My name is Jim Trusty. I have been an attorney for 35 years. I started as an Assistant State's Attorney in Montgomery County, Maryland for ten years, and then I served as an Assistant U.S. Attorney in Greenbelt, Maryland for another ten years. In both roles, I was fortunate to be involved in some very challenging and high stakes prosecutions. This ranged from a "no-body" murder prosecution to a series of RICO prosecutions of MS-13 gang members. I prosecuted everything from vulnerable adult abuse to drunk driving to murders, and I led three different death penalty trials.

In 2009, I accepted a Deputy position at the fledgling Gang Unit of the Department of Justice. Within about 18 months, I became the Chief of the DOJ Organized Crime and Gang Section, where I ran the Section for about six years. In that capacity, I supervised line prosecutors handling regional, national and international gang cases, Mafia prosecutions, and international white-collar conspiracies. We pursued criminal enterprises like MS-13, Aryan Brotherhood, Bloods, Barrio Azteca, Las Zetas, and others across the country. I was a senior member of the Attorney General's Death Penalty Review Committee, helping determine whether the death penalty should be sought in cases such as the Boston Marathon Bomber and the Charleston Church shooter, but also numerous lower profile matters. I was also privy to the consideration and development of DOJ policies and criminal justice legislation, and I would routinely be involved in discussing some of the Department's biggest criminal investigations. I regularly had a role in the FBI undercover review process and ATF's undercover process. I hired applicants for my Section as well as the DOJ's Honors Program, and I served under seven different Attorney Generals, if my memory serves.

I left the Department in 2017 to join a boutique litigation practice around the corner from the White House, called Ifrah Law. I have represented a variety of clients in primarily criminal, but some civil, matters. My clients include professional athletes, human trafficking victims, white-collar defendants in varying industries, and for a one-year period, President Donald J. Trump.[1]

Long before representing President Trump, I considered myself someone devoted to our criminal justice system. I was, and am, proud of the important work I did as a prosecutor. One lesson that was deeply instilled in me by the State's Attorney who hired me, Andy Sonner, was the importance of fairness and the need to wield power with grace. I took those fundamental lessons to heart and as a prosecutor I tried, at least, to recognize the power disparity and the enormous impact investigation and accusation—much less prosecution—can have on people.

As a prosecutor, I felt strongly that I represented the community, whether a county or a country, and that I had pursued a noble calling. Even after leaving the Department of Justice, I worried that I would miss the moral clarity of prosecution and that I might struggle to represent a client, rather than simply following my conscience. I had also come to realize over the years that there were people attracted to prosecution for the wrong

[1] As with any former client, I will not discuss confidential matters or violate statutory rules of secrecy.

reasons—ego, political ambition, power, self-righteousness—but I considered them a small minority at most, a rare exception felt more accurate.

I have not completely changed my view of prosecutors. I still have good friends that are career prosecutors at the state and federal level. So, make no mistake from my comments—I believe that there are many decent, gracious, fair-minded and talented lawyers who populate prosecutor offices around this country. They have much to be proud of, and citizens in their communities have much to be thankful for from their service. That said, I have seen something happening within DOJ, as well as New York and Georgia, which reflects a seismic shift in the criminal justice system, and one that may cause severe damage to the criminal justice system, the Rule of Law, and to the democratic process in this country.

The Differential Treatment of President Trump

On August 8, 2022, I learned that the FBI was at Mar-a-Lago, executing a search warrant. As with any time that a client is subjected to a search warrant, I wanted to know who the overseeing prosecutor was (National Security Division Supervisor Jay Bratt) and whether we might be able to see the affidavit in support of the search warrant (to this day, it still remains partially redacted). The fact that a search warrant was being executed by FBI Agents was immediately a historic and troubling circumstance.

