminal liability. And they really do prohibit a

wide range of conduct. So there is the classic, I have stolen national security information from the United States on behalf of the foreign power classic espionage. And I don't think anyone seriously disputes that that is a proper criminal statute, that is a proper exercise of Congress' power, all the way to the other extreme.

[00:12:30] Which is that there's a reading of one of the provision, Section 793 E, that actually, in some cases, would make it illegal to hold on to your copy of The New York Times, um, right, because you are retaining information relating to the national defense, um, at that point. And you're not entitled to receive it, if The Times, for example, has broken, leaked national security information on the front page. So, um, there is a lot of trouble with the Espionage Act at the margins.

[00:12:58] Um, there are real concerns about potentially using it to go after third parties, that is to say, downstream recipients of information that has been wrongfully purloined from the federal government. I think the key for present purposes is that as we are contemplating, as we are speculating about President Trump's potential liability here, that's not at the margins of the Espionage Act, that's in the heartland, right? That is someone who was lawfully in possession of this information, who received the demand to return it from the appropriate national security official, we assume, and who refuse to do so.

[00:13:33] And so, yes, there have been challenges to the Espionage Act. I've testified against the use of the Espionage Act, against third parties. But that's not this case. And that's why I think, John, you know ... I actually have even stronger views about 1519, but I think if that's why 793 is in this conversation. That spells a lot of potential trouble for President Trump and not a lot of obvious grounds to challenge the constitutionality of the statute as so applied.

[00:13:59] **Jeffrey Rosen:** Thanks so much for that. John, imagine the most serious charge under the Espionage Act, that President Trump had nuclear secrets. He was asked to return them and refused, or rather the nuclear codes that would allow them to set off the bombs. Could that possibly justify an investigation or possible prosecution?

[00:14:17] **John Yoo:** Oh, of course. I mean, this is the difference between what's being, uh, said in the media and then what's in the search warrant. The search warrant itself doesn't talk about nuclear secrets [laughs]. It doesn't say... And actually, there's, you know, some pretty, uh, pretty important law about things related to nuclear weapons. But the statutes themselves we're talking about are focused on National Defense Information. I actually am a little disappointed in the Justice Department that they've been leaking that they were looking for nuclear secrets of some kind.

[00:14:46] Um, because it could be ... It makes it sound like a- as you, your hypothetical, Jeff, that he took the nuclear codes to launch the missiles, although it actually doesn't work that way [laughs]. Yeah, look, works that way in the movies, but that's not actually how it works. And even if it did, I would think that on January 20th, at noon, the government changed the nuclear codes immediately [laughs], that President Trump won't work any- They may not even let him have the real ones even while he was president, are you kidding? [laughs]

[00:15:15] So, given how that phrases, it could have been ... And I could easily see it being like letters between him and Kim Jong-un talking about like, what do I need to give you to get rid of the North Korean nuclear weapons program? In fact, there have been, I think, other leaks that suggest that there actually is correspondence between North Korea and the United States in these documents. Or it could be documents about ... This is also probably, I think, very likely.

[00:15:42] They might have some documents between him and the government of Iran, about the, the, the Iran nuclear deal, the, what's called the JCPOA. But putting that aside, um, as I said earlier, as I said, I think that, um, if Trump had those documents and he took them, he knowingly took them, that's going to be interesting. Did he knowingly took them or ... I mean, because the espionage is not what we would call a strict liability crime where you can just violate it without even knowing, you know. He has to know there were secrets.

[00:16:12] He, I think he did, given the, uh, Steve said, the story of the ongoing negotiations between the FBI and the Justice Department and Trump's post presidential staff who've been negotiating about how to hand these over and how much to hand over and so on. So, I think Trump does know that some of these were classified. So, I think he has probably committed a criminal violation. Uh, I have a hard time believing that the Justice Department would actually prosecute him for it or seek jail time. I mean, that's violating the Espionage Act is a serious crime, it's a felony.

[00:16:49] And people have gone to jail for a long time, uh, particularly, uh, spies for the Soviet Union, as, has been the, the most extreme use. But that raises the, uh, uh, more I think the prosecutorial policy, uh, prosecutorial discretion less than did Trump violate the law, and could he go to jail for it? And that's a question of, do we want to treat former presidents this way? Is it, uh, consistent with the way we've treated other, uh, of not just former presidents, but cabinet members, high level decision makers, who have similarly violated the law?

