



## What the FBI's Mar-a-Lago Warrant Does—and Doesn't—Mean

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Former President Donald Trump's Tuesday night appeal to the Supreme Court is the latest expression of his insistence that his rights have been violated by the federal investigation following an FBI search for classified documents at his Mar-a-Lago estate. And while the allegation here is fairly arcane, more often Trump has been leveling (and fundraising from) a simpler and graver charge: that this was an "Unwarranted, Unnecessary, and possibly Illegal Raid on Mar-a-Lago, a clear violation of the Fourth Amendment."

That'd be terrible were it true—like anyone, Trump deserves constitutional protections. But the search was not, in fact, "unwarranted" in the relevant sense of the word: We've seen the warrant, its inventory list, and much of its justification. Of course, it's possible that we'll learn the FBI lied, though it's hard to imagine even federal law enforcement being reckless enough to take that risk in the highest profile case on earth. For now, anyway, we've learned no such thing.

Still, Trump's whining raises an interesting question: Was a search the feds' only option to get these documents back? And if it wasn't, does that decision tell us something about Trump's legal fate—say, that he's headed for criminal prosecution?

*Reason* spoke with Walter Olson, a senior legal scholar at the Cato Institute, to try and answer these questions. A search warrant wasn't the only option the Department of Justice (DOJ) had here, Olson said, though the history of the case suggests jumping to that move wasn't unreasonable. A "subpoena would be the ordinary, less dramatic way to use legal process to get the documents," he explained, and Trump was subpoenaed earlier this year but "failed to comply," "falsely certified compliance," and otherwise disregarded instructions for how to keep the documents secure while they remained in his hands.

"Some have talked about whether some intermediate 'this time we really mean it' subpoena or related motions might have been feasible," Olson continued. "I don't know. DOJ has indicated that

informer reports of insecure storage of sensitive papers, coupled with what it regards as bad faith concealment and false certification, lifted this episode, in its view, out of the 'ask again, but this time more sternly' realm."

Yet, even if a warrant wasn't the Justice Department's only option, its choice to go this route doesn't signal—let alone prove—anything about the future of the probe, Olson said. "Nothing whatsoever about a search warrant or its execution compels later prosecution," he explained. "Even if decisively incriminating evidence is found, the usual principles of prosecutorial discretion will apply." The DOJ could still elect not to pursue an indictment for Trump, perhaps because of the difficulty of proving criminal intent. Reclaiming the documents may be the end of the matter.

Or maybe not. As wary as he was of conjecture about the DOJ's plans, Olson doubted the Mar-a-Lago search would be the department's last big act in this case. "If nothing else, obstruction of justice through concealment of evidence and bad faith certification of compliance with a subpoena [are in] a category of crime that DOJ does typically prosecute with vigor," he wrote. Whether Trump's legal and political shenanigans make prosecution more or less likely he was not inclined to speculate.

I *am* inclined, though I suspect it can only ever be speculation for those of us outside DOJ walls. The debate over whether to prosecute Trump in this and other possible cases—like the Georgia investigation into possible election fraud—has plenty of practical considerations around evidence quality, venue selection, witness cooperation, and more. But in the bigger picture, of which the Justice Department is undoubtedly aware, it comes down to a question of whether to prioritize rule of law or civil peace.

That's a legitimately difficult choice because those are both paramount goods in a polity like ours. If Trump is prosecuted, especially on charges which could result in his imprisonment, civil unrest or outright violence is all but guaranteed.

I'm not forecasting a full-blown civil war, on which I tend to be quite bearish. But another Capitol riot-style event? Attempted attacks on people like Attorney General Merrick Garland? Utter chaos at polling places in 2024? Something in that vein is not just possible but probable. Prosecuting Trump is not a path to domestic tranquility. It will not suddenly convince his tens of millions of supporters that he's a terrible leader or a vicious man.

On the other hand, rule of law is not a small thing, and I'm eager to see a new precedent of prosecuting presidents—ideally for weightier offenses than obstruction, like responsibility for torture and other war crimes and constitutional breaches. Comparable countries already indict and prosecute their heads of government and state for committing such crimes, and we could too. The chief law enforcement officer, of all people, should not be above the law.

But whether the Mar-a-Lago search stands any chance of moving us toward that end remains an open question. I can see a way to just about any outcome: prosecution or no prosecution, a big charge or a technicality, conviction or acquittal, a serious sentence or a slap on the hand. Whatever his destination, though, we can at least rely on Trump to caterwaul the whole way there.