Over the months that followed that raid, I would learn a lot about the relatively haphazard way classified document retrieval is handled at the White House. I learned that the problem of "overclassification" was a real one – with NSC cheat sheets for avoiding social blunders with foreign dignitaries remaining classified as if they were war gaming results from a desktop war with China. I would also learn that the entire process of archiving was a non-criminal, negotiable, and long-term process where archivists showed great deference to FPOTUS and his decision regarding sharing documents.

Shortly after President Biden's exposure for knowingly possessing classified materials in multiple unsecure locations, our legal team wrote to the Chairman of the House Permanent Select Committee on Intelligence. We called for a top-to-bottom review of the entire "pack out" process for departing administrations, and that this process should be examined by the intelligence community with an eye towards regularity and avoiding spillage, rather than conducting criminal cases. Our letter was factual and apolitical, pointing out that the treatment of President Trump was unlike that of any other President in our history.

The Political Underpinnings of the Classified Document Prosecution

The politicized treatment actually began with the National Archives and Records Administration ("NARA") whose Director publicly took offense that President Trump was departing Washington, D.C. with boxes of documents. Negotiations took place and eventually President Trump authorized the release of 15 boxes of materials to NARA. As was later acknowledged by NARA to be true in the case of every modern-day presidency, those boxes contained some documents marked as classified. The reaction of NARA's

leadership to this "shocking" discovery was apparently to make a "criminal referral" to DOJ, for the first time in NARA's history.

DOJ's decision to use criminal enforcement tools in an exaggerated dispute about document retention was unique and simply wrong. I have personally seen the September 11, 2018 letter from representatives of the Barack Obama Foundation to the Director of NARA in which President Obama's representatives casually refer to their post-Presidency possession of a vast quantity of documents—specifically including classified ones. The letter pledges to digitize records held at an Illinois facility over almost a three-year period and then transfer those records to NARA. The Obama Foundation pledged to "transfer" up to $3,300,000 to the National Archives Trust Fund "to support the move of classified and unclassified Obama Presidential records…from Hoffman Estates to NARA-controlled facilities," and the letter memorializes having already sent a $300,000 payment in August of 2018. The implications of the letter are somewhat staggering – NARA was willing to wait for the still non-existent Obama digitized library to be completed while innumerable classified documents were outside of their control. Shady financial "transfers" notwithstanding, the agreement is also instructive in that it shows the typical deference displayed by NARA to FPOTUS. The agreement also demonstrates the norm—that negotiations with former administrations can stretch for years, as they have with various presidents, and that no Director at NARA would view lengthy negotiations as triggering a possible criminal case.

That model of sluggish cooperation between FPOTUS and NARA is perfectly reflective of the Presidential Records Act ("PRA") and the position of DOJ in a prior litigated dispute regarding presidential records. Without trying to write a treatise on the PRA for lawmakers who probably have familiarity with it, I will just take out two important components for summary. The PRA calls for collaboration between former Presidents and NARA in properly preserving presidential records for posterity. It does not include criminal penalties. It makes no distinction between classified materials and non-classified ones, but simply Presidential and Personal. It is a statutory framework that specifically relates to presidents (and vice presidents), and as such I believe that affords a measure of protection to former Presidents who possess classified documents but who have not used them for nefarious purposes like those criminalized in the Espionage Act.

But my focus on the PRA aspect is directed towards DOJ and its position in the case of *Judicial Watch, Inc. v. National Archives and Records Administration*, 845 F. Supp. 2d 288, 291 (D.D.C. 2012). In that case, President Clinton retained audio recordings from his time as President in a sock drawer, rather than turning them over to NARA. This was deemed to effectively serve as a characterization as "personal" by President Clinton. When the District of Columbia District Court Judge queried the DOJ attorney about the possibility of a former President wrongly classifying material as personal, the DOJ attorney took the position that PRA disputes favored the FPOTUS in making those determinations, and that if NARA disagreed with that categorization its only relief was to civilly sue in Washington, D.C. The same DOJ, then, conceded in

President Clinton's case that a former President had authority to hold on to anything they deemed "personal" and that no criminal penalties ensue if they are wrong.