[00:17:26] We've never, as again, we've never charged the former president with a federal crime. Other cabinet members who've run into these problems, um, have not served jail time. And so I, that's, that, I think, is really the difficult question facing the Justice Department, uh, Attorney General Garland and ultimately, uh, uh, it faces President Biden.

[00:17:46] **Jeffrey Rosen:** Steve, what do you make of John's suggestion that given the fact that this will be the first prosecution of a former president in American history, even a technical violation of the Espionage Act wouldn't justify it, even also, as he points out, that presumably, the nuclear codes were changed after, after President Trump left office. Wh- what is the most serious violation of the Espionage Act that could possibly justify what would indeed be unprecedented prosecution?

[00:18:14] **Steve Vladeck:** I think we need to separate out two things because I think they're two different conversations. If you are the government, you know, John served in the Justice Department, I haven't. But if you're in that meeting, if you're in that room, your first priority, presumably, is getting these materials back. If you genuinely believe that President Trump's continuing possession of this information poses an ongoing harm to the United States, poses an

ongoing risk, then your actual first goal is not holding President Trump accountable. It's simply getting the stuff out of his hands.

[00:18:46] And that, again, I think, is consistent with the notion that there was this ongoing months' long process, right, to have these documents returned. So, it's possible, Jeff, that from the Justice Department's perspective, they have now solved the problem, right, that the conducting the search, obtaining, getting the information out of President Trump's hands, returning it to government custody, um, actually has obviated, right, the national security risk that prompted all of this in the first place.

[00:19:11] So it's possible that a criminal prosecution was never the end game here, or at least wasn't assumed to be the end game. Of course, some of that might depend upon what the search found. Um, and indeed, we still, you know ... John mentioned that we've seen the, the warrant itself and we've seen the inventory, uh, that were unsealed, I believe, last, uh, uh, as we're sitting here last week. Um, you know, at least as we're recording this, the affidavit, um, that the government would have submitted to the court explaining why they needed to conduct the search, explaining the factual basis on which there was probable cause to believe President Trump had violated these three statutes.

[00:19:48] We haven't seen any of that. And so, Jeff, I think, you know, it's, it's hard to, sort of, be too, um, confident about what the most serious offenses could be. Because I think part of it depends on exactly what President Trump had and what he was thwarting by not turning these materials over. Um, you know, grand jury subpoenas are supposed to be to produce responsive documents in ongoing criminal investigations. It's not necessarily the case that the grand jury subpoena was about an investigation into President Trump, as opposed to others who might have been in his orbit, affiliate with his administration, et cetera. And so I think there's still so much we don't know about whether criminal charges are even in the offing. And if so, how serious they could be?

[00:20:32] Jeffrey Rosen: Thank you for that. Well, John, let's put on the table the second of our three statutes, that's 1519, which deals with obstruction of justice. What might be the potential violations here? And would they have justified the search, in your view?

[00:20:46] John Yoo: This is actually where, uh, I get, uh, more concerned about what's really going on with the search. Starting on the ... I think, we, we agree, Steve, and it sounds like we agree, you know, there is probable cause here. There's well beyond probable cause here because, uh, the Justice Department, the FBI had already been to this room in Mar-a-Lago and saw all the boxes and the documents and, right, took some away. Uh, uh, it actually makes me wonder why the FBI had to actually go to, uh, this level of getting a search warrant.

[00:21:19] Because with past presidents, I think past cabinet officers this has not gone on before. And there is this kind of negotiation, uh, between lawyers that hopefully works it all out so that there's an accommodation. We just had like President Nixon could have been prosecuted for all of these statutes. He tried to take all of his records with him, right? And, and Congress, you know, there's a supreme, supreme, well, famous to, you know, people like us, a famous Supreme

Court case called, you know, Nixon versus general services administrator, which is really boring title.

[00:21:52] It's a really great case, so. Because Nixon went to take all his papers. And Congress passed this law, the Presidential Records Act saying, no, now they belong to the US government. And Nixon said, before me, every president before me, the papers belonged to the president. They were their personal property. And so, Nixon interestingly said, this is a taking, [laughs] you've taken my personal ... I want just compensa- Nixon, only Nixon would take something like this, I want just compensation. You know, he wants money. But even Nixon, turned over the papers.