DOJ Criminalization

In President Trump's case, however, NARA and DOJ took a distinct departure from history. Prior to the Mar-a-Lago case, the issuance of a subpoena to a former President was considered a major escalation and a clear signal that criminal investigation was afoot. The decision to issue a subpoena to President Trump for documents with classification markings was an aggressive move. In typical cases, a document subpoena creates a dialogue between defense counsel and the government, with extended deadlines, rolling production, and both parties working toward a mutual moment deemed "full compliance." Here, however, DOJ again departed from the norm. Evan Corcoran asked for more time and initially received it from Mr. Bratt. But Mr. Bratt then inexplicably reneged on that agreement, disallowing Corcoran from doing a deeper dive for responsive materials.

As I have read from the *Washington Post*,[2] not only did Mr. Bratt shut down the typical compliance process without explanation, but behind the scenes he had been fighting with the FBI to block any further cooperation with Mr. Corcoran. According to one news report, Mr. Bratt met with FBI officials who "repeatedly urged" that the FBI should seek to negotiate a consensual search, rather than conducting a surprise search. According to the *Post,* "Tempers ran high in the meeting. Bratt raised his voice at times and stressed to the FBI agents that the time for trusting Trump and his lawyer was over." The same article reported that Mr. Bratt urged the use of a search warrant as early as *May* 2022, which speaks volumes about his desire to use criminal investigative tools in the unprecedented and heavy-handed fashion that followed.

The Execution of a Search Warrant at Mar-a-Lago

On August 8, 2022, DOJ and the FBI chose to pursue executing a search warrant, even going so far as to request shutting off CCTV cameras, for "agent safety" at a facility already teeming with Secret Service agents and security personnel. The FBI had been given wide range to take documents, and they took advantage of that general permission slip by taking items like President Trump's passport, among other things. One detail of that process has been overlooked in its importance – the inventory. Federal Rule of Criminal Procedure 35 requires the government to provide the target and issuing judge with a specific inventory of seized items. In this case, the initial inventory was spectacularly vague in most instances, referring to "documents" instead of providing any substance. The exception to that vagueness was several entries that specified "Pardon packages" for several high-profile criminal defendants. I find it quite interesting that the

[2] Carol D. Leonnig et al., "Showdown before the raid: FBI agents and prosecutors argued over Trump," *The Washington Post* (March 1, 2023), https://www.washingtonpost.com/national-security/2023/03/01/fbi-dispute-trump-mar-a-lago-raid/.

only documents with specificity fell into that category, and it feeds my suspicion that there was a greater interest in getting the camel's nose under the Mar-a-Lago tent—to fuel *any* form of justification for the historic action—than collecting various classified documents. When forced by a judge to provide a more detailed inventory, the government chose to insert "documents belonging to the United States of America" or words to that effect. This was a thinly veiled effort to swap in legal conclusions and emphasize to the public that President Trump had "wrongly" held onto documents in the face of unreasonable demands from NARA and DOJ.

The DOJ Departure from Due Process Protections at Press Conferences

In the end, Attorney General Garland endorsed Mr. Bratt's conduct by approving DOJ's raid and then, on August 11, holding an unethical press conference that failed to mention President Trump's offer to cooperate regarding the return of documents. The Attorney General expressed a desire to unseal the warrant and the inventory. This was an unprecedented position, and one that flies in the face of prosecutorial ethics. Mr. Garland wanted to show the public that a judge had permitted the raid (warrant) and he sought to justify the decision by unsealing the inventory, which would serve the "I told you so" purpose of saying the raid led to the seizure of important materials. He had no interest in unsealing the supporting evidence contained in the affidavit, which remains partially sealed to this day. In my 35 years as an attorney, I have never seen a prosecutor at any level hold a press conference to justify a search warrant, particularly in the case of an uncharged target.

As an aside, it seems Manhattan District Attorney Alvin Bragg may have learned an unethical trick from that 2022 press conference. When Mr. Bragg indicted President Trump for the ongoing spectacle of the current fraud trial the indictment was a "bare bone" charging document that simply described the statutory elements and specified which record entries were supposedly felonies. He also unveiled a "statement of the offense," bearing only his signature (it was not a finding by the Grand Jury) to particularize his theory of President Trump's guilt. In effect, Mr. Bragg flouted prosecutorial ethics by creating a false entry into the public record for the purpose of justifying another "creative" prosecution that would impact the presidential election.

If DOJ was acting with integrity they would follow a completely different course. They would recognize the incredible political import of investigating and now prosecuting a former President who poses the serious threat of thwarting President Biden's bid for a second term. That would mean they adhere to principles of non-interference with elections. And, perhaps most importantly, they would be determined to show complete transparency and a willingness to subject their actions to scrutiny at every turn. That model could lead, or at least has the best chance of leading to, respect for the final outcome. Process is a huge factor in ultimate fairness.

Instead, we have had to hear Jack Smith demand a "speedy trial" under the nebulous theory that speedy trial is focused on trial observers, not the defendant. When the pre-election trial date was threatened by appellate review of the immunity question, Mr. Smith impatiently asked for Supreme Court intervention despite the expeditious

consideration of the issue by the Court of Appeals. A fair and transparent Department, at that same juncture, would have simply announced "we are ready for trial whenever the Court deems it appropriate." Open discovery and early disclosures of exculpatory information would be the hallmark of a Department bent on showing its ethics rather than one making all of its decisions based on political calculations.

Grand Jury Abuse

The next aspect of singular behavior by DOJ surrounds its use of the Grand Jury. For the vast majority of the pre-indictment investigation, DOJ used the Washington, D.C. Grand Jury for its presentation. The overwhelming majority of witnesses lived and worked at Mar-a-Lago. A good portion of the people brought to the D.C. Grand Jury received very little notice, and at times it appeared that the inconvenience and natural intimidation at the prospect of traveling to D.C. to testify were being used as a tool by the investigative agents and prosecutors. For instance, one witness – a young administrative aid to President Trump – was told to provide her password to a seized laptop that was not actually her property. Her hesitancy was met with a demand to either give the password now or travel later that week to Washington, D.C where "the Grand Jury would demand it" of her. The young woman understandably yielded.

Much of the conduct of the investigators remains shrouded in secrecy, but one remarkable example has made its way into the public domain—the interrogation of attorney Tim Parlatore. Tim was one of the attorneys representing President Trump and he had taken an active role in searches we conducted to ensure all classified documents were provided to DOJ. During Tim's testimony, the DOJ prosecutor asked questions that led to the invocation of attorney-client privilege on approximately 48 occasions. This was not a situation where an attorney overly invokes, it was a prosecutor bent on pushing the boundaries of ethical grand jury presentation, knowing that the jurors would likely hold the invocations against the target of the investigation, President Trump. In the clearest demonstration of this unethical approach, the questioner asked Mr. Parlatore, "If the President is being so cooperative, why won't he waive his attorney-client privilege?" This was a blatant attempt to have the grand jurors draw an impermissible inference against the former President, and once again something I never witnessed in 27 years of regular Grand Jury usage. I would later catch the same prosecutor completely mischaracterizing a witness interview to a federal judge, without serious consequence.

Exceptions to Bedrock Principles

In litigating various matters relating to the D.C. Grand Jury, two extraordinary things took place that had little or no precedent before the cases against President Trump. The first was the Government's successful invocation of the rarely established "crime fraud" exception to attorney-client privilege. The effect of this maneuver was to gain unfettered access to Evan Corcoran's notes and then elevate his commentary to a prominent position in the ensuing indictment. While I admit a good portion of my career as a prosecutor was more "blue collar" than in the white-collar lane where the crime fraud exception has more potential, I had never seen a prosecutor succeed in piercing that historic protection. Further, the pursuit of this treasure was founded almost entirely on

ex parte submissions to a judge, which is difficult to address from the other side. In the context of a historically important prosecution, and one in which DOJ was not particularly credible, the one-sided fight to extinguish President Trump's privilege is galling.