[00:22:24] Even Nixon turned over the Watergate tapes, which, in a way, were, right, under his theory, his personal property, too. Um, and so this is h- Just the m- reason I say this, this how, shows how, um, extreme the dispute became, I think, between justice and the Trump people, is that even went beyond what Nixon, given all the things that happened to him and all his claims of presidential power and privilege, even Nixon didn't go this far. It makes me wonder exactly why this negotiation between the government and a former president broke down.

[00:22:56] It's really, really unusual. So, to me, that's why I go to this next criminal provision about obstruction of justice, which is really, to violate the law, you would say, was President Trump, uh, really going to destroy some of these documents. It was going to destroy documents that impede, um ... Actually, he doesn't have to impede anything, just destroying government documents that he's not supposed to have is a violation. You can see why Congress would pass such a law.

[00:23:25] I wonder whether the Justice Department, in some way, is searching for things not just related to whether President Trump has boxes of documents in his basement that he's, he shouldn't have taken, he's trying to keep his mementos. But whether they thought they're going to find other stuff, you know, things that, uh, aren't really necessarily National Defense Information, but might be related to, you know, Steve pointing out, there's a lot of other investigations of President Trump going on.

[00:23:54] Obviously, the most high profile one is a January 6th investigation. Where the FBI and the DOJ who have legitimate constitutional grounds to conduct the search hoping to come across other things that might aid their investigation into something as far more serious than where President Trump put documents, which is, was he part of a conspiracy to try to prevent the proper election of President Biden in and the, uh, counting of the electoral votes on January 6th?

[00:24:23] **Jeffrey Rosen:** Thank you for that. Steve, what are your thoughts on 1519, the obstruction charge, including John's suggestion that this was even more serious than the dispute between the government and Nixon, uh, negotiations broke down so much that he or the government seems to think that Trump's lawyers lied to them and said they turned over stuff and hadn't? And then what are your thoughts about his suggestion that this might be a pretext for looking for information about other crimes, including potentially January 6th?

[00:24:52] Steve Vladeck: Yeah. So, I mean, I think the first thing to say is, you know, 1519 wasn't on the books at the time of the Nixon administration. I think we mentioned earlier it was a product of the, the financial accounting scandals of the early 2000s. Again, I'd encourage folks to read the statute. I mean, I think the, the wording is instructive. The statute would s- the statute prohibits anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry. I think the concealing is actually part of the story here.

[00:25:20] And it has a much more specific intent requirement than either the Espionage Act or the other statute we're going to talk about, Section 2071, um, with the intent, um, right. The statute says to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. So, first, I, I mean, I think, you know, department or agency is not a term that we usually think includes Congress, um, right. Department or agency is usually a reference to the executive branch.

[00:25:50] And what this says to me is that, again, back to the grand jury subpoena, that this is probably ... Again, I'm speculating, but like it seems the most logical explanation, that there were materials that the grand jury subpoena sought that were not turned over in compliance with the subpoena, um, and that were withheld in DOJ's view, deliberately, to fort that grand jury investigation into what we don't know.

[00:26:16] I'm loathe to, to think that it's a fishing expedition as opposed to ... I mean, as John said, they had been in the room, they had a sense of what materials were talking about. And so, as opposed to a genuine concern that President Trump's, uh, how shall we say, incomplete compliance with the prior grand jury subpoena, um, was actually a deliberate move on his part to avoid turning over evidence that would inculcate somebody, maybe not him, right, but somebody who's in cult patient he was worried about.

[00:26:45] From that perspective, I'm not sure that seems like a fishing expedition, so much is actually perhaps the most targeted of the three. That the real sin that DOJ was worried about here was that President Trump was obstructing an ongoing criminal investigation by refusing to comply with the grand jury subpoena. An offense that may not sound that sexy, but that ought to be one that we all agree is something we want the Department of Justice to prosecute.

[00:27:10] Jeffrey Rosen: Thanks for that. John, is there any set of facts that you could imagine a legitimate, uh, obstruction charge? You, you know that the Nixon dispute was serious. Is, is there anything that President Trump could be trying to cover up that could justify the search? And then, then what are your thoughts about the legitimacy of using information that's obtained in the course of one search to investigate another, uh, potential crime in such as, for example, January 6th?