Secondly, mostly in the context of the January 6 prosecution, President Trump lost all protection afforded by Executive Privilege. The practical result was the same: the eventual indictment was heavily flavored with information gleaned from Vice President Pence and others that never should have seen daylight. It was President Biden's administration, of course, that made the threshold determination that Executive Privilege simply did not apply to President Trump. The concept itself, never mind the legal implications, practically destroys the protection for future presidents because of the question of whether this was another "one off" at the expense of only President Trump or whether the privilege itself is literally dead. Neither is an acceptable result of overzealous prosecution.

The Grand Jury Migration to Florida

Within the last few weeks of a lengthy grand jury investigation, the DOJ team shifted their case to the Southern District of Florida. There is no official explanation that I am aware of, and it is possible that they determined that there was a venue problem with charging in D.C. for documents moved to Mar-a-Lago while President Trump was indeed still President.

But in light of the problematic and hyper-aggressive Parlatore testimony, as well as endless appearances and "instructions" from the DOJ prosecutors, I tend to think that the DOJ was effectively sanitizing their bad behavior by presenting a streamlined version to the Florida grand jury. Once again, I have never heard of using a home turf grand jury for many months and then pivoting to another location. From the defense side, we only got a few troubling glimpses of how DOJ was conducting itself in this investigation, a fulsome transcript will almost undoubtedly raise additional issues.

The Walt Nauta Obsession

Walt Nauta was the "body man" for President Trump. The role suggests a near constant presence around the President, and consequently DOJ's aggressivity towards Nauta reached epic proportions. I try to be evidence-driven in my assessment of legal issues, so I will admit an inability to prove my next point with certainty. But I believe DOJ engaged in a leak campaign to the Washington Post and New York Times to pressure Nauta. They viewed him as the "keys to the kingdom" and thus his name was regularly in the newspapers with rumblings of either cooperating or obstructing the probe. Ultimately, of course, he was charged and will presumably stand trial, but an early aspect of the investigation remains one of the most troubling accounts of DOJ misconduct.

Stanley Woodward is a well-respected, highly intelligent, and very experienced attorney. Mr. Woodward has sworn to an event that should greatly bother any fair-minded individual. When he first began to represent Mr. Nauta, he was invited to DOJ to meet with Mr. Bratt. Assuming it would be a fairly routine meet-and-greet, Mr. Woodward was

quickly surprised by the direction the meeting seemed to take. First, Mr. Bratt was not alone, as he had enlisted another 5-6 prosecutors to join him for the conversation. Second, Bratt displayed an open file in front of him, leafing through it as if it pertained to Mr. Woodward, and not Mr. Nauta. Specifically, Mr. Woodward reported that Bratt announced that he knew Woodward had applied for a federal judgeship and that the application was being considered by President Biden. He then immediately made the extortionist link—words to the effect of, "Your guy, Walt, needs to flip. I'd hate to see you jeopardize your chances for the judgeship."

If this account is true, it is a devastating indictment of the mentality of DOJ. And keep in mind, Bratt was with other prosecutors when the comments were made. Surely, there is a communication trail of those other prosecutors either endorsing or criticizing the extortionate conduct of the man then leading the investigation. I certainly hope that the accusation made by Mr. Woodward gets fully investigated by a court, the DOJ, Congress, or whoever else can explore allegations of such outrageous, and indeed, illegal, behavior.

Singular Treatment

Consistent with the HPSCI letter described above, my starting point philosophy is that DOJ should be very reluctant to criminalize simple possession of classified materials by a FPOTUS. From my perspective, the American public votes presidents into office knowing that they will have access to our very most valuable secrets on a daily basis. There is no "brain swipe" that takes place to re-secure the briefings and documents that inform our Commanders-in-Chief, so mere possession of a written form of that information does not immediately ring my alarm bills.