[00:27:35] John Yoo: Oh, sure. I think, um, I'm, I'm of open mind about President Trump's involvement of January 6th, whether it rises to the level of probable cause for conspiracy charge at, at a minimum. Um, uh, uh, we need to know more facts. I think the January 6th hearings, uh, right, they showed that President Trump really would have liked to have blocked the, uh, counting the electoral votes and had this, I think, kind of off the wall theory that you could send

the thing back to the States. And then you saw the violence and the preparations for that conspiracy for that.

[00:28:09] The factual link between the two, I think, is what the January 6th committee is still investigating and still has yet to show. And I'm sure that's what the Justice Department is steadily going towards. So, for example, if in all those boxes of documents that President Trump had stored in his basement, if there are documents relating to those, you know, connecting those two things and, right, he knows, we all know that both Congress and the Justice Department are investigating January 6th, and the Justice Department has already, for example, conducted searches of President Trump's outside legal advisors like John Eastman and Jeff Clark and Rudy Giuliani, I believe, too.

[00:28:50] Or if not, I'm sure they will. If he knows that's going on and then, say, President Trump sends his lawyers or he himself goes into this basement, starts looking for documents that are related to that and he destroys them, well, that would be a violation of the statute. Th- th- this a thing. It's, again, again, it's the difference between what's being said in the media and what c- what the statutes and the warrants actually say, you know, what the department has been leaking is, oh, we're only concerned that he took the wrong documents out of the White House and he's been storing them in an unsecure facility.

[00:29:21] That's not what the statute says. The statute is, are you actually trying to destroy and cover up something related to a government investigation? And then the next statute is, I think even more broad than that, that, that's not just limited to, you know, whether you have classified documents in the basement. This is much broader. Uh, and i- it's I, I think the department actually, in its public statements, is underplaying how broad the search terms actually are and what they actually were allowed to look for.

[00:29:53] **Jeffrey Rosen:** Thanks so much for that. Steve, let's put on the table the third of, of the statute John just alluded to, the 2071, about the wrongful mutilation of government documents that's not tied to an ongoing investigation, as you said. Tell us about the potential violations that might be investigated here.

[00:30:10] **Steve Vladeck:** 2071, in some respects, is a more capacious record retention statute than 1519 that was written earlier. And I think it was perceived in some quarters to be insufficient to respond to some of the abuses in the financial accounting scandals in the early 2000s. So it's actually two pretty different provisions. Uh, 2071 A is about anyone who willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, um, any record proceeding, paper document, or other thing filed or deposited with a political officer of a court in the United States or public office, et cetera.

[00:30:44] So that's sort of like a, you know, a modest felony for concealing, removing, or destroying official documents of some kind. Um, and then there's a slight, there's a more serious, um, offense in 2071 B, about those who have the custody of these materials, um, who nevertheless are responsible for concealing, removing, mutilating, obliterating, or falsifying them. And the idea being that if you're actually in charge of holding on to these documents and you do something nefarious to them, you've done an even worse crime.

[00:31:18] And what, what really drives these two sections apart is the second provision has, as a consequence, the forfeiture of your office and disqualification from holding any future office under the United States. And so I think a lot of folks, back to John's point about the daylight between, um, how people are reacting to this news and what the news might actually be, a lot of folks gravitated right to this and assume that this was part of some master plan on the Biden administration's part to try to disqualify President Trump from running at any future election, which presumably would happen if he were convicted under 2071 B and if that conviction withstood the inevitable constitutional challenge that would follow.

[00:32:00] I'm not sure this is about B as opposed to A, you know. I don't know that this is a claim that there were documents that he was the lawful custodian of that he failed to properly account for, versus just there were documents he messed with. And so, again, I, I think it's worth stressing like, there's still a lot we don't know. We'd know a lot more if instead of just listing the three sections, right, the warrant had listed the, the subsections. I mean, 1519 is only one section. But if you listed the subsections of 793 or 2071, we know a lot more.

[00:32:29] Uh, I'll just say this, I, I think those who think 2071 B is a path to preventing President Trump from running for office again are probably going to be disappointed, um, right. Because even if he's tried and convicted, and again, I'm not sure that's the end game here. Um, I think there are some pretty serious constitutional questions about whether Congress can, by statute, disqualify, uh, individuals from running for president or vice president on grounds other than those set out in the disqualification provision of the Fourteenth Amendment, Section 3. So just, that's a lot there, but it's sort of why, why of in 2071 may not actually be the ballgame here.

[00:33:10] **Jeffrey Rosen:** Thanks so much for that. John, on this question of whether the president could be disqualified under 2071 from running for office, I think you and Steve may agree that Supreme Court cases, including Powell versus McCormack and US term limits v. Thornton, uh, from '94, uh, suggests that Congress cannot add, by statute, to the very few constitutional qualifications for running for president. Is that right? And, and what do you think?

[00:33:38] **John Yoo:** Yeah, and I, I think that's right, Jeff. And those are the main cases that, that you pointed out. Um, there's two different reasons to think that the statute couldn't actually disqualify Trump from running for reelection even if he were convicted. You know, one is that, uh, January link when Congress talks about officers of the United States in a criminal statute, courts try not to read off that phrase to include the president. They want a clear statement that when Congress wants to regulate the president, it says so.

[00:34:10] Because to, for Congress to try to regulate the president, uh, create separation of powers problems. And so, you could easily see a court just reading this law saying, well, this is about as these are custodians, people in charge of documents, officers of the United States who are appointed pursuant to the appointments clause in the Constitution by the president and the Senate. But the president and the senators are not themselves officers of the United States, they're in the Constitution itself.

[00:34:38] But suppose somebody, you know, quarter the Justice Department were to read this phrase to include the president, then, Jeff, you're right, there would be these constitutional

problems. Both those cases, McCormack and term limits are about can Congress or the states add to the minimum qualifications the Constitution sets out for election to office, like age, residency, state, you know, right where you live, that kind of thing. And in both of those cases, the court said, no, Congress or the States can't add to the qualifications.

[00:35:13] Or putting it differently, the qualifications set out in the Constitution, were they minimums that could be added to or were they maximums, were they floors, or were they ceilings. And the Court has said, they're ceilings, they're the only qualifications you need to satisfy in order to win office. And so this statute would be in violation of that principle, although neither of these cases are about the presidency. But they would be in violation of that principle because you could say, well, what Congress is doing here is adding another qualification to be president, which is, right, not only your age and s- you know, being a natural born citizen and so on, but also never having been convicted of this crime. [laughs]

[00:35:52] Now he would say, okay, well, you, you would think that that should be a, a qualification for officers who've never violated federal law before, but that's actually not in the constitution. So, I think that's, I think it's a hard case to make out. I know, you know, when this, the Mar-a-Lago search ca- came out, Marc Elias, one of the big Democratic party election law attorneys, was out there with this provision saying, 'oh, you know, wow, this is, you know, this is how we, uh, stopped Trump.'

[00:36:25] Remember, it's similar to the, um, discussions that we had during the impeachment. And remember, because you could actually, as a punishment for impeachment, disqualify someone for future office. And, you know, Jeff, you, you, you've written and cited about this, you know. This is, uh, part of what happened during the Civil War and the aftermath as, you know, disqualification of the confederate officeholders. But this is, this is not it. [laughs] I don't think. I don't think this is really gonna come close. And people are just getting too excited that there's some kind of shortcut to holding President Trump responsible in some way and preventing him from running from office.

[00:37:02] Jeffrey Rosen: Thanks very much for that. Well, let's take stock at this point in this really fascinating conversation. Steve, you've suggested that the purpose of the search might not have been prosecution, but simply to get the documents back. Based on what we know and, and also what we don't know, can you imagine any prosecution of former President Trump under the three statutes we've been describing that would be justified, gi- given the momentousness of, of prosecuting a former president? And what would those facts look like?

[00:37:30] Steve Vladeck: One quick point on the last thing John said, uh, I, I do think it's worth stressing. I think there's one context where Congress can impose additional qualifications on the president, and that's when it's enforcing Section 3 of the Fourteenth Amendment. And there are a couple of statutes that do that. So, for example, 18 USC 2383 disqualifies from office anyone convicted of insurrection, right. I think that's ...I don't know if John agrees with this.