Frankly, collecting materials from a secured facility ("SCIF") while a Senator, leaving those documents in obviously non-secure settings like a garage and holding them for the purpose of supporting an autobiography (with an $8 million advance) pushes my "don't over-criminalize" philosophy to its limit. I suspect General Petraeus might have a different take on this issue.

The Cost of Lawfare

The emergence of "lawfare" is not entirely new in terms of human nature. It is an ends-justify-the-means mentality, and it is the antithesis of justice. Lawfare is an effort to manipulate law as a way of targeting an individual who is despised by its user. Justice, and the concept of the Rule of Law, relies upon honest cops and honorable prosecutors to follow the evidence and make impartial determinations as to accountability. It is evidence driven, not animus driven. And while the goal of perfect justice is saddled with the inherent limits of human beings being at the helm, our country has long been the model for fairness, due process, and equal protection.

I firmly believe that lawfare endangers the entire system of criminal justice, as well as the faith of our citizenry that the institution is predominantly fair and predictable.

Lawfare is not limited to federal criminal law enforcement, of course. I think back to the ballot eligibility litigation and the Colorado case in which President Trump was disqualified from the ballot. In that expedited litigation, there was testimony from a university sociologist that President Trump's "go peaceful and patriotically" comments on January 6 were *actually* "dog whistles" to encourage his supporters to violently attack police officers. This absurdity formed part of the Colorado Supreme Court's decision to keep President Trump off the ballot, before the U.S. Supreme Court put a procedural end to the unrecognizable and almost laughable "trials" springing up around the country.

In the current trial in New York, the State has been allowed to hide its novel theory of felonizing misdemeanor bookkeeping entries even as the end of the evidence approaches. Prosecutorial creativity in that case appears to establish that a check memo or ledger entry that says "for legal services" is a felony, but "for legal services (NDA)" would not be a crime at all. Such a thin and unique line of criminality suggests that Alvin Bragg and the former Associate Attorney General leading that case are making up new rules for a particular target.

Whether the creativity of the lawfare is private parties, state actors or the federal government, the broader damage of its acceptance is predictable. We now have prosecutors running for office on promises to indict a specific target. This is unethical to the highest degree, and the antithesis of a fair criminal justice system. Prosecutor creativity should be a red flag when the target is running against the administration that put the prosecutor in office. I fully understand that an ex-President and any politician can face consequences for breaking the law; but we should know from the outset that the evidence shows a of a violation of a well-established law (ex. bribery, extortion, etc.) and not leave the fact of criminality up to the creativity of a trophy-hunting prosecutor.

In the recent oral argument before the Supreme Court on presidential immunity, DOJ's representative was Mike Dreeben, a man I respect and consider a friend. When the Justices pushed him on the checks within the system to prevent hyper-ambitious prosecutors from wrongly targeting a political enemy to their administration, Mike said that the check came from the fact that it was "not in [the prosecutors'] interest" to wrongly indict someone based on political animus. He asserted that DOJ is filled with honorable prosecutors who would never do such a thing. My only lingering question from that contention is whether it was naïve or willfully naïve. We are amidst an explosion of election-season indictments that rely on creativity and mental gymnastics to even establish whether a crime has occurred. Prosecutors are willing to rely upon a failed cooperator with a history of perjury and epidemic-level bias against the target in an effort to convict a presidential candidate of an otherwise misdemeanor bookkeeping violation. A conflicted prosecutor in Georgia made disrespectful and perjurious appearances before the trial judge, followed by her claims of racial victimization from the church pulpit. We are experiencing a series of politicized, hyper-aggressive, abuses of power.

When individuals entrusted with power believe that the ends justify the means, we are left with a weaponized political agent, cheered on by partisans and those blinded by dislike of Candidate Trump. If they succeed, we begin a new age where even old hands at criminal justice like me will not recognize the perversion of Justice and justice, and we

will descend into attacks and counterattacks launched by power hungry politicians masquerading as agents of fairness.