[00:37:54] But I, at least, would say that that's a much stronger constitutionally sound exercise of power since the Fourteenth Amendment gives Congress the power to enforce the rest of the Fourteenth Amendment, including Section 3. That aside, on the question of what would a

prosecution look like, I mean, again, it really depends on what actually happened. But so imagine, Jeff, a scenario and this is extreme. I want to stay up top, there's no factual basis what I'm about to say.

[00:38:20] But imagine a scenario where President Trump was literally offering donors, access to National Security Information that was in his basement, right, and was to sell it, like pay \$5,000, come check out our crown jewels, um, right. And it didn't matter if these donors were American citizens or not, it didn't matter if they might be Russian spies or not. If he was aware of all that. And again, I'm not saying this is what happened. Um, I would think that is a pretty flagrant violation of the Espionage Act. I would think that is a pretty flagrant violation of 2071.

[00:38:54] And if there was an ongoing criminal investigation into that behavior and he didn't turn over the materials, I would think that would be a violation of 1519. So, you know, I think we can conjure hypotheticals where the, sort of, the nefariousness of President Trump's conduct would be just, you know, undeniable to all but his most zealous supporters. Um, I doubt that's the actual reality here. And so, I think the, the, the conversation shifts to what led Attorney General Garland, who, by all accounts, agonized over this decision for weeks, right.

[00:39:26] What led him to think that the search was a necessity, given the inevitable firestorm it was going to provoke? And I think the same calculus, Jeff, is going to apply to any potential move toward an indictment. And that's been dependent, I think, to an enormous degree on stuff we just don't know yet.

[00:39:44] Jeffrey Rosen: John, what's your best thought about what could have led Attorney General Garland to authorize the search, given the fact that, as Steve says, he didn't take it lightly? And then can you imagine, you know, any set of facts that would justify prosecution under the three statutes we've been discussing?

[00:40:00] John Yoo: This is a question where we're leaving the requirements of the law as written. And we're talking about good judgment, prudence, uh, what we've commonly called prosecutorial discretion. It's not whether someone has committed a violation of the law. It's whether the government should use the vast power it has as it, at its disposal to, to choose, to prosecute someone. And so, you want to do that, I think, consistent- given that prosecutors can destroy anybody's life without ever getting to court, right.

[00:40:33] They have...I'm reminded of... when he was attorney general at the time with Justice Robert Jackson's famous speech on the role of the prosecutor and how they should think of wielding this great power that they have at their disposal and what kind of judgment they should exercise. I think that this search is overkill if it's really just about, did President Trump take the wrong documents? Was he holding them in his basement? Uh, should he have turned over documents not just A, B, and C, but also, D, E, and F?

[00:41:06] Because we haven't done that before to past presidents and to past officeholders. President Trump himself raised the case of Hillary Clinton and her unsecured server, which was handling classified emails. And it was an investigation into that, I think, improperly revealed in public. And I said so at the time by Jim Comey just a few days before the election. You could see

the enormous effect that had on our politics and our, our law. But she ultimately wasn't indicted and prosecuted.

[00:41:38] There was no sort of, intrusive search. There was no seizure of her computer servers. And instead what was done is what I thought should be done here, which is Hillary Clinton's lawyers and the Justice Department, FBI consensually worked out a process for the return and handing over of the information that the government thought she shouldn't have on those servers. And they conducted their investigation. There was never a need to get to this kind of intrusive search warrant process.

[00:42:06] That's why to me, I would not think the Justice Department would want to prosecute Donald Trump for this. It's got to be to me something more, something that would justify this kind of search, sending 30 agents into a former president's house, first time this has ever done. To me, I can't see the Justice Department, you know ... Again, good sense, judgment, prudence. I can't see them doing this just to f- to get classified documents back. To me, that's why I think that they're looking for something more.

[00:42:34] Oh, you also asked, Jeff, in the last question, I didn't answer it, whether that would be legitimate. Well, there is something called the plain view doctrine, right. If you are executing a search warrant and you're legally allowed to be there in Trump's basement and you're legally allowed to be looking at documents that you come across other stuff, that comes into that's not suppressed in any kind of criminal proceeding or criminal investigation. To me, that was what would justify a search like this, would be trying to find information about January 6th.

[00:43:03] I don't think there's anything ... It's a, it is kind of like the Al Capone Approach, right? Al Capone committed murder, committed robbery, he was engaged in racketeering, but the government got him on tax evasion at first, right? You, that's a, that's a, actually, kind of a typical prosecutorial investigation technique, is to try to get people, uh, targets of things you think that something serious on things that are less serious at first, just as a way to get the investigation started and open it up. And I think, to me, that's what the department is doing here.

[00:43:35] Jeffrey Rosen: Thanks so much for that. Steve, first of all, do you agree with John, that might be what the department is doing here, is using the plain view doctrine to look for evidence of January 6th in the course of investigating obstruction and, and other document issues? And then if whether or not you think that was the motive, do you think that would be a legitimate use of that search? Re- remind our listeners of how the plain view document works as the evidence of the different ill- illegality have to be obvious? Or can they really dig into the documents to find it? Would that be an appropriate basis for Attorney General Garland's reason for authorizing the search to, to look for evidence of January 6th?

[00:44:13] Steve Vladeck: Here again, I really do think that the presence in the warrant of Section 1519 is a really important clue that that's not what's going on here. 1519 would have required DOJ to convince Judge Reinhardt that there was probable cause to believe that President Trump had concealed or worse, documents with the intent to impede or obstruct an ongoing investigation or proceeding before a federal executive branch agency. My read of the statute is

that does not include the January 6th committee. And so, presumably, there had to be some kind of proceeding.

[00:44:47] Given what we think has happened, I have to think it's the grand jury proceeding that produced the subpoena in the first place. Jeff, from where I'm sitting, you know, if the Justice Department believes that President Trump was holding onto documents that were probative in an ongoing grand jury proceeding and was doing so to frustrate that grand jury proceeding from going forward, I'm not sure if that justifies prosecuting him. But from my perspective, it sure as heck justifies going in and gathering those documents.

[00:45:16] That's the distinction I think we all have to be thinking about, is, you know, it's one thing for Merrick Garland to sit back and decide to execute this search. It's another thing for him to bring charges. This is where I think public faith, or the lack thereof, in the integrity of the Attorney General is such a critical part of the conversation, right. The Attorney General is not constitutionally independent of the president, he serves at the president's pleasure. The president can fire him for any reason or no reason.

[00:45:45] But we expect the Attorney General to be at least, to some degree, aloof from politics and aloof from doing things for partisan reasons to preserve the notion that the Justice Department is principally engaged in equal justice under the law. And so, you know, I will just say, maybe this is my own biases, prejudice in my view, I view Merrick Garland as a by the book, down the middle, very cautious type, who's not going to do things just to score political points, right, who's not trying to play to the Democratic base, but who's doing what he thinks is honestly, in his best estimation, in the best interest of the United States. He might be wrong, right, but I don't see reason to believe any of this was done in bad faith.

[00:46:31] **Jeffrey Rosen:** Thanks so much for that. I think it's time for closing thoughts in this really interesting discussion. And maybe Steve's last point is the way of framing your closing thoughts. Please tell We the People listeners whether giving, given everything we know, you believe that Attorney General Garland's decision to authorize the search, although not necessarily the prosecution of President Trump was wise.

[00:46:55] **John Yoo:** A, that is a great way to end it and think about it, is I don't think it was wise. I'm not saying it's illegal. I think given the history, we learned about what's, uh, the negotiations between the Trump team and the Justice Department and what's in the warrant and what we've seen in the inventory. It does seem to me like, it does seem to me that the search was legal and constitutional and would survive any kind of suppression hearing if the crime was really holding documents.

[00:47:29] But I think, and this is where I'm not sure a by the book prosecutor is all you want here, because this is not just a search of a drug dealer or mafia don. This is the search of a former president. And so it involves a lot of delicate, first of their kind questions, maybe questions we have not really thought about seriously since Nixon, which is actually true about a lot of the things that happened during President Trump's time in office, is like he raised a lot of questions we have not thought about since Nixon.

[00:48:02] And this is the things I do, in partially when you're thinking about whether to exercise the vast power the department to search, I think, much more broadly. I think that was necessary to go beyond the usual process of negotiation between the department and the lawyers for former president, uh, to use this kind of intrusive search. Are we creating, um, bad incentives for future presidents? Presidents, capital P, not precedents like former practice. That's something, I think, that you do want more than just a by the book prosecutor to be responsible for.

[00:48:39] That is actually where you do want to bring President Biden in. I mean, under the Constitution, it's President Biden who is the only one who has a constitutional duty to enforce the laws and Merrick Garland is his subordinate and really, his constitutional assistant in carrying that out. I think something, a case of this high prominence, it's almost, to me, goes beyond the Attorney General. The Attorney General should check with President B- I don't think this is a case where he can just say, oh, I'm just gonna let the prosecutors follow the book.

[00:49:08] There is no book about how to do this. And so, to me, the thing I'm really worried about, and it goes beyond Trump and beyond this investigation, is are we creating unintended, unforeseen consequences on future presidents? So, for example, what effect would it have on President Biden now if he started worrying, is a Trump, suppose Trump wins the presidency 2024, is he gonna send the FBI to search my house for hunter Biden stuff, right? I mean, that's, I have no idea how that's gonna affect presidents.

[00:49:41] I do have a pretty good idea how the rules, as they were in the past, affected presidents. We had kind of a stable equilibrium, and Donald Trump did disrupt that equilibrium in many ways. That's what I really worry about, is if we allow this practice to become permanent where subsequent presidents order the search and investigation of their predecessors, is that going to distort the incentives that we want presidents to have, so they make good decisions while they're in office?

[00:50:11] **Jeffrey Rosen:** Thank you very much for that. Steve, last word to you. John has argued that Attorney General Garland's authorization of the search, although legal, was not necessarily wise, do you agree or disagree?

[00:50:25] **Steve Vladeck:** I think we just don't know yet. And I think this is a conversation worth revisiting 6 months, 9 months, you know, 12 months from now. Um, uh, I will say that there's, you know ... John is right that it is unprecedented for w- w- an administration to conduct a search of the house of a former administration, uh, former president. I would just say it's unprecedented to have a former president who is accused of this much criminal activity.

[00:50:50] And so, you know, uh, I'm not sure the creating incentives where presidents are worried about their potential criminal liability when they're out of office if they are violating the law is a bad thing, um, right? It seems like it's not self-evident, that we want to create a culture of impunity where presidents believe they're above the law. It's a, it's a common trope among President Trump supporters. Well, if they could do this to President Trump, they can do this to any of us. Um, with all respect to them, that's not true.

[00:51:18] I wasn't the president. I did not bring home boxes of classified material last night. Um, I didn't even stay at a Holiday Inn Express, right? I mean, this is ... The, the notion that this is like, you know, the end of the rule of law because the Biden administration convinced a federal judge that there was probable cause to believe that President Trump had committed at least three federal crimes, I think, is a pretty shocking indictment of what we think the rule of law is.

[00:51:40] I think it's worth stressing that because this is a first time case, it might behoove the Department of Justice to formalize procedures as it has done in the context of subpoenas to reporters, for when it isn't, isn't appropriate, um, in the future to investigate a former president, to conduct a search of a former president, I think that could go a long way toward alleviating charges of partisan bias. But I, I guess, I'm just, I am less troubled by the president of an administration investigating potential crimes by its predecessor just because it seems to me that the alternative is worse.

[00:52:16] Jeffrey Rosen: Thank you so much, John Yoo and Steve Vladeck, for a wonderfully nuanced and thoughtful discussion of the complicated issue about the wisdom and constitutionality of the search of President Trump. Love your suggestion to revisit this in several months when we know more. And it would be wonderful to do just that. John. Steve, thank you so much for joining.

[00:52:39] John Yoo: Thanks, Jeff.

[00:52:40] Steve Vladeck: Thank you, Jeff.

[00:52:43] Jeffrey Rosen: Today's show was produced by Melody Rowell and engineered by Greg Scheckler. Research was provided by Sam Desai, Vishan Chaudhary, Colin Thibault, and Samuel Turner. Homework of the week, Justice Jackson's speech about prosecution. I can't wait to check it out myself. And please rate review and subscribe to We the People on Apple podcasts and recommend the show to friends, colleagues, or anyone, anywhere who's eager for thoughtful learning and light about the Constitution. And always remember that the National Constitution Center is a private nonprofit.

[00:53:13] It is so meaningful when you send a note or a link donating any amount of \$5, \$10, or more, or, or just letting me know that you are engaged by the show and are part of our community of lifelong learners. So, do that with an email to me, jrosen@constitutioncenter.org, or by becoming a member at constitutioncenter.org/membership, or give a donation of any amount to support the work, including